



# SMALL BUSINESS HR POLICIES AND PROCEDURES

## – Are Yours Up To Date?

It is a best practice for employers to communicate important rules, guidelines and information to employees through written policies. It is equally important for employers to develop procedures to consistently address workplace issues. While a lack of policies and procedures can lead to a host of problems, ill-conceived policies can be problematic as well.

The following are 9 policies and procedures that may run contrary to federal, state, or local law, along with acceptable alternatives where applicable.



### #1 | PROHIBITING WAGE DISCUSSIONS (e.g., “Employees are prohibited from discussing their pay with co-workers.”)

**Reason:** Under Section 7 of the NLRA, employees have, among other things, the right to act together to improve wages and working conditions and to discuss wages, benefits, and other terms and conditions of employment, with or without a union. The National Labor Relations Board, which enforces the NLRA, and many courts have found that pay secrecy or confidentiality rules violate Section 7. Additionally, Minnesota currently requires employers who maintain an employee handbook to have a clear policy explaining employees’ rights to disclose their own pay information under Minnesota’s Women’s Economic Security Act (WESA).

**Alternatives:** Employers should never take actions or implement policies that could be construed to restrict Section 7 rights under the NLRA. Instead, employers may want to take steps to better communicate information about their company’s compensation program and how employees’ salaries and wages are determined.

### #2 | BLANKET POLICIES CONCERNING CRIMINAL HISTORY

(e.g., “Our company will not hire anyone with a criminal conviction.”)



**Reason:** Blanket policies regarding criminal convictions can have a disparate impact on protected classes and may violate federal, state and local laws. It is strongly recommended that employers follow the Equal Employment Opportunity Commission’s (EEOC) guidance from April 25, 2012. In the guidance, the EEOC reiterates its position that an employer cannot simply disregard any applicant who has been convicted of a crime.

**Alternatives:** According to the EEOC guidance, employers should evaluate how the specific criminal conduct relates to the duties of a particular position. This generally requires an individualized assessment in which the employer considers a variety of factors to determine whether exclusion based on an individual’s criminal record should be applied (such as the facts and circumstances surrounding the offense, the number of offenses for which the individual was convicted, rehabilitation efforts, and employment or character references).

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*Ill-conceived policies and procedures can be problematic, especially when they conflict with federal, state, or local law. When drafting policies, employers should take into consideration all applicable laws. As these laws change often, employers should review policies and procedures on a regular basis to ensure compliance.*

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### #3 | NO-FAULT ATTENDANCE POLICIES

[e.g., "Employees will receive a point for any absence or tardiness, regardless of the reason. If the employee accumulates 7 points, the employee will be subject to progressive discipline. After 15 points, the employee will be terminated."]

**Reason:** No-fault attendance policies subject an employee to a specific form of discipline if they are absent or tardy a certain number of times, regardless of the reason. These types of policies are problematic if one or more absences are protected under federal, state, or local laws and the employer still counts the absence against the employee. For example, employees who have the right to take leave under the Family and Medical Leave Act or the Americans with Disabilities Act cannot have that leave count against them when evaluating their attendance

**Alternatives:** Employers are permitted to adopt a policy that subjects employees to discipline for excessive, unapproved absences, provided that employees are never subjected to adverse action for taking leave to which they are entitled under federal, state, or local law. how employees' salaries and wages are determined.

### #4 | WITHHOLDING PAY UNTIL COMPANY PROPERTY IS RETURNED

[e.g., "Employees' final paychecks will be held until company equipment is returned."]



**Reason:** Federal law requires employees to receive their final pay by the next scheduled payday. Many states have enacted laws establishing shorter timeframes for providing final pay, such as at the time of termination. Employers must comply with final pay laws even if the individual has yet to return company equipment.

**Alternatives:** Whenever possible, employers should reclaim company equipment prior to the individual's departure. Depending on the state, employers may be permitted to make limited deductions from the final pay of non-exempt employees for unreturned equipment, provided they do not bring the employee's pay below the applicable minimum wage and do not reduce any overtime pay due. Some states expressly prohibit any deduction for unreturned equipment. If the employee is classified as exempt, the employer is prohibited from reducing the employee's final pay for unreturned company equipment. Employers should review their applicable law and consider consulting legal counsel before applying any deduction.



### #5 | ENGLISH-ONLY POLICIES

[e.g., "Employees must speak English at all times while on company property."]

**Reason:** The EEOC has taken the position that rules requiring employees to speak only English in the workplace violate federal law unless they are reasonably necessary to the operation of the business. Policies that require employees to speak only English in the workplace at all times, *including during breaks and meal periods*, will not likely be considered reasonably necessary for business operations.

**Alternatives:** Employers that believe an English-only rule is reasonably necessary to the operation of their business should consult legal counsel to determine whether it is permitted. If permitted, employers should apply the rule in limited circumstances and only when it is needed for the employer to operate its business safely and efficiently.

### #6 | UNAUTHORIZED OVERTIME WILL NOT BE PAID

[e.g., "The company will not pay employees for overtime that was not authorized in advance."]



**Reason:** Under the Fair Labor Standards Act (FLSA), non-exempt employees are entitled to overtime pay at a rate of one and a half times their regular rate of pay for all hours worked over 40 in a workweek. Note: Some states have additional overtime requirements. If a non-exempt employee has worked overtime, he or she must be paid an overtime premium, regardless of whether the overtime was pre-authorized. The fact that an employer has a policy that no overtime work is permitted unless authorized in advance doesn't relieve the employer of this requirement.

**Alternatives:** Employers may subject the employee to disciplinary measures for working unauthorized overtime, but in no case may the employer withhold overtime pay.



## #7 | ARBITRARY WAITING PERIODS

(e.g., "Employees become eligible for the company health plan after 6 months.")

**Reason:** The Affordable Care Act generally prohibits all health plans from requiring an otherwise eligible individual to wait more than 90 days to enroll in the plan. At least one state (California) prohibits waiting periods that exceed 60 days. In California, any waiting period must be 60 days or less.

**Alternatives:** Employers in most states are permitted to establish a waiting period of 90 calendar days or less. In California, any waiting period must be 60 days or less.

## #8 | PROHIBITING LAWFUL OFF-DUTY CONDUCT

(e.g., "Employees will be terminated if caught drinking alcohol or smoking while off duty.")



**Reason:** Several states prohibit employers from taking adverse action against employees and applicants who use tobacco. Additionally, a few states expressly prohibit employers from taking adverse action against individuals on the basis of any legal off-duty conduct. In states that don't have such laws, it is not considered a best practice to have such a policy.

**Alternatives:** Employers may prohibit smoking and the consumption of alcohol while on company property and while conducting company business. Employers generally may also offer resources and incentives to help smokers quit using tobacco.



## #9 | CERTAIN SAFETY INCENTIVE PROGRAMS

(e.g., "All employees will receive a \$500 bonus after 180 consecutive days of no injuries.")

**Reason:** These types of incentive programs may violate the Occupational Safety and Health Act, which, among other things, gives employees the right to report a workplace injury. Safety incentive programs could discourage workers from reporting workplace injuries out of fear they'd jeopardize the bonus for themselves and/or co-workers.

**Alternatives:** Employers are permitted to offer incentives that promote worker participation in safety-related activities, such as incentives for identifying hazards, making suggestions for safety improvements, participating in safety committees, or assisting in investigations of injuries, incidents, or "near misses."

*(This content provides practical information concerning the subject matter covered and is provided with the understanding that ADP is not rendering legal advice or other professional services.)*

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