



# The NLRB's Continued Meddling With Employer Handbook Policies

Presented by:

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## Today's Agenda

### NLRB Handbook Rules:

- Confidentiality Policies
- Behavior Policies – Conduct Towards Company & Supervisors
- Behavior Policies – Conduct Towards Other Employees
- Rules Regulating Third Party Communications
- Rules on Use of Company Logos, Copyrights, and Trademarks
- Rules Restricting Photo/Video Recordings
- Rules Restricting Employees from Leaving Work
- Conflict-of-Interest Rules
- E-Mail Policies



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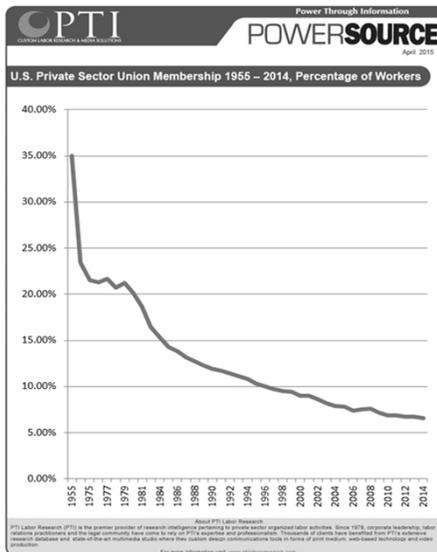


# NLRB Overview

- Over the last few years, the NLRB has been extending its reach to impose its powers on **NON-UNION** employers, including employers who have never had to deal with “union issues.”
- Why? → Less than 7% of private sector workers belonged to a union in 2015.



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2015: 6.7%



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# What's At Stake

- Unfair labor practice charges
  - Backpay
  - Notice posting
  - Lawyer fees and lost time!
- Overturned union election results (if we win)



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## Section 7 of the National Labor Relations Act (NLRA)

- “Employees shall have the **right** to:
  - self-organization;
  - form, join, or assist labor organizations;
  - bargain collectively through representatives of their own choosing; and
  - **engage** in other **concerted activities for the purpose** of collective bargaining or other **mutual aid or protection** . . . .”
- \*\*NLRB has been taking an expansive view of Section 7 in order to infringe on **non-union** work places.



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# Confidentiality Policies

- **The NLRB says:**
  - An employer’s confidentiality policy that either specifically prohibits employee discussions of terms/conditions of employment—or that employees would reasonably understand to prohibit such discussions—violates the NLRA.
- For example, the following Rules have been found to be unlawful:
  - *Do not discuss customer or employee information outside of work, including phone numbers and addresses.*
  - *Sharing conversations overheard at the work site with your co-workers, the public, or anyone outside of your immediate work group is prohibited.*
  - *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.*
  - *Do not discuss your wage rate or other compensation information with others.*
- The above Rules fail to clarify, expressly or contextually, that they do not restrict Section 7 activity.



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# Confidentiality Policies

- **The NLRB says:**
  - Broad prohibitions on disclosing “confidential” information are lawful so long as they do not reference information that would reasonably be considered a term/condition of employment, because employers have a substantial and legitimate interest in the privacy of certain business information.
- For example, the following Rule has been found to be unlawful:
  - *Never publish or disclose the Employer’s Confidential Information. Confidential Information means all information in which its loss, undue use, or unauthorized disclosure could adversely affect the Employer’s interests.*
- The above rule would reasonably lead employees to believe that they cannot disclose information about wages and working conditions, because it might adversely affect the employer’s interest.



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# Confidentiality Policies

- Rules will likely be lawful if they:
  - Do not reference information regarding terms/conditions of employment;
  - Do not define “confidential” in an overbroad manner; and
  - Do not otherwise contain language that would reasonably be construed to prohibit Sec. 7 communications.
- Examples of lawful Rules:
  - *No unauthorized disclosure of “business secrets” or other confidential information.*
  - *Unauthorized disclosure of confidential information not otherwise available to persons or firms outside the Company is cause for disciplinary action.*
  - *Do not disclose non-public, proprietary company information. Do not share confidential information regarding business partners, vendors, or customers.*



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# Confidentiality Policies

## ***Banner Health System, 358 NLRB No. 93 (2012)***

- Employer violated the NLRA by asking an employee who was the subject of an internal investigation to refrain from discussing it while the investigation was pending.
- The Board held: “[T]o justify a prohibition on employee discussion of ongoing investigations, an employer must show that it has a legitimate business justification that outweighs employees’ Section 7 rights”.



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# Confidentiality Policies

## ***Banner Health System, 358 NLRB No. 93 (2012)***

- The employer had the burden to first determine whether, in any given investigation:
  - (1) witnesses needed protection;
  - (2) evidence was in danger of being destroyed;
  - (3) testimony was in danger of being fabricated; or
  - (4) there was a need to prevent a cover-up.
- The Board found that the general assertion of protecting the integrity of an investigation “clearly failed to meet” that burden.



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# Confidentiality Policies

## ***Banner Health System, 358 NLRB No. 93 (2012)***

- The decision applies equally to unionized and non-union settings.
- The decision is **not** a total prohibition on asking employees for confidentiality during an internal investigation.
  - Employers who do ask for confidentiality must establish that confidentiality is necessary to protect a witness, prevent the destruction of evidence, preserve testimony, prevent a cover-up, or further another legitimate business interest.



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# Confidentiality Policies

## *First Transit, Inc. (April 2, 2014)*

- At issue in this case were provisions prohibiting the disclosure of the following:
  - “any company information,” including wage and benefit information;
  - statements about work-related accidents to anyone but the police or company management; and
  - “false statements” about the company.
- In addition, there was a policy barring participation in outside activities that would be “detrimental” to the company’s image.



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# Confidentiality Policies

## *First Transit, Inc. (April 2, 2014)*

- What did the NLRB have to say about these policies?
  - **ALL OF THEM ARE UNLAWFUL!!!**
- Why?
  - The language in the policies could be viewed as “chilling” the employees’ Section 7 rights.



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## Behavior Policies – Conduct Towards Company & Supervisors

- **The NLRB says:**
  - Rules prohibiting employees from engaging in disrespectful, negative, inappropriate, or rude conduct towards the employer or management will usually be found unlawful.
  - Rules that ban false statements will be unlawful unless they specify that only maliciously false statements are prohibited.
  - Rules that limit conduct towards the employer or management may be unlawful.

## Behavior Policies – Conduct Towards Company & Supervisors

- **The NLRB says:**
  - Rules requiring employees to be respectful and professional towards clients or competitors, but not to the employer or management, likely will be lawful.
  - Rules that prohibit conduct that amounts to insubordination would also likely be lawful.
  - Rules that prohibit an employee's criticism of an employer's policies or treatment of employees in a public forum will likely be unlawful.

## Behavior Policies – Conduct Towards Company & Supervisors

- The following Behavior Policies have been found to be unlawful:
  - *Be respectful to the **Company**, other employees, customers, partners, and competitors.*
  - *Employees shall not make defamatory, libelous, slanderous or discriminatory comments about the **Company**, its customers and/or competitors, its employees, or **management**.*
- Employees reasonably would construe them to ban protected criticism or protests regarding their supervisors, management, or the employer in general.

## Behavior Policies – Conduct Towards Company & Supervisors

- The following also was found to be unlawful:
  - ***Disrespectful conduct** or insubordination, including, but not limited to, refusing to follow orders from a supervisor or a designated representative, is prohibited.*
  - *Chronic resistance to proper work-related orders or discipline, **even though not overt insubordination**, will result in discipline.*
- Because they ban conduct that does not rise to the level of insubordination.

## Behavior Policies – Conduct Towards Company & Supervisors

- The following rules have been found to be lawful, as they restrict or limit conduct only towards customers, competitors, etc.:
  - *No rudeness or unprofessional behavior toward a customer, or anyone in contact with the Company, is permitted.*
  - *Employees will not be discourteous or disrespectful to a customer or to any member of the public while in the course and scope of Company business.*
- Similarly, rules that require employees to work together in a civil manner have been found to be lawful:
  - *Each employee is expected to work in a cooperative manner with management/supervision, coworkers, customers, and vendors.*

## Behavior Policies – Conduct Towards Company & Supervisors

- Additionally, context matters in terms of Behavior Policies.
- While normally a ban on disrespectful behavior towards management would be unlawful, if the context limits the rule to only serious misconduct, it might be lawful.
- The following rule was found lawful in *Tradesmen International*, 338 NLRB 460 (2002), because it was contained in a larger provision that focused only on serious misconduct:
  - *Being insubordinate, threatening, intimidating, disrespectful, or assaulting a manager/supervisor, coworker, customer, or vendor will result in discipline.*

## Behavior Policies – Conduct Towards Company & Supervisors

### *Laurus Technical Institute and Joslyn Henderson* (June 13, 2014)

- The provision at issue:
  - a “**no gossip**” policy which prohibited employees from “participating in or instigating gossip about the company, fellow employees or customers.”
- NLRB affirmed an ALJ ruling which held that “the language in the no gossip policy [was] overly broad, ambiguous and severely restrict[ed] employees from discussing or complaining about any terms and conditions of employment.”
- The Board also affirmed the finding that the gossip policy improperly restricted the employees’ rights to concerted action under Section 7 of the National Labor Relations Act.



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## Behavior Policies – Conduct Towards Other Employees

- **The NLRB says:**
  - Employees have a right to argue and debate with each other about unions, management, terms/conditions of employment, etc.
  - Protected concerted speech will not lose its protection even if it includes abusive and inaccurate statements.
  - Rules that prohibit “negative” or “inappropriate” discussions among employees, without further clarification, will likely be unlawful.
  - Although employers are entitled to have anti-harassment rules, they cannot be so broad as to prohibit vigorous debate or comments about Section 7-protected subjects.



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## Behavior Policies – Conduct Towards Other Employees

- The following rules have been found to be unlawful because employees would reasonably construe them to encompass protected activity:
  - *Don't pick fights with coworkers 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.*
  - *Do not send unwanted, offensive, or inappropriate emails.*

## Behavior Policies – Conduct Towards Other Employees

- The following rules have been found to be lawful considering they require respectful behavior towards customers or competitors only, they do not mention management or the company, and employees would not believe they prohibit Section 7-protected activity.
  - *No harassment of employees, customers, or facility visitors.*
  - *No threatening, intimidating, coercing, or otherwise interfering with the job performance of fellow employees or visitors.*
  - **Rule appearing within section on unlawful harassment and discrimination:** *No use of racial slurs, derogatory comments, or insults.*

## Behavior Policies – Conduct Towards Other Employees

### *Hills and Dales General Hospital (April 1, 2014)*

- At issue in this case were the following three paragraphs in the employer’s Values and Standards of Behavior Policy:
  1. A paragraph prohibiting employees from making “negative comments about our fellow team members,” including coworkers and managers;
  2. A paragraph requiring employees to represent the employer “in the community in a positive and professional manner in every opportunity;” and
  3. A paragraph prohibiting engaging or listening to “negativity or gossip.”



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## Behavior Policies – Conduct Towards Other Employees

### *Hills and Dales General Hospital (April 1, 2014)*

- What did the NLRB have to say about these policies?
  - **ALL OF THEM ARE UNLAWFUL!!!**
- Why?
  - The language in the policies could be viewed as “chilling” the employees’ Section 7 rights.



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# Rules Regulating Third Party Communications

- **The NLRB says:**
  - Handbook Rules that reasonably could be read to restrict comments with the media, government agencies, and other third parties (**e.g., unions**) about wages, benefits, and terms/conditions of employment will be unlawful.
  - Company media policies must be written carefully to ensure rules are not read to ban employees from speaking to media or other third parties on their own (or other employees’) behalf.

# Rules Regulating Third Party Communications

- The following company media policy was found to be unlawful because the phrase “company matters” could be construed to encompass employment and labor concerns:
  - *Employees are not authorized to speak to any representative of the media about company matters unless so designated by HR.*
- The following was found to be unlawful because it could be understood to apply beyond just media comments speaking to the employer’s official position:
  - *Employees are not authorized to answer questions from the news media. When approached for information, you should refer the person to the Media Relations Department.*

## Rules Regulating Third Party Communications

- Media contact rules will be lawful when they clearly specify that employees should not speak to media on behalf of the company, as opposed to speaking on their own behalf.
  - *The company will respond to the news media in a timely and professional manner only through designated spokespersons.*
  - *It is imperative that one person speaks for the Company to deliver an appropriate message and to avoid giving misinformation in any media inquiry.*

## Rules on Use of Company Logos, Copyrights, and Trademarks

- **The NLRB says:**
  - Handbook rules cannot prohibit employees' fair protected use of such property.
  - Employees have a right to use a Company's name and logo on picket signs, leaflets, and other protest material.
  - A broad ban on such use without clarification will generally be found unlawfully overbroad.

## Rules on Use of Company Logos, Copyrights, and Trademarks

- The following rules were found to be unlawful because they contain broad restrictions that employees reasonably could construe as limiting fair use of intellectual property:
  - *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 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.*

## Rules on Use of Company Logos, Copyrights, and Trademarks

- The following rules were found to be lawful:
  - *Respect all copyright and other intellectual property laws. For the Company's protection, it is critical that you show respect for laws governing copyright, fair use of copyrighted material owned by others, trademarks and other intellectual property, including the Company's copyrights, trademarks, and brands.*
  - *To minimize risk of a violation of law, you should provide references to the sources of information you use in your online communications. Do not infringe on the Company's logos, brand names, taglines, slogans, or other trademarks.*

## Rules Restricting Photo/Video Recordings

- **The NLRB says:**
  - Employees have a Section 7 right to photograph and make recordings in furtherance of protected concerted activity.
  - Rules placing a total ban on such photography or recordings, or banning use or possession of cameras or such devices, are unlawfully overbroad where they could reasonably be construed to prohibit such activity on non-work time.

## Rules Restricting Photo/Video Recordings

- The following rules were found 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 employee or Company operation.*
- The following blanket restrictions also were found to be unlawful:
  - *A total ban on use or possession of personal electronic equipment on Company property.*
  - *A prohibition on personal computers or data storage devices on Company property.*

## Rules Restricting Photo/Video Recordings

- While employers may limit such activity to only non-work time, they must carefully define what that includes. For example, the following rule was found unlawful, because “on duty” could be construed to include meal and break time:
  - *Employees are prohibited from wearing cell phones, making personal calls, or viewing or sending texts **while on duty**.*

## Rules Restricting Photo/Video Recordings

- Rules will be lawful where their scope is appropriately limited. For example, if the Company has an obvious, strong privacy interest to protect, a no-photography rule might be lawful.
- Rules might also be lawful when considered in context with the whole provision. The following rule was found lawful since it was located in the media policy provision and following instructions on how to deal with reporters on premises:
  - *No cameras are to be allowed in the store or parking lot without prior approval from the corporate office.*

## Rules Restricting Employees from Leaving Work

- **The NLRB says:**
  - Rules regulating when employees can leave work are unlawful if employees reasonably would read them to forbid protected strike actions and walkouts.
  - If a rule makes no mention of “strikes,” “walkouts,” “disruptions,” or the like, employees will reasonably understand the rule to pertain to employees leaving their posts for reasons ***unrelated to*** protected concerted activity. Such rules likely will be found to be lawful.

## Rules Restricting Employees from Leaving Work

- The following rules were found 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 schedule shift is prohibited.*
  - *Walking off the job is prohibited.*

## Rules Restricting Employees from Leaving Work

- The following rule was found to be at least partially lawful, considering it fails to use terms like “work stoppage” or “walking off the job”:
  - *Entering or leaving Company property without permission may result in discharge.*
- However, the above requirement to obtain permission before *entering the property* was found to be unlawful, because employers may not deny off-duty employees access to nonworking areas except where sufficiently justified by business reasons.

## Conflict-of-Interest Rules

- **The NLRB says:**
  - An employee’s right to engage in concerted activity is strongly protected, even if that activity is in conflict with the employer’s interests.
  - If an employer’s conflict-of-interest rule would reasonably be read to prohibit such activities, the rule will be found unlawful.
  - Where a rule clarifies that it is limited to legitimate business interests, employees will reasonably understand the rule to prohibit only unprotected activity.

## Conflict-of-Interest Rules

- The following rule was found to be unlawful:
  - *Employees may not engage in any action that is not in the best interest of the Company.*
- The rule is phrased broadly and does not include any clarifying examples or context to exclude Section 7 activity.

## Conflict-of-Interest Rules

- The following rule was found to be lawful:
  - *Do not give, offer or promise anything of value to any representative of an outside business that sells or provides a service to, purchases from, or competes with the Company. Examples of violations include holding an ownership or financial interest in an outside business and accepting gifts, money or services from an outside business.*

## E-Mail Policies

- **The NLRB says:**
  - Employees **who have been given access to their employer's e-mail system for work purposes** also must be able to use the e-mail system to engage in statutorily protected discussions about terms and conditions of employment during nonworking time (e.g., **union organizing**), unless the employer can show that special circumstances justify specific restrictions.

## E-Mail Policies

- The following communications policy was found to be unlawful:
  - *Computers, laptops, internet access, voicemail, electronic mail (email), Blackberry cellular telephones and/or other Company equipment is provided . . . to facilitate Company business.*
  - *Employees are strictly prohibited from using the computer, internet, voicemail and **email** systems, and other Company equipment in connection with ...*
    - *Activities on behalf of organizations or persons with no professional or business affiliation with the Company; and*
    - *Sending uninvited email of a personal nature.*

## E-Mail Policies

- Accordingly, employers need to evaluate their current e-mail policies to ensure that they are consistent with NLRB precedent.
- Employers will have to revise handbook rules and other policies that prohibit employees, **who have already been granted e-mail access**, from using electronic communications systems for non-business purposes.

## E-Mail Policies

- Employers can still conduct regular e-mail monitoring; however, they should avoid any targeted monitoring of union activities.
- While an employer may be able to justify a complete ban on non-business use of company e-mail under special circumstances, the Board indicated that it anticipates such special circumstances to occur in rare cases.

## Concluding Remarks

- Other big ticket items include social media policies and dress code policies.
- It is imperative to review your rules and policies to evaluate whether any updates are needed.
- When practical, be specific with definitions and give examples of conduct being proscribed.
- Consider the use of a “savings clause.”
- Keep abreast of NLRB developments.

## Questions?

