



Legal Implications of Employee Handbooks

The relationship between school districts and their employees is governed by a number of sources, including federal, state and local laws and regulations; contracts; and board policies. Another source of governance is the employee handbook. Since 2011, Wisconsin Act 10 and the elimination of collective bargaining agreements as the primary document outlining the wages and benefits, hours of work and other terms and conditions of employment for many district employees, employee handbooks have largely taken over that function. This Legal Comment will review the purpose of employee handbooks, legal issues involved in drafting them, and specific provisions that should be included in a handbook.¹

■ Drafting considerations for employee handbooks

Employee handbooks serve several important purposes. They serve as a means of communicating to employees the essential terms of their employment, such as wages, benefits, hours of work and time off. Handbooks also establish the expectations a district has regarding the conduct of its employees, such as attendance and use of electronic communications. Finally, some laws require school boards to adopt specific policies related to employment, such as policies on drugs and alcohol and discrimination and harassment. Handbooks provide a means of communicating those policies to employees and processes by which districts can comply with those laws.

Handbooks should be easy for employees to understand and, therefore, should be written differently than formal board policies or individual contracts. As such, districts should draft handbooks in plain

language, define commonly used terms clearly, and use those terms consistently. For example, the use of the term “school year employees” is ambiguous and could mean employees who are scheduled to work during the school fiscal year (July 1 to June 30) or those who are regularly scheduled to work only during the 9-10 months a year when students are in attendance.

Because handbooks are one of several sources of employee governance, they must reflect legal standards and be consistent with individual contracts and board policies. This does not mean that handbooks should be a pure recitation of those laws, contracts or policies. For example, handbooks often provide elaboration on how board policies are implemented, such as with respect to sick and vacation leave.

Given the different sources governing district employees, handbooks should contain disclaimers that in the event the handbook conflicts with individual contracts or board policies, the latter documents control. This is particularly true regarding insurance benefits. Handbooks commonly include information about which employees are eligible for insurance benefits, particularly health and dental benefits. However, most districts provide benefits to employees by contract with an insurance carrier, and those benefits are subject to the terms of the applicable plan documents. Districts might have difficulty summarizing the details of comprehensive insurance plan documents in a handbook. Additionally, plan documents can change over time. Therefore, handbooks should contain a disclaimer that the terms of applicable insurance policies control if they conflict with handbook provi-

sions. Handbooks should also contain language that explains that all insurance benefits are subject to the terms, conditions and determinations of the insurance carrier and the insurance plan.

Handbooks should also contain a provision noting that the handbook is not an exhaustive list of matters related to employment. This is particularly true with respect to handbook sections detailing misconduct which could lead to disciplinary action. No handbook section can enumerate every possible form of misconduct.

Board policies often change during the year, particularly if districts are using a policy service. Because of this, districts should also review their handbooks regularly, particularly when corresponding board policies change, to ensure that the handbook stays consistent with board policy. Handbooks should contain a provision that they can be changed at any time at the board’s discretion. Electronic or digital handbooks are a useful format because they can easily be updated, distributed and received by employees during the year, without having to print out a new paper handbook for each employee whenever an employment policy changes.

■ At-will employment standard

Employees in Wisconsin are at-will employees, unless a district changes this status by policy, contract, handbook or course of conduct. Under at-will employment, employees and employers may terminate employment at any time, without prior notice, for any reason (so long as the reason is not illegal) or no reason. At-will employment maximizes a district’s flexibility in managing its workforce.

Each school board must determine what standard it will use for discipline and discharge for each of its various classifications of employees. Whatever standard a board chooses, the board must make sure that the handbook is consistent in that respect with any applicable board policies and individual contracts.

If a board has established at-will employment as its governing standard, it must make sure that the handbook does not undermine that standard and inadvertently create a higher standard for discipline or discharge, such as just cause. In certain circumstances, courts have interpreted handbooks as creating either express or implied contracts if they contain provisions through which a court could reasonably infer that the employer and the employee intended to bind each other by the handbook.² If a court concludes that a handbook creates a contract, employees would have the ability to sue the district for breach of contract if the district failed to comply with the terms of the handbook, particularly with respect to an employee's termination.

In order to avoid this result, handbooks should contain a provision that the handbook is not intended to create any implied or express contract with the employee and does not establish an expectation of continued employment or otherwise alter an employee's at-will status. A recent Wisconsin Court of Appeals case highlights the importance of using such language.³ In that case, a teacher sued her former employing school district, claiming that the district's handbook contained a whistleblower policy and that non-renewing the teacher's contract in violation of that policy was a breach of contract. The court held that the employee did not comply with the requirements of the whistleblower policy. Additionally, the court noted that the handbook contained disclaimer language stating that the handbook did not constitute a separate contract of employment and that employment

may be terminated at any time, with or without cause, which suggests that, even if the employee had complied with the requirements of the whistleblower policy, the court would have concluded that the handbook did not create an employment contract.

Provisions that are routinely found in handbooks — mostly as a vestige of districts' collective bargaining agreements — that can erode an employee's at-will status include the following:

- Promises or suggestions of employment longevity, security or continued employment;
- References to “probationary” or “trial” periods of employment. This language suggests that when the employee completes the probationary period, the employee has achieved a new status other than at-will employment;
- Use of the word “permanent” in conjunction with references to employee status;
- Use of the terms “cause” or “just cause” regarding termination of employees;
- Establishing progressive discipline steps without providing a disclaimer that the district may impose discipline at any level, including termination, depending on the circumstances;
- Establishing a standard of review under the grievance procedure required by Wis. Stat. s. 66.0509(1m) for the impartial hearing officer at a level more restrictive than arbitrary or capricious;
- Creating seniority provisions that establish length of service as the determining factor in employment decisions, such as layoffs. Districts should maintain the right to use whatever legal criteria it chooses in making employment decisions (e.g., seniority, experience, performance, skill set);

- Including a “sign-off” section that contains a provision that the employee agrees to be “bound by” or to “abide by” all policies and rules stated in the handbook. This can potentially create an argument that if the employee abides by the provisions of the handbook, then the employee will remain employed. However, a “sign-off” section that merely acknowledges that an employee received the handbook is acceptable.

■ Legally required language

Every handbook should contain specific language to satisfy legal requirements or protect a district in the event a district is involved in employment-related litigation. The following language does not constitute an exhaustive list, but represents some of the most important sections to include in a handbook.

All handbooks must include a notice of an employee's Family and Medical Leave Act rights.⁴ As a practical matter, many districts include their entire FMLA policy in a handbook so that employees can easily reference it when reviewing their rights. Failure to include this required notice could result in an employee winning an FMLA interference claim against a district if the employee was eligible for FMLA leave and can establish that the employee did not understand his or her right to request FMLA leave due to the lack of proper notice by the district.

District handbooks should also include provisions prohibiting employment discrimination and harassment and providing employees with notice of prohibited conduct and the means by which to complain about prohibited conduct if it occurs. If a district widely disseminates a policy for reporting such conduct and a harassment victim unreasonably fails to report the conduct under the policy, the district may be able to avoid liability for harassment in certain circumstances.⁵ Similarly, Title IX requires districts to identify the district's Title

IX coordinator and include a notice that the district does not discriminate on the basis of sex in its education programs or activities. This notice should be contained in a handbook, among other places.⁶

Handbooks should include language that outlines when and where districts can conduct searches, including desks, public spaces, district computer servers and district-provided technology such as email, internet use and cell phones. This language should expressly state that employees have no expectation of privacy in district-provided equipment or in communications using such equipment or district servers. Such language maximizes a district's ability to search and monitor the use of this equipment and these communications, including during investigations into misconduct.

A handbook should also contain a section setting forth district expectations regarding attendance and tardiness. Such language is required if a district is going to challenge an employee's eligibility for unemployment benefits based on misconduct or substantial fault if an employee is terminated for attendance and tardiness.⁷ Districts also need to make sure employees sign an acknowledgment of receipt of the attendance language although acknowledgement of receipt of the entire handbook is likely sufficient.

Finally, a handbook should include the district's statement in compliance with the Drug Free Workplace Act. That law requires recipients of federal grants, which includes school districts, to "publish a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violations of the prohibition."⁸ As a practical matter, most board policies also cover alcohol and include language prohibiting employees from

being under the influence of alcohol or a controlled substance at the workplace. Including this policy in a handbook assists districts in challenging an employee's eligibility for unemployment benefits based on misconduct or substantial fault if an employee is terminated for violating this policy.⁹

■ The importance of complying with an employee handbook

Districts that do not comply with their handbook provisions risk having their employment decisions — such as discipline, terminations, non-renewals or layoffs — overturned by a court.¹⁰ While a disclaimer might limit an employee's ability to bring a breach of contract claim, a court might determine that a district that fails to abide by its own policies is acting arbitrarily or capriciously in violation of the 14th Amendment of the U.S. Constitution.

Additionally, a district's failure to follow its handbook provisions can serve as evidence for an employee who files a discrimination claim against the district. For example, if a board terminates a female employee for a violation of the handbook's attendance policy and the employee sues the district for gender discrimination, one way the former employee can prove her case is by providing evidence that the district did not enforce the handbook attendance policy similarly with respect to male employees.

■ Conclusion

Employee handbooks play an important role in establishing the relationship between the district and its employees. However, if not drafted carefully, a handbook can create inadvertent employee protections, limit the district's flexibility in governing its workforce and create legal liability. Given the importance of handbooks, boards and administrators should understand the conse-

quences of any changes they make to them. Boards should also be aware that changes to board policies might require corresponding changes to handbooks. Boards that have questions about the implications of specific revisions to their handbooks should contact their legal counsel. ■

■ Endnotes

1. This Legal Comment was written by Michael J. Julka; Steven C. Zach; and Brian P. Goodman of Boardman & Clark LLP, WASB Legal Counsel. For additional information on this topic, see Wisconsin School News: "Discipline, Termination and Nonrenewal Under Districts' Grievance Policies" (June 2019); "Limitations on Modifying Retirement Benefits" (Sept. 2015); "Addressing Questions About Act 10 After Wisconsin Supreme Court Decision" (Sept. 2014).
2. *Ferraro v. Koelsch*, 124 Wis. 2d 154, 368 N.W.2d 666 (1985).
3. *Johnson v. Sch. Dist. of Flambeau*, No. 2019AP725, 2020 WL 6141029 (Wis. Ct. App. Oct. 20, 2020) (unpublished).
4. 29 C.F.R. s. 825.300(a)(3).
5. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).
6. 34 C.F.R. s. 106.8(b).
7. Wis. Stat. s. 108.04(5)(e).
8. 41 U.S.C. s. 8103(a)(1)(A).
9. Wis. Stat. s. 108.04(5)(a).
10. See *Scheckel v. Sch. Dist. of Wauzeka*, No. 92-3121, 1994 WL 36060 (Wis. Ct. App. Feb. 10, 1994) (unpublished).
 - "Districts should review their handbooks regularly, particularly when corresponding board policies change, to ensure that the handbook stays consistent with board policy."
 - "Every handbook should contain specific language to satisfy legal requirements or protect a district in the event a district is involved in employment-related litigation."
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