DEVELOPING AN EMPLOYEE HANDBOOK

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I. WHY YOUR COMPANY SHOULD HAVE AN EMPLOYEE HANDBOOK

A handbook is often the only place the employer has to convey to employees the rules, policies and procedures for the workplace, the employer’s expectations for its employees, the rights and obligations of employer and employee, and the employer’s philosophy and mission. An effective handbook:

- Establishes that employment with the employer is at-will;
- Provides information about working conditions, benefits and policies affecting employment;
- Avoids ad hoc decision-making on employment issues;
- Disclaims certain privacy expectations, enabling the employer to monitor the activities of employees;
- Communicates harassment policies, thereby offering the employer a potential affirmative defense to a claim of harassment;
- Satisfies employer obligations to communicate state and federal leave policies, including medical and military leave;
- Provides employees with an internal procedure for complaining, which may resolve complaints short of litigation; and
- Provides supervisors with a framework for consistent treatment and discipline of employees.

II. WORKPLACE “GROUND RULES”

A. At-Will Employment / No Contract for Employment

Every handbook should include a provision that clearly informs employees that their employment is at-will, that they can quit or be fired at any time, for any reason or no reason, and that no one at the employer can change the at-will nature of the employment relationship. The handbook should also clearly state that while it is a statement of the employer’s current policies, it is not intended to be a an express or implied contract of employment, and that the employer has the right to modify, amend or discontinue the provisions of the handbook at its discretion dependent upon business needs and conditions.
B. Employee Categories & Classifications

Employers may list or define various categories of employees. Employees may be classified as full-time, part-time, temporary or probationary. By these categories, an employer can define employee eligibility for vacation and other benefits. Employers should also indicate that employees may be classified as exempt or non-exempt and provide notice that each employee will be informed of their classification when hired.

C. Attendance and Punctuality

An attendance policy should specify:

- Hours of operation or shift schedules;
- The time at which employees are expected to report to work;
- The procedure for employees to follow if they are late or absent (who do they contact, what methods of contact are permitted, when must they contact the company);
- Excused vs. unexcused absences; and
- The discipline that will be imposed for failure to comply with such procedures.

Employers should also include a policy that sets forth the consequences of unexcused absences; for example, that an employee will be considered to have resigned their position after three (3) consecutive unexcused absences. A handbook can also detail if different classes of employees are required to report to work at different times or to follow different notification procedures.

D. Meal & Rest Breaks

Oregon law requires employers to provide meal and rest periods to employees.¹ A Meal and Rest Break Policy should notify employees of:

- their right to take rest and meal breaks and that no work is to be performed during rest and/or meal breaks;
- when breaks should be taken, and if the timing for rest or meal breaks varies based on the workload;
- time keeping requirements related to meal breaks; and
- where they should take breaks (and whether they must remain on the premises).

The policy should also provide information to employees about what they should do if, for some reason, they are not able to take their breaks or are asked to work through a

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¹ The Fair Labor Standards Act (FLSA) also covers most Oregon employees and does not require meal or rest periods. However, employers must comply with the law that is most beneficial to the employee, which currently is Oregon law, and provide rest and meal breaks.
break, inform employees that they are responsible for taking their breaks, and notify employees that meal and rest breaks cannot be combined or skipped to allow early departure.

E. Pay Periods & Paychecks

Employers must establish and maintain regular paydays which may not be more than 35 days apart. ORS 652.120(1)(2). A handbook should notify employees of the employer’s regular paydays and provide that employees may agree to direct deposit of their paychecks. Employers may also include rules concerning who (other than an employee) may pick up an employee’s paycheck and whether employees may take advances against their pay. Some employers also include information about deductions from pay (for example for taxes, social security, garnishments).

F. Time Keeping & Overtime

A handbook should include information on how employees keep track of their hours worked, i.e., rules for completing and submitting time sheets, use of a time clock, or other method to track working and non-working time. The handbook should state the employer’s deadline for submission of time records (or time limitations on clocking in/out), the consequences of failing to meet the deadline, and a prohibition on falsifying time records or permitting co-workers to punch in/out for each other.

Every handbook should include an overtime policy. **Example:**

Due to the nature of the company’s business, overtime may be required as a condition of employment. When operating requirements or other business needs cannot be met during regular working hours, it may be necessary for employees to work either scheduled or incidental overtime hours. Scheduled overtime will be announced in advance by your supervisor. Incidental overtime is not pre-scheduled; it is a necessary response to extenuating circumstances within our work environment. Whether overtime is scheduled or incidental, all employees are expected to work overtime when requested.

All nonexempt employees will be paid one and one-half times their regular rate of pay for all hours worked in excess of 40 in one workweek. For overtime purposes, the company’s workweek is 12:00 a.m. Monday through 11:59 p.m. Sunday. Overtime is based upon actual hours worked. Compensated time off (PTO, holidays, jury duty, etc.) does not count as “time worked” for the purpose of calculating overtime.

All overtime must be pre-authorized by your supervisor. Working overtime without pre-authorization may subject you to discipline, up to and including termination of employment.
The Company reviews overtime worked by employees and may discipline or terminate an employee for working overtime without prior authorization and/or for incurring excessive unnecessary overtime.

If your company provides non-exempt employees with company cell phones, laptops, and/or tablets, your overtime policy should also address use of devices during non-business hours. **Example:**

Non-exempt employees who are issued company owned electronic devices for business use may not use those devices outside of normal work hours without advance authorization, and must document all time spent using such devices outside of normal work hours. Except where specifically authorized, non-exempt employees should not check, read, send and/or respond to work-related emails/text messages or other electronic communications outside of normal work hours. Employees who do not comply with these restrictions may be subject to discipline, up to and including termination of employment.

### III. GENERAL WORKPLACE CONDUCT

**A. General Behavior Standards**

The handbook gives the employer the opportunity to inform employees about how they are expected to behave at work. Employers often include a non-exclusive list of unacceptable behaviors and indicate that employees engaging in the behaviors may be disciplined or terminated. For example, employers may expressly prohibit: stealing; gambling on company premises or while at work; fighting, horseplay or engaging in practical jokes; insubordination, willful destruction of property, equipment, or materials; violating a known safety rule or practice; reselling any article or product purchased through the company for personal use; leaving job during working hours without proper approval; or unauthorized use of company vehicles or equipment.

**B. Electronic Communications**

A handbook should include the employer’s policies on use of computers, voicemail, email and other electronic systems (collectively, the “Systems”). Generally, an electronic communications policy should include the following information and notices:

1. **No Expectation of Privacy**

The employee handbook should contain a policy that makes it clear that employees have no personal privacy right in anything created, received, or sent on or from the Systems, and that by accessing the Systems, employees expressly waive any right of privacy in anything they create, store, send, or receive on the Systems. The provision should also inform employees that by their accessing the Systems, they consent to
allowing personnel of the employer to access all material created, sent, or received on the Systems (including personal websites/email accessed using the Systems).

The provision should notify employees that the employer periodically monitors the Systems (this should also be included in the handbook acknowledgment). A policy may also state that encrypting or applying password protection to files on the Systems does not make the files private.

2. Use of the Systems

The electronic communications provision should explain that the System is to be used for business and is intended to increase productivity. Employees should be informed that messages and files created, sent, received or stored within the Systems should be business-related and are the property of the Employer. Employees should also be informed about permitted and prohibited uses. **Example:**

In using the Systems employees may not:

- Visit chat rooms, use listservs, instant messaging, and/or news groups as well as post their e-mail addresses on the Internet unless such activity is business-related;
- Subscribe to any listserv, unless work-related;
- Download or copy software without approval from the IT Department. Software that is approved for downloading must be registered to the company;
- Knowingly introduce a computer virus, worm, “Trojan horse,” or any other contaminating or destructive features into the System;
- Transmit copyrighted materials without permission;
- Download files from the Internet except for an express business purpose;
- Download radio, video, or music transmissions from Internet sites;
- Attempt to defeat any security mechanisms to gain unauthorized access to computer files or other information on the System;
- Attempt to read, intercept, copy, or delete e-mails between other users;
- Post or transmit any message anonymously or under a false name or permit any other individual to do so;
- Transmit, forward, or download material that is offensive, abusive, pornographic, obscene, profane, discriminatory, harassing, insulting, derogatory, inflammatory, fraudulent, or otherwise unlawful;
- Use e-mail or the Internet for any purpose that is illegal, or against company policy;
- Transmit or disseminate the company’s confidential information, proprietary materials, or trade secrets to any outside source without an express business purpose or authorization;
- Send or forward any chain e-mail, broadcast e-mail, or spam;
- Gamble, shop on-line and/or participate in fantasy sport leagues;
- Solicit noncompany business or use the System for personal gain including outside employment, self-employment, and family-owned businesses;
- View any web sites that are pornographic or sexual in nature, send or cause to be transmitted any pornographic material;
- Modify, revise, transform, recast, or adapt any software, or reverse engineer, disassemble, or decompile any software;
- Apply encryption or password protection to any e-mail or voice mail, company data or electronic information without express written authorization by supervisor or manager.

3. **Sensitive Information**

The electronic communications provision should explain how the company wants various kinds of information treated.

4. **Discipline**

The policy should notify employees that they will be disciplined for violation of the electronic communications policy.

5. **Waiver**

There are situations when an employee will claim that an electronic communication sent/received on their employer’s systems is subject to some kind of privilege. To avoid such a claim, an electronic communications policy can include language whereby an employee waives all applicable privileges with respect to any communication or data stored in, created, received, accessed through or sent over the Systems, including material sent or received through external personal and/or password-protected internet websites.²

C. **Social Media**

Employees need to know what kinds of work related information they may (and may not) publish on personal websites, web logs (blogs), wikis, social networks, online forums, virtual worlds, or any other kind of social media (such as Twitter). At a minimum, a social media policy should inform employees that when using social media, employees should:

- Be respectful, honest and accurate;
- Disclose that the employee’s views are the employee’s alone and that they do not necessarily reflect the views of the employer and are not a spokesperson for the employer;

² This language is adapted from *The Employee Handbook: Every Word Counts*, Proskauer Rose LLP, 2011.
• Not disclose any of the employer or its clients/customers confidential, private and/or trade secret information;
• Comply with copyright laws;
• Not use social media to harass, discriminate or create a hostile work environment; and
• Not use social media to break the law.

When drafting a social media policy, employers must be careful to avoid violating Section 8(a)(1) of the National Labor Relations Act. Generally, Section 8(a)(1) prohibits employers from interfering with, or restraining, employees’ rights to engage in “concerted activities.” “Concerted activities” means two or more employees acting together in furtherance of matters of mutual interest, such as employee compensation, benefits or improving workplace conditions. With respect to social media, a concerted activity can include, for example, employees communicating on facebook about their pay or working conditions. Social media policies, should not attempt to prohibit employees from discussing work, disparaging the employer, or otherwise lead employees to reasonably believe they are restricted from engaging in concerted activities.

D. Use of Company Equipment

The employee handbook should make clear to employees that all employer equipment is to be used only for employer business and that prior permission must be obtained from a member of management before personal use of any company equipment. Potential consequences for misuse should also be included. Notice that company equipment must be returned upon request or upon termination of employment should be included.

E. Electronic Devices

1. BYOD

Handbooks should address employer policies on employees’ use of personal devices for work and use of company owned devices. “Bring Your Own Device” policies (“BYOD”) can be lengthy. At a minimum, a BYOD policy should include:

• Software requirements for personal devices (mobile device management and remote wipe software)
• Personal use of device during work hours
• Business use of personal devices outside of work hours

3 If this type of provision is included, the employer should list the types of information that are considered confidential or proprietary. Further, in light of employee rights under the National Labor Relations Act, employers should be careful not to prohibit employees from discussing compensation (which discussion is likely to be a concerted activity under Section 8(a)(1) of the National Labor Relations Act).
• 3rd party use of personal devices
• Privacy
• Reimbursement or pay for use of personal devices (data and/or cell)
• Safe use (see cell phone policy below)
• Loss, damage, theft of personal devices

Company device policies should cover similar topics. However, because the company owns the device, use can be more narrowly restricted.

2. Use of Cell Phones / Personal Data Assistants at Work

Employers should have a policy that expressly notifies employees if they can talk, text, or otherwise use electronic devices to conduct personal business while at work. Employers may also want to address use of cameras and tape recording at work. Private employers can prohibit the use of cell phone cameras and require consent of all parties for audio/video recording.

3. Use of Cell Phones/Personal Devices in Company/Personal Vehicles

Employers should notify that use cell phones/personal devices while driving company vehicles or driving personal vehicles for work is prohibited. The policy should: discourage employees from making and/or receiving phone calls while operating a vehicle; prohibit employees texting while operating a vehicle; request that employees pull over to a safe place to talk or text; and require use of a hands free device where required by law. The policy should also include consequences for violation of the policy.

F. Workplace Violence

A workplace violence policy defines behaviors that are prohibited and encourages employees to notify management if they have information about potential violent behavior of co-workers or third parties. The policy should notify employees that workplace violence, including physical violence, intimidation, harassment, threats, vandalism, unsafe behavior or any behavior that threatens or frightens co-workers or third parties is prohibited. The policy should include rules about weapons (typically employers prohibit weapons on company premises, company business and/or in company vehicles). Handbook provisions should tell employees how, and to whom, they should report their concerns, and set forth consequences for violating the policy. Depending on the nature of the business, the policy may also include detailed procedures for dealing with threats and details on contacting the police or other authorities.

G. Confidentiality

Protection of confidential information is vital to the success of many businesses. The nature of the employer’s business will define what constitutes confidential information. Under Oregon law, “trade secret” means “information, including a drawing, cost data,
customer list, formula, pattern, compilation, program, device, method, technique or process that: (a) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." ORS 646.461. Confidential information may be broader than trade secrets.

An effective handbook policy will notify employees that during employment and for some period of time thereafter, they are prohibited from directly or indirectly, disclosing, publishing or using confidential information and company trade secrets except as required to perform their job. The confidentiality provision in an employee handbook should, at a minimum, include the following items:

1. The importance of maintaining confidentiality;
2. A description of what information the employer considers sensitive, such as products, processes, marketing data and discoveries;
3. The expectation that employees must keep information confidential and may not disclose it to people outside of the employer; and
4. The warning that anyone who breaches the confidentiality provision will be disciplined, up to and including termination.

H. Solicitation

An employer may wish to ban solicitation or distribution of literature or to restrict the time and manner in which solicitation may occur. Under the National Labor Relations Act ("NLRA"), employers may prohibit certain types of solicitation and distribution in the workplace, but a blanket prohibition against all forms of solicitation on the employer's property is unlawful and a requirement that all solicitations must be pre-approved by management is also unlawful.

Employers may prohibit solicitation by non-employees, including solicitation by a union organizer, unless such individuals have no other reasonable means of accessing the employees. The non-solicitation policy must be consistently enforced against all third parties. Employees may also be prohibited from soliciting one another during working time. Employers may also prohibit distribution of literature by employees during work time and in work areas, although employees have a legal right to distribute literature to one another during non-working time in non-working areas, such as break rooms, cafeterias and parking lots.

I. Drug & Alcohol Policy

Most employers include a policy addressing employee use of drugs and alcohol and employer testing of employees for drugs and alcohol. Generally, the policy should:

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4 For employees in senior positions with greater access to confidential information, employers may want to use a separate, more specific Confidentiality Agreement.
• Prohibit employees from reporting to work when they are impaired by alcohol or drugs, including prescription drugs which affect judgment, alertness, or motor skills.
• Prohibit possession, sale and/or distribution of drugs at work, in company vehicles and while on company business.
• Clarify the employer’s position on marijuana.
• Address the use of alcohol at work, at company functions, when traveling for work.
• Disclose whether the company will conduct searches and what will be searched.
• Address use of prescription medication. The Department of Labor Drug-Free Workplace Policy Builder suggests the following:

Prescription and over-the-counter drugs are not prohibited when taken in standard dosage and/or according to a physician’s prescription. Any employee taking prescribed or over-the-counter medications will be responsible for consulting the prescribing physician and/or pharmacist to ascertain whether the medication may interfere with safe performance of his/her job. If the use of a medication could compromise the safety of the employee, fellow employees or the public, it is the employee’s responsibility to use appropriate personnel procedures (e.g., call in sick, use leave, request change of duty, notify supervisor, notify company doctor) to avoid unsafe workplace practices.

The illegal or unauthorized use of prescription drugs is prohibited. It is a violation of our drug-free workplace policy to intentionally misuse and/or abuse prescription medications. Appropriate disciplinary action will be taken if job performance deterioration and/or other accidents occur.

• Notify employees of the consequences of being found under the influence of, or impaired by, alcohol, controlled or illegal drugs, or other substance covered by the policy and the consequences of a search that discovers drugs or other illegal substances.

Drug and alcohol testing policies should include: (i) the circumstances for testing; for example, random tests, tests upon reasonable suspicion that an employee is under the influence, and/or in the event of an accident involving property damage or physical injury; (ii) the procedure for testing; (iii) the consequences of a refusal to submit to drug/alcohol testing; and (iv) the consequences of failing a test.

Handbooks should include information about the employer’s policy on substance abuse treatment: what services are available; how an employee requests assistance; and whether employees can use paid sick and/or vacation time for treatment.
J. Dress Code, Personal Appearance & Grooming

Tell employees what type of dress/grooming is and is not appropriate and who gets to determine the appropriateness of an employee’s appearance. Different categories of employees can be required to adhere to different dress codes and grooming requirements depending upon their job duties, safety rules and company culture. If uniforms are required and the employer reimburses or subsidizes the cost of them, such policy should be clearly stated. Dress code policies should detail the consequences of an employee’s failure to comply; for example, that the employees will be sent home if inappropriately dressed, or otherwise disciplined.

Dress code policies should avoid creating rules concerning appearance that apply differently to men and women and that do not represent community norms. Similarly, restrictions on appearance can give rise to claims of discrimination based on religion or race unless the employer has a reasonable business purpose for imposing the restriction.

K. Other Optional Provisions

Employers may also consider adding the following provisions to their handbook depending on their business needs: performance evaluations; worker's compensation; smoking; employment of minors; personnel records; work for hire; bonuses; progressive discipline; inclement weather; employee discounts; tuition remission; outside employment; conflicts of interest; and nepotism.5

IV. HARASSMENT, DISCRIMINATION & EQUAL OPPORTUNITY

A. Harassment and Discrimination

Both federal and Oregon law prohibit harassment and discrimination in the workplace. The laws differ in who is protected and which employers are covered, but generally, employers should have a harassment/discrimination policy that, at a minimum, explains what constitutes harassment and discrimination, what an employee should do if they feel they have been harassed, experienced discrimination or retaliation, or believe they have witnessed harassment, discrimination or retaliation, and what the employer will do upon receiving an employee complaint.

5 Note, Oregon law protects an individual from discrimination on the basis of “marital status” (ORS 659A.030), and discrimination solely because of the employment of another family member (ORS 659A.309).
B.  *Faragher v. City of Boca Raton*

1. **The Faragher Defense**

   In *Faragher v. City of Boca Raton*, 524 U.S. 775, 807, 118 S. Ct. 2275, (1998), the Supreme Court created the “Faragher affirmative defense” to liability or damages for discrimination under Title VII. In *Faragher*, one of the issues was the employer’s vicarious liability for the discriminatory acts of the plaintiff/employee’s supervisor. The Supreme Court held: “An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence.” The Court explained that the defense comprises two necessary elements:

   1. "The employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and
   2. The employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer."

   The defense is also available to an employer under Oregon Administrative Rule 839-005-0030(5) when there is no tangible employment action. Further, the EEOC has generally taken the position that the same basic standards apply to all types of prohibited harassment.

2. **So what does my handbook have to do with Faragher?**

   A well written harassment/discrimination policy can help an employer set forth the *Faragher* affirmative defense because it sets out what an employee should do if they experience harassment and demonstrate that an employer exercised “reasonable care to prevent and correct promptly any sexually harassing behavior” by detailing prohibited conduct and the employer’s intended response procedure. An anti-harassment policy should contain, at a minimum, the following elements:

   a. **A clear explanation of prohibited conduct:**

   Example (general prohibition on harassment/discrimination):

   “It is the intent of the Company to provide a work environment free from all verbal, physical, and visual forms of discrimination, harassment and/or intimidation. All employees are subject to this policy and are expected to be sensitive to and respectful of their co-workers and customers. The

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6 A “tangible employment action” means an actual change that has an actual adverse effect on the job or working conditions, such as a firing, demotion, or suspension.
Company absolutely prohibits all forms of harassment, whether based on gender, sexual orientation, race, religion, disability, pregnancy, age, national origin, or any other protected class. All employees are expected to conduct themselves so that the work environment is free from harassment and intimidation.

Example (specific explanation of sexual harassment):

“Sexual harassment is a form of unlawful discriminatory behavior and will not be tolerated. Sexual harassment consists of: (i) unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature constitutes sexual harassment when such conduct is directed toward an individual because of that individual's gender, and (ii) submission to such conduct is made explicitly or implicitly a term or condition of an individual's employment, or (iii) submission to, or rejection of, such conduct by an individual is used as the basis for employment decisions affecting such individual, or (iv) such conduct has the purpose or effect of reasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.”

Example (specific actions that may constitute harassment from the EEOC):

Offensive conduct may include, but is not limited to, offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance.

Example (from the U.S. Department of State):

Unwelcome actions such as the following are inappropriate and, depending on the circumstances, may in and of themselves meet the definition of sexual harassment or contribute to a hostile work environment:

- Sexual pranks, or repeated sexual teasing, jokes, or innuendo, in person or via e-mail;
- Verbal abuse of a sexual nature;
- Touching or grabbing of a sexual nature;
- Repeatedly standing too close to or brushing up against a person;
- Repeatedly asking a person to socialize during off-duty hours when the person has said no or has indicated he or she is not interested (supervisors in particular should be careful not to pressure their employees to socialize);
- Giving gifts or leaving objects that are sexually suggestive;
- Repeatedly making sexually suggestive gestures;
o Making or posting sexually demeaning or offensive pictures, cartoons or other materials in the workplace;

o Off-duty, unwelcome conduct of a sexual nature that affects the work environment.

b. **A clearly described complaint process:**

An employer's harassment complaint procedure should be designed to encourage victims and those witnessing harassment to come forward. When an employee complains to management about alleged harassment, the employer is obligated to investigate the allegation regardless of whether it conforms to a particular format or is made in writing. The complaint procedure should provide accessible points of contact for the initial complaint. A complaint process is not effective if employees are always required to complain first to their supervisors about alleged harassment, since the supervisor may be a harasser. It is advisable for an employer to designate at least one official outside an employee's chain of command to take complaints of harassment, and to designate officials of different genders. For example, if the employer has an office of human resources, one or more officials in that office could be authorized to take complaints. Allowing an employee to bypass his or her chain of command provides additional assurance that the complaint will be handled in an impartial manner, since an employee who reports harassment by his or her supervisor may feel that officials within the chain of command will more readily believe the supervisor's version of events. For large employers, using an outside vendor as an option for reporting may also be an option.

c. **Confidentiality (sort of):**

An employer should make clear to employees that it will protect the confidentiality of harassment allegations to the extent possible. An employer cannot guarantee complete confidentiality, since it cannot conduct an effective investigation without revealing certain information to the alleged harasser and potential witnesses. However, information about the allegation of harassment should be shared only with those who need to know about it. Records relating to harassment complaints should be kept confidential and separate from personnel files.

d. **A complaint process that provides a prompt, thorough, and impartial investigation:**

An employer should set up a mechanism for a prompt, thorough and impartial investigation into alleged harassment. As soon as management learns about alleged harassment, it should determine whether a detailed fact-finding investigation is necessary. For example, if the alleged harasser does not deny the accusation, there would be no need to interview witnesses and the employer could immediately determine appropriate corrective action.
e. **Assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred:**

An employer should make clear that it will undertake immediate and appropriate corrective action, including discipline, whenever it determines that harassment has occurred in violation of the employer’s policy. Management should inform both parties about these measures.

f. **No Retaliation:**

The harassment policy should include state that the employer will not retaliate against a complaining employee or witness. Example:

The Company prohibits retaliation against employees who make complaints in good faith or who participate in good faith in any investigation or resolution of a complaint. Employees who have been subject to or who witness retaliation should report the conduct to Human Resources or to any member of management.

C. **EQUAL OPPORTUNITY & ADA**

A handbook should include provisions addressing equal opportunity and employment of individuals with disabilities. Example (from Dell Computers):

Dell is an Equal Opportunity Employer and Prohibits Discrimination and Harassment of Any Kind: Dell is committed to the principle of equal employment opportunity for all employees and to providing employees with a work environment free of discrimination and harassment. All employment decisions at Dell are based on business needs, job requirements and individual qualifications, without regard to race, color, religion or belief, national, social or ethnic origin, sex (including pregnancy), age, physical, mental or sensory disability, HIV Status, sexual orientation, gender identity and/or expression, marital, civil union or domestic partnership status, past or present military service, family medical history or genetic information, family or parental status, or any other status protected by the laws or regulations in the locations where we operate. Dell will not tolerate discrimination or harassment based on any of these characteristics. Dell encourages applicants of all ages.

Example:

The Company is committed to providing equal opportunity to qualified individuals with disabilities. The Company agrees to employ, advance in employment, and otherwise treat qualified individuals without regard to their disability in all employment practices. The Company will reasonably accommodate disabled employees to permit them to perform the essential functions of their jobs in a safe and efficient manner. The Company will afford reasonable accommodation to qualified applicants and employees with a known disability, provided that the accommodation does not cause undue expense or hardship to the Company or, irrespective of the accommodation, that such individuals do not pose a direct threat to the health and safety of themselves or others.

D. BULLYING

There is a fair amount of confusion on the definition of “bullying.” For that reason, and because prohibiting bullying in a handbook has the potential to create a large number of claims/complaints, employers differ on whether to include anti-bullying policies in their handbooks.

Example (based on language from State healthy workplace laws and proposed laws):

The company will not tolerate bullying. Bullying consists of abusive conduct or creating an abusive environment. Abusive conduct includes: repeated infliction of verbal abuse such as the use of derogatory remarks, insults and epithets; verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating; or the gratuitous sabotage or undermining of a person’s work performance.

If you believe you have been bullied or if you have witnessed behavior that you believe in good faith constitutes bullying, please report the behavior to Human Resources. The Company will investigate the allegations and will impose discipline, up to and including termination, on any employee who is found to have engaged in bullying or created an abusive working environment.

Retaliation against an employee who reports bullying is prohibited.
V. BENEFITS

A. Vacation / Paid Time Off

Employers are free to provide vacation or paid time off (PTO) based on any criteria, provided it is uniformly applied. Typically, paid vacation/PTO is accrued based on hours worked or duration of employment. Vacation/PTO policies should include information about:

- How time is earned or accrued
- Whether accrued time can be carried forward from year to year (and how much time can be carried over)
- Whether a maximum number of days or hours can be accrued
- How to request and schedule time off
- Whether employees can borrow against future accrued vacation/PTO
- Payment for unused vacation/PTO upon termination.

Note, be careful to distinguish between accrual of vacation/PTO and earning of vacation/PTO. Further, if employees are permitted to borrow against future vacation, the policy should address how an employee “pays back” the borrowed time if they quit or are terminated before earning the balance.

B. Sick Leave

Sick leave is now required by Oregon law. Pay for sick leave is dependent upon the number of employees. BOLI’s poster provides a good roadmap for the information that should be included in a sick pay policy.


At a minimum, a sick leave policy should include:

- Accrual rates for sick time based the statute (or a higher rate)
- Whether sick time is paid or unpaid
- Whether sick time is front-loaded
- Purposes for taking sick leave
- Increments of time available for sick leave
- Carry-over of sick leave
- Pay (or not) for unused accrued sick leave upon termination of employment
- Notice requirements
- Verification requirements

Note, PTO policies can be amended to provide equivalent sick time benefits.
C. Holidays

Paid holidays are at the employer’s discretion. The employee handbook should list paid holidays. Employers should also set forth the availability of paid personal days for individual religious observance or other reasons. Typically, employers provide paid holidays for: New Year’s Day, Memorial Day, Independence Day, Labor Day, Thanksgiving and Christmas. The handbook should also detail whether employees who work on paid holidays receive premium pay and whether employees can combine paid holidays with other forms of paid leave.

D. Health Insurance & 401(K) Plan

Handbook provisions describing health and retirement benefits should be general and should not suggest guaranteed eligibility. Your handbook should summarize the types of benefits available and when employees become eligible for the different types of coverage. Example (adapted from hrhero.com):

Employees may be eligible to participate in the plans described below once they meet the appropriate eligibility requirements. More detailed information about each plan can be found in the plan documents maintained in Human Resources and the summary plan descriptions (SPDs). SPDs are the official documents regarding employee benefit plans and supersede all references to employee benefits in this manual. The Company offers: medical Insurance (after 30 days of continuous employment); dental Insurance (after 30 days of continuous employment); vision coverage (after 60 days of continuous employment).

VI. Leave

A. FMLA and OFLA (Including Federal Service Members Leave)

Employers are faced with numerous decisions when setting policies for employee leaves of absence. Some grounds for employee leave are required by statute, while others are at the employer’s discretion. Employee handbooks are essential for communicating the various types of leave and eligibility requirements therefore.

1. FMLA / OFLA

Under the Family Medical Leave Act (“FMLA”), employers are required to provide employees with notice of their rights under the law. The FMLA regulations require employers to post information about the FMLA and to include general notice in the employee handbook. 29 CFR §825.300 provides:

If an FMLA-covered employer has any eligible employees, it shall also provide this general notice to each employee by including the notice in
employee handbooks or other written guidance to employees concerning
employee benefits or leave rights, if such written materials exist, or by
distributing a copy of the general notice to each new employee upon
hiring. In either case, distribution may be accomplished electronically.”

The Oregon Family Leave Act ("OFLA") requires posting only. Many of the provisions in
the FMLA and OFLA are similar. However, even where the laws differ, if an employer is
subject to both laws (because it employs 50 or more people), the employer is required
to apply whichever law gives the employee the most favorable treatment.

Generally, FMLA / OFLA provisions in a handbook should include the following
information:

a. Employee eligibility;
b. Medical conditions covered;
c. How leave is requested and deadlines to submit requests
   and medical certification;
d. Consequences for failure to comply with deadlines;

2. Military Family Leave

Employers covered by the FMLA are also required to provide two kinds of military family
leave: Family Member Military Duty "Exigency" Leave and Military Injury Care-Giving
Leave. As with OFLA/FMLA, employee handbooks should include a provision that
explains these two types of leave, eligibility for each, how much leave is available, the
procedure for requesting and taking leave, and reinstatement rights. Employers should
also notify employees that time taken for military family leave is counted with other
types of FMLA leave toward the employee’s 12 workweek limit in a 12 month period.

3. Oregon Military Family Leave ("OMFL")

Oregon law provides unpaid leave to an employee who is the spouse of a member of
the armed forces, national guard or military reserve. The law applies during periods of
military conflict to employers with 25 or more employees. A handbook provision on
OMFL should include information eligibility, how much leave is available and the
conditions / circumstances for leave. The policy should also notify employees of their
right to be restored to employment after leave and to continuation of benefits.
4. **Oregon Bereavement Leave**

Employers subject to OFLA should include a provision to notify employees of their right to take bereavement leave under the statute. If a handbook provides non-OFLA bereavement leave, make sure to distinguish then different benefits available. In particular, the handbook should specify how much leave is available, whether leave is paid or unpaid, how it is requested, and who constitutes an “immediate family member” for purposes of leave.⁷ **Example:**

Employees who are eligible for leave under the Oregon Family Leave Act (OFLA) may take up to two weeks of bereavement leave to make arrangements necessitated by the death of a family member (as defined above); to attend the funeral or memorial service of a family member, or; to grieve the death of a family member (“OFLA Bereavement Leave”).

The two weeks of OFLA Bereavement Leave will count toward an employee’s total of 12 weeks of medical leave in each 12 month period. Bereavement leave is unpaid, and the Company requires employees to use any accrued PTO during the OFLA Bereavement Leave. At the time leave is approved, the Company will provide information about how PTO will be applied to OFLA Bereavement Leave.

Employees must take bereavement leave within 60 days of receiving notification of the death of a family member and must give the Company oral notice of leave within 24 hours of beginning leave.

Employees who are not eligible for OFLA Bereavement Leave may take up to three days of unpaid leave in connection with the death of a family member, or may use available PTO to take paid leave. For purposes of non-OFLA Bereavement Leave, a family member is that same as defined under OFLA.

5. **Military Leave (USERRA)**

The Uniformed Services Employment and Re-Employment Rights Act (“USERRA”) permits employees to take leave from their jobs for military service and be reinstated upon return. USERRA covers all employers regardless of size and includes federal, state and local governments and school districts.

Depending upon the length of service, an employee whose absence from a position of employment is necessitated by service in the uniformed services (Army, Navy, Air

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⁷ Immediate family member is typically defined as including the employee’s spouse, domestic partner, children, parents, step-children, legal guardian, grandparents, siblings, and corresponding in-laws.
Force, Marines, Coast Guard and United States Public Health Service) will be protected with respect to re-employment if the employee:

1. Gives their employer advance written or verbal notice of their absence from work to perform military service;
2. Makes a timely application for re-employment after release from service; or if
3. Cumulative time in the uniformed services, with respect to that particular employer, does not exceed five years.

A Military Leave policy should set forth the requirements for notice, eligibility, reinstatement, whether leave is paid or unpaid (employers are not obligated to pay employees on military leave), and provide information on continuation of health plan coverage.

6. Crime Victim and Domestic Violence Leave

Oregon law grants certain crime victims and immediate family members the right to protected unpaid leave from work to attend criminal proceedings. Generally, the law applies to any organization that employs six or more persons in Oregon. A handbook provision should include information regarding eligibility, procedures for requesting leave and information regarding substitution of paid time off. Employers are entitled to a copy of any notices of scheduled criminal proceedings that the employee receives from a law enforcement agency, but must keep any such documents confidential.

7. Jury and Witness Duty Leave

Employees should be allowed time off for jury duty or to testify as a witness. A handbook policy should include information regarding: how an employee requests time off for jury duty or to testify as a witness; whether the employee is required to submit a copy of their Summons or other paperwork; whether leave is paid and whether the employee gets to keep their pay for jury service; and whether the employee is required to report for work where jury service is for a partial day. Employers may also consider including language that permits the employer to ask the employee to be excused from jury duty if the employee’s absence would cause a significant disruption to the

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8 The employee must have worked an average of more than 25 hours per week for at least 180 days immediately before the leave begins, and be a "crime victim" which means the employee must have "... suffered financial, social, psychological or physical harm as a result of a personal felony." The law treats immediate family members of the person as crime victims as well and defines "immediate family" to include a spouse, domestic partner, father, mother, sibling, child, stepchild or grandparent.

9 Under Oregon law, employers are prohibited from terminating an employee for serving on a jury. Federal law also prohibits employers from discharging or threatening employees who serve on juries, and provides that employees may sue for damages and reinstatement and recover attorney fees. 28 U.S.C. § 1875. Employers may also be subject to civil fines of up to $1,000 per violation of the statute.
employer’s business. However, an employer cannot force an employee to seek a postponement.

8. Personal Leaves Of Absence

Employers may permit employees to take unpaid leaves of absence for personal or medical reasons where such leave is not covered by the FMLA, OFLA or ADA (or any other law) or where the employer is not a covered employer. Personal leave policies should include information about how an employee requests leave, how much leave is available, whether leave is paid or unpaid, what type of documentation should be submitted, application of accrued vacation or sick leave to personal leave, and circumstances related to reinstatement or re-employment, including whether the employee must produce a fitness for duty certificate to return.

VII. ARBITRATION PROVISIONS IN EMPLOYEE HANDBOOKS

A. Why Arbitrate?

Arbitration, at least theoretically, streamlines dispute procedures and allows parties to have a case heard and resolved more quickly than in court. In some situations, arbitration can resolve disputes more quickly than a court action, with the result that attorneys’ fees are lower. Arbitration keeps resolution of employment disputes away from a jury which may be a key factor for employers because juries are typically composed of employees (or retired employees, or terminated employees). Pre-arbitration discovery may be more limited than in court. For employers, who typically have custody of the bulk of employment documents, this limitation can be very important. Arbitration decisions are also often final (a.k.a. “binding”), so that they cannot be appealed.

B. Handbook Approaches to Arbitration

1. Oregon Law

ORS 36.620 provides:

(5) A written arbitration agreement entered into between an employer and employee and otherwise valid under subsection (1) of this section is voidable and may not be enforced by a court unless:

(a) At least 72 hours before the first day of the employees employment, the employee has received notice in a written employment offer from the employer that an arbitration agreement is required as a condition of employment, and the employee has been provided with the required arbitration agreement that meets
the requirements of, and includes the acknowledgment set forth in, subsection (6) of this section; or

(b) The arbitration agreement is entered into upon a subsequent bona fide advancement of the employee by the employer.

(6) The acknowledgment required by subsection (5) of this section must be signed by the employee and must include the following language in boldfaced type:

I ACKNOWLEDGE THAT I HAVE RECEIVED AND READ OR HAVE HAD THE OPPORTUNITY TO READ THIS ARBITRATION AGREEMENT. I UNDERSTAND THAT THIS ARBITRATION AGREEMENT REQUIRES THAT DISPUTES THAT INVOLVE THE MATTERS SUBJECT TO THE AGREEMENT BE SUBMITTED TO MEDIATION OR ARBITRATION PURSUANT TO THE ARBITRATION AGREEMENT RATHER THAN TO A JUDGE AND JURY IN COURT.

2. Practical Issues

a. Create an Enforceable “Agreement”

Most employee handbooks include language that states: “This handbook is not intended to create, nor is it to be construed as, a contract of employment.” If this language is included, the obligation to arbitrate should be referenced in the handbook but employees should also be required to sign a separate stand-alone arbitration agreement. Or, the statement should carve out the obligation to arbitrate.

The handbook acknowledgment should clearly reference the obligation to arbitrate, refer the employee to the arbitration provision if it is in the handbook and include the required statutory language from ORS 36.620.

b. Avoid Claims of Unconscionability

Most challenges to arbitration of employment disputes are grounded in claims of unconscionability. In Oregon, the test for unconscionability has two components — procedural and substantive. Vasquez-Lopez v. Beneficial Oregon, Inc., 210 Or App 553, 560, 152 P3d 940 (2007). Procedural unconscionability refers to the conditions of contract formation, and substantive unconscionability refers to the terms of the contract. Id. at 566-67, 152 P.3d 940. An analysis of procedural unconscionability focuses on two factors: oppression and surprise. “Substantive unconscionability generally refers to the terms of the contract, rather than the circumstances of formation, and the inquiry focuses on whether the substantive terms unfairly favor the party with greater bargaining power.” Livingston v. Metropolitan Pediatrics, LLC, 234 Or App. 137, 151, 227 P3d 796 (2010).
To avoid a challenge based on unconscionability, an arbitration provision should, at a minimum:

1. Clearly disclose that arbitration results in a waiver of the right to a jury trial.
2. Be noticeable (don’t bury in the handbook or use tiny typeface).
3. Make the obligation to arbitrate mutual.
4. Expressly state that employees have the right at arbitration to be represented by counsel.
5. Include a process for permitting reasonable discovery at arbitration, such as the exchange of documents and depositions.
6. Give your employee the chance to equally participate in selection of an arbitrator.
7. Locate the arbitration near the employee (or a place mutually agreed upon by employer and employee).
8. State that the employer will cover the costs of arbitration that would be greater than what the employee would have to pay in court, such as arbitrator fees. If the employee has to pay a fee to initiate arbitration (i.e., whatever is equivalent to a court filing fee), make sure that the employee does not have to pay that fee to the employer.
9. Agree that employee’s potential remedies in arbitration are the same as those that would be available in court under the applicable law.
10. Avoid including provisions that are solely beneficial to the employer. For example, providing that only the employer can terminate the agreement to arbitrate or imposing a shortened statute of limitations on employee claims but not employer claims.
11. Translate the provisions if you have non-English speaking employees.

- END -

These materials are not intended (and should not be used) as a substitute for legal advice since legal advice may only be given in response to inquiries regarding specific factual situations. Moreover, the topics discussed could be affected by a number of factors, such as: special legislation regulating certain employers or activities; the presence or absence of a union; the language of any applicable collective bargaining agreement, employment contract or employment policy; applicable federal, state, or local laws or regulations; etc. Put simply, an employer should always consult with, and obtain specific advice of, legal counsel when making or implementing decisions and/or policies.