

Top Employee Handbook Updates for 2021

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The start of the year is a good time for employers to review their handbooks and ensure policies are updated with the latest employment and labor law developments. Notably, the COVID-19 pandemic may have prompted changes to employers' remote-work, paid-leave and other policies.

Here are the topics employment law attorneys said employers should review for 2021.

Remote-Work Rules



"Remote work became a new widespread practice in 2020, and employers should update handbooks and policies to reflect this new practice and establish well-thought-out policies for remote workers into the coming year," said Mark Phillips, an attorney with Reed Smith in Los Angeles.

State and local stay-at-home orders and other efforts to stop the spread of the coronavirus led many workplaces to move their operations online in 2020. Some businesses decided made work-from-home options (www.shrm.org/resourcesandtools/pages/remote-work.aspx) long term or permanent.

"I think work from home is here to stay," said Bruce Sarchet, an attorney with Littler in Sacramento.

Even employers that plan to resume in-person operations may have to revise their policies on providing reasonable accommodations under the Americans with Disabilities Act and other anti-discrimination laws.

Not all jobs can be done from home, but the Equal Employment Opportunity Commission (EEOC) has said that allowing an employee to work from home could be a reasonable accommodation if an employee's disability prevents him or her from successfully performing the job onsite, unless the accommodation would cause an undue hardship for the business.

"Historically, employers could say it's an undue hardship, but that's much more difficult to say now," Sarchet noted. "So this is a place where policies and handbooks could be strengthened."

Leave Mandates

Managing leaves of absence is much more complicated today than it was in 2019, Sarchet observed.

In 2020, the federal Families First Coronavirus Response Act (FFCRA) provided paid leave for certain workers who had COVID-19 or whose children's schools or child care providers were closed due to the pandemic. Although FFCRA's paid-leave requirements expired at the end of 2020, a new coronavirus relief package (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/coronavirus-relief-package-workplace-provisions.aspx) extended the refundable employer payroll tax credit for paid sick and family leave through March 2021.

Additionally, some states, counties and cities have more-expansive leave mandates that will remain in effect for at least part of 2021. Some states, such as New York (www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/new-york-state-paid-sick-leave-law-takes-effect-sept-30.aspx), passed permanent paid-leave laws in addition to temporary pandemic-related laws.

Employers might choose not to include temporary requirements in their handbooks, Sarchet noted, but they should consider developing policies and procedures for managing compliance while the rules remain effective.

Health and Safety Requirements



Employers should review guidelines from the federal Occupational Safety and Health Administration (OSHA) and state and local agencies that are meant to keep workers healthy and safe during the pandemic.

OSHA's existing standards cover pandemic-related safety risks. Specifically, all employers must provide a work environment that is "free from recognized hazards that are causing or are likely to cause death or serious physical harm." OSHA has also released COVID-19-specific guidelines for limiting workers' exposure to the coronavirus.

Employers should note that states may have more-stringent standards. At least 14 states have adopted (<https://www.nelp.org/blog/which-states-cities-have-adopted-comprehensive-covid-19-worker-protections/>) comprehensive COVID-19 worker safety protections, and some cities also have passed pandemic-related workplace safety ordinances, according to the National Employment Law Project.

Employers may see more claims of retaliation from employees who raise health and safety concerns, said Rob Boonin, an attorney with Dykema in Detroit. "For this reason, compliance and reporting policies could be made more robust."

Anti-Discrimination Policies

Title VII of the Civil Rights Act of 1964 prohibits businesses with at least 15 employees from discriminating against workers based on protected characteristics with respect to terms and conditions of employment, including hiring, firing, laying off, training or disciplining. Protected characteristics include color, national origin, race, religion and sex.

In 2020, the U.S. Supreme Court held (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/supreme-court-title-vii-scope-of-protection.aspx) that "sex" discrimination under Title VII includes sexual orientation and gender identity.

"While some states' laws already prohibited discrimination along those lines, employers should review and revise their handbooks' anti-discrimination policies where appropriate," Phillips said.

Drug-Testing Programs

In the last election, voters in five states approved marijuana laws (www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/more-states-legalize-marijuana-use.aspx) that will take effect in 2021. Thirty-five states have now approved medical marijuana use, and 15 of those states and Washington, D.C., also have approved recreational use.

Employers need to be aware of how each applicable statute impacts the workplace. Although no state requires employers to tolerate on-the-job cannabis use or intoxication, many states protect registered medical marijuana patients from employment discrimination. So employers may want to review their drug-testing policies to ensure compliance with evolving laws in this area.

Looking Ahead

The future is uncertain for employers in light of the ongoing pandemic and a new presidential administration.

Under President-elect Joe Biden, Phillips expects that the U.S. Department of Labor and the National Labor Relations Board will return to an approach similar to that of President Barack Obama's administration and focus more on employee rights.

The new administration could raise (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/can-employers-expect-a-new-overtime-rule-under-biden.aspx) the federal minimum wage and the salary threshold for workers who are exempt from overtime pay under the Fair Labor Standards Act's white-collar exemptions.

"Employers will have to brace themselves for changes they may have to accommodate, if not in the first year (www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Pages/what-will-not-change-under-Biden-administration.aspx), within the first two," Boonin said, noting that changes for federal contractors could happen quickly.

"Those changes will likely serve as a sneak-preview as to what other employers may anticipate," he said.

Compliance Tips

While some handbook changes will apply companywide, others may be more appropriately made in a state or local addendum, noted Michele Haydel Gehrke, an attorney with Reed Smith in San Francisco.

Boonin said multistate employers will continue to face challenges stemming from the patchwork of state and local rules. So employers should consider having their policies audited regularly for legal compliance.

"States often apply new concepts to the workplace at a faster rate than the federal government," he observed. Areas that are getting a lot of attention lately include paid sick leave, paid family leave, limits on settlement confidentiality, more-stringent definitions of who is exempt from overtime and what constitutes compensable work time.

"Compliance, reporting and anti-retaliation will also be an area that employers will have to address more often, and good policies in these areas may be effective shields from liability," Boonin said.

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