

# 4 common company policy writing mistakes

Company policies lay the foundation on which employment expectations are formed, and thus, workplace actions are taken. A missing phrase here, an undefined term there can spell policy disaster.

A discipline policy, for example, that promises progressive discipline in each and every instance of workplace misbehavior can curtail *your* disciplinary moves rather than the egregious behaviors of an unruly employee who deserves to be terminated on the spot.

There's no time like the present to audit your organization's policy handbook. While it's unlikely the handbook needs a total rewrite, you might find that it could use a little fine-tuning. Start by checking that your organization's policies don't fall into the four policy writing traps discussed below.

Then learn from your colleagues' mistakes, as Jim Collison, president of Employers of America, Inc., who has been writing and critiquing employee handbooks since 1981, highlights real-life policy writing blunders and offers advice on how to avoid making those same mistakes.

## Mistake #1:

### Disclaimers that are too few and far between

Some employers mistakenly believe that adding a single disclaimer to an employee policy handbook is all they need to do to give themselves the latitude to bypass, revise, or replace existing policy provisions. If, however, employees are left scratching their heads after reading the disclaimer or searching for it within the text of the handbook, chances are good that the disclaimer will carry little legal weight should any of your organization's policies be legally challenged.

Collison stressed the importance of having not one, not two, but five disclaimers and qualifiers in your organization's employee handbook. He recommends:

1. **Opening disclaimer**, which, in no uncertain terms, states that the handbook is not a contract of employment and that the employment relationship is at-will.
2. **Benefits section qualifier**, which explains that benefits or premium contributions may change at the company's discretion and that if there is a conflict between language in the employee handbook and language in an official plan document (such as a group health insurance policy), the official plan document governs.
3. **At-will reminder**. "In any discipline policy or complaint resolution policy, restate the employer's right to discipline or terminate an employee at-will, with or without cause," stated Collison.
4. **Misconduct qualifier**. Said Collison: "In any list of misconduct examples, state that the list is *not all encompassing or not all inclusive*."

Here are some additional phrases you might find useful.

- These rules do not represent every conceivable type of offense, but reflect those most frequently encountered.

- Misconduct not specifically described in these guidelines will be handled as warranted by the circumstances of the situations involved.
  - Penalties imposed as a result of infractions of company policy may be modified by the company when extenuating circumstances are found.
  - Flagrant infractions of this policy may result in action of greater severity than usual.
5. **An acknowledgment**, upon which an employee's signature means that he/she acknowledges: receiving a copy of the handbook, reading it, understanding it, having had the opportunity to ask questions about it, having had it explained, that the handbook is not a contract of employment, and that the employment relationship is at-will.

## **Mistake #2:**

### **Provisions that are too open to interpretation**

No matter how well-worded you think a policy appears, there's a chance that some employees may be confused by it. Sometimes, that confusion is a result of the language used. Just because you're familiar with certain terms, doesn't mean rank-and-file employees are, too. Always read policies with an eye out for HR jargon or legalese.

Other times, confusion is the result of what's not said, and, thus, left open to employee interpretation. That's why it's imperative that your organization's policies spell out exactly what they mean and define all terms, as necessary.

For example, if an attendance policy states "absent employees are required to present medical documentation upon their return," employees may assume that presenting any kind of medical document will excuse their absence under an attendance policy, when, in fact, company rules require that the documentation specifically state an employee is unable to perform his/her essential job functions.

**Case in point:** An employee was hospitalized and received workers' compensation benefits after injuring her back on the job. A couple of months later, she called out sick on two occasions due to her back. Both times, her doctor gave her a note stating that she could return to work, but did not excuse her previous absences. The company charged points to the employee's attendance record, which put her over the attendance policy limit. When the company subsequently fired her, she sued, claiming the company violated her federal FMLA rights and retaliated against her for filing a workers' comp claim. *Company's defense:* She didn't provide medical documentation stating that she couldn't work on those days because of a work-related injury.

Since the medical documentation the employee provided did not address her absences, she did not have a valid FMLA claim, ruled a court. However, the court gave her retaliation claim the go-ahead. While the court agreed with the employer that asking for medical certification is a reasonable means to confirm the employee was not abusing sick leave, it called into question why the company questioned the employee's absences. The mere fact that the employee didn't produce a doctor's excuse was not enough to dismiss the retaliation claim. Instead, an employer must consider all the facts that it knows or should know about an employee before it counts an absence against him/her. (*Wessel v. EnerSys, Inc.*, D.C. KS, No. 03-4089-SAC)

**Best bet:** In addition to spelling out and training employees on policy particulars, assess your motivations for taking an adverse action against an employee based on a policy infraction. That's not to say you shouldn't follow your policy to the letter. You should. You just also need to make sure that discipline for a policy infraction can't be interpreted by a judge or jury as retaliation for filing a previous claim.

## **Mistake #3:**

## Requirements that are too stringent

Another mistake employers commonly make when drafting policies is including more stringent requirements than called for by federal and state law. In some instances, this is perfectly acceptable, as *long* as you don't penalize employees for failing to meet these more stringent requirements.

**Case in point:** During surgery, an employee's doctor determined that her condition was more serious than originally thought. He asked her to report for a follow-up appointment the day after she was scheduled to return to work. Consequently, the employee called her employer and requested an FMLA leave extension. The company nurse asked for certification. The employee took that to mean that the extension had been granted and she had 15 days to provide it. Six days later, her physician faxed over the certification. When the employee called to confirm that the documentation had been received, she was fired. *Reason:* The employee failed to follow the company's policy for requesting and obtaining FMLA leave. The employee responded with a lawsuit, claiming that her termination violated the FMLA.

A court agreed, ruling that the employee had provided the company with adequate notice of her need for extended leave, and the company's medical certification policy violated FMLA regulations because it did not provide her with the 15 days required under the Act. *Said the court:* While employers are free to establish their own medical leave policy requirements, an employee's failure to follow such a policy does not allow the employer to deny or delay an employee from taking FMLA leave, so long as the employee's actions satisfy the requirements of the FMLA. (*Killian v. Yorozu Auto. Tenn., Inc.*, 6th Cir., No. 04-6202)

**Best bet:** Keep policies in step with legal requirements. Before actually writing a policy, consider whether there are any applicable laws no matter what the topic is. Of course you won't forget to incorporate the FMLA or Americans with Disabilities Act into your policies, if applicable. But what about a more obscure state law on school visitation leave or lifestyle discrimination? Thinking in terms of federal and state laws every time you sit down to write a policy is a must. And remember, where federal and state requirements conflict, the one that is most beneficial to employees is the one that must be followed.

## Mistake #4:

### Protections that are too one-sided

Still another mistake employers make is forgetting to equally address all potential parties in a policy. For example, a sexual harassment policy should address the rights of the accuser, as well as the accused. Or, as in the following case, union advocates versus union opponents.

**Case in point:** One company's policy on union harassment stated: "This is a non-union organization. It always has been and it is certainly our desire that it will always be that way....You have a right to join and belong to a union and you have an equal right NOT to join and belong to a union. If any other employee should interfere or try to coerce you into signing an authorization card, please report it to your supervisor and we will see that the harassment is stopped immediately."

While the policy might have been intended to protect union supporters and detractors alike, the 7th Circuit deemed it unlawful. *Reason:* The policy lacked an "equal protection guarantee" for union sympathizers and could lead employees to "conclude that engaging in protected activity was tantamount to 'harassment' under the policy." (*Brandeis Machinery & Supply Co.*, 7th Cir., No. 04-3156)

**Best bet:** Whenever drafting any type of harassment policy or provision, make sure it addresses both sides of the harassment coin. State the company's commitment to protecting each and every employee from harassment of any kind. Then spell out exactly what steps employees should take if they feel harassed. Include examples of prohibited harassment. Don't stop there, though. Address the rights of the accused. Outline the

investigatory steps the organization will take to ensure that false accusations or retaliatory motivations aren't the basis for the claim.

## **They didn't actually write that, did they?**

Most of the problems you will face in writing and implementing a policy have already been faced. Some organizations have overcome these obstacles and penned policies worthy of emulation. Others haven't been so lucky. In fact, their policies serve as prime examples of what not to do. Here are some of those examples as identified by Collison.

**Example #1:** "Exempt employees are excluded from specific provisions of federal and state wage and hour laws. An employee's exempt or non-exempt classification may be changed only by written notification by the company management."

*What's wrong?* "The last sentence is not true," noted Collison. "An employee's exempt or non-exempt status is determined or changed by the actual responsibilities of the job or by how the employer treats the employee." For example, treating exempt employees like hourly employees changes their status to non-exempt; simply declaring a change in writing isn't enough.

**Example #2:** "Poor attendance and excessive tardiness are disruptive. Either may lead to disciplinary action up to and including termination."

*What's wrong?* The policy fails to define what's meant by "poor" attendance and "excessive" tardiness. "Be specific as to what is required of employees," cautioned Collison. "Define important terms."

**Example #3:** "Compensatory time may be requested in lieu of overtime at the same rate."

*What's wrong?* It's illegal. "Private, non-government employers are violating the law if they give employees compensatory time off in lieu of overtime pay," Collison reminded.

**Example #4:** "Pregnant employees are to inform us of their pregnancy as soon as possible so we can be sure you are assigned to work that is not harmful to you or your child."

*What's wrong?* "First," said Collison, "an employer has a right to know about an employee's illness or disability only if it affects the employee's ability to do the job or represents a direct threat to the employee or co-workers. Second, it's not legal to change the pregnant employee's work because it might be harmful to the fetus."

**Example #5:** "The final paycheck of an employee who quits or is terminated by management will include any accrued vacation to date only if the resignation procedures under subpoints C and D are followed. In addition, Policy 23, subpoint F may affect the disbursement of the final paycheck and the amount therein."

*What's wrong?* Said Collison: "This kind of legalese has no place in an employee handbook. Also...under federal rules and many state laws...any earned and accrued vacation pay is due to the employee...no matter what resignation procedures the employer wants to try to enforce."