

Employment-at-Will

I Don't Like You – That's Why!

By Lesley Sifers, Tax Favored Benefits, Inc.

In every employee handbook, there are three things I believe must be included:

- #1: A statement, up front in the introduction, that all employees are “at-will”
- #2: A Code of Conduct
- #3: A policy for progressive discipline

Let's start with item #1. What is Employment-at-Will and why is a statement about it so important? Employment-at-Will is not a law – it is a doctrine, or theory of law, that gives employers the right to dismiss an employee who was hired for an indefinite period, for any reason or no reason. Likewise, every employee not covered by an employment contract has the right to leave a job for any reason or no reason. (Maybe they don't like you!)

An Employment-at-Will statement remains an important part of a handbook since it is the first step toward preserving management and employee rights in the workplace. It also helps to clarify the fact that your handbook is not a contract of employment, nor is it intended to be.

Due to Employment-at-Will, it remains perfectly legal to fire someone simply because you do not like them. Perhaps you dislike the way they dress or wear their hair. Maybe they have too many visible tattoos or body piercings. However, don't get too excited about this idea because the caveat is that you cannot fire someone for an illegal reason.

Title VII of the Civil Rights Act (and many amendments thereto) defines protected classes of employees. Minorities, women, the handicapped, the elderly (anyone over 40?!?), persons of certain national origin or color and various religious persuasions fall under this umbrella. In some states (Mexifornia or is it Calixico?) people who live “alternative lifestyles” are protected. What if that hairdo, style of dress or nose ring is required by some obscure religious or ethnic belief?

In the real world, the doctrine of Employment-at-Will is played out in courts and remains under siege everywhere in this country. Some states have enacted “just cause” laws meaning that no person can be terminated without due process and proof of justification for termination. These skirmishes are often fought in unemployment hearings – where employers usually lose unless the issue is absenteeism and you have a file drawer full of documentation.

Add to the melee with laws like the FLSA, FMLA, COBRA, HIPAA, ADEA, PDEA and the rest of the alphabet soup. Other laws also protect “whistleblowers” and people who are victims of “constructive discharge.” In spite of all that, Employment-at-Will is alive – even if somewhat eroded – and it's one step in maintaining your management rights. As long as it survives, you should include an Employment-at-Will statement in your handbook.

In the March issue we will move on to item #2. A Code of Conduct is an open-ended statement of your expectations regarding employee behavior. A well-written statement replaces those endless lists of rules and preserves your right to actually manage your workplace.

A Code of Conduct in the Workplace

Would You Do That if Your Mom Could See You?

By Lesley Sifers, Tax Favored Benefits, Inc.

Many years ago, as I sat down to write my very first employee manual, I came across a short “*Code of Conduct*” included in another company’s manual that had been loaned to me. With permission, I stole it and used it in my handbook. Over the years, it has become one of the most useful portions of our manual. Today, I often recommend that some type of *Code of Conduct* be included in an employee handbook.

A *Code of Conduct* is a general statement outlining what you expect from your associates in the workplace. It remains one of the few methods you have for addressing, in a roundabout way, employee conduct outside the workplace. Some handbooks include lists of precise rules of behavior. Often, these rules originated as a direct result of what someone did long ago. Rather than deal with that person, a rule was made for everyone to live by. For some people, rules are a challenge – they seem to enjoy bending them to see just how much they can get away with before they actually “break” a rule. (Sort of like toddlers, if you think about it.)

A *Code of Conduct* would read something like this:

We are all adults here and it should be obvious that certain conduct is unacceptable. It is not possible to list every action that could result in disciplinary action, therefore, we offer this general “Code of Conduct” so you will have a better understanding of our expectations:

Actions that bring our Company into disrepute in our community or with our customers are prohibited. Examples could include spreading gossip or rumors about our Company, its employees or customers; engaging in criminal activities; making threats or committing violence against customers, coworkers or in the community.

Misappropriation or abuse of company property or resources will not be tolerated. For example, this could include neglect or abuse of equipment or facilities, conversion of company resources to personal use; creating or contributing to unsafe or unsanitary conditions; theft or tampering with company, customer or coworker property; tampering with or falsifying company records and documents.

Actions that interfere with your ability or the ability of your coworkers to perform their work duties are unacceptable. Examples are engaging in horseplay or practical jokes; distributing or circulating petitions, flyers or other literature; excessive visiting; sleeping or loafing on the job; unnecessarily delaying work activities.

Department Managers are responsible for interpreting the Code of Conduct and determining when and at what level corrective action should be initiated.

A *Code of Conduct* may not be necessary for your business. Perhaps it would work for you to say, “At all times, employees should behave as if their Mom was in the room!” But, for those of you whose handbooks are “rule” books or who have extraneous lists of “dos” and “don’ts,” a *Code of Conduct* may prove more effective.

Developing and Using a Corrective Action Policy Put Some Heart in That Roar

By Lesley Sifers, Tax Favored Benefits, Inc.

This is the final in a series of articles about the three things I believe should be required reading in an employee handbook. The first article covered “Employment-at-Will” and the second addressed developing a “Code of Conduct.” Now you can stop, write your handbook and remain fairly certain that your HR consultant, attorney and insurance carriers will all approve it (once their input is included, of course). After all, you’ve outlined your expectations and many key policies and have provided way too much detail about all those great benefits. Your employees are adults and should be able to figure it all out. So far, so good.

But what happens when people mess up? Sometimes people make mistakes because they don’t realize that what they are doing is not appropriate in your company. Other people just want to see how far they can stretch your patience. Too often, I have observed companies where odd, usually unenforceable rules are formulated for everyone to follow because one or two people remain a problem for management. I call this the “Cowardly Lion” syndrome – all roar and no heart!

Actually, employees do want to know how you will treat them if they mess up, so a useful employee handbook should always include a policy for “Corrective Action.” As the name suggests, the goal of corrective action is to improve performance or correct unacceptable behavior. That’s the heart part – giving people a chance to succeed. At the same time, management must preserve its right to circumvent any procedure in situations that compromise the firm’s success or present a danger to others. Sometimes, you have to roar!

There are four steps to corrective action:

1. *Verbal Counseling* – Explain the problem and what is needed to fix it. This is most effective with performance issues but required for behavior problems. Document with a note to file.
2. *Written Notice* – Use when verbal counseling doesn’t take or for the first offense of a serious nature. Document with a notice signed by the employee and keep it in file.
3. *Suspension* – A “wake up call” that can be paid or unpaid. Use this when the first two steps don’t bring the desired result or (for very serious situations) when termination is under consideration. Document with a signed, written notice of suspension to be retained in file.
4. *Discharge* – Undertaken when an employee remains unwilling to correct his/her behavior or is unable to improve his/her performance after earlier efforts have failed to produce expected results. You should have plenty of documentation for your decision at this point.

When Corrective Action procedures are followed in a sincere manner and documented properly, a termination has a better chance of holding up under scrutiny from such governmental agencies as your state unemployment office. The key word here is “sincere.” Do not rush to discharge or you will be sincerely sorry. In the end, a person who resists your efforts to correct problems has actually made a choice to leave employment.

If you would like to review a Corrective Action policy suitable for your handbook, e-mail me at lesley@taxfavoredbenefits.com or call the HR HelpLine at 800-683-3440.