603 The Employee Manual: No Policy is Not Good Policy

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Faculty Biographies

Paulette Brown

Paulette Brown is a partner with Duane, Morris, Hecksher, LLP in Newark New Jersey, where she handles employment litigation.

Prior to her current position, Ms. Brown was a founding partner of Brown & Childress, LLC. She also served as a Judge of the Municipal Court, City of Plainfield, New Jersey and was deputy counsel of the Essex County Board of Chosen Freeholders. She has served as adjunct professor of law at Rutgers Law School. Ms. Brown began her legal career serving as corporate counsel for organizations including the National Steel Corporation, Prudential Insurance Company of America, Inc., and Buck Consultants, Inc.

Ms. Brown has served the ABA as committee chair of the Litigation Section House of Delegates, as division director of the Section of Litigation, as a member of the House of Delegates, and as chair of the Council on Racial and Ethnic Justice. She has served the National Bar Association as president, chair of the International Meeting, and chair of the Issues and Resolutions Committee. She is a member of the New Jersey State Bar Association and the Garden State Bar Association. She was president of the Association of Black Women Lawyers of New Jersey and master of the Willard Heckel Inn of the American Inns of Court. She has also served on the New Jersey Supreme Court Committee on Minority Concerns and the Third Circuit Task Force On Equal Treatment In The Courts.

Ms. Brown also volunteers her time on the board of directors of the YWCA of Plainfield and North Plainfield and for the Lawyers Volunteer Project, Essex/Newark Legal Services. She is a recipient of the National Bar Association's "Equal Justice" award and the New Jersey State Bar Foundation's Medal of Honor.

Ms. Brown is a certified federal mediator. She received a BA from Howard University and a JD from Seton Hall University School of Law.

Diane J. Geller

Diane J. Geller is a partner at Ruden, McClosky, Smith, Schuster & Russell, P.A. in Ft. Lauderdale, Florida. A member of the firm's Corporate and Finance Practice Group and Labor and Employment Law Practice Group, Ms. Geller concentrates her practice in those issues which routinely affect the business owner-–contract negotiations, employment matters, receivables financing, subcontractor issues, franchise law issues, and general corporate matters.

For over eight years prior to joining the firm, Ms. Geller served as general counsel for a large publicly traded company in the staffing and funding industry which provided a variety of employment services to more than 65,000 people nationally. As general counsel, she supervised all legal and risk management functions of the company including all corporate and employment law matters, workers' compensation insurance issues, and all questions relating to the funding of independent staffing services

Ms. Geller is a member of the Florida, New York, and Tennessee Bars. She is also a member of the board of directors of the Children's Home Society of Palm Beach County, Florida Staffing Services Association, and the Ft. Lauderdale Chamber of Commerce.

Ms. Geller received her BA *summa cum laude* from Long Island University, C.W. Post Center and received her JD from Hofstra University School of Law.

Michael J. Harrison
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Evett L. Simmons

Evett L. Simmons is a partner in the law firm of Ruden, McClosky, Smith, Schuster & Russell, PA. Her responsibilities include probate, guardianships, real estate, and public finance.

Ms. Simmons is the 58th president of the National Bar Association, which is primarily comprised of a network of more than 20,000 African-American lawyers, judges, law professors, and law students. She is a fellow of the American Bar Foundation and a member of the ABA, where she serves on the Committee on State Justice Initiatives and the Committee on Diversity in the Profession. She is also a member of the American Law Institute.

Ms. Simmons has been honored with the "Mercer University School of Law Alumni of the Year" award, the Florida Southern College Alumni Achievement Citation, the "Council on Legal Education Alumni of the Year" award, the "St. Lucie County United Way Volunteer of the Year" award, and the "Florida Bar 19th Judicial Circuit Pro Bono" award.

Ms. Simmons is a graduate of Florida Southern College and Mercer University's School of Law. She is the recipient of an honorary doctorate of law degree at Suffolk University in Boston.

Drafting Employee Handbooks

Prepared by

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DRAFTING EMPLOYEE HANDBOOKS

I. INTRODUCTION

A. In General

Employee handbooks and other written personnel policies have traditionally been an easy and effective way to communicate with employees. Recently, however, the courts have recognized that employee handbooks are a two-way street. An employer may legitimately expect its employees to conduct themselves in accordance with the handbook but, likewise, an employee may reasonably rely on the employer's representations in the manual. The reasons for having an employee handbook still remain valid, but an employer must be conscious of the unintended consequences which can come from drafting and distributing employee handbooks.

B. Purpose of Employee Handbooks

Handbooks are an important part of an overall employer-employee communications program. Communication is essential to an employer-employee relationship.

Handbooks help ensure that employees understand what their role is and what is expected of them. At a minimum, the handbook should take away from the employee any excuse for not understanding his or her obligations to the company. This element of "notice" is particularly important in defending employment decisions which are subject to review and investigation by agencies such as the Equal Employment Opportunity Commission, State Human Relations or Civil Rights Commissions, the National Labor Relations Board or the Department of Labor.

Handbooks provide guidance for supervisors in handling day-to-day problems.

Uniform policies reduce the risks of uneven treatment, which is especially important in employment discrimination cases.

Handbooks can also be an important factor in maintaining a union-free work force. If done properly, a handbook can succeed in giving employees security without a union. In the event employees are organized, a detailed handbook often sets the stage for negotiation of the first union contract.

C. Problems With Handbooks

A well-drafted handbook creates two sets of expectations: one for the employer and one for the employees. If expectations are not met or the employer does not follow its own handbook, it will look suspicious not only to employees but also to government agencies which may be investigating a particular employment practice. Further, the expectations created by the handbook may prove to be difficult to change if change becomes necessary.

If an employer rather routinely ignores or fails to meet the commitments made in the handbook, it makes the employee an easier target for unions and it makes it more difficult for the employer to explain to its employees why a union is unnecessary.

II. CREATING A CONTRACT

A. Legal Consequences of Handbooks

The most serious downside risk created by employee handbooks is the possibility that it will create enforceable contractual obligations between an employer and its employees. As a general rule, employment is presumed to be "at will" meaning that either party can terminate the relationship at any time for any reason or even for no reason.[1] A handbook should be drafted to ensure that an employee's "at-will" status is not altered.

B. Ways To Reduce The Legal Risks

Do not show corporate policies or handbooks to applicants or to employees at the time of hiring. This eliminates an employee's argument that he or she relied on certain representations in the handbook when he or she accepted the job.

Avoid gratuitous remarks to applicants about job security.

Be sure application forms, handbooks and policies are consistent and cross-referenced.

Include a **disclaimer** in the handbook explaining that the handbook does not create a contract and preserving the company's rights with regard to interpreting, revising and following the manual.

i. As a general rule, the disclaimer should be:

- part of the employee handbook;
- displayed prominently;
- in clear and simple terms; and

- v an affirmation of an employee's at-will status.

ii. An example of a disclaimer is as follows:

> "This Manual is not intended to, nor does it, constitute a contract of employment or a promise or guarantee of benefits or policies stated in it. Despite any provisions of this manual, employment remains at-will at all times. As the Company considers it appropriate, changes or exceptions may be made to the provisions of this Manual at any time, with or without prior notice. It is to be expected that there will be variations in the interpretation and application of these provisions by management in individual circumstances. The Company remains the final authority as to the proper interpretation and application of the provisions of this Manual. Deviations from its provisions by management personnel may be authorized, or subsequently ratified, by the Company as it deems appropriate."

iii. In drafting the disclaimer, employers should be careful to consult state law requirements for making an effective disclaimer. In New Jersey, for example, the courts have specifically held that an effective disclaimer must be strong, straightforward, clear and unambiguous and must specifically state that notwithstanding any provisions contained in the manual, the employer remains free to fire employees at will.

Also, include an "**at-will**" **statement** that makes clear that employment is at will and that either party, the employer or the employee, can end the employment relationship at any time. An example of an at-will statement follows:

> "Employment with the Company is "at will" and will last so long as both the employee and the Company choose to continue the relationship without limitation on either party. While we ask for reasonable notice, the employee may terminate the relationship at any time, for any reason, with or without notice, and the Company retains the similar right. Nothing said or written, now or in the future, is to be interpreted to the contrary. No officer, supervisor, employee or representative of the Company has authority to enter into any agreement for employment for any specified period of time, or to make any agreement contrary to the foregoing."

III. KEY ELEMENTS OF AN EMPLOYEE HANDBOOK

A. Handbook Introduction

B. Personnel Policies and Practices

1. At-Will Statement and Disclaimer

As discussed above, it is important for a handbook to contain a statement as to the nature of the employment relationship and, specifically, that employment is at will. (*See* sample at-will statement above). Along the same lines, it is essential that the handbook contain a disclaimer that prominently states that the handbook is not intended to, and does not, create a contract. (*See* sample disclaimer above).

2. EEO Policy Statement

An equal employment opportunity ("EEO") policy statement should be included in the handbook. The statement should affirm that the employer is committed to complying with federal and state law and will not illegally discriminate against an employee in the terms and conditions of his or her employment. A sample EEO policy statement follows:

> "The Company provides equal employment opportunity to all employees and applicants regardless of a person's race, religion, color, sex, age, national origin, medical condition, marital status, sexual orientation, veteran status, disability, or any other legally protected status.
>
> This policy applies to all conditions of employment including, but not limited to, recruitment, selection, placement, transfer, promotion, training, compensation, benefits and termination. All decisions regarding conditions of employment must be based on the individual's overall qualifications and his or her ability to meet the requirements of the position.
>
> Employees with disabilities shall be provided with reasonable accommodation, except where such accommodation would cause the Company undue hardship. We invite employees with disabilities which require reasonable accommodation to inform Human Resources of their need for such reasonable accommodation. The Company will use its utmost discretion in keeping such information confidential."

C. CONFIDENTIALITY PROVISIONS IN EMPLOYEE HANDBOOK

1. Revise Employee Handbook

Employee handbooks should be revised if necessary, to include provisions explaining the importance of confidentiality and non-disclosure. Handbooks should lay out the various policies and procedures implemented by the company to accomplish this goal.

2. Discipline and Discharge

Sections in the employee handbook dealing with discipline and discharge should be revised to included mention of unauthorized disclosure of confidential or trade secret information.

3. Respect for Trade Secrets of Others

Employees should be informed that they have a duty to keep their employer's secret information confidential, and that employees should respect the trade secrets of others.

SAMPLE LANGUAGE

HARASSMENT POLICY

Prohibition of Sexual and Discriminatory Harassment

[Name of Company] provides a working environment free from any form of sexual or discriminatory harassment. Each individual has the right to work in an environment which promotes equal opportunities and prohibits discriminatory practices, including sexual harassment.

Specifically, [Name of Company] expressly prohibits any form of unlawful employee harassment based on sex, race, color, religion, national origin, age, disability, marital status or veteran status. Sexual harassment and other forms of discriminatory harassment are unacceptable conduct, whether in [Name of Company]'s offices or in other work-related settings, and will not be tolerated by the Company. Discrimatory harassment in the workplace is also prohibited by law.

Definition and Examples of Sexual Harassment

For the purpose of this policy, the term "sexual harassment" includes any unwelcome or unwanted sexual attention, sexual advances, requests for sexual favors, and other verbal, visual, or physical conduct of a sexual nature or other offensive behavior directed toward an employee because of or on account of his or her gender, whether by a person of the opposite or same gender, when:

1. submission to or rejection of such conduct by an individual is used as a basis or factor in decisions affecting the terms or conditions of employment of any individual; **or**

2. submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; **or**

3. such conduct has the purpose or effect of unreasonably interfering with an individual's work performance; **or**

4. such conduct creates an intimidating, hostile or offensive work environment.

Examples of the types of conduct that constitute sexual harassment include, but are not limited to: threatening adverse employment actions if sexual favors are not granted; unwanted and unnecessary physical contact; demands for sexual favors in exchange for favorable treatment or continued employment; display of pornographic material; excessively offensive remarks, including unwelcome graphic or suggestive comments about an individual's body, appearance or dress, obscene jokes or other inappropriate use of sexually explicit or offensive language; the display in the workplace of sexually suggestive objects or pictures which create an intimidating or hostile work environment; unwelcome sexual advances if condoned, explicitly or implicitly, by the

Company; and other unwelcome and unwanted conduct of a sexual nature, such as leering, name calling and sexual innuendos.

Coverage

This policy covers all employees without exception. All who work at [Name of Company] are responsible for ensuring that the workplace is free from all forms of discriminatory harassment. [Name of Company] will not tolerate, condone or allow discriminatory harassment, whether engaged in by fellow employees, supervisors, managers, customers, vendors or other non-employees who conduct business with [Name of Company]. We encourage the reporting of all incidents of harassment, regardless of who the offender may be.

Open-Door Complaint Procedure

While [Name of Company] encourages individuals who are being harassed to firmly and promptly notify the offender that his or her behavior is unwelcome, [Name of Company] also recognizes that power and status disparities between an alleged harasser and a target may make such confrontation extremely difficult. In the event that such informal, direct communication between individuals is either ineffective or too difficult, the following steps should be followed in reporting a harassment complaint.

If you have been subjected to sexual harassment or experience any other job-related harassment based on your race, color, religion, national origin, age, disability, marital status or veteran status, or believe you have been treated in an unlawful, discriminatory manner, or have been retaliated against for making a report of harassment or discrimination or for providing information concerning an act of harassment or discrimination, whether by a co-worker, superior, client or vendor of [Name of Company] or other non-employee who conducts business with [Name of Company], promptly report the incident, either verbally or in writing, to your department manager. In the event you feel uncomfortable for any reason with discussing such matter with your department manager, or in the event you are not satisfied after bringing the matter to the attention of your department manager, promptly report it directly to the Human Resources Manager, President or Vice President of the Company.

All reports of harassment will be reduced to writing by the person receiving the complaint and signed by the complainant. The full and complete cooperation of the complainant is vitally necessary for the prompt and effective investigation and remediation of all harassment, discrimination or retaliation complaints.

[Name of Company], under the direction of its President, Vice President, Human Resources Manager or other senior management official, will investigate all allegations of discriminatory harassment in as thorough, prompt, and confidential a manner as is reasonably possible. [Name of Company] will undertake all investigations with due regard to the privacy of all parties involved consistent with a thorough and appropriate investigation. Where necessary, [Name of Company] will engage a lawyer or consultant to investigate the complaint and provide guidance in handling the matter.

Resolving the Complaint

Upon completing the investigation of a harassment complaint, [Name of Company] will communicate its findings and intended action to the complainant and alleged harasser. If [Name of Company] determines that an employee is guilty of harassing another individual, appropriate disciplinary action will be taken, commensurate with [Name of Company]'s judgment as to the seriousness of the particular offense, up to and including termination of employment. Disciplinary action may include one or more of the following: a verbal and written reprimand; referral to counseling; withholding of a promotion; reassignment; temporary suspension without pay; financial penalties; and termination.

Although [Name of Company]'s ability to discipline a non-employee harasser is limited by the degree of control, if any, that [Name of Company] has over the alleged harasser, any employee who has been subjected to work-related discriminatory harassment by a non-employee should file a complaint and be assured that appropriate action will be taken.

Retaliation Prohibited

[Name of Company] will not in any way retaliate against an individual who makes a report of harassment or discrimination or provides information concerning an act of harassment or discrimination, nor permit any other employee to do so. Retaliation is a **serious** violation of this policy and should be reported immediately. Any person found to have retaliated against another individual for reporting harassment will be subject to appropriate sanctions, including all of the same disciplinary actions noted above for harassment offenders. If you believe you have been subject to any acts of retaliation or threatened with retaliation, you should promptly report the same pursuant to the open-door complaint procedure outlined in this Policy.

APPENDIX "B"

EMPLOYEE HANDBOOK CONFIDENTIALITY PROVISION
[To Be Inserted In Employee Handbook]

"What Are Trade Secrets?"

What is a "trade secret," and what makes it valuable property of _____ Company? A trade secret is confidential information known only to the Company and to those of its employees entrusted to use it. It is not necessary that confidential information be patentable or copyrightable, although it may also be. Trade secrets give _____ Company the opportunity to obtain a competitive advantage over our competitors who do not have the information we have or, if they do, do not know how to use it.

The following are examples of trade secrets owned by _____ Company:

- Customer, supplier, and vendor lists;
- Research and development information;
- All financial information pertaining to pricing, sales, profits, rebates, discounts, etc.; and
- Distribution processes, sources of materials, and inventories.

How to Protect Company Trade Secrets

Since trade secrets must be kept secret, stringent filing of documents containing trade secret information must be adhered to. Never leave trade secret material lying open on your desk, specially after hours. Always file trade secret information into your file cabinet or desk. Material marked "Confidential" are to be filed in a locked file cabinet designated for such use. Secure all computers containing trade secrets with suitable passwords, codes, and, if possible, use encryption software to encode the secret information.

Copies of documents not to be filed are to be destroyed. Several shredders are available in central locations. All documents, whether or not they contain trade secrets, are to be shredded.

How to Handle Visitors

Outside persons frequently visit _____ Company. They include vendors, repair persons, suppliers, manufacturers' representatives, sales personnel, advertising agents, and outside support persons. All visits are to be strictly monitored.

_ Each visitor shall complete the Visitor Log at the reception desk. This will show the time of the visit, the person being visited, and the purpose of the visit.

_ Each visitor shall also sign a Visitor Confidentiality Agreement, which will be given to and preserved by the receptionist.

_ Each visitor shall wear a Visitor's Badge given by the receptionist to wear while on the premises of _____ Company.

_ Visitors are not allowed to wander around the premises unescorted. An employee shall meet each visitor at the reception desk and guide the visitor to the employee's office or meeting room. After the visit, the employee will accompany the visitor back to the reception desk.

_ Employees shall not give any visitor more information than is strictly necessary for purposes of the visit.

PURPOSE OF EMPLOYEE HANDBOOKS

- Communication
- Notice to employees about what is expected of them
- Guidance for supervisors
- Reduce risks of uneven treatment
- Employee security

REDUCING THE LEGAL RISKS

- Do not show handbooks to applicants
- Avoid remarks about job security
- Keep application forms, handbooks, and policies consistent
- Include a disclaimer
  - Display it prominently
  - Make it clear
  - State that handbook does not create a contract
  - Affirm employment at-will
  - Reserve right to make changes
  - Reserve right to deviate from terms of manual
- Include an at-will statement
  - State that either party can end relationship at any time
  - Nothing said or written is to be interpreted to the contrary

HANDBOOK INTRODUCTION

_ Provide a friendly welcome

_ Build employee commitment and loyalty

_ Provide a company history

_ Give information about structure and organization

_ Explain company philosophy

_ Describe business plans

_ Do not make representations that will bind the company

EEO POLICY STATEMENT

_ Consult state and local law for "protected classes"

_ Affirm commitment to no discrimination

_ Invite employees with disabilities to request reasonable accommodations

_ In carrying out EEO Policy:

- Be uniform
- Base decisions on individual qualifications
- Keep information confidential
- Document decisions

WORK PLACE HARASSMENT

_ Unlawful Harassment

_ Definitions and Examples of Sexual Harassment

_ Other types of Harassment (including ADA)

_ Complaint Procedure

_ No retaliation

CONFIDENTIALITY/EXPORT ISSUES

_ Agreements

_ Discharge

- Exit Interview
- Signed Acknowledgment
- Return Of All Materials/Documents
- Follow-up Letter to Former Employee

_ Controlled Access to Worksite

_ Office Security

_ Legitimate Business Interests

DISCIPLINE & DISCHARGE

_ Establish standard for employees

_ Establish guidelines for supervisors

_ Uniformly enforce policy

_ Avoid terms like "for cause" or "just cause"

_ Affirm at-will status

_ Be flexible in discipline procedures

_ Reserve right to go right to termination

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The Employee Manual: No Policy is Not Good Policy

Confidentiality and Non-Compete Agreements
The Federal Family Medical Leave Act – An Overview
and
Drafting Settlement and Separation Agreements for Former Employees

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CONFIDENTIALITY AND NON-COMPETE AGREEMENTS

Good employees are difficult to find. Losing a valued employee to a competitor or to start his own business is often one of the most troubling situations many companies face today. Is there any way to protect your company from such desertion? Probably not, but being aware of the legal measures available to you may be your best defense.

However, prior to implementing a policy requiring employees to sign restrictive covenant agreements, in addition to legal concerns, the company should consider business factors. These include employee morale, and the ability to attract employees who already have significant experience in the company's field.

Many firms require that employees sign an agreement acknowledging their obligations to the firm during their employment which includes a post-employment, non-compete covenant. Often the non-compete covenant is enhanced by a non-solicitationagreement. These agreements attempt to prohibit the employee from working at a job or in a position which competes with his present employer, and from approaching his employer's customers/clients for the purpose of soliciting business, and/or persuading other employees to leave the firm's employ. In theory, this agreement helps protect the employer from a loss of future income, confidential company information and proprietary property, (i.e. trade secrets) not covered by a patent. In reality, this agreement may not provide any safeguard at all.

There is no federal law governing non-compete agreements and an analysis of the enforceability of such contracts needs to be done on a state by state basis. Some states hold non-compete agreements illegal (i.e. IL), and yet others recognize and enforce them (i.e. NC). Generally, in those states where non-compete agreements *are* enforceable, the Agreement must be:

- incident to an employment relationship
- reasonably necessary for the protection of the employer; and
- reasonably limited in duration and geographic scope

The question of what constitutes employment differs from state to state. Some (i.e. SD) hold that acceptance of employment is sufficient consideration for the covenant. Others hold that there must be a formal employment agreement and independent consideration for the covenant (i.e. TX).

The issue of an employer's reasonable protection is also a state by state decision. Some states like Kansas make it clear that they will not protect the employer from ordinary competition. The rule limiting an employee in geographic scope or duration from soliciting business is also subject to state statute interpretation.

Clearly there is no simple solution to the problem. There are suggestions.

1. Determine exactly what your state permits.

2. Consider obtaining a non-solicitation and confidentiality agreement from every employee. These agreements will assist you in protecting proprietary information including your base of employees (supplemental and regular) and your current clients.

3. Make it company policy to send a letter signed by an official of the company reminding the employee of the non-compete or non-solicitation agreement that they signed, and reminding them of their obligations.

Even in states where the enforceabilityof a non-compete or non-solicitationagreement is not ensured (as long as it is not illegal), a signed agreement to former employees along with a reminder letter stating their obligations may serve as a deterrent by reminding them of the potential liability they may have if the company seeks to enforce the agreement.

Sample Confidentiality and Non-Compete Language – (used in Florida)

The following language is generic and may not comply with the laws of all states and may not be appropriate for, or sufficient to, protect the interests of your company. This language should be used only as a guideline and you should consult the local laws, statutes, regulations and case law prior to using the language.

"Confidential Information and Competition.

A. Employee hereby acknowledges that he/she will or may be making use of, acquiring and adding to confidential information of a special and unique nature and value affecting and relating to the Company and its operations, including, but not limited to, the Company's Business, the identity of the Company's customers and suppliers, the names, addresses and phone numbers of representatives and employees, mailing lists, computer runoffs, financial information, prices paid by the Company for inventory, selling prices of the Company's products, its business practices, marketing strategies, expansion plans, the Company's contracts, business records and other records, the Company's trade secrets, formulas, inventions, techniques used in the Company's Business, know-how and technologies, whether or not patentable, and other similar information relating to the Company and the Company's Business (all the foregoing regardless of whether same was known to Employee prior to the date hereof or is or becomes known to third parties is hereinafter referred to collectively as "Confidential Information"), all of which provides Company with a competitive advantage and none of which is readily available except to authorized representatives, agents and employees of Company. The Employee further recognizes and acknowledges that all Confidential Information is the exclusive property of the Company, is material and confidential, and greatly affects the goodwill and effective and successful conduct of the Company's Business. Accordingly, Employee hereby covenants and agrees that he/she will use the Confidential Information only for the benefit of the Company and shall not at any time, directly or indirectly, during the term of this Agreement or afterward, divulge, reveal or communicate any Confidential Information to any person, firm, corporation or

entity whatsoever, or use any Confidential Information for his/her own benefit or for the benefit of others, including without limitation the solicitation of any employees, agents, representatives, consultants or suppliers of the Company or its successors and assigns. Confidential Information shall not include information that is, or becomes, generally available to the public through no violation of this Agreement by Employee, or which is generally known within the industry.

For purposes of this Agreement, the Employee agrees that the fact the Employee had prior knowledge of a particular item of information encompassed within the Confidential Information, whether the same is or becomes generally known to the public, shall not permit the disclosure or use thereof, except as permitted in this Agreement.

B. Employee recognizes and acknowledges that the Company's Business is built upon the confidence of the customers and that all goodwill arising out of the Employee's acquaintances with customers shall be the sole and exclusive property of the Company.

C. Employee hereby acknowledges and agrees that the Company would suffer irreparable injury if Employee solicits representatives, contractors, employees, suppliers or consultants of the Company, diverts business from the Company, or solicits or accepts business from clients, customers, or vendors of the Company. As a material inducement to the Company to enter into this Agreement, and employ or continue to employ Employee, Employee hereby covenants and agrees that, unless the Company and its successors and assigns shall cease to engage in the Company's Business, during the period beginning on the date hereof and continuing until _____*(insert months, years)* following the date of the termination of this Agreement, for any reason whatsoever, he/she shall not within the _____ (*insert territory)*:

(i) directly or indirectly, operate, organize, maintain, establish, manage, own, participate in, or in any manner whatsoever, individually or through any corporation, firm or organization of which he/she shall be affiliated in any manner whatsoever, have any interest in, whether as owner, operator, partner, stockholder, director, trustee, officer, lender, representative, employee, principal, agent, consultant or otherwise, any other business or venture anywhere, that is in direct competition with the Company or the Company's Business, unless such activity shall have been previously agreed to in writing by the Company or its successors and assigns;

(ii) directly or indirectly, divert business from the Company or its successors or assigns, or solicit business from, accept business from, divert the business of, or attempt to convert to other methods of using the same or similar services as are provided by the Company, any client, customer, vender or account of the Company; or

(iii) directly or indirectly, solicit for employment, employ or otherwise engage the services of, any representatives, contractors, employees, distributors or consultants of the Company or its successors or assigns.

D. In view of the irreparable harm and damage that would result to the Company as a

result of a breach by the Employee of the covenants in this Section ___, and in view of the lack of an adequate remedy at law to compensate the Company for such harm and damage in the event of a breach or threatened breach by the Employee of those covenants, the Company shall have the right to receive, and the Employee hereby consents to the issuance of, temporary and permanent injunctions enjoining the Employee from any violation of said covenants. In the event that a bond or other undertaking is required of the Company in connection with the issuance of a temporary injunction, the Employee agrees that such bond or undertaking shall not exceed One Thousand Dollars ($1,000.00), which sum is hereby agreed to be sufficient to compensate the Employee for all damages that may result from the wrongful issuance of such temporary injunctive relief.

E. The provisions of this Section ____ shall be enforceable in law and in equity notwithstanding the existence of any claim or cause of action by the Employee against the Company whether predicated on this Agreement or otherwise.

F. The Employee has carefully read and considered the provisions of this Section ___ and, having done so, agrees that the restrictions set forth in such Section are fair and reasonable and are reasonably required for the protection of the legitimate business interests of the Company. In the event that a court of competent jurisdiction shall determine that any of the foregoing restrictions are unenforceable, the parties hereto agree that it is their desire that such court substitute an enforceable restriction in place of any restriction deemed unenforceable, and that the substituted restriction be deemed incorporated herein and enforceable against the Employee. It is the intent of the parties hereto that the court, in determining any such enforceable substituted restriction, recognize that it is their intent that the foregoing restrictions be imposed and maintained to the greatest extent possible. The foregoing shall not be interpreted to limit any party's rights to appeal.

G. The obligations of the Employee under this Section ___ shall survive the expiration or termination of this Agreement for any reason.

H. The Company's failure or refusal to enforce any of the terms contained in this Agreement against any other employee or former employee, for any reason, shall not constitute a defense to the enforcement of this Agreement against Employee."

THE FEDERAL FAMILY MEDICAL LEAVE ACT – AN OVERVIEW

According to the Department of Labor Final Rule implementing the Family Medical Leave Act ("FMLA), the "FMLA is intended to allow employees to balance their work and family life by taking reasonable unpaid leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition. The Act is intended to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity. It was intended that the Act accomplish these purposes in a manner that accommodates the

legitimate interests of employers, and in a manner consistent with the Equal Protection Clause of the 14th Amendment in minimizing the potential for employment discrimination on the basis of sex, while promoting equal employment opportunity for men and women."

The Act defines an employer covered by FMLA as any person engaged in commerce or in any industry or activity affecting commerce, who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. Employers covered by FMLA also include any person acting, directly or indirectly, in the interest of a covered employer to any of the employees of the employer, any successor in interest of a covered employer, and any public agency. Public agencies are covered employers without regard to the number of employees employed. Public as well as private elementary and secondary schools are also covered employers without regard to the number of employees employed.

The FMLA allows "eligible" employees of a covered employer to take job-protected, unpaid leave, or to substitute appropriate paid leave if the employee has earned or accrued it, for up to a total of 12 work-weeks in any 12 months because of the birth of a child and to care for the newborn child, because of the placement of a child with the employee for adoption or foster care, because the employee is needed to care for a family member (child, spouse, or parent) with a serious health condition, or because the employee's own serious health condition makes the employee unable to perform the functions of his or her job. In certain cases, this leave may be taken on an intermittent basis rather than all at once, or the employee may work a part-time schedule.

An eligible employee of a covered employer is defined by the FMLA as an employee who:

- Has been employed by the employer for at least 12 months, and
- Has been employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave, and
- Is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite.

The 12 months an employee must have been employed by the employer need not be consecutive months. If an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave (sick, vacation) during which other benefits or compensation are provided by the employer (*e.g.*, workers' compensation, group health plan benefits, *etc.*), the week counts as a week of employment. For purposes of determining whether intermittent/occasional/casual employment qualifies as "at least 12 months," 52 weeks is deemed to be equal to 12 months.

Whether an employee has worked the minimum 1,250 hours of service is determined according to the principles established under the Fair Labor Standards Act (FLSA) for determining compensable hours of work . The determining factor is the number of hours an employee has worked for the employer within the meaning of the FLSA.

In addition to receiving the 12 weeks of unpaid leave, an employee on FMLA leave is also entitled to have health benefits maintained while on leave as if the employee had continued to work instead of taking the leave. If an employee was paying all or part of the premium payments prior to leave, the employee would continue to pay his or her share during the leave period. The employer may recover its share only if the employee does not return to work for a reason other than the serious health condition of the employee or the employee's immediate family member, or another reason beyond the employee's control.

The FMLA provides that an employee generally has a right to return to the same position, or an equivalent position with equivalent pay, benefits and working conditions, at the conclusion of the leave. The taking of FMLA leave cannot result in the loss of any benefit that accrued prior to the start of the leave

The employer has a right to 30 days' advance notice from the employee where practicable. If the situation is an emergency, the FMLA only requires the employee to notify their employer as soon as practical. In addition, the employer may require an employee to submit certification from a health care provider to substantiate that the leave is due to the serious health condition of the employee or the employee's immediate family member. Failure to comply with these requirements may result in a delay in the start of FMLA leave. If the employer has a uniformly applied policy, the employer may also require that an employee present a certification of fitness to return to work when the absence was caused by the employee's serious health condition. The employer may delay restoring the employee to employment without such certificate relating to the health condition which caused the employee's absence.

FMLA leave may be taken "intermittently or on a reduced leave schedule" under certain circumstances. Intermittent leave is FMLA leave taken in separate blocks of time due to a single qualifying reason. A reduced leave schedule is a leave schedule that reduces an employee's usual number of working hours per workweek, or hours per workday. A reduced leave schedule is a change in the employee's schedule for a period of time, normally from full-time to part-time. Whether or not the leave may be taken intermittently or on a reduced schedule is generally a function of the condition that resulted in the leave. Under some circumstances, the employer can refuse to provide intermittent or reduced leave.

When drafting a policy for your company, you need to review your state laws as some states have adopted their own Family and Medical Leave Acts.

Sample Family and Medial Leave Act Policy

The following language is generic and may not comply with the laws of all states, and may not be appropriate for or sufficient to protect the interests of your company. This language should be used only as a guideline and you should consult the local laws, statutes, regulations and case law prior to using.

In accordance with the Family and Medical Leave Act of 1993 ("FMLA"), the Company grants leave without pay to eligible employees for up to 12 work weeks of unpaid leave in a 12-month period.

Employees can request or use FMLA leave to cover the time they need to be away from work for any of the following reasons:

- For birth or placement for adoption or foster care of a child;
- To care for an employee's child, spouse, or parent who has a serious health condition; or
- To provide employee time to attend to their own serious health condition that leaves them unable to perform their job functions.

The entitlement to leave for the birth or placement of a child for adoption or foster care will expire twelve (12) months from the date of the birth or placement.

Married couples, in which both spouses are employed by the Company, are only entitled to a total of 12 work-weeks of family leave to care for a newborn or a child placed for adoption or foster care.

To be eligible for FMLA leave, an employee must have worked for the Company for at least 12 months and performed at least 1,250 hours of work during the 12 months preceding commencement of the leave.

The leave year will be a "rolling" twelve-month period measured backward from the date an employee uses FMLA leave. The time an employee uses FMLA leave, the remaining leave entitlement is the balance of the 12 weeks not used in the preceding 12 months. *(This can be measured on a calendar year basis; however, in order to prevent tacking most employers chose this basis for measurement of the 12 week period.)*

Employees taking FMLA leave for the birth or placement of a child, or to care for a family member with a serious health condition, will be required to use all their accrued paid vacation or personal leave for all or part of the period of FMLA leave. Employees taking FMLA leave because of the employee's own serious health condition will be required to use all accrued paid vacation, personal, and sick leave for all or part of the period of the leave. The period of paid leave will count against that employee's 12 week entitlement. Otherwise, the 12 week FMLA leave will be without pay. *(Some companies do not require the employees to use their accrued paid time. Most do however to prevent tacking.)*

During the period of FMLA leave, an employee will be retained on the Company's health plan under the same conditions that applied before the leave commenced. To continue health coverage, the employee must continue to make any contributions that he or she made to the plan before taking leave. Failure of the employee to pay his or her share of the health insurance

premium may result in the loss of coverage.

The Company may recover from an employee who fails to return to work at the end of the leave health insurance premiums that it has paid during a period of unpaid FMLA leave unless the failure to return is due to the following:

1. The continuation, recurrence or onset of a serious health condition that would have entitled the employee to FMLA leave.

2. Other circumstances beyond the employee's control.

An employee who returns for at least _____ days is deemed to have returned to work.

An employee is not entitled to the accrual of any seniority or employment benefits that would have accrued if not for the taking of leave. An employee who takes FMLA leave will not lose any seniority or employment benefits that accrued before the date leave began.

Upon return from FMLA leave, the Company will restore the employee (other than those designated as "key" employees) to his or her original job, or to an equivalent job with equivalent pay, benefits, and other employment terms and conditions. The Company cannot guarantee that an employee will be returned to his or her original job. A determination as to whether a position is an "equivalent position" will be made by the Company. The FMLA does not entitle a restored employee to any more rights, benefits, or employment beyond that to which the employee would have been entitled had the employee not taken FMLA leave.

The Company may decline to reinstate certain highly paid "key" employees after using FMLA leave under certain circumstances where keeping the position vacant will cause substantial and grievous economic injury to the Company's operations. Under those circumstances, the Company will take these actions:

1. Notify the employee of his or her status as a key employee in response to the employee's notice of intent to take FMLA leave.

2. Notify the employee as soon as the Company decides it will deny job restoration, and explain the reason for this decision.

3. Offer the employee a reasonable opportunity to return to work from FMLA leave after giving this notice.

4. Make a final determination as to whether reinstatement will be denied at the end of the leave period if the employee then requests restoration.

A key employee will be advised of his or her status under separate cover.

Employees who know they need FMLA leave a month before the leave begins MUST submit an application for leave to their supervisor and to _____ *(i.e. the Human Resources Manager, Benefits Manager)* at least 30 calendar days' before the leave is to begin. If the leave is to begin within thirty (30) days, the employee must give notice to his or her immediate supervisor and to _____ *(i.e. the Human Resources Manager, Benefits Manager)* as soon as the necessity for the leave arises.

Applications for leave based upon a serious health condition affecting the employee or an immediate family member must be accompanied by a "medical certification statement" completed by the applicable health care provider. The certification must state the probable duration of the condition.

During FMLA leave, employees will be required to submit periodic reports regarding the employee's status and intent to return to work.

If the leave was taken as a result of the employee's own serious health condition, the employee will be required to submit medical certification that he or she is able to return to work before he or she can be returned to active status.

When leave is needed to care for an immediate family member with a serious health condition or the employee's own serious health condition, and is for planned medical treatment, the employee must try to schedule the treatment so as not to unduly disrupt the company's operations.

The failure of an employee to return to work upon expiration of FMLA leave will subject the employee to immediate termination unless an extension is granted. An employee who requests an extension of FMLA leave due to the continuation , recurrence or onset of his or her own serious health condition, or of the serious health condition of the employee's immediate family member, must submit a request for an extension, in writing, to the employee's immediate supervisor. The written request should be made as soon as the employee realizes that he or she will not be able to return at the expiration of the current leave period.

This policy is intended to comply with FMLA and should be interpreted in light of regulations implementing that Act. In particular, terms used in this policy have the meanings they are given in the regulations implementing FMLA.

The Company complies with all requirements, prohibitions, and other provisions of the state and local laws applicable in areas where it operates or does business. If a state law entitles an employee to more generous benefits than under FMLA, the employee receives the more generous benefits.

DRAFTING SETTLEMENT AND SEPARATION AGREEMENTS FOR FORMER EMPLOYEES

An employee's separation from the Company, whether related to pending or threatened claims, or otherwise, raises various issues which must be addressed during the settlement/separation agreement drafting phase. First, a practitioner must fully investigate the employer's existing policies, agreements, compensation and/or other ERISA-type plans, to determine their impact on the proposed separation or settlement. Second, the circumstances behind the employee's separation must be explored, including the employee's status, age, and disciplinary history. Third, the written settlement/separation agreement must comply with all applicable statutory and/or common law requirements concerning release language, pension and other plan-type benefits, scope of restrictive covenants, and review period.

Ideally a practitioner should refrain from using "off the shelf," "one-size fits all" form settlement/separation agreements which fail to adequately consider the particular circumstances and issues engendered by the employee's departure. Instead, each agreement preferably should be tailored to meet all of the nuances of the particular employee's situation. The remainder of this outline provides a checklist for the most common agreement provisions, as well as a guide to assist a practitioner's important pre-drafting investigation.

CHECKLIST TO CONSIDER BEFORE TERMINATION/DRAFTING THE PRICKLY POINTS

What is the company policy?

Handbooks/guidelines
ERISA plan
COBRA
Vacation/sick leave
EPLI coverage

Who is the person being terminated?

Job position
Employment agreement
Protected class
Previously disciplined
Vested in 401k/stock options
Sick days/vacation time
Loans/equipment
Cooperation/litigation
Company duty to indemnify

What is the reason for discharging the employee?

Reduction in workforce
For cause

What does the company really need/want?

Release
Non-compete
Non-solicitation
Confidentiality
Cooperation/no assistance

What is the company willing to give up?

CHECKLIST OF EFFECTIVE AGREEMENT COMPONENTS

Release. Use broadly-worded release language on behalf of employer, and any related entity and/or affiliate.

Expressly state that the payment of any settlement/separation payment is conditioned on employee providing the Release.

List specifically all claims being released/waived.

a) "Laundry list" of claims as illustration, not limitation.

b) Specifically mention any release of indemnification/duty to defend rights.

Age Discrimination Wrinkle. Older Workers Benefit Protection Act ("OWBPA"), as an amendment to the ADEA, requires that employees covered by the Act (age 40 or older) only waive rights "knowingly and voluntarily." Requires that the ADEA/OWBPA be **specifically mentioned** in the release to be effective.

OWBPA Release requires:

A clearly written, non-legalese agreement;

Specific reference to rights/claims under the ADEA;

No waiver of future claims;

Waiver only in return for consideration in addition to that which Employee is already entitled;

Employee advised to consult an attorney; and

Employee given 21 days (individual discharge) or 45 days (group discharge) to consider agreement.

If a waiver is requested in a "reduction in force" scenario, where termination effects group or class of employees, then employee must be given: (i) job titles and (ii) ages of all individuals eligible for the program offered, and for those not offered the program.

If the above information is not provided in the agreement, it may invalidate the waiver obtained from employee.

Have release expressly reference all other employment-relatedstatutes by name, such as ADA, Title VII, the FMLA, etc.

Also include a provision that expressly states that no "future claims" (i.e. those that have not yet arisen at the time of the execution of the agreement) are being released.

Covenant Not to Sue. Works hand-in-hand with release. Bars any future suits based on released claims. Ensures that agreement provides that employee will not sue or file charges for any released claims.

1. Include "liquidated damage" penalty for breach.

2. *OWBPA Wrinkle.* Language must make clear that it does not preclude the filing of claims with EEOC seeking something other than personal recovery; or to preclude future claims.

Injunctive Relief. Provision to permit Company to seek and/or obtain injunctive relief in the event that employee breaches agreement. Recites presumption of "irreparable harm" to employer if employee breaches agreement.

No Admission of Liability Clause.

Settlement Payment. Include a description of the consideration paid to employee.

Lump Sum v. Salary Continuation. Subject to negotiation.

Effect of new employment being obtained by former employee. Terminate Salary Continuation and Accept Lump Sum.

OWBPA Wrinkle. Consideration paid must be in **excess** of that to which employee otherwise entitled.

Settlement Payment as Taxable Income. Although before 1996, it was possible to structure payment to claim that it was not income if characterized as compensation for emotional distress, now all such income is specifically taxable under IRS Code §104(a)(2).

Indemnification/Hold Harmless. Requires that employee be responsible for own tax obligations, and to indemnify Company if any taxes owed.

Confidentiality Provision.

1. Require employee to keep all of employer's confidential/proprietaryinformation confidential.

2. Require employee to keep terms of settlement/separation, including payment, confidential, and only disclose to limited group of third-parties (accountants, tax preparers, etc.)

Return of Materials.

Require return of all Company property, information, documents, equipment, etc.

Require return of all documents/information/deposition transcripts, etc. obtained in discovery.

Non-Disparagement/Gag Provision. Require employee to refrain from disparaging employer in the future. Also, you can limit what the parties tell third-parties about the settlement/separation.

No Right to Re-employment. Also, add language permitting termination of former employee who is found to have been rehired.

Time To Review Agreement. Although Title VII does not contain any provisions concerning the amount of time an employee must be given to review a settlement/separation agreement, the OWBPA requires the employer to provide a certain amount of time for review.

OWBPA requires that if no EEOC proceeding pending, the employee be given either 21 days (individual discharge) or 45 days (group discharge) to consider agreement containing a release.

OWBPA also requires that employee be given 7 days after signing to revoke signature.

OWBPA also requires that employee be permitted to have attorney review the settlement agreement.

Integration Clause. While it eliminates any "parol" agreements which predate the separation/settlement agreement, it may also destroy any other agreements which employee signed during course of employment. **Warning**: Be aware that if agreement's language says that this is the "entire agreement" between the parties, then it may extinguish a prior non-compete/confidentiality agreement the Company had with employee.

Severance Clause. If any portion of agreement is unenforceable, the remainder is binding.

Prevailing Party. Pays attorney's fees and costs.

Choice of Law/Venue. Consider arbitration provision.

Waiver of Attorney's Fees and Costs. Have employee acknowledge that the payment he is receiving under the agreement is inclusive of any and all fees and costs to which he may be entitled under any employment law statute, including attorney's fees and costs.

Termination of Litigation or Claim. Provide mechanism for terminating/dismissing any lawsuit pending against Company, and/or ending any EEOC-type administrative proceeding by having the claim withdrawn.

Future Cooperation. Consider whether employer needs cooperation/consulting from employee post-separation.

No Assistance. Employee agrees not to voluntarily participate or assist in any private litigation against Company. Assistance that would be barred includes, voluntarily (i.e. without subpoena-compulsion) meeting with opposing counsel, being interviewed, providing documents or information ("free discovery"), etc.

ACCA Annual Meeting Seminar Presentation: The Employee Manual: No Policy is Not Good Policy

Presented by: Michael Harrison
Vice President & General Counsel
Danone Group North America
October 17, 2001

Areas to be Covered:

- Marketing
- Antitrust
- Dealing with the Media
- Lost cost things small Law Departments can do

Marketing
Key Liability Areas

- Claims
- Established Written Policy & Procedures
- Handbook
- Routine Employee Training

Antitrust
Key Liability Areas

- Collusion
- Price Discrimination
- Anti-Competitive Behavior
- Written Policy
- Employee Acknowledgement & Receipts

Dealing with the Media

- Routine
  - Designated Spokesperson
  - Media Training
  - Legal Review of Press Releases
- Crisis
  - Pre-established Crisis Committee
  - Employee Crises Manual - Established Written Procedure
  - Media Training
  - Designated Spokesperson
  - Consistent Statements
  - Keep a Log
  - Honesty Early
  - Legal Review of Press Releases

Low Cost Things Small Law Departments Can Do

- Template Policies
- Internet Resources
- Web sites
  - EEOC
- On-Line Compliance Training
- Make Chief Executive aware of current events
- In-house Seminars

