

# The Importance of Employee Handbooks in W. Va.

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# Disclaimer

- ▶ The information and materials provided in this presentation are provided for general informational purposes only and are not intended to constitute legal or other advice or opinions on any specific matters and are not intended to replace the advice of a qualified attorney.

# What is an Employee Handbook?

- ▶ Employee Handbooks provide guidance and information related to an organization's history, mission, values, policies, procedures, and benefits in a written format.



# The Basics

- ▶ **Employee Handbooks should contain:**
  - ▶ **Employment Policies**
    - ▶ At-Will Status; Anti-Discrimination Policy/Harassment Policy; Dress Code; Standards of Conduct; etc.
  - ▶ **Administrative Policies**
    - ▶ Employee Classification; Introductory Period of Employment; Hour of Work; Attendance; Overtime; Method of Payment
  - ▶ **Leave Policies**
  - ▶ **Benefits**
    - ▶ Health Benefits; PERS; Life Insurance; Family Medical Leave Act (FMLA).
  - ▶ **Electronic / Social Media Policies**
    - ▶ Telephones; Cell phones; computer usage; internet policy; and social networking.

# Considerations



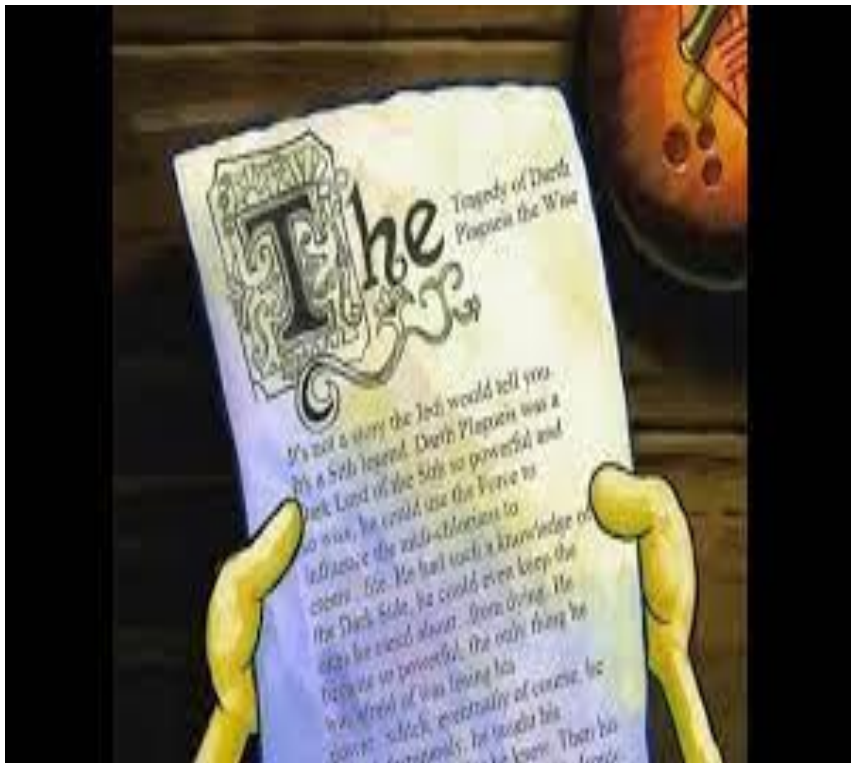
An example of a bad Employee Handbook

- ▶ Balanced Content, Concise, Easy to Read and Understand, and Accessible to All Employees.
- ▶ Make it clear that all employees are at-will.
- ▶ Review your Employee Handbook every 3 to 5 years
  - ▶ The law changes, and your needs as an employer may change!

# The Goals of a Well-Written Employee Handbook

- ▶ Effective Communication of Employer Policies and Expectations
- ▶ Ensures Consistent Enforcement of Employer Policies
- ▶ Minimize Risks and Conflicts in the Workplace

# Goal #1: Effective Communication of Employer Policies and Expectations



- ▶ Eliminates Misunderstandings About Employee Rights and Employer Legal Obligations
- ▶ Communicates Expectations for Employee Behavior and Increases Compliance Which Minimizes Liability Risk to Employer.

## Real World Example: Smith v. First Union Nat'l Bank, 202 F.3d 234 (2000)

- ▶ Employer's sexual harassment policy only prohibited: "sexual harassment, sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."



## Real World Example (cont.): Smith v. First Union Nat'l Bank, 202 F.3d 234 (2000)

- ▶ A work environment can be considered “hostile” even if employee not subjected to “sexual advances or propositions.” Id. “An employer violates Title VII when workplace is permeated with discriminatory intimidating, ridicule, and insult” which is “sufficiently severe or pervasive.” Id. (citing Harris v. Forklift Sys, Inc., 510 U.S. 17, 23 (1993)).

## Real World Example (cont.): Smith v. First Union Nat'l Bank, 202 F.3d 234 (2000)

- ▶ Female employee of a male supervisor, who alleged she was experiencing sex-based harassment from male supervisor, understood employer's policy to only prohibit conduct involving "sexual advances," and therefore, did not report harassing behavior until 7 months after conduct began. Employer's summary judgment reversed in Fourth Circuit.

# Real World Example: Why It Matters



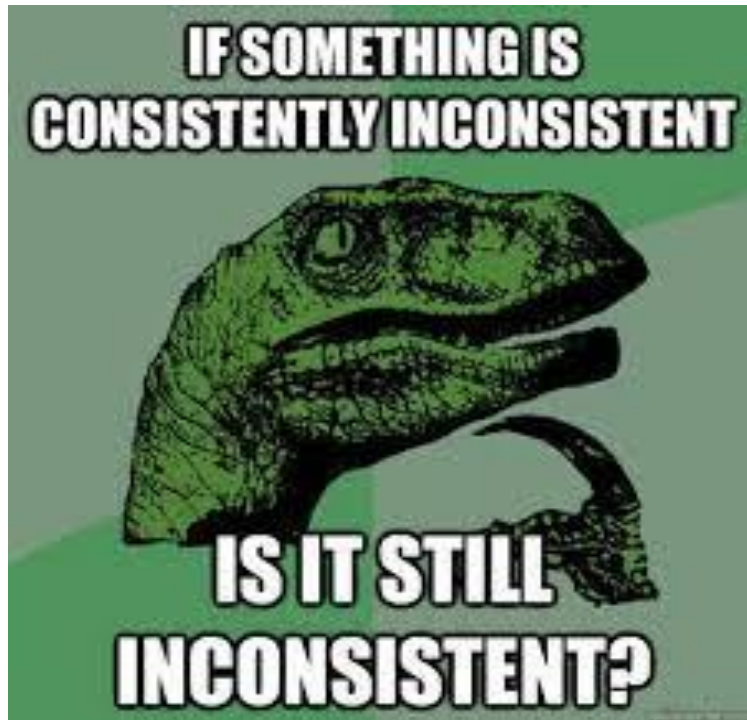
- ▶ Employer failed to properly draft sexual harassment policy based on Employer's legal obligations.
- ▶ Therefore:
  - ▶ Failed to remediate situation before Employee quit because of sex-based harassment
  - ▶ Failed to avoid costly litigation
  - ▶ Failed to win legal argument, thus increasing cost of litigation.

# How to Avoid



- ▶ Employee Handbook With:
  - ▶ Clear and Concise Language
  - ▶ Up-To-Date Information about Employer's Legal Obligations
  - ▶ Standard Procedures for Handling Employer's Legal Obligations
- ▶ The Result:
  - ▶ Employee Understands Policies
  - ▶ Resolve Situation Before Litigation
  - ▶ Protects Employer From Costly Litigation

## Goal #2: Ensures Consistent Enforcement of Employer Policies



- ▶ An Employee Handbook:
  - ▶ Identifies Replicable Procedures For Employer
  - ▶ Communicates Those Procedures To Employee
  - ▶ When Procedures Are Followed, Legal Obligations Are More Likely To Be Met and Employee's Expectations Are Fulfilled

## Real World Example: EEOC v. Kohler, Co., 335 F.3d 766 (8th Cir. 2003)

- ▶ Plaintiff, who was African-American, was supposed to work from 7:00 a.m. until 3:30 p.m. However, Plaintiff decided to begin clocking in at 6:00 a.m. and clocking out at 2:30 p.m. because other Employees did it as well.
- ▶ Employer's policy did not permit this without a manager's authorization; however, both employer and employees were "inconsistent" and "unclear" about the policy over a series of years.

## Real World Example: EEOC v. Kohler, Co., 335 F.3d 766 (8th Cir. 2003)

- ▶ Plaintiff, who was African-American, was supposed to work from 7:00 a.m. Plaintiff was terminated for violating Employer's Clock-In Policy.
- ▶ Plaintiff pointed to three white Employees who did the same thing, at the same time period as Plaintiff. The Employer refused investigate or punish the other employees but were aware that other employees had violated the policy previously.

## Real World Example: EEOC v. Kohler, Co., 335 F.3d 766 (8th Cir. 2003)

- ▶ Disparate treatment is defined as “intentional discrimination” on the basis of a protected class.
- ▶ Once a Plaintiff can show they are a member of a protected class and have been treated differently than other employees, a court may find an Employer’s reason for terminating Plaintiff was *pretextual*. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).



## Real World Example: EEOC v. Kohler, Co., 335 F.3d 766 (8th Cir. 2003)

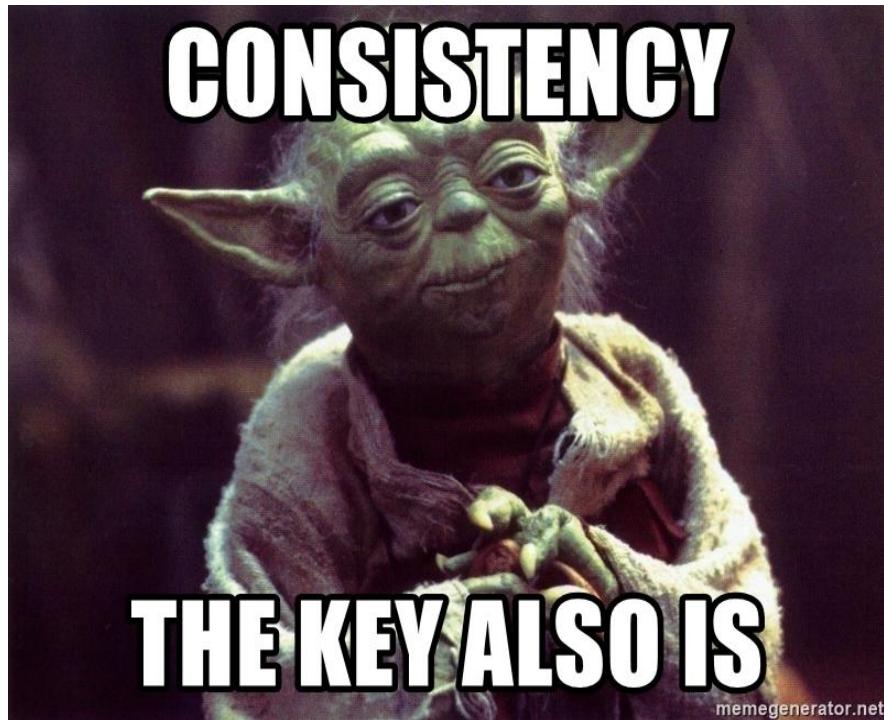
- ▶ Here, Plaintiff showed three white employees violated the same rule as him, but those employees were treated differently by Employer. This allowed a jury to infer that the Employer's reasons for termination (i.e., the clock-in time) were *pretextual*. Therefore, Employer incurred substantial legal liability.
- ▶ Even if Employer did not **intend** to treat Employees differently, the jury could infer malicious conduct because Employer did not uniformly enforce its own policies.

# Real World Example: Why It Matters



- ▶ The Employer Failed To Properly and Uniformly Enforce Disciplinary Policies. Therefore,
  - ▶ Terminated One Employee For Rule Violation That Other Employees Had Violated.
  - ▶ Failed to Prevent Costly Litigation
  - ▶ Failed to Win Legal Argument, Thus Adding to Cost of Litigation

# How To Avoid



- ▶ Draft Employee Handbook With Replicable Standards Which Are Easy to Follow
- ▶ Use As Guide To Handle Difficult Situations Involving Employees
- ▶ Treat All Employees Similarly To Avoid The Risk of Litigation

# Goal #3: Minimize Risks and Conflicts in the Workplace



- ▶ Ensure That Handbook Clarifies “At-Will Status”
- ▶ Can ensure that a page acknowledges the receipt and understanding of Employer policies and procedures
- ▶ Acts as a guidance to handle workplace conflicts, leave requests, and other employer needs

# Importance of “At-Will” Statement

- ▶ “An employee handbook may form the basis of a unilateral contract if there is a definite promise therein by the employer not to discharge covered employees except for specified reasons.” Syl. Pt. 3, Suter v. Harsco Corp., 184 W. Va. 734 (1991).
- ▶ “An employer may protect itself from being bound by statements made in an employee handbook by having each prospective employee acknowledge in his [or her] employment application that the employment is for no definite period and by providing in the employment handbook that the handbook’s provisions are not exclusive. Syl. Pt. 4, Suter v. Harsco Corp., 184 W. Va. 734 (1991).

## Importance of “At-Will” Statement (cont.)

- ▶ “An employer may protect itself from being bound by any and all statements in an employee handbook by placing a clear and prominent disclaimer to that effect in the handbook itself.” Syl. Pt. 5, Suter v. Harsco Corp., 184 W. Va. 734 (1991).
- ▶ “I UNDERSTAND AND AGREE THAT, IF HIRED, MY EMPLOYMENT IS FOR NO DEFINITE PERIOD AND MAY, REGARDLESS OF THE DATE OF PAYMENT OF MY WAGES AND SALARY, BE TERMINATED AT ANY TIME WITHOUT ANY PRIOR NOTICE.” Suter v. Harsco Corp., 184 W. Va. 734, 736 (1991).



# Cons of Employee Handbooks

- ▶ The Existence of a Handbook Can Create an Implied Contract of Employment In Certain Circumstances, Thus Displacing The Employee's Status As An At-Will Employee.
- ▶ A Handbook Can Reduce Flexibility and Discretion As A Handbook Can Be Used Against An Employer When The Employer Fails to Follow Its Own Policies Set Forth In Its Handbook.
- ▶ A Handbook Cannot Conceivably Address Every Situation Which An Employer May Face.

# Other Statements to Attempt Limiting Future Liability

- ▶ “These Policies Are Not Exhaustive.”
- ▶ “Policies May Be Changed At Any Time.”
- ▶ “This Handbook is Meant To Be Interpreted as Guidelines Only.”
- ▶ “Oral Statements Do Not Modify These Policies.”
- ▶ “This Version Supersedes All Prior Policies.”



# Questions?

