

# EMPLOYEE HANDBOOK TIPS & PITFALLS

by  
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## I. INTRODUCTION

Employment laws constantly change. Your company's employee handbook should too. However, employers and Human Resource ("HR") departments are kept busy trying to keep up with the more direct impact of major legislative changes and seemingly mundane issues such as annual reviews and updates of company handbooks are often overlooked or shelved for a later day. If you were to ask yourself how often you review and update your company handbook, what would your answer be? What would your colleagues' answers be? Most would probably have a hard time remembering when they last tackled this tedious task.

Think of the handbook as a living document rather than something that simply collects dust on employees' bookshelves. The work world isn't static; it changes, rapidly. Laws change. Your company changes. Your workforce changes. As such, your policies *need* to change too. So why are you using the same handbook that was written five years ago? The dynamic nature of employment law, including the recent flood of major revisions, have made certain policies in many outdated handbooks obsolete, confusing and, in certain circumstances, even illegal.

## II. WHY HAVE AN EMPLOYEE HANDBOOK?

This instruction manual is a company's first line of protection against employee complaints and potential lawsuits. It gives employees a clear picture of the company's rules, benefits and expectations. A well-crafted employee handbook also can be used as an effective tool to minimize both litigation and liability. A poorly drafted or largely ignored handbook can do more harm than good. If your employee handbook has not been reviewed and revised within the past six months, chances are it's already out of date.

## III. KEY PROVISIONS TO INCLUDE IN AN EMPLOYEE HANDBOOK

As you draft your revisions, legal counsel should be engaged to review the draft policies to ensure that the company is protected. Experienced employment counsel can identify the necessary updates, guide the company through problematic nuances and identify vague areas that could be left open to debate...or litigation.

When revamping your employee handbook, be sure to pay close attention to these key provisions:

- **Anti-harassment and discrimination policies with reporting procedures** – Employee handbooks provide an excellent means of conveying the company’s equal employment policies and how alleged violations must be reported. As Supreme Court decisions have proven, well-drafted policy and complaint procedures to deal with harassment and discrimination issues will serve as a useful tool in limiting employer liability. In this area, consider whether you need to amend your handbook in light of the recent ADA Amendments Act (ADAAA), which became effective at the beginning of 2009.
- **FMLA accommodations clearly outlined, if applicable** – Under the Family and Medical Leave Act (“FMLA”), companies with 50 or more employees must grant unpaid leave for up to 12 weeks a year for certain medical or family care reasons. If you qualify, your handbook must spell out the leave-of-absence policy, including eligibility requirements, leave request procedures and guidelines for when employees return to work. As you review this particular area, it is essential that you address the series of recent revisions to the FMLA. These revisions, which are discussed further below, directly impact how the company will manage such leaves and will likely require policy revisions.
- **E-mail and technology resource policies** – In an era where electronic communications are the rule rather than the exception, companies should offer a comprehensive policy that addresses the “dos” and “don’ts” of email, Internet and instant messaging use on company equipment and company time. The handbook also should note that employees’ use of such resources may be monitored by the employer (some states *require* this notice). Do not forget to address employees’ remote access to company resources, as well as their use of company-supplied cell phones, Blackberries/PDAs and laptops.
- **At-will statement** – Employees should be notified that their employment is at-will and no company policy can be relied upon to alter that relationship.
- **Disclaimer** – Include one that states the handbook is not a contract and is subject to change.

#### IV. AVOIDING COMMON MISTAKES

Too often, employers make several common mistakes when drafting policies in an employee handbook. Some of the biggest problem areas include the following:

- **Introductory and probationary periods** – Employees need to have a precise understanding of what is expected of them during this period. This

section needs to alert workers that they remain employed at-will during this timeframe and the employer “can terminate without cause during the probationary period.” Be careful the language does not imply that this period is a guarantee of employment for any specific period of time.

- **Discipline/standards of conduct** – If you elect to outline a progressive disciplinary policy, it is essential that you reserve the discretion to skip steps based on the severity of the offense. While there should be an underlying reason for any discipline, as an at-will employer, you should avoid building in a “just cause” standard. Setting such a standard unnecessarily forces an employer to satisfy a heightened standard to justify the discipline. If you opt to include a defined list of potential disciplinary offenses, you also must clearly state that it is not “all inclusive” and the company ultimately will determine when discipline is warranted.
- **Vacation/sick days/paid time off (PTO)** – Employees need to be informed on how this time is accrued, whether it may be carried over from year to year and, if applicable or required by state law, paid out upon separation. In some states, you may get stuck with paying out unused leave time when an employee terminates employment because of poorly-drafted policy language.
- **Confidential information** – A common statement in many aging handbooks instructs a worker to “not discuss your wages with any other person.” However, under certain circumstances, employees, have a right to discuss topics for their mutual aid and protection under federal labor law, which would include wage and benefits information. Employees may have the right to discuss this with both fellow employees and third parties, such as union representatives.
- **No solicitation and distribution** – Employers often permit charitable solicitations (United Way, Girl Scout cookies, etc.) in the workplace. While serving a good purpose, permitting that to occur can subsequently preclude the employer from prohibiting union solicitation or materials in the workplace. Given the looming presence of the proposed Employee Free Choice Act (“EFCA”) and renewed union organizing momentum, the employer must re-visit the phrasing of this policy. Do not forget to consider how to handle electronic solicitation as well.
- **Potential conflicts** – Employers need to ensure the handbook does not conflict with benefits plan documents. Thus, a general rule of thumb is to avoid including overly-detailed health insurance provisions in the handbook. Likewise, in the case of multi-state employers, employers need to ensure the handbook does not conflict with the potential variances in state employment laws.

- **Use of “Guarantee” Language And Confusing Terms** – As you draft your handbook, pay close attention to the language you use. Don’t use too much “legalese,” big or confusing words or get too technical. Avoid “guarantee language,” such as “will” or “shall”. Instead, use such phrasing as “may” or “strives to” or even “will make best efforts.” Also, try not to fall into the *War and Peace* trap. There is such a thing as too long, particularly when it comes to employee handbooks.
- **Acknowledgements** – Including a clear and understandable acknowledgement provision in an employee handbook is crucial and every employee must officially acknowledge receipt of the new handbook. Common mistakes employers make in this regard, however, include failing to include a signature line (or to collect signed forms) and using poorly drafted acknowledgement language. Typical phrasing of the acknowledgement should reiterate the at-will nature of employment and always include a signature/date line so you have a record that each employee has received/reviewed the document.
- **Form Language** – The use of form language (e.g. language found on the Internet) is another common mistake. Such language may not account for variations between state laws and federal laws. Further, many employment laws impose a minimum employee threshold such that form language may not apply to all employers.
- **Eroding Employment At-Will** – The handbook should be reviewed to ensure that it does not inadvertently erode the employment at-will status of applicable employees. Handbook phrases and provisions which can inadvertently destroy the at-will status include phrases such as “permanent employee” as well as discussions of “cause” for discipline and termination.
- **Handbook Implementation And Rollout** – A final step in the handbook process is ensuring proper rollout and implementation. From a legal perspective, a handbook which is not properly distributed or implemented is the same as not having a handbook at all. Thus, employers should have steps in place to ensure that the handbook is distributed to all employees and should also ensure that the handbook is not just dropped on employees without giving them an opportunity to explain and answer questions. In this regard, as you roll-out your revised handbook, consider going “green” with the updated installment. In today’s electronic world, it is usually less expensive and almost always more pragmatic for the HR professional to distribute and manage the handbook electronically. With even the most basic technology nowadays, employers can track the recipients’ actions and determine potentially significant information such as whether the email or posting reached the intended recipient, if and when the handbook was accessed and reviewed, how long the employee

reviewed the document. Employers can even solicit feedback or questions related to the handbook electronically. In addition, if done properly, the recipient's electronic signature will carry the same legal weight as the traditional "hard copy" signature.

When it comes time to introduce the new handbook, make sure you distribute to all employees at the same time and advise them to any policy updates or new policies added during the review and revision process. Dropping it on them without out any explanation or the chance to ask questions or sets the company, and the new handbook, up for failure.

## **V. RECENT CHANGES IN THE LAW AND DEVELOPING ISSUES TO CONSIDER**

Recently, there have been many changes to existing laws and new employment laws have been enacted. Additionally, the explosion in employee use of technology and social networking sites has forced employers to reexamine their existing policies to make sure they adequately address the employment issues that arise from these new activities. Finally, there are also several proposed pieces of employment legislation of which employers should be aware. All of these are discussed further below.

### **A. Americans With Disabilities Amendment Act**

On January 1, 2009, the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA") went into effect. Congress passed the ADAAA in response to a number of U.S. Supreme Court and lower court rulings that it believed substantially weakened important protections of the original Americans with Disabilities Act ("ADA"). The amendments, intended to restore the "spirit and intent" of the original ADA legislation, will cause a much larger group of employees to be deemed disabled and, therefore, protected under the law. As highlighted by the following summary of the ADAAA's impact, employers will need to be even more careful when making decisions affecting applicants and employees who may have physical or mental impairments.

#### **1. Original ADA Definition Of Disability**

Under the ADA and ADAAA, an employer is required to make a reasonable accommodation to the known disability of a qualified applicant or employee if it would not impose an "undue hardship" on the operation of the employer's business. A qualified employee or applicant with a disability is an individual who, with or without reasonable accommodation, can perform the essential functions of the job in question.

The original ADA defined a disability as: 1) a physical or mental impairment that substantially limits one or more major life activities; 2) a record of such an impairment; and/or 3) being regarded as

having such an impairment. Under judicial interpretation of the original ADA, “substantially limits” a major life activity was construed to require the impairment to prevent or severely restrict activities that are of central importance to most people’s daily lives. Additionally, case law interpreting the original ADA required the determination of whether an individual had a covered disability to be made with respect to corrective and mitigating measures. Further, impairments of temporary or limited duration typically were not considered to be substantially limiting by courts applying the ADA.

## **2. Broader Interpretation Of “Disability”**

In assessing what constitutes a “disability,” the ADAAA directly charges reviewing courts to construe that term “to the maximum extent permitted” under the law. This is significant because various other ADAAA revisions, discussed below, will increase the number of employees protected by the definition of “disability.” The definition of “disability” also now includes any impairment that is episodic or in remission. This means that a condition, like cancer, that is not currently impairing the individual would still be a disability if it would substantially limit a major life activity “when active.”

Additionally, in the EEOC’s proposed new regulations, for the first time, the EEOC lists examples of impairments that will consistently meet the definition of a disability. If these proposed regulations are adopted, such impairments would include, but not be limited to:

- Blindness
- Deafness
- Intellectual disabilities
- Partially or completely missing limbs
- Mobility impairments requiring the use of a wheelchair
- Autism
- Cancer
- Cerebral palsy
- Diabetes
- Epilepsy
- HIV/AIDS
- Multiple sclerosis

- Muscular dystrophy
- Major depression
- Bipolar disorder
- Post-traumatic stress disorder
- Obsessive-compulsive disorder
- Schizophrenia

**3. “Mitigating Measures” May Not Be Considered – U.S. Supreme Court *Sutton* Decision Overruled**

Under a prior U.S. Supreme Court decision, *Sutton v. United Airlines*, physical and mental impairments were not considered “disabilities” for purposes of ADA protection if they were controlled with “mitigating measures,” such as medication or corrective devices (e.g., hearing aids or prosthetics). The ADAAA explicitly states that such measures, unless they are eyeglasses or contact lenses, may not be taken into account when analyzing whether the impairment substantially limits a major life activity. Thus, the employer must consider whether the impairment constitutes a disability without considering the corrective impact of the mitigating measures. Previously, certain employees who had impairments controlled by medication or treatments, such as asthma, diabetes or epilepsy, could be excluded from coverage because their condition was not severe enough to warrant coverage. Now, those employees likely fall into the definition of disability and therefore are protected.

**4. Extension Of “Major Life Activities” Definition**

In order to be deemed disabled under the law, an employee must have an impairment that substantially limits “one or more major life activities.” The ADAAA sets out a specific list of “major life activities,” which include: caring for oneself, performing manual tasks, seeing, hearing, breathing, lifting, bending, learning, reading, concentrating, thinking, communicating and working. Further expanding the definition of “major life activities”, the ADAAA adds “any major bodily function” to the list, specifically enumerating coverage for immune system, normal cell growth, digestive, bowel, bladder and reproductive functions, amongst other bodily functions.

**5. Rejection Of “Substantial Limitation” Standard**

The ADAAA also rejects the U.S. Supreme Court’s stringent interpretation of “substantially limits a major life activity.” According

to the Supreme Court, that phrase required an individual's impairment to prevent or severely restrict an activity of central importance to the individual's daily life. While the ADAAA rejects that pro-employer definition, it fails to provide an alternate standard.

Instead, the ADAAA requires the EEOC to define "substantially limits," which will likely result in a lower threshold. Indeed, the EEOC issued proposed new regulations in September 2009. Under these proposed regulations, an impairment will now be considered a disability if it "substantially limits" the ability of an individual to perform a major life activity as compared to most people in the general population. Importantly, in order to be considered a "disability," an impairment does not need to prevent or even significantly restrict the individual from performing a major life activity. Further, the EEOC has indicated that any determination of whether an individual has an impairment which substantially limits a major life activity will be based upon a "common-sense assessment." Additionally, an individual whose impairment substantially limits a major life activity need not also demonstrate a limitation in the ability to perform activities of central importance to daily life in order to be considered an individual with a disability. The proposed regulations have not yet been finalized but are expected to be.

#### **6. Expansion Of "Regarded As" Coverage**

The ADAAA also makes it easier to prove an employer discriminated against someone it wrongly "regarded as" having a disability. Under the original ADA, an individual bringing suit needed to prove the employer regarded the employee as being substantially limited in a major life activity. This was a difficult standard to meet. Now, the individual only has to show that the employer perceived the individual as having a mental or physical impairment, regardless of whether the impairment substantially limits, or is perceived to limit, a major life activity.

#### **7. Grant Of Authority To EEOC**

In response to the U.S. Supreme Court's questioning of the Equal Employment Opportunity Commission's ("EEOC") ability to issue binding regulations and interpretive guidance, the ADAAA now expressly grants that authority to the EEOC. Additionally, the EEOC is specifically charged by Congress to define "substantially limits."

#### **8. Pro-Employer Clarifications**

The ADAAA does clarify that "regarded as" claims cannot be based on impairments that are minor or "transitory," i.e., expected to last less than six (6) months. In addition, the ADAAA makes it clear

that employers do not have to provide a reasonable accommodation to individuals who are “regarded as” disabled. Finally, the ADAAA prohibits “reverse discrimination” claims. Thus, a non-disabled employee may not claim discrimination if a disabled employee is favored in an employment decision.

## **9. Practical Impact For Employers**

The practical impact of the amendments will be that more employees will be subject to the protections of the ADA and therefore it will be easier for employees to bring ADA claims. Likewise, these claims are more likely to be successful than previously and it will be harder for employers to defend against them. For example, under the original ADA, the first line of defense for employers traditionally has been that the employee’s impairment does not meet the definition of a disability and therefore, the entire claim has been dismissed for failure to meet this threshold issue. The ADAAA, however, shifts the focus from whether the employee is disabled to whether there has been discrimination. Additionally, the EEOC’s new “substantially limited” definition will likely be pro-employee. Thus, employers should work from a heightened presumption of coverage when assessing ADAAA eligibility.

## **B. Military Leave Amendments To The Family And Medical Leave Act**

President Bush signed into law the National Defense Authorization Act for Fiscal Year 2008, which includes two major amendments to the FMLA. The amendments expand the benefits of the FMLA to assist military members and their families. As discussed further below, the first amendment requires covered employers to provide up to twelve (12) weeks of unpaid leave each year for a “qualifying exigency” related to an employee’s spouse, son, daughter, or parent who is on “active duty” or has been notified of an impending call to “active duty” (“Active Duty Leave”). The second amendment entitles eligible family members to take twenty-six (26) weeks of unpaid leave in a single year to care for a wounded spouse, son, daughter, parent or next of kin (“Caregiver Leave”).

On October 28, 2009 - President Obama signed into law the fiscal year 2010 National Defense Authorization Act (“NDAA”) which further expands the rights under the FMLA of military service members and their families.

A brief overview of key provisions of the FMLA as well as the impact of both sets of amendments to the FMLA is discussed below.

### **1. Covered Employers**

The FMLA applies to any private sector employer who engages in commerce, or in any industry or activity affecting commerce, and who has fifty (50) or more employees each working day during at

least twenty (20) calendar weeks in the current or preceding calendar year. The law also covers all public employers and schools, whether public or private.

## **2. Employees Eligible for FMLA Leave**

To be eligible for FMLA leave, an individual must: 1) be employed by a covered employer and work at a worksite within seventy-five (75) miles of which that employer employs at least (fifty) 50 people; 2) have worked at least twelve (12) months (which do not have to be consecutive) for the employer; and 3) have worked at least 1,250 hours during the twelve (12) months immediately before the date FMLA leave begins.

## **3. Additional Reason for Leave -Active Duty Leave**

Prior to the amendments, employees eligible for FMLA could take up to twelve (12) weeks of unpaid leave for the following reasons:

- Birth and care of the employee's child, or placement for adoption or foster care of a child with the employee;
- Care of an immediate family member (spouse, child, parent) or an individual who acted "in loco parentis" (as a parent) who has a serious health condition; or
- Care of the employee's own serious health condition.

The new amendment adds another reason - An employee is entitled to FMLA because of any "qualifying exigency" arising out of the "active duty" of an employee's spouse, son, daughter or parent, or when such person is notified of an impending call to duty. A "qualifying exigency" may, in fact, not be the same as a "serious health condition," as that term is otherwise defined in the FMLA.

Examples of "qualifying exigencies" include: 1) making childcare arrangements; 2) making financial and legal arrangements related to the service member's absence; 3) counseling; 4) attending farewell or arrival arrangements for a service member; and 4) attending to affairs caused by a service member's death or missing status.

## **4. Additional Reason for Leave - Caregiver Leave**

The amendments also allow for "Caregiver Leave." This leave is available only during a single 12-month period and is available to an employee to care for a spouse, son, daughter, parent or next of kin of a "covered service member" who has a "serious illness or injury." A "covered service member" is a member of the Armed Forces who is:

- Undergoing medical treatment, recuperation or therapy;

- In an outpatient status; or
- On the temporary disability retired list for a serious injury or illness.

A caregiver may take up to twenty-six (26) weeks of FMLA during a single 12-month period.

## **5. Summary of Key Additional Changes After 2009 Amendments**

A summary of the key changes resulting after the 2009 amendments, including the relationship of those amendments to the 2008 amendments, is discussed below.

### **a. In Support Of A Contingency Operation**

Previous FMLA provided up to 12 weeks of job protected leave necessary by any “qualifying exigency” arising out of the fact that an employee’s spouse, child or parent is on active duty or has been called to active duty “in support of a contingency operation”. The 2009 Amendments remove the requirement that military duty be in support of contingency operation.

**b. Covered Active Duty**

Additionally, the 2009 Amendments replace the phrase “active duty” with “covered active duty”. “Covered active duty” is defined to include deployment of any active Armed Service member to a foreign country and any deployment of an Armed Service reservist to a foreign country under a call or order to active duty. Previously under the FMLA’s Military Leave provisions, such “exigency leave” was available only to family members of National Guard members and military reservists.

**c. Five Year Veteran And Aggravating Injuries**

The legislation extends the coverage of “Servicemember caregiver leave” to include caring for child, spouse, parent or next of kin who is a veteran undergoing medical treatment, recuperation or therapy for a serious illness or injury and who was a member of the Armed Forces (including National Guard or Reserves) at any time during the five years preceding the date on which the veteran undergoes treatment. Treatment of the veteran must be related to a “serious illness or injury suffered” while in the line of duty or which existed before the beginning of the veteran’s military service and was aggravated by service in the line of duty.

Military leave is also expanded to include care for a servicemember who aggravates prior injury or illness during the course of military service. Previously aggravation of injury or illness was not covered.

**6. New Forms And Posters**

If they have not already done so, employers should immediately post the notice issued by the DOL advising employees of their new rights to military-related FMLA leave and they should also be using the new FMLA forms and posters.

**C. Meet GINA - Genetic Information Non-Discrimination Act**

On May 21, 2008, President Bush signed the Genetic Information Non-Discrimination Act (“GINA”) into law. GINA, which was effective November 21, 2009, makes it unlawful for employers with fifteen (15) or more employees, employment agencies, labor organizations and insurance carriers to discriminate against persons based upon genetic information indicating a predisposition to chronic diseases. Among other things, GINA prevents employers from making employment decisions based upon a concern that an applicant, employee or dependent with a

genetic predisposition for certain chronic medical conditions will place a financial burden on the employer's group medical insurance plan. Like most employment laws, GINA also prohibits employers from retaliating against employees who claim discrimination based upon the use of genetic information.

## **1. Definition Of Genetic Information**

Under GINA, "genetic information" is information gained from: 1) an individual's genetic tests; 2) genetic tests of family members; and 3) an individual's family medical history.

## **2. Specific Employer Prohibitions/Obligations**

The new law prohibits discrimination on the basis of genetic information, without regard to how the information is derived by the employer, in hiring, termination, compensation, and other personnel actions such as promotions, classifications and assignments. Thus, employers will be breaking the law if, based upon such information, they discharge or refuse to hire any applicant or employee, or otherwise discriminate against an employee with respect to employment compensation, terms, conditions, or privileges.

GINA also makes it unlawful, with some limited and clearly defined exceptions, for employers to request, require, or purchase genetic information about an employee. The exceptions are where the information is: 1) required to comply with medical certification requirements of state or federal family and medical leave laws; 2) to be used to monitor the adverse effects of hazardous workplace exposures; and 3) the employer conducts DNA analysis for law enforcement purposes as a forensic laboratory. Therefore, for example, employers will not be allowed to require employees to submit to genetic testing, although such tests may be allowed as part of a wellness program, medical monitoring as required by OSHA, or employer-sponsored medical examinations where the employer will not have access to the information.

The law also prohibits disclosure of genetic information, except: 1) upon the employee's request; 2) to an occupational or other health researcher; 3) pursuant to court order; 4) to a government official investigating compliance with this law; 5) in connection with the employee's compliance with the Family and Medical Leave Act or state family and medical leave laws; and 6) to a public health agency.

GINA also provides for genetic information received by the employer to be maintained confidentially and disclosed to the employee only.

### **3. Insurance Carrier Prohibitions**

The law also makes it illegal for insurance carriers (including self-insured employers) to discriminate against persons based upon genetic information that indicates predisposition to chronic diseases. Likewise, GINA prohibits health insurers from requesting or requiring an individual to take a genetic test. This means that health insurers may not raise premiums or deny coverage based on genetic information.

### **4. Remedies/Enforcement**

Remedies and enforcement of Title II (Employment Discrimination) under GINA are the same as those under Title VII of the 1964 Civil Rights Act, with the exception of “disparate impact” claims which are not allowed under GINA. The EEOC will enforce the employment provisions of GINA and the Department of Labor will enforce the provisions relating to health insurance.

## **D. Employee Use Of Technology**

### **1. Texting**

The law regarding what constitutes sexual harassment or other unlawful discriminatory conduct has not changed but the methods for making such inappropriate communications (texting, social networking sites) have changed. Indeed, 4.1 billion text messages are sent each day in the United States and not all of them are nice. Additionally, 46 states have enacted laws against cyberstalking. Thus, employee texting, and in particular, “textual harassment” is an emerging issue with which employers must deal.

From an employee handbook perspective, employers must implement clear written policies that limit employee texting to matters of business necessity. Additionally, the policies must make clear to employees that inappropriate text messages are no different from inappropriate face-to-face comments. Texting has the immediacy of a casual, spoken word but the permanency of an indelible document. Employees understand the first. They do not understand the second. Another option that some employers have chosen is to ban texting. Whatever position the company adopts, it should be clearly set forth in the employee handbook.

Another issue to address in the texting policy is the issue of texting while driving. Ohio does not yet ban texting while driving but Cleveland and other municipalities do. Additionally, a statewide ban is likely to occur given that 22 states currently restrict, to some degree, cell phone and texting while driving. Thus, employers must

adopt or amend written policies to explicitly ban work-related texting while driving. Otherwise, employers may face liability if an employee causes an accident while engaging in work-related texting. This is already the law in California.

Employers must also institute procedures that enable the storage and retention of text messages from company-provided phones. In cases of sexual harassment, such messages constitute “electronic messages” that are considered evidence in harassment cases, and must be retained by the employer — to support or refute the charge.

Employee handbooks should also address Fair Labor Standards Act (“FLSA”) texting concerns. In recent cases, nonexempt employees have sought wages and overtime for time spent reviewing and responding to text messages, emails and other communications received through company-issued PDAs. These cases point out the need for clear written policies regarding the use of company-issued cell phones and PDAs.

So how do you address these issues? Employers need to have a policy in place in the handbook which addresses: a) the use of technology – who (just exempts?), when, how, etc.; b) how to document those hours; c) how to confirm those hours – electronic method, copy memo to supervisor; d) consequences of non-compliance; and e) educate managers on the issue.

## **2. Social Networking Media**

Employee use of social networking media is another issue to consider in the handbook. Approximately 25% of employees ADMIT visiting during work hours, approximately 10% of employers have terminated an employee for the content of their postings to a social networking site, and approximately 50% of employers now block Facebook, MySpace and Twitter.

In preparing the handbook policies on this issue, the key components should include the following:

- Keep it personal
- No employer-related information/sponsorship (no logos, company email, etc.)
- Disclaimers as to personal viewpoint
- Confidential information is to be protected (Company and employee information)

- Reminder that information can be viewed by others, including employer
- Discipline may result

Further, employers must remember to tie in the social networking/social media policies to other policies including harassment/discrimination and acceptable use policies. Further, your current acceptable use policies are likely out of date in light of the emerging technology and will need updated.

## **VI. PROPOSED LEGISLATION TO KEEP ON THE RADAR SCREEN**

### **A. Employment Non-Discrimination Act**

The Employment Non-Discrimination Act (ENDA), is a proposed federal law that would prohibit discrimination against employees on the basis of sexual orientation. Currently, there are two versions of the bill. One bill includes protection for gender identity while the other does not. Both bills, however, cover gay, lesbian and bisexual employees and extend similar protections to such employees as those provided to other protected classes under Title VII of the Civil Rights Act of 1964. Unlike Title VII, the proposed bill contains an exemption for employer dress codes. Additionally, the bill also departs from Title VII in that it does not allow disparate impact lawsuits. It also exempts small businesses, religious organizations and the military, and does not require that domestic partner benefits be provided to the same-sex partners of employees.

#### **1. Covered Employer**

The Act would cover employers with fifteen (15) or more employees.

#### **2. Scope of Proposed Legislation**

ENDA closely tracks Title VII's protections to other protected classes with the following significant differences:

- It does not apply to religious organizations;
- It does not apply to the uniformed members of the armed forces;
- It does not allow for quotas or preferential treatment based on sexual orientation or gender identity;
- It does not allow disparate impact claims;
- It does not provide for affirmative action plans for violations of ENDA;
- It does not allow the Equal Employment Opportunity Commission to collect statistics on sexual orientation or gender identity or compel employers to collect such statistics; and

- It does not apply retroactively.

### **3. Practical Impact**

Many but not all states currently provide some form of protection against sexual orientation discrimination. Federal legislation would obviously extend such protection. Thus, if enacted, employers in states without current protection for such employees need to update their policies and handbooks. Additionally, employers in states with such protections may need to revise existing policies and handbooks to comport with any differences in the federal law.

## **B. Proposed Legislation - Federal Healthy Families Act**

The federal Healthy Families Act is a bill pending before Congress with a stated purpose to provide for paid sick leave to ensure that Americans can address their own health needs and the health needs of their families. It requires covered employers to provide a minimum paid sick leave and employment benefits of: 1) seven (7) days annually for those who work at least thirty (30) hours per week; or 2) a pro rata number of days or hours of sick leave with pay and benefits annually for employees who work less than thirty (30) but at least twenty (20) hours a week, or less than 1,500 but at least 1,000 hours per year.

### **1. Covered Employer**

The Act would cover an employer who employs fifteen (15) or more employees for each working day during each of twenty (20) or more calendar workweeks in the current or preceding calendar year.

### **2. Scope Of Sick Leave**

The Act allows employees to use such leave to meet their own medical needs or to care for the medical needs of certain family members.

## **C. Proposed Expansion Of The Family Medical Leave Act**

As discussed above, the FMLA was recently revised in key areas and new categories of military-related leave were also added. Although not yet enacted, additional changes have also been proposed. Specifically, proposals have been made to expand covered employers to those with only twenty-five (25) employees or more, expand the types of conditions that qualify for leave, expand the classification of employees who can take leave and create an insurance system to provide for paid family medical leave.

## **VII. CONCLUSION**

In short, we are in the midst of a rapidly changing business environment. Many of these changes reflect back into the human resources arena. Chances are, your existing employee handbook hasn't kept pace with these changes and likely is missing some of the newer and updated provisions that need to be added to keep compliant with the most current employment laws.

While updating the old employee handbook might not be the most glamorous thing you do all year, it is one of the most important. Don't delay. If you do, you might wind up getting a call from a plaintiff's attorney who has found a loophole in your outdated policies. Taking the preventive approach, as opposed to reactive, is always your best protection.