

# When Good Policies Go Bad Employee Handbook Pitfalls And Best Practices

Jo Ellen Whitney  
Kelsey A. Knutson  
Davis Brown Law Firm



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## DISCLAIMER

Due to limitations and the nature of this program please understand that printed material and oral presentations or other data presented are not intended to be a definitive analysis of the subjects discussed. Users are cautioned that situations involving healthcare and employment law questions are unique to each individual circumstance, and the facts of each situation will dictate a different set of considerations and varying results. Material contained on this site or listed as a reference is a general review of the issues, and must not be considered as a substitute for advice from your own attorney on your own independent situations.

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## Jo Ellen Whitney Kelsey Knutson

Jo Ellen is a senior partner at the Davis Brown Law Firm.

Ms. Whitney's areas of expertise include:

- Employment & Labor Relations
- Health Law
- Privacy & Security (HIPAA)

Kelsey is an associate at the Davis Brown Law Firm.

Ms. Knutson's areas of expertise include:

- Employment & Labor Relations
- Litigation
- Insurance Defense

Contact information for Ms. Whitney and Ms. Knutson:

[JoEllenWhitney@davisbrownlaw.com](mailto:JoEllenWhitney@davisbrownlaw.com)

[KelseyKnutson@davisbrownlaw.com](mailto:KelseyKnutson@davisbrownlaw.com)

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## Kelsey's Top Three – Big Picture

- 1) Handbooks are useful but they must be properly and wisely used.
- 2) Remember the difference between a handbook policy and a contract and communicate this to your employees.
- 3) Consider how your policies may violate harassment and discrimination laws.

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## Jo Ellen's Top Three

(Don't Learn These Mistakes The Hard Way!)

- 1) Wage deductions and wage and hour policies that don't comply with the law
- 2) Attendance policies that don't comply with the law (FMLA / ADAAA) or take into account various scenarios
  - Communicable Disease Policy
  - Severe Weather Policy
- 3) Failure to understand the quirks of the law
  - Iowa Veteran's Day Leave
  - Lactation Rooms
  - Paid Time Off Donation Policies

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## Why Should Employers Use Employee Handbooks?

- Communicate With Employees
  - Inform Employees & Managers
    - Policies, procedures, programs, and expectations
    - Explain how problems will be resolved
- Liability Shield
- Branding & Culture



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## Best Practices Use Straightforward Language

- The tone and writing style should fit with the organization
- Avoid "guarantee language," such as "will" or "shall" and use discretionary language instead
- Determine who the handbook applies to
- Consider including definitions where it may aid employee understanding

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## Give The Handbook To Your Employees!



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## Regularly Review & Update



- Employment laws constantly change
- Employers may modify policies at anytime
  - It is important for every policy and/or procedure to reflect an effective date
    - Before modifying policy, determine whether any employees that would be affected by the change have express written contracts of employment

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## Changes

- Pregnancy Discrimination Act
- EEOC Guidance
- *Young v. United Parcel Service*  
– (March 25, 2015)
- Iowa Code Chapter 216




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## The Law Says What?

- ARRA – Lactation Rooms



- Veteran’s Day




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## Have Employee Sign Acknowledgment Form For Major Revisions

- I understand and agree that this revised version of \_\_\_\_\_'s handbook supersedes all prior versions that have been issued by \_\_\_\_\_ and that it will be effective on \_\_\_\_\_ [enter appropriate date].
- I also understand that I am responsible for reviewing this revised version, familiarizing myself with its contents, and for directing any questions that I may have regarding any changes to Human Resources.




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## Avoid An Overly Detailed Discipline Procedure

Define employee misconduct and explain the consequences



But, include generic discretionary statements:

- "or any other behavior proven to be detrimental to the company"
- "subject to management discretion"
- "unless a supervisor determines otherwise"
- "violation of this policy may lead to discipline, up to and including termination of employment"

– Remember that your handbook cannot address every situation.

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## Problem – Resolution Procedure



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## The Disclaimer

- Every handbook should have a disclaimer that defines the nature of the handbook.

This handbook does not create a contract of employment and all employees of Company \_\_\_\_ are employees at will. Company \_\_\_\_ retains the right to modify, interpret, or cancel in whole or in part any of the published or unpublished policies of the Company without notice or consideration to any employee. The employment practices set forth are not intended and should not be construed as an express or implied employment contract. These policies do not in any way guarantee employment for any specified period of time. Employees are "at will" employees and employment may be terminated with or without cause and with or without notice either by Company \_\_\_\_ or the employee.

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### Arbitration

- Campbell v. General Dynamics Gov't Sys. Corp., 407 F.3d 546 (1st Cir. 2005)
  - Handbook arbitration policy was not a valid contract
  - Arbitration policy can only be enforced if it provides a reasonably prudent employee with sufficient notice that the policy serves to waive access to the judicial forum
- Patterson v. Tenet Healthcare, Inc., 113 F.3d 832 (8th Cir. 1997)
  - The court concluded that the arbitration clause was separate from the other provisions in the handbook and it constituted an enforceable contract

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### Improper Deductions

- Some employers not only make improper or illegal deductions but also reflect that practice in their handbook



- Employers must pay all wages due to its employees less any lawful deductions

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### Agreement for Wage Withholding

I, \_\_\_\_\_, hereby authorize \_\_\_\_\_ to withhold from my periodic earnings or wages any and all amounts due and owing to the company for expenses incurred for me or paid on my behalf by \_\_\_\_\_ as listed below. This release specifically authorizes withholding for equipment assigned specifically to me and in my control that is not returned upon employer request including, but not limited to: \_\_\_\_\_

I also authorize my employer to withhold all charges for cell phone overages or other non-policy cell phone use.

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## Attendance & Leave Policies

Do not put a cap on an employee's medical leave without considering legal implications.

- Under the ADA and Iowa Civil Rights Act, employers may be required to permit an employee with a disability to take time off, to recover from a disability or serious health condition.



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## Attendance & Leave Policies

- If employers do not designate the FMLA leave year, employees are entitled to use whichever FMLA leave year is best for them.
  - This could result in leave stacking.
  - To avoid this, many employers use a rolling FMLA year, which constantly changes.
    - An employer may look back 12 months and total the amount of FMLA leave the employee has taken to determine whether the employee has leave available.
    - An employer may also measure remaining leave from the first date the FMLA leave began.
- Policies that only permit sick leave for the employee violates the FMLA.

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## Communicable Disease Policy

Employers should create a culture where a genuinely ill employee with a fever or a contagious disease understands that he or she should stay home from work.



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### Communicable Disease Policy

\_\_\_\_\_ requires that any employee who believes he/she has the flu or is potentially contagious after exposure to the flu virus or any other contagious diseases such as but not limited to mumps, measles and chicken pox, take PTO and remain away from work during any contagious or recovery period. Any employee reporting to work with flu or other disease symptoms or who develops such symptoms at work will be sent home.

Additionally, employees are not allowed to bring children into the office who exhibit flu symptoms or any other contagious diseases.

Employees should also practice good work hygiene in order to avoid potential viral spread. This would include frequent hand washing, limiting your use of telephones or other items which come in close facial contact and which are primarily used by others, keeping your desk or work area clean, and wiping down surface areas such as door handles and light switches as appropriate.

We appreciate your cooperation and consideration for your fellow employees.



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### Severe Weather Policy



**Must employers pay employees when their office shuts down?**



**Does this vary for exempt or non-exempt employees?**



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### Hours of Work



**Your handbook should not violate the FLSA.**

A violation occurs when employers state that all breaks are not compensable work hours.

Rest periods, usually 5 to 20 minutes, are treated as compensable work hours pursuant to the FLSA.



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### Paid Time Off (“PTO”) Donation Policies

- Leave donation policies can create tax liability for the donor, the recipient, and a double payroll tax for the employer who is administering the program.
  - These policies must not be poorly drafted.
- Two Types
  - Medical Emergencies
  - Major Disasters



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### PTO Donation Policy

- Medical Emergencies
  - An employee surrenders a certain amount of unused PTO, and the employer places the unused PTO in a “bank” that can be used by other employees who run out of PTO due to a medical emergency.
  - Medical emergency means a medical condition of the employee, or a family member of the employee, that will require a prolonged absence and the employee will have used all PTO available
    - The employee who donates the PTO is not taxed, but the employee receiving the PTO is taxed.

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### PTO Donation Policy

- Major Disaster Exception
  - Declared by the President (Not for all disasters)
  - The PTO donated is not included in the donating employee’s income (it is taxed as income to the receiving employee)
  - The plan must only benefit employees who have been adversely effected by the disaster
  - The IRS does not allow the donor to designate the recipient

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## Harassment & Discrimination Policies

- Be clear that your company has absolutely no tolerance for harassment or discrimination of any kind.
- Include multiple ways for your employees to voice complaints and list different individuals that workers can turn to with their concerns.
  - Make it clear that employees will not be retaliated against for raising their concerns.
- Define a clear procedure for your employees as well as your obligations as the employer.

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## Language In The Workplace

The EEOC interprets a person's primary language as a characteristic essential to national origin.

When applied all the time, a rule requiring employees to speak only English in the workplace is a burdensome term and condition of employment.

It may also create an atmosphere of inferiority, isolation, and intimidation based on national origin which violates Title VII.

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## Dress Code & Grooming Policies

- While employers are legally allowed to maintain dress and grooming policies, there may be issues if the policy violates discrimination or harassment laws.
  - Policies must not be grounded in stereotypes.
  - Understand the distinction between characteristics that one can change (dress) compared to those one cannot change (skin color)
  - Religion is different!

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### Rogers v. American Airlines Inc. 527 F. Supp. 229 (S.D.N.Y. 1981)



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### Can your grooming policy differentiate between female and male employees?

- Sex differentiated standards are valid when burdens imposed are not relatively unequal.
  - Jespersen v. Harrah's Operating Co., Inc., 444 F.3d 1104 (9<sup>th</sup> Cir. 2006)
- Demonstrate a valid business necessity for your rule that does not violate discrimination laws.



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### Part 2 - The NLRB Has Its Say



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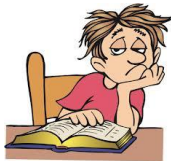
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# The NLRB and Section 7

Memo GC 15-04

March 18, 2015

Just in case you were bored



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# Section 7

- Section 7 applies regardless of union status. All employees have a right to concerted activity.



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# Historically You May Not Prohibit Discussions About:

- Salary/wages
- Discipline
- My boss is a jerk
- My employer is awful
- Direct agency reporting



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### Also . . .

- Can solicit in non-work time, non-work areas
- May not require confidentiality of investigations



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### Could the Employee . . .

- Construe the rule to prohibit Section 7 activity? If yes – then you can't say it.



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### Balancing the Rules

- The EEOC and NLRB don't have a beer together. Hard to make them both happy



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### Confidentiality Examples

- You must not disclose proprietary or confidential information about [the Employer, or] other associates (if the proprietary or confidential information relating to [the Employer’s] associates was obtained in violation of law or **lawful Company policy**).

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### Confidentiality (cont.)

- “Never publish or disclose [the Employer’s] or **another’s confidential** or other proprietary information. Never publish or report on **conversations that are meant to be private or internal** to [the Employer].”

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### Confidentiality (cont.)

- “If something is **not public information**, you must not share it.”



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### Confidentiality (cont.)

- “Do not disclose confidential financial data, or other non-public proprietary company information. Do not share confidential information regarding business partners, vendors or customers.”

Ok – Does not reference terms and conditions of employment and is not overbroad.

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### Savings Clause Pro or Con

- You can specifically define information relating to wages, benefits and work conditions, as well as items required to be reported by law as not confidential.
- You can say attendance and other work policies do not apply to strikes

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### Employee Conduct

- Employees have a Section 7 right to protest employee treatment.



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### The NLRB Doesn't Like Prohibitions On:

- Disrespectful
- Negative
- Inappropriate
- Rude; or
- False (unless malicious)

Comments, statements and actions!

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### Focus Instead On

- Professional
- Courteous
- Insubordination (term of art)



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### Examples

- “[B]e **respectful** to the company, other employees, customers, partners, and competitors.”

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### Examples (cont.)

- No “[d]efamatory, libelous, slanderous or discriminatory comments about [the Company], its customers and/or competitors, its employees or management.

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### Examples (cont.)

- “Never engage in behavior that would undermine the reputation of [the Employer], your peers or yourself.”

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### Examples (cont.)

- “Employees will not be discourteous or disrespectful to a customer or any member of the public while in the course and scope of [company] business.”
- Ok- Civility codes are generally acceptable.

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### Examples (cont.)

- “Each employee is expected to work in a cooperative manner with management/supervision, coworkers, customers and vendors.”

Ok – Legitimate expectation of civility

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### Social Media

- Be careful of how you limit public comment



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### Examples

- Do not make “insulting, embarrassing, hurtful or abusive comments about other company employees online,” and “avoid the use of offensive, derogatory, or prejudicial comments.”

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### Examples (cont.)

- “[S]how proper consideration for others’ privacy and for topics that may be considered **objectionable** or **inflammatory**, such as **politics** and religion.”

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### Examples (cont.)

- Do not send “**unwanted, offensive, or inappropriate**” emails.



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### Huh?

“The Act does not protect employee conduct aimed at disparaging an employer’s product, as opposed to conduct critical of an employer’s labor policies or working conditions.”



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## Employee to Employee Conduct

How do you balance the EEOC and the NLRB?



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## Examples

- Prohibits any logos or graphics worn by employees “must not reflect any form of violent, discriminatory, abusive, offensive, demeaning, or otherwise unprofessional message.”
- Prohibits “Threatening, intimidating, coercing, or otherwise interfering with the job performance of fellow employees or visitors.”
- No “use of racial slurs, derogatory comments, or insults”.

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## The NLRB says you can be:

- Rude
- Offensive
- Derogatory
- Insulting; and
- Embarrassing

to other employees. The reasoning is that unionization is a rough business.

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### Third Party Interactions

- “Associates are not authorized to answer questions from the news media . . . When approached for information, you should refer the person to [the Employer’s] Media Relations Department.”

No-Overbroad

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### Third Party Interactions (cont.)

- “If you are contacted by any government agency you should contact the Law Department immediately for assistance.”

No-may chill legally required reporting;  
chill participation in agency investigation

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### Third Party Interactions (cont.)

- The company strives to anticipate and manage crisis situations in order to reduce disruption to our employees and to maintain our reputation as a high quality company. To best serve these objectives, the company will respond to the news media in a timely and professional manner *only* through the designated spokespersons.

Ok- may not speak on behalf of company rather than not speak on employee’s own behalf

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## Logos & Trademarks

- Do “not use any Company logos, trademarks, graphics, or advertising materials” in social media.

No – Doesn’t address fair use

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## Logos & Trademarks (cont.)

- “Respect all copyright and other intellectual property laws. For [the Employer’s] protection as well as your own, it is critical that you show proper respect for the laws governing copyright, fair use of copyrighted material owned by others, trademarks and other intellectual property, including [the Employer’s] own copyrights, trademarks and brands.”

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## Photography

- “Taking unauthorized pictures or video on company property” is prohibited.

“We concluded that employees would reasonably read this rule to prohibit all unauthorized employee use of a camera or video recorder, including attempts to document health and safety violations and other protected concerted activity.”

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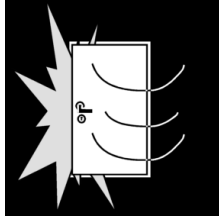
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## Rules on Leaving Work

- Did they leave in a huff, fail to report or did they walk off the job?



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## Examples

- Failure to report to your scheduled shift for more than three consecutive days without prior authorizations or “walking off the job” during a scheduled shift is prohibited.

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## Examples (cont.)

- Entering or leaving Company property without permission may result in discharge.



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### Examples (cont.)

- We found this rule was lawful because, in the absence of terms like “work stoppage” or “walking off the job,” a rule forbidding employees from leaving the employer’s property during work time without permission will not reasonably be read to encompass strikes.

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### Special Rules

- Special rules may apply to healthcare, childcare and other safety sensitive functions.



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### Conflict of Interest Rules

“Not in the best interest of the Company”

vs.

“Employment with competition, accepting gifts or loans . . .”



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## Take Aways

- 1) Look at context/construction
- 2) Avoid the easy, obvious traps
- 3) Consider “savings” language 
- 4) Including, but not limited to, examples
- 5) Balance your obligations
- 6) Use common sense in enforcement



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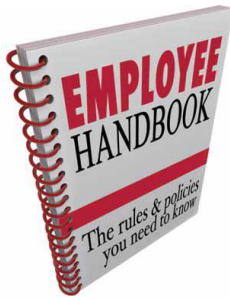
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## Questions?



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