

Speaker 1: [inaudible]

Speaker 2: Well, welcome to the performance review. I'm your cohost Ryan Bykerk. And as usual, I'm joined by my cohost Phillip person, and we are labor and employment attorneys and partners here at Greenberg Traurig. Phillip is, uh, up in the San Francisco office and I'm down [00:00:30] here in Los Angeles

Speaker 3: And we're joined by two of our compliance and counseling specialists. We have Ellen Bandel and Vanessa Krumbain because today we're talking about handbooks and how not to shoot yourself in the leg when drafting them Ellen, Vanessa, welcome to the performance review. Thanks for having me. Thank you.

Speaker 2: Well, why don't we, why don't we get started with some introductions, Phillip, maybe, can you introduce, uh, Vanessa and I'll introduce Ellen. How about that? That's fair.

Speaker 3: Vanessa is one of our all-star employment [00:01:00] counselors in the LA office. She can do it all. She spent a long time practicing as an employment litigator, but now she focuses her practices on advising employers of all sizes on California, labor and employment pitfalls, and also regularly works on either creating or updating handbooks and stand alone policies for employers.

Speaker 2: Yeah. And I'd use, I'd use nearly all the same words to describe Ellen. So Ellen, thank you for being with us. Ellen is also just one of our all-star employment counselors here in the Los Angeles office. [00:01:30] She provides advice for union non-union employers on pretty much every aspect of employment law, both California and, and nationally. Um, I'd say she's she counsels employers on really everything from recruitment to handbooks, to developing employment policies and wage and hour compliance, uh, discipline issues, leave issues, terminations and everything in between. So Ellen, thank you so much. Uh, thank you both for sitting down with us,

Speaker 4: Looking forward to the presentation. As

Speaker 2: Phillip mentioned, we're talking about handbooks today. [00:02:00] The goal is to talk about some of the dues and some of the don'ts or since this is the performance review podcast, uh, we were trying to give our listeners tools to give their company's handbook a performance review itself, give, give employers some metrics for how to decide if your company's handbook exceeds expectations or is unsatisfactory. And

Speaker 3: We'll find out soon enough whether you guys are tough graders or easy graders. Um, but there's a temptation to think of the handbook as an afterthought, [00:02:30] but it's often the first thing a new employee sees. The first thing a dissatisfied employee will read and often is the first piece of evidence in any litigation in short, at some point someone is going to read it and when they do they'll usually read it pretty carefully.

Speaker 2: Yeah. So let's, let's start from square one. Does, does a company even need to have a handbook in the first place?

Speaker 5: Um, so I'll start with that one. Um, so there are definitely lots of advantages to having a handbook in [00:03:00] place. Um, it sets clear guidelines and expectations for both the company and the employees. Um, and it's just a really good way to get everyone on the same page at the start of the employment relationship. Um, another advantage is that a well drafted handbook is usually part of the company's arsenal of tools to defend against legal claims. So if a lawsuit does get filed at the goal is always for the company to be able to use its own handbook as its piece of evidence. Um, it's also a good way [00:03:30] to communicate certain policies and information that employers are required by California law to provide. So for example, in California, employers need to have a written lactation policy and also a policy preventing harassment, discrimination and retaliation. Um, and it's just an efficient way to provide all of these sort of necessary important policies in one place. So, you know, to answer your original question on balance, uh, yes, for most companies, it does make sense [00:04:00] to have a handbook. And more importantly, I think many employees, especially in California would even expect it,

Speaker 3: Vanessa. You're a really nice person, but when you say arsenal of tools, I kind of cringed. I was a bit scared, but moving on, I'm not going to, I'm not going to dig any further into that. I know there are some companies that don't want or don't believe in handbooks. What are some of the reasons why a company wouldn't have one? Ellen? Can [00:04:30] you answer that for me?

Speaker 4: Well, Phillip, I think, um, you, you mentioned it a little bit in your, in your introduction. I would say some employers, uh, don't feel strongly about handbooks or, or actually are, are anti because they feel that employees don't read them. So what's the point if employees don't read them. Um, but as, as you alluded to, when they do read them, that's when it becomes really important, especially if they're, they've had an employment dispute with the, with the company or they've, uh, [00:05:00] worse, they filed the lawsuit. Another issue that leads employers to, uh, dislike handbooks is that they say it doesn't fit their culture. So they will, uh, you know, in response to that, I would, I would say that that some policies are required regardless of what your culture is. Culture is not going to be a defense for you. So, um, you know, you can also draft any policy that fit your culture. So I think that, that, um, that's a, uh, not a winner either. So, um, [00:05:30] I think a third, uh, example would be employers, uh, feeling that, um, a handbook, uh, unduly restricts them in their activities. And I think that's a misconception because a good and well drafted handbook will actually give managers discretion. So I think that's, uh, no, that's just a misnomer out

Speaker 2: There. So it sounds like there's, there's a lot of that. There might be a few objections, but none of them probably at end of the day, carry enough freight to say, we're not going to do a handbook here. [00:06:00] Exactly. Yeah.

Speaker 3: And I agree with that. I don't think a, a culture defense is usually a strong defense to any loss. I've never tried it that I will now let's, let's move on to talking about some of the do's and don'ts, what are your must have policies to include in the handbook?

Speaker 5: So this is definitely a very hard list to narrow down, especially if you're an employer in California, but some of my must haves and things I'm always looking for are so [00:06:30] first at-will employment policy, this is something I think should be really prominent and probably at the start of the handbook rather than buried somewhere in the back, because it's really important because you never want your handbook to be interpreted as a contract. Um, second, you want to, uh, have some equal employment opportunity policies. So, and this includes not just an EEO policy, but also a policy on preventing harassment, discrimination and retaliation in the workplace. And in California, this is something [00:07:00] that is actually required for employers with five or more employees. And just a quick note on this type of policy, it's not enough to just have this policy. There are actually certain elements that are required by law.

Speaker 5: So when an employer is drafting it, they should really make sure that they're including whatever elements need to be included in there. Um, so just as an example, the policy should be informing employees to whom they should be reporting complaints to, um, and hopefully providing as many [00:07:30] avenues for reporting as possible. Um, the policy should also inform employees that the company is going to investigate any, um, any complaints that receives and take appropriate action and the policy should also make it clear that no retaliation will occur for bringing a complaint forward in good faith. Um, third policies I'm looking for our wage and hour policies. And what I mean by these are for example, policies on timekeeping. [00:08:00] So making sure employees know they're not allowed to work off the clock, um, a policy on overtime, which you want to identify. What's considered overtime in California, which is different than under federal law.

Speaker 5: And maybe you want to clarify if employees need approval from a manager or supervisor before they are allowed to work overtime. And you certainly want to have a meal and rest break policy, particularly for California. And you want to make sure that those policies are in line with any legal requirements. [00:08:30] And you also want to include language in handbook regarding how to report any errors in pay fourth on my list. I would say if an employer is covered under the federal family and medical leave act, you certainly want to include an overview. You need to include an overview of that law, um, as well as for any applicable state family and medical leave laws. So for example, here in California, we have the California family rights act. And that was actually recently expanded to employers [00:09:00] who have five or more employees. Um, so fifth you, I, I'm looking for a policy on record, uh, reporting work-related injuries and illnesses.

Speaker 5: Um, this type of policy puts employees on notice of their workers' compensation rights, six, uh, if your employee, if your business is subject to a state or local order, which in California, we have plenty of these. And we're all always writing blogs about definitely want to include a policy [00:09:30] on paid sick leave, um, and information about, you know, what benefits the employee is entitled to. And seven finally, you obviously want to make sure you're including any other policies that are required by law. So for example, earlier I mentioned lactation policy and this is sort of my catch all category.

Speaker 2: Okay. So, so those are some of the must haves that to do's, but as Philip mentioned, you can shoot yourself in the leg pretty badly here. So what, what are, let's maybe talk

about some of those, what are some of the pitfalls, um, [00:10:00] that to, to don't wait, I don't think people say that

Speaker 3: One shoot yourself in the leg. I

Speaker 2: Mean, I think he said that, so let's, let's talk about how to, let's talk about how you can do, uh, or, or I suppose, uh, not do that. What are the, some of the things, some of the things you want to make sure you're not putting in your handbook? Okay.

Speaker 5: So obviously you, you definitely do not want to include any unlawful policies. So if you have a policy that on its face reflects a valid violation [00:10:30] of law, even if it's just a minor wording issue, this is going to be harmful and could potentially give rise to class issues. So employers should really keep in mind that careless drafting or not reading the handbook carefully before they roll it out and be a very expensive mistake. Um, you definitely don't want the handbook to be used against you if a lawsuit does get filed. Um, so what I mean by examples of unlawful policies, these would include, um, a no fault attendance policy. [00:11:00] Uh, these are policies that penalize employees for any absences without making exceptions for any, um, absences protected by law. Another example are rules that prevent or discourage employees from engaging in protected activity. So for example, telling your hourly employees that they can't discuss their wages with one another, or report any workplace issues outside of the company.

Speaker 4: Yeah. Um, I can chime in here as well. Uh, another, [00:11:30] another type of problematic policy we see often, um, is, is what I call the boiler plate policy, which is kind of a variant of a botched copy and paste job. So that, that comes up when, you know, uh, HR representative or, or an attorney or who else, whoever is working on the handbook will, uh, pull a handbook for off internet, pull a handbook from their old place of employment and, and not tailor it all, or customize [00:12:00] it to actually reflect the operational realities of the business that they're now working in. Uh, you know, it not only, uh, it looks sloppy and employees who are actually reading it will see that it's sloppy and, uh, you know, it, it can also lead to some legal trouble if, uh, that copy and paste job results in, and kind of going back to Vanessa's point results in a policy that, uh, is unlawful as to that employer.

Speaker 4: Uh, you know, I also see stale policies, [00:12:30] uh, which makes me think of like stale old cereal. Um, no one, no one likes that, um, you know, that comes up when an employer has been avoiding a handbook update because, you know, fire drill after fire drill have come up and they just don't have the opportunity to devote the time they need to, to updating the handbook or that, you know, uh, HR personnel has, has been turning over frequently and they just don't have the, the ability to [00:13:00] invest time. So, you know, in a state like California and New York, uh, where you have really active legislatures that are constantly, um, passing and amending employment laws, uh, you really don't want to find yourself in that position because it's, it's almost inevitable that if you're not updating on a regular basis, they're going to have outdated policies or, uh, you're, you're going to be lacking policies that are imperative.

Speaker 5: And I want to add another issue that I think Ellen [00:13:30] and I always sort of cringe when we see our policies that are either too detailed or just too rigid. So for example, they don't give the company any leeway to deviate from the policy, depending on the particular circumstances of the situation. Um, so examples of these would include like progressive discipline policies. This is where the company is essentially committing that it's not going to terminate an employee without going through these various levels of discipline. Um, you know, [00:14:00] no situation is the same and there might be a situation that warrants immediate termination. So managers really need to retain that discretion. Also, another example would be a policy stating that the company is either going to respond in a certain timeframe or in a particular way. There's just no reason for a company to make these promises, unless that's actually what the law requires.

Speaker 4: Uh, I'll jump in. I got a couple more actually, um, to add because there's all sorts of, of inappropriate policies that you can have in [00:14:30] a handbook. So, um, you know, uh, policies that are theoretical, uh, and, and actually, and by that, I mean, um, not implemented or not trained on by members of management or supervisors that is really going to be problematic because like we said, occasionally employees do read the handbook. And when they, and realize that, that the company isn't doing what they set out to do in the handbook, that, again, it doesn't look good for you at best and can lead to legal [00:15:00] trouble at worst. And then another type of policy that Vanessa and I love seeing is an irrelevant policy. You know, it's sort of like for the most part, I take the approach. I don't know if Vanessa would agree with me, but, um, less is more with the handbook.

Speaker 4: We don't, we don't want it to be so bare bones, but we also don't need a 200 page handbook that is really gonna literally put every reader to sleep. So, you know, if it's not necessary, if it doesn't relate to the business, it doesn't advance the employment relationship and, and employees [00:15:30] understanding the business really. You don't need to put it in there. Um, you know, that would include, uh, standard operating procedures that belongs in its own separate category. They, they, those types of, um, documents don't belong in a handbook. Um, uh, anything that's contractual in nature, um, uh, for example, arbitration provisions, although I will just say, I don't know if anyone else on this call saw it, but, um, a court of appeals decision came out [00:16:00] recently, uh, upholding an arbitration agreement in the handbook. Am I, has anyone else seen that? Yeah. So we'll save that for another podcast, but, uh, in similar vein non-compete non-solicitation provisions do not belong, uh, in the handbook. So I almost always recommend those be taken out when I see them in the course of my reviews

Speaker 5: And Ellen. Yes. I definitely agree. The less is more approach is always the preferred approach.

Speaker 3: So [00:16:30] you two mentioned updates, let's go to Vanessa. How often do they need to be updated?

Speaker 5: Um, so I would say probably every year, um, possibly every two years, as long as you are, you know, making sure you're staying on top of the law, but the longer you wait between updates, the more there is to update and the greater, the risk of being out of

compliance for some period of time. So that's why I think a good rule of thumb is probably, you know, every year.

Speaker 3: So what about timing? When should I check my [00:17:00] calendar and realize I'm due for an update?

Speaker 4: Yeah, I'll, I'll take this one. So in, in California, I often am hearing from employers in the fall, uh, you know, August, September, October range for, uh, January, February rollout of, uh, of an updated handbook. And that usually is, uh, is ideal because it tracks the legislative session to a degree. As Vanessa mentioned earlier, the governor just passed a new law that, that, you know, pretty [00:17:30] dramatically expands the California family rights act Sephora. And so, you know, for employers who are timing their updates, uh, in the fall for a beginning of year rollout, um, the timing is perfect because, uh, you know, that is going to affect a lot of employers in California. For sure.

Speaker 3: Got it. I guess from my mind, I would say, you said August, September timeframe, that's right around when football season starts, and then you said January, that's right around when the playoffs starts. [00:18:00] So for those who need those kinds of numbers, those time markers, there you go, see,

Speaker 2: This is very helpful. So why we do this podcast is it gives you these helpful tips. I'm here to

Speaker 3: Help. So let's move on. What's the process for recommending that you recommend for updating a handbook?

Speaker 4: Yeah. I can take that unless you feel strongly, Vanessa. Um, I think, you know, it should really be a team effort between HR, um, legal, [00:18:30] you know, if you're a small enough company that HR is, and, you know, you have, uh, someone wearing multiple hats, just really whoever wears the hat of, um, managing employment issues. And in some cases you may also get your departmental managers involved because they can speak to, uh, you know, as I mentioned before, the operational realities, reflecting that in the handbook is important. So there may be times when, uh, they need to be consulted on, on some issues in the handbook. Um, [00:19:00] and you know, I, when I review a handbook, I get a lot of enjoyment out of it. I know that sounds weird and nerdy, and you guys can laugh at me cause you're the litigators and you don't get it.

Speaker 4: But, um, but I find the handbook review too often operate as a mini audit of sorts and that it often helps to bring to the surface and identify legal issues, especially if it's the first time that a lawyer, an employment lawyer has gotten an opportunity [00:19:30] to review it and in some time, so that, uh, can really be beneficial for a company because we can, you know, knit problems in the bud and make corrections and, you know, uh, so you know, that that sometimes leads to a longer handbook review, but almost always worth it. Um, and so, you know, I think regardless of, of the process, you know, working as a team is, is going to be the best way to get it across the finish line.

Speaker 3: You've heard it here first for Ellen's birthday or [00:20:00] a holiday sent her a hand plane tickets. Yeah. She'll love it. No, let's talk about the elephant in the room. What about COVID-19 should employers have anything in writing, addressing the pandemic?

Speaker 5: So I can definitely take that one is this is one of those hot, hot button topics that I've really enjoyed working on. So I, my answer to that would be yes, and in some cases it might even be required by law, [00:20:30] but even when it's not required, I think it's definitely a good idea to have a written COVID related safety policy in place, which should probably include, you know, clear instructions pertaining to case coverings, social distancing, what to expect if someone at the company gets infected. Um, any of those issues that are also, you know, potentially required by local, um, ordinances with respect to protocols that are in place. Um, and you probably also want to note any deviations [00:21:00] from your standard policies due to the pandemic. So for example, changes to how the company might be handling vacation time or holiday pay, as well as making sure to address any new supplemental paid sick leave benefits relating to COVID. Okay.

Speaker 2: So once, once you've gone through this process of either creating the, the handbook going through that kind of mini audit that Ellen mentioned or create, for example, like one of these COVID, uh, supplements or something to go [00:21:30] in, what's the best way to end up rolling out or putting into place a newer updated handbook. Do you guys have any general tips or recommendations or best practices for that?

Speaker 4: Yeah, I would say my, uh, my most important recommendation, uh, tip would be to get acknowledgements from employees. Oftentimes employers say can't, we just put it on our intranet and have employees review it. And, uh, well you can definitely put it on the intranet. It's best to have it acknowledged as well, [00:22:00] so that yes, the content of the handbook ever becomes a subject of litigation with an employee. You've got the employees acknowledgement that they've read and understood the policies in it. And again, hopefully you've got a fully compliant handbook, so you'll be in great shape. You know, you may also want to announce, uh, changes that were made. If, for example, if you roll out a handbook and, uh, create a, a richer PTO policy for your employees that provides them more time off, let them know about that, but Hey, we're giving [00:22:30] you another week of PTO. You're welcome.

Speaker 5: Um, I definitely have a couple more. You really want to give employees the opportunity to ask any questions about the new policies you're rolling out. You definitely don't want an employee saying that they didn't understand something and they had no one to ask. And also you want to consider translating the handbook. If employees don't speak English as their primary language, um, if an employee doesn't understand the handbook, then it's not going to do anyone any good. Right? [00:23:00] Makes sense. Very good points.

Speaker 3: All right. We've covered a lot of ground here. Now. It's time to sum it up for our listeners in a nice little bow. First, most of our listeners probably need a handbook. Employees will likely read it during the critical moments such as employment disputes, litigation, anything that comes up second, we covered some of the must have policies at will policy

equal employment, opportunity, policy, FMLA, Sefer overview. We [00:23:30] talked about that. Uh, we also talked about reporting for work-related injuries. I believe we talked about that. If not, we should have paid sick leave. If we did, we did. I think we did paid sick leave. Uh, what else? Wage hour issues like timekeeping over time meal and rest breaks and lactation policy. You need a re-written lactation policy. Think I caught it all. Um, but I'm going to shoot it over to Ryan just to check, to see if he's paying attention. [00:24:00] So,

Speaker 2: So I, so I was paying attention and yes, you did, uh, covered all, but, but let's talk about those pitfalls. Cause we went through those and you guys, you teed those really up, uh, up really nicely for us. So they were obviously you got to watch out for unlawful policies. We need to watch out for, for boiler plate policies that, that copy and paste job that we talked about. Stale policies are a problem. Remember, schedule your updates once a year, use Phillips sports calendar. If you need a reminder, you don't want to avoid having rigid policies. [00:24:30] You've got to make sure that there's enough discretion to do what needs to be done in a given situation. Uh, Ellen, I think mentioned theoretical policies, right? It's a great policy on paper, but nobody knows what it says. So make sure you've got your managers trained. People know what they're doing. And then finally, uh, cut out any of those irrelevant policies, uh, your contractual things, standard operating procedures, all that stuff should be separate. Let's try not to have a 200 page employment handbook that I get that right.

Speaker 4: Yeah. 300 pages is ideal, but you know, [inaudible] works [00:25:00] too.

Speaker 3: So we've talked about COVID, which we've given an unsatisfactory grade and we've talked about how employers might want to clearly state that COVID related policies are in the handbook. Now we covered the roll-outs got those handbook acknowledgements, make sure employers can understand and have an opportunity to ask those questions. I believe that covers everything. Anything else, Ryan?

Speaker 2: No, I, I, I think that covers [00:25:30] it. So it's time to put you, uh, put you on the hot seat as Phillip may have told you, one of our traditions here on the performance review podcast is to end each podcast with a wild employment story that can, of course be either from your own practice, with the names changed to protect the innocent and or guilty as the case may be, or it could be from the news or history or whatever the case may be. So when we have guests, we like to ask them to share their wild stories and you guys are our guests. So please wow. Us with your most wild employment story.

Speaker 5: [00:26:00] All right. Um, so I have one, but this was actually one that I read about, but I found it pretty entertaining. And I think it's definitely one of his cautionary tales. So apparently this employee was upset when he found out that his good friend and his colleague had been fired for essentially refusing to accept a demotion. And he was so upset. In fact that he walked into a conference room where the company's executive officers were meeting, he actually dropped his pants and moved to them. [00:26:30] Yeah. I thought this was only happening in the movies, but apparently it's in real life. Okay. So he was obviously fired, but what's less obvious is that under his employment agreement with the company, a termination for cause would result in him for fitting a



very large severance package. And when I say very large, I'm talking like three quarters of a million dollars.

Speaker 5: Um, so the company fired him and said that, no, the mooning wasn't funny. [00:27:00] And it did constitute cause so it also refused to pay him any severance. So this employee then sued the company, um, for breach of his employment agreement. But he obviously, well, maybe not so obvious, but he lost his case. And the court found that his behavior was insubordinate and that he was justly terminated for. Cause, uh, so I think, I think the moral of that story is make sure to keep your clothes on at work and also make sure you've carefully [00:27:30] reviewed, uh, your employment agreement before doing anything you might regret.

Speaker 4: I wonder if they have policy prohibiting mooning in the handbook that

Speaker 5: Something to consider, I'm going to assume they did not.

Speaker 3: I would say that's just cause for termination right there. Um, well that's, that's a great story. And like we say, our jobs are never boring. That that does it for [00:28:00] this episode of the performance review. Quick reminder that you can email us at [performancereview@gtlaw.com](mailto:performancereview@gtlaw.com) with any questions, suggestions for future topics or wild stories about somebody mooning their supervisors. But until then, thank you for listening to the performance review and we'll catch you on the next one.

Speaker 1: [inaudible].