

Labor & Employment Alert
April 2015

**NLRB GENERAL COUNSEL ISSUES GUIDANCE ON
EMPLOYEE HANDBOOK RULES**

Over the years, many employers, both union and non-union, have been charged with violating the National Labor Relations Act (“Act”) when the National Labor Relations Board (“NLRB”) determines that an employer’s handbook rules prohibit or restrict activities protected by the Act. Noting that the Act “does not allow even well-intentioned rules that would inhibit employees from engaging in activities protected by the Act,” the NLRB General Counsel has issued a memorandum to assist employers with drafting lawful policies (click here for [General Counsel Memo](#)). This memo provides examples of both lawful and unlawful policies. This memo also focuses on policies that have historically been problematic for employers often resulting in unfair labor practice charges, including¹:

- Confidentiality Rules;
- Rules Regarding Employee Conduct towards the Company and Supervisors;
- Rules Regulating Conduct towards Fellow Employees;
- Rules Regarding Employee Interaction with Third Parties, including news media, government agencies, blogging and social media;
- Rules Restricting Photography and Recording; and
- Conflict-of-Interest Rules.

As employers review their handbooks in light of this NLRB memo, they must be mindful of 2 guiding principles. First, the NLRB emphasizes that it does not read handbook rules in isolation. Accordingly, while a rule set forth below may be lawful in one employer’s handbook based on its context, the context of the same rule in another employer’s handbook could render it unlawful. For this reason, employers must exercise caution before plucking a rule characterized as lawful below and inserting it into its policy.

Second, there are very few bright lines distinguishing lawful and unlawful rules. Instead, it is an evolving area of the law where there is often a blurry line between what is acceptable and what may lead to an unfair labor practice charge. Perhaps the most vivid example of this is in the “Employee Conduct towards the Company and Supervisors” rules, described below. On the one hand, a rule that prohibits “disrespectful” conduct towards a supervisor will usually be unlawful. On the other hand, a rule requiring employees to “cooperate” with each other, including their supervisors, will usually be lawful. Since the law contains subtle nuances and is continually developing, legal review/guidance is strongly advised.

¹ The categories listed below represent a summary of the areas covered in the General Counsel’s memo.

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This Client Alert will highlight key provisions of the NLRB memo. The “lawful” and “unlawful” rules set forth below represent a sampling of examples provided by the NLRB in its memo and do not reflect all “lawful” or “unlawful” rules in any given topic area.

Confidentiality Rules

Protected Right Under the Act: Under Section 7 of the Act, employees have the right to discuss wages, hours, and other terms and conditions of employment with fellow employees, as well as with nonemployees, such as union representatives. Accordingly, an employer’s confidentiality policy cannot directly or implicitly prohibit discussions of items such as wages, hours or workplace complaints.

Unlawful - The rules below were found to be unlawful because they restrict disclosure of employee information and are therefore overbroad:

- *Do not discuss “customer or employee information” outside of work, including phone numbers and addresses.*
- *You must not disclose proprietary or confidential information about the Employer or other associates (if the proprietary or confidential information relating to the Employer’s associates was obtained in violation of the law or lawful Company policy).*
- *Never publish or disclose the Employer’s or another’s confidential or other proprietary information.*
- *Confidential Information is: All information in which its loss, undue use or unauthorized disclosure could adversely affect the Employer’s interests, image and reputation or compromise personal and private information of its members.*

Lawful - The rules below were found to be lawful because they do not reference information regarding employees or employee terms and conditions of employment, and they do not define “confidential” in an overbroad manner:

- *No unauthorized disclosure of business “secrets” or other confidential information.*
- *Misuse or unauthorized disclosure of confidential information not otherwise available to persons or firms outside the Employer is cause for disciplinary action, including termination.*
- *Do not disclose confidential financial data, or other non-public proprietary company information. Do not share confidential information regarding business partners, vendors or customers.*



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Rules Regarding Employee Conduct towards the Company and Supervisors

Protected Right Under the Act: Under Section 7 of the Act, employees have the right to criticize or protest their employer’s labor policies or treatment of employees. This includes the right to do so in a public forum, e.g., social media.

Unlawful - The rules below were found to be unlawfully overbroad since employees would reasonably construe them to ban protected criticism or protests regarding their supervisors, management, or the employer in general:

- *Be respectful to the company, other employees, customers, partners, and competitors.*
- *No defamatory, libelous, slanderous or discriminatory comments about the Company, its customers and/or competitors, its employees or management.*
- *Do not make statements that damage the company or the company’s reputation or that disrupt or damage the company’s business relationships.*

Lawful - The rules below were found to be lawful because they simply require employees to be respectful to customers, competitors, and the like, but do not mention the employer or management. While an employer cannot require employees to respect managers and supervisors, it can require employees to cooperate with each other and the employer in the performance of their work.

- *Employees will not be discourteous or disrespectful to a customer or any member of the public while in the course and scope of company business.*
- *Each employee is expected to work in a cooperative manner with management/supervision, coworkers, customers and vendors.*

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Rules Regulating Conduct towards Fellow Employees

Protected Right Under the Act: Under Section 7 of the Act, employees have the right to argue and debate with each other about unions, management, and their terms and conditions of employment.

Unlawful - Rules that ban “offensive,” “derogatory,” “insulting,” and “embarrassing” comments are unlawful because they limit employees’ ability to honestly discuss unions, management, and terms and conditions of employment.

- *Do not make insulting, embarrassing, hurtful or abusive comments about other company employees online, and avoid the use of offensive, derogatory, or prejudicial comments.*
- *Do not send unwanted, offensive, or inappropriate e-mails.*
- *Material that is fraudulent, harassing, embarrassing, sexually explicit, profane, obscene, intimidating, defamatory, or otherwise unlawful or inappropriate may not be sent by e-mail.*

Lawful - The rules below were found to be lawful because they simply require employees to be respectful to customers or competitors, or direct employees not to engage in unprofessional conduct, and do not mention the employer or its management.

- *Any logos or graphics worn by employees must not reflect any form of violent, discriminatory, abusive, offensive, demeaning, or otherwise unprofessional message.*
- *Threatening, intimidating, coercing, or otherwise interfering with the job performance of fellow employees or visitors.*
- *No harassment of employees, patients or facility visitors.*

Rules Regarding Employee Interaction with Third Parties, Including News Media, Government Agencies, Blogs and Social Media

Protected Right Under the Act: Under Section 7 of the Act, employees have the right to communicate with the news media, government agencies, and other third parties about wages, benefits, and other terms and conditions of employment.

Unlawful - The rules below were found to be unlawful because they ban protected communications with the media and government agencies.

- *Employees are not authorized to speak to any representative of the print and/or electronic media about company matters unless designated to do so by HR, and must refer all media inquiries to the company media hotline.*
- *If you are contacted by any government agency you should contact the Law Department immediately for assistance.*

Lawful - The rule below was found to be lawful because it prohibits employees from speaking on behalf of the employer; it does not prohibit employees from speaking to outsiders on their own or other employees’ behalf.

- *Events may occur at our stores that will draw immediate attention from the news media. It is imperative that one person speaks for the Company to deliver an appropriate message and to avoid giving misinformation in any media inquiry. ... Every employee is expected to adhere to the following media policy: Answer all media/reporter questions like this: “I am not authorized to comment for the Employer” or “I don’t have the information you want. Let me have our public affairs office contact you.”*

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Conflict-of-Interest Rules

Protected Right Under the Act: Under Section 7 of the Act, employees have the right to engage in concerted activity to improve their terms and conditions of employment, even if that activity is in conflict with the employer's interests.

Unlawful - The rule below was found to be unlawful because it is overbroad and does not include any clarifying examples or context that would indicate it does not apply to activities designed to improve terms and conditions of employment.

- *Employees may not engage in any action that is not in the best interest of the Employer.*

Lawful - The rule below was found to be lawful because of its context. It appeared in a section of the handbook dedicated to business ethics, and, accordingly, could not reasonably be read to prohibit participation in unions.

- *Employees must refrain from any activity or having any financial interest that is inconsistent with the Company's best interest and also must refrain from activities, investments or associations that compete with the Company, interferes with one's judgment concerning the Company's best interests, or exploits one's position with the Company for personal gains.*

Rules Restricting Photography and Recording

Protected Right Under the Act: Under Section 7 of the Act, employees have the right to photograph and make recordings to advance protected concerted activity, including the right to use personal devices to take such pictures and recordings.

Unlawful - The rules below were found to be unlawful because they prohibit the use of personal equipment while on breaks or other non-work time.

- *No employee shall use any recording device including but not limited to, audio, video, or digital for the purpose of recording any Employer employee or Employer operation.*
- *Prohibition from wearing cell phones, making personal calls or viewing or sending texts while on duty.*

Lawful - In this case, the guidance did not provide a particularly instructive example of a lawful rule. The guidance indicated a rule regarding recording or photography would be lawful if appropriately limited in scope, such as protecting a strong privacy interest.



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As the examples above illustrate, the NLRB scrutinizes handbook policies to see if employees “would reasonably construe the rule’s language” to interfere with their Section 7 rights to form, join or assist unions and to engage in other concerted activity for the purpose of mutual aid or protection. It is important to note that both non-union employees and union employees have Section 7 rights. Accordingly, unlawful handbook provisions can violate the Section 7 rights of both non-union and union employees and can result in an unfair labor practice charge against the employer, even if the employer does not have unionized employees. As a result of the NLRB memo, employers should review their handbook provisions and are strongly advised to seek counsel in undertaking such review.

This Client Alert was prepared by Nan O’Neill. If you have any questions about this issue, please contact Nan O’Neill or the attorney responsible for your account, or call (617) 479-5000.

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