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"Why Should I Worry, Our Company is Non-Union?"

Learn How to Protect Your Business and Keep it Union-Free

July, 2015

Presented By:

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NATIONAL LABOR RELATIONS BOARD

Frequently Asked Questions - NLRB

What are my rights under the National Labor Relations Act?
The NLRA is a federal law that grants employees the right to form or join unions; engage in protected, concerted activities to address or improve working conditions; or refrain from engaging in these activities. For more information, see our Employee Rights page.

What is the National Labor Relations Board's role?
The NLRB is an independent federal agency created to enforce the National Labor Relations Act. Headquartered in Washington DC, it has regional offices across the country where employees, employers and unions can file charges alleging illegal behavior, or file petitions seeking an election regarding union representation. For more information, see our What We Do page.

I have a workplace issue, but I'm not sure the NLRB is the right place. What other government agencies might be able to help me?
If your question is about unpaid wages, safety on the job, employment discrimination, workers' compensation, or a number of other work-related issues, you will have to contact a different government agency. Website links and phone numbers are available on this Related Agencies page.

Is my employer subject to the National Labor Relations Act (NLRA)?
The NLRA applies to most private sector employers, including manufacturers, retailers, private universities, and health care facilities. The NLRA does *not* apply to federal, state, or local governments; employers who employ only agricultural workers; and employers subject to the Railway Labor Act (interstate railroads and airlines). See this Jurisdictional Standards page for more information.

Which employees are protected under the NLRA?
Most employees in the private sector are covered under the NLRA. The law does *not* cover government employees, agricultural laborers, independent contractors, and supervisors (with limited exceptions).

Do I have to be in a union to be protected by the NLRA?
Employees at union *and* non-union workplaces have the right to help each other by sharing information, signing petitions, and seeking to improve wages and working conditions in a variety of ways. For more information on this aspect of the law, including a description of recent cases, see our Protected Concerted Activity page.

What are an employer's and union's obligations under the NLRA?
Employers and unions may not restrain or coerce employees who are exercising their rights under the NLRA. In a union workplace, the employer and union are obligated by law to bargain in good faith with each other over terms and conditions of employment, either to agreement or impasse. More information is available on ourEmployer/Union Obligations page.

I believe that my rights have been violated. How do I file a charge with the NLRB?
Charges must be filed in a Regional Office, usually with the help of an Information Officer, within six months of the occurrence. The Regional Office will investigate the charge and, if found meritorious, will issue a complaint. For forms and more information, see our Investigate Charges page.

How do I start the process for an election to bring in a union (or decertify an existing union)?
To start the election process, a petition must be filed with the nearest NLRB Regional Office showing interest in the union (or interest in decertifying the union) from at least 30% of employees. NLRB agents will then investigate to make sure the Board has jurisdiction and there are no existing labor contracts that would bar an election. More information is available on our Conduct Elections page.

What are the rules governing collective bargaining for a contract?
If a union is selected as the representative of employees, the employer and union are required to meet at reasonable times to bargain in good faith about wages, hours, and other mandatory subjects. Even after a contract

expires, the parties must bargain in good faith for a successor contract, or the termination of the agreement, while terms of the expired contract continue. Further information on good faith bargaining is available on our Employer/Union Obligations page.

Do I have to pay union dues if there is a union at my workplace?
The question of union dues is subject to federal and state laws and court rulings. The NLRA allows unions and employers to enter into agreements that require all employees in a bargaining unit to pay union dues. However, more than 20 states have banned such agreements by passing so called “right to work” laws. More information is available on our Employer/Union Obligations page.

Is it legal to strike or picket an employer?
Strikes and picketing are protected by the NLRA under certain conditions and to varying degrees. For important information on the rules regarding strike activity, see this Right to Strike page. A union cannot strike or picket an employer to force it to stop doing business with another employer who is the primary target of a labor dispute. At worksites with more than one employer, such as a construction site, picketing is only permitted if the protest is clearly directed exclusively at the primary employer.

How do I make a Freedom of Information Act (FOIA) request?
To request public records under the Freedom of Information Act, see our FOIA page which includes a sample FOIA letter and an electronic request form.

What if I have a question that's not on this list?
If you have a question that isn't on this list, you may send a question by email(link sends e-mail), or contact your local NLRB office (click here for a map of offices) to speak with an information officer.

https://www.nlrb.gov/resources/faq/nlrb#faq-expand-all-link

CONSTANGY BROOKS, SMITH & PROPHETE LLP

MEMORANDUM

TO: Constangy, Brooks, Smith & Prophete Clients

FROM: The Firm's Traditional Labor Practice Group

DATE: April 13, 2015

RE: NLRB Ambush Election Rules/Highlights and Checklist

Now that we know the federal courts have not acted to delay implementation of the new National Labor Relations Board (NLRB) Election Rules, we thought it important to highlight for you the significant changes in those rules, how they might affect you and your company and some things you can do to prepare in advance to avoid missing deadlines established by the new rules.

First and foremost we point out that the new election rules apply ONLY to petitions for elections that are filed on or after April 14, 2015. Under the new rules and depending upon whether a pre-election hearing is held, elections could be held within 8 days of the filing of the petition or approximately 21 days following the filing of the petition if a hearing is held.

HIGHLIGHTS & CHECKLIST

1. Petitions may now be filed with the NLRB and served on the Employer by e mail. This will mean that Employers should direct facility managers and facility human resources to carefully monitor e mails to avoid missing NLRB deadlines.

2. Notice of Hearing. NLRB will serve Notice of a Hearing after receiving a Petition. Hearing will be scheduled 8 days from the date of service by the NLRB or next business day if the 8th day is on a weekend or a federal holiday.

3. Requirement to post Notice of Petition. Within 2 business days of service of the Notice of Hearing the Employer must post the Notice of Petition for Election

    - Posting must be in conspicuous places including where notices to employees are customarily posted.
    - Posting must remain posted until a petition is dismissed or withdrawn or until it is replaced by a Notice of Election.
    - Notice of Petition must be distributed electronically if the Employer customarily communicates with employees electronically.
    - Failure to post or distribute the Notice may be grounds for setting aside the election.

4. Statement of Position. If a hearing is actually held, the Employer must submit a Statement of Position by noon of the business day preceding the date of the hearing. (Some exceptions, but rare).

Statement of Position Form supplied by NLRB must be served on Company by Union at time it serves Employer with Petition

Statement of Position must contain:

- Completed Commerce Questionnaire
- Whether proposed unit is appropriate and if not basis for contention and classifications, locations, or other employee groupings that should be added or excluded
- Individuals whose eligibility to vote will be contested and the reasons why
- Any election bars asserted by the Employer
- Other issues Employer intends to raise at the pre-election hearing
- Employer's position on election details:
  - Type (Manual, Mail, Mixed Mail/Manual voting)
  - Date(s)
  - Time(s)
  - Location(s)
  - Payroll period information (length and last ending date)
  - Eligibility period
- Alphabetized electronic list(s) of employees:
  - Full names, work locations, shifts and job classifications of all individuals in proposed unit
  - If Employer maintains unit is inappropriate then a separate list of full names, work locations, shifts and job classifications of all individuals Employer claims should be added
  - If Employer maintains unit is inappropriate then a separate list of full names, work locations, shifts and job classifications of all individuals Employer claims should be excluded (Note: Failure to provide list(s) precludes Employer from contesting appropriateness of proposed unit at any time and from contesting eligibility or inclusion at the hearing).

5. Voter List - Employer must provide an alphabetized voter list in electronic format

    - When: within 2 business days after issuance of directed election by the Regional Director, or unless otherwise agreed, within 2 business days of approval of election agreement.
    - Who: Employer must electronically file the list with the NLRB and with the Petitioner (Union)
    - What:

        - ❖ Full Alphabetized names
        - ❖ Work locations
        - ❖ Shifts
        - ❖ Job Classifications
        - ❖ Contact information (including home addresses, available personal email addresses and available home and personal cell telephone numbers)
        - ❖ Voters to be challenged.

6. Notice of Election. For 3 full working days prior to election Notice must be posted and electronically distributed if Employer customarily communicates electronically with employees in unit.

While these are the highlights and do not include other legal substantive and procedural changes, it behooves Employers to begin rethinking now the makeup of your workforce to insure employees are properly classified as supervisors or non-supervisors, what the possible appropriate units are, other issues of voter eligibility and possible arguments for inclusion or exclusion. It is also a good idea to review and organize your employee roster lists in such a way as to comply with the new requirements for providing lists should a petition be filed. As always, we are ready to provide advice and assistance in accordance with your needs and desires.

CLIENT BULLETIN
March 25, 2015

CONSTANGY BROOKS, SMITH & PROPHETE LLP

Client Bulletin #551

NLRB General Counsel's report on employee handbook rules provides some guidance . . . but employers may not like it

David Phippen, Metro Washington D.C. Office

As we have previously reported, the National Labor Relations Board in recent years has put employee handbooks and policy manuals under a magnifying glass, searching for any provision that might, in its view, violate the National Labor Relations Act. Last week, apparently after hearing from labor law practitioners that guidance was needed, NLRB General Counsel Richard F. Griffin, Jr., **issued a report** attempting to explain several years of Board decisions and positions taken by his office. His stated goal was "to offer guidance on . . . this evolving area of labor law, with hope that it will help employers to review their handbooks and other rules, and conform them, if necessary, to ensure that they are lawful."

Unfortunately, because the decisions and positions have often been inconsistent, the guidance provides few bright lines for employers to follow to ensure that their rules are lawful. But, perhaps worst of all, the General Counsel's guidance follows the current Board majority view and, at least implicitly, largely rejects a balanced interpretation of the NRLA that gives sufficient weight to employers' interests in managing their workplaces, protecting employees, and protecting confidential information and intellectual property.

Prudent employers will have their handbooks and policies reviewed by an experienced labor lawyer who understands Section 7 and has developed a keen appreciation for the direction in which the Board and the General Counsel are moving.

All employers, especially non-union employers not used to dealing day-to-day with the NRLA, should take note and get their employee handbook rules and policies in line with the GC's expressed views. Employers found to be in violation can be ordered to rescind any unlawful rules and rescind and remedy any disciplinary action based on the rules. An unlawful rule can also be ground for the Board to set aside an NLRB election vote against union representation and direct a re-run election, thus giving the union another chance to win.

Categories of rules addressed in the report

The General Counsel's report addresses the following types of workplace rules: a summary of key provisions of the Wage Theft law:

- confidentiality
- conduct toward the employer and management
- conduct toward co-workers
- communications and interaction with outside parties and the media
- use of logos, copyrights or trademarks
- photography and recording in the workplace
- leaving work or premises, or walking off the job
- conflicts of interest

Overview of the General Counsel's position

The General Counsel expansively interprets what constitutes unlawful "interference" with the Section 7 right to engage in protected concerted activity. He generally views employer rules as unlawful when, *in his view*, an employee "would reasonably" construe a rule as prohibiting any form of protected concerted activity. It is not relevant that there may be no evidence that the policy language in fact restricted any employee's actions, and there is no room for an employer to demonstrate that the GC's view of how an employee "would reasonably" construe language is incorrect. A rule might be viewed as having a "chilling effect" even if the prohibited behavior is harmful to the employer, co-workers, third parties, or the public, and even if there are less-harmful ways for employees to dispute and communicate.

Employers found to be in violation can be ordered to rescind any unlawful rules, and to rescind and remedy any disciplinary action based on the rules. An unlawful rule also can be grounds for the Board to set aside a vote against union representation and direct a re-run election, thus giving a union another chance to win.

Given the GC's perspective, an employee handbook rule generally is unlawful if any employee might interpret it as restricting any form of Section 7 activity, subject to some relatively limited exceptions. Exceptions may exist when the Board or GC views the rule as fostering some employer business interest that the Board or the GC deems "legitimate" and sufficiently weighty to justify some restriction of employee activity that otherwise would be protected.

Employers should also be aware that the GC views Section 7 activity as encompassing the nearly unfettered right of employees to strike, walk out, dispute, criticize, complain, and communicate, by nearly any means or method, and with nearly any content, to co-workers, management, third parties,

the media, government officials, and the public, about nearly anything having to do with wages, hours, and other terms and conditions of employment. And even "wages, hours, and other terms and conditions of employment" is a term of art viewed expansively by the GC (for example, in the stated view of the GC it includes certain political activity).

A few "safe harbors" for employers?

On a more positive note, the GC's report suggests that he does not consider certain workplace rules to be unlawful (the Board may or may not agree):

- Rules prohibiting "unlawful" acts
- Rules prohibiting "malicious" defamation
- Rules prohibiting "disparagement" of the "employer's product" (although "disparage" and "employer's product" are interpreted narrowly)
- Rules prohibiting "knowingly" false statements
- Rules requiring "respect for" copyright, trademark, and similar laws
- Rules prohibiting disclosure of "trade secrets"
- Rules prohibiting employees from making photographs or recordings during "working time" or of work areas (exceptions apply when the photography/recording is of activity protected by the NLRA, such as documenting health or safety issues or a strike or work-related protest)
- Rules prohibiting "financial" conflicts of interest
- Rules requiring employees to work during "working time" (CAUTION: "working time" should not be confused with "on-duty time," "company time," "shift time," or "time on the clock"; "working time" is the time that an employee is engaged or should be engaged in performing his or her work tasks for the employer)
- Rules prohibiting distribution of literature in "working areas" (CAUTION: "working areas" does not include areas that are used both for working and breaks)
- Rules prohibiting distribution and solicitation during "working time" as defined above
- Rules prohibiting employees from coming into the interior of the workplace for "any reason" during non-working time

The above list is illustrative and should not be used as a substitute for legal advice on the subject. And just as the Board or the GC sometimes considers the surrounding context of an employee handbook rule's language to determine its lawfulness (for example, placement of the rule language in a sexual harassment policy), employers are cautioned that an otherwise lawful rule might be found to be unlawful if the context gives it a potentially different meaning.

What wasn't in the report

The General Counsel's report did not claim to be an exhaustive review, and notably absent is any discussion of union-free statements, employment-at-will statements, binding dispute resolution and arbitration polices, and the newest type of handbook rule in the "interference" mix, **an English-only rule**, which recently was a matter of first impression before an administrative law judge of the Board. Unfortunately, the GC also does not meaningfully address the effect (if any) of so-called "savings language" in an employee handbook, such as, "Nothing in this handbook should be construed to prohibit any form of Section 7 activity under the National Labor Relations Act and nothing herein is intended to prevent, deter, or interfere with employees in the exercise of any employee rights under the National Labor Relations Act." These subjects may get attention from the GC or the federal courts in the future.

Conclusion

The General Counsel's report will certainly help employers understand the GC's position, but employers may not like what they hear. Many employers are confused by what they see as a one-sided interpretation of the law and arguably strained, and often wholly out-of-context, "non-real-world" interpretation of employee handbook rules and other policies. Employers almost universally publish and enforce rules to advance legitimate business goals such as maintaining civil employee relations; providing useful information to employees to avoid lack of "fair notice"; fostering productive, profitable, and safe workplaces; and protecting Company investments in employee training and education, and intellectual property. Private sector employers are now on notice that the GC, when given the opportunity, will scrutinize employee handbook rules for a possible "chilling effect" on employees' exercise of the right to engage in protected concerted activity.

To be in the best possible position to avoid unfair labor practice charges regarding employee handbook rules and other policies, employers should take the following steps, with the assistance of experienced labor counsel:

- Review handbooks, policy manuals, social media policies, work rules, plant rules, and individual employee agreements – including confidentiality and non-disclosure agreements – to determine whether the language "could be" interpreted as interfering with Section 7 activity, and revise as needed.

- Revisions to policies and rules should be made *before* the employer has knowledge of any union organizing activity. (Changes to policies should be made only after consultation with labor counsel, and this is especially true if the employer is aware of organizing activity.)

- Consider using specific examples of prohibited behavior, and consider a disclaimer or multiple disclaimers (including the "savings language" described above).

- Although this approach has costs, consider dispensing with some general rules that attempt to encompass broad classes of bad behavior. If the behavior is egregious enough, you may be able to deal with it even if you don't have a written policy.

- In connection with rule-based discipline or discharge of an employee, carefully review the rule before taking the action and consider the potential for an "interference" or "discrimination" claim based on the rule itself or disparate enforcement of the rule even if it is otherwise lawful.

Feel free to contact any member of Constangy's **Labor Relations Practice Group**, or the Constangy attorney of your choice.

NATIONAL LABOR RELATIONS BOARD

The NLRB and Social Media

The National Labor Relations Act protects the rights of employees to act together to address conditions at work, with or without a union. This protection extends to certain work-related conversations conducted on social media, such as Facebook and Twitter.

In 2010, the National Labor Relations Board, an independent federal agency that enforces the Act, began receiving charges in its regional offices related to employer social media policies and to specific instances of discipline for Facebook postings. Following investigations, the agency found reasonable cause to believe that some policies and disciplinary actions violated federal labor law, and the NLRB Office of General Counsel issued complaints against employers alleging unlawful conduct. In other cases, investigations found that the communications were not protected and so disciplinary actions did not violate the Act.

General Counsel Memos

To ensure consistent enforcement actions, and in response to requests from employers for guidance in this developing area, Acting General Counsel Lafe Solomon released three memos in 2011 and 2012 detailing the results of investigations in dozens of social media cases.

The first report, issued on August 18, 2011, described 14 cases. In four cases involving employees' use of Facebook, the Office of General Counsel found that the employees were engaged in "protected concerted activity" because they were discussing terms and conditions of employment with fellow employees. In five other cases involving Facebook or Twitter posts, the activity was found to be unprotected. In one case, it was determined that a union engaged in unlawful coercive conduct when it videotaped interviews with employees at a nonunion jobsite about their immigration status and posted an edited version on YouTube and the Local Union's Facebook page. In five cases, some provisions of employers' social media policies were found to be overly-broad. A final case involved an employer's lawful policy restricting its employees' contact with the media.

The second report, issued Jan 25, 2012, also looked at 14 cases, half of which involved questions about employer policies. Five of those policies were found to be unlawfully broad, one was lawful, and one was found to be lawful after it was revised. The remaining cases involved discharges of employees after they posted comments to Facebook. Several discharges were found to be unlawful because they flowed from unlawful policies. But in one case, the discharge was upheld despite an unlawful policy because the employee's posting was not work-related. The report underscored two main points regarding the NLRB and social media:

- Employer policies should not be so sweeping that they prohibit the kinds of activity protected by federal labor law, such as the discussion of wages or working conditions among employees.

- An employee's comments on social media are generally not protected if they are mere gripes not made in relation to group activity among employees.

The third report, issued May 30, 2012, examined seven employer policies governing the use of social media by employees. In six cases, the General Counsel's office found some provisions of the employer's social media policy to be lawful and others to be unlawful. In the seventh case, the entire policy was found to be lawful. Provisions were found to be unlawful when they interfered with the rights of employees under the National Labor Relations Act, such as the right to discuss wages and working conditions with co-workers.

Some of the early social media cases were settled by agreement between the parties. Others proceeded to trial before the agency's Administrative Law Judges. Several parties then appealed those decisions to the Board in Washington D.C.

https://www.nlrb.gov/news-outreach/fact-sheets/nlrb-and-social-media

Board Decisions

In the fall of 2012, the Board began to issue decisions in cases involving discipline for social media postings. Board decisions are significant because they establish precedent in novel cases such as these.

In the first such decision, issued on September 28, 2012, the Board found that the firing of a BMW salesman for photos and comments posted to his Facebook page did not violate federal labor law. The question came down to whether the salesman was fired exclusively for posting photos of an embarrassing accident at an adjacent Land Rover dealership, which did not involve fellow employees, or for posting mocking comments and photos with co-workers about serving hot dogs at a luxury BMW car event. Both sets of photos were posted to Facebook on the same day; a week later, the salesman was fired. The Board agreed with the Administrative Law Judge that the salesman was fired solely for the photos he posted of a Land Rover incident, which was not concerted activity and so was not protected.

In the second decision, issued December 14, 2012, the Board found that it was unlawful for a non-profit organization to fire five employees who participated in Facebook postings about a coworker who intended to complain to management about their work performance. In its analysis, the Board majority applied settled Board law to social media and found that the Facebook conversation was concerted activity and was protected by the National Labor Relations Act.

https://www.nlrb.gov/news-outreach/fact-sheets/nlrb-and-social-media

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 15- 04 March 18, 2015

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Richard F. Griffin, Jr., General Counsel

SUBJECT: Report of the General Counsel Concerning Employer Rules

Attached is a report from the General Counsel concerning recent employer rule cases.

Attachment

cc: NLRBU
Release to the Public

Report of the General Counsel

During my term as General Counsel, I have endeavored to keep the labor-management bar fully aware of the activities of my Office. As part of this goal, I continue the practice of issuing periodic reports of cases raising significant legal or policy issues. This report presents recent case developments arising in the context of employee handbook rules. Although I believe that most employers do not draft their employee handbooks with the object of prohibiting or restricting conduct protected by the National Labor Relations Act, the law does not allow even well-intentioned rules that would inhibit employees from engaging in activities protected by the Act. Moreover, the Office of the General Counsel continues to receive meritorious charges alleging unlawful handbook rules. I am publishing this report to offer guidance on my views of this evolving area of labor law, with the hope that it will help employers to review their handbooks and other rules, and conform them, if necessary, to ensure that they are lawful.

Under the Board's decision in *Lutheran Heritage Village-Livonia,* 343 NLRB 646 (2004), the mere maintenance of a work rule may violate Section 8(a)(1) of the Act if the rule has a chilling effect on employees' Section 7 activity. The most obvious way a rule would violate Section 8(a)(1) is by explicitly restricting protected concerted activity; by banning union activity, for example. Even if a rule does not explicitly prohibit Section 7 activity, however, it will still be found unlawful if 1) employees would reasonably construe the rule's language to prohibit Section 7 activity; 2) the rule was promulgated in response to union or other Section 7 activity; or 3) the rule was actually applied to restrict the exercise of Section 7 rights.

In our experience, the vast majority of violations are found under the first prong of the *Lutheran Heritage* test. The Board has issued a number of decisions interpreting whether "employees would reasonably construe" employer rules to prohibit Section 7 activity, finding various rules to be unlawful under that standard. I have had conversations with both labor- and management-side practitioners, who have asked for guidance regarding handbook rules that are deemed acceptable under this prong of the Board's test. Thus, I am issuing this report.

This report is divided into two parts. First, the report will compare rules we found unlawful with rules we found lawful and explain our reasoning. This section will focus on the types of rules that are frequently at issue before us, such as confidentiality rules, professionalism rules, anti-harassment rules, trademark rules, photography/recording rules, and media contact rules. Second, the report will discuss handbook rules from a recently settled unfair labor practice charge against Wendy's International LLC. The settlement was negotiated following our initial

determination that several of Wendy's handbook rules were facially unlawful. The report sets forth Wendy's rules that we initially found unlawful with an explanation, along with Wendy's modified rules, adopted pursuant to a informal, bilateral Board settlement agreement, which the Office of the General Counsel does not believe violate the Act.

I hope that this report, with its specific examples of lawful and unlawful handbook policies and rules, will be of assistance to labor law practitioners and human resource professionals.

Richard F. Griffin, Jr.
General Counsel

Part 1: Examples of Lawful and Unlawful Handbook Rules

A. Employer Handbook Rules Regarding Confidentiality

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, such as union representatives. Thus, an employer's confidentiality policy that either specifically prohibits employee discussions of terms and conditions of employment—such as wages, hours, or workplace complaints—or that employees would reasonably understand to prohibit such discussions, violates the Act. Similarly, a confidentiality rule that broadly encompasses "employee" or "personnel" information, without further clarification, will reasonably be construed by employees to restrict Section 7-protected communications. *See Flamingo-Hilton Laughlin*, 330 NLRB 287, 288 n.3, 291–92 (1999).

In contrast, broad prohibitions on disclosing "confidential" information are lawful so long as they do not reference information regarding employees or anything that would reasonably be considered a term or condition of employment, because employers have a substantial and legitimate interest in maintaining the privacy of certain business information. *See Lafayette Park Hotel*, 326 NLRB 824, 826 (1998), *enforced*, 203 F.3d 52 (D.C. Cir. 1999); *Super K-Mart*, 330 NLRB 263, 263 (1999). Furthermore, an otherwise unlawful confidentiality rule will be found lawful if, when viewed in context, employees would not reasonably understand the rule to prohibit Section 7 protected activity.

Unlawful Confidentiality Rules

We found the following rules to be unlawful because they restrict disclosure of employee information and therefore are unlawfully overbroad:

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

In the above rule, in addition to the overbroad reference to "employee information," the blanket ban on discussing employee contact information, without regard for how employees obtain that information, is also facially unlawful.

- **"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 law or lawful Company policy)."

Although this rule's restriction on disclosing information about "other associates" is not a blanket ban, it is nonetheless unlawfully overbroad because a reasonable employee would not understand how the employer determines what constitutes a "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]."**

While an employer may clearly ban disclosure of its own confidential information, a broad reference to "another's" information, without further clarification, as in the above rule, would reasonably be interpreted to include other *employees'* wages and other terms and conditions of employment.

We determined that the following confidentiality rules were facially unlawful, even though they did not explicitly reference terms and conditions of employment or employee information, because the rules contained broad restrictions and did not clarify, in express language or contextually, that they did not restrict Section 7 communications:

- **Prohibiting employees from "[d]isclosing . . . details about the [Employer]."**

- **"Sharing of [overheard conversations at the work site] with your co-workers, the public, or anyone outside of your immediate work group is strictly prohibited."**

- **"Discuss work matters only with other [Employer] employees who have a specific business reason to know or have access to such information. . . . Do not discuss work matters in public places."**

- **"[I]f something is not public information, you must not share it."**

Because the rule directly above bans discussion of all non-public information, we concluded that employees would reasonably understand it to encompass such non-public information as employee wages, benefits, and other terms and conditions of employment.

- **Confidential Information is: "All information in which its [sic] 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."**

Employees not only have a Section 7 right to protest their wages and working conditions, but also have a right to share information in support of those complaints. This rule would reasonably lead employees to believe that they cannot disclose that kind of information because it might adversely affect the employer's interest, image, or reputation.

Lawful Confidentiality Rules

We concluded that the following rules that prohibit disclosure of confidential information were facially lawful because: 1) they do not reference information regarding employees or employee terms and conditions of employment, 2) although they use the general term "confidential," they do not define it in an overbroad manner, and 3) they do not otherwise contain language that would reasonably be construed to prohibit Section 7 communications:

- **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 [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."**

Finally, even when a confidentiality policy contains overly broad language, the rule will be found lawful if, when viewed in context, employees would not reasonably understand the rule to prohibit Section 7-protected activity. The following confidentiality rule, which we found lawful based on a contextual analysis, well illustrates this principle:

- **Prohibition on disclosure of all "information acquired in the course of one's work."**

This rule uses expansive language that, when read in isolation, would reasonably be read to define employee wages and benefits as confidential information. However, in that case, the rule was nested among rules relating to conflicts of interest and compliance with SEC regulations and state and federal laws. Thus, we determined that employees would reasonably understand the information described as encompassing customer credit cards, contracts, and trade secrets, and not Section 7-protected activity.

B. Employer Handbook Rules Regarding Employee Conduct toward the Company and Supervisors

Employees also have the Section 7 right to criticize or protest their employer's labor policies or treatment of employees. Thus, rules that can reasonably be read to prohibit protected concerted criticism of the employer will be found unlawfully overbroad. For instance, a rule that prohibits employees from engaging in "disrespectful," "negative," "inappropriate," or "rude" conduct towards the employer or management, absent sufficient clarification or context, will usually be found unlawful. *See Casino San Pablo*, 361 NLRB No. 148, slip op. at 3 (Dec. 16, 2014). Moreover, employee criticism of an employer will not lose the Act's protection simply because the criticism is false or defamatory, so a rule that bans false statements will be found unlawfully overbroad unless it specifies that only maliciously false statements are prohibited. *Id.* at 4. On the other hand, a rule that requires employees to be respectful and professional to coworkers, clients, or competitors, but not the employer or management, will generally be found lawful, because employers have a legitimate business interest in having employees act professionally and courteously in their dealings with coworkers, customers, employer business partners, and other third parties. In addition, rules prohibiting conduct that amounts to insubordination would also not be construed as limiting protected activities. *See Copper River of Boiling Springs, LLC*, 360 NLRB No. 60 (Feb. 28, 2014). Also, rules that employees would reasonably understand to prohibit insubordinate conduct have been found lawful.

Unlawful Rules Regulating Employee Conduct towards the Employer

We found the following rules unlawfully overbroad since employees reasonably would construe them to ban protected criticism or protests regarding their supervisors, management, or the employer in general.

- **"[B]e 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 "[d]efamatory, libelous, slanderous or discriminatory comments about [the Company], its customers and/or competitors, its employees or management.**

While the following two rules ban "insubordination," they also ban conduct that does not rise to the level of insubordination, which reasonably would be understood

as including protected concerted activity. Accordingly, we found these rules 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.**

In addition, employees' right to criticize an employer's labor policies and treatment of employees includes the right to do so in a public forum. *See Quicken Loans, Inc.*, 361 NLRB No. 94, slip op. at 1 n.1 (Nov. 3, 2014). Accordingly, we determined that the following rules were unlawfully overbroad because they reasonably would be read to require employees to refrain from criticizing the employer in public.

- **"Refrain from any action that would harm persons or property or cause damage to the Company's business or reputation."**

- **"[I]t is important that employees practice caution and discretion when posting content [on social media] that could affect [the Employer's] business operation or reputation."**

- **Do not make "[s]tatements "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."**

With regard to these examples, we recognize that the Act does not protect employee conduct aimed at disparaging an employer's product, as opposed to conduct critical of an employer's labor policies or working conditions. These rules, however, contained insufficient context or examples to indicate that they were aimed only at unprotected conduct.

Lawful Rules Regulating Employee Conduct towards the Employer

In contrast, when an employer's handbook simply requires employees to be respectful to customers, competitors, and the like, but does not mention the company or its management, employees reasonably would not believe that such a rule prohibits Section 7-protected criticism of the company. The following rules, which we have found lawful, are illustrative:

- **No "rudeness or unprofessional behavior toward a customer, or anyone in contact with" the company.**

- **"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."**

Similarly, rules requiring employees to cooperate with each other and the employer in the performance of their work also usually do not implicate Section 7 rights. *See Copper River of Boiling Springs, LLC*, 360 NLRB No. 60, slip op. at 1 (Feb. 28, 2014). Thus, we found the following rule was lawful because employees would reasonably understand that it is stating the employer's legitimate expectation that employees work together in an atmosphere of civility, and that it is not prohibiting Section 7 activity:

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

And we concluded that the following rule was lawful, because employees would reasonably interpret it to apply to employer investigations of workplace misconduct rather than investigations of unfair labor practices or preparations for arbitration, when read in context with other provisions:

- **"Each employee is expected to abide by Company policies and to cooperate fully in any investigation that the Company may undertake."**

As previously discussed, the Board has made clear that it will not read rules in isolation. Even when a rule includes phrases or words that, alone, reasonably would be interpreted to ban protected criticism of the employer, if the context makes plain that only serious misconduct is banned, the rule will be found lawful. *See Tradesmen International*, 338 NLRB 460, 460–62 (2002). For instance, we found the following rule lawful based on a contextual analysis:

- **"Being insubordinate, threatening, intimidating, disrespectful or assaulting a manager/supervisor, coworker, customer or vendor will result in" discipline.**

Although a ban on being "disrespectful" to management, by itself, would ordinarily be found to unlawfully chill Section 7 criticism of the employer, the term here is contained in a larger provision that is clearly focused on serious misconduct, like insubordination, threats, and assault. Viewed in that context, we concluded that employees would not reasonably believe this rule to ban protected criticism.

C. Employer Handbook Rules Regulating Conduct Towards Fellow Employees

In addition to employees' Section 7 rights to publicly discuss their terms and conditions of employment and to criticize their employer's labor policies, employees also have a right under the Act to argue and debate with each other about unions, management, and their terms and conditions of employment. These discussions can become contentious, but as the Supreme Court has noted, protected concerted speech will not lose its protection even if it includes "intemperate, abusive and inaccurate statements." *Linn v. United Plant Guards*, 383 U.S. 53 (1966). Thus, when an employer bans "negative" or "inappropriate" discussions among its employees, without further clarification, employees reasonably will read those rules to prohibit discussions and interactions that are protected under Section 7. *See Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. at 7 (Aug. 22, 2014); *Hills & Dales General Hospital*, 360 NLRB No. 70, slip op. at 1 (Apr. 1, 2014). For example, although employers have a legitimate and substantial interest in maintaining a harassment-free workplace, anti-harassment rules cannot be so broad that employees would reasonably read them as prohibiting vigorous debate or intemperate comments regarding Section 7-protected subjects.

Unlawful Employee-Employee Conduct Rules

We concluded that the following rules were unlawfully overbroad because employees would reasonably construe them to restrict protected discussions with their coworkers.

- **"[D]on't pick fights" online.**

We found the above rule unlawful because its broad and ambiguous language would reasonably be construed to encompass protected heated discussion among employees regarding unionization, the employer's labor policies, or the employer's treatment of employees.

- **Do not make "insulting, embarrassing, hurtful or abusive comments about other company employees online," and "avoid the use of offensive, derogatory, or prejudicial comments."**

Because debate about unionization and other protected concerted activity is often contentious and controversial, employees would reasonably read a rule that bans "offensive," "derogatory," "insulting," or "embarrassing" comments as limiting their ability to honestly discuss such subjects. These terms also would reasonably be construed to limit protected criticism of supervisors and managers, since they are also "company employees."

- **"[S]how proper consideration for others' privacy and for topics that may be considered objectionable or inflammatory, such as politics and religion."**

This rule was found unlawful because Section 7 protects communications about political matters, e.g., proposed right-to-work legislation. Its restriction on communications regarding controversial political matters, without clarifying context or examples, would be reasonably construed to cover these kinds of Section 7 communications. Indeed, discussion of unionization would also be chilled by such a rule because it can be an inflammatory topic similar to politics and religion.

- **Do not send "unwanted, offensive, or inappropriate" e-mails.**

The above rule is similarly vague and overbroad, in the absence of context or examples to clarify that it does not encompass Section 7 communications.

- **"Material that is fraudulent, harassing, embarrassing, sexually explicit, profane, obscene, intimidating, defamatory, or otherwise unlawful or inappropriate may not be sent by e-mail . . . ."**

We found the above rule unlawful because several of its terms are ambiguous as to their application to Section 7 activity—"embarrassing," "defamatory," and "otherwise . . . inappropriate." We further concluded that, viewed in context with such language, employees would reasonably construe even the term "intimidating" as covering Section 7 conduct.

Lawful Employee-Employee Conduct Rules

On the other hand, when an employer's professionalism rule simply requires employees to be respectful to customers or competitors, or directs employees not to engage in unprofessional conduct, and does not mention the company or its management, employees would not reasonably believe that such a rule prohibits Section 7-protected criticism of the company. Accordingly, we concluded that the following rules were lawful:

- **"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."**

- **"[T]hreatening, 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."**

With respect to the last example, we recognized that a blanket ban on "derogatory comments," by itself, would reasonably be read to restrict protected criticism of the employer. However, because this rule was in a section of the handbook that dealt exclusively with unlawful harassment and discrimination, employees reasonably would read it in context as prohibiting those kinds of unprotected comments toward coworkers, rather than protected criticism of the employer.

D. Employer Handbook Rules Regarding Employee Interaction with Third Parties

Another right employees have under Section 7 is the right to communicate with the news media, government agencies, and other third parties about wages, benefits, and other terms and conditions of employment. Handbook rules that reasonably would be read to restrict such communications are unlawfully overbroad. *See Trump Marina Associates*, 354 NLRB 1027, 1027 n.2 (2009), *incorporated by reference*, 355 NLRB 585 (2010), *enforced mem.*, 435 F. App'x 1 (D.C. Cir. 2011). The most frequent offenders in this category are company media policies. While employers may lawfully control who makes official statements for the company, they must be careful to ensure that their rules would not reasonably be read to ban employees from speaking to the media or other third parties on their own (or other employees') behalf.

Unlawful Rules Regulating Third Party Communications

We found the following rules were unlawfully overbroad because employees reasonably would read them to ban protected communications with the media.

- **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.**

We determined that the above rule was unlawful because employees would reasonably construe the phrase "company matters" to encompass employment concerns and labor relations, and there was no limiting language or other context in the rule to clarify that the rule applied only to those speaking as official company representatives.

- **"[A]ssociates are not authorized to answer questions from the news media . . . . When approached for information, you should refer the person to [the Employer's] Media Relations Department."**

- **"[A]ll inquiries from the media must be referred to the Director of Operations in the corporate office, no exceptions."**

These two rules contain blanket restrictions on employees' responses to media inquiries. We therefore concluded that employees would reasonably understand that they apply to *all* media contacts, not only inquiries seeking the employers' official positions.

In addition, we found the following rule to be unlawfully overbroad because employees reasonably would read it to limit protected communications with government agencies.

- **"If you are contacted by any government agency you should contact the Law Department immediately for assistance."**

Although we recognize an employer's right to present its own position regarding the subject of a government inquiry, this rule contains a broader restriction. Employees would reasonably believe that they may not speak to a government agency without management approval, or even provide information in response to a Board investigation.

Lawful Rules Regulating Employee Communications with Outside Parties

In contrast, we found the following media contact rules to be lawful because employees reasonably would interpret them to mean that employees should not speak on behalf of the company, not that employees cannot speak to outsiders on their own (or other employees') behalf.

- **"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 spokespersons."**

We determined that this rule was lawful because it specifically referred to employee contact with the media regarding non-Section 7 related matters, such as crisis situations; sought to ensure a consistent company response or message regarding those matters; and was not a blanket prohibition against all contact with the media. Accordingly, we concluded that employees would not reasonably interpret this rule as interfering with Section 7 communications.

- **"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: . . . 2. 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.'"

We concluded that the prefatory language in this rule would cause employees to reasonably construe the rule as an attempt to control the company's message, rather than to restrict Section 7 communications to the media. Further, the required responses to media inquiries would be non-sequiturs in the context of a discussion about terms and conditions of employment or protected criticism of the company. Accordingly, we found that employees reasonably would not read this rule to restrict conversations with the news media about protected concerted activities.

E. Employer Handbook Rules Restricting Use of Company Logos, Copyrights, and Trademarks

We have also reviewed handbook rules that restrict employee use of company logos, copyrights, or trademarks. Though copyright holders have a clear interest in protecting their intellectual property, handbook rules cannot prohibit employees' fair protected use of that property. *See Pepsi-Cola Bottling Co.*, 301 NLRB 1008, 1019–20 (1991), *enforced mem.*, 953 F.2d 638 (4th Cir. 1992). For instance, a company's name and logo will usually be protected by intellectual property laws, but employees have a right to use the name and logo on picket signs, leaflets, and other protest material. Employer proprietary interests are not implicated by employees' non-commercial use of a name, logo, or other trademark to identify the employer in the course of Section 7 activity. Thus, a broad ban on such use without any clarification will generally be found unlawfully overbroad.

Unlawful Rules Banning Employee Use of Logos, Copyrights, or Trademarks

We found that the following rules were unlawful because they contain broad restrictions that employees would reasonably read to ban fair use of the employer's intellectual property in the course of protected concerted activity.

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

- **Do not use "other people's property," such as trademarks, without permission in social media.**

- **"Use of [the Employer's] name, address or other information in your personal profile [is banned]. . . . In addition, it is prohibited to use [the Employer's] logos, trademarks or any other copyrighted material."**

- **"Company logos and trademarks may not be used without written consent . . . ."**

Lawful Rules Protecting Employer Logos, Copyrights, and Trademarks

We found that the following rules were lawful. Unlike the prior examples, which broadly ban employee use of trademarked or copyrighted material, these rules simply require employees to respect such laws, permitting fair use.

- **"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."**

- **"DO respect the laws regarding copyrights, trademarks, rights of publicity and other third-party rights. To minimize the risk of a copyright violation, you should provide references to the source(s) of information you use and accurately cite copyrighted works you identify in your online communications. Do not infringe on [Employer] logos, brand names, taglines, slogans, or other trademarks."**

F. Employer Handbook Rules Restricting Photography and Recording

Employees also have a Section 7 right to photograph and make recordings in furtherance of their protected concerted activity, including the right to use personal devices to take such pictures and recordings. *See Hawaii Tribune-Herald*, 356 NLRB No. 63, slip op. at 1 (Feb. 14, 2011), *enforced sub nom. Stephens Media, LLC v. NLRB*, 677 F.3d 1241 (D.C. Cir. 2012); *White Oak Manor*, 353 NLRB 795, 795 (2009), *incorporated by reference*, 355 NLRB 1280 (2010), *enforced mem.*, 452 F. App'x 374 (4th Cir. 2011). Thus, rules placing a total ban on such photography or recordings, or banning the use or possession of personal cameras or recording devices, are unlawfully overbroad where they would reasonably be read to prohibit the taking of pictures or recordings on non-work time.

Unlawful Rules Banning Photography, Recordings, or Personal Electronic Devices

We found the following rules unlawfully overbroad because employees reasonably would interpret them to prohibit the use of personal equipment to engage in Section 7 activity while on breaks or other non-work time.

- **"Taking unauthorized pictures or video on company property" is prohibited.**

We concluded that employees would reasonably read this rule to prohibit all unauthorized employee use of a camera or video recorder, including attempts to document health and safety violations and other protected concerted activity.

- **"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 . . . ."**

We found this rule unlawful because employees would reasonably construe it to preclude, among other things, documentation of unfair labor practices, which is an essential part of the recognized right under Section 7 to utilize the Board's processes.

- **A total ban on use or possession of personal electronic equipment on Employer property.**

- **A prohibition on personal computers or data storage devices on employer property.**

We determined that the two above rules, which contain blanket restrictions on use or possession of recording devices, violated the Act for similar reasons. Although an employer has a legitimate interest in maintaining the confidentiality of business records, these rules were not narrowly tailored to address that concern.

- **Prohibition from wearing cell phones, making personal calls or viewing or sending texts "while on duty."**

This rule, which limits the restriction on personal recording devices to time "on duty," is nonetheless unlawful, because employees reasonably would understand "on duty" to include breaks and meals during their shifts, as opposed to their actual work time.

Lawful Rules Regulating Pictures and Recording Equipment

Rules regulating employee recording or photography will be found lawful if their scope is appropriately limited. For instance, in cases where a no-photography rule is instituted in response to a breach of patient privacy, where the employer has a well-understood, strong privacy interest, the Board has found that employees would not reasonably understand a no-photography rule to limit pictures for protected concerted purposes. *See Flagstaff Medical Center*, 357 NLRB No. 65, slip op. at 5 (Aug. 26, 2011), *enforced in relevant part*, 715 F.3d 928 (D.C. Cir. 2013). We also found the following rule lawful based on a contextual analysis:

- **No cameras are to be allowed in the store or parking lot without prior approval from the corporate office.**

This rule was embedded in a lawful media policy and immediately followed instructions on how to deal with reporters in the store. We determined that, in such a context, employees would read the rule to ban *news* cameras, not their own cameras.

G. Employer Handbook Rules Restricting Employees from Leaving Work

One of the most fundamental rights employees have under Section 7 of the Act is the right to go on strike. Accordingly, rules that regulate when employees can leave work are unlawful if employees reasonably would read them to forbid protected strike actions and walkouts. *See Purple Communications, Inc.*, 361 NLRB No. 43, slip op. at 2 (Sept. 24, 2014). If, however, such 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, and the rule will be found lawful. *See 2 Sisters Food Group*, 357 NLRB No. 168, slip op. at 2 (Dec. 29, 2011).

Unlawful Handbook Rules Relating to Restrictions on Leaving Work

We found the following rules were unlawful because they contain broad prohibitions on walking off the job, which reasonably would be read to include protected strikes and walkouts.

- **"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.**

Lawful Handbook Rules Relating to Restrictions on Leaving Work

In contrast, the following handbook rule was considered lawful:

- **"Entering or leaving Company property without permission may result in discharge."**

We found this rule was lawful because, in the absence of terms like "work stoppage" or "walking off the job," a rule forbidding employees from leaving the employer's property during work time without permission will not reasonably be read to encompass strikes. However, the portion of the rule that requires employees to

obtain permission before *entering the property* was found unlawful because employers may not deny off-duty employees access to parking lots, gates, and other outside nonworking areas except where sufficiently justified by business reasons or pursuant to the kind of narrowly tailored rule approved in *Tri-County Medical Center*, 222 NLRB 1089, 1089 (1976).

- **"Walking off shift, failing to report for a scheduled shift and leaving early without supervisor permission are also grounds for immediate termination."**

Although this rule includes the term "walking off shift," which usually would be considered an overbroad term that employees reasonably would understand to include strikes, we found this rule to be lawful in the context of the employees' health care responsibilities. Where employees are directly responsible for patient care, a broad "no walkout without permission" rule is reasonably read as ensuring that patients are not left without adequate care, not as a complete ban on strikes. *See Wilshire at Lakewood*, 343 NLRB 141, 144 (2004), *vacated in part*, 345 NLRB 1050 (2005), *enforcement denied on other grounds*, *Jochims v. NLRB*, 480 F.3d 1161 (D.C. Cir. 2007). This rule was maintained by an employer that operated a care facility for people with dementia. Thus, we found that employees would reasonably read this rule as being designed to ensure continuity of care, not as a ban on protected job actions.

H. Employer Conflict-of-Interest Rules

Section 7 of the Act protects employees' 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. For instance, employees may protest in front of the company, organize a boycott, and solicit support for a union while on nonwork time. *See HTH Corp.*, 356 NLRB No. 182, slip op. at 2, 25 (June 14, 2011), *enforced*, 693 F.3d 1051 (9th Cir. 2012). If an employer's conflict-of-interest rule would reasonably be read to prohibit such activities, the rule will be found unlawful. However, where the rule includes examples or otherwise clarifies that it is limited to legitimate business interests, employees will reasonably understand the rule to prohibit only unprotected activity. *See Tradesmen International*, 338 NLRB 460, 461–62 (2002).

Unlawful Conflict-of-Interest Rules

We found the following rule unlawful because it was phrased broadly and did not include any clarifying examples or context that would indicate that it did not apply to Section 7 activities:

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

Lawful Conflict-of-Interest Rules

In contrast, we found the following rules lawful because they included context and examples that indicated that the rules were not meant to encompass protected concerted activity:

- **Do not "give, offer or promise, directly or indirectly, anything of value to any representative of an Outside Business," where "Outside Business" is defined as "any person, firm, corporation, or government agency that sells or provides a service to, purchases from, or competes with [the Employer]." Examples of violations include "holding an ownership or financial interest in an Outside Business" and "accepting gifts, money, or services from an Outside Business."**

We concluded that this rule is lawful because employees would reasonably understand that the rule is directed at protecting the employer from employee graft and preventing employees from engaging in a competing business, and that it does not apply to employee interactions with labor organizations or other Section 7 activity that the employer might oppose.

- **As an employee, "I will not engage in any activity that might create a conflict of interest for me or the company," where the conflict of interest policy devoted two pages to examples such as "avoid outside employment with a[n Employer] customer, supplier, or competitor, or having a significant financial interest with one of these entities."**

The above rule included multiple examples of conflicts of interest such that it would not be interpreted to restrict Section 7 activity.

- **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."**

We also found this rule to be lawful based on a contextual analysis. While its requirement that employees refrain from activities or associations that are inconsistent with the company's best interests could, in isolation, be interpreted to include employee participation in unions, the surrounding context and examples ensure that employees would not reasonably read it in that way. Indeed, the rule is in a section of the handbook that deals entirely with business ethics and includes requirements to act with "honesty, fairness and integrity"; comply with "all laws,

rules and regulations"; and provide "accurate, complete, fair, timely, and understandable" information in SEC filings.

Part 2: The Settlement with Wendy's International LLC

In 2014, we concluded that many of the employee handbook rules alleged in an unfair labor practice charge against Wendy's International, LLC were unlawfully overbroad under *Lutheran Heritage*'s first prong. Pursuant to an informal, bilateral Board settlement agreement, Wendy's modified its handbook rules. This section of the report presents the rules we found unlawfully overbroad, with brief discussions of our reasoning, followed by the replacement rules, which the Office of the General Counsel considers lawful, contained in the settlement agreement.

A. Wendy's Unlawful Handbook Rules

The pertinent provisions of Wendy's handbook and our conclusions are outlined below.

Handbook disclosure provision

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 without the express written permission of Wendy's International, Inc. The information contained in this handbook is considered proprietary and confidential information of Wendy's and its intended use is strictly limited to Wendy's and its employees. The disclosure of this handbook to unauthorized parties is prohibited. Making an unauthorized disclosure of this handbook is a serious breach of Wendy's standards of conduct and ethics and shall expose the disclosing party to disciplinary action and other liabilities as permitted under law.

We concluded that this provision was unlawful because it prohibited disclosure of the Wendy's handbook, which contains employment policies, to third parties such as union representatives or the Board. Because employees have a Section 7 right to discuss their wages and other terms and conditions of employment with others, including co-workers, union representatives, and government agencies, such as the Board, a rule that precludes employees from sharing the employee handbook that contains many of their working conditions violates Section 8(a)(1).

Social Media Policy

Refrain from commenting on the company's business, financial performance, strategies, clients, policies, employees or competitors in any

social media, without the advance approval of your supervisor, Human Resources and Communications Departments. Anything you say or post may be construed as representing the Company's opinion or point of view (when it does not), or it may reflect negatively on the Company. If you wish to make a complaint or report a complaint or troubling behavior, please follow the complaint procedure in the applicable Company policy (e.g., Speak Out).

Although employers have a legitimate interest in ensuring that employee communications are not construed as misrepresenting the employer's official position, we concluded that this rule did not merely prevent employees from speaking on behalf of, or in the name of, Wendy's. Instead, it generally prohibited an employee from commenting about the Company's business, policies, or employees without authorization, particularly when it might reflect negatively on the Company. Accordingly, we found that this part of the rule was overly broad. We also concluded that the rule's instruction that employees should follow the Company's internal complaint mechanism to "make a complaint or report a complaint" chilled employees' Section 7 right to communicate employment-related complaints to persons and entities other than Wendy's.

Respect copyrights and similar laws. Do not use any copyrighted or otherwise protected information or property without the owner's written consent.

We concluded that this rule was unlawfully overbroad because it broadly prohibited *any* employee use of copyrighted or "otherwise protected" information. Employees would reasonably construe that language to prohibit Section 7 communications involving, for example, reference to the copyrighted handbook or Company website for purposes of commentary or criticism, or use of the Wendy's trademark/name and another business's trademark/name in a wage comparison. We determined that such use does not implicate the interests that courts have identified as being protected by trademark and copyright laws.

[You may not p]ost photographs taken at Company events or on Company premises without the advance consent of your supervisor, Human Resources and Communications Departments.
[You may not p]ost photographs of Company employees without their advance consent. Do not attribute or disseminate comments or statements purportedly made by employees or others without their explicit permission.

We concluded that these rules, which included no examples of unprotected conduct or other language to clarify and restrict their scope, would chill employees

from engaging in Section 7 activities, such as posting a photo of employees carrying a picket sign in front of a restaurant, documenting a health or safety concern, or discussing or making complaints about statements made by Wendy's or fellow employees.

[You may not u]se the Company's (or any of its affiliated entities) logos, marks or other protected information or property without the Legal Department's express written authorization.

As discussed above, Wendy's had no legitimate basis to prohibit the use of its logo or trademarks in this manner, which would reasonably be construed to restrict a variety of Section 7-protected uses of the Wendy's logo and trademarks. Therefore, we found this rule unlawfully overbroad.

[You may not e]mail, post, comment or blog anonymously. You may think it is anonymous, but it is most likely traceable to you and the Company.

Requiring employees to publicly self-identify in order to participate in protected activity imposes an unwarranted burden on Section 7 rights. Thus, we found this rule banning anonymous comments unlawfully overbroad.

[You may not m]ake false or misleading representations about your credentials or your work.

We found this rule unlawful, because its language clearly encompassed communications relating to working conditions, which do not lose their protection if they are false or misleading as opposed to "maliciously false" (i.e., made with knowledge of falsity or reckless disregard for the truth). A broad rule banning merely false or misleading representations about work can have a chilling effect by causing employees to become hesitant to voice their views and complaints concerning working conditions for fear that later they may be disciplined because someone may determine that those were false or misleading statements.

[You may not c]reate a blog or online group related to your job without the advance approval of the Legal and Communications.

We determined that this no-blogging rule was unlawfully overbroad because employees have a Section 7 right to discuss their terms and conditions of employment with their co-workers and/or the public, including on blogs or online groups, and it is well-settled that such pre-authorization requirements chill Section 7 activity.

Do Not Disparage:
Be thoughtful and respectful in all your communications and dealings with others, including email and social media. Do not harass, threaten, libel, malign, defame, or disparage fellow professionals, employees, clients, competitors or anyone else. Do not make personal insults, use obscenities or engage in any conduct that would be unacceptable in a professional environment.

We found this rule unlawful because its second and third sentences contained broad, sweeping prohibitions against "malign[ing], defam[ing], or disparag[ing]" that, in context, would reasonably be read to go beyond unprotected defamation and encompass concerted communications protesting or criticizing Wendy's treatment of employees, among other Section 7 activities. And, there was nothing in the rule or elsewhere in the handbook that would reasonably assure employees that Section 7 communications were excluded from the rule's broad reach.

Do Not Retaliate:
If you discover negative statements, emails or posts about you or the Company, do not respond. First seek help from the Legal and Communications Departments, who will guide any response.

We concluded that employees would reasonably read this rule as requiring them to seek permission before engaging in Section 7 activity because "negative statements about . . . the Company" would reasonably be construed as encompassing Section 7 activity. For example, employees would reasonably read the rule to require that they obtain permission from Wendy's before responding to a co-worker's complaint about working conditions or a protest of unfair labor practices. We therefore found this rule overly broad.

Conflict-of-Interest Provision

Because you are now working in one of Wendy's restaurants, it is important to realize that you have an up close and personal look at our business every day. With this in mind, you should recognize your responsibility to avoid any conflict between your personal interests and those of the Company. A conflict of interest occurs when our personal interests interfere—or appear to interfere—with our ability to make sound business decisions on behalf of Wendy's.

We determined that the Conflict-of-Interest provision was unlawfully overbroad because its requirement that employees avoid "any conflict between your personal interests and those of the Company" would reasonably be read to encompass Section 7 activity, such as union organizing activity, demanding higher

wages, or engaging in boycotts or public demonstrations related to a labor dispute. Unlike rules that provide specific examples of what constitutes a conflict of interest, nothing in this rule confined its scope to legitimate business concerns or clarified that it was not intended to apply to Section 7 activity.

Moreover, we concluded that the Conflict-of-Interest provision was even more likely to chill Section 7 activity when read together with the handbook's third-party representation provision, located about six pages later, which communicated that unions are not beneficial or in the interest of Wendy's: **[b]ecause Wendy's desires to maintain open and direct communications with all of our employees, we do not believe that third party/union involvement in our relationship would benefit our employees or Wendy's.**

Company Confidential Information Provision

During the course of your employment, you may become aware of confidential information about Wendy's business. You must not disclose any confidential information relating to Wendy's business to anyone outside of the Company. Your employee PIN and other personal information should be kept confidential. Please don't share this information with any other employee.

We concluded that the confidentiality provision was facially unlawful because it referenced employees' "personal information," which the Board has found would reasonably be read to encompass discussion of wages, hours, and terms and conditions of employment.

Employee Conduct

The Employee Conduct section of the handbook contained approximately two pages listing examples of "misconduct" and "gross misconduct," which could lead to disciplinary action, up to and including discharge, in the sole discretion of Wendy's. The list included the following:

Soliciting, collecting funds, distributing literature on Company premises without proper approvals or outside the guidelines established in the "No Solicitation/No Distribution" Policy.

The blanket prohibition against soliciting, collecting funds, or distributing literature without proper approvals was unlawfully overbroad because employees have a Section 7 right to solicit on non-work time and distribute literature in non-work areas.

Walking off the job without authorization.

We found that this rule was unlawfully overbroad because employees would reasonably construe it to prohibit Section 7 activity such as a concerted walkout or other strike activity. As discussed in Part 1 of this report, the Board has drawn a fairly bright line regarding how employees would reasonably construe rules about employees leaving work. Rules that contain phrases such as "walking off the job," as here, reasonably would be read to forbid protected strike actions and walkouts.

Threatening, intimidating, foul or inappropriate language.

We found this prohibition to be unlawful because rules that forbid the vague phrase "inappropriate language," without examples or context, would reasonably be construed to prohibit protected communications about or criticism of management, labor policies, or working conditions.

False accusations against the Company and/or against another employee or customer.

We found this rule unlawful because an accusation against an employer does not lose the protection of Section 7 merely because it is false, as opposed to being recklessly or knowingly false. As previously discussed, a rule banning merely false statements can have a chilling effect on protected concerted communications, for instance, because employees reasonably would fear that contradictory information provided by the employer would result in discipline.

No Distribution/No Solicitation Provision

[I]t is our policy to prohibit the distribution of literature in work areas and to prohibit solicitation during employees' working time. "Working time" is the time an employee is engaged, or should be engaged, in performing his/her work tasks for Wendy's. These guidelines also apply to solicitation and/or distribution by electronic means.

We concluded that this rule was unlawful because it restricted distribution by electronic means in work areas. While an employer may restrict distribution of literature in paper form in work areas, it has no legitimate business justification to restrict employees from distributing literature electronically, such as sending an email with a "flyer" attached, while the employees are in work areas during non-working time. Unlike distribution of paper literature, which can create a production hazard even when it occurs on nonworking time, electronic distribution does not

produce litter and only impinges on the employer's management interests if it occurs on working time.

Restaurant Telephone; Cell Phone; Camera Phone/Recording Devices Provision

Due to the potential for issues such as invasion of privacy, sexual harassment, and loss of productivity, no Crew Member may operate a camera phone on Company property or while performing work for the Company. The use of tape recorders, Dictaphones, or other types of voice recording devices anywhere on Company property, including to record conversations or activities of other employees or management, or while performing work for the Company, is also strictly prohibited, unless the device was provided to you by the Company and is used solely for legitimate business purposes.

We concluded that this rule, which prohibited employee use of a camera or video recorder "on Company property" at any time, precluded Section 7 activities, such as employees documenting health and safety violations, collective action, or the potential violation of employee rights under the Act. Wendy's had no business justification for such a broad prohibition. Its concerns about privacy, sexual harassment, and loss of productivity did not justify a rule that prohibited all use of a camera phone or audio recording device anywhere on the company's property at any time.

B. Wendy's Lawful Handbook Rules Pursuant to Settlement Agreement

Handbook Disclosure Provision

This Crew Orientation Handbook . . . is the property of Wendy's International LLC. 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 business/commercial venture without the express written permission of Wendy's International, LLC. The information contained in this handbook is strictly limited to use by Wendy's and its employees. The disclosure of this handbook to competitors is prohibited. Making an unauthorized disclosure of this handbook is a serious breach of Wendy's standards of conduct and ethics and shall expose the disclosing party to disciplinary action and other liabilities as permitted under law.

Social Media Provision

- Do not comment on trade secrets and proprietary Company information (business, financial and marketing strategies) without the advance approval of your supervisor, Human Resources and Communications Departments.

- Do not make negative comments about our customers in any social media.

- Use of social media on Company equipment during working time is permitted, if your use is for legitimate, preapproved Company business. Please discuss the nature of your anticipated business use and the content of your message with your supervisor and Human Resources. Obtain their approval prior to such use.

- Respect copyright, trademark and similar laws and use such protected information in compliance with applicable legal standards.

Restrictions:

YOU MAY NOT do any of the following:

- Due to the potential for issues such as invasion of privacy (employee and customer), sexual or other harassment (as defined by our harassment /discrimination policy), protection of proprietary recipes and preparation techniques, Crew Members may not take, distribute, or post pictures, videos, or audio recordings while on working time. Crew Members also may not take pictures or make recordings of work areas. An exception to the rule concerning pictures and recordings of work areas would be to engage in activity protected by the National Labor Relations Act including, for example, taking pictures of health, safety and/or working condition concerns or of strike, protest and work-related issues and/or other protected concerted activities.

- Use the Company's (or any of its affiliated entities) logos, marks or other protected information or property for any business/commercial venture without the Legal Department's express written authorization.

- Make knowingly false representations about your credentials or your work.

- Create a blog or online group related to Wendy's (not including blogs or discussions involving wages, benefits, or other terms and conditions of employment, or protected concerted activity) without the advance approval of the Legal and Communications Departments. If a blog or online group is approved, it must contain a disclaimer approved by the Legal Department.

<u>Do Not Violate the Law and Related Company Policies</u>:

Be thoughtful in all your communications and dealings with others, including email and social media. Never harass (as defined by our anti-harassment policy), threaten, libel or defame fellow professionals, employees, clients, competitors or anyone else. In general, it is always wise to remember that what you say in social media can often be seen by anyone. Accordingly, harassing comments, obscenities or similar conduct that would violate Company policies is discouraged in general and is never allowed while using Wendy's equipment or during your working time.

Discipline:
All employees are expected to know and follow this policy. Nothing in this policy is, however, intended to prevent employees from engaging in concerted activity protected by law. If you have any questions regarding this policy, please ask your supervisor and Human Resources before acting. Any violations of this policy are grounds for disciplinary action, up to and including immediate termination of employment.

Conflict of Interest Provision

Because you are now working in one of Wendy's restaurants, it is important to realize that you have an up close and personal look at our business every day. With this in mind, you should recognize your responsibility to avoid any conflict between your personal interests and those of the Company. A conflict of interest occurs when our personal interests interfere – or appear to interfere – with your ability to make sound business decisions on behalf of Wendy's. There are some common relationships or circumstances that can create, or give the appearance of, a conflict of interest. The situations generally involve gifts and business or financial dealings or investments. Gifts, favors, tickets, entertainment and other such inducements may be attempts to "purchase" favorable treatment. Accepting such inducements could raise doubts about an employee's ability to make independent business judgments and the Company's commitment to treating people fairly. In addition, a conflict of interest exists when employees have a financial or ownership interest in a business or financial venture that may be at variance with the interests of Wendy's. Likewise, when an employee engages in business transactions that benefit family members, it may give an appearance of impropriety.

Company Confidential Information Provision

During the course of your employment, you may become aware of trade secrets and similarly protected proprietary and confidential information

about Wendy's business (e.g. recipes, preparation techniques, marketing plans and strategies, financial records). You must not disclose any such information to anyone outside of the Company. Your employee PIN and other similar personal identification information should be kept confidential. Please don't share this information with any other employee.

Employee Conduct Provision

- Soliciting, collecting funds, distributing literature on Company premises outside the guidelines established in the "No Solicitation/No Distribution" Policy.

- Leaving Company premises during working shift without permission of management.

- Threatening, harassing (as defined by our harassment/discrimination policy), intimidating, profane, obscene or similar inappropriate language in violation of Company policy.

- Making knowingly false accusations against the Company and/or against another employee, customer or vendor.

No Distribution/No Solicitation Provision

Providing the most ideal work environment possible is very important to Wendy's. We hope you feel very comfortable and at ease when you're here at work. Therefore, to protect you and our customers from unnecessary interruptions and annoyances, it is our policy to prohibit the distribution of literature in work areas and to prohibit solicitation and distribution of literature during employees' working time. "Working Time" is the time an employee is engaged or should be engaged in performing his/her work tasks for Wendy's. These guidelines also apply to solicitation by electronic means. Solicitation or distribution of any kind by non-employees on Company premises is prohibited at all times. Nothing in this section prohibits employees from discussing terms and conditions of employment.

Restaurant Telephone/ Cell Phone/Camera Phone/Recording Devices Provision

Due to the potential for issues such as invasion of privacy (employee and customer), sexual or other harassment (as defined by our harassment /discrimination policy), protection of proprietary recipes and preparation techniques, Crew Members may not take, distribute, or post pictures, videos, or audio recordings while on working time. Crew Members also may not take pictures or make recordings of work areas. An exception to the rule concerning pictures and recordings of work areas would be to engage in

activity protected by the National Labor Relations Act including, for example, taking pictures of health, safety and/or working condition concerns or of strike, protest and work-related issues and/or other protected concerted activities.