

*Richard H. Chapman, Esq.*

# Do You Know the New 2015 NLRA Handbook Violations?

Section 7 of the National Labor Relations Act (NLRA) permits employees to engage in concerted protected activity for the purpose of collective bargaining or other mutual aid or protection. Section 7 is not just for union matters. Recently, the General Counsel of the National Labor Relations Board (NLRB) released a 30-page memorandum citing widely used handbook language that violates Section 7. The memorandum also addresses lawful rules covering eight topics. The focus of this article, however, is the unlawful language hiding in your handbook today and will give you a sample of what the NLRB is looking for regarding compliance. To see the full memorandum, go to [www.clarkhill.com/alerts](http://www.clarkhill.com/alerts) and select “National Labor Relations Board’s General Counsel Issues Memorandum Regarding Handbook Rules.”

## Why Care?

The NLRA applies to union as well as non-union employees. If a non-union employee files an unfair labor practice charge, the NLRB will investigate. As part of the investigation, the NLRB will review the employer’s handbook and if a provision violates Section 7, the NLRB can file a charge against the employer. The NLRB can file a lawsuit to compel an employer to change the policy, require the employer post a notice stating the employer violated the act and informing employees of their rights under the act. If the employer discharged an employee because of a rule the NLRB finds violates the act, the NLRB will order the employer to reinstate the employee with back pay.

## Unlawful Confidentiality Rules

Section 7 gives employees the right to discuss wages, hours, workplace complaints and other employment matters with fellow employees, as well as with union representatives and other third parties. The NLRB found the following handbook confidentiality rule to be unlawfully overbroad as restricting disclosure of employee information:

“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.”

## Employee Conduct Toward the Company and Supervisors

Section 7 also gives employees the right to criticize or protest their employer’s labor policies or treatment of employees. According to the NLRB, policies that prohibit employees from criticizing their employer or engaging in “disrespectful,” “negative,” “inappropriate” or “rude” conduct toward the employer are unlawfully overbroad, absent sufficient clarification or context.

Even employee statements that are false or defamatory are protected unless the policy specifically notes that only maliciously false statements are prohibited. The NLRB found the following rules unlawfully overbroad since employees would construe them to ban protected criticism or protests regarding their employer or its employees:

- “Be respectful of others and the company.”
- “No defamatory, libelous, slanderous or discriminatory comments about the company, its customers and or competitors, its employees or managers.”

Additionally, while the following policy bans “insubordination,” the NLRB asserts it also bans undefined “disrespectful” conduct that reasonably may be understood as including protected concerted activity:

- “Disrespectful conduct or insubordination, including, but not limited to, refusing to follow orders from a supervisor or a designated representative.”

## Rules Regulating Conduct Toward Fellow Employees

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. Even protected concerted speech will not lose its protection if it includes “intemperate, abusive and inaccurate statements.” The memorandum declared the following policy’s prohibited conduct ambiguous:

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

## Rules Regarding Employee Interaction With Third Parties

Section 7 gives employees the right to communicate with the news media, government agencies, and other third

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## Spring Valley

SPRING VALLEY CITY BANK

**Julie Eilers**, a loan officer, has been promoted to assistant vice president of loans at the bank.

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## Taylorville

U.S. BANK

**Deb Jostes** was promoted to the position of vice president in the trust department.

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## Wayzata, MN

TCF FINANCIAL CORPORATION

**Tom Butterfield** has joined the company as executive vice president and chief information officer. **Craig R. Dahl**, currently vice chairman and executive vice president, has been promoted to president. **IB**

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# Human Resources

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parties about wages, benefits, and other terms and conditions of employment. The NLRB found the following rule unlawfully overbroad because employees could reasonably believe it 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.

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

While copyright holders have a clear interest in protecting their intellectual property, the handbook rules cannot prohibit employees’ fair protected use of that property such as on picket signs and other protest materials. The NLRB found the following rule unlawfully broad:

“Do not use any company logos, trademarks, graphics or advertising materials in social media.”

## Rules Restricting Photography and Recordings

Employees also have a Section 7 right to photograph and record other employees or employer operations during non-work times. The NLRB found the following rule unlawfully overbroad:

“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.”

## Rules Restricting Employees Leaving From Work

One of the most fundamental employee Section 7 rights 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. The NLRB found the following rule unlawful because it contains a broad prohibition:

“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.

## Conflict of Interest Rules

Section 7 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. The NLRB found the following broadly phrased policy unlawful as not including any clarifying examples:

Employees may not engage in “any action” that is “not in the best interest of the employer.”

## Call to Action

How individual employees might use the memorandum outside of the NLRB is not yet certain. Nonetheless, you should audit and update your employee handbook to account for the NLRB’s Section 7 position. Don’t wait for the NLRB’s interpretations to haunt you. **IB**

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# Are You Managing Hail Damage Risks?

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it remains one of the costliest results of summertime severe weather. When the storm clouds roll in, be sure that your bank isn’t caught unaware. **IB**

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