



EMPLOYMENT POLICIES AND PROCEDURES

Prepared For:

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Conference**

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TODAY'S AGENDA

- ✓ Employment Policy Considerations Unique to Public Employment
 - Constitutional Considerations
 - Unique State and Local Laws
 - Collective Bargaining Protections
- ✓ Documentation
- ✓ Employee Handbooks
- ✓ Anti-Harassment Policies and Procedures
 - Policies, Training, Investigations, and Remedial Actions
- ✓ Vacation Leave and Paid Time Off
- ✓ Inflexible Leave Policies and the ADA

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**EMPLOYMENT POLICY CONSIDERATIONS
UNIQUE TO PUBLIC EMPLOYMENT:**
Constitutional Considerations
Unique State and Local Laws
Collective Bargaining Protections

CONSTITUTIONAL CONSIDERATIONS

•Freedom of Speech

- Comments as a citizen may be protected
 - Comments made pursuant to official duties are not
- Must concern matters of public opinion
- Court will balance protected speech with efficiency of public service
 - Public interest in promoting workforce harmony and confidentiality
- Claim must establish connection between protected speech and adverse action

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CONSTITUTIONAL CONSIDERATIONS: FREEDOM OF ASSOCIATION



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CONSTITUTIONAL CONSIDERATIONS: FREEDOM OF ASSOCIATION



- Protects association with unions
- Protects some partisan political activities
- May not protect those in policy making positions

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CONSTITUTIONAL CONSIDERATIONS

• Due Process

- Must establish a Protected Interest (life, liberty, or property)
- Most commonly this is a Property Right
 - Expectation of employment based on state law
 - Tenure statutes
 - Civil service laws
 - Established rules
 - Distinguish at-will employment



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NEBRASKA CIVIL SERVICE ACT

- Applies to full time police and fire in communities with populations over 5,000

- Just cause requirement

- Outlines due process procedures

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CONSTITUTIONAL CONSIDERATIONS: DUE PROCESS



- Protected interest
- Liberty interest
 - Stigma plus
 - Damage to reputation/defamation
 - Which may limit future employment

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CONSTITUTIONAL CONSIDERATIONS: DUE PROCESS

- Hearing Requirement – *Loudermill*
 - Pre-deprivation procedures
 - Identification of charges
 - Summary of evidence
 - Provide an opportunity to respond
 - Post-deprivation/termination procedures
 - Formal hearing

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IMPORTANCE OF GOOD DOCUMENTATION

- Communicates expectations to employees.
- Aids the employee in understanding what he/she needs to improve upon to keep his/her job.
- Demonstrates what the employer has done to notify the employee of performance issues.
- Supports an employer's position on the legitimate, non-discriminatory reasons for termination.
- Memorializes key facts.

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WHEN SHOULD YOU DOCUMENT?

Simple answer: when you care enough about the issue to rely on it later!

- Major incidents
- Violation of workplace rules and EEO issues
- Performance deficiencies
- Meetings with employees about performance issues

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PROPER DOCUMENTATION

- Does it state the “who,” “what,” “when,” “where,” and “how”?
- Author of the documentation
- Date
- Policy or expectation violated
- Consequences of further violations/deficiencies
- Acknowledged by implicated employee
- Witnessed by HR or another supervisor

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PROPER DOCUMENTATION

Example:

Yesterday Bob was caught making nasty remarks to a lady on the production line. She tattled on him and got pretty hysterical. We yelled at Bob to knock that stuff off, and that was the end of it.

Is this helpful, or not?

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PROPER DOCUMENTATION

What's unhelpful, both now and down the road:

Yesterday *[precise date?]* Bob *[last name?]* was caught *[by who? how?]* making nasty *[what specifically was said?]* remarks to a lady *[name?]* on the production line. She tattled *[better description?]* on him and was hysterical *[avoid inflammatory terms]*. We yelled *["counseled"]* at Bob to knock that stuff off *[more accurate description?]*, and that was the end of it *[follow-up with female employee? Bob acknowledged misconduct? discussion of anti-retaliation? who authored this document, and when?]*.

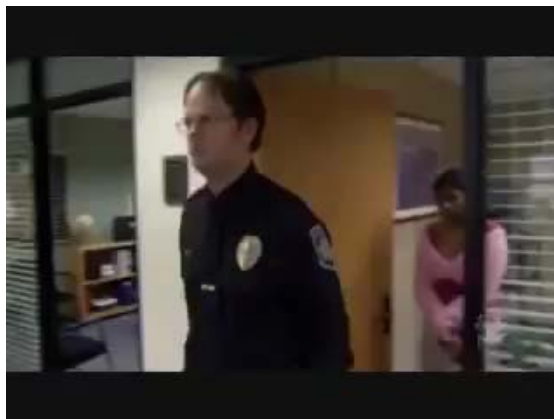
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PROPER DOCUMENTATION

- Document promptly and contemporaneously
- Focus on job duties and performance categories
- Be factual, accurate, and concise
- Avoid emotions
- Avoid subjective opinions
- Where appropriate, include key documents as objective evidence
- When in doubt, talk to HR/Legal

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CONSTITUTIONAL CONSIDERATIONS: FOURTH AMENDMENT CONCERNS



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CONSTITUTIONAL CONSIDERATIONS: FOURTH AMENDMENT CONCERNS



○ Searches of employee offices/files and lockers

- Employers typically have wide latitude to conduct searches
- Policies should defeat expectations of privacy

○ Video surveillance

- Policies and practices should defeat expectation of privacy
- Obligation to bargain?

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CONSTITUTIONAL CONSIDERATIONS: FOURTH AMENDMENT CONCERNS



Reasonable suspicion testing
may be allowed

“Suspicionless” testing for
safety-sensitive positions
(balance governmental
interests)

Pre-employment physicals

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CONSTITUTIONAL CONSIDERATIONS: FOURTH AMENDMENT CONCERNS

Text messages and emails

Public devices/public records

Policies should defeat expectation of privacy



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COLLECTIVE BARGAINING PROTECTIONS

COLLECTIVE BARGAINING PROTECTIONS

- National Labor Relations Act guidance on employment policies

- Employee right to engage in “concerted activity”
- Employment policies/procedures may implicate employee rights to engage in “concerted activity”
- Recent revisions to law in this area



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NATIONAL LABOR RELATIONS ACT

- Section 7 Protected Concerted Activity

- “Employees shall have the right to...engage in... concerted activities for the purpose of collective bargaining or other mutual aid or protection...”
- “The law we enforce gives employees the right to act together to try to improve their pay and working conditions, with or without a union.”



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EXAMPLES

Lutheran Heritage Village-Livonia

- A rule will be found unlawful if employees would reasonably construe the rule's language to prohibit Section 7 activity.
- Confidentiality
 - Employees have a Section 7 right to discuss terms and conditions of employment with fellow employees and nonemployees
- Conduct toward Company and Supervisors
 - Employees have a Section 7 right to criticize or protest their employer's labor policies or treatment of employees.
- Conduct toward Fellow Employees
 - Employees have a right under the Act to argue and debate with each other about unions, management, and their terms and conditions of employment.
- Conduct toward Third Parties
 - Employees have the Section 7 right to communicate with the news media, government agencies, and other third parties about terms and conditions of employment.

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EXAMPLES

The Boeing Company

- Category 1 – lawful to maintain
 - The rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or the potential adverse impact on protected rights is outweighed by justifications associated with the rule.
- Category 2 – warrant individual scrutiny
 - In each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.
- Category 3 – unlawful to maintain
 - Prohibit or limit NLRA-protected conduct.

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COLLECTIVE BARGAINING PROTECTIONS

Salaries Employment Health
Grievance Protection Law
Representative Employees
Issues are a part of Health Cost
Limits Work, air, Salary
Regulate Contract
Participate
Process Negotiation
Agreement Productive
Working Hours Terms Rules
Employer Union Wages Group
Overtime Safety Establish Cost

Concerted activity under the Nebraska Industrial Relations Act

Distinctions between
NIRA and NLRA provisions

CIR recognition of
protected concerted
activity

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EMPLOYEE HANDBOOKS

EMPLOYEE HANDBOOK: FRIEND OR FOE?

A good Handbook can serve several important functions:

- Introduce the organization.
- Explain expectations.
- Answer common employee questions.
- Articulate the consequences for failing to comply with policies and procedures.
- Minimize legal risk ... by encouraging resolution of workplace issues.
- Demonstrate compliance with applicable employment laws!



"Now hold on, Mike. You're talking about embezzlement! And unless I'm very mistaken, that's strictly prohibited in the company's employee handbook!"

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EMPLOYEE HANDBOOK: FRIEND OR FOE?

A Handbook can be problematic IF:

- It is poorly drafted or unclear.
- It doesn't align with your organization's *actual* practices.
- It places unnecessary burden on your organization.
- It creates a contractual expectation.
- It contradicts applicable employment laws.
- It hasn't been reviewed in the last 3 years.



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EMPLOYEE HANDBOOKS = CONTRACTS?

Johnston v. Panhandle Coop Association



- The Nebraska Supreme Court held that personnel handbook provisions may become enforceable as an employment contract, if the handbook language:
 - constitutes a definite offer;
 - is communicated to the offeree; and
 - the offer is accepted.
- Employee's retention of employment constitutes acceptance of the offer.

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AVOIDING A HANDBOOK CONTRACT

Handbook's Introduction should state:

- **THIS HANDBOOK IS NOT A CONTRACT.**
- No one except [a designated representative of the EMPLOYER] has the authority to execute an agreement for a fixed term or contrary to the policies in the handbook.
- The handbook belongs to the EMPLOYER.
- The EMPLOYER reserves the right to modify the handbook as needed, consistent with applicable law.
- Employment is at-will, if it is.

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AVOIDING HANDBOOK BLUNDERS: Demonstrate Receipt



"Your Honor, I *just know* the Plaintiff got the handbook!"

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AVOIDING HANDBOOK BLUNDERS: Demonstrate Receipt

- Distribution of handbook and periodic changes to all:
 - On-site/off-site employees?
 - Hard copy or electronic form?
- Acceptance of handbook and periodic changes:
 - Execution of paper acknowledgment
 - Electronic confirmation
- Maintaining record/proof of acceptance

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AVOIDING HANDBOOK BLUNDERS: Use Clear, Practical Policies



Handbook Policies
are problematic when
they are:

Unclear

Too rigid

Overbroad

Impractical

Too formulaic

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AVOIDING HANDBOOK BLUNDERS: Use Clear, Practical Policies

Most commonly seen in Discipline Policies.

Solution?

- Remove formulaic or rigid requirements.
- Ensure flexibility in application of discipline.
- Confirm ability to bypass steps in a progressive discipline policy, depending on the circumstances and severity of the infraction.
- Clarify throughout the handbook that discipline may result upon policy violations.

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ANTI-HARASSMENT POLICIES AND PROCEDURES

WORKPLACE HARASSMENT



The EEOC found that common workplace-based responses by those who experience harassment are to:

- Avoid the harasser (33% to 75%)
- Deny or downplay the gravity of the situation (54% to 73%)
- Attempt to ignore, forget, or endure the bad behavior (44% to 70%)

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WORKPLACE HARASSMENT



- **70% of harassment is not reported**
- One-third of formal charges allege harassment on the basis of:
 - **45% Sex**
 - 34% Race
 - 19% Disability
 - 5% Religion

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Do you have a *Harvey* in your organization?

RISK FACTORS AND COMMON THEMES



Positions of Power



"What would we do without them?"



Lack of Voice to Object



Lack of Accountability

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WORKPLACE HARASSMENT: CULTURE CREATION

#MeToo

#NotUs
#NotNow
#NotEver

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LESSONS LEARNED FROM THE #MeToo MOVEMENT

- Is your workplace perceived as a place where people are empowered to speak up?
- Does the employer have power centers or certain employees that are above the law or perceived as such?
- Is HR viewed as being fair or biased in favor of the employer?
- #MeToo requires more proactive actions (response time, surveys?)
- Interim measures, such as suspensions during investigations, are probably more important now.

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ANTI-HARASSMENT TRAINING: “IT’S A BIG DEAL”



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ANTI-HARASSMENT TRAINING

- EEOC’s most recent task force report on workplace harassment:
 - https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm#_Toc453686302
- Emphasizes several training guidelines to prevent harassment:
 - Training should be championed by senior leaders – not complained about
 - Repeated and reinforced regularly
 - Provided to employees at every level/location
 - Provided in all languages employees commonly use
 - Tailored to the specific workforce
 - Live/in-person training more effective than computerized “click-through” testing

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ANTI-HARASSMENT POLICIES: REQUIREMENTS AND BEST PRACTICES

- Definition of Harassment
- Who is covered
- How to report complaints
 - Reporting methods
 - Access
- Response and investigation procedures
- Consequences of engaging in prohibited conduct
- Anti-retaliation

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WORKPLACE HARASSMENT CLAIMS: REPORTING METHODS

- Multi-Avenue Reporting Channels
 - Who to complain to if typical report is the offender?
 - App or Hotline
- Reporting **expected** from:
 - Those who have **experienced** harassment
 - Those who have **observed** harassment
- Protection of confidentiality
 - To the extent possible/practicable
 - Treat reports discreetly



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WORKPLACE HARASSMENT CLAIMS: PROPER INVESTIGATION



- Social Media Reports of #MeToo
- Anonymous Hotline or App Reports
- Informal Reports
 - No Request for Action
 - Supervisor Knowledge
- Investigator:
 - Internal, or Neutral Third Party?
 - Maintain Attorney-Client Privilege?
- Preservation of Evidence

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SETTLEMENT OF WORKPLACE HARASSMENT CLAIMS

- A public entity shall maintain a public written or electronic record of all settled claims.
- The record for all claims settled in the amount of \$50,000 or more, or 1% of the total annual budget of the public entity, whichever is less, shall include a written executed settlement agreement and shall be included as an agenda item at the next meeting.
- The settlement agreement shall contain a brief description of the claim, the parties released, and the amount paid.
- Any claim or settlement agreement involving a public entity shall be a public record.
 - Under limited circumstances, specific portions of the claim or settlement agreement may be withheld from the public.

Nebraska Revised Statute § 84-713

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VACATION LEAVE AND PAID TIME OFF

VACATION AND PAID TIME OFF: NO MORE “USE IT OR LOSE IT”

- Nebraska law defines vacation leave as wages.
- Accrued wages must be paid upon termination of employment.
- Once vacation leave is accrued, it cannot be lost or forfeited.
- Same rule applies to leave that looks and feels like vacation leave and has no contingencies on its use, like Paid Time Off.

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VACATION AND PAID TIME OFF: ACTION ITEMS

- Use clear policy language on accrual.
- Provide for payment of accrued vacation/PTO leave upon termination.
- Avoid forfeiture of accrued vacation/PTO leave during employment (such as end of calendar year).
- BUT, expressly state that sick leave CAN be forfeited upon termination.

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VACATION AND PAID TIME OFF: ACTION ITEMS

- Consider adopting an accrual system that avoids forfeiture and prevents large or early build-up of accrued vacation, to decrease overall liability when paying out accrued and unused vacation/PTO leave.
 - Example: January 1st accrual of ALL leave to employee; followed by January 2nd resignation.

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INFLEXIBLE LEAVE POLICIES

INFLEXIBLE LEAVE POLICIES: ONE BAD APPLE . . .



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INFLEXIBLE LEAVE POLICIES AND THEIR IMPACT ON DISABILITY DISCRIMINATION LAWS

- The EEOC will target employers (of 15 or more employees) that use inflexible leave policies:
 - *Example:* “Employees who fail to return upon the expiration of FMLA leave will be terminated.”
 - *Example:* “Employees who miss 3 or more consecutive days of work will be terminated.”



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INFLEXIBLE LEAVE POLICIES AND THEIR IMPACT ON DISABILITY DISCRIMINATION LAWS

- Understand the role the federal Americans with Disabilities Act (and its state law equivalents) plays with your organization's policies on leave from work!
- Employers *must consider leave* as a potentially reasonable accommodation for a disability.
- This includes unpaid leave that exceeds a normal leave allowance.

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QUESTIONS?

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