Faculty Handbooks: Their Legal Significance, What They Should Contain, and How to Draft Them

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I. Introduction. The faculty handbook holds a central place in defining the relationship between faculty members and their institutions. This outline addresses three key issues in faculty handbooks: their legal significance, what they should contain, and how to draft them.

The American Association of University Professors takes a special interest in faculty handbooks. Since 1915, AAUP has developed model policies, sometimes in collaboration with other higher education groups, that it recommends to the academic community. Some, but not all, of the recommended policies appear on the AAUP's website. Anyone with a serious interest in faculty handbooks should have at hand the AAUP Policy Documents and Reports. Commonly known as the "Redbook," this volume represents the most complete collection of AAUP-recommended policies. Key policies to consider in drafting campus handbooks include: the 1940 "Statement of Principles on Academic Freedom and Tenure," the "Statement on Ethics," and the "Recommended Institutional Regulations on Academic Freedom and Tenure." As discussed further below, institutions are free to adopt, adapt, or ignore AAUP's recommendations.

Another excellent resource on faculty handbooks and contracts is two-volume treatise The Law of Higher Education. It offers a thorough analysis of the legal status of campus handbooks, contracts, and collective bargaining agreements.

II. The Legal Significance of Faculty Handbooks. Many U.S. employees serve "at will," subject to dismissal at any time for any reason. Faculty members, in contrast, typically have letters of appointment or contracts. Faculty serve for a defined period of time, such as a semester or a year, or for an indefinite period under a tenured appointment. Key elements of their status, including rank, salary, and duration, appear in the appointment letter or contract. Other campus personnel with contracts for a stated term might include the president, other senior leaders, and key athletic staff. Faculty are the largest campus group with individual written contracts and the group that, at most institutions, may receive a tenure contract of unlimited duration.

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1 The author may be reached at annfranke@verizon.net.
2 www.aaup.org.
3 The tenth edition, published in 2006, is available for $30 from The Johns Hopkins University Press. For ordering information, including bulk discounts, visit www.aaup.org and click on Publications and Research.
The appointment letter or contract is a legal agreement, binding the individual and the institution to its terms. What about the faculty handbook? It contains many other provisions, such as standards and procedures for reappointment, tenure, and dismissal. Does the handbook have legal force? Here the situation becomes more complicated. The exact wording of the handbook and state law both bear on the question. AAUP has prepared an excellent state-by-state analysis of the legal effect of faculty handbooks, from which the cases cited in this section are drawn.5

Express incorporation. At many institutions, an individual faculty member’s appointment letter or contract explicitly refers to the handbook and incorporates it by reference. This makes the faculty handbook unquestionably a part of the legal agreement between the parties. For example, the University of New Hampshire System states in its lecturers’ appointment letters that “Except as modified by this letter, the remaining terms and conditions of your employment will be governed by applicable University System and UNH policies.”6 The reference to policies would sweep in the faculty handbook. It would be up to the parties, at some later date, to decide which system and university policies would be applicable and hence legally binding.

Say a faculty member’s individual agreement does not explicitly incorporate the faculty handbook. Would the handbook still have legal effect? This question typically arises in a legal dispute between the faculty member and the institution over breach of contract. Several additional layers of complexity enter the analysis. A court will ask questions including: What is the institution’s past practice? What does state law say about the contractual force of handbooks? And does the handbook include a disclaimer?

Implicit incorporation by past practice. A court might examine the practices of the institution – whether the institution behaves as if the handbook is legally binding.7 If the institution customarily follows the handbook’s policies and procedures, a court may find that the institution has made the handbook an implicit part of its contract with its faculty members.

Implicit incorporation under state law. Contract law varies from state to state. Thus we have no uniform rule on whether a court will find that a faculty member’s contract implicitly incorporates the handbook. In the District of Columbia, for example, the answer is yes, usually.8 A court may find a faculty handbook to be binding, even if the appointment letter does not explicitly mention the handbook. In Georgia and Louisiana, courts have typically answered the same

6 For tenure-track faculty, the provision covers more: “The terms and conditions of your employment will be governed by applicable University System and UNH policies and the terms of the collective bargaining agreement with the UNH Chapter of the American Association of University Professors.” www.unh.edu/provost/facultylettertemplates.html
7 See, e.g., Hulen v. Yates, 322 F.3d 1229 (10th Cir. 2003)(University’s custom and practice relevant to faculty member’s rights); Ricioppo v. County of Suffolk, et al., 2009 U.S. Dist. LEXIS 18979 (E.D.N.Y. March 4, 2009); (College’s existing practices showed fifth-year faculty member was eligible for, but not automatically entitled to, reappointment); Gray v. Board of Regents of University System of Georgia, 150 F.3d 1347 (11th Cir. 1998), cert. denied, 526 U.S. 1065 (1999)(University’s practices did not support professor’s claim to de facto tenure based on length of service); Holland v. Kennedy, 548 So.2d 982 (Miss. 1989)(where contract terms between professor and university were ambiguous, court would look to university’s practices).
question the opposite way.9 "[A]n employer’s failure to follow termination procedures in a personnel manual is not actionable under Georgia law."10 The majority view is that handbooks and similar policy documents may have the legal force of a contract.11

Please bear two additional points in mind. First, state law can change over time. Perhaps a state court ruled ten or twenty years ago that it would not give contractual force to a faculty handbook that a university’s appointment letters did not mention. The law is fluid and can evolve. Second, one cannot look only at higher education cases to understand state law. Cases on the employee manuals of grocery stores, manufacturing plants, and utility plants can be highly relevant to determining whether a faculty handbook is legally binding under state law.

Express disclaimer. Sometimes an institution will use disclaimer language in a faculty handbook stating that the handbook is not legally binding. The 1997 faculty handbook at Indiana University illustrated this approach: “Statements and policies in this Handbook do not create a contract and do not create any legal rights.” A court found that this disclaimer was an effective and complete defense to a professor’s lawsuit alleging a breach of contract for failure to follow the handbook.12 Simply put, because of the disclaimer the university won the lawsuit. In a Maryland case, however, a court observed that a disclaimer in a community college faculty handbook did not appear in a conspicuous place. Moreover, a memorandum accompanying the handbook “muted the effectiveness of the disclaimer.” The court declined to enforce the disclaimer and instead interpreted the handbook as a contract.13 If an institution seeks to disclaim the contractual force of its faculty handbook, counsel should first check state law and, if the legal environment is hospitable, draft the disclaimer carefully. As the Maryland case illustrates, placement of the disclaimer can be important, as can accompanying statements and even font size.

Legal Significance of Handbook Changes. Faculty handbooks are “living documents,” changing over time. Change may come slowly, through a series of small amendments over an extended period of time, or more rapidly from a complete overhaul. In either case the question may arise as to whether the new provisions apply to current faculty members. Current faculty members were, after all, appointed under the original provisions. Can the institution change horses, so to speak, in mid-stream? This question assumes that the handbook has contractual force. Which version of the handbook is the contract?

In answering this question, lawyers and judges would look to several sources.

Appointment letter. The appointment letter may contain relevant wording. It may say that the individual is subject to the institution’s policies, as amended. One state university, which shall remain unnamed, takes the opposite approach. It recommends this sample language for appointment letters:

An appointment at the rank of Assistant [or Associate] Professor is in the tenure track and is subject to the tenure and promotion guidelines, and other policies and procedures which

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9 “Faculty Handbooks,” supra n. 7, at 7-8, 16-19.
12 Lim v. The Trustees of Indiana University, 2001 U.S. Dist. LEXIS 24822 (S.D. Ind. Dec. 4, 2001), aff’d, 297 F.3d 575 (7th Cir. 2002).
are in effect on the effective date of this appointment. All appointments are subject to the terms and conditions set forth in the Faculty Manual in effect on the beginning date of your tenure-track employment. (Emphasis added.)

This suggests that the university may not apply to the faculty member any subsequent changes in the handbook, even over the course of a multi-year contract or, potentially, multiple contracts.

The opposite approach carries its own legal twists and turns. Is it fair for an institution significantly to change the handbook in mid-stream? A change, such as an increase in the standards for tenure, could place an individual at a serious disadvantage. When a faculty member was hired, a college generally required two published articles for tenure. A few years later, the college change its expectation to three articles, all in peer-reviewed journals. Which standard must the faculty member satisfy?

In legal terms, a binding contract involves an offer, an acceptance, and consideration. Consideration is something of value that passes between the two parties. You offer to sell me a mule; I accept and pay you $50. The $50 is the consideration that turns the transaction into a contract, rather than a promise. Say a college adopts an amendment to its faculty handbook in January. In abstract terms, some states consider that, by continuing to work for the spring term, each faculty member has accepted the amendment.

Some faculty handbooks contain language indicating that the Board of Trustees may change them at any time. A public college in Colorado combines its unilateral right to amend the handbook with a disclaimer:

The Board of Trustees of Adams State College (“Board” or “Trustees”) reserve the right to amend this Handbook at any time .... Faculty to whom this Handbook applies have no expectation that these policies will not be amended, nor shall they have or be construed to have any contractual rights arising from or based on any policies or procedures published herein.

Other institutions might amend the handbook at any time but also delay the effective date of the changes. The University of Mary Washington (VA), for example, states: "Approved changes to the Faculty Handbook go into effect in August at the start of the next academic year following their adoption unless otherwise stated in the amendment itself." Under this schedule, faculty signing their contracts for the new year would be accepting the changes.

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14 Reading closely, one can imagine an inconsistency between the two sentences quoted. The first sentence refers to “this appointment” while the second refers to “the beginning date of your tenure-track employment.” What if the faculty member is reappointed? Consider this hypothetical. An assistant professor receives a two-year appointment to a tenure-track position that begins in August, 2005. Handbook version #1 is in force on the date of her appointment. She receives a second contract for the 2007-2008 and 2008-2009 academic years. Handbook version #2 is in force on the date she begins her second contract. The first sentence above suggests that the relevant policies for her evaluation appear in Handbook version #2, while the second sentence seems to make Handbook version #1 operative.

15 Found at www.adams.edu/pubs/media/fac-handbook-current.pdf

If a faculty member is about to undergo review for tenure, it would be manifestly unfair to apply more stringent tenure standards to her. If, in contrast, she is in the second year of a probationary appointment, applying the changes to her eventual tenure review may be more reasonable. Institutions should take into account the practical effect of handbook changes for faculty at different stages in their careers and seek to limit severe adverse consequences.

Good practice in amending handbooks requires:

- Close consultation with faculty on the proposed amendment
- Distribution of the amendment to all faculty after it is adopted
- A clear statement on when the amendment becomes effective
- Depending on the topic, a reasonable phase-in period.

### III. What Faculty Handbooks Should Contain

This question has no single and easy answer. The faculty handbook has been the traditional vehicle for bringing to the faculty's attention all major policies of significance to faculty that do not appear in their individual appointment letters.

**Policies for Adjunct Faculty.** With the growth of adjunct faculty, some institutions are re-evaluating whether their faculty handbooks do, or should, include policies relevant to them.\(^{18}\)

**AAUP Model Policies.** The 1940 “Statement of Principles on Academic Freedom and Tenure” is the AAUP policy most widely incorporated into faculty handbooks across the country. It provides basic definitions of faculty rights and responsibilities in teaching, research, and extramural utterances. Institutions should also consider including in their handbooks the 1987 “Statement on Professional Ethics” which offers a fair and balanced approach to faculty responsibilities.

AAUP writes some of its model documents as essays, a form that does not readily lend itself to handbooks. To address this issue AAUP offers its “Recommended Institutional Regulations on Academic Freedom and Tenure.” Known informally as the RIR, the regulations are short, numbered sections setting out the key substantive and procedural steps that AAUP believes are important to protecting academic freedom and tenure.

Whether or not to adopt AAUP’s model policies is entirely a matter of institutional discretion. A well-informed faculty committee working on handbook revisions will probably bring AAUP’s policies to the table. Administrators and counsel benefit from familiarity with AAUP’s policies. The options are to adopt the language in full, adapt it to the institution’s needs, or ignore AAUP’s recommendations. The practices of peer institutions and the judgments of faculty, administrators, and counsel weigh into resolution of whether and, if so, how to adopt AAUP’s model policies.

For institutions on its censure list, AAUP reviews the faculty handbook once the administration is taking steps to address the censure. A key question in censure removal is whether institutional policies substantially conform to the Association’s recommendations. Another occasion on which

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\(^{18}\) The American University Faculty Manual includes sections relevant to adjuncts. It is available at [www.american.edu/provost/academicaffairs/faculty-manual-toc.cfm](http://www.american.edu/provost/academicaffairs/faculty-manual-toc.cfm).
AAUP staff will analyze a handbook is upon request. If an institution is seriously engaged in revising its handbook, AAUP staff will review the current text and offer suggestions.\(^\text{19}\)

*Campus-wide Policies?* Some policies have significance for the entire campus community rather than just to faculty. An example would be the policy on conflict of interest. Everyone from the trustees to the grounds keepers needs to avoid conflicts of interest. Similarly many human resource policies apply campus-wide, covering topics such as benefits, Family and Medical Leave, and military duty. Other matters with broad impact include FERPA compliance, computer use, intellectual property rights, nondiscrimination, and use of campus facilities.

Faculty members need to know where to find all current policies that apply to them. Whether to include these policies in the faculty handbook, or an appendix to the handbook, is entirely a matter of institutional convenience. As one solution, an institution's intranet can post links to campus-wide policies in the same area in which the faculty handbook appears. Electronic versions eliminate the need to keep paper copies updated.

*Specific Topics.* The following chart addresses many topics commonly covered in faculty handbooks, offering comments and suggestions on them. The topics appear in no special order. Use the chart to analyze your institution’s handbook on the same topics.

<table>
<thead>
<tr>
<th>Potential Faculty Handbook Topic</th>
<th>Issue</th>
<th>Our Faculty Handbook or Campus Policies</th>
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</thead>
<tbody>
<tr>
<td><strong>Discrimination &amp; Harassment</strong></td>
<td>List all personal characteristics protected by federal, state, and local law, plus any other characteristics that the institution protects as a voluntary matter (e.g., sexual orientation). Federal law prohibits discrimination on basis of genetic information and veteran's status, which are often omitted from campus policies. Prohibit harassment on the basis of <em>all</em> protected characteristics, not just sex. Sometimes a handbook will include the nondiscrimination policy at several places. Either consolidate into one or make sure the policies are the same.</td>
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</table>

\(^\text{19}\) Because handbook review is labor intensive and offered without charge, AAUP will decline to review a faculty handbook in response to a casual inquiry from an individual, unless a serious revision process is underway.
<table>
<thead>
<tr>
<th>Topic</th>
<th>Description</th>
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<tbody>
<tr>
<td>Retaliation</td>
<td>Include a separate section prohibiting retaliation.</td>
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<tr>
<td></td>
<td>Check whether federal courts in the jurisdiction have required employers to</td>
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<td></td>
<td>continue internal hearings after an employee files an EEOC charge. In some</td>
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<td></td>
<td>federal circuits, discontinuing an internal process under those circumstances</td>
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<tr>
<td></td>
<td>may constitute retaliation.</td>
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<tr>
<td>Investigations</td>
<td>Every faculty member has a duty to cooperate in internal investigations and</td>
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<td></td>
<td>hearings.</td>
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<tr>
<td>Handbook Status</td>
<td>Any prior inconsistent policies are null &amp; void.</td>
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<td></td>
<td>In case of conflicts with insurance plans or other benefits, the plan</td>
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<td></td>
<td>prevails.</td>
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<td></td>
<td>Board reserves the right to amend policies at any time.</td>
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<tr>
<td>Interpretation</td>
<td>Any issue of interpretation of this Handbook shall be referred to the</td>
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<tr>
<td></td>
<td>Provost, whose determination shall be final and binding.</td>
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<tr>
<td>Time Computations</td>
<td>Every deadline period should have a clear beginning and end. Indicate</td>
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<td></td>
<td>whether days are “class days,” calendar days, business days, or some other</td>
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<tr>
<td></td>
<td>type. Requiring steps to be taken within 7 days, or multiples of 7, can be</td>
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<tr>
<td></td>
<td>handy.</td>
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<tr>
<td>Faculty Covered</td>
<td>Address whether the Handbook or any parts of it apply to adjunct, part-time,</td>
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<td></td>
<td>non-tenure-track, or other contingent faculty. Many institutions have</td>
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<td>increased their reliance on such faculty without adapting existing policies</td>
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<td></td>
<td>or developing new ones.</td>
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<tr>
<td>Human Resources and Other</td>
<td>Check carefully the alignment of the Handbook and HR policies. Some</td>
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<tr>
<td>Policies</td>
<td>institutions place all institution-wide policies in HR documents, such as</td>
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<td></td>
<td>conflict.</td>
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of interest, intellectual property, and computer use.

Handbooks can refer to external policies or include them as appendices. Including the full texts on the body of the handbook can create issues if the policies are later changed, which may or may not necessitate a formal Handbook amendment process.

### References to External Sources

If referring to Robert’s Rules, state the edition and, if desired, note substitution of subsequent editions. E.g., "Business before the Faculty Senate will be conducted pursuant to Robert’s Rules of Order Newly Revised (11th edition, 2011) or any subsequent edition." Check with the parliamentarian.

If referring to AAUP policies, indicate the year AAUP adopted the policy. E.g., “1940 Statement of Principles on Academic Freedom and Tenure;” “Statement on Professional Ethics (1987).”

The Redbook has a headnote for each policy indicating the year it was adopted.

With AAUP documents, consider whether you wish automatically to accept any subsequent versions. Most institutions do not.

The Statement on Professional Ethics can be a particularly valuable addition to a faculty Handbook.

### Grievances and Appeals

Give any grievance body the discretion to decline to hear a grievance. For example, the matter may not be within its authority, the issue may have been resolved in an earlier case, or the committee may just consider a complaint to be “much ado about nothing.”

Appeals, in contrast to grievances, are usually a matter of right.
For each body deliberating on an individual case, state what it should determine, the burden of proof, and which party bears the burden.

Academic institutions tend to create excessive layers of review. Avoid the proliferation of appeals to successive committees and administrators. Aim for a process that is efficient as well as fair.

<table>
<thead>
<tr>
<th>Evaluation for Tenure</th>
<th>Tenure reviews do involve multiple layers. Make clear at what points the candidate will receive written or verbal information about the interim recommendations. What documents can he or she see? Can the candidate submit a rebuttal to a negative recommendation?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Indicate whether the candidate can provide supplemental information during the review process, such as an article or book accepted for publication or the most recent teaching evaluation scores.</td>
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<tr>
<td>Consider the possibility that a candidate undergoing review may be charged with misconduct or that reviewers at some level may discuss serious allegations. E.g., A student files a harassment complaint. “Did you know he was arrested last year for domestic abuse?” “Her graduate students have complained for years about her bullying.” One approach is to take a “time out” in the tenure review to allow the candidate to respond or to allow other appropriate campus bodies to address allegations, such as a student harassment complaint.</td>
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<tr>
<td>Be careful about whether you wish to confer tenure automatically after the passage of seven years, as AAUP suggests. Many handbooks state that tenure is awarded only upon affirmative approval</td>
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</table>
by the governing board or, in some cases, the president.

State the locus of tenure, for example in the department or the institution.

### Academic Freedom

AAUP is recommending amendment of institutional policies to address the implications of the Supreme Court’s decision in *Garcetti v. Ceballos*. See the Selected Resources below for further information.

### Faculty Discipline & Dismissal

Discipline. AAUP’s recommended policies say relatively little about discipline. Some institutions have taken the initiative to create fuller statements on types of, and processes for, lesser discipline.

Dismissal for cause. A recurring question is the standard of proof in a dismissal for cause. The burden of proof typically rests on the institution, which must prove that a tenured professor, or a nontenured professor during the contract term, is no longer performing satisfactorily. The standard of proof is lower than, for example, the criminal standard of “beyond a reasonable doubt.” AAUP recommends “clear and convincing evidence” while some institutions prefer “preponderance of evidence.” The Department of Education recently promoted use of “preponderance of evidence in sexual assault cases,” although the impact of the recommendation on faculty dismissal proceedings is debatable.

Financial exigency. AAUP’s standard for “how broke” an institution must be before terminating tenured professors or nontenured professors during their contracts is that the situation must “threaten the survival of the institution as a whole” and cannot be alleviated by less drastic means than terminating faculty appointments. Many institutions have
adopted less drastic standards.

Program discontinuance. The elimination of a program is yet another reason for the dismissal of tenured faculty members and nontenured faculty during their contract terms. (Since institutions usually discontinue programs at the end of an academic year, faculty with one-year contracts would be subject to nonrenewal rather than dismissal. Other faculty may have multi-year contracts extending beyond the date the program is terminated.) AAUP requires the complete elimination of a program, while some institutions also reserve the right to dismiss faculty if a program is substantially reduced rather than completed eliminated. Other conditions often apply, such as seeking alternative positions for faculty members who will be laid off and options for retraining.

“Detenuring” has become a popular way to describe the termination of a tenured faculty member’s appointment. “Dismissal” is a better word, because “detenuring” could raise an implication that the individual might have a continuing relationship with the institution after tenure is removed.

A faculty member may face legal claims, criminal or civil, for conduct that may also violate the faculty member’s institutional responsibilities. The University may, in its discretion, proceed with disciplinary action prior to, simultaneously with, or following court proceedings. Reserve the right to do so.
IV. How to Draft Faculty Handbooks. The best answer on how to draft faculty handbooks is – with active verbs. Endless amounts of trouble have arisen from provisions such as “the candidate will receive notice....” A vastly superior approach is “The dean will provide notice to the candidate.” Review all handbook text and eliminate as many passive verbs as possible!

Another invaluable piece of information for handbook drafters is how to find sample provisions from other institutions. This is easy with Google. Here’s the process. Select your search term, such as faculty interim suspension. Type your search term into the Google search box. If your search term is a phrase, put quote marks around it. Follow the search term with a space and then type site:.edu. With this combination, Google will look for your search term only in websites having .edu domains. To summarize, type this into the Google search box:

faculty interim suspension site:.edu

This particular search yields loads of sample faculty policies, as well as some addressing the faculty role in interim student suspensions. The same device works for other domains, such as .gov or .org.

From a larger perspective, an institution might reflect on some preliminary questions before undertaking a major handbook revision.

- What are the strengths and weaknesses of the current handbook?
- What does the institution hope to accomplish through revisions? Consider both primary and secondary goals.
- To what extent should revisions reflect a consensus of the faculty and the administration?
- Who will do the bulk of the work? Is this a realistic assignment for them?
- To what other institutions does the institution compare itself? Are their handbooks useful as resources or models?
- Do handbook revisions go to the board of trustees for final approval? If not, what individual or body has that authority?
- What is our timetable for the project? Our budget?
- Do we have institution-wide protocols for drafting, adopting, or distributing policies? How do these apply to the faculty handbook?
- Do we want the final product to be distributed – on paper, in electronic form, or both? If on paper, how will we handle updates?
- In recent years, how often have we amended the faculty handbook? Approximately how often do we want to amend the revised version in the future?
- Can we devote administrative assistance and IT support to the project? Administrative assistance is helpful in planning meetings, taking notes, and formatting long documents. IT support can be useful in creating a platform, if one does not already exist, for maintaining shared drafts and for eventual posting of the handbook in electronic form.
One of the few useful analyses of the faculty handbook drafting process appeared twenty years ago. “Adapting Faculty Personnel Policies” by James L. Pence outlined a collaborative, eight-stage process. He suggested these steps:

1. Establish the team. Pence offers advice on selecting members for a handbook revision committee.
2. Plan the work, including scope, issues, and team member assignments.
3. Draft the policies.
4. Revise and edit the drafts, within the team.
5. Vet the draft handbook with the campus community and revise as needed.
6. Approve the final document.
7. Implement change.
8. Evaluate outcomes and celebrate change.

This model emphasizes the value of collaboration between the faculty and administration in drafting and revising faculty handbooks. If the institution has an effective system of shared governance, work on the faculty handbook will fall naturally within it. If faculty-administration relations are more strained, achieving consensus on handbook text will be challenging. Even under normal circumstances, a major faculty handbook revision might take two years to complete.

Last but not least, appreciate both the strengths and limitations of a revised faculty handbook. While the revision should be an improvement and a valuable tool in reducing the risk of legal liability, it will not have magical power to resolve all campus issues and disputes.

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SELECTED RESOURCES

Association of College and University Policy Administrators. This informal organization offers useful materials, a discussion list, and occasional events on drafting campus policies.

www.acupa.org


AAUP Policy Documents and Reports (Johns Hopkins University Press, 10th ed., 2006)


Filson, Lawrence and Sandra Strokoff, The Legislative Drafter’s Desk Reference (CQ Press, 2d ed., 2008) Good discussions on style, word usage, and form, including numbering systems. Several chapters address drafting regulations, which are country cousins of handbooks.
