



SHERMAN & HOWARD

**EMPLOYEE HANDBOOKS:**  
*The Good, the Bad, and the Ugly*

**Bryan A. Stillwagon**  
**Sherman & Howard L.L.C.**  
**October 15, 2014**

# **Mission of Pro Bono Partnership of Atlanta:**

To maximize the impact of pro bono engagement by connecting a network of attorneys with nonprofits in need of free business legal services.

# Pro Bono Partnership of Atlanta Eligibility & Other Information

- To be a client of Pro Bono Partnership of Atlanta, an organization must:
  - ✓ be a 501(c)(3) nonprofit,
  - ✓ be located in or serve the greater Atlanta area,
  - ✓ serve low-income or disadvantaged individuals, and
  - ✓ be unable to afford legal services.
- *Visit us* on the web at [www.pbpatl.org](http://www.pbpatl.org)
- We host free monthly webinars on legal topics for nonprofits
  - ✓ To view upcoming webinars or workshops, visit the Workshops Page on our website
  - ✓ Join our mailing list by emailing [rla@pbpatl.org](mailto:rla@pbpatl.org)

# Legal Information

- ✓ This workshop presents general guidelines for Georgia nonprofit organizations and should not be construed as legal advice. Always consult an attorney to address your particular situation.
  
- ✓ All rights reserved. No further use, copying, dissemination, distribution or publication is permitted without express written permission of Pro Bono Partnership of Atlanta.

# Is Your Organization Required to Have an Employee Handbook?

**NO**

# Why Have a Handbook?

- help explain employer's policies, procedures, and philosophies
- introduce employees to employer's environment and culture
- communicating employer expectations
- encourage uniformity and consistency in policy interpretation, administration, and enforcement
- provide useful defenses in wrongful discharge litigation
  
- **BUT, if poorly drafted**
  - ✓ violate laws
  - ✓ increase liability exposure if employer fails to follow policies consistently/uniformly

# Handbook Contents

➤ You *can't* include it all, so what *should* you include?

- Positive & personal introduction
- Equal Employment Opportunity
- No Harassment
- No Retaliation
- At Will
- Introductory Period
- Employee Classification
- FMLA (if covered)
- No Recording
- Unionization
- Social Media

# Equal Employment Opportunity

- Equal opportunity without regard to irrelevant factors such as race, color, religion, gender, age, national origin, disability, veteran status, or any other legally protected status
- Applies to recruiting, hiring, training, advancement, work assignments, compensation, benefits, discipline, reductions, transfers, termination, and all other terms, conditions, and privileges of employment
- Ability to notify his/her supervisor or HR without fear of reprisal
- Complaints or reports will be kept as confidential as possible
- Company will investigate and will, if called for, take appropriate corrective action

# Anti-Harassment

- Harassment can take the form of words, actions, or visual representations
- Policy applies to all Company personnel, as well as to vendors and clients who interact with Company personnel
- Promptly report it to your supervisor or HR without fear of reprisal
- Company will investigate complaints and will, if called for, take appropriate disciplinary action
- Complaints will be kept as confidential as possible under the circumstances

# Anti-Harassment: What *Not* to Say

- “report to anyone”
- “report in good faith”

# Policy Against Retaliation

- Employees should be free to ask questions, raise concerns, and make complaints about treatment the employee believes is improper, unfair, unethical, harassing, or discriminatory
- Respects the right of an employee to contact resources outside of the Company (agency/court)
- Strictly prohibits retaliation against an employee merely for
  - ✓ expressing a concern or making a complaint within the company
  - ✓ bringing a formal claim against the company
  - ✓ communicating with an outside agency.
- Notify HR if retaliation occurs
- Company will investigate
- Anyone who engages in, authorizes, or permits any form of retaliation in violation of this policy invites severe disciplinary action, including employment termination

# Introductory Period

- a time for getting to know the Company, your fellow employees, your manager, and the tasks involved in your job position
- a trial period for both you, as an employee, and the Company, as an employer
- it will be up to you to prove to the Company that you would make a positive contribution to the business were you to become a regular employee
- the Company will evaluate your suitability for employment, and you should evaluate the Company, as well
- work habits, attitude, attendance, and performance will be monitored and reviewed by your supervisor
- by the end of the Introductory Period, if not sooner, your manager will discuss your job performance with you and will make a recommendation concerning continued future employment
- does not create a contract of employment
- both before and after the Introductory Period, your employment with the Company is “at will”

# Policy Against Unionization

- We're "a union-free company."
- Emphasize the company prefers to deal directly with its employees instead of through a third party
- Honesty and concern for employees is the best way of ensuring the Company's well-being and that of its employees

# Recording

- Prohibit it
- Without the knowledge and permission of anyone being recorded, audio or video recording shouldn't take place on Company property

# Wage & Hour – Employee Classification

- Exempt vs. Non-Exempt
- NO: “Without consent, the time worked will be considered unauthorized and, therefore, non-payable.”
- “Employ”: to suffer or permit to work
- YES: “Employees are not permitted to work overtime without permission from their manager. Employees who work without permission will be paid, but are subject to discipline up to and including termination.”

# Handbook Scrutiny: The Antagonists

## ➤ **EEOC**

- ✓ **E**qual **E**mployment **O**pportunity **C**ommission
- ✓ **E**veryone **E**ntitled to an **O**ccupation  
un**C**onditionally

## ➤ **NLRB**

- ✓ **N**ational **L**abor **R**elations **B**oard
- ✓ **N**ot **L**iking or **R**elating to **B**usiness

# The Big Issues

- **EEOC:** Title VII, ADEA, ADA, etc.
  - ✓ Non-discrimination
    - Adverse impact
  - ✓ Harassment-free
  - ✓ Retaliation-free
- **NLRB:** NLRA
  - ✓ Concerted protected activity
  - ✓ Retaliation-free
  - ✓ Union status irrelevant

# Big EEOC Issues: Criminal History Exclusions

- The issue
- Why the EEOC says it cares
  - ✓ Disparate treatment
  - ✓ Disparate impact
- What you can do:
  - ✓ “Except where required by law or necessitated by fiduciary or other compelling business necessity, or instances of conduct shocking to the conscience, negative criminal history information shall not serve as the sole basis for exclusion of any applicant for employment.”
  - ✓ Consider the nature of the crime, the nature and duties of the job, and how much time has gone by since the criminal conduct occurred.
  - ✓ Provide the excluded applicant the opportunity to show why s/he should not be excluded.

# The NLRB's General Test for Handbooks and Policies

- Sec. 7: “Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, **and** shall also have the right to refrain from any or all of such activities . . . .”
- Policy unlawful if:
  - ✓ Explicitly restricts Section 7 rights, or
  - ✓ Employees would “reasonably” construe the language to restrict or “chill” Section 7 activities, or
  - ✓ Policy adopted specifically in response to union activity, or
  - ✓ Policy has been applied to restrict Section 7 activities in the past
- General Section 7 disclaimers not enough
- Unenforced rules are still “rules”

# Big NLRB Issues: Confidentiality

- The issue: barring workers from discussing company, employee, or personal information
- Why the NLRB says it cares: info could be interpreted as encompassing workers' terms and conditions of employment
- What you can do:
  - ✓ “The term ‘confidentiality’ does not include your salary, benefits, or other terms and conditions of employment.”
  - ✓ Avoid broad and general prohibitions, as well as undefined terms
  - ✓ Use specific language for *why* info needs to be protected

# Big NLRB Issues: Harassment

- The issue
- Why the NLRB says it cares
- What you can do:
  - ✓ “This harassment policy does not prevent you from discussing the terms and conditions of your employment with your co-workers, or discussing issues related to union organizing in the workplace, provided, however, that such discussions occur consistent with our Non-Solicitation Policy.”

# Big NLRB Issues: Non-Solicitation Policies

- The issue
- Why the NLRB says it cares
- What you can do:
  - ✓ “Solicitation and distribution of literature/materials on the company’s private property by non-employees is strictly prohibited. Solicitation and distribution of literature/materials by employees on the company’s private property are prohibited (a) during the soliciting-employee’s (or the targeted employee’s) working time (excluding break and meal time); or (b) at any time in any working area. Off-duty employees are prohibited from entering the interior of the facility or any work areas during off-duty time for any reason.”

# NLRB Won't Chill Out

- Board combing handbooks/policies
- Basis to overturn election
- Basis for nationwide remedy
- Whether the policy may “chill” Section 7 activity
- Ambiguity construed against...EMPLOYER

# Big NLRB Issues: Social Media

- The issue
- Why the NLRB says it cares
- What you can do:
  - ✓ Restrict unlawful use of trademarks, trade names, copyright
  - ✓ Restrict unlawful disclosure of information that may affect markets

# Social Media (cont' d)

- ✓ Restrict “anonymous” product endorsements in violation of FTC Rules
- ✓ Restrict use to non-working times and non-employer resources/tools
- What you cannot do:
  - ✓ Prohibit profanity, sarcasm, criticism, name-calling, or offensive conduct
  - ✓ Prohibit discussions of workplace issues or the company
  - ✓ Prohibit negative comments about management, managers, or co-workers

# **Social Media – What’s an Employer to Do?**

- “Our rules of conduct apply with equal force with respect to social media. While you are free to use social media in concert with your co-workers to discuss or otherwise address wages, hours, working conditions, and other terms and conditions of employment, your use of social media beyond those topics are governed by our policies to the extent they apply to off-duty conduct.”

# At-Will Employment

“This Handbook is neither a contract of employment nor an offer of such a contract. Your employment with the Company is ‘at will,’ which means that it is not for a specified period and may be terminated either by you or the Company at any time with or without cause or advance notice.”

“I agree that the at-will employment relationship cannot be amended, modified or altered in any way.”

## ➤ NLRA

- ✓ Does this force an employee to give up his/her right to act in a concerted fashion?
- ✓ Management could enter into an agreement to change the employees’ at-will status.
- ✓ “This at-will employment policy can be modified by the Company only by a written agreement signed by the HR Manager . . . .”

## ➤ Employee Relations

- ✓ No need to over-emphasize, especially in Georgia (at-will by statute).

# CHILD ABUSE REPORTING IN GEORGIA

## ➤ **WHAT** is considered child abuse?

- ✓ Left home alone or in the neighborhood for long periods of time
- ✓ Frequently hungry
- ✓ Not dressed properly for the weather
- ✓ Frequently misses school or other activities
- ✓ Has injuries or marks of physical violence
- ✓ Becomes overly aggressive or withdrawn
- ✓ Does not receive needed medical attention

## ➤ **WHO** must report?

- Physicians, nurses, hospital or medical personnel, dentists, and psychologists
- Professional counselors, social workers, and marriage and family therapists
- School teachers and administrators and guidance counselors
- Child welfare agency personnel, meaning any child-caring institution, child-placing agency, maternity home, family boarding home, family day care home, or day care center
- Child counseling personnel
- Law enforcement personnel

# CHILD ABUSE REPORTING IN GEORGIA

## ➤ **WHEN** must one report?

- Must have an honest belief that the child is being abused
- Must report within 24-hours of establishing honest belief

## ➤ **HOW** does one report?

- Report to county Division of Family and Children Services, Police or District Attorney
- If in hospital or school social agency, report to designated person
- In emergency situations, call Police

## ➤ **WHAT** goes into a report?

- As much identifying information as possible
- Child's name, address, age, and injuries
- Photograph if possible (no parental consent necessary)
- Reporters have the option to give their name

## **For More Information:**

If you would like more information about the services of Pro Bono Partnership of Atlanta, contact us at:

Phone: 404-407-5088

Fax: 404-853-8806

[Info@pbpatl.org](mailto:Info@pbpatl.org)

[www.pbpatl.org](http://www.pbpatl.org)