



The Top Ten Policies and Practices HR Would Wish for to Make Life Easier

Tuesday, Sept. 26, 2023 | 3:30 PM - 4:45 PM

Presented by Members of Drummond Woodsum's
Tribal Nations Labor & Employment Group:

S. Campbell Badger, Esq. | sbadger@dwmlaw.com

Anna B. Cole, Esq. | acole@dwmlaw.com

Michael-Corey F. Hinton, Esq. | mchinton@dwmlaw.com

Daniel J. Rose, Esq. | drose@dwmlaw.com

If I Had a Magic Wand: Top Ten Policies and Practices to Make Life Easier

I. Why should tribal governments and enterprises create employee handbooks?

There are basically four reasons to define workplace rules through a handbook or a collection of policies. A handbook will (1) communicate expectations; (2) promote fairness by providing a tool for management; (3) reduce the employer's risks; and, (4) perhaps a little selfishly, make life easier for Human Resources.

(1) Communicate expectations

The simple fact is tribal governments and enterprises employ people, and people deserve to understand the terms and conditions of those employment relationships. Employees want to understand the rules because that knowledge enables them to meet their employer's expectations and also allows them to be a strong advocate for their employer.

Along with tribal law, departmental standard operating procedures, job descriptions, training materials, and continuing employer reinforcement of best practices, the handbook is an effective way to communicate the employer's rules and expectations.

(2) Promote fairness by providing a tool for management

An aspect of fair management includes (1) tell me the rules; (2) hold me accountable to those rules (do not make it up as you go along); (3) give me an opportunity to tell my side of the story. The handbook serves a critical role in all three of these objectives. As outlined above, the handbook helps with the first objective by communicating the rules and expectations to employees. With regard to the second objective, the handbook helps management by ensuring that employees are held accountable to a consistent set of rules. For example, if here is one written sexual harassment policy that is uniformly applied across the organization, that uniformity generates consistency.

NOTES

(3) Reduce the employer's risks

The handbook, if properly drafted and reviewed by legal, should embody the Tribe's policies and values with respect to regulating the employment relationship with its employees. These may include important areas such as equal employment opportunities, anti-harassment and nondiscrimination policies, family and medical leave, wage and hour expectations, and the like. Not only does it help define the desired work environment, the promulgation of such policies will necessarily touch upon the interrelationship between Tribal Sovereignty and employment laws from outside sovereigns, like the federal government and in limited circumstances the state. In instances where policies mirror federal employment laws, compliance to our policies will reduce the risk of federal intrusion in sovereign matters. In those instances where a Tribe had decided to deviate from federal law, then the handbook will reflect that risk management choice made by leadership and ensure that managers understand the standard that the Tribe has opted to adopt in lieu of the federal law.

(4) Make HR's Life Easier

The simple truth is that HR needs to make numerous decisions throughout the workday. The beauty of having a well written, concise, and accessible policy manual/handbook is that it helps HR professionals make thoughtful and consistent decisions, saves administrative time and energy by avoiding having to face the same issue over and over, and provides authoritative support when HR decision are challenged.

II. Policies and Practices to Make HR's Life Easier

(1) Outline of Employee Conduct Expectations, including Professionalism and Cooperation

Nothing is more frustrating than dealing with employees who squabble. While we cannot mandate that employees like each other, we certainly can require that they work collaboratively and take responsibility for their own actions. A good employee handbook will articulate the seemingly more subjective skills we expect from our employee, including the need to work cooperatively with others, take the initiative/act as a self-starter, work independently, and prohibit behaviors that undermine the morale within the workplace.

NOTES

(2) AI Policy – Regulating What We (or at least some of us) Don't Yet Understand

The world is quickly evolving. As new technologies come onto the scene, employers need to stay on top of them and give employees guidance about how (if at all) the employer wants employees to be using those technologies at work. Choosing to stay silent on an evolving era creates the risk of inconsistent use of the technology and enforcement by managers, as well as the potential of missed opportunity to create efficiencies. Are administrative employees within your organization permitted to use ChatGPT to prepare initial drafts of letters? If they do so, are they intentionally (but perhaps thoughtlessly) uploading confidential information into that system in order to create those drafts? Employers across the country are learning the hard way that employees need boundaries in this area. As with all rules, do yourself the favor of being clear in advance so that you can enforce your expectations down the line.

(3) Trust but Verify – There are Always Two Sides to Every Story

As noted at the outset, a fundamental component of fairness is allowing an individual to tell their side of the story before we determine that they have violated our policies or expectations. Therefore, while we generally trust our supervisors, it helps to be reminded that there are always two sides to a story, and often, an employee might see things very differently than their boss. We need to be mindful that both the supervisor and the employee will see a particular situation through their own contradictory lens. A policy that provides employees with due process before disciplinary actions are taken can be helpful to ensure that managers pause and speak to employees before taking action. Such policies should not be so rigid that they prevent effective management, but also should not be so flexible that the employee feels that the employer unfairly denied them a chance to defend themselves.

(4) Effective Investigations and Clear, Well Written Reports

Performing a proper investigation is essential in order to discover the truth, make informed decisions, and protect the rights of both the Tribal employer and the employee. In the context of a disciplinary situation, the decision to discipline an employee is going to be scrutinized to ensure that it is fair, impartial, and justified and there is no evidence of improper motive. How the investigation is performed, the articulation of facts elicited and the conclusions drawn are critical to sustaining a challenge.

NOTES

(5) Progressive Discipline and Articulable Reasons

We all know that an employee “at will” can be let go for any reason or no reason at all. However, employers make significant investment in employees and commonly want to give them a chance to grow and improve in their position, even if they periodically engage in missteps. Additionally, even with an employment at-will standard, it is prudent for an employer to have an articulable reason for serious adverse employment actions, because often employees nonetheless have some access to a mechanism to challenge the employer’s decisions. As a result, the concept of progressive discipline, with escalating severity of disciplinary consequences, provides a useful roadmap for requiring managers and supervisors to articulate their reasons for disciplinary action and requires them to impose proportionate consequences. This functions to reinforce preexisting communications to employees about workplace expectations and develop a record of conduct that can be useful in a subsequent challenge.

(6) Having Department Supervisors Check with HR before Disciplining an Employee

In a perfect world, wouldn’t it be nice to have our managers and supervisors check with HR before they impose discipline? Not only would this offer an opportunity to revisit the underlying facts and circumstances leading to the contemplated action, but it would ensure consistency in the application of the work rules through the various departments within the enterprise and avoid claims that our discipline was arbitrary and capricious. Work to developing a relationship with supervisors that encourages them to adopt the practice of checking with HR before implementing discipline.

(7) A Meaningful Grievance Procedure – It Can’t be an Empty Promise and It Can Protect Tribal Sovereignty

Employers that have internal mechanisms to address and resolve workplace disputes have the advantage of conquering workplace problems before they become lawsuits. Frustrated employees seek assistance of lawyers and federal agencies when there is a perception or reality that the employer is not treating employees fairly. One step toward both the perception and reality of workplace fairness, is a meaningful informal and formal grievance process.

On the informal side of the ledger, employers should insist that directors, managers and supervisors are giving employees numerous avenues to communicate about workplace victories and challenges. Those avenues of communication take myriad forms but, for example, it includes a manager’s open door policy, a director’s

NOTES

insistence that his managers meet with him monthly, or a Tribal administrator who manages by walking around.

On the formal side of the ledger, Tribal employers should implement an effective grievance procedure that allows employees to raise concerns within a structure that permits for meaningful review. There are many ways to design and construct a meaningful grievance process and therefore take the opportunity to shape the process to reflect the tribe's values and customs. By providing meaningful due process to tribal employees, workplace disputes are addressed before the employee gets so frustrated that they are retaining legal counsel or submitting a complaint to a federal agency, which may, or may not, have jurisdiction.

(8) Keeping Records of Trainings – If it is not Documented, it Did Not Happen.

Not only are employee trainings, including employee orientation, an investment of time and energy in our employees, but it is a means by which tribal employers can communicate their expectations of employees. This is the essence of due process and fairness – we tell them what we need and we show them how to do it. A record of employee trainings will demonstrate that the employee has been told of the rules or work expectations and can provide a useful defense should subsequent discipline (including termination) be challenged.

(9) Consistency in Application of Policies – Recalibration

One of the main reasons for having a policy is to ensure that a rule is consistent throughout the workplace. However, while the rule may be consistent, the application may not be. Adopting a practice of periodically meeting with our directors, managers, and supervisors to review our handbook and ensure that we are all interpreting and enforcing them in a unified manner is HR's long-term investment in an effective policy manual. This practice will allow HR to uncover circumstances where a rule or policy has fallen out of step with the realities of the workplace and needs to be updated, as well as areas where managers need additional training to ensure they are enforcing rules that continue to be valuable and/or necessary.

III. 10 Simple Steps to Effective Handbook Writing

1. One topic per work rule
2. Use clear, direct language
3. Use short, declaratory sentences
4. Avoid legal jargon, pomposity, and lecturing

NOTES

5. Keep each rule as short as possible, but be sure to address what you want and why
6. Use positive rather than negative language whenever possible
7. Use a consistent style and terminology in all policies and rules
8. Make sure the title accurately reflect the subject matter of the rule and organize the rules so that they are easily accessible to employees
9. Test the rule before adopting: ask people to tell you what they think it says and make sure it passes legal muster
10. Avoid “reinventing the wheel” – review available sample policy before draft your own policy

IV. Ten Policy Mistakes to Avoid

1. Make sure policies are legal and consistent with the Tribe’s values
2. Follow policies consistently
3. Avoid inflexible policies that can lead to absurd results
4. Know the difference between policies and administrative procedures
5. Don’t make promises that you cannot keep
6. Make sure that policies are communicated to those covered or affected by them
7. Make sure all directors, managers and supervisors are trained on the rules and policies within the handbook and fully understand their rationale.
8. Review your handbook on a regular basis and make sure that new rules are consistent with existing rules.
9. Make sure you employees sign an acknowledgement of receipt of the handbook and also when a rule is revised.
10. Failing to reach out to a NNAHRA friend for help and advice.

Contact Us

84 Marginal Way, Suite 600
Portland, Maine 04101
207.772.1941 Main
207.772.3627 Fax

670 N. Commercial Street, Suite 207
Manchester, NH 03101
603.716.2895 Main
603.716.2899 Fax

78 Bank Street
Lebanon, NH 03766
603.433.3317 Main
603.433.5384 Fax

114 N. San Francisco Street
Suite 100, Box 24
Flagstaff, AZ 86001
800.727.1941 Main