

# 2018 Employment Handbook Review: 8 Key Policy Updates

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With the start of the new year right around the corner, it is the perfect time for employers to dust off their employee handbooks and consult with counsel on policy updates. Many policies remain the same year after year. However, employers may wish to pay attention to certain policies due to recent changes in federal and state law.

1. **Employee Handbook Policy Standard:** Over the past decade, the National Labor Relations Board has found a number of common policies implemented by employers (both union and non-union) to be illegal because employees could “reasonably construe” the policy to bar them from exercising their right to engage in protected, concerted activity under the National Labor Relations Act (“NLRA”). On December 14, 2017, with a Republican majority decision, NLRB overturned this standard for determining the legality of employee handbook policies. Under its new standard, the NLRB balances a given policy’s impact on workers’ rights and the employer’s reasons for maintaining the policy. The new standard allows the Board to give consideration to the complexities associated with many employment policies, work rules and handbook provisions. All employers (even non-union ones) should still carefully craft their handbooks and policies (particular those related to confidentiality, non-disclosure and the use of social media) to ensure that the right to engage in protected, concerted activity is not violated.
2. **Leave for Foster Parents:** In 2017, Section 21.0595 was added to the Texas Labor Code, and it requires employers who have a policy that allows parents to take leave to care for a sick biological or adopted child to also provide such leave for the care of foster children. Note, this statute does not require an employer to provide such leave, but it does require an employer who does provide such leave to also extend such leave to foster parents. Employers should review their leave policies to make sure they do not specifically exclude foster children or only provide leave to parents to care for biological or adopted children.
3. **Preference for Employment of Veterans:** In Texas, pursuant to Texas Labor Code Section 23.002, private employers can adopt a policy—the policy must be in writing—that gives preference in employment decisions regarding hiring, promotion, or retention of a veteran over another qualified applicant or employee. In 2017, the Texas Legislature amended this law so that such employers may now notify the Texas Workforce Commission and the Texas Veterans Commission that they have such a policy so they can be included on the respective commission’s website listing employers who give veterans preference. An employer who adopts this policy is required to apply this policy reasonably and in good faith in its employment decisions. Employers should update their handbooks to appropriately reflect this policy if applicable.
4. **Background Checks and Ban-the-Box Laws:** The Fair Credit Reporting Act (the “FCRA”) requires employers, when obtaining background reports from third parties, to do very specific things during the initial employment process. One such requirement is that employers should have a separate authorization that complies with the FCRA’s requirements when requesting permission to obtain a background report. This authorization should be separate from an employer’s employee handbook policies. Employers risk litigation for alleged failure to meet these FCRA requirements. Background checks may have stricter rules depending on state and local laws. Recently, many cities, counties, and states have adopted fair hiring policies that require an employer to consider a job candidate’s qualifications first without the stigma of a criminal record. These fair hiring policies require employers to remove the conviction history question on the job application and delay the background check inquiry until later in the hiring. Employers should check state and local laws to ensure that their application process is compliant.
5. **The Occupational Safety and Health Act of 1970 (“OSHA”):** In 2016, OSHA was amended to require that certain employers electronically submit injury and illness data to OSHA, the content of which depends on the size and industry of the employer. Also, regardless of whether an employer is subject to the reporting requirements, OSHA was amended to require all covered employers to inform employees of their right to report work-related

injuries and illnesses free from retaliation, and an employer's reporting method must be reasonable and not deter or discourage employees from reporting. It is important that employers consult with counsel to ensure that their handbook policies regarding workplace illness and injury reporting are compliant with these changes.

6. **Defense of Trade Secrets Act ("DTSA") Immunity Notice**: This law, passed in 2016, establishes, among other things, uniform national standards for trade secrets, misappropriation, service of process, and execution of judgments. The DTSA requires employers to notify employees and contractors of certain criminal and civil immunities to preserve claims for punitive damages and attorneys' fees that may be available under the DTSA in the event of a violation involving confidential information/trade secrets. Employee handbooks, as well as confidentiality and proprietary agreements with employees, independent contractors, and consultants, must be updated to include this immunity notice in compliance with the DTSA.

7. **Nursing Mother Policy**: The Patient Protection and Affordable Care Act ("ACA") requires employers subject to the Fair Labor Standards Act ("FLSA") to provide unpaid, reasonable break time for an employee to express breast milk for one year after her child's birth, unless they have fewer than 50 employees and can demonstrate that compliance would impose an undue hardship. Several states (including Texas) and some municipalities have similar requirements. Employers should consult with counsel to ensure that they have the appropriate policies incorporated into their handbooks, including related anti-retaliation provisions.

8. **Protected Classes**: Employers should review the list of protected classes in their policies prohibiting discrimination, harassment, and retaliation in order to ensure compliance with federal, state, and local laws. For example, the Equal Employment Opportunity Commission ("EEOC") has identified sexual orientation and gender identity discrimination as a form of sex discrimination—and some cities and states also prohibit such discrimination. This should be reflected in an employer's discrimination, harassment, and retaliation policies.

Many of these recent changes impact employer handbook policies. Employers are advised to review these key policy updates and incorporate these updates into their employment handbook policies when applicable, while keeping in mind the new NLRB standard and balancing the impact of these new policy changes against the employer's business and operational needs. It is always good practice for employers to consult with counsel to review their handbooks annually to keep current on changes in federal, state, and local laws. The New Year is also a great time to revisit anti-harassment and complaint procedures and to coordinate with counsel to schedule training for employees.

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