# Will Your Handbook Rules Pass the NLRB's Test?

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**Categories:**

Publications

Certainly an employer can prohibit "defamatory, libelous, slanderous or discriminatory comments about the Company, its customers and/or competitors, employees or management." And, of course, an employer can instruct employees not to make "insulting, embarrassing, hurtful or abusive comments about other company employees online," and "avoid the use of offensive, derogatory, or prejudicial comments."

You would think so, wouldn't you? But the National Labor Relations Board (NLRB) thinks differently. Those are just two examples of many handbook rules the NLRB has found unlawful.

On March 18th, the General Counsel of the National Labor Relations Board (NLRB) issued a report offering new guidance to employers on drafting and implementing handbook rules and policies to ensure compliance with the National Labor Relations Act (NLRA).

## Protected Concerted Activity under the National Labor Relations Act

In recent years the NLRB has taken a very aggressive approach toward employee handbooks to ensure that no rules or policies chill employees' exercise of their rights to engage in protected concerted activities under Section 7. Section 7 of the NLRA guarantees employees "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." Section 8(a)(1) of the NLRA prohibits employers from interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the NLRA. This applies to both union and nonunion workforces.

While it is often clear when a policy explicitly prohibits protected concerted activity—such as when a rule prohibits employees from


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discussing their wages or working conditions—most rules are more ambiguous. The NLRB considers any rule or policy that employees would "reasonably construe" to prohibit Section 7 activity unlawful. This somewhat broad definition has resulted in difficulties for companies when drafting and implementing a wide variety of standard workplace policies.

## The March 18th Report

The March 18th report provides new guidance to employers on what types of policies may be construed as violating Section 7 of the NLRA by offering examples of handbook rules and providing explanations for why the NLRB deemed a particular rule either lawful or unlawful. The report focuses on the categories of rules most likely to cause issue, such as confidentiality rules, anti-harassment rules, rules governing logo and trademark use, and media contact rules.

Even though this report provides valuable insight into the NLRB's thinking, the line between legal and illegal policies is not black and white and in many instances one or two words may make a difference. For example, the NLRB found unlawful a rule prohibiting "walking off the job" but found lawful a rule prohibiting "leaving Company property without permission."

## What to Do

As the NLRB General Counsel notes, most handbook policies are drafted with good intentions, but, as this report highlights, they may still run afoul of the NLRA. Employers should be mindful of the General Counsel's most recent report when drafting employee handbooks to understand the nuances between overly broad rules, and those in compliance with the NLRA.

Additionally, existing handbooks need to be reviewed to determine whether they are in compliance with the NLRB's current views.

If faced with an unfair labor practice charge, the normal remedy for maintaining an unlawful rule in a handbook is removing or changing the rule and posting a notice for 60 days stating that the company will not maintain or enforce the rule. The real problem occurs when an employee is disciplined or discharged for violating an unlawful


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rule.  That can result in reinstatement and back pay.

Please contact Jessica Hill, Ray Neusch or any other attorney in the Frost Brown Todd Labor and Employment Practice Group if you would like a handbook rule or policy reviewed for consistency with the NLRB's latest guidance.

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