



2015 Employer Policy and Procedure Review – Confidentiality, Civility, and Other Rules – Part One

Insights

1.19.15

The NLRB has widely attacked employer policies and rules and ordered employees reinstated on the grounds that the rules somehow chilled or prohibited Employee section 7 Rights. So what are Section 7 Rights?

Section 7 of the National Labor Relations Act states as follows:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

Employee Section 7 speech has been broadly defined as almost any sort of remark or action involving employees' wages, terms and conditions of work. For many years, the NLRB has prohibited employer rules forbidding employees to talk about their wages, benefits and terms and conditions of employment. Now the Board attacks confidentiality provisions which do not even reference wages and benefits. Based on 2014 decisions, the NLRB now also seems almost convinced that such Section 7 statements must include profanity, and disparagement of the company.

As an example, in the January 2014 NLRB decision, Hills and Dale General Hospital, the Board struck down hospital rules prohibiting employees from making "negative comments about coworkers and from engaging in or listening

to "negativity or gossip," despite the employer's argument that there was no evidence suggesting linkage between these restrictions and employees protected concerted activity. No union activity was ongoing.

The Board also found unlawful the hospital's work rule requiring employees to "represent the employer in the community in a positive and professional manner. The Board concluded that employers would reasonably construe the rule as prohibiting them from engaging in any public

activity or making public statements that are not perceived as “positive” to the employer on work-related matters. The Board concluded also that employees would be discouraged from publicly contesting unfair labor practices or from making statements to third parties protesting their terms and conditions of employment. A previous decision, *Tradesmen’s International* (2002) approved the term “positive and ethical manner” but the Board ruled that by contrast, the phrase “positive and professional” was too broad. Not very clear or consistent.

The Board has found the rules below as overbroad:

- A rule prohibiting “*making false, vicious, profane or malicious statements toward or concerning the hotel or any employee;*”
- Verbal comments or physical gestures directed to others that exceed the bounds of fair criticism and behavior that is counter to promoting teamwork;
- Behavior that is disruptive to maintaining a safe and healing environment or that is counter to promoting teamwork;
- Prohibiting “*loud, abusive, or foul language;*”
- Discipline for “*the inability or unwillingness to work harmoniously with other employees;*”
- Prohibiting negativity, any type of negative energy or attitudes;
- Engage in any activity which could harm the image or reputation of the company; and
- A rule prohibiting “*negative conversations about employees or managers.*”
- A rule prohibiting bus drivers from showing discourtesy and “*inappropriate attitude.*”

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