

EMPLOYER HANDBOOK RULES - NLRB MEMO SAYS WHAT'S LAWFUL AND WHAT'S NOT

A HELPFUL MEMO?

Almost every employer has an employee handbook of some sort or at least a set of rules and policies that are established to let employees know what is expected of them. In the private sector, the NLRB has been focusing for several years on rules and policies that are too broad and unlawfully interfere with employees' legal rights to engage in concerted activity. On March 18, 2015, in an effort to help employers understand which rules and policies will pass the NLRB's scrutiny, the NLRB's General Counsel issued a [30-page memo](#) intended to clarify any confusion. Whether it does or not is another question.

A LITTLE BACKGROUND

The National Labor Relations Act is the federal law that governs the relations between employees and employers in the private sector. Generally, employees have the protected right to form or join labor unions and to engage in concerted activity for their mutual aid and protection - free of employer interference. The law does not allow even well-intentioned rules that would inhibit employees from engaging in activities protected by the law. The mere maintenance of a work rule may violate the law if the rule has a **chilling effect** on employees' activities. The most obvious way a rule would violate the law is by explicitly banning union activity. But even if the rule does not explicitly prohibit protected activity, it will still be found to be unlawful if: 1) employees would reasonably construe the rule's language to prohibit protected activity; 2) the rule was promulgated in response to union or other protected activity; or 3) the rule was actually applied to restrict the exercise of protected rights.

THIS IS CHILLING!

The biggest challenge for employers is to know when a rule or policy will have the prohibited **chilling effect**. The NLRB's decisions over the years seem to have little consistency. (See our previous [HR Insights Blog articles](#) dealing with the NLRB's focus on employer handbooks.) This current memo hopes to give examples of good rules and bad ones. Ultimately, the memo concludes with an entire set of "good" rules that the NLRB negotiated with Wendy's Inc., in settlement of a complaint challenging many of that national company's policies. It's worth looking at the negotiated handbook rules and policies in the memo as a guide when evaluating your existing policies.

SOME EXAMPLES - UNLAWFUL AND LAWFUL

The memo sets out nine categories of rules and policies and then gives examples of what the NLRB General Counsel considers to be unlawful and lawful. Here are just a few of the more interesting, if not confusing, examples cited by the General Counsel:

Rules on confidentiality

- *Do not discuss customer or employee information outside of work, including phone numbers and addresses. - UNLAWFUL*
- *Discuss work matters only with other employees who have a specific business reason to know or have access to such information. Do not discuss work matters in public places. - UNLAWFUL*
- *Knowing unauthorized disclosure of "business secrets" or other confidential information. - LAWFUL*
- *Do not disclose confidential financial data, or other nonpublic proprietary company information. Do not share confidential information regarding business partners, vendors or customers. - LAWFUL*

Rules on dealing with management

- *Disrespectful conduct or insubordination, including but not limited to, refusing to follow orders from a supervisor or a designated representative. - UNLAWFUL*
- *No defamatory, libelous, slanderous or discriminatory comments about the company, its customers and or competitors its employees or management. - UNLAWFUL*

- *Each employee is expected to work in a cooperative manner with management/supervision, coworkers, customers and vendors. - LAWFUL*
- *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. - LAWFUL*

Rules on dealing with co-workers

- *Do not send unwanted, oversensitive or inappropriate e-mails. - UNLAWFUL*
- *Show proper consideration for others' privacy and for topics that may be considered objectionable or inflammatory, such as politics and religion. - UNLAWFUL*
- *Threatening, intimidating, coercing or otherwise interfering with the job performance of fellow employees or visitors. - LAWFUL*
- *No harassment of employees, patients or facility visitors. - LAWFUL*

Rules on third party communications

- *If you are contacted by any government agency, you should contact the law department immediately for assistance. - UNLAWFUL*
- *All inquiries from the media must be referred to the Director of Operations in the corporate office, no exceptions. - UNLAWFUL*
- *The company strives to anticipate and manage crisis situations in order to reduce disruption to our employees and to have met 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 spokespersons. - LAWFUL*

Rules restricting employees from leaving work

- *Walking off the job is prohibited. - UNLAWFUL*
- *Walking off a shift, failing to report for a scheduled shift and leaving early without supervisor permission are also grounds for immediate termination. - LAWFUL*

MAKING SENSE OF THE MEMO

The memo also covers rules dealing with conflicts of interest, company logos, trademarks and copyrights, photos, recordings and electronic devices and the disclosure of the contents of the company's handbook. It is a challenge to understand why some rules are lawful and others are not, especially when the language is so very similar. It's important to keep in mind that the General Counsel's memo does not have the force of law. It is only an indication of the likely position the NLRB will take if an unfair labor practice charge is filed over the rules and policies contained in an employer's handbook.

The memo does try to explain the nuances, but employers are left to wonder even so if their policies will withstand the NLRB's review. Employers should consider reviewing the full memo, especially the negotiated and approved set of policies and rules reached in the settlement with Wendy's Inc., found near the end of the memo.

Reference: [NLRB Memorandum GC 15-04, March 18, 2015](#)

If you have any questions, please contact Steve Lyman at slyman@hallrender.com or your regular Hall Render attorney.