

NLRB Issues New Guidance On Employee Handbooks and Employee Conduct Rules

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March 18, 2015

***NLRB General Counsel Issues
Report on the Lawfulness of
Employee Conduct Rules***

<https://www.nlr.gov/reports-guidance/general-counsel-memos>

NLRA

- Employers may not prohibit employees from engaging in protected concerted activities and/or union activities protected by **Section 7** of the National Labor Relations Act.
- Employees' comments and conduct about terms and conditions of employment are protected when they are made with or on behalf of other employees or where they discuss or seek to induce group action by employees.

NLRA

- Employees are engaged in protected concerted activity when they are expressing a concern regarding terms and conditions of employment (including actions of supervisors) on behalf of co-workers, in concert with co-workers, or on a matter of common concern to co-workers.

March 18, 2015 Report Overview

- NLRB takes the position that merely having a rule that has a chilling effect on employees engaging in protected concerted activity under Section 7 of the NLRA is unlawful.
- Remember the NLRA applies to union and non-union work environments.
- Primary recommendation is that handbook or other employee conduct policies include clear and specific language, precise examples, and explanatory context so that employees will not reasonably construe the policies to violate their Section 7 rights.

March 18, 2015 Report Overview

- 30 pages divided into two sections
 - Examples of employee conduct rules that are and are not lawful
 - Review of Wendy's conduct rules with revisions required by the NLRB
- Does not have the full force of “law”
 - Will be used by the NLRB to rule on cases
 - May be adopted by Courts

Confidentiality Policies

Confidentiality Policies

- Employees have a Section 7 right to discuss wages, hours, and other terms and conditions of employment with fellow employees as well as with nonemployees and to raise concerns on behalf of others or on matters of concern to employees in general.
- If your confidentiality policy
 - Specifically prohibits employee discussions of terms and conditions of employment (such as rates of pay) or workplace complaints OR
 - If employees could **reasonably construe** your policy to prohibit these types of discussions, your policy will be found unlawful by the NLRB.
 - Broad prohibitions on disclosing “confidential” information are lawful as long as they do not reference information regarding employees or anything that would reasonably be considered a term or condition of employment.

NLRB Found These Confidentiality Policies To Be Unlawful

- 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 [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. Never publish or report on conversations that are meant to be private or internal to [the employer.]”
- Employees are prohibited from “disclosing . . . details about the employer.”

NLRB Found These Confidentiality Policies To Be Unlawful

- “Sharing of overheard conversations at the work site with your coworkers, the public, or anyone outside of your immediate work group is strictly prohibited.”
- “Discuss work matters only with other company employees who have a specific business reason to know or have access to such information . . . Do not discuss work matters in public places.”
- “If something is not public information, you must not share it.”
- Confidential Information if “all information in which its loss, undue use or unauthorized disclosure could adversely affect the company’s interests, image and reputation or compromise personal and private information of its members.”

Lawful Confidentiality Policies Before The NLRB

- “No authorized disclosure of “business secrets” or other confidential information.”
- “Misuse or unauthorized disclosure of confidential information not otherwise available to persons or firms outside the company 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.”
- **NOTE:** Confidential Information was narrowly defined in these cases and did not refer to employees or employee terms and conditions of employment.

General Employee Conduct Policies

NLRB Found These Employee Conduct Policies To Be Unlawful

- “Be respectful to the company, other employees, customers, partners, and competitors.”
- “Do not make fun of, denigrate, or defame your co-workers, customers, franchisees, suppliers, the Company, or our competitors.”
- “Be respectful of others and the Company.”
- “No defamatory, libelous, slanderous, or discriminatory comments about the company, its customers, and/or competitors, its employees or management.”

NOTE: NLRB found these statements to be overly broad since employees could reasonably construe the language to ban protected criticism or protests regarding supervisors, management or the company in general.

NLRB Found These Employee Insubordination Policies To Be **Unlawful**

- “Disrespectful conduct or insubordination, including, but not limited to, refusing to follow orders from a supervisor or a designated representative.”
- “Chronic resistance to proper work-related orders or discipline, even though not overt insubordination” will result in discipline.”

NLRB Found These Employee Policies Regarding Treatment Of Others To Be **Unlawful**

- “Refrain from any action that would harm persons or property or cause damage to the Company’s business or reputation.”
- “It is important that employees practice caution and discretion when posting content on social media that could affect the employer’s business or reputation.”
- “Do not make statements that damage the company or the company’s reputation or that disrupt or damage the company’s business relationships.”
- “Never engage in behavior that would undermine the reputation of the employer, your peers or yourself.”

NLRB Found These Employee Policies Regarding Treatment Of Others To Be **Unlawful**

- “Don’t pick fights online.”
- “Do not make insulting, embarrassing, hurtful or abusive comments about other company employees online and avoid the use of offensive, derogatory, or prejudicial comments.”

NOTE: The second comment was found to be unlawful because the Board found that debate about unionization and other protected activity is often contentious and controversial. Therefore, employees would reasonably read a rule that bans “insulting, hurtful,” etc. comments as limiting their ability to honestly discuss such subjects.

NLRB Found These Employee Policies Regarding Treatment Of Others To Be **Unlawful**

- “Show proper consideration for others’ privacy and for topics that may be considered objectionable or inflammatory, such as politics and religion.”

NOTE: This rule was found unlawful because Section 7 of the NLRA protects communications about political matters such as right-to-work legislation. The policy may have been looked at differently if it had contained examples or the context in which these discussions were prohibited was better explained.

- Do not send “unwanted, offensive, or inappropriate emails.”

NOTE: Found to be unlawful because it is vague and overbroad with no context or clarifying examples.

NLRB Found These Employee Policies Regarding Treatment Of Others To Be **Unlawful**

- “Material that is fraudulent, harassing, embarrassing, sexually explicit, profane, obscene, intimidating, defamatory, or otherwise unlawful or inappropriate may not be sent by email . . .”

NOTE: Found to be unlawful because several of the terms are ambiguous as to how they might apply to an employee complaining about terms and conditions of employment. For example, these terms were found to be ambiguous – “embarrassing,” “defamatory,” “otherwise inappropriate.”

Lawful Employee Conduct Policies Before The NLRB

- “Being insubordinate, threatening, intimidating, disrespectful or assaulting a manager/supervisor, coworkers, customer, or vendor will result in discipline.”

NOTE: Board found this policy lawful because the rule includes phrases that indicate only serious misconduct is banned. Ordinarily a rule banning all disrespectful behavior would be found unlawful but here it was acceptable because of the context of the other language.

Lawful Employee Conduct Policies Before The NLRB

- “Making inappropriate gestures, including visual staring.”
- 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.”
- No “use of racial slurs, derogatory comments, or insults.”

NOTE: Ordinarily a blanket rule against derogatory comments would be overly broad. However, with this last rule, it was in a section of the handbook that dealt exclusively with unlawful harassment. The Board believed employees would reasonably construe the rule as prohibiting those types of comments toward coworkers rather than protected criticism of the employer.

Employee Contact With Media and Other Third Parties

NLRB Found These Policies Regarding Employee Contact With Third Parties To Be **Unlawful**

- Employees are not “authorized to speak to any representatives 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.
- “Associates are not authorized to answer questions from the new media . . . When approached for information, you should refer the person to the Media Relations Department.”
- “All inquiries from the media must be referred to the Director of Operations in the corporate office, no exceptions.”
- “If you are contacted by any government agency you should contact the Law Department immediately for assistance.”

NOTE: All policies found to be overly broad and overly restrictive on employee rights to talk to the media about complaints, union activity, and terms and conditions of employment.

Lawful Employee Conduct Policies Before The NLRB

- “The Company strives to anticipate and manage crisis situations in order to reduce disruption to our employees and to maintain our reputation as a high quality company. To best serve these objectives, the company will respond to the news media in a timely and professional manner *only* through the designated spokesperson.”
- “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. While reporters frequently shop as customers and may ask questions about a matter, good reporters identify themselves prior to asking questions. Every ... employee is expected to adhere to the following media policy ...”

Intellectual Property

NLRB Found These Policies Regarding Use of Company Intellectual Property To Be **Unlawful**

- Do “not use any Company logos, trademarks, graphics, or advertising material in social media.”
- Do not use “other people’s property,” such as trademarks without permission in social media.
- “Use of the Company’s name, address or other information in your personal profile is banned.... In addition, it is prohibited to use the Company’s logos, trademarks, or any other copyrighted material.”
- “Company logos and trademarks may not be used without written consent”

Lawful Use of Intellectual Property Policies Before The NLRB

- “Respect all copyright and other intellectual property laws. For the Company’s protection as well as your own, it is critical that you show proper respect for the laws governing copyright, fair use of copyrighted material owned by others, trademarks, and other intellectual property, including the Company’s own copyrights, trademarks and brands.”
- DO respect the laws regarding copyrights, trademarks, rights of publicity and third party rights. To minimize the risk of a copyright violation, you should provide references to the source of information you use and accurately cite copyrighted works you identify in your online communications. Do not infringe on the Company’s logos, brand names, taglines, slogans, or other trademarks.”

Audio, Video, and Photographs

NLRB Found These Policies Prohibiting Photography or Recordings To Be **Unlawful**

- “Taking unauthorized pictures or video on company property” is prohibited.
- “No employee shall use any recording device including but not limited to, audio, video, or digital for the purpose of recording any Company employee or the Company’s operation.”

NOTE: The first rule is simply overly broad. The second one could be reasonably construed as limiting an employee’s right to document unfair labor practices.

Strikes and Walkouts

NLRB Found These Policies Prohibiting Employees From “Walking Off The Job” To Be **Unlawful**

- “Failure to report to your scheduled shift for more than three consecutive days without prior authorization or ‘walking off the job’ during a scheduled shift” is prohibited.
- “Walking off the job is prohibited.”

NOTE: The NLRB found these rules were unlawful because they contain broad prohibitions on walking off the job which reasonably would be read to include protected strikes and walkouts.

Disclosure of Company Handbooks

NLRB Found These Policies Prohibiting Employees From Disclosing the Company Handbook To Be Unlawful

- “No part of this handbook may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or information storage and retrieval system or otherwise, for any purpose with the express written permission of Wendy’s International, Inc.”

NOTE: The NLRB found this provision to be unlawful because it prohibited disclosure of the Wendy’s handbook, which contains employment policies, to third parties such as union representatives or the NLRB itself. Because employees have a right to discuss wages and other terms and conditions of employment with others, this policy was overly broad.

Social Media

The NLRB and Social Media

- In 2011 and 2012, the NLRB's General Counsel issued 3 guidance memorandums on social media issues involving employees. These memos outlined what is and what is not protected activity on social media.
- On March 18, 2015 the NLRB's General Counsel issued a guidance memorandum on employee rules that also addresses social media issues involving employees.
- These memorandums, NLRB cases, and court cases govern how we address social media issues with our employees.

What About Employee Threats On Social Media?

FB Post --- I HATE ABC COMPANY SO MUCH!! Of all the greed, stupidity, false advertising, lies and other crap I've put up with for 9 years at this shithole, what happened today makes me sick. Since the higher ups are NOT anywhere close to smart we have useless attendance point system. Well today, a girl at work had to leave because she was on the verge of miscarrying and these dumbass f___tards actually gave her a point! I can't tolerate the level of stupidity and greed from this company and it is making me want to burn the entire warehouse to the ground.

When the NLRB is faced with cases regarding whether statements threatening violence are protected, the NLRB focuses on whether an objective person would think the employee was making a “literal” threat, versus a hyperbolic (exaggerated) threat.

- Look at what is said in the post
- The circumstances surrounding the post
- When it was posted
- What has occurred since the post

FB Post -- Bob is such a NASTY MOTHER F_____ don't know how to talk to people!!!!!! F_____ his mother and his entire f_____ family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!

NLRB – found the termination of the employee for this post to be **unlawful** because he was engaging in protected activity supporting a union organizing campaign.

NLRB Finds Comments To Supervisors **Lawful**

- “I’m going to see you f’n fry.” (NLRB found statement ambiguous)
- “I’m gonna kick your ass.” (NLRB found statement a mere “colloquialism that standing alone does not convey a threat of actual physical harm.”)
- “This is going to get ugly. You better bring boxing gloves.” (NLRB found statement was “vocal resistance to a policy employees thought was unfair and unsafe.”)
- “f’n crook” “asshole” “you will regret it if you fire me.” (NLRB found statements not so outrageous as to deprive the employee of his statutory protection to raise concerns about terms and conditions of employment.)

CURRENT STATE OF NLRB GUIDANCE

- After four sets of “guidance,” the NLRB seems to be holding that:
 - Protected Activity includes complaints: about the way a company conducts its business; the way it generally treats its employees (“concerted activity”); and the company’s culture/morale.
 - Unprotected Activity includes: personal gripes; inappropriate racist/misogynistic/religious language; actual literal threats; and complaints which focus on a company’s products/business policies (unless the complaints are protected from retaliation by whistleblower or other laws).

So, What Can Employers Say In Social Media Policies?

Social Media Policy

- At a minimum, a good social media policy should include:
 - Prohibition on comments about co-workers or supervisors or the Employer that are vulgar, obscene, threatening, intimidating, harassing, or a violation of the Employer's workplace policies against discrimination or harassment.
 - Requirement that the employee use a disclaimer when an employee is expressing his or her views and has identified himself as an employee of the company.
 - Prohibition on uses of social media that disclose proprietary or confidential information belonging to the company.

UNLAWFUL SOCIAL MEDIA POLICY #1

GM Policy:

- “[B]e sure that your posts are completely accurate and not misleading and that they do not reveal non-public company information on any public site.”

NLRB:

- “The term “completely accurate and not misleading” is overbroad because it would reasonably be interpreted to apply to discussions about, or criticism of, the Employer’s labor policies and its treatment of employees that would be protected by the Act so long as they are not “maliciously false.”

UNLAWFUL SOCIAL MEDIA POLICY #1

GM Policy:

- “Non-public information includes: ... Personal information about another employee, such as his or her ... performance, compensation or status in the company.”

NLRB:

- “[E]mployees would reasonably construe the policy as precluding them from discussing terms and conditions of employment among themselves or with non-employees.”

UNLAWFUL SOCIAL MEDIA POLICY #1

GM Policy:

- “Do not incorporate [Employer] logos, trademarks or other assets in your posts.”

NLRB:

- “[E]mployees’ non-commercial use of the Employer’s logo or trademarks while engaging in Section 7 activities would not infringe on [the employer’s] interest.”

UNLAWFUL SOCIAL MEDIA POLICY #2

DISH Network Policy:

- “You may not make disparaging or defamatory comments about [Employer], its employees, officers, directors, vendors, customers, partners, affiliates, or our, or their, products/services.”

NLRB:

“[T]he prohibition on making ‘disparaging or defamatory’ comments is unlawful. Employees would reasonably construe this prohibition to apply to protected criticism of the Employer’s labor policies or treatment of employees.”

LAWFUL SOCIAL MEDIA POLICY

Wal-Mart Policy:

- Prohibits “inappropriate postings that may include discriminatory remarks, harassment and threats of violence or similar inappropriate or unlawful conduct.”
- “Always be fair and courteous” to fellow employees and others.
- Prohibits communications “that reasonably could be viewed as malicious, obscene, threatening, or intimidating.”

LAWFUL SOCIAL MEDIA POLICY

Wal-Mart Policy:

- “Examples ... might include offensive posts meant to intentionally harm someone’s reputation or posts that could contribute to a hostile work environment on the basis of race, sex, disability, religion or any other [protected] status.”

LAWFUL SOCIAL MEDIA POLICY

Wal-Mart Policy:

- “Examples ... might include offensive posts meant to intentionally harm someone’s reputation or posts that could contribute to a hostile work environment on the basis of race, sex, disability, religion or any other [protected] status.”

NLRB: Policy not ambiguous because “it provides sufficient examples of prohibited conduct so that, in context, employees would not reasonably read the rules to prohibit Section 7 activity.”

CURRENT STATE OF NLRB GUIDANCE

- Overbroad social media policies
 - reference communications which could “embarrass,” or “harass,” or “defame” companies and/or staff; those which “lack truthfulness” or could “damage the goodwill” of a company and/or its employees;
 - prohibitions on “talking about company business on their personal accounts”;
 - and postings “that could be construed as inappropriate.”

CURRENT STATE OF NLRB GUIDANCE

– Appropriate social media policies

- offer examples of specific prohibited conduct (“maliciously false” comments, “engage in unlawful harassment,” “violate company privacy/ethics policies”);
- include an NLRA disclaimer (though this alone won’t save you);
- may limit contacts with the media on behalf of the company;
- and may restrict employees from discussing “embargoed information” under securities laws, “personal health information” HIPAA laws, etc.

What to do now?

RISK

- Audit your employee handbook for potential issues under the latest NLRB guidance.
- Make a reasonable risk assessment about making changes to avoid problems with the NLRB latest guidance.
- Changes can be made that do not impact your ability to control unacceptable, disruptive, and otherwise inappropriate employee conduct.
- Provide specific examples.
- Consider the context of your employee rules. For example,
 - Discuss inappropriate social media postings in your EEO/harassment policy.
 - Discuss prohibitions against threats, bullying, intimidation, insubordination and threats in a violence or weapons policy as well as in employee conduct policies.

**What Questions
Do You Have?**