





Protecting Your Company & its Secrets

How Well-crafted Employee Manuals & Noncompete Agreements can Mitigate Employer Liability


Presented by
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Today's Presenters





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Protecting Your Company With Well-Crafted Handbook Policies

Presented by
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Benefits of Employee Handbooks

- *Renny v. Port Huron Hosp.*, 427 Mich. 415 (1986): “an employer is under no obligation to establish personnel policies or practices. However, it is presumed that the employer, as well as the employee, benefits from establishing a clearly defined employment relationship.”
- Maintain good employee relations – Let employees know what to expect and eliminate surprise factor.

Continued



Benefits of Employee Handbooks

- Avoid liability
- Proactive solutions to future problems
- Apply policies uniformly and consistently
- *Carlson v. Leprino Foods*, 522 F.Supp.2d 883 (W.D. Mich. 2007)
- *Griffin v. AutoZone, Inc.*, 2003 WL 1139873 (W.D. Mich. 2003)



Basic ‘Must Haves’

- At-will employment provisions
 - Express and clear disclaimer in handbook of at-will employment relationship
 - Written acknowledgement by employee of at-will relationship

Continued



At-will Employment

- Clarifies any potential ambiguity regarding at-will versus just cause relationship
- *Waterman v. Greektown Casino*, 2004 WL 787157 (Mich. App. 2004)

Continued

At-will Employment

- Handbook provision that states that only certain individuals (specify by position, not name) can modify an at-will relationship, and that this modification must be in writing
- Provision that any progressive discipline system constitutes mere guidance but is not mandatory for employer

Continued

At-will Employment

- Employment with [REDACTED] is "at-will." This means that either employee or [REDACTED] may terminate employment relationship at any time, with or without cause, and with or without notice. No representative of [REDACTED] has authority to enter into any agreement for employment for any specified period of time or to make any agreement contrary to foregoing, with exception of agreement in writing, signed by President of [REDACTED]. Furthermore, an claim or lawsuit relating to employee's service with [REDACTED] must be filed no more than six months after date of employment action that is subject to claim or lawsuit.

Equal Employment Opportunity Policy

- Include characteristics protected by both federal and state law or any other characteristic protected by law
- For employers with employees only in Michigan, these characteristics include race, color, national origin, religion, age, sex, height, weight, marital status and disability.

Continued



Equal Employment Opportunity Statement

- [REDACTED] is an equal employment opportunity employer and provides employment and advancement opportunities to its employees without discrimination on basis of race, color, religion, sex, age, national origin, disability or any other protected characteristic as established by law. This policy of equal employment opportunity applies to all policies and procedures relating to recruitment and hiring, compensation, benefits, termination and all other terms and conditions of employment.

Continued



Equal Employment Opportunity Reporting

- Reporting procedures for discrimination and harassment

Continued



Anti-Harassment Policy/ Reporting Procedure

- *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)
- Select individuals for reporting by position, rather than by name.
- Include several options to whom an employee may report suspected violations

Anti-Harassment Policy

NON-DISCRIMINATION AND ANTI-HARASSMENT POLICY

██████████ is committed to a work place which is free of discrimination or harassment. All individuals are treated with respect and dignity. Each individual has the right to work in a professional atmosphere that promotes equal employment opportunities and prohibits discriminatory practices, including harassment. Therefore, ██████████ expects that all relationships among persons in the workplace will be free of bias, prejudice and harassment.

Definitions of Harassment

A. Sexual Harassment

Sexual harassment is defined as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature when:

- Submission to such conduct or communication is made a term or condition, either explicitly or implicitly, to obtain employment.
- Submission to or rejection of such conduct or communication by an individual is used as a factor in decisions affecting such individual's employment.
- Such conduct or communication has the purpose or effect of substantially interfering with an individual's employment or creating an intimidating, hostile or offensive employment environment.

Anti-Harassment Policy

B. Harassment on the Basis of Other Protected Characteristics

Under this policy, harassment constitutes verbal or physical conduct that denigrates or shows hostility or aversion towards an individual because of his or her race, color, religion, national origin, age, disability, marital status, or any other characteristic protected by law; or that of the employee's relatives, friends or associates and that: a) has the purpose or effect of creating an intimidating, hostile or offensive work environment; b) has the purpose or effect of unreasonably interfering with an individual's work performance, or c) otherwise adversely affects an individual's employment opportunities.

██████████ prohibits any sexual or other discriminatory, harassing behavior. This behavior is a serious violation of ██████████'s policies and procedures. These policies apply to all applicants and employees and prohibit harassment, discrimination and retaliation, whether engaged in by fellow employees, by a supervisor or manager, or by a customer or vendor.

██████████ prohibits retaliation against any individual who reports discrimination and harassment or participates in an investigation of such reports. Retaliation against an individual for reporting harassment or discrimination or for participating in an investigation of a claim of harassment or discrimination is a serious violation of this policy and, like harassment or discrimination itself, will be subject to disciplinary action.

Anti-Harassment Policy

_____ strongly encourages its' employees to report all incidents of discrimination, harassment or retaliation, regardless of the offender's identity or position, or status as a non-employee or vendor. Individuals who believe they have experienced conduct that they believe is contrary to The Company's policy, or who have concerns about such matters should file their complaints with their immediate supervisor, the Controller, Vice President, or the President as soon as possible. Employees are not obligated to bring their complaints to their immediate supervisor before bringing the matter to the attention of the Controller, Vice President, or President.

Early reporting and intervention have proven to be the most effective methods of resolving actual or perceived incidents of harassment. Therefore, The Company strongly urges prompt reporting of complaints or concerns so that rapid and constructive action can be taken. The Company will make every effort to stop alleged harassment before it becomes severe or pervasive, but can only do so with the cooperation of its employees.

Any reported allegations of harassment, discrimination or retaliation will be investigated promptly, thoroughly and impartially.

Misconduct constituting harassment, discrimination or retaliation will be dealt with promptly and appropriately.



Reporting Procedure

- If employee believes that he or she has been victim of discrimination, he/she should report that fact immediately to his/her supervisor, manager on duty, his/her district supervisor, regional supervisor up to and including Vice President of Operations. After receiving such a complaint, _____ will undertake a full and complete investigation of charges.

Continued



Anti-Harassment Policy/ Reporting Procedure

- If it is determined that discrimination has occurred, _____ will take steps to eliminate that discrimination and take disciplinary action against any employee whom it determines engage in discriminatory behavior. _____ prohibits retaliation against any employee who reports discrimination or harassment, or participates in an investigation of such reports.



Family & Medical Leave Act (FMLA)

- Track basic requirements of FMLA
- *Thomas v Pearle Vision, Inc*
- Do not count FMLA-qualifying absences under no-fault attendance policy.
- Ensure FMLA and non-FMLA medical leave policies do not violate ADA
- *Bachelder v America West Airlines, Inc*

Continued



Basic “Must-Haves”

- Shortened statute of limitations
 - Statute of limitations under Michigan's Elliott-Larsen Civil Rights Act is three years.
 - Employers and employees can agree to shorten this period to as little as 180 days, unless statutory period is shorter

Continued



Shortened Statute of Limitations

- Include this provision in a separate standalone document to be signed by each employee at time of hire (or for current employees, at time they sign an acknowledgement of an updated handbook)
- *Shipman v. Stout Risius Ross*
- *Detizio v. Bill Knapp's Restaurants*

Continued



Other Concerns

- Concerns regarding modification of certain provisions and maintaining an at-will employment relationship
 - Arbitration
 - *Heurtebise v. Reliable Business Computers, Inc.*
 - *Rembert v. Ryan's Family Steak Houses, Inc.*

Continued

Other Concerns

- Protect the company – If you include a statement that the handbook is subject to employer's modifications, expressly state these provisions are exceptions or include these provisions in a separate document from the handbook to ensure these clauses will be binding

Violence Policy

- Sample – "Violence" is defined to include physically harming another in any way; shoving or pushing; physical intimidation or coercion; brandishing weapons; and/or threatening or talking of violence toward another. Any display or threat of violence in the workplace may subject employee to disciplinary action up to and including immediate termination.

Reporting Potential Problems

- Sample – It is each employee's responsibility to prevent violence in the workplace. Employees can help by reporting to management their observations in the workplace. In keeping with our "Open Door Policy," we urge immediate reporting of any violent activity. Employees can help maintain the violence free environment [REDACTED] seeks through communication and cooperation. In event of violent incident, follow [REDACTED] procedures regarding emergency situations to ensure safety of co-workers, customers and visitors.



Weapons Policy

- Sample – Weapons of any kind, including, but not limited to, guns, brass knuckles, nunchaku, knives, clubs or any other object that is intended to be used as a weapon is prohibited and not permitted on [REDACTED] premises. Possession of a weapon on [REDACTED] property, regardless of whether employee obtained a permit to carry such a weapon, will subject employee to disciplinary action up to and including immediate termination.



Social Security Number Privacy

- Michigan Social Security Number Privacy Act
- Prohibitions on use of more than four sequential digits include: public display, employee identification numbers, primary account numbers, requiring employee to use number over an unsecured computer system.
- Social security number privacy policy



Mandatory Arbitration Agreements

- *D.R. Horton*, 357 NLRB No. 184 (Jan. 3, 2012)

Social Media/Internet Policy

- Facebook, Twitter, LinkedIn can present a host of issues for employers
- Employee advertising
 - 16 CFR 255.5, Example 8
 - Lanham Act, 15 USC 1125(a)(1)(B)

Federal Wiretap Act

- *Sherman & Co. v. Salton Maxim Housewares, Inc.*, 94 F Supp 20 817 (ED Mich 2000)

Federal Stored Communications Act

- *Van Alstyne v. Electronic Scriptorium Ltd*, 560 F.3d 199 (4th Cir 2009)
- *Pietrylo v. Hillside Restaurant Group*, 2009 WL 3128420 (DNJ 2009)



Social Media/Internet Policy

- Highlights of well-crafted social media handbook policy
- Take caution that social media policy is not overbroad.
 - *NLRB v. American Medical Response* (2011)
 - Proactive solution – Disclaimer in policy: “this policy is not intended to limit any activities protected by the National Labor Relations Act.”



Review of Must-Haves

- Apply policies uniformly and consistently
- Contractual/at-will disclaimer with written acknowledgement each time handbook is updated
- Harassment/reporting – select individuals by position, rather than name. Also include several options of positions to which to report
- Include shortened statute of limitations, arbitration and non-compete provisions in separate, standalone contract



Review of Must-Haves

- Violence and weapons policies
- Include a social security number privacy policy
- Prohibit employees from accessing personal stored electronic communications without authorization
- Social media policy should state that it is not intended to interfere with any rights protected by the law





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Making Sense of Noncompete Agreements

Presented by
Michael J. Barton

General Principles

- Employee Non-compete Agreements are authorized by Michigan statute, M.C.L.A. 445.774a:
 - “An employer may obtain from an employee an agreement or covenant which protects an employer’s reasonable competitive business interests and expressly prohibits an employee from engaging in employment or a line of business after termination of employment if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or lines of business.”



Reasonable Competitive Business Interests

- Courts generally recognize two primary legitimate business interests to be protected by a Noncompete Agreement:
 - To protect against employee using customer relationships to solicit customers following termination of employment;
 - To prevent employee from using confidential information to compete with employer following termination of employment.

Protection of Customer Relationships

- Applicable to employees such as sales representatives, account managers and other employees whose job duties involve close customer contact and developing customer relations and good will.

Continued

Protection of Customer Relationships

- Courts will enforce covenants designed to prohibit such employees from having any contact with customers for reasonable period of time.
- Agreements prohibiting such employees from soliciting any customers of employer with whom employee had contact in the course of his or her employment will typically be enforced.
- No geographical limitation is usually required.

Protection of Confidential Information

- Noncompete clause is a mechanism for protecting misuse of confidential information.
- It is a key method but not only method.
- Contract can prohibit employee from disclosing confidential information to a competitor or using confidential information to compete against his or her former employer, indefinitely. (See, *Superior Consultant Company Inc. v. Bailey*, 2000 WL 1279161 (ED. Mich. 2000).

Continued

Protection of Confidential Information

- In addition, Michigan Uniform Trade Secrets Acts provides statutory protections against employees misusing and disclosing trade secrets.
- Although confidential information can be entitled to indefinite protection, noncompete clause cannot have an indefinite duration.

Duration

- Underlying Principles:
 - Customer relationships: Prevent employee from contacting customers for sufficient period of time to allow employer to maintain customer relationship without interference

Continued

Duration

- Confidential Information: Prevent employee from competing for sufficient period of time to allow confidential information to become "stale."
 - Courts try to make a determination of how long information can be expected to remain confidential and useful to employer.

Continued

Duration

- Enforceable ranges are typically one to three years.
 - One Michigan court has upheld five years due to employee's extraordinary close relationship with customers.

Duration: Confidential Information

- Court may enforce the noncompete for a period of years, and enter a further order barring disclosure of confidential information indefinitely even after expiration of noncompete provision.

Line of Business

- In principle, noncompete cannot prevent an employee from doing any work whatsoever for a competitor.
- It should only prohibit employee from engaging in same type of work or area of business in which employee was engaged while working for his or her former employer.
- Covenant cannot bar former employee from all work for competitors, such as working as a janitor.



Key Provisions

- “Regardless of the reason”
- Noncompete clause should make clear that it will be enforced no matter what reason for termination of employment relationship.
- It should state: “Following the termination of the employee’s employment relationship with the company, ‘regardless of reason for termination of employment,’ and regardless of whether the employment relationship is terminated by the company or the employee...”

Continued



Key Provisions

- This bars employee from defending on the ground that employer first breached agreement, and should bar an argument that the clause should not be enforced because employee was terminated without cause. *Coates v. Bastian Brothers, Inc.*, 276 Mich. App. 498 (2007); *Oak Street Funding, LLC v. Ingram*, 749 F.Supp. 2nd 568 (ED. Mich. 2010).



Choice of Law & Choice of Forum

- Not all states enforce covenants not to compete. California, for example, has a strong public policy against noncompetes.
- If company has employees in different states, choice of law and choice of forum provisions provide at least an argument for enforcing Noncompete Agreement, even if employee is located in a state that would not enforce the agreement.

Continued

Choice of Law & Choice of Forum

- Further, choice of forum clause may preclude employee from attempting to file declaratory judgment action in state outside of Michigan to have noncompete declared invalid.

Continued

Choice of Law & Choice of Forum

- No guarantee, but gives an argument. See for example, *Lowry Computer Product, Inc. v. Head*, 984 F. Supp. 1111 (ED. Mich. 1997), finding Michigan choice of law provision in an Employment Agreement between Michigan corporation and California resident was valid, and, therefore, covenant not to compete could be enforced against California resident.

Employee Acknowledgements

- Agreement should identify type of confidential information to which employee will have access, and have employee agree and acknowledge that such information is confidential and entitled to protection.
- If relevant, agreement should also have employee agree and acknowledge that employee will have customer contact, and will be required to generate customer goodwill on behalf of employer.

Continued



Employee Acknowledgements

- Agreement should have employee agree and acknowledge that noncompete provision is reasonable, is necessary to protect against misuse of confidential information, and to protect employer's customer goodwill.
- Agreement should also have employee agree that should employee breach the agreement, breach will cause employer irreparable harm

Continued



Employee Acknowledgements

which money damages will not be complete remedy, and that, therefore, injunctive and equitable relief is appropriate.

- These clauses do not guarantee success, but they have been recognized by different courts as further justification for enforcing an agreement.



Other Potential Clauses

- Extension of duration in case of breach
- Attorney fees to prevailing party
- Liquidate damages provisions
- Assignment

Questions & Answers



Questions?



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Save-the-Date



- **November 15** - Employee Investigations: From Harassment to Embezzlement & Everything in Between



Thank You!