

**ASA**  
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# The Employee Handbook—Do I Really Need One for Corporate Staff and Contract Workers?

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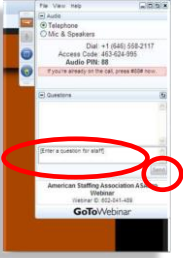
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# How to Ask a Question

- **Questions Panel**
  - Type your questions into the Questions panel and click Send.



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## The Employee Handbook: Do I Really Need One For Both Staff and Contract Workers?

Presented by  
Diane J. Geller, Esq.  
Keith Chrestionson, Esq.

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## Things to Consider Before You Draft a Handbook

- What is the intended purpose or goal
- Content
  - What will the handbook contain?
  - No bright line rule regarding content
- Distribution
  - To whom and how is the handbook going to be distributed?
- Tone

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## Things to Consider Before You Draft a Handbook

- **Employee Handbooks—Sword or Shield**
  - Sword used by plaintiffs’ attorneys to demonstrate a violation of law or employment contract with certain terms
  - Shield used by the company to demonstrate compliance with legal obligations

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## Things to Consider Before You Draft a Handbook

- **How to make your handbook work as a shield**
  - Disclaimers
  - Avoid using words that create rights (i.e., “accrual,” “entitlement,” “earned”)
    - Try using “eligible,” “permitted,” etc.
  - Include specific policies
    - Policies must comply with all applicable laws and regulations: federal, state and local
  - Administer policies consistently and fairly

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## Things to Consider Before You Draft a Handbook

- **Disclaimers**
  - Preserve At-Will employment status
- **Code of conduct**
  - Dress codes/personal appearance policies
  - Absentee/lateness policies
  - Drug and alcohol policies
- **Employee definitions**
  - Distinguish between full-time staff and contract employees, but avoid using the word “permanent.”

The Essential Components of a Handbook




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## Things to Consider Before You Draft a Handbook (continued...)

- Discrimination and harassment policies
- Complaint/grievance procedures
- Leave policies
- Computer/internet/device usage policies\*\*
- Confidential policies
- Alternative dispute resolution policies
- Signed acknowledgement that the employee has reviewed and received the handbook

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## Disclaimers

- Why do you need a disclaimer?
  - Handbook can create a unilateral contract absent a clear and prominent disclaimer
- To be effective, a disclaimer MUST
  - Use clear, straight forward terms to indicate following:
    - Handbook is not a contract
    - Employment is At-Will
    - Employer retains the right to terminate employee for any reason, with or without cause

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## Disclaimers (continued...)

- To be effective, a disclaimer MUST
  - Be Prominently Displayed
    - Highlighted, Underscored, CAPITALIZED
    - Listed at beginning of handbook
  - Indicate that changes to handbook can be made only when
    - In writing
    - Acknowledged and signed by employee and high-ranking official

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## Code of Conduct

- **Dress codes/personal appearance policies**
  - Prohibit inappropriate attire at work
    - Provide examples of what is considered unacceptable workplace attire
  - Address religious and medical exceptions
  - Reserve employer's right to send inappropriately dressed employees home to change into appropriate attire

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## Code of Conduct (continued...)

- **Absentee/Lateness policies**
  - Statement that unexcused absences are unacceptable
    - Habitual absences/lateness will result in disciplinary action
  - State what an employee must do in the event of an absence/late arrival
    - Who to contact, etc.
  - Discussion of circumstances warranting a doctor's note

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## Code of Conduct (continued...)

### Drug and Alcohol policies

- **Clear statement: "No Tolerance" policy**
  - Employees will be immediately terminated
  - Company grounds
  - Company business
  - Including break periods




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### Drug and Alcohol Policies—Required Provisions

- Reserve employer’s right to perform drug testing and search of employee’s person or possessions upon reasonable suspicion of drug or alcohol use
  - Random vs. for cause

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### Drug and Alcohol Policies—Required Provisions (continued...)

- Statement that employer encourages treatment and prevention
  - Will not discipline employees solely based on the decision to voluntarily seek assistance
  - Will provide references to treatment facilities, if requested

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### Employee Definitions

- Who is an employee?
  - Full-time
    - How many hours per week?
  - Part-time
    - How many hours per week?
    - Avoid use of the word permanent
      - May insinuate additional employment rights
  - Introductory vs Probationary
    - How long? Are benefits provided?
  - Note: Beware of the Independent Contractor

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**Discrimination/Harassment Policies**

- **Why necessary?**
  - **Affirmative Defense to Harassment Claims**
    - Establishment of an effective, anti-harassment policy and complaint mechanism serves as evidence of an employer's due care and may provide protection from vicarious liability in sexual harassment claims
    - Creates process that employees must follow
    - \*\*\* Policy must be consistently enforced

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**Discrimination/Harassment Policies** (continued...)

- **Effective harassment policy**
  - **Equal Opportunity Employer Statement**
  - **Zero Tolerance**
    - Clear statement that the employer will not tolerate any harassment on the basis of any protected activity
  - **A discussion of the definition of harassment**
    - Illustrative examples

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**Discrimination/Harassment Policies** (continued...)

- **Statement that the policy applies to work-related settings such as business trips and business-related events**
- **Statement that the policy covers all employees, managers, and outside clients/vendors doing business with the company**

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### Discrimination/Harassment Policies (continued...)

- **Clearly described complaint process**
  - How and to whom employees should report harassment that they experience or witness
  - How the investigation will be conducted, and results will be communicated
  - Appeals
- **No retaliation provision**
- **Sanctions**

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### Discrimination/Harassment Policies (continued...)

- **Use simple, easy-to-understand language**
  - Available in multiple languages



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### Complaint/Grievance Process

- **Identify where miscellaneous (Non-EEO related) complaints or questions should be directed**
  - HR
  - Management, General Counsel etc.
  - Tip: Try to be in the know
  - Faragher-Ellerth Defense

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**Leave Policies**



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**Leave Policies** (continued...)

- **Medical/Personal Leave**
  - How and where to file a request for leave
    - FMLA and State and Local Statutes
      - Discussion of Qualifying Circumstances
        - Who is covered?
      - Notification
      - Medical Certification
      - Substitution of Paid Leave

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**Leave Policies** (continued...)

- **Accumulation and usage**
  - How does company calculate 12-month leave periods?
    - Calendar year, fiscal year, rolling period?
- **Non-Retaliation Provision**

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## Leave Policies (continued...)

- **Additional Leave Policies to Consider**
  - Confidentiality and Non-Competition
  
  - Military Leave
  
  - Jury Duty
  
  - Witness Duty
  
  - Bereavement Leave

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## Reasonable Accommodations

- **To whom should requests be directed?**
- **Should requests be in writing?**
  - Religious
  - Disability



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## Computer/Internet/Device Usage Policy

- **YOU ARE BEING MONITORED!!**



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### Computer/Internet/Device Usage Policy (continued...)

- **Employer Concerns**
  - Confidentiality
  - Harassment
  - Copyright issues
  - Risk of criminal transactions
  - Litigation issues

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### Computer/Internet/Device Usage Policy (continued...)

- **Recent case law stresses the need for a policy specifically advising employees that they have **no reasonable expectation of privacy** in their email communications and internet searches**

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### Computer/Internet/Device Usage Policy (continued...)

- **Employee Privacy Policies**
  - Strike a delicate balance
    - State Law Specific
- **Say it loud and say it proud!!**
  - No expectation of privacy when using employer devices/internet (including PDAs)
    - Even personal, password-protected, web-based email accounts are subject to monitoring
    - BYOD policies

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**Computer/Internet/Device Usage Policy** (continued...)

- **Prohibit personal use**
  - Only if this will be enforced; otherwise, limit personal use
- **Prohibit illegal and improper uses of email and the internet, such as pornography, obscenity, harassment and gambling**
  - Not only illegal or improper, but such conduct may be attributed to the employer

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**Computer/Internet/Device Usage Policy** (continued...)

- **Cross-reference the non-harassment policy**
- **Prohibit solicitation**
- **Reserve the employer's right to deny access to resource-intensive activities that interfere with storage space or computing resources**
- **Prohibit the use of the email system to subscribe to or to solicit information which incurs any form of cost without the express permission of a supervisor**

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**Computer/Internet/Device Usage Policy** (continued...)

- **Prohibit any copyright violation, or any unauthorized use of intellectual property**
- **Require complete, periodic deletions from the system**
  - watch litigation requests/holds
- **Include reference to disciplinary action to be invoked for violation of the policy**

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## Computer/Internet/Device Usage Policy (continued...)

### ▪ Social Networking/Media Policies

#### – Considerations

- Make sure policy does not improperly restrict employees' rights to engage in union activities or to discuss wages, hours and working conditions with fellow employees
  - NLRB has indicated that social media policies may interfere with employees' Section 7 rights to discuss working conditions
  - In re: Hispanics United of Buffalo Inc. and Carlos Ortiz
- Ownership of Personae and Connections

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## Confidentiality Policies



- Do you require executives, employees to execute confidentiality agreements to protect trade secrets, customer lists, and other confidential information?

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## Confidentiality Policies (continued...)

- Reinforce these confidentiality protections in the handbook
- Language **MUST** be consistent with the respective confidentiality agreements
- If most employees aren't required to sign confidentiality agreements then consider leaving them out

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### What Confidentiality Policies Should Include:

- **A list of the general items that the employer considers to be confidential**
  - Include language indicating that the list is not all-inclusive
  - The list should be consistent with the list in the confidentiality agreements
- **Requirement that employees return all confidential information upon termination of employment**
- **Requirement that employees maintain the confidentiality of the employer's information post-termination**

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### What Confidentiality Policies Should Include (continued...)

- **Any policy violations will subject a current employee to disciplinary action, up to and including termination and possible litigation**
- **Former employee**
  - Violations subject them to litigation costs incurred enforcing the policy/agreement

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### Alternative Dispute Resolutions

- **Handbook can be used to require employees to arbitrate employment disputes and waive their rights to a jury trial**
- **Consent to arbitrate must be clear and concrete manifestation of employee's intent**
  - Employee **MUST** sign acknowledgment form that unmistakably indicates receipt of handbook and acceptance of arbitration requirement

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**Additional Policies/Issues to Consider Including in Your Handbook**

- **Compensation/Recordkeeping**
  - Regular hours of work
    - Lunch hour/breaks
  - Overtime/Flex Time
  - Time Records
    - Time clock, time sheets, etc.
  - Pay Periods and Payroll Deductions
    - How paid; direct deposit
  - Errors in Pay
    - Who to contact?
  - Bonuses

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**Additional Policies/Issues to Consider Including in Your Handbook**

- **Benefits**
  - Holidays
  - Vacations
    - How much? Process for requesting vacation time?
    - Does unused time carry over? Use it or lose it?
  - Health/Dental/Vision Insurance
    - When are employees eligible? To whom should any questions be addressed?
  - Reimbursement of Travel/Business Expenses
    - Process?

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**Additional Policies/Issues to Consider Including in Your Handbook**

- **Benefits (cont'd)**
  - Telecommuting
    - Qualifications/requirements/rules
    - Statutory Requirements: Wages/Injuries
  - Tuition Aid/Scholarship
  - Child Care
  - Employee Loans
  - Employee Discounts
  - Moving Programs/Relocation Assistance
  - Recreation Programs

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### Additional Policies/Issues to Consider Including in Your Handbook

- **Work Rules**
  - **ALWAYS RESERVE RIGHT TO TERMINATE FOR ANY REASON**
    - Disciplinary procedures
      - Illustrative examples of conduct warranting disciplinary action or termination
        - Insubordination; theft, workplace violence, etc.
    - Visitor Rules
    - Access to Premises
    - Smoking
    - Gifts and Gratuities
    - Employee Relationships
    - Outside Employment

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### Additional Policies/Issues to Consider Including in Your Handbook

- **Termination/Resignation**
  - Notice required for resignation
  - Benefits to be paid out upon separation
  - Exit Interviews
- **Evaluations**
  - How are they conducted?
  - How often, by whom?
- **Safety Precautions**
  - Process/rules for Reporting Accidents
- **Workers' Compensation**
  - Process for reporting injuries

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### Additional Policies/Issues to Consider Including in Your Handbook

- **Requests for Medical Information**
  - HIPAA implications
- **Searches of Employer Property**
  - Desk, locker, voicemail/email
- **Use of Employer Equipment**
  - Telephones, supplies, vehicles
- **Employee References**
  - To whom should requests be directed? What information will be shared?

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## Additional Considerations

- **Out of State Offices/Locations**
  - May need state-specific supplements
- **Federal Government Contracts**

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## Last but By No Means Least

- **Distribute to all employees**
- **Collect signed acknowledgments of review and receipt**
- **Enforce without exception**
- **Perform annual handbook updates**

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# QUESTIONS?

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