



## The Employment Application: More Than A Formality

By Tillman Coffey (Atlanta)

With a tightening economy, those employers fortunate enough to be hiring can't afford to make bad hiring decisions. Among other problems, bad hires can result in high turnover, low production, workplace disruption, abuse of benefits and creation of legal risks.

Many bad hires can be avoided by simply taking the time to carefully review an employment application before the interview process even begins. Many applicants who will be problem employees if hired provide clues on the application that they are a problem waiting to happen. When the employment application is treated as nothing more than a "formality," these indicators often are missed, and bad hires made.

The following are potential "red flags" that you should watch for, which may disqualify the applicant from further consideration prior to the interview, or at least prompt a number of questions to be asked during the interview.

**Start With a Good Application.** The answers are only as good as the questions. If possible, use an application tailored to your company or at least to your industry. Generic, short form applications may not seek the information needed for an informed decision. Employers who are concerned that the application is too long or tedious may be looking for trouble.

**Legibility and Neatness.** The ability to provide legible responses on the application should be a threshold requirement for most jobs. Since many job positions require the ability to communicate and document in writing, someone who lacks the basic ability to write in a manner that can be read and understood by others may not be a qualified applicant. If the applicant is merely sloppy because he or she did not care enough to write more neatly, that applicant may not be a good hire for that reason alone.

**Completeness.** An absolute minimum requirement/skill for employment should be the ability to follow instructions and pay attention to details. One of the first indications of an applicant's ability or inability to meet these most basic requirements is the manner in which the applicant completes (or fails to complete) the employment application. After all, the instructions on an application are relatively simple and straightforward, such as the one that states that the application must be fully completed. Sloppiness, carelessness, and inability or unwillingness to follow instructions when completing an application often foreshadow these same traits in job performance.

**Scratch-Outs.** An application with several answers scratched out or otherwise changed may suggest sloppiness, but also should raise concerns about the truthfulness of the information provided. For example, scratching out original answers on the job history section may indicate the

applicant changed the information to make his or her timeline fit together without exposing gaps, disclosing certain employers, or other potentially negative information.



**Signatures.** The failure to sign the application, or at-will and arbitration statement, may be a simple oversight, or it may be deliberate. An oversight suggests carelessness or lack of attention to detail. The deliberate failure to sign may indicate the applicant is not who the applicant says he or she is, or may indicate the person does not want to be bound by the agreement and releases set forth in the application. That unwillingness to accept standard policies may suggest someone who will be non-compliant in other areas. If interviewed, the applicant should be questioned about this significant "oversight."

**Missing Information.** The amount or nature of the missing information is key.

Is the applicant merely careless, or is he or she trying to avoid disclosing certain information? Missing information could be the failure to provide a maiden name, or disclose a former address or a former employer, or reveal criminal convictions. Each question on an application is intended to have relevance to the hiring process, and each question should be answered. If the failure to provide the information alone initially does not disqualify the applicant, applicants should be required to provide the missing information on the application and explain why he or she initially omitted it. (Don't fill in the information yourself – employers should never write on the application.)

**Gaps in Employment History.** Applicants with gaps of employment in excess of one-month intervals should raise concerns. Unfortunately, many hiring managers ignore this potential red flag. While there are legitimate reasons for some gaps, even legitimate reasons should raise concerns about stability if there appears to be a history or pattern. Applicants who fail to disclose reasons for gaps on the application may be attempting to conceal them or be careless in completing the application.

**Frequent Job Changes.** An applicant who changes jobs frequently suggests a lack of stability or may indicate an employee who had problems at previous employers. While the applicant's overall job history should be taken into account, an applicant who frequently moves from job to job should not be expected to be a long term employee.

**Telephone Numbers and Addresses.** Applicants who provide post office boxes instead of a residence address may be covering up information or hiding from someone. Likewise, someone who provides an 800-number or someone else's telephone number for a contact number may not be the best candidate. If interviewed, applicants should be questioned about why they have no residence address or telephone of their own.

Continued on page 4

# Put Handbook Review On Your 2009 “To Do” List

By D. Albert Brannen (Atlanta)

Not complying with current law can be expensive in today’s legal climate. One of your New Year’s resolutions should be to review your employee handbook and employment-related policies to make sure they are up to date. When doing so, remember to draft your handbooks so that your employees actually read them and follow your policies.

In this article we’ll offer advice on how to write handbooks employees will actually read, and also identify 10 important policies that every employer should have in place to minimize the risks of employment-related litigation.

## Making A Handbook Readable

First and foremost, consider your employee handbook as a management communication tool – not as merely a document for strict legal compliance. As such, your handbook should positively reflect the values of upper management and create an employee-friendly environment.

In the world of handbook drafting, some handbooks are “integrity-based” and others are “compliance-based.” Integrity-based handbooks are proactive, morally oriented, management-directed, positive and encouraging. The policies in an integrity-based handbook reflect internal values, not external obligations.

On the other hand, compliance-based handbooks are defensive, legalistic, lawyer-driven, punitive and based on externally imposed rules. Where possible, employers should adopt the integrity-based model for their handbooks and hold employees to higher standards than those minimally required by applicable laws. Companies that set this positive tone in today’s world are more likely to attract the next generation of workers and to succeed into the future.

Although many of the policies in a handbook will be common across industries, every employer should endeavor to tailor its handbook to its own unique situation. Tailoring the handbook should take into account your company’s size, geographic location or scope of operations, your operating culture, employee expectations, and other relevant factors. Tailor your handbook to set the proper “tone” and to comply with the many laws that may apply.

### *Use Easily Understood, General Terms*

A handbook is just a summary of benefits and your most important policies. It’s not intended to be a comprehensive personnel procedures manual. Nor does it need to address every possible contingency that can be expected.

By way of example, the military leave policy does not need to go into every detail about what the company will do for service members while they are out on leave or when they return. Instead simply state that you support the concept of military leave, require employees to provide advance notice of military leave, and commit to comply with all applicable laws covering service members.

Similarly, sub-sections describing insurance or retirement benefits do not need to include deductible amounts or other coverage details that are likely to change from time to time. Instead, insurance-related sections should simply state that the employer provides such benefits, that benefit levels and costs are subject to change from time to time and that the employer pays the majority of the cost for such benefits. Employees with specific questions should be referred to either the Human Resources department or to the current Summary Plan Description document.

By using such general language, the handbook will be more readable and more dynamic in that it will not have to be revised and re-published every time specific benefits change. Generalities may also serve to allow management more discretion with specific situations that may arise.



### *Begin With A Personalized Message*

Your handbook should begin with a letter from the company’s founder or President welcoming employees to the organization. Following that personalized message, the handbook should contain a positive description of the “History of the Company.” This section should inform the new employee about significant facts in the company’s history or about its plans for the future. The idea here is to portray the company in the most positive light and to make new employees feel that they are proud of their new employer’s standing in the industry or community.

### *Cover Company Benefits In The First Main Section*

When employees read a handbook, they naturally want to know what the employer is going to “give” them for working there. To meet this expectation – and to make a positive first impression on the handbook reader – the first major section of the handbook should list all of the benefits and other things of value that you provide employees in addition to just their pay. Obviously, this part of the handbook should list all of the insurance and retirement benefits, preferably with a one paragraph or so description of each. Listing each such benefit in a separate paragraph allows the table of contents to include a heading for each benefit and makes the list of benefits have more impact on employees.

This section of the handbook should also include sub-sections on the employees’ pay, paid holidays, vacations, and other paid time off from work, such as sick or medical leave, bereavement leave, and civic duty leave. Leave that is not paid should also be listed here, including extended medical or family leave, military leave or personal leave. Other benefits, such as tuition-reimbursement programs, relocation benefits or employee discounts should also be listed here. Even *government-required* benefits should be included here as subsections, including social security, workers’ compensation, COBRA, modified duty or reasonable accommodation policies and other benefits which you provide should be addressed in this major section of the handbook.

### *Emphasize Safety and Security Issues*

The handbook should stress your concern for safety in the workplace in the most employee-oriented way possible. No employer wants its employees to be injured at work and this message should come through loud and clear in the handbook. Employees that get this message will be positively influenced by the handbook.

Your safety programs, references to a safety committee and training, and to policies covering drugs and alcohol, workplace security policy, weapons, driving and criminal records, workplace chemicals and related matters will all reinforce an overarching concern for safety on the job.

### *Organize the Handbook with Many Headings*

To make a handbook more readable by employees, use numerous headings and sub-headings as guides. Headings break up long stretches of text and help employees to understand the handbook’s content. They also make it easier to find topics and for employees to actually use the

*Continued on page 3*

## Put Handbook Review On Your 2009 “To Do” List

*Continued from page 2*

handbook. A table of contents is essential and can also be used as an outline for the orientation process.

Having outlined a few ways to make an employee handbook more likely to be read by employees, summarized below are 10 important policies that every employee handbook should address. And all of them should be reviewed periodically for legal compliance.

### 10 Policies That Should Be Included In Your Handbook

#### 1. *No Discrimination, Harassment or Retaliation*

With harassment verdicts against employers sometimes running into millions of dollars, employers need written policies prohibiting all types of workplace discrimination, harassment and retaliation. Such policies should, at a minimum:

- cover **all** applicable protected classifications, such as race, color, national origin, sex (including pregnancy and same sex), religion, age, disability and other categories, including categories that may be protected by state or local laws or regulations;
- contain specific examples of prohibited conduct;
- explain the consequences of policy violations;
- contain a specific reporting procedure;
- contain a “bypass” reporting procedure; and,
- prohibit retaliation against those who report violations.

#### 2. *Problem Solving or Grievance Procedures*

An effective problem-solving procedure can help an employer to avoid liability for discrimination, harassment, retaliation, safety complaints and union activity, as well as improving employee morale. Such policies should include a step-by-step procedure for addressing employee concerns and for addressing employee complaints. Employees should follow the “chain of command,” but they also should have access to a “bypass” procedure for reporting concerns if for some reason they cannot follow the standard procedures. In recent years, the best advice has been to establish a “special” direct procedure for claims of discrimination, harassment and retaliation – outside of the “normal” chain of command.

#### 3. *At-will Statements*

Employee handbooks and written policies should contain the necessary legal disclaimers in prominent places. For example, a handbook should state that it is not a “contract” and that employment is “at-will” under state law and can be terminated at any time, for any reason, with or without cause and without advance notice. Similar language should be included on the employment application and on a separate “acknowledgement of receipt” of handbook form signed by each employee and retained in the employee’s personnel file.

#### 4. *Rules of Conduct*

Avoid both oral and written promises of “progressive” discipline and lists of specific work rules with levels of discipline. Instead, rules of conduct should state that employees can be discharged immediately for a variety of things. That statement should be followed by a list of broadly defined acts of misconduct, such as absenteeism or tardiness; breach of confidence or security; conflict of interest; damage to property; fighting, threats or weapons; fraud, dishonesty or false statements; harassment;

insubordination; misuse of property; sleeping or inattention; solicitation or distribution; substance abuse; theft; unlawful activity; unsafe work practices; or other applicable misconduct. “Poor performance,” although technically not “misconduct,” also should be included as a basis for termination.

#### 5. *Drugs and Alcohol*

Drug-and-alcohol policies should require as a condition of employment that applicants or employees not have drugs or prohibited amounts of alcohol “in their systems.” Employers should avoid policies that refer to being “under the influence” or “impaired” since those terms create a higher legal burden for employers. Such policies should state the consequences for testing positive or otherwise violating the policy and that the employer reserves the right to test “at any time” and to conduct searches.

#### 6. *Workplace Security and No Weapons*

In view of the increase in workplace violence, your policies should address workplace security and weapons. A workplace security policy should state that any employee who commits or threatens any violent act against any person while on company premises or at work will be subject to immediate discharge. The policy also should cover off-site conduct and procedures for reporting and investigating violent acts or threats. This policy should also reaffirm your right to conduct background checks at any time during employment.

Of course, compliance with the Fair Credit Reporting Act is still required even with such language in the handbook. And several states now have some version of a “bring your gun to work” act, so be sure that your policy is in compliance with that, as well.

#### 7. *Safety*

Similar to workplace security, safety should be a workplace priority and a handbook should contain essential safety rules and procedures. In addition to listing specific safety rules and procedures, the handbook should include at least general references to the employer’s safety program, its safety committee, recordkeeping requirements, training procedures and overall safety program. Safety policies should reflect compliance with current standards and regulations and a “safety coordinator” should be specifically identified in the handbook.

#### 8. *Electronic Communications*

With the extensive use of e-mail and other electronic communications systems, you’ll need to state your policies about the use of such tools. Among other things, specify your right to access such “systems” for business-related reasons; prohibit (or limit) personal use of such systems; prohibit insulting or offensive communications such as sexually explicit or offensive messages, jokes or cartoons, propositions or love letters, ethnic or racial slurs or any other harassing or disparaging messages; and require employees to follow the company’s encryption procedures.

Should a lawsuit arise, electronically stored and even deleted information likely will be accessible to the opposing party. In view of the recent changes to the Federal Rules of Civil Procedure, you should also include references to your document retention and “litigation hold” policies.

#### 9. *Confidential Information and Conflicts of Interest*

At a minimum, have policies in your handbook that protect the company’s intellectual property, business relationships, information and similar assets. These policies should prohibit conflicts of interest and unauthorized use and disclosure of confidential information and trade secrets. A confidential information policy should state, among other things, that unauthorized use or disclosure of such information may result in discipline, up to and including immediate discharge or civil or criminal actions by the employer, as appropriate.

*Continued on page 4*

## The Employment Application: More Than A Formality

Continued from page 1

**Criminal Record.** Applicants who fail to respond to questions about criminal convictions often are concealing facts that could be detrimental to their efforts to land a job. If interviewed, applicants should be required to complete this portion of the application and be questioned about why it was not completed initially. Applicants who reveal a criminal record on an application may be considered more trustworthy than ones who conceal the information, but the inquiry should not stop there. Do not be afraid to ask tough questions about the criminal history. If criminal background checks are completed, be sure to compare those results with the information provided by the applicant.

The *Labor Letter* is a periodic publication of Fisher & Phillips LLP and should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult counsel concerning your own situation and any specific legal questions you may have. Fisher & Phillips LLP lawyers are available for presentations on a wide variety of labor and employment topics.

### Office Locations

#### Atlanta

1500 Resurgens Plaza  
945 East Paces Ferry Road  
Atlanta, GA 30326  
phone (404) 231-1400

#### Charlotte

Suite 2020  
227 West Trade Street  
Charlotte, NC 28202  
phone (704) 334-4565

#### Chicago

1000 Marquette Building  
140 South Dearborn Street  
Chicago, IL 60603  
phone (312) 346-8061

#### Columbia

Suite 1400  
1901 Main Street  
Columbia, SC 29201  
phone (803) 255-0000

#### Dallas

Thanksgiving Tower  
Suite 4343  
1601 Elm Street  
Dallas, TX 75201  
phone (214) 220-9100

#### Denver

Suite 3300  
1999 Broadway  
Denver, CO 80202  
phone (303) 218-3650

#### Fort Lauderdale

Suite 800  
450 East Las Olas Boulevard  
Fort Lauderdale, FL 33301  
phone (954) 525-4800

#### Houston

Two Allen Center  
Suite 620  
1200 Smith Street  
Houston, TX 77002  
phone (713) 292-0150

#### Irvine

Suite 400  
18400 Von Karman Avenue  
Irvine, CA 92612  
phone (949) 851-2424

#### Kansas City

Suite 400  
104 West 9th Street  
Kansas City, MO 64105  
phone (816) 842-8770

#### Las Vegas

Suite 650  
3993 Howard Hughes Parkway  
Las Vegas, NV 89169  
phone (702) 252-3131

#### New Jersey

430 Mountain Avenue  
Murray Hill, NJ 07974  
phone (908) 516-1050

#### New Orleans

Suite 3710  
201 St. Charles Avenue  
New Orleans, LA 70170  
phone (504) 522-3303

#### Orlando

1250 Lincoln Plaza  
300 South Orange Avenue  
Orlando, FL 32801  
phone (407) 541-0888

#### Philadelphia

Radnor Financial Center  
Suite 650  
201 King of Prussia Road  
Radnor, PA 19087  
phone (610) 230-2150

#### Portland

Suite 1250  
111 SW Fifth Avenue  
Portland, OR 97204  
phone (503) 242-4262

#### San Diego

Suite 950  
4225 Executive Square  
La Jolla, CA 92037  
phone (858) 597-9600

#### San Francisco

One Embarcadero Center  
Suite 2340  
San Francisco, CA 94111  
phone (415) 490-9000

#### Tampa

SunTrust Financial Centre  
Suite 2300  
401 E. Jackson Street  
Tampa, FL 33602  
phone (813) 769-7500

**Reasons for Termination.** Focus on reasons provided by applicants for leaving prior employment. Applicants terminated for performance problems or rule violations should prompt probing questions into the background facts. Applicants who provide “stock” answers for leaving such as “better opportunity,” “wanted advancement,” “needed a change” and the like should be asked to explain exactly what those phrases mean in the context of this applicant’s employment history. Many times those answers do not match the reality of the job that followed. For example, going to a job that pays less generally does not qualify as “better opportunity.”

**Victim-like Responses.** An indication that an applicant may be a problem, if hired, is “victim-like” responses to questions. For example, providing “disagreed with a policy” or “didn’t get along with my supervisor” or “personality conflict” or “didn’t like working conditions” or “needed a change” or “wasn’t promoted” as reasons for leaving prior employers may suggest that the applicant is unwilling to accept responsibility and willing to blame others. This applicant likely will bring those traits to the new workplace. If you interview such applicants, require them to fully explain each such response.

**Résumés.** Accepting a résumé in lieu of an application puts you at risk. Résumés generally do not include negative information about the applicant and are intended to cast the applicant in the best light possible. Applications purposefully seek negative information. Using a résumé as a pre-screening tool is acceptable, but the application process should be completed as well so that you have all the necessary information before making a job offer. “See résumé” responses to questions on the application should not be accepted.

The key to making a good hiring decision is to consider all these factors in context and as a whole. Generally, when there are concerns about an applicant’s “fit” with the company, those concerns are justified. Employers do not want to be in the position later of saying “I knew I should not have hired him/her.”

For more information email the author at [tcoffey@laborlawyers.com](mailto:tcoffey@laborlawyers.com) or call 404.231.1400.

## Put Handbook Review On Your 2009 “To Do” List

Continued from page 3

### 10. Family and Medical Leave

The Family and Medical Leave Act requires employers with 50 or more employees within a 75 mile radius to provide eligible employees with a leave of absence for family or medical reasons, benefits continuation, and reinstatement to the same job if the employee returns to work prior to the expiration of the leave. It also requires covered employers to include a family and medical leave policy in their handbooks, post a prescribed notice and follow certain unique notification procedures.

### Conclusion

This article has offered some general guidance on making your employee handbook more user-friendly, while still offering protection to the company. For more specific advice regarding your own situation, contact your Fisher & Phillips lawyer.

For more information email the author at [dabrannen@laborlawyers.com](mailto:dabrannen@laborlawyers.com) or call 404.231.1400.

*Fisher & Phillips LLP represents employers nationally in labor, employment, civil rights, employee benefits, and immigration matters*

We’re interested in your opinion. If you have any suggestions about how we can improve the *Labor Letter* or any of our other publications, let us know by contacting your Fisher & Phillips attorney or email the editor at [mmitchell@laborlawyers.com](mailto:mmitchell@laborlawyers.com).

#### How to ensure continued receipt of this newsletter

If you would like to continue to receive our newsletters and other important information such as Legal Alerts and seminar information via email, then please take a moment right now to make sure your spam filters are set to allow transmissions from the following addresses: [communications@laborlawyers.com](mailto:communications@laborlawyers.com) or [seminars@laborlawyers.com](mailto:seminars@laborlawyers.com). If you currently receive communications from us by regular mail, and would like to begin receiving them by email, please send a request to [communications@laborlawyers.com](mailto:communications@laborlawyers.com).