

NLRB General Counsel Issues Guidance Memorandum on Employee Handbook Rules

The General Counsel for the National Labor Relations Board (NLRB) recently published a [guidance memorandum](#) that provides specific examples of lawful and unlawful employee handbook rules in the areas of confidentiality, professionalism and employee conduct, use of company logos, copyrights and trademarks, conflicts of interest, photography and recording, and interaction with the media and other third parties. The memorandum also includes General Counsel-approved handbook rules that were adopted as part of an unfair labor practice settlement with the fast-food chain, Wendy's.

Over the past few years, the NLRB and its General Counsel have aggressively scrutinized many frequently used employee handbook provisions. The basis for this scrutiny is the alleged infringement of the right of employees to engage in protected concerted activity under Section 7 of the National Labor Relations Act (NLRA). Section 7 activity includes the right to discuss, challenge, question, and advocate changes in wages, hours, and other terms and conditions of employment in both unionized and non-unionized work environments. Of course, it also includes the right to engage in union organizing. A majority of the current NLRB will deem an employee handbook provision to violate the NLRA if it specifically prohibits Section 7 activity or if "employees would reasonably construe" the rule as prohibiting such activity. It is this "reasonably construe" language that has resulted in many common employee handbook provisions being declared unlawful by the majority of the current NLRB.

While one could editorialize at length regarding the razor-thin distinctions drawn between the provisions found lawful and unlawful, the usefulness of the guidance for employers lies in its concrete examples, some of which are highlighted below.

[Confidentiality Rules](#)

A confidentiality policy will be deemed by the current NLRB to violate the NLRA if it specifically prohibits employee discussions regarding terms and conditions of employment, such as wages or workplace conditions, or if employees would reasonably construe the policy to prohibit such discussions.

[Unlawful](#)

- Do not discuss customer or employee information outside of work, including phone numbers and addresses.
- 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.

[Lawful](#)

- No unauthorized disclosure of business secrets or other confidential information.
- Do not disclose confidential financial data, or other non-public proprietary company information. Do not share confidential information regarding business partners, vendors, or customers.

Employee Conduct/Professionalism Rules

The memorandum reinforces that employees have the right to criticize their employer's policies and actions toward its employees, and therefore, any policies prohibiting disrespectful, inappropriate, or rude conduct toward the employer have been deemed unlawfully overbroad. In contrast, rules requiring employees to be respectful to co-workers, clients, and customers have generally been found to be lawful.

Unlawful

- Be respectful of 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.

Lawful

- No rudeness or unprofessional behavior toward a customer or anyone in contact with the company.
- Being insubordinate, threatening, intimidating, disrespectful, or assaulting a manager/supervisor, co-worker, customer, or vendor will result in discipline.

Use of Company Logos, Copyrights, and Trademarks

The NLRB has found that a broad ban on use of an employer's name, logo, or other trademark is unlawful because it may restrict the use of the company name and logo on picket signs, leaflets, and other protest material.

Unlawful

- Do not use any company logos, trademarks, graphics, or advertising materials in social media.

Lawful

- Respect all copyright and other intellectual property laws. For the employer'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 employer's own copyrights, trademarks, and brands.

The release of this guidance suggests the NLRB will continue to aggressively enforce and scrutinize the employment policies of union and non-union employers. An unlawful policy is itself a violation of the NLRA, and if an employee is disciplined or terminated for violating an unlawful policy, the discipline could be rescinded and the employer could be ordered to restore the employee to his/her position with back pay.

As seen in the examples above, tweaking one or two words or adding additional context and clarification to what would be an otherwise overbroad policy can mean the difference between an unlawful or lawful policy. Employers should, therefore, use this memorandum as a guide in reviewing and revising their handbooks and other employee rules.

To learn more, contact [Tyler T. Hendry](mailto:thendry@bsk.com) at (315) 218-8301 or thendry@bsk.com.



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