

# The Employee Manual—An Essential Practice Tool

By Paul Welk, PT, JD

As a solo private practitioner, it is rather simple to determine when you take vacation, what hours you work, how to structure your compensation, and how to handle personnel issues. Such decisions become more difficult as a practice grows. While there is no magic number, at some point every growing private practice realizes that it is time to add a new tool to the practice's tool kit—the employee manual. Once a practice commits to developing an employee manual, there are a number of key legal issues to consider during the drafting process. While there are significant benefits to utilizing an employee manual, the following are five key areas that require particular legal consideration to reduce the practice's potential employment-related liability:

1. *Make sure employees are aware of the employee manual and its contents.* An employer (and ultimately a hearing officer or court) can only reasonably expect its employees to comply with an employee manual if the employees are in fact aware of the manual and its contents. In an effort to avoid questions regarding this issue, it is good practice to require that, upon hire, each employee sign an acknowledgment indicating that he or she has read and understands the employee manual. This general acknowledgment can also contain a specific acknowledgment that the employee is an employee at will (discussed below). In addition to an initial acknowledgment, a practice should consider requiring an annual acknowledgment and/or additional signed acknowledgment in the event of a material change in the employee manual. In the event an employee brings a claim against the practice following discharge for violation of a practice policy, an acknowledgment is excellent evidence to overcome an employee's argument that he or she was not aware of such a policy.
2. *Allow the practice management team the flexibility to amend the manual.* An employee manual should be used as a guideline for dealing with employment-related matters, not an all-inclusive document. It is important to allow the employee manual to be amended so that it can change along with practice growth and updated legal requirements. For this reason, the employee manual should include a general statement indicating that the practice reserves the right to modify the policies and procedures and that the employee manual does not include all of the practice's policies

and procedures. Such a provision allows the management team the flexibility to run the practice while benefiting from a well drafted employee manual and to mitigate against an employee claim based upon a change in the employee manual.

3. *Set forth certain state and federal legal requirements.* There are a number of federal and state laws that govern the employment relationship. Many of these laws can be addressed within the employee manual in an effort to educate employees and the employer regarding such legal requirements, to provide a starting point for legal compliance, and to reduce the risk of adverse claims against the employer. Examples of federal employment-related laws include the Americans With Disabilities Act, Title VII of the Civil Rights Act of 1964 (prohibiting employment discrimination based on race, color, religion, sex, or national origin), Family Medical Leave Act (mandates that covered employers grant unpaid leave for birth and newborn care, medical leave, and other matters), the Age Discrimination and Employment Act of 1967 (protects individuals who are 40 years of age or older), and the Fair Labor Standards Act (relating to minimum wage and overtime requirements). Please note that this is not an all-inclusive list and does not include state law requirements which are beyond the scope of this article.  
Within these areas of federal and state law, a particular area of concern relates to discrimination or harassment claims that may be alleged by an employee. To reduce the risk of such a claim, the practice should consider including, within the employee manual, a clearly stated policy forbidding discrimination and harassment as well as a policy informing a victim of discrimination or harassment as to the proper process for reporting this conduct to the employer. Such a policy can go a long way in showing a court that the practice does not permit such conduct and can be used defensively in the event a claim was not reported by the alleged victim until post-termination.
4. *Benefit from a well defined discipline policy that is complied with and well documented.* While the specifics of a discipline policy are heavily dependent upon the philosophy of the practice's management team, a well drafted employee discipline policy that is complied with should significantly reduce the risk of a successful

wrongful termination claim against the practice. A common progressive employee discipline policy may include discipline levels from an oral warning, to a written warning, to a suspension, to employment termination. The policy should expressly include the right to terminate employment immediately for a more serious policy violation.

It is essential that once an employee is subject to the progressive discipline policy, the policy is in fact followed. Interestingly enough, it is often generous employers (physical therapists are generally good people who may have difficulty disciplining and terminating employees) who have difficulty defending their actions relative to progressive discipline problems. For example, a discipline policy may provide for a maximum of two oral warnings prior to a written warning but an employer may in fact issue many oral warnings before ultimately terminating an employee. Not only does this subject the practice to an employee claim that the practice failed to follow its own policy, but the practice opens itself to additional risks if employees are not treated equally. Finally, it is important that the steps taken in the progressive discipline process are well documented in the employee file. In the event of a hearing or litigation, the final outcome often turns on the employer's documentation of the employee's actions.

5. *Minimize the risk of the employee manual being construed as a promise of continued employment.* Under the law of most states, the default rule is that the employment relationship is one of employment at will.<sup>1</sup> Under the doctrine of employment at will, employment is usually undertaken without a contract and may be terminated at any time by either the employer or employee without cause.<sup>2</sup> However, a number of studies have shown that most employees believe that their job is legally protected and that they may not be terminated without cause.<sup>3</sup> In addition to this common employee misunderstanding regarding job security, courts in a number of jurisdictions have analyzed employee manuals and determined that the language of the employee manual may in fact create an implied employment contract.<sup>4</sup> Some courts have gone so far as to create an "employee manual exception" to the employment at will doctrine in finding an employee's right to continued employment through the terms of an employee manual<sup>5</sup>. This right to continued employment subjects the employer to additional legal obligations it otherwise did not intend to undertake.

To decrease the likelihood of a court finding that your practice's employee manual is in fact an implied contract of continued employment, the manual should contain a statement expressly stating that the manual is not a contract of employment and should explain to the employee that the "at will" employment concept is applicable to the employment relationship. Not only should this improve the practice's likelihood of success in the event of an employment claim by the employee, but it will also serve to educate employees regarding the status of their employment. Additionally, an employee manual should avoid statements indicating that employees will not be fired without good cause as this may also be interpreted as creating a right to ongoing employment.

It is not possible in this article to discuss all of the issues that may be covered within a comprehensive employee manual. In addition to those discussed, a manual may include sections covering employment applications and the hiring process, employee classifications (such as full-time, part-time, etc.), vacation and leave policies, fitness for duty, drug and alcohol issues, employee orientation, vacation scheduling, dress code, outside employment, incidents and incident reporting, and attendance. Ultimately, for an employee manual to benefit the practice, it is essential to take the time to tailor the document to meet the particular needs of the practice as well as to comply with all applicable state and federal laws. ■

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<sup>1</sup> See Leiser Levy, Rachel, "Judicial Interpretation of Employee Handbooks: The Creation of a Common Law Information-Eliciting Penalty Default Rule", 72 U. Chi. L. Rev. 695 (2005).

<sup>2</sup> *Black's Law Dictionary*, Abridged Seventh Edition (2000).

<sup>3</sup> See Leiser Levy, Rachel, "Judicial Interpretation of Employee Handbooks: The Creation of a Common Law Information-Eliciting Penalty Default Rule", 72 U. Chi. L. Rev. 695 (2005).

<sup>4</sup> David H. Autor, John J. Donohue III, and Stuart J. Schwab, "The Costs of Wrongful Discharge Laws", *The Review of Economics and Statistics*, Vol. 88, Issue 2 (2006).

<sup>5</sup> Fletcher, Kelby D., "The Disjointed Doctrine of the Handbook Exception to Employment At Will: A Call for Clarity Through Contract Analysis" 34 Gonz. L. Rev. 445 (1998/1999).