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Briefly

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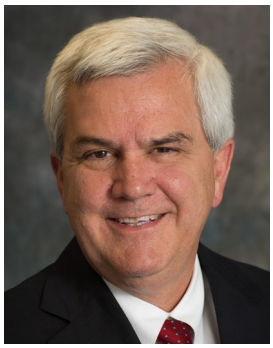
EMPLOYEE HANDBOOK UPDATES FOR 2021



Howard B. Jackson

"[Health and Safety] is an area that can often stand improvement in Handbooks generally. This year has brought even more reason to do so."

Perhaps some of you put updating the Employee Handbook on your list of New Year's resolutions. Some consider handling that task about as much fun as the other items on their resolution list.

Be that as it may, the Handbook should be a good communication tool. It should be accurate and up to date. Like many tools it requires maintenance and repair from time to time. With that in mind, below are some topics that may deserve attention in your Handbook this year.

Leave Laws and Policies. Congress passed the Families First Coronavirus Response Act (FFCRA) that provided leave for various COVID-related reasons. That law is currently set to expire at the end of March. Given its temporary nature you may not want to have a Handbook policy on that subject. But stay tuned. There may be new legislature ahead related to this and other leave practices.

If you are a covered employer under the Family and Medical Leave Act (FMLA) it would be well to revisit that policy. Many older policies are not compliant with the latest regulations.

In addition, many states and even municipalities have leave laws. For example, several states have laws that provide leave to victims of domestic violence for matters such as visits with counsel or court dates. Some states have laws that apply to volunteer firefighters and other part-time public servants. In short, be sure that your policies are appropriate to all jurisdictions where you have employees.

Remote Work Arrangements. This practice has become so common that it would be wise for most employers to have some guidance on the topic in their Handbook. There is not a "one size fits all" version of such a policy. The practice and approach can vary significantly depending on the nature of the workplace and the jobs in question.

It would be reasonable to provide some information in the Handbook that in a general fashion addresses the organization's stance toward remote work. Some employers may encourage it strongly. Others may be far less enthusiastic, and both for good reason.

The policy may also let employees know how they can broach the subject if it is of interest. It's always good for employees to understand how to communicate about their questions.

Although this is not a topic for discussion in the Handbook, employers should be aware that the U.S. Equal Employment Opportunity Commission (EEOC) and courts sometimes consider working remotely as a reasonable accommodation that an employer is obligated to provide under the Americans With Disabilities Act (ADA). As with all things ADA, this decision depends on the specific facts of the situation. This is simply a reminder that if an employee requests to work from home because of a limiting condition, the employer cannot dismiss the request out of hand.

Health and Safety. This is an area that can often stand improvement in Handbooks generally. This year has brought even more reason to do so. In particular, President Biden has called upon the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) to generate standards for safety in view of COVID-19. In a January 21, 2021 Executive Order Biden ordered OSHA to issue revised guidance on COVID-19 safety, to determine whether temporary mandates such as use of masks are necessary, and to focus enforcement efforts on circumstances where large numbers of employees are at-risk or where an environment of retaliation is evident. In addition to COVID-focused efforts the President has indicated a desire to double the number of OSHA investigators. In short, expect greater regulation and greater enforcement efforts.

Drug Testing. This is a developing area of the law. In many states that have de-criminalized marijuana, employers

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"NO POACH" PENALTY: CRIMINAL CHARGES FROM DOJ

Rosalia Fiorello

"[I]t does not matter whether the no-poach [agreement] is informal or formal, written or unwritten, spoken or unspoken; it still violates federal law …"

On January 7, 2021, the U.S. Department of Justice ("DOJ") issued a press release wherein a federal grand jury returned a two-count indictment charging Surgical Care Affiliates LLC ("SCA"), for agreeing with competitors not to solicit senior-level employees. This is the DOJ's first-ever criminal charges alleging a group of employers agreed not to hire away each other's senior-level employees.

According to the press release, SCA, one of the largest outpatient providers in the United States, entered into agreements with competitors not to poach each other's executive talent, in violation of federal antitrust law. SCA allegedly conspired with a Texas health care company not to solicit each other's executives. The press release indicated that SCA allegedly reached a similar deal with a Colorado company between 2012 and 2017. To read the DOJ's full press release, visit https://www.justice.gov/opa/pr/health-care-company-indicted-labor-market-collusion.

As evidence of the above-mentioned alleged agreements, the indictment details various emails between SCA and unnamed co-conspirators, including, for example, an email in which one co-conspirator's CEO emailed its employee the following statement: "I had a conversation with [SCA's CEO] re people and we reached agreement that we would not approach each other's proactively." Another email cited in the indictment was directed from a co-conspirator to SCA's CEO, "Just wanted to let you know that [recruiting company] is reaching out to a couple of our execs. I'm sure they are not aware of our understanding." The indictment further contains allegations of the impact of the agreement. Of note, the indictment alleges that a Human Resource employee at one company emailed a recruiter, advising the recruiter that a candidate looked great but that she, "can't poach her" because the candidate worked for SCA. To read the indictment in full, visit https://www.justice.gov/opa/press-release/file/1351266/download.

In general, no-poach agreements involve an agreement with another company not to compete for each other's employees, such as by not soliciting or hiring them. No-poach agreements are "naked" if they are not reasonably necessary to any separate, legitimate business collaboration between the employers. A wage-fixing agreement on the other hand, involves an agreement with another company regarding employees' salary or other terms of compensation, either at a specific level or within a range.

Naked no-poach and wage-fixing agreements are per se unlawful because they eliminate competition. Specifically, no-poach agreements make it difficult for employees to negotiate better terms of employment for themselves. Legal competition amongst employers helps both employees and potential employees compete for higher wages, better benefits, and other relevant terms of employment. Moreover, market competition among employers aids consumers. Simply put, a more competitive workforce may generate better goods and services for the general public.

The SCA indictment should not come as a surprise to those closely following the DOJ's intent to proceed criminally against no-poach and wage-fixing agreements. In October 2016, the DOJ ran a public campaign warning companies about no-poach agreements and the efforts federal antitrust agencies have taken to enforce actions against employers that have agreed not to compete for employees. The campaign resulted in a publication titled, *Antitrust Guidance for Human Resource Professionals.*

The Guidance outlines an individual likely is breaking the antitrust laws if they, 1) agree with individual(s) at another company about employee salary or other terms of compensation, either at a specific level or within a range (so-called wage-fixing agreements), or 2) agree with individual(s) at another company to refuse to solicit or hire that other company's employees (so-called "no poaching" agreements). Keep in mind it does not matter whether the no-poach is informal or formal, written or unwritten, spoken or unspoken; it still violates federal law as there may be evidence that could lead to an inference that the individual has in fact agreed to do so. See, https://www.justice.gov/atr/file/903511/download.

After the October 2016 publication, in 2018, the Antitrust Division ("Division") filed a civil antitrust lawsuit against Knorr-Bremse AG and Westinghouse Air Brake Technologies Corp. The Division also simultaneously filed a civil settlement. The 2018 complaint alleged the above-mentioned companies and a third company, Faiveley, reached naked no-poach agreements spanning from 2009 until at least 2015, in violation of Section 1 of the Sherman Act.

The 2018 settlement was a first-of-its-kind and contained several provisions intended to terminate each defendant's no-poach agreements and prevent future violations. It included a broad injunction prohibiting each of the defendants from entering or maintaining no-poach agreements among themselves and with other employers. Under the terms of the settlement, these provisions would be enforced for seven years. The agreement also consisted of an affirmative obligation to cooperate in any Division investigation of other potential no-poach agreements between the defendant and any other employer and a requirement that each defendant affirmatively notify its U.S. employees and recruiters and the rail industry at large of the settlement and its obligations. Finally, there was also a provision designed to improve the

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"WE'VE MOVED!"

As of March 1, 2021, our Nashville, Tennessee office has moved to the following new address (phone and fax remain the same):

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DID YOU KNOW? WIMBERLY LAWSON HAS LICENSED MEDIATORS

Wimberly Lawson Wright Daves & Jones PLLC has attorneys who are qualified Rule 31 Licensed Mediators in Tennessee. Mediation is a voluntary alternative to litigation, and can help in a wide variety of cases including employer/employee disputes. In mediation, both parties present their arguments to a mediator, who is not a judge but an impartial third party who manages the process and helps the parties talk to each other, explore options, and reach a mutually agreed-upon resolution. Our Rule 31 attorneys can assist you with the process and advise on a final written agreement. Advantages of mediation include more control over the process and outcome, prompt settlement, reduced expenses compared to trial, and privacy. For more information, please contact Mary Moffatt or Eric Harrison.

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may still test for it and exclude applicants from employment. Or they may discharge an employee based on a positive test result.

But not everywhere. For example, in New Jersey medical marijuana users are protected - a simple positive is not sufficient for discharge. An employee or applicant who tests positive must be given an opportunity to provide a legitimate medical explanation for the result.

In Nevada a law became effective in 2020 that, with some exceptions such as for safety-sensitive positions, bars employers from testing applicants for marijuana.

This is another area where the employer must know the rules of the road in the states and municipalities where it has employees.

Harassment and Discrimination. As we all know last year the U.S. Supreme Court ruled that Title VII's prohibition against discrimination on the basis of sex includes discrimination on the basis of sexual orientation or identity. Many older Handbook policies do not make that clear.

In addition, concerns over treatment based on race and sex in particular are very much in the public eye. A wise employer will not only ensure that its policies properly address those subjects but further provide employees with simple and clear directions regarding how to raise an issue.

It is difficult to overstate the importance, and the value, of having a simple reporting procedure and effective training on how to use it. Employers that communicate their policies well and that respond promptly and reasonably when issues arise create a more productive and enjoyable environment. That inevitably leads to positive results such as greater production, less turnover and an overall healthier culture.

Retaliation and Whistleblower. This is an area of increasing concern for employers. And that is even more true for certain types of regulated industries. Consider whether the industry you are in weighs in favor of having a separate policy in the Handbook that informs employees of the industry-specific requirements, who to contact in the organization as a resource for any questions, and how to communicate any related concerns that arise.

It is also critical to note in other places that retaliation against an employee for raising a legal concern is prohibited. This prohibition applies for claims of discrimination, for taking protected leave, for requesting reasonable accommodation, and for many other actions an employee may take. It is well to review the Handbook with an eye toward ensuring that retaliation concerns are properly addressed.

Protected Activity Under the National Labor Relations Act (NLRA). The NLRA has long protected employees who engage in concerted activity for mutual aid and protection regarding their wages, hours and working conditions. The interpretation of what language in a policy or handbook has an improper "chilling effect" on employees' exercise of such rights changes over time depending on who is in charge at the National Labor Relations Board ("the Board"). Expect the pendulum at the Board to swing back toward closer scrutiny of Handbook policies, such as those requiring respectful treatment, those that relate to social media activity, and those that relate to employee communications with third parties.

Conclusion. This year and next are likely to see changes in labor and employment laws as the new administration implements new leaders and revises various laws and policies. Revising the Handbook is one way to help your management team and workforce keep up. Finding other ways to educate and inform your team will also be critical during these times. We encourage you to select, plan for and use other communication tools for the benefit of your organization.

"'NO POACH' PENALTY: CRIMINAL CHARGES FROM DOJ" continued from page 2

effectiveness of the decree and the Division's future ability to enforce it. The press release issued on April 10, 2018 by the DOJ warned marketplace participants, "the Division intends to zealously enforce the antitrust laws in labor markets and aggressively pursue information on additional violations to identify and end anticompetitive no-poach agreements that harm employees and the economy." See https://www.justice.gov/atr/division-operations/division-update-spring-2018/antitrust-division-continues-investigate-and-prosecute-no-poach-and-wage-fixing-agreements.

It is imperative for companies to raise awareness that improper agreements in the labor market could expose them to criminal charges. The Sherman Act of 1890 was the first major federal law passed with the purpose of ensuring competition across and within industries. Today, a violation of the Act carries a maximum $100 million dollar penalty. The fine may be increased to twice the gain derived from the crime or twice the loss suffered by victims if either amount is greater than the statutory maximum.

Familiarity with the 2016 Guidance, proper compliance programs, and regular training within your company are imperative to determine whether your company has potential anticompetitive hiring practices and procedures currently in place. If Human Resource professionals have questions regarding whether particular conduct or workplace practices violate the antitrust laws, they should consider seeking legal advice.