

# Employee Handbooks: What You Don't Know Can Hurt You

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DarrowEverett<sub>LLP</sub>

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# The Employment Relationship

# The Employment Relationship

## » At-Will Employment

- » The natural status of the employment relationship in the U.S. is employment at-will (except for Montana).
- » This means that the employment relationship can be terminated by either party for any, or no, (lawful) reason.
- » While this is the base status, employers can alter this both intentionally or unintentionally.



# The Employment Relationship

## » Exceptions

- » Individual employment agreement
- » Collective Bargaining Agreement
- » Unlawful motive (public policy/adherence to regulations)

## » Just Cause

- » Not required, but can be a good idea



# The Employment Relationship

## » Just Cause

- » Generally established by contract
- » Can include right to an investigation, substantial evidence of violation of policy, and progressive discipline
- » Collective Bargaining Agreements (cannot circumvent through handbook)



# Setting the Tone

# Employee Handbooks

## » Basics

- » Handbooks are not required, but recommended
- » Not a contract (if drafted properly)

## » State Requirements

- » Good place to store required policies (ex. NY HERO Act)
- » Pitfalls (SC)

## » So Why Have Them?

- » Employee satisfaction of knowing clear policies
- » Company culture
- » Liability reduction tools





## Your First Month

So you've decided where you put your desk. You know where the coffee machine is. You're even pretty sure you know what that one guy's name is. You're not freaking out anymore. In fact, you're ready to show up to work this morning, sharpen those pencils, turn on your computer, and then what?

This next section walks you through figuring out what to work on. You'll learn about how projects work, how cabals work, and how products get out the door at Valve.

## What to Work On

### Why do I need to pick my own projects?

We've heard that other companies have people allocate a percentage of their time to self-directed projects. At Valve, that percentage is 100.

Since Valve is flat, people don't join projects because they're told to. Instead, you'll decide what to work on after asking yourself the right questions (more on that later). Employees vote on projects with their feet (or desk wheels). Strong projects are ones in which people can see demonstrated value; they staff up easily. This means there are any number of internal recruiting efforts constantly under way.

If you're working here, that means you're good at your job. People are going to want you to work with them on their projects, and they'll try hard to get you to do so. But the decision is going to be up to you. (In fact, at times you're going to wish for the luxury of having just one person telling you what they think you should do, rather than hundreds.)

### But how do I decide which things to work on?

Deciding what to work on can be the hardest part of your job at Valve. This is because, as you've found out by now, you were not hired to fill a specific job description. You were hired to constantly be looking around for the most valuable work you could be doing. At the end of a project, you may end up well outside what you thought was your core area of expertise.

There's no rule book for choosing a project or task at Valve. But it's useful to answer questions like these:

- Of all the projects currently under way, what's the most valuable thing I can be working on?
- Which project will have the highest direct impact on our customers? How much will the work I ship benefit them?
- Is Valve not doing something that it should be doing?
- What's interesting? What's rewarding? What leverages my individual strengths the most?

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On Your First Day



New Employee - Read On Your First Day

Benefits

We offer full time employees a range of great benefits! Learn all about them below.

Health

1

Dental

Disability Insurance



Family

1

Primary Mobile Devices

Vacation, Holidays, And Time Off

Vacation Policies

Sick Leave

Trello Company Holidays

Reasonable Work Schedule

Jury Duty Pay

Unpaid Time Off

Parental Leave Policy

Travel, Conferences & DevDollars



Why conferences and professional development?



How it works.

Speaking at Conferences

Other Travel

Best Practices and Guidelines

Travel Expenses and Reimbursements

Flights



Lodging

Meals

Taxis

Rental Cars

Trello HQ



Lunch



Biking to work!



# Proper Drafting & Recommended Policies

# Proper Drafting

- » Drafting 101
  - » Use of plain language
  - » Language should allow for some discretion (no exhaustive lists)
  - » No contractual terms
    - » i.e., full Confidentiality/IP agreements inside handbook
    - » Be careful of limiting language regarding discipline and decision-making



# Policies and Practices

## Equal Employment Opportunity Statement

- » Company provides equal employment opportunities to all employees and applicants for employment without regard to race, creed, color, national origin, nationality, ancestry, age, sex, pregnancy and pregnancy related conditions, religion, sexual orientation, gender identity or expression, disability, citizenship, genetic information, military service, veteran status, or any other category protected by applicable federal, state, and local laws.
- » Equal employment opportunity applies to all terms and conditions of employment, including, but not limited to, hiring, placement, promotion, termination, layoff, recall, transfer, leave of absence, compensation, and training. Any conduct in violation of this policy will result in appropriate disciplinary action, up to and including an unpaid suspension or termination of employment.



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# Policies Continued

## At-Will Disclaimer

- » We believe that the employment relationship will be one of mutual satisfaction and benefit to you and Company. However, nothing contained in this Handbook (or the Handbook itself) should be considered a contract of employment or constitute a guarantee that your employment will continue for any specified period of time.
- » All Company employees are “at-will.” This means that you are not guaranteed employment for any fixed period, and either you or the Company may terminate the employment relationship at any time, with or without cause, for no reason or any reason not otherwise prohibited by law. No representative of the Company, other than the Managing Member, has the authority to enter into any agreement for employment for any specific period of time or to make any agreement contrary to the foregoing. Any such agreements purporting to alter the at-will nature of employment with the Company in any manner must be in writing and approved by the Managing Member.



# Policies Continued

## » Required Policies

- » FMLA, Drug Free Workplace and Pay Transparency (applicable federal contractors)
- » Massachusetts
  - » Harassment, SNLA, Domestic Violence, Data Security, Earned Sick Time
- » New York City
  - » Sexual Harassment, HERO Act (NY)
- » South Carolina
  - » At-will disclaimer



# Liability



# Liability Reduction

## » Policies

- » Good place for required policies and training – NYC
- » General anti-harassment policies
- » Anti-bullying policies – TN
- » Relationships



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# Accommodations Policies

## » Accommodations Policy

- » ADA (15 or more employees)
  - » Some states only require 1 employee
- » Should accomplish two things:
  - » Demonstrate company's commitment to compliance
  - » Educate and inform employees of the company's process for requesting a reasonable accommodation

## » Common Issues

- » Cliff Leave policies
- » 100% recovery requirements
- » Failure to engage in interactive dialogue
- » Not aligned with personal leave of absence policy



# Sexual (and Other) Harassment

- » State model policies – MA and NY
- » General Policy Questions
  - » Does the policy prohibit harassment based on other protected characteristics in addition to sexual harassment?
  - » Is it distributed on an annual basis?
  - » Is there a signed acknowledgment?
  - » Does the company get a signed acknowledgement every year?
- » Aspects
  - » Establish zero tolerance for harassment
  - » Define harassment
  - » Provide internal reporting mechanisms
  - » Explain investigation process
  - » Anti-retaliation provisions



## » Faragher-Ellerth Defense

- » The employer did not take tangible adverse employment action against the plaintiff (for example, discharge, demotion, or undesirable reassignment).
- » The employer exercised reasonable care to prevent and promptly correct the harassing behavior. For example, harassment policies demonstrate reasonable care to prevent harassing behavior.
- » The plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to otherwise avoid harm (for example, by not taking advantage of reporting procedures outlined in an anti-harassment policy).



# FLSA Safe Harbor

- » Exemption status of an employee is not guaranteed (with some exceptions):
  - » Must perform exempt duties
  - » Paid on salary basis of at \$684/week
  - » Other than required or permitted deductions, cannot deduct from salary of exempt employee for partial day absences and non-availability of work
- » Safe Harbor Policy Defense
  - » Clearly communicated policy prohibiting improper deductions
  - » Complaint mechanism
  - » Reimburses employees
  - » Good faith commitment to compliance



# FMLA Estoppel

## » Family Medical Leave Act Policy

- » Clear definition of eligibility
  - » Worked for company for at least 12 months (does not need to be consecutive)
  - » Worked at least 1,250 hours in last 12 months
  - » Be employed at a worksite with 50 or more employees within a 75-mile radius
- » Many requirements
  - » Provider certification for serious health condition
  - » Limited leave length

## » Common Issues

- » Inconsistent enforcement of requirements
- » Not reinstating employees
- » Accidental FMLA estoppel issues for uncovered employees



# Internet and Technology Usage

## » IT Policies

- » Clearly communicate the company's stance on communications monitoring and personal use of company equipment and networks
- » Some state laws require specific disclosure of methods and types of electronic monitoring
- » Notify employees that there is no reasonable expectation of privacy when using company resources, devices, and systems, including to conduct personal communications

## » Common Issues

- » If not clearly identified as monitored communications, employees may be able to invoke privilege (ex. Spousal) as to email communications over company's own network.



# Constantly Evolving Law



# Constantly Changing

## » National Labor Relations Board

- » Constantly changing interpretations of work rules
- » Applicable to unionized and non-unionized workplaces
- » Stericycle, Inc., 372 NLRB No. 113 (2023).
  - » New standard for employer rules
  - » Does the rule have a reasonable tendency to chill employees from exercising their rights
  - » Employer may rebut – legitimate and substantial business interest that the employer is unable to advance with a more narrowly tailored rule
- » Non-Disparagement
  - » Knowingly, maliciously untrue



# NLRB Continued

## » Disclaimers

- » Clearly indicate that the rule is not intended to restrict employees' Section 7 Rights (concerted activity)

## » Drafting Considerations

- » Clearly state policy purpose
- » Identify specific prohibitions
- » Include disclaimers of non-prohibited activity if relevant
- » Consistency enforce

## » Common Issues

- » Targeted non-solicitation policies
- » Timing of policy revision in close proximity to union activity



# Questions?

## Andrew J. Adams

Andrew is a Partner of DarrowEverett's Labor & Employment Practice Group. He has represented clients ranging from small local businesses to those with a larger, multinational presence on matters ranging from acqui-hire transactions to due diligence on reverse SPAC mergers. Andrew has represented employers in federal and state litigation across the country involving claims of discrimination, harassment and retaliation, wage and hour violations, contract disputes, and other employment issues.

He regularly advises clients with respect to employment agreements, restrictive covenant compliance, regulatory compliance challenges, personnel policies, and day-to-day employment issues, and has experience with state and federal agency investigations, negotiating collective bargaining agreements, and litigating unfair labor practice charges on behalf of employers.



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