

Creating an Effective Employee Handbook for Your Nonprofit



By

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Employers often use handbooks and manuals to inform employees of their employment policies and to enforce their at-will policies. Although no express employment contract exists, courts have held that handbooks and manuals can be implied contracts if the language creates an impression that employees can only be dismissed for cause. The employee must be aware of the handbook provisions at the time of the discharge to rely on them in a lawsuit. Consequently, when a nonprofit changes its policies and distributes a new employee handbook it's important to ensure that every employee receives the new version of the policy manual. Even employees who are out of work on leave should receive a new manual, by mail using a method that provides proof of delivery.

States recognizing implied contracts based on handbook statements include: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana (by statute), Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Virginia, Washington, West Virginia, Wisconsin and Wyoming.

Some courts have found that a handbook or manual may create not only a right not to be discharged except for cause, but also an obligation on the part of the employer to follow certain procedures – even where an employee is discharged for cause. For example, when an employer includes a detailed description of progressive discipline procedures, the handbook may create an impression that the employer will follow every step in the procedures before terminating an employee. If the employee is summarily discharged without all steps being taken, even if the employee's conduct warranted dismissal – courts have found that the employer breached an implied contract to follow all disciplinary steps described in the manual prior to discharging an employee.

The primary way to minimize the likelihood that a court or arbitrator will find that handbook provisions amount to an implied contract is to include an unambiguous prominent disclaimer, on the first page of the handbook, stating that the handbook or other documents don't create contractual rights, and that the employment relationship is at-will. Any procedures that describe disciplinary steps should always be clearly described as *guidelines*, to be used at the nonprofit's discretion. The disclaimer should also address the fact that the nonprofit has the right to make changes to its personnel policies and that the new policy manual supersedes any prior manuals.

Example of an at-will disclaimer:

DISCLAIMER – IMPORTANT NOTICE ABOUT YOUR EMPLOYMENT

Employment with Nonprofit is *at-will*, which means that either you or Nonprofit may terminate employment at any time, for any reason, with or without notice. The policies and practices described in this employee manual are provided to you for guidance only, but don't constitute a contract of employment. Neither this handbook nor any other documents circulated to employees, nor any verbal representations constitute contracts. No supervisor or employee except the executive director has the authority to enter into an employment agreement, express or implied, with any employee concerning the employment relationship. These policies supersede any previous policies that may have been distributed previously. Your signature on the acknowledgement is a certification that you have received a copy of these policies as updated. These policies are subject to change at any time at the discretion of Nonprofit.

States Recognizing Implied Contract Based on Verbal Promises

In the following states that recognize an implied contract based on verbal promises, it's critical to make sure that all hiring staff and supervisors are aware that *their statements to applicants and employees can bind the nonprofit into a contractual relationship*. Alabama, Alaska, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Mississippi, Minnesota, Montana (by statute), Nebraska, New Hampshire, New Jersey, New Mexico, Ohio, Oregon, Pennsylvania, South Carolina, Texas, Utah, Washington, West Virginia, Wisconsin and Wyoming.

Handbook Errors to Avoid

The following are examples of employee handbook mistakes that may give an employee sound footing to claim wrongful discharge based on a breach of an implied contract:

- Language implying that if an employee makes it through the introductory work period (often called the *probationary period*) the employee is somehow less vulnerable to termination
- The use of *permanent employee anywhere* in the handbook
- The absence of a disclaimer about employment-at-will status, or a disclaimer that's so buried in the text that it isn't *prominently displayed*
- A narrowly defined list of reasons for termination that implies that an employee can only be terminated for the reasons itemized on a list
- A verbal promise from a supervisor that the employee will have a job *as long as you want* or similar assurances of continued employment
- Language stating that termination can only be *for cause*
- A definite list of disciplinary actions, usually described as *progressive discipline* that could be interpreted as requiring that all the steps, or certain of the steps, *must* be followed prior to termination, or that the discipline described must be applied in a *certain order* prior to termination.

A Template Is a Framework, Not a Finished Product

Using a commercially available software package of personnel policy templates to create your nonprofit's policies is only a beginning. State law will affect which policies are required, and the individual nonprofit's culture will determine which other policies are needed. A template is only as useful as the time spent customizing its framework to suit the culture and resources of the nonprofit, as well as any rules that apply based on its status (for example, federal, state or county contractor) or location. It's important to obtain input from a diverse group, such as the members of a personnel committee, but also to get input from an expert in local employment law, who can provide specific state-law guidance. Many nonprofits have great success inviting professionals who work in the human resource departments of local corporations to become volunteers on the nonprofit's personnel committee. Including several of the nonprofit's staff members on the committee ensures that the policies will address the practical problems that emerge through day-to-day management of the organization. The presence of staff members will also help ensure that the revised language is readily understood by all who must comply.

Verbal Promises

As a precautionary measure, any supervisory employee involved in hiring should be trained not to make promises about future job tenure. Courts in 34 states have held that *an employer's oral statements can create an enforceable contract for employment*. For example, statements to a prospective employee that he will have a job (i) 'as long as your performance is adequate' or (ii) 'as long as you do the job' were found to create a

standard that employees could only be terminated (i) if their performance was inadequate, or (ii) if they failed to complete their job duties.

Employee Handbooks: Risk Management 101

Having written workplace policies and procedures that are legally up to date and easy to follow is as important as having adequate insurance. Policies that are clearly communicated to staff and consistently applied serve to safeguard against improvised solutions that can result in a lawsuit. Written policies are the starting point for ensuring that personnel dilemmas are resolved consistently and fairly. Moreover, several federal laws and many state laws require that workplaces distribute or post certain written policies. Up-to-date, legally sound personnel policies are so significant that many insurance companies, funders and potential board members look to a nonprofit's personnel policies as a bellwether of security or risk. Many accreditation standards require that personnel policies be reviewed regularly. To ensure that the nonprofit's policies are current, schedule a policy review on a regular basis.

Revising or drafting policies is generally authorized by the chief staff executive or board of directors that designates a staff person or special task force to lead the project. Some nonprofits have standing personnel or human resource committees charged with responsibility for the project. Compare current practices to the written policies. Are we doing what we say we'll do? is a basic but important question to explore. Ultimately, after changes are made and the draft has been reviewed by legal counsel, the board of directors should formally approve the revised policies and charge the chief staff executive with making employees aware of policy changes and distributing the policies to all employees.