

IT'S 2023 – DOES YOUR EMPLOYMENT POLICY MANUAL NEED ATTENTION?

Poms HR & Employment Webinar Series – Sept 29, 2022

POMS RISK CONTROL & INSURANCE
SMARTER INSURANCE FOR SMARTER BUSINESS.

POMS & ASSOCIATES HR & EMPLOYMENT WEBINAR SERIES

IT'S 2023 - DOES YOUR EMPLOYMENT POLICY MANUAL NEED ATTENTION?

Tips and Traps for Writing and Updating Your Policies

Steven G. Meilleur, Ph.D., SPHR
Sr. VP Risk Services - HR & Employment
Faculty, UNM School of Public Administration
smeilleur@pomsassoc.com

11 JANUARY 2023

1

POMS

TODAY'S PRESENTER

Steven G. Meilleur, PhD., SPHR
Sr. Vice President, Risk Services - HR & Employment, and
Faculty, UNM School of Public Administration
Poms & Associates Risk Services
201 3rd Street NW, Suite 1400 | Albuquerque, New Mexico 87102
(505) 933-6291 • m - (505) 401-0942 • smeilleur@pomsassoc.com

Steven G. Meilleur, Ph.D., SPHR is Sr. Vice-President of Risk Services for Poms & Associates, working with clients around the country to provide consulting, training, and other advisory services specializing in human resources and employment matters. He has more than 40 years of exempt-level experience in HR management, Risk Management, and Organizational Development in the public, private for-profit, and private non-profit sectors. Among other positions he has held Dr. Meilleur has served as the HR Director for the City of Rio Rancho, NM, Director of the State Bar of NM's Center for Legal Education, and HR Team Leader for Plains Electric G&T Cooperative.

His experience in HR management is in the public, private for-profit, and private non-profit sectors, having served in executive and other management positions. He received his BA in English Literature and Education at Bucknell University, and his EMBA & Ph.D. from the University of New Mexico. He is also a Lecturer on the faculty of the UNM Graduate School of Public Administration, teaching in the areas of human resource management, leadership, organizational behavior, strategy and change, and NPO management.

2

POMS

LEGAL DISCLAIMERS

- The information presented is intended as educational and is for general purposes only.
- The information presented herein is prepared and provided by management and human resources professionals, and not by an attorney licensed to practice law in New Mexico, or in any other federal, state, or local jurisdiction.
- While this presentation may provide and/or refer to various information on federal, state and other law, it is not a substitute for legal advice. Further, applicability of the information presented may vary by state or other local jurisdiction, by industry, and/or by employer.
- If you have concerns about this subject matter, consult with your legal counsel prior to acting on or relying upon the recommendations in this presentation.
- The copyright in the material solely belongs to Poms & Associates, Insurance Brokers and any access to it by the general public does not imply free license to use it unless permitted by law, or by express written permission from Poms & Associates.
- With regard to any information presented by a speaker or third-party at any event, Poms & Associates, Insurance Brokers does not make any warranty, express or implied, including the warranties of merchantability and fitness for a particular purpose, and specifically disclaims any legal liability or responsibility for the accuracy, completeness, or usefulness of any information, product, service or process presented and makes no representation that its use would not infringe upon privately owned rights.

3

POMS

TODAY'S TOPICS AND AGENDA

- WHY DO YOU NEED AN EMPLOYMENT POLICY MANUAL, ANYWAY?
- POLICY FORMAT AND ADMINISTRATIVE ISSUES
- LEGAL CONCERNS WITH EMPLOYMENT POLICY MANUALS
- COMMON POLICY MISTAKES AND PROBLEMS
- KEY POLICIES AND UPDATES FOR 2022-23
- REVISING AND UPDATING YOUR POLICY MANUAL

4

IT'S 2023 – DOES YOUR EMPLOYMENT POLICY MANUAL NEED ATTENTION?



WHY DO YOU NEED AN EMPLOYMENT POLICY MANUAL, ANYWAY?


POMS

5

Poms HR & Employment Webinar Series – Sept 29, 2022

POMS AXIOM #1: VERY IMPORTANT

- If you and your managers, supervisors, and lead workers don't have the **ABILITY** or the **WILL to enforce** your policies *as they are written...*
- Then don't include them in your Employment Policy Manual ...
- ... Unless it is a policy required by law. THEN you have no choice but to enforce the policy.
- Be sure to train your management employees about their legal duty to enforce and uphold policy as written!




POMS

6

POMS EMPLOYMENT POLICY MANUALS:

- Set out your organizational culture
- Must be easy for employees to understand
- Are driven by legal compliance
- Set expectations
- Communicate employer expectations of employees
- Clarify employee expectations of employer
- Consider terms:
 - Employee vs. team member
 - "Manager" vs. "Supervisor"
 - First or third person?
 - Singular "they"
- Consider an Employee Handbook of 30 pages or less



POMS

7

POMS WHY EMPLOYMENT POLICIES ARE IMPORTANT

- They set clear expectations and guidelines for all employees
- Legal Compliance/Protections - Strengthens defense in litigation
 - Protects against discrimination and unfair treatment claims
 - Explains applicable laws
- Communicates values and expectations for how things are done at your organization
- Advises Employees of Benefits Available
- Advises Employees of Rights and Responsibilities
- Supports consistent treatment of staff, fairness and transparency
- Helps management to make decisions that are consistent, uniform and predictable
- Establishes basis for taking corrective action and disciplinary action
- Documents and communicates best practices appropriate to the organization

POMS

8

IT'S 2023 – DOES YOUR EMPLOYMENT POLICY MANUAL NEED ATTENTION?

POMS WHY EMPLOYMENT POLICIES ARE IMPORTANT

- Helps identify potential problems before they flair up, minimizing "crisis management"
- Reduces the number of emotional decisions and promotes a more businesslike atmosphere
- Defines authority and responsibility of employees
- Communicates and facilitates consistent, fair, and equitable administration of policies.
- Promotes continuity in management and supervision style throughout the organization.
- Helps Guide Your Managers, Supervisors, and Leads in their roles - duty to enforce
- Consistent personnel management and supervision practices build fairness and equitable treatment
 - Builds morale, productivity and employee engagement
 - Reduces exposure to discriminatory practices and impact

9

Poms HR & Employment Webinar Series – Sept 29, 2022

POMS YOUR POLICY MANUAL: SHIELD or SWORD?



- **SWORD:** An Employment Policy Manual that is poorly done, and not followed or enforced will do you more harm than good. It can become a Sword used by plaintiff's attorneys to demonstrate a violation of law, policy, or employment contract.
- **SHIELD:** When done well, followed, and properly enforced, the Employment Policy Manual can become a Shield used by the employer to demonstrate fairness, and compliance with legal obligations.

10

POMS DANGERS OF POOR EMPLOYMENT POLICY MANUALS

- *"A poorly done employment policy manual, one that is out of date, or one that isn't followed, is the plaintiff attorney's best friend."*
- A bad policy manual/handbook or one that is misapplied may do more harm than good
- If not strictly followed, may give rise to breach of express or implied contract, misrepresentation or promissory estoppel claims
- Failure to apply policies uniformly may support claims of discrimination or retaliation
- Can create legal rights where none exist



11

POMS LEGAL PITFALLS - BEWARE!

- Examine what is in writing vs. what actually happens "on the job"
 - In NM, CA, and many other jurisdictions, courts have said that "employment practice" over-rides your employment policy.
- Provide training to supervisors, and other members of management. If they are not properly trained, no policy will provide any protection and in fact may be the basis for upholding an employee's claim against a company.
- Make sure that ALL copies of employment policy manuals are current - particularly ones that managers and supervisors have.
- Not keeping your employment policies current is an invitation to risk exposure, and litigation

12

IT'S 2023 – DOES YOUR EMPLOYMENT POLICY MANUAL NEED ATTENTION?

LEGAL PITFALLS - BEWARE!

- In most jurisdictions within the US, employment is presumed to be “at will” - either the employer or employee can terminate the employment relationship “*at any time, for any reason or for no reason at all.*”
- Exceptions to “at will” provide employers with “due process rights” in the State of Montana and in Public Sector employment
- Plaintiff’s attorneys will try to find ways around the employment at will doctrine based on:
 1. Public policy exception (most states have some form);
 2. Implied covenant of good faith and fair dealing (minority view); and
 3. Express or implied written or oral contract.
- The “strength” of the “at will” doctrine varies among jurisdictions.

13

LEGAL PITFALLS - BEWARE!

POLICY MANUALS AS CONTRACTS

- Most states have recognized that provisions in an employment policy manual may give rise to implied assurances of continued employment and hence to an implied-in-fact contract.
- Contract terms are construed against the drafter of the document.
 - Thus, ambiguities are construed against the employer.
- Contracts are usually considered to be ambiguous if the language can reasonably be construed in more than one sense and the construction cannot be determined within the four corners of the document.




14

LEGAL FRAMEWORK


- Laws set floors
 - Employers can always go above & beyond the law
 - E.g., FMLA employer maintaining more than health insurance.
 - Drafting a policy to a law can often be a mistake
- Doesn’t need to be printed
 - Intranets, HCM applications
 - Accessible any time



15



POLICY FORMAT AND ADMINISTRATIVE ISSUES



16

IT'S 2023 – DOES YOUR EMPLOYMENT POLICY MANUAL NEED ATTENTION?

NOMENCLATURE OF EMPLOYMENT POLICIES

- Employment Policy Manual (EPM) is the official policy document that carries the force of law - it is the authoritative statement of policy.
- On-Line Master EPM managed by HR - accessible to all employees
- “Control” Print Copies - 3-Ring Binders that key managers have in their offices for reference and use by employees
 - “Controlled” by HR to ensure properly updated & current
 - Start each policy on a new page for easy replacement to update policies
- Master EPM Archive - Record of past policies with effective dates
- Employee Handbook is a SUMMARY of your employment policies, procedures, and work rules. That can be distributed in hard copy.
 - The Handbook can also include basic information that employees need to know about your organization

17

Poms HR & Employment Webinar Series – Sept 29, 2022

EXTERNALLY DRIVEN POLICIES: *Jurisdictional*

- Externally driven policies are usually expressed as laws, regulations, or ordinances formulated and enforced by government on the federal, state, or local (county or municipal) level. For example:
 - Federal - Fair Labor Standards Act, FMLA, and on, and on ...
 - State - Anti-discrimination laws, NM “Victims of Domestic Violence Act,” Workers Comp, Wage & Hour laws, Voting, CA Paid Leave laws, etc.
 - Local - Minimum wage ordinances, anti-discrimination ordinances e.g. Cincinnati ordinance prohibiting discrimination on the basis of “Appalachian Descent”
- We recommend that you append, reference, or otherwise incorporate policies into your EPM that reflect requirements from all jurisdictions that apply to you.

18

EXTERNALLY DRIVEN POLICIES: *Industry-Specific*

- Many industry-specific policies are also externally driven, expressed as laws formulated and enforced by government. For example:
 - Federal Contractors - AAP, paid leave, hiring practices, etc.
 - Medicaid-Funded Entities - DRA Medicaid Fraud, Whistleblower
 - USDOT-Covered CDL Drivers - Drug Free Workplace, driver safety
 - Tree Service Companies - OSHA ANSIZ133.1 Standard for Tree Care Safety
 - Healthcare Organizations - OSHA Infection controls, HIPAA, etc.
 - Schools - Title IX, FERPA, Mandatory Reporting, Staff-Student Boundaries, etc.
- Again, we highly recommended that you append, reference, or incorporate such industry-specific policies in EPM.

19

INTERNALLY DRIVEN POLICIES: *Nature of Organization*

- Internally driven policies are based on the nature of the organization, and dependent on a number of variables. For example:
 - Federal or State Government Contractors - AAP, paid leave, hiring practices, etc.
 - Organizations Preparing and Serving Food - FDA FSMA regulations, OSHA, USDA
 - Number of Employees - laws and regulations often apply to organizations based on the number of employees e.g., FMLA, ADA, COBRA, etc.
 - Public v. Private Sector Employers - “probationary period” vs. “introductory and training period,” “comp time,” Loudermill rights, etc.
 - Unionized v. Non-Unionized Employers/Departments/Classes of Employees - CBAs, Weingarten Rights, etc.

20

IT'S 2023 – DOES YOUR EMPLOYMENT POLICY MANUAL NEED ATTENTION?

Poms HR & Employment Webinar Series – Sept 29, 2022

POMS SAMPLE POLICY MANUAL CONTENTS *(Edited)*

<p>1. General Information</p> <ul style="list-style-type: none"> • DISCLAIMER(s) • About the Company • Employment At Will • Right To Interpret and Change Policies <p>2. Commitment to Diversity</p> <ul style="list-style-type: none"> • Diversity and Inclusion • EEO & Non-Discrimination • Civility and Respect in the Workplace • Reporting and Anti-Retaliation • ADAAA Disability Accommodation • Lactation Accommodation 	<p>3. General Employment Practices</p> <ul style="list-style-type: none"> • Promotions, Transfers, & Demotions • Training & Introductory Period • Performance Management <p>4. Workplace Conduct & Behavior</p> <ul style="list-style-type: none"> • Expectations of Conduct & Behavior • Corrective and Disciplinary Action • Teamwork & Collaboration • Personal Appearance, Grooming & Hygiene • Attendance & Punctuality • Ethics & Conflict of Interest • Required Disclosure of Outside Employment
--	--

21

POMS SAMPLE POLICY MANUAL CONTENTS *(Edited)*

<p>5. Organizational Property & Information Technology</p> <ul style="list-style-type: none"> • Privacy, Protection of Business Records, Equipment, & Assets • Non-Disclosure of Confidential & Proprietary Information • Care of Organizational Property & Equipment • Electronic Communications • Computer Use • Theft, Misappropriation, Fraud • Cyber-Security 	<p>6. Time Off and Leaves of Absence</p> <ul style="list-style-type: none"> • Holidays • Paid Leave (Annual Leave, Sick Leave) • FMLA • Personal Leave Without Pay • Military Leave • Jury Duty or Witness Service Leave • Bereavement • Victims of Domestic Abuse Leave • Volunteer Emergency Responder Leave • Religious Observances Leave • Parental School or Childcare Activities Leave • Blood Donation Leave (CA or optional)
--	---

22

POMS SAMPLE POLICY MANUAL CONTENTS *(Edited)*

<p>7. Wage & Salary Administration & Pay Practices</p> <ul style="list-style-type: none"> • Payment of Wages • Employee Classifications (FLSA, FT-PT, Type & Status) • Work Schedules • Flexible Work Arrangements • Overtime • On-Call and Call-Back Pay • Business Travel & Reimbursement <p>8. Employee Benefits</p> <ul style="list-style-type: none"> • Benefits Overview <ul style="list-style-type: none"> • Don't Include Details of Benefits • Refer to HR for Current Benefits Info • Workers Compensation • Employee Training & Prof Development • Educational Assistance Program • Service Animals, Pets, Companion Animals 	<p>9. Safety and Security</p> <ul style="list-style-type: none"> • General Safety Rules • Workplace Violence Prohibited • Weapons in the Workplace • Workplace Bullying and Abusive Conduct • Accident or Near Miss Reporting • Tobacco and Smoke-Free Workplace • Fitness for Duty • Return-to-Work/Transitional Employment • Drug-Free Workplace • Inspections, Searches & Surveillance • Security of Electronic Resources • Driving Policies • Visitors and Security • Infectious Disease/Pandemic Outbreak
--	---


23

POMS SAMPLE POLICY MANUAL CONTENTS *(Edited)*

10. Leaving Employment with [Company]

- Separation from Employment (Types)
 - Voluntary Resignation
 - Retirement
 - Involuntary Termination
 - Job Abandonment
 - Failure to Return to Work from Leave Within Allotted Time
- Return of Company Property
- Exit Interviews
- References/Verifications of Employment
- Layoffs, Reductions in Force
- Furloughs

11. Receipt / Acknowledgment of Receipt of Employment Policy Manual



24


POMS POLICIES, PROCEDURES, SOPs, AND JOB AIDS

What is a Policy? The Rules.

- Policies are “The Rules” that govern the operation of your organization and those who work for it.
- They are designed to tell you the rules that need to be followed, and that shows the intention to do some thing.
- Policies often will allow for some “management prerogative” in enforcement.
- An employment policy is a business rule that includes things like no smoking, no drinking, and other business practices like dress codes, vacation policy, or your company’s codes of conduct.
- Policies evolve as the business, and legal environment grows and changes.
- Organizations need to be more regimented about how often employment policies are revisited and updated.
 - *Example: A company might have a policy that mandates preventative maintenance be performed on all manufacturing equipment so that workers are not at risk and downtime is avoided.*
- A common problem we see is that sections of the personnel policies become so detailed and specific that they virtually outline the procedures, especially for disciplinary actions, grievances and appeals of adverse actions.

25

POMS POLICIES, PROCEDURES, SOPs, AND JOB AIDS



- **Different “levels of Policies” you may need:**
 - Organization-wide
 - Department / Team
 - Program-specific
 - Labor-Management Relations
- Work rules are specific applications of policies that typically apply to department, job classification, or program-specific matters related to conduct, or behavior.
- Write work rules for a specific job category or location such as service, clerical, front desk, grounds.
 - *Example: Proper Notice for Absence or Tardiness:* Employees must call their immediate supervisor or designated contact within <X> minutes of their beginning work time (may be different times for different departments).

26

POMS POLICIES, PROCEDURES, SOPs, AND JOB AIDS

What are Procedures? The Steps.

- A Procedure is a written document detailing all inter-related activities of specific system - such as system of document control, or a system of procurement,
 - *Example: A procurement procedure would have detail of related activities like supplier evaluation & approval activities, purchasing activities, supplier monitoring activities etc.*
- Procedures are established or official way of doing something, in order to comply with a policy.
- Procedures explain how to fulfill a company’s policies in more specific detail, often dictating “what” must be done and “who” is responsible.
 - *Example: If it was policy that all employees must receive 20 hours of safety training annually, a procedure would provide detail about how those hours are to be allocated and attained.*

27

POMS POLICIES, PROCEDURES, SOPs, AND JOB AIDS

- **Differences Between Policy and Procedure**
 - Procedures are established or official way of doing something, in order to comply with a policy. A series of steps taken to accomplish an end.
 - Procedures explain how to fulfill a company’s policies in more specific detail, often dictating “what” must be done and “who” is responsible.
 - *Example: If it was policy that all employees must receive 20 hours of safety training annually, a procedure would provide detail about how those hours are to be allocated and attained.*

Policies	Procedures
Have widespread application	Have a narrower focus
Are non-negotiable, change infrequently	Are subject to change and continuous improvement
Are expressed in broad terms	Are a more detailed description of activities
Are statements of <i>what</i> and/or <i>why</i>	Are statements of <i>how</i> , <i>when</i> and/or <i>who</i> & sometimes <i>what</i>
Answer major operational issues	Detail a process

28

IT'S 2023 – DOES YOUR EMPLOYMENT POLICY MANUAL NEED ATTENTION?

Poms HR & Employment Webinar Series – Sept 29, 2022


POMS EMPLOYMENT POLICY MANUAL / WORK RULES

- Work Rules are more about the rules of the work and not the employment relationship. This type of document will generally change more frequently than employment relationship information. Work rules are often incorporated into collective bargaining agreements.
- The major purpose of the Work Rules document is to provide detailed information to employees about everything they need to do/know to perform the work of the organization without harm to themselves or others.
- The Work Rules document is generally a good idea - its content varies a lot with the specific business. For example, a healthcare organization probably needs an OSHA infection control set of policies and procedures. A retail store not at all.
- Work Rules can also be used to modify and adapt policies to the needs of particular departments or programs, e.g., Call-in times for absence or tardiness where individual departments may have different requirements.

29

POMS EMPLOYEE HANDBOOK

- An Employee Handbook should be a short concise booklet that an employee can use to know the basic “rules of the road.” Primarily summaries and guidelines about the employment relationship but may need to have some safety/work rules information.
- Because an Employee Handbook is necessarily shorter and more general, the use of the word “policy” in the Employee Handbook can cause a contradiction when there is another document (e.g., a Policy Manual) that covers the same topic and also uses the word “policy.”
- The Employee Handbook states that it contains only guidelines, and the Employment Policy Manual is the official statement of Policy. It refers the employee to a supervisor, manager and the EPM for specific details. *e.g., FMLA*



30

POMS SAMPLE FORMAT FOR COMPREHENSIVE MANUAL

EMPLOYMENT POLICY MANUAL – Section 3: Wage and Salary Administration

THE <COMPANY NAME> EMPLOYMENT POLICY MANUAL			
Original Issue:	Current Revision:	Current Approval By:	Page 1 of 1

3.XX SAFE HARBOR POLICY – IMPROPER OR UNLAWFUL DEDUCTIONS FROM PAY

POLICY:

Every effort is made to ensure that compensation and paychecks are properly computed and calculated. It is against <COMPANY NAME> policy for any FLSA exempt employee's wages to have improper or unlawful deductions. If the Employee believes their pay is incorrect or that an improper or unlawful deduction was made to their wages or salary, they must immediately contact Accounting or the <TOP HR OFFICIAL>.

SCOPE:

This policy applies to all FLSA exempt employees of <COMPANY NAME>.

DISCUSSION: STANDARDS, GUIDELINES, PROCEDURES, AND WORK RULES:

1. The salaries of employees exempt under the Fair Labor Standards Act, 29 CFR Part 541, may be reduced or be subject to deduction for the following conditions ONLY:
 - 1.1. For a day or more full days for absence for personal reasons other than sickness or disability and the employee has no leave to cover the absence.
 - 1.2. For a day or more full days for sickness, or disability (including work place injury) if the employee has not qualified for our leave benefit, has not earned sufficient leave to cover the absence, or has exhausted all leave and has no earned leave remaining to cover the absence. Such deductions will be in full day increments, not on an hourly basis, with the exception of unpaid Family and Medical Leave Act leave. If the employee has exhausted all leave benefit that would cover an FMLA absence, the employee's salary may be reduced in hourly increments while on FMLA leave.
 - 1.3. Deductions for penalties imposed for violations of safety rules of major significance, including those relating to the


31

POMS MULTI- JURISDICTION MANUALS

should be tailored to the industry, number of employees, union/non-union status, and whether they are government contractors or public- or private-sector employers.

Likewise, multistate employers need to make sure their employee handbooks are compliant with applicable state and local laws where their employees are physically located, sent to work on assignments, or working remotely.

- Comprehensive EPMs detailing all jurisdictional differences can create a “we-they” schism, as employees will compare.
- Separate EPMs for all jurisdictions may also lead to comparing, and can be difficult to maintain.
- Consider
- Consider selecting “the best” policy for all employees, less comparison, maybe even celebration
- Make sure all “notification” policies are included in the handbook body
- All state-required benefits not included in the body should be in an addendum



32

IT'S 2023 – DOES YOUR EMPLOYMENT POLICY MANUAL NEED ATTENTION?




LEGAL CONCERNS WITH EMPLOYMENT POLICY MANUALS



33

Poms HR & Employment Webinar Series – Sept 29, 2022

 **POMS DON'T LET YOUR POLICIES BE EXHIBIT "A" IN COURT**

- Too often, policies themselves are inconsistent with the way business is actually conducted, or they mistakenly imply that workers have certain rights. Examples:
- Poorly written progressive discipline policies that suggest an employee will be fired only for good cause. Such language can erase a worker's employment at will status and the employer's right to fire the person for any reason.
- Even a statement about an initial "probationary period" can suggest that workers are virtually guaranteed continued employment after a certain period of time.
 - The term, "probationary period" should ONLY be used in the public sector; NEVER use it for private for-profits or non-profits


34

 **POMS DON'T LET YOUR POLICIES BE EXHIBIT "A" IN COURT**


1. Consistent personnel management and supervision practices build fairness and equitable treatment
 - Builds morale, productivity and employee engagement
 - Reduces exposure to discriminatory practices and impact



35

 **POMS DON'T LET YOUR POLICIES BE EXHIBIT "A" IN COURT**


2. Examine what is in writing vs. what actually happens "on the job" - In New Mexico and many other jurisdictions, courts have said that "employment practice" becomes your de facto employment policy.
3. Provide training to supervisors, and other members of management. If they are not properly trained, no Manual will provide any protection and in fact may be the basis for upholding an employee's claim against a company.
4. Don't "wing it." Many employers write policy manuals, distribute them, and then fail to read and follow them when making important employment decisions. Read your policy manual and follow it.
5. Don't just put it on the shelf. Policy manuals should be reviewed and updated *at least* annually for legal compliance and to ensure that you're following your own policies.
6. Beware templates and do-it-yourself software package at the local Office Wiz store. Unfortunately, those one-size-fits-all packages don't adequately reflect state or local law and are often poorly drafted.
7. Have your policies reviewed by your employment law attorney - not by your divorce lawyer.



36

IT'S 2023 – DOES YOUR EMPLOYMENT POLICY MANUAL NEED ATTENTION?


POMS DON'T LET YOUR POLICIES BE EXHIBIT "A" IN COURT

1. Can you say that 100% of your managers and supervisors understand and follow the Employment Policy Manual?
 2. Do your managers and supervisors all consistently enforce and uphold employment policies and procedures?
 - The Doctrine of Agency
 3. Are your organizational and management practices always consistent with your written employment policy?
 4. Is your Employment Policy Manual *always* clear, so that there are no areas that cause you or your supervisory staff difficulty?
 5. Does your anti-harassment policy prohibit all forms of illegal harassment, and not just sexual harassment?
- 

37

Poms HR & Employment Webinar Series – Sept 29, 2022

POMS DON'T LET YOUR POLICIES BE EXHIBIT "A" IN COURT


6. When you update your Employment Policies, do you ensure that ALL copies are properly updated, particularly those used by managers and supervisors?
 7. Do you have safety policies and procedures?
 8. Have you updated your policies at all during the past year?
- Let's just say that the answers to these 8 questions all should be an unequivocal "YES!"
- 

38

POMS DON'T LET YOUR POLICIES BE EXHIBIT "A" IN COURT

If you answered "no" to any of these 8 questions, your Employment Policy Manual needs attention.

It is time to develop a policy when:

- Legislation or regulations that expressly requires an organization has a policy in place
 - Legislation or regulations that do not expressly require an organization have a policy, but the regulations and steps to be followed are tightly defined and a policy will help to ensure the organization is in compliance
 - There is inconsistency in how employees behave, or managers make decisions that is negatively impacting the work environment or accomplishment of business
 - There is confusion about certain areas of the business or how things are to be done
- 

39

POMS DON'T LET YOUR POLICIES BE EXHIBIT "A" IN COURT

- Policies are developed for the many, not the few - when you bring a policy into force you are establishing a standard that will apply broadly across the organization - not just to a few individuals who may be causing problems.
- Policies are rules or standards to be followed consistently and reduce a managers' flexibility to treat each situation as unique.
- It can be difficult to change policies once they have been implemented and become part of your organization's culture and ways of working
- Be sure that any policies you implement, address a real need and are in line with what your company values and how work should be accomplished.
- You also need to ensure managers have the skills and resources to be able to implement and monitor the policy.


40

IT'S 2023 – DOES YOUR EMPLOYMENT POLICY MANUAL NEED ATTENTION?




41

Poms HR & Employment Webinar Series – Sept 29, 2022

 **COMMON MISTAKES AND PROBLEMS WE SEE**


1. Not regularly changing and updating policies - i.e. reaching up onto a dusty shelf to hand out and refer to the same old Employment Manual someone wrote years ago.
 - Review and update AT LEAST annually, AND as needed.
2. Including details that are likely to change frequently.
 - e.g. Using peoples' names, details about benefits
3. Using a Manual template that does not fit the company. Manual templates are useful but must be used with care.
 - Be particularly careful about using public sector manuals as a model for a private sector employer.
4. Not including disclaimers and other statements to preserve management rights, e.g. right to bypass progressive discipline.

42

 **COMMON MISTAKES AND PROBLEMS WE SEE**

5. Not communicating changes effectively to all employees - including getting proper employee sign-offs on new or revised policies.
6. Overly long and legalistic policies that are not distinct from procedures and guidelines.
7. Not adapting the policies for your local jurisdiction(s). You may need more than one version of the policy manual if you have employees in several states.
8. Having unlawful policy statements in your Employment Policy Manuals
 - Examples: won't pay for unauthorized overtime, deductions from pay for lost/damaged property not allowed by law, compensatory time in private sector, prohibiting discussion of pay, non-payment of paid leave if required by state law, etc.

43

 **COMMON MISTAKES AND PROBLEMS WE SEE**

9. Wage and hour issues - Misclassification (exempt, non-exempt, independent contractor), failure to define workweek, meal and rest periods (state law especially). This is much more than just a Manual problem. Majority of employers have technical violations of wage/hour laws - DOL estimates 75%-80%.
10. Not having essential or legally required provisions (EEO statement, reasonable accommodation statements (disability, religion) anti-harassment (of any kind), anti-retaliation, FMLA notice if covered employer, authorized to work in United States, at-will employment).
11. Leave policies that don't allow the flexibility needed to comply with ADA reasonable accommodation obligations.

44

IT'S 2023 – DOES YOUR EMPLOYMENT POLICY MANUAL NEED ATTENTION?

COMMON MISTAKES AND PROBLEMS WE SEE

12. Not having a statement prohibit making false charges, fraudulent workers comp claims, etc.; subject to discipline
13. Creating obligations the company does not comply with (e.g. performance reviews, disciplinary procedures, attendance policies, pay increases and promotions).
14. Overly restrictive policies, such as social media, non-solicitation, confidentiality, etc. These areas are frequently the source of charges to the NLRB alleging violations of the NLRA (section 7 - protected concerted activity rights of employees).
15. Improper Harassment policy - e.g. having a sexual Harassment policy instead of having a broad policy prohibiting harassment for other protected classes, and retaliation.
 - Current “best practice” is to have a policy on: “Civility and Respect in the Workplace: Preventing Discrimination, Harassment, and Retaliation”

45

Poms HR & Employment Webinar Series – Sept 29, 2022

COMMON MISTAKES AND PROBLEMS WE SEE

16. Limiting who employees can or must report to for harassment, retaliation or discrimination of any kind and/or not following the process laid out .
17. Not providing sufficient flexibility for similar conduct but different context or severity. This is essentially over restrictive or overly detailed disciplinary processes or rules of employment.
18. Having contradictory provisions (e.g. multi-step discipline vs. immediate termination provisions)
19. Putting a cap on medical leaves and overly restrictive return-to-work policies.
20. Not controlling Meal and Rest Periods ... or not providing meal and rest periods that comply with legal requirements.
21. Not clearly stating policy to control Overtime

46

COMMON MISTAKES AND PROBLEMS WE SEE

22. “Use it or lose it” vacation/PTO policies in some jurisdictions (e.g. CA - maximum accrual cap is okay).
23. Public sector policies in private employer EPMs (e.g. comp time)
24. Negative, “prohibitive,” or punitive language - written in such a way that it demonstrates the company does not trust or respect employees - culture.
25. Not including policies specific to your organization or industry (e.g. Medicaid Fraud, Food handling, Child welfare)
26. An overly detailed, step-driven corrective action/disciplinary policy or procedure.
27. Problematic terminology (e.g. “permanent” vs. “regular” employee, “probationary period” vs. “Introductory” or “Training and Orientation” period)

47

COMMON MISTAKES AND PROBLEMS WE SEE

28. Having unlawful policy statements:
 - “Do not discuss your wages with any other person ...” - Right to discuss terms and conditions of employment.
29. “Guarantee” language such as “will,” “shall,” etc. Becomes promissory and can be interpreted as contractual.
 - e.g. “Employees performance shall be reviewed on the anniversary date of hire.”
30. Conflating policy with procedures and work rules - except where required (e.g. unlawful harassment)
31. Not “capping” certain paid leave benefits, can result in unintended costs
 - Offering Paid Jury Duty leave - rare, but some jury trials (federal grand juries, for example) can last for months.
32. Acknowledgement page certifying that the employee has “read” the policy manual.
 - Signed acknowledgement receipt, and employee’s responsibility for becoming familiar with the policies, and knowing who to ask questions about the policies.
 - Provides a level of consistency and proof that an employer makes their employees aware of the Policy Manual.
 - File original signature acknowledgements (including revisions) in official file.

48

IT'S 2023 – DOES YOUR EMPLOYMENT POLICY MANUAL NEED ATTENTION?

Poms HR & Employment Webinar Series – Sept 29, 2022

POMS COMMON MISTAKES AND PROBLEMS WE SEE

33. Clearly define leave benefits: how vacation time/PTO/sick leave is earned or accrued, and how it is paid out upon separation.
34. Having an Overly Restrictive Disciplinary Policy.
 - List the types of conduct that may result in employee discipline and potential penalties for infractions up to and including termination of employment
 - Should not include a rigid “step” disciplinary system from which the organization cannot deviate, leaving you ill-equipped to handle serious incidents if it is the employee’s first infraction.
35. Not Applying Policies Consistently.
 - *Managers’ & supervisors’ legal duty to uphold and enforce policy.*
36. Not Expressly Reserving the Right to Change and Modify the Employment Policies With or Without Notice
37. Forget to include Safety and Security Policies
 - Employers have the obligation to provide a safe and healthful workplace to their employees, who in turn are obligated to follow policy.

49

POMS COMMON MISTAKES AND PROBLEMS WE SEE

38. Consider union contract (CBA) conflicts. Try to align policies and CBAs for consistent administrative processes.
 - If certain employees are covered by a union contract, there are limitations as to the degree that the employee manual can apply to those employees.
 - Many times, an introductory section of the manual will make clear that the manual does not apply to these employees.
 - If any aspects of the manual are intended to apply to such employees, application of the manual may require bargaining obligations.
39. Not Including a Computer/Technology Use Policy, and having a separate companion written agreement updated and signed annually.
40. Copying Policies from the Internet or Other Organizations without careful review and revision for your organization.

50




KEY POLICIES, AND UPDATES FOR 2022-23

POMS

51

POMS 12 ESSENTIAL POLICIES


1. At-Will Employment
 - *NOTE: The “strength” of the “at-will” doctrine varies from state to state*
 - *“At-Will” doctrine doesn’t apply in Montana, or for public sector employers (except appointed positions)*
2. Equal Opportunity Employer
3. Prohibiting Discrimination, Harassment, and Bullying
4. Leaves of Absence
5. Attendance & Punctuality
6. Discipline & Corrective Action
7. Safety and Security Policies (OSHA,
8. Drug-Free Workplace (include DOT, federal contractors, etc.)
9. Workplace Security & Violence Prevention
10. Policies Implicating Privacy Rights
11. Confidentiality and Trade Secrets (Data breach)
12. Policies Driven by Company Size - FMLA, ADA, ACA, Title VII, COBRA, etc.



52

IT'S 2023 – DOES YOUR EMPLOYMENT POLICY MANUAL NEED ATTENTION?

POMS WELL ... 23 ESSENTIAL POLICIES, ANYWAY

- 13. Internet, E-Mail and Electronic Communications
 - 14. Pay Practices
 - 15. Benefit Description - not details!
 - Reference to Plan Documents, Benefits Handbook
 - 16. Employee Status and Classifications
 - 17. Grievance/Complaint, or Dispute Resolution
 - 18. Separation Policies
 - 19. FLSA Safe Harbor Policies
 - 20. Code of Conduct - Expected, Prohibited, Off-Duty Conduct
 - 21. Other Industry-Driven Policies - e.g., Medicaid Fraud, Medication Security and Dispensing, Federal Contractor Policies, etc.
 - 22. Other Jurisdictionally-Driven Policies - e.g., CFRA, Paid Sick Leave, etc.
 - 23. Other Sector-Driven Policies - e.g., Compensatory Time, Probationary Period, etc.
- 

53

Poms HR & Employment Webinar Series – Sept 29, 2022

POMS AT-WILL EMPLOYMENT

- Is it clear that all employment is at-will?
 - Employees operating under the terms of a contract or collective bargaining agreement would require separate documents.
- Does the language used explain the concept?
 - Workers should understand that at-will arrangements give both workers and companies the right to terminate employment at any time with or without reason.
 - However, employers cannot fire on the basis of a protected category such as race or disability.
- Do you mention the courtesy of two weeks' notice before quitting?
 - Leaving immediately is becoming increasingly popular, especially among Millennials.
 - Make people aware of any possible *future* repercussions, such as forfeiting the possibility of future employment with the organization.
 - Be careful about having immediate consequences - can erode "at-will"

54

POMS SOCIAL MEDIA

- Do you adequately cover relevant topics?
 - It's important to include guidelines on confidentiality of company/client information, posting on work time or devices, and staying away from harassing colleagues.
- Who can post on official company sites?
 - You may wish to limit who comments/posts on company sites and pages.
 - In addition, you may wish for employees who comment on company social media posts to disclose their employment with the company.
- Does your language leave the impression that the company is trying to prohibit employees from talking about work?
 - Remember that the National Labor Relations Act enables employees to converse freely with each other about employment and working conditions, including topics like pay, hours, and treatment.

55

POMS HYBRID OR REMOTE WORK POLICIES

- Organizations that don't already have hybrid or remote work policies should develop them for their 2023 employee handbooks.
- Having these policies in place is vital for protecting the company from unnecessary risk and exposure, improving employee performance and experience, and ensuring the organization gets all its equipment back when employees move on. A remote work policy should address these items:
 - How employees deliver work
 - How meetings are conducted, including technologies used and dress codes
 - Expected working hours and scheduling
 - Expectations for employee availability and response times
 - Rules for cyber safety
 - Technologies and equipment employees will use
 - The return of equipment when employees move on
 - Inclement weather procedures, especially whether employees will still work if the headquarters is closed

56

IT'S 2023 – DOES YOUR EMPLOYMENT POLICY MANUAL NEED ATTENTION?

POMS HYBRID OR REMOTE WORK POLICIES

- Who is eligible to telecommute, and under what circumstances?
- What technology is required, and who will pay for it?
- Do employees have set hours to be online while telecommuting, and is there any flexibility in scheduling?
- What security measures does the company have in place and expect telecommuting employees to follow when working outside of the office?
- Is it clear that telecommuters must display the same professional behavior when working online as when in the office?
 - Ensure employees know improper conduct such as bullying coworkers on company chat platforms is subject to disciplinary measures.
- Note that supplementary handbook material may prove useful when presenting work-from-home policies during the COVID-19 pandemic.

57

Poms HR & Employment Webinar Series – Sept 29, 2022

POMS INCLEMENT WEATHER

- Is it clear how weather-related closure decisions get made?
- How does information regarding weather-related decisions get conveyed to employees, including the timing of such messages and communication method?
- Do employees get paid on snow days?
 - Spell out any differences by status (exempt vs. non-exempt) and length of closure (partial or full day).
- Who, if anyone, can work at home when the weather is questionable but the office is open?
 - How does one get approval? What activities (such as trainings) “count” as working?

58

POMS HEALTH AND SAFETY

- Have your policies kept pace with relevant legislation, such as federal law requiring employers to provide reasonable time and space accommodations for breastfeeding mothers?
- Are elements of the Family and Medical Leave Act spelled out in a way that workers know how the information pertains to your workplace?
- Do you make it clear that sick people are expected to stay at home for their own good and that of their fellow employees?
- Do you have general policies concerning communicable diseases, and pandemic responses?
 - Regarding COVID-19, is information presented about testing, quarantining, contact tracing, and returning to the office? Are leave policies spelled out in detail?
 - What screening procedures are in place at the office, and what hygiene rules are employees expected to follow?
- Again, a separate supplement with greater detail could be beneficial when presenting information directly related to the pandemic.

59

POMS EVOLVING LEAVE POLICIES (Paid and Unpaid)

The past year saw increasing calls for paid leave laws to be enacted at both the state and local level. And new paid leave laws have come into effect in several states in 2022, like New Mexico's Healthy Workplaces Act.

At least 11 states and municipalities have enacted paid leave laws and others are likely to follow.

Consider these factors when assessing whether your leave paid policies may be in need of an update:

1. Pay attention to where employees are located and headcount. Depending on the laws in those jurisdictions, consider a state or local supplement to the main handbook to account for the nuances under greatly differing paid leave laws, which may apply depending on how many employees you have in a particular state.

60

POMS EVOLVING LEAVE POLICIES (Paid and Unpaid)

2. Clearly explain employee eligibility. Federal law requires employers provide FMLA leave after one year on the job and 1250 hours worked and state and local requirements may require leave after less time on the job (e.g.,
 - Wisconsin's unpaid FMLA law only requires 1000 hours in the preceding 52 weeks). However, employers can also offer leave at any point before those requirements kick in.
 - Ensure that your policy clearly explains when an employee may be eligible for various paid leaves and ensure that if such leave is protected by law, the policy is compliant.
3. Make sure your leave policies are not inadvertently discriminatory. For example, parental leave policies should apply equally to all types of new parents, although there is an important distinction to be made between paid leave for recovering from childbirth and paid leave for bonding or other non-medical reasons.

61

POMS EVOLVING LEAVE POLICIES (Paid and Unpaid)

The big-ticket items for employers to watch at the state level involve paid and unpaid leave laws.

- Many states expanded access to leave for COVID-19-related and other medical reasons.
- Effective Jan. 1, 2021, all private employers with five or more employees are covered under the California Family Rights Act (CFRA) - only applied to private employers with 50 or more employees.
- Effective Jan. 1, 2022, the California Family Rights Act was expanded to allow covered workers to take leave to care for a parent-in-law.
- Effective July 1, 2022, New Mexico private employers are required to provide paid sick leave
- In 2022, Connecticut and Oregon also expanded their family-leave laws, and Illinois has a new law requiring employers to provide victims of violent crimes (and family members of victims) with unpaid leave or allow them to take available paid time off.

62

POMS DRUG-FREE WORKPLACE POLICIES

- Several states have enacted medical and/or recreational use of marijuana, which affects your drug-free workplace policies and procedures.
- Post-Accident/Incident drug and alcohol testing - most policies we see do not comply with current law and regulations:
 - OSHA issued a rule on post-accident/incident/injury drug testing (29 CFR § 1904.35(b)(1)(i)), effective August 2016; which clarified in 2018 when post-accident drug testing is permitted
 - OSHA requires that employers replace a blanket testing policy or rule.
 - OSHA clarified that most workplace drug-testing programs are permissible, including:
 - Random drug testing.
 - Drug testing unrelated to the reporting of a work-related injury or illness.
 - Drug testing under a state workers' compensation law.
 - Drug testing under other federal law, such as a U.S. Department of Transportation rule.
 - Employers need not specifically suspect drug use before testing, but there must be a reasonable possibility that drug or alcohol use by the reporting employee was a contributing factor to the reported injury or illness for an employer to require drug testing.
 - Additionally, drug testing that is conducted to evaluate the root cause of a workplace incident that "harmed or could have harmed employees" is allowed if the employer tests all workers who could have contributed to the incident, rather than just the employees who reported injuries.

63

POMS EXPENSE REIMBURSEMENT

- While federal law only requires that employers reimburse employees for expenses that bring an employee's earnings below the federal minimum wage, state and local laws vary greatly in the treatment of worker expenses and reimbursement.
- California, Illinois, Iowa, Massachusetts, Montana, New York and the District of Columbia require that employers reimburse employees for various work-related expenses.
 - Further, several of those states consider expense reimbursement wages subject to the same timing requirements as regular payroll.
- Lawsuits for failure to properly reimburse employees for expenses are rapidly increasing in these states and for all manner of expenses ranging from typical work-related expenses such as telephone and internet fees and the cost of office supplies, to the extra cost of energy to heat or cool a house.

64

POMS EXPENSE REIMBURSEMENT

Expense reimbursement also raises questions regarding the ultimate ownership of devices and equipment, especially when employment ends. To address these issues, a good expense reimbursement policy clearly provides:

- what expenses are reimbursable and by when the employer will reimburse the employee (applicable state law will govern these and set floors for reimbursement);
- who owns the devices or equipment; and
- how the equipment is handled when the employment relationship terminates (will they be wiped of company information and the employee can keep them, must they be returned, etc.?)



65

POMS PROTECTED CHARACTERISTICS

- Over the last several years, state and local authorities have expanded definitions of protected characteristics. At least 18 states and many municipalities have added protections for natural and protective hair styles, for example.
- Moreover, medical or recreational use of marijuana is now legal in 26 states. Several of those states such as Connecticut, Montana, Nevada, New Jersey, New York, and Rhode Island provide protections for employees that participate in off-duty recreational use of cannabis products and therefore limit an employer's ability to refuse to hire or take adverse action against those workers.
- While catch-all language to include additional protected characteristics, such as "and any other characteristic protected by federal, state, or local law," is a common solution, adding the particular protected characteristic to the policy - and better still to harassment and discrimination training - can serve as a defense against liability.

66

POMS SEXUAL ORIENTATION AND GENDER IDENTITY

- Does the language used throughout the handbook reflect the recent Supreme Court ruling that Title VII's sex discrimination provision applies equally to discrimination based on sexual orientation and gender identity?
- Does your equal opportunity statement include that the company does not discriminate on the basis of sex – including sexual orientation and gender identity/transgender status?
- Has your anti-harassment policy been updated to specifically state that the organization does not tolerate harassment based on sex, sexual orientation, or gender identity?
- Have outdated rules (such as requiring men to wear suits and women to wear dresses) been modified to reflect that the company does not enforce the dress code in a way that reinforces stereotypes about how a particular gender should look and dress?

67

POMS SEXUAL ORIENTATION AND GENDER IDENTITY

- Have gendered hairstyle rules (such as no long hair or buns on men) been rectified?
- What legislation regarding hairstyles may affect your workplace? Several states already have passed the CROWN Act to ban discrimination against natural hair (including afros, braids, twists, and locks), with federal action on the horizon.
- Does the code correctly place an emphasis on neatness, cleanliness, and safety in workplace dress over dictating specifics?
- Do the guidelines display an organizational commitment to supporting employees' religious, ethnic, and cultural beliefs?
- Does the policy manual encourage workers with questions regarding appearance standards to consult with HR?

68

IT'S 2023 – DOES YOUR EMPLOYMENT POLICY MANUAL NEED ATTENTION?

POMS PROTECTED CLASSES/CHARACTERISTICS

- At a minimum, every handbook should contain an Anti-harassment and Anti-Discrimination Policy that:
 - provides the state and local-specific characteristics that are protected from unlawful harassment and discrimination;
 - has a reporting procedure providing multiple reporting avenues for individuals to make complaints about harassment; and
 - emphasizes the employer's commitment to maintaining a workplace free from such unlawful conduct.
- Finally, Remember the Basics:
 - Use plain language.
 - Set clear expectations for attendance, conduct, and discipline.
 - Include that the handbook is not a contract of employment and does not modify the at-will nature of employment.
 - Include that the policies within the handbook may be revised, modified, or revoked at any time, with or without notice.
 - Make sure that the company retains discretion and flexibility when making decisions.
 - Ensure that you actually follow the policies!

69

Poms HR & Employment Webinar Series – Sept 29, 2022

POMS DEIB AND THE CROWN ACT

- Diversity, equity, inclusion, and belonging (DEIB) has been a hot-button topic for employers for a long time. However, in 2023, many organizations may need to create or update specific policies (including grooming and dress code policies) and language in their employee handbook for a few reasons.
 - Firstly, there are 18 states with their own version of The CROWN Act. This legislation protects employees (often black women) with natural hairstyles from discrimination.
 - There may be a federal CROWN Act in the future, as well. Additionally, more states are adding natural hairstyles to the list of protected classes.
 - Outside of a legal perspective, DEI is becoming more important to all workers. A report by the Pew Research Center finds that Generation Z is the most ethnically and racially diverse generation yet. This means the talent employers are trying to attract and retain are racially and ethnically diverse, or they have deep connections with people who are.
 - Employers will pay the price in talent loss if they don't update their employee handbook to support DEI efforts, reduce opportunities for discrimination, and condemn racism, sexism, homophobia, and general bigotry.

70

POMS DEIB AND THE CROWN ACT

- DEIB Policies and Statements:
 - Use diversity, equity, inclusion & belonging statements if you have them
 - Include this language where appropriate in the policy manual itself
 - Singular “they”
 - “Civil and Respectful Workplace” policy vs. “Harassment Prohibited”



71

POMS EMPLOYEE WELLNESS AND MENTAL HEALTH

- To retain staff in 2023, employers are increasingly looking to keep up with the recent trend in supporting employee wellness and mental health. The pandemic accelerated this trend.
- Employers should deeply review employee benefits and a general prioritization of employee wellness.
 - Do they offer enough vacation time for employees to avoid burnout?
 - Do their health insurance plans make mental health care more accessible?
 - Many employers are offering mental health days and Employer Assistance Programs (EAPs) to improve access to mental health care services.
 - Employers may also want to adopt language urging employees to stay home or work from home when sick.
 - FMLA policies can be expanded to include language about mental health conditions, which often also qualify for leave.
 - It may be a good idea for employers to create a specific “Wellness Policy” in your 2023 employment policies, including the initiatives and benefits offered to support employees’ physical and mental health

72

IT'S 2023 – DOES YOUR EMPLOYMENT POLICY MANUAL NEED ATTENTION?

PARENTAL LEAVE BENEFITS FOR WORKING PARENTS

- Employment policies should be updated to meet new and changing parental leave programs, as well as the expectations of working parents generally.
- Parental leave policies have been multiplying all over the US. Currently, ten states in the US have paid parental leave programs, with more states working on their own.
- Employers in these ten states and with employees who work remotely from these states must have paid family leave policies that are updated and in compliance.
- Beyond the legal requirements, employers should also seriously consider offering more flexibility for working parents as part of their employer brand.
 - Post-pandemic, employees can expect a substantial increase in flexibility at work.
 - Parents have benefitted from this flexibility and often consider it a necessity, not a perk.
 - Especially in the current, tight labor market, employers are more likely to lose talent (or have trouble attracting it) when they don't offer the flexibility that working parents demand.

73

Poms HR & Employment Webinar Series – Sept 29, 2022

WEINGARTEN RIGHTS MAY SOON APPLY TO NON-UNION EEs

- The National Labor Relations Board (NLRB) recently released an advice memo in which it signaled it is evaluating whether to extend Weingarten rights to nonunion employers.
 - Nonunion employees can have representative in investigatory interviews that could lead to discipline
 - Should your organization's policy change? Or just your practice?
- The NLRB may be looking to expand this right to nonunion workforces once again may signal it will be more lenient when it comes to the type of conduct allowed by representatives in such meetings. Accordingly, this is an issue all employers should watch.



74

U.S. DEPT. OF LABOR (DOL) CHANGES IN OVERTIME AND INDEPENDENT CONTRACTOR RULES

- The DOL agenda lists May 2023 as the target date for two key Fair Labor Standards Act (FLSA) developments:
 - a proposed overtime rule and
 - a final independent contractor rule.
- The DOL's new overtime rule is expected to raise the minimum salary ("salary level test") for most overtime-exempt employees and possibly update the duties tests as well.
- Last October, the DOL proposed a new independent contractor rule that would establish a version of the "economic realities test" as the standard for determining whether a worker is an employee or an independent contractor under the FLSA.
 - The proposed rule is more consistent with the IRS IC guidelines.

75

NEW PROTECTIONS FOR PREGNANT & NURSING MOTHERS

- The 2023 omnibus government funding bill includes two provisions that expand protections for pregnant and nursing employees.
- The Pregnant Workers Fairness Act (PWFA), and
 - The Providing Urgent Maternal Protections (or PUMP) for Nursing Mothers Act
 - These two laws are aligned with Title VII, the Pregnancy Discrimination Act, the Americans with Disabilities Act (ADA), and many existing state laws.
 - The new legislation clarifies many of the rights and treatment of working mothers that have historically been pieced together under multiple statutes, regulations, and court decisions.
 - The PWFA requires employers with 15 or more employees to engage in an interactive process to determine temporary reasonable workplace accommodations for pregnant applicants and employees with conditions related to pregnancy and/or childbirth, and to provide such accommodations if doing so would not impose an undue hardship.
 - The PWFA took effect at the first of this year.
 - Employers should be mindful of these expanded protections for pregnant employees and carefully consider accommodations that may be needed as a result of their pregnancy.

76

POMS NEW PROTECTIONS FOR PREGNANT & NURSING MOTHERS

- The PUMP Act amends the Fair Labor Standards Act (FLSA) by requiring employers to provide all employees—both exempt and non-exempt—with reasonable break time and a private location other than a restroom in which to express breast milk.
 - PWFA's requirements do not take effect until June 2023.
 - Employers with fewer than 50 employees may be granted an exemption from complying with the requirements if the employer is able to show that doing so would present an undue hardship in terms of expense or other difficulties in light of the employer's size, resources, nature, or business structure.
 - Employees must provide an employer with notice of an alleged failure to comply with the requirement to provide a private location to pump and give the employer 10 days to remedy the matter before initiating any legal action based on the failure.
 - Employers subject to the PUMP Act will need to immediately ensure that they afford to all nursing mothers, regardless of their status as exempt or non-exempt, adequate break time and access to a private location for purposes of expressing breast milk.
 - Employers should also evaluate their current policies and procedures to ensure they are prepared to address accommodation requests from pregnant employees.

77

POMS RESOURCES FOR STATE UPDATES

The Littler firm has an excellent blog summarizing many state-specific updates you should consider:

- <https://www.littler.com/publication-press/publication/employment-law-update-2023-new-compliance-obligations-new-year>

And the Littler firm's good summary of California employment laws:

- <https://www.littler.com/publication-press/publication/no-rest-california-employers-2022-here-are-latest-employment-laws>



78

POMS NEW MEXICO LAWS IMPACTING POLICY

Minimum Wage Increases

- New Mexico's minimum wage increased effective Sunday, January 1st, 2023:
 - State minimum wage: \$12.00 per hour
 - State tipped minimum wage: \$3.00 per hour
- Employers are required to post the New Mexico Minimum Wage Act Summary Poster in a place where all workers can easily see it.
- The City of Albuquerque, Bernalillo County, the City of Las Cruces, the City of Santa Fe, and Santa Fe County currently enforce their own minimum wage. Businesses should be aware that the state will enforce the highest available rate.

79

POMS NEW MEXICO LAWS IMPACTING POLICY

NM HEALTHY WORKPLACES ACT: Paid Sick and Safe Leave

- The HWA requires all private employers in New Mexico to allow employees to accrue and use earned sick leave. The law took effect on July 1, 2022.
- Employees may use this leave for various reasons listed in the Act, like the employee's or their qualifying family member's illness or injury, or to deal with certain legal and family issues.
- Employers can use a "front loading" method, or an accrual method - there are pros and cons to each. Front loading must be a minimum of 64 hours, and accrual needs to be at least 1 hour for every 30 hours *worked*.
- Employers with paid-time-off policies that are more generous than the minimum accrual and usage limits specified in Act are compliant with the Act if employees may use the leave for the same purposes and under the same terms and conditions specified in the Act.
- The earned sick leave required by the Act is in addition to any paid time off provided by an employer pursuant to a collective bargaining agreement unless employees may use the paid time off for the same purposes and under the same terms and conditions specified in the Act.
- For more information, see NMDWS: <https://www.dws.state.nm.us/NMPaidSickLeave>

80

IT'S 2023 – DOES YOUR EMPLOYMENT POLICY MANUAL NEED ATTENTION?

POMS NEW MEXICO LAWS IMPACTING POLICY

LABOR AND EMPLOYMENT POSTER REQUIREMENTS

- Employers are required by state and federal law to post at their workplaces certain information concerning the rights of employees.
- The required posters can be downloaded from the website below and may be printed individually using a standard printer and paper.
 - You may also print posters at your local New Mexico Workforce Connection center.
 - Federal 7-in-1 posters that include all mandatory federal postings in one are also available for pick up for free in both English and Spanish at New Mexico Workforce Connection centers.
 - Employers should never have to pay a commercial service for posters.
- <https://www.dws.state.nm.us/en-us/State-and-Federal-Posters>

81

Poms HR & Employment Webinar Series – Sept 29, 2022

POMS NEW MEXICO LAWS IMPACTING SCHOOL POLICY

HB 128 – School Personnel Background and Training:

- NMSA 22-10A-5.1. Duty to report ethical misconduct; responsibility to investigate ethical misconduct; ethical misconduct report coordination.
 - School district personnel, a school employee, a contractor or a contractor's employee who knows or has a reasonable suspicion that a child or student has been subject to ethical misconduct by school district personnel, a school employee, a school volunteer, a contractor or a contractor's employee shall report the matter immediately to:
 1. the superintendent; or
 2. the department.
- NMSA 22-10A-5.2. Applicants for school employment, contracts, or volunteer positions; requirements for work history and other information.
 - A public school shall require an applicant for employment to provide ... (see statute)
- 22-10A-32. School district personnel, school employees, school volunteers, contractors, and contractors' employees; required training program.
 - All school district personnel, school employees, school volunteers, contractors and contractors' employees shall be required to complete training in the detection and reporting of child abuse and neglect, ethical misconduct, professional responsibilities, sexual abuse and assault and substance abuse.

82

POMS NEW MEXICO LAWS IMPACTING SCHOOL POLICY

HB 43 –The Black Education Act:

- NMSA 2-5-4.3. School discipline policies; racial sensitivity and anti-racism training; hotline for reporting racially charged incidents and racialized aggression involving students or school personnel; students may self-administer certain medications.
- The bill details the sections within the proposed act to include, among other things:
 1. creation of the Black Education Advisory Council (BEAC or council);
 2. BEAC's meeting requirements and duties;
 3. creation of the Black Education Liaison (Liaison), along with the prescribed Liaison's duties, within PED;
 4. requirement for PED to submit a Black Education Statewide Status Report (BESSR) annually;
 5. requirement that school discipline policies define and include a specific prohibition against racialized aggression involving a student or school personnel;
 6. requirement that every school district and charter school have a hotline to report racially charged incidents or racialized aggression; and
 7. requirement for all school personnel to successfully complete an anti-racism and racial sensitivity training or professional development approved by PED.

83

POMS SOME NEW LAWS IN CALIFORNIA IMPACTING POLICY

Minimum Wage Increases; Impact on Exempt Employees Salary Level Test

- As of Jan. 1, 2023, the California state minimum wage increased to \$15.50 for all employers, regardless of employee headcount.
- This also means that as of Jan. 1, 2023, exempt employees in California must be paid a minimum annual salary of \$64,480.
 - Covered exempt computer professional employees must be paid a minimum of \$53.80 per hour, or \$112,065.20 in annual salary.
- "Living wage ordinances" in various locales within the state have been enacted, so local standards should be confirmed to ensure compliance with all governing wage requirements.

84

POMS SOME NEW LAWS IN CALIFORNIA IMPACTING POLICY

AB 1041 - Expanded Definition of "Family Member" for Medical and Sick Leave

- Through AB 1041, the California legislature amended Government Code section 12945.2 and Labor Code section 245.5 to expand the definition of "designated person" for purposes of employee medical leave.
 - Section 12945.2 provides qualifying employees with up to 12 workweeks in any 12-month period for unpaid family care and medical leave. Section 245.5 relates to California paid sick leave.
- AB 1041, the Legislature added a "designated person" to this list of "family members" for whom an employee may take protected leave.
 - A "designated person" is defined as "any individual related by blood or whose association with the employee is the equivalent of a family relationship."
- In light of this broad definition, employers should be prepared to provide employees with leave to care for a wider range of persons. An employee may identify his or her designated person at the time of requesting protected leave. However, an employer may limit an employee to one designated person per 12-month period.

85

POMS SOME NEW LAWS IN CALIFORNIA IMPACTING POLICY

AB 1949 - Bereavement Leave

- AB 1949 adds section 12945.7 to the Government Code, to provide employees with protected leave for bereavement. Under this new law, eligible employees may request up to five days of bereavement leave upon the death of a qualifying family member.
 - Family member is defined as a spouse, child, parent, sibling, grandparent, grandchild, domestic partner, or parent-in-law.
 - Although the employee must complete bereavement leave within three months of the family member's death, the employer may not require that the five days be used consecutively.
 - Statutory bereavement leave is unpaid, but the employer must allow the employee to use any accrued and unused paid vacation, personal leave, sick leave, or other paid time off for this purpose.
 - The employer must maintain confidentiality when an employee takes bereavement leave.
 - Finally, section 12945.7 does not apply to certain union employees, with an existing agreement regarding bereavement leave.

86

POMS SOME NEW LAWS IN CALIFORNIA IMPACTING POLICY

SB 1162 - Posting Pay Ranges and EEO Reporting Requirements

- SB 1162 modifies Government Code section 12999 and Labor Code section 432.3 to require employers with more than 15 employees to provide candidates with salary ranges on job postings, report employee compensation and demographic information to the California Civil Rights Department (formerly the DFEH) on an annual basis and retain relevant records.
 - For job postings (including those posted by third parties), employers with 15 or more employees will be required to include a pay range, which is defined as the salary or hourly wage range that the employer reasonably expects to pay for the position.
 - In addition to the current requirement that, upon request, the employer must provide a candidate a pay range, the employer must now also provide existing employees with a pay range, when requested.
- The new reporting requirement concerns annual employer pay data reports.
 - Employers must now report the median and mean hourly rate by each combination of race, ethnicity, and sex, within each job category, with the first report due on May 10, 2023, based on 2022 pay data.
 - Employers with 100 or more employees hired through labor contractors must now produce data on pay, hours worked, race/ethnicity, and gender information in a separate report.
- Finally, employers must retain records of job titles and wage rate histories for each employee for the duration of the employee's employment and three years after termination.

87

POMS SOME NEW LAWS IN CALIFORNIA IMPACTING POLICY

AB 2188 - Off the Job Cannabis Use Protection

- Effective January 1, 2024, AB 2188 adds section 12954 to the Government Code, which prohibits employers from discriminating against a person because of cannabis use while off the job, with some exceptions.
- Employers may take action against a person who fails a pre-employment drug test, or other employer-required drug test, that does "not screen for non-psychoactive cannabis metabolites." This is because, according to the California Legislature, cannabis "*matabolites do not indicate impairment, only that the individual has consumed cannabis in the last few weeks.*"
- The employer may administer a performance-based impairment test, and terminate any employee who is found to be impaired in the workplace.
- This new law does not apply to employees in the building or construction industry, or in positions requiring a federal background investigation or clearance and does not preempt state or federal laws that require employees such as federal contractors or USDOT-covered drivers, to be tested for controlled substances.

88

IT'S 2023 – DOES YOUR EMPLOYMENT POLICY MANUAL NEED ATTENTION?

POMS SOME NEW LAWS IN CALIFORNIA IMPACTING POLICY

AB 152 - COVID-19 Supplemental Paid Sick Leave Extension

- AB 152 modified Labor Code section 248.6 and 248.7 in order to extend COVID-19 Supplemental Paid Sick Leave (SPSL), which was expected to expire on September 30, 2022.
- This new modification allows California employees to use any remaining SPSL through December 31, 2022. It does not provide employees with new or additional SPSL.
- In a departure from the original version of the law, when an employer requires an employee to take a COVID-19 test five days or later after a positive test result, the employer is now permitted to require the employee to submit to a second diagnostic test within no less than 24 hours. I
- f the employee refuses, the employer may decline to provide additional SPSL.
- The employer obligation to cover the cost of any employee COVID-19 tests remains in effect.

89

Poms HR & Employment Webinar Series – Sept 29, 2022

POMS SOME NEW LAWS IN CALIFORNIA IMPACTING POLICY

SB 1044 - Prohibition on Adverse Employment Action for Fears of Workplace Safety

- SB 1044 will prohibit employers, in the event of an “emergency condition,” from taking any adverse employment action against an employee who refuses to report to, or leaves, a workplace or worksite within the affected areas because the employee had a reasonable belief that the workplace or worksite is unsafe.
 - The law also prohibits the employer from preventing any employee from accessing a phone or other mobile device to seek emergency assistance, assessing the safety of the emergency condition or communicating with others to confirm that the employee is safe.
 - NOTE: The new law does require employees to notify employers of the emergency condition.
- The new law defines “emergency condition” as either “conditions of disaster or extreme peril to the safety of persons or property caused by natural forces or a criminal act” or “an order to evacuate a workplace, worksite, or worker’s home, or the school of a worker’s child due to a natural disaster or a criminal act.”
- The new law also states that a health pandemic does not constitute an “emergency condition.”

90



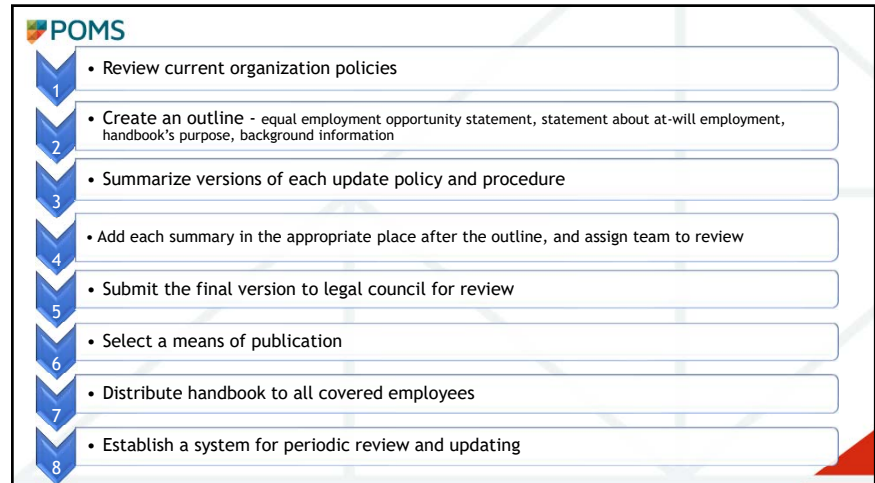
Policy AV


Procedure ST

**REVISING AND UPDATING YOUR
EMPLOYMENT POLICY MANUAL**


 POMS

91



 POMS

- 1 • Review current organization policies
- 2 • Create an outline - equal employment opportunity statement, statement about at-will employment, handbook's purpose, background information
- 3 • Summarize versions of each update policy and procedure
- 4 • Add each summary in the appropriate place after the outline, and assign team to review
- 5 • Submit the final version to legal council for review
- 6 • Select a means of publication
- 7 • Distribute handbook to all covered employees
- 8 • Establish a system for periodic review and updating

 POMS


92

IT'S 2023 – DOES YOUR EMPLOYMENT POLICY MANUAL NEED ATTENTION?

Poms HR & Employment Webinar Series – Sept 29, 2022

POMS EMPL. POLICY FORMAT AND COMPANION DOCUMENTS


- 1. MASTER POLICY MANUAL**
 - Managed by Human Resources
 - Electronic - Available on-Line - Direct EE access, or Kiosks
 - Electronic & E-mail notification of updates and changes
- 2. "CONTROL" PRINT HARD COPIES**
 - In key locations, managers as "custodians"
 - Controlled for accurate updating by HR - each policy starts on a new page for ease of replacement; heading used to record effective dates of each policy version.
 - Easy reference by managers & supervisors
 - Available to employees for review if needed
- 3. MASTER HISTORICAL ARCHIVE**
 - HR maintains historical record of all previous policies, when they were in effect
 - Litigation support
- 4. EMPLOYEE HANDBOOK FOR DISTRIBUTION - NOT A POLICY MANUAL**
 - "Readers Digest" summary of key policies and other FAQs
 - Can be easily and inexpensively distributed in hard copy, and replaced when changes need to be made.



93

POMS ASSESSING YOUR EMPLOYMENT POLICIES


- Get input before writing policies
- Legal and/or professional guidance on changes or additions needed to update policy manual
- Hold a meeting - feedback and suggestions from managers, supervisors and leads
- Union considerations
- Review HR Issues of concern, past issues
- Feedback from employees regarding questions or concerns



94

POMS ASSESSING YOUR EMPLOYMENT POLICIES

- Do the policies comply with the current laws (statutes, regulations and case law)?
- Have any policies interfered with company operations?
- Have any of the policies affected employees' productivity or morale?
- Have any of the policies generated lawsuits or charges of discrimination?
- Have the policies been consistently applied?
- Are there policies that need to be added to the Manual, or that should be deleted?



95

POMS ALIGN POLICIES WITH OTHER DOCUMENTS

- An Employment Policy Manual is only one document in an entire set of employment documents that a company needs.
 - Policies
 - SOPs
 - Forms
 - Administrative procedures
- All of these documents are interrelated and contradictions between one document and another document can cause problems in the event of employment charges or litigation.



96

IT'S 2023 – DOES YOUR EMPLOYMENT POLICY MANUAL NEED ATTENTION?

Poms HR & Employment Webinar Series – Sept 29, 2022

ALIGN POLICIES WITH OTHER DOCUMENTS

- An Employment Policy Manual is particularly interrelated with other employment documents because it is a summary of most of the information related to a company's employment practices and policies.
- Very few companies review their Employment Policy Manuals in the context of their other employment documents.
- A related problem is revising one document and not reviewing/revising other documents that are affected by the change in the first document.



97

MANAGEMENT / LEGAL REVIEW & FEEDBACK

- Have key management employees and supervisors review policies to ensure understanding
 - REMEMBER - these people have an affirmative legal duty to enforce the policies as they are written, so they need to understand the policies.
- Review by the employment attorney who will be defending you if an employment practices claim or charge is filed.
- Re-draft based on feedback, prior to publishing.



98

DISTRIBUTION OF MANUAL: EDUCATE EMPLOYEES

- Communication of policies to employees is key, both at hire, and whenever you issue changes
 - Review, signature page(s)
 - Opportunity to ask questions
- Training
 - Human Resources Personnel
 - Managers, Supervisors, Leads - affirmative legal duty to uphold and enforce policies
 - Employee Training - Review key provisions, questions
 - Explain the steps that were taken and why.
 - Re-educate employees when changes in policy occur
 - Take action when policies are misused - Accountability, consistency

99

DISTRIBUTION OF MANUAL: EDUCATE EMPLOYEES

- Get signed document acknowledging receipt, that it is the employee's responsibility to read and understand the policies, etc.
- Collect and Storing Employee Acknowledgment Forms

_____	I acknowledge that I have been encouraged to read and familiarize myself with the contents of this Policy Manual, and that I accept the terms of these employment policies, procedures, Manual, and work rules as a condition of my employment.
_____	I acknowledge that these policies in this Employment Policy Manual have been reviewed with me, and that I have had an opportunity to ask questions about all the policies.
_____	I understand that nothing in this Policy Manual constitutes an employment contract or agreement to maintain any current level of employment or other benefit, and that it does not create a promise of future employment, benefits, or a binding contract for any purpose.
_____	I understand that nothing in this Policy Manual is meant to, nor should it be interpreted to, in any way limit my rights under any applicable federal, state, or local laws, including my rights under the National Labor Relations Act to engage in protected concerted activities with other employees to improve terms and conditions of employment, such as wages and benefits.
_____	I fully understand that as a condition of my continued employment with LCDN, my responsibility to comply with, uphold, and observe these and future revisions to all of LCDN's policies, procedures, Manual, and work rules, including those specific to my department and work area.

100

IT'S 2023 – DOES YOUR EMPLOYMENT POLICY MANUAL NEED ATTENTION?

KEY ELEMENTS OF A POLICY

- Don't commit to a policy that can't be enforced, e.g.:
 - No fault attendance policy
 - Strict progressive discipline policies
 - No personal cell phone use during working hours
 - No outside employment
- Avoid Rigidity
 - Listing prohibited conduct
 - Personal appearance policies
 - Personal/romantic relationships
- Avoid language which unduly limits management discretion
- Don't write a policy for every little thing - remember, policies are for the many, not for the one.

101

Poms HR & Employment Webinar Series – Sept 29, 2022

TRACKING CHANGES, UPDATES, ADDITIONS

- Develop a plan for active maintenance and review
- Solicit, and encourage users to provide feedback, and be prepared to make revisions as needed
- Archive changes and date new releases with an "Effective Date"
- Once adopted your policies must be followed & enforced by supervisors - check with them regularly
- Remember - you can change your mind and change your policy!
- Make it simple to update and keep it updated
- Track updates clearly and consistently
- Don't just throw it on the shelf
- Remember it is a "living" document subject to legislative rulings, industry norms, technological advancements, and changes in your organization
- Measure outcomes by monitoring or testing - Why have a policy that nobody follows? That will only create liability exposure for you.

102

SUPERVISORY TRAINING

- It is vital to train managers, supervisors, and leads on the policy manual
 - The affirmative legal duty to enforce policy as written
- To Avoid legal problems, the company must enforce provisions as written, unless management provides different instructions
- Managers, supervisors, and leads should refer all benefits and leave issues to Human Resources - (e.g., ADAAA, FMLA)
- Supervisors fully put on notice of obligations
- Supervisors develop a better understanding of purpose of company's policies
 - Also provides opportunity to provide input

103


YOUR EMPLOYMENT POLICY MANUAL: The 7 "C"s

1. Contract ... NOT
2. Communicate policies
3. Clarity of writing - must be understandable
4. Comply with current applicable law
5. Consistent with your actual practices
6. Comprehensive - cover important policies
7. Commitment to enforce & update policies



104

IT'S 2023 – DOES YOUR EMPLOYMENT POLICY MANUAL NEED ATTENTION?




TAKEAWAYS

- Staying Up to date is hard
- Consider an official employment policy manual, and a shorter “Reader’s Digest” version for your Employee Handbook for distribution.
- Take a 30,000 foot view - don’t make a policy for an individual.
- Make widely available & understandable
- Consider how an employee might use a handbook when crafting
- Keep compliant by reviewing laws & your obligations
- Consider your handbook a retention tool
- Embracing them as a culture signal helps further your culture
- Draft in the organization’s voice
- Share with employees
- Train managers, supervisors, and leads


105

Poms HR & Employment Webinar Series – Sept 29, 2022



QUESTIONS


- This is the chance to address issues that may not have been covered to your satisfaction; or
 - To expand a point; or
 - To clarify a point.
- If there are any further questions which we were not able to get to today, please feel free to contact us.




Julie Garcia, SPHR, ARM-P
jgarcia@pomsassoc.com

Steven G. Meilleur, Ph.D., SPHR
smeilleur@pomsassoc.com

106



Disclaimer



DISCLAIMER: Please be advised that insurance coverage cannot be altered, bound, or cancelled by voicemail, email, facsimile, or online, and insurance coverage is not effective until confirmed in writing by a licensed agent. The materials contained herein do not establish a broker relationship with Poms & Associates Insurance Brokers and is provided for informational purposes only.

A representative of Poms & Associates Insurance Brokers can provide you with a personalized assessment. Please contact us at 818-449-9317.

107