

# **5 LEGAL HAZARDS**

## **IN**

# **EMPLOYEE HANDBOOKS**

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# **5 LEGAL HAZARDS IN EMPLOYEE HANDBOOKS**

*Presented by: John M. Payne*

## **INTRODUCTION**

Employee Handbooks are often the foundation of discrimination lawsuits by disgruntled employees. Well-meaning employers create legal problems for themselves with Handbook promises. Promises of specific treatment in specific situations become “Exhibit 1” in lawsuits.

What’s the crux of the problem? If you create rigid Handbook policies and then deviate from them, you are inviting a lawsuit. If you don’t bind yourself with mandatory language and practices, you will keep the freedom you need to make employment adjustments that you deem appropriate.

Here’s 5 mistakes to avoid in drafting your Employee Handbook.

### **HAZARD #1: Mandatory progressive discipline language.**

- “You will receive one warning before you are terminated.”
- “We follow the concept of progressive discipline.”

**The Problem:** If you want to follow such a philosophy, that’s fine. Just don’t promise it in writing. There is no legitimate reason for an employer to give up its legal right to employment-at-will. You will want it when you need it.

**HAZARD #2: Promise of specific treatment/performance appraisals.**

- “You will receive a written performance review annually.”
- “Pay adjustments will be based on your performance appraisal.”

**The Problem:** Employers often fall behind in their performance reviews, or ignore them altogether. A weak employee may be terminated without a performance review. He/she then claims that your deviation from this performance review timeline is *prima facie* evidence of discrimination.

**HAZARD #3: Mandatory layoff language.**

- “Layoff decisions will be based on skills, abilities, attendance and length of service.”
- “You will be eligible for recall for 1 year after your date of layoff.”

**The Problem:** Assume you are facing a layoff situation. You have a newer employee who has boundless energy and enthusiasm, whom you want to keep. You want to lay off an internal candidate who is a “C-” performer, but has been with you for 10 years. The 10-year employee files a lawsuit and alleges: “I relied on the Handbook language, and I have the skills and abilities to do the job. Furthermore, I’m entitled to recall for 1 year.” This could have easily been avoided.

#### **HAZARD #4: Promotion promises.**

- “We promote from within whenever possible.”
- “All internal candidates will be interviewed.”
- “Written reasons for rejection will be provided.”

**The Problem:** Suppose you want to recruit an all-star from outside the Company to fill a vacancy. An internal candidate can use this Handbook language to claim you did not follow your “promote from within” policy. This creates a legal claim for a mediocre internal candidate.

#### **HAZARD #5: Probationary language.**

- “All new hires are subject to a 90-day probationary period.”
- “We may extend that probationary period at our discretion.”

**The Problem:** If an employee passes his probationary period, a good argument can be made by a plaintiff’s lawyer that a “for cause” disciplinary standard now applies to him. Otherwise, there would be no need for a probationary period in the first place. The best strategy is to avoid probationary periods altogether.

*John M. Payne practices in the area of labor and employment law. He has been representing employers in the Pacific Northwest for 29 years.*