

Handbook Horror Stories

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AT-WILL STATUS

At-Will Status

- **Key Takeaways:**

- Default rule in many states
- Where do we see references to status?
 - Commonly appear in introduction of handbook
 - Can also appear in progressive discipline policies
- What is the purpose?
 - Serves as a disclaimer
 - No contract between company and employee

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At-Will Status

O'Rourke v. Hampshire Council of Gov'ts, et. al, 121 F. Supp. 3d 264 (D. Mass. 2015):

- Employee handbook referenced a six-month probationary period for employees
- Employee in the probationary period could be terminated "without cause"
- Handbook also referenced specific reasons for which the employer could terminate someone outside of the probationary period
- Handbook contained no at-will disclaimer

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LEAVE

When you try to leave work a little early, but your boss reminds you that you have 7 hours left...



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Parental Leave

- **Key Takeaways:**

- Watch for policies that improperly discriminate against men
- Ensure that differences in leave provided are tied to actual medical reasoning

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Parental Leave

Rotondo v. JPMorgan Chase Bank, N.A., Civil Action 2:19-cv-2328 (S.D. Ohio Nov. 20, 2019):

- Male employee was offered only two weeks of parental leave (instead of his requested 16 weeks of parental leave)
- Reasoning for denial? The male employee was not the "primary caregiver" of his child
- Settlement agreement

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Parental Leave

U.S. Equal Employment Opportunity Commission v. Estée Lauder, Civil Action No. 2:17-cv-03897-JP (E.D. Penn. Aug. 30, 2017):

- Differing treatment of new mothers and new fathers
- Occurred after mothers' medical leave expired
- Consent decree

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“Use It or Lose It” Policies

- **Key Takeaways:**
 - Some states, including Nebraska, prohibit the application of “Use It or Lose It” vacation policies.
 - Many employers continue to maintain these unlawful leave policies in their employee handbooks.

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“Use It or Lose It” Policies

Roseland v. Strategic Staff Management, Inc., 722 N.W.2d 499 (Neb. 2006):

- Nebraska Supreme Court held that a “use it or lose it” provision requiring employees to forfeit their vacation leave conflicted with the Nebraska Wage Payment and Collection Act (“NWPCA”)
- Employers must pay out earned but unused vacation time when an employee leaves

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Family and Medical Leave

- **Key Takeaways:**

- FMLA only applies to some employers
- FMLA does not require paid time off
- Multistate considerations

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Family and Medical Leave

- **Example:**

- Oregon employer
- Only has 24 employees
- Oregon state law provides for unpaid job-protected leave

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Other Protected Leave

- **Key Takeaways:**

- Some states have leave-related protections that are not provided by federal law
- Examples?

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Other Protected Leave

Example:

- Kansas law provides protections for employees who are victims of domestic violence
- Employee requests leave for permissible purpose and gives reasonable advance notice of the need for leave
- Manager in the Kansas office is unaware of this requirement, as this type of leave is not referenced in the employee handbook/discussed in training
- Manager tells the employee that she has no leave available for this purpose
- Employee does not show up for her shift, and the manager fires the employee

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PROGRESSIVE DISCIPLINE POLICIES

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Progressive Discipline Policies

• **Key Takeaways:**

- Is it appropriate?
- What to state
- What are we trying to avoid?
 - Scenario where employee alleges that the employee is not an at-will employee

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Progressive Discipline Policies

Smith v. Shaw's Supermarkets, Inc., 2019 WL 1436660 (D. Vt. 2019):

- Employer terminated an employee
- Employer utilized an employee handbook that contained a progressive discipline policy
- Employee claimed violation of policy, which employee claimed created implied employment contract
- Court's decision?

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ANTI-HARASSMENT POLICY AND PROCEDURE

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Anti-Harassment Policy and Procedure

• **Key Takeaways:**

- Maintain a thorough anti-harassment and reporting policy and procedure
- Encourages employees to report
- Potentially provides the employer with an affirmative defense

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Anti-Harassment Policy and Procedure

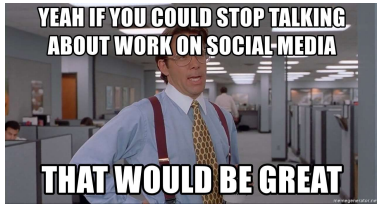
Rudi v. Wexner and L Brands, Inc, 2:20-cv-3068 (S.D. Iowa):

- Failure to address issues of sexual harassment
- Settlement (monetary and policy changes)

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SOCIAL MEDIA RESTRICTIONS



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Social Media Restrictions

• **Key Takeaways:**

- Policies that expressly prohibit an employee from making a negative statement about the employer on social media might be in violation of Section 7 of the National Labor Relations Act ("NLRA")
- Carefully craft social media policies so as not to interfere with an employee's NLRA rights

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Social Media Restrictions

Medic Ambulance Service, Inc. and United Emergency Medical Services Workers, Local 4911, AFSCME, AFL-CIO. Case 20-CA-193784 (NLRB Jan. 4, 2021):

- NLRB analyzed a social media policy that prohibited employees from engaging in "inappropriate communications" on social media
- NLRB determined provision was lawful due to careful tailoring
 - phrase "inappropriate communications" was in an introductory paragraph and would be read in the context of specific "guidelines" that followed the phrase

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INCONSISTENCIES

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Failure to Include Policies in the Handbook

• **Key Takeaway:**

- Makes it difficult to respond to employee litigation related to policies

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Failure to Include Policies in the Handbook

Oakes v. Barnes & Noble College Booksellers LLC, Calif. Ct. App., No. H040951 (Apr. 24, 2017):

- Language in the employee handbook that indicated the plaintiff was an "at-will" employee
- Outside of handbook, there was evidence of an unwritten policy requiring that managers utilize progressive before terminating an employee's employment
- Conflicting information = court reversed a dismissal of a wrongful termination claim
 - Trial was necessary to determine the terms of the employment relationship between Barnes & Noble and its former employee

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Failure to Update Your Policies

• Key Takeaways:

- Managers and employees might improperly rely on a policy
- Existence of the written policy can become relevant during litigation

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Failure to Update Your Policies

Reid v. Centrick Consulting LLC, Civil Action No. 15-14048-JGD (D. Mass. Mar. 29, 2018):

- Company was not covered by the Family and Medical Leave Act
- Employer incorrectly labeled the middle 12 weeks of the plaintiff's leave as FMLA leave and informed the plaintiff that it was doing so
- When the employer ultimately terminated the plaintiff, the plaintiff claimed that the employer terminated him in retaliation for his having taken "FMLA" leave

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TIPS AND TRICKS!

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Tips and Tricks

- Ensure employees review, understand, and confirm receipt of the employee handbook (including updates!)
- Always consult the employee handbook before taking action
- Regularly review the number of employees working for your organization

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Tips and Tricks

- Train managers, the human resources department, and other decision makers
- Train employees regarding their obligations under the employee handbook



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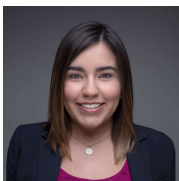
Tips and Tricks

- Consider creating state law addendums
- Conduct an annual review of your employee handbook and consult legal counsel if necessary
- For your handbook to have value to your organization, the handbook must be kept current

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Questions?



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