

# EMPLOYEE HANDBOOKS: CAN YOUR POLICIES WITHSTAND LEGAL SCRUTINY?

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## VALUE AND PURPOSE OF A HANDBOOK

- A handbook should be a concise articulation of the rules of employment, laying out the employer's expectations of employees
- A handbook should be a plainly written and relatively short document that
  - Expressly defines the nature of the workplace relationship
  - Contains all legally mandated policies (e.g., FMLA, EEO, harassment, etc.)
  - Identifies rules of employment and explains their practical application
  - Expressly states employer's commitment to comply with all laws
  - Expressly states that employees are expected to comply with all laws
  - Articulates the employer's hope to create a harmonious work environment

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## UNDERLYING PRINCIPLES TO KEEP IN MIND

- Do...
  - Draft handbook provisions and work rules to **specifically** address the legitimate concerns of the employer
  - Draft handbook provisions and work rules to **clearly** address the legitimate concerns of the employer
- Don't...
  - Use boilerplate language, or language that does not apply to your workplace
  - Draft handbook provisions and work rules so **overbroad** as to restrict Section 7 rights
  - Draft handbook provisions and work rules so **vague** as to allow an employee to reasonably interpret that Section 7 rights have been restricted

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## **MY WORKFORCE IS NOT UNIONIZED - WHY SHOULD I CARE WHAT THE NLRB HAS TO SAY?**

- National Labor Relations Act (NLRA) covers most private sector employers
  - National Labor Relations Board (NLRB) has jurisdiction over union and non-union workplaces
  - NLRB has jurisdiction over private sector employers whose activity in interstate commerce exceeds a minimal level
  - Federal or State governmental offices, the Federal Reserve Bank, employers subject to the Railway Labor Act, municipalities and religious organizations are excluded
- NLRA covers most private sector employees, including those not in a union
  - Government, agricultural, “true” independent contractors, and supervisors (with limited exceptions) are not covered

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## UNDERSTANDING EMPLOYEE RIGHTS UNDER THE NLRA

- Section 7 of the NLRA gives employees the right to organize, strike, collectively bargain, and engage in other protected concerted activity for the purpose of mutual aid and protection
  - Concerted activity is much broader than union organizing
  - Section 7 grants employees the right to communicate about wages, hours, and any other terms and conditions of employment with fellow employees, as well as with nonemployees, such as union representatives
  - Such communication may occur at the water cooler or on social media
- Section 8 prohibits employers from any conduct that interferes, restrains, or coerces employees in the exercise of their protected Section 7 rights and also prohibits employers from retaliating against employees for engaging in such conduct

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## TRADITIONAL SECTION 7 TEST – CONDUCT MUST BE BOTH PROTECTED AND CONCERTED

- Conduct must be protected by the NLRA
  - Right to Organize
  - Statements or activity regarding an employee's wages, working conditions or other terms of employment
- Conduct must involve concerted activity
  - Concerted activity occurs when “the employee is engaged with or on the authority of other employees, and not solely on behalf of the employee himself”
  - “Where individual employees seek to initiate or to induce or to prepare for group action”

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## COMMON WAYS TO VIOLATE AN EMPLOYEE'S SECTION 7 RIGHTS

- Interfering with or restricting an employee's right to organize a union or join a union
- Retaliating against employees for engaging in protected concerted activity
- Disciplining employees for engaging in protected concerted activity

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## WHAT DOES THIS HAVE TO DO WITH MY HANDBOOK AND WORK RULES?

- The NLRB has stated that 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
- Thus, even if a rule does not explicitly prohibit Section 7 activity 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
  3. The rule was actually applied to restrict the exercise of Section 7 rights

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## CONSEQUENCES OF AN UNLAWFUL WORK RULE

In the event that the NLRB finds that an employer issued an unlawful work rule, the employer may be ordered to

- Reinstatement and make whole (through backpay) any employee terminated under illegal work rule
- Rescind the unlawful work rule and issue a work rule in compliance with the NLRA
- Post notices at workplaces informing employees that the employer had issued an illegal work rule and of their rights under the NLRA

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## STATUTORY HANDBOOK PROVISIONS

### Family Medical Leave Act (FMLA): General notice

- If an FMLA-covered employer has any eligible employees, it shall also provide this general notice to each employee by including the notice in employee handbooks or other written guidance to employees concerning employee benefits or leave rights, if such written materials exist, or by distributing a copy of the general notice to each new employee upon hiring. In either case, distribution may be accomplished electronically.

### Fair Labor Standards Act (FLSA): “Safe Harbor” policy

- Employers can protect themselves from a collective overtime wage action for an improper deduction from a single exempt employee’s pay by: (1) establishing a clearly communicated policy prohibiting improper deductions; (2) establishing a complaint mechanism; (3) reimbursing employees for improper deductions in a reasonable time; and (4) making a good-faith commitment to future compliance
- Employers may distribute this policy in written form directly to employees, on the company intranet, or in employee handbooks

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## STATUTORY HANDBOOK PROVISIONS CONT.

### Occupational Safety and Health Administration (OSHA): Drug testing rule

- OSHA's 2016 final rule requires employers to "establish a reasonable procedure for employees to report work-related injuries and illnesses promptly and accurately," to inform each employee of that procedure, of their right to make reports, and that there will be no retaliation for making such a report
- Drug testing policies should limit post-incident testing to where employee drug use is likely to have contributed to the incident, and for which the drug test can accurately identify impairment caused by drug use
- Employers need not specifically suspect drug use before testing, but there should be a reasonable possibility that drug use was a contributing factor to the reported injury or illness in order for an employer to require drug testing
- Accordingly, post-accident drug testing handbook policies must concisely lay out a reasonable reporting procedure, be distributed to all employees to inform them of the procedure and their right to make reports, and clearly articulate making a report will not result in any form of employer retaliation

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## STATUTORY HANDBOOK PROVISIONS CONT.

Equal Employment Opportunity (EEO) provision: Failure to include

- The Equal Employment Opportunity Commission (EEOC) requires covered employers to give employees notice of their right to be free from workplace discrimination and retaliation
- EEO handbook policies should expressly prohibit workplace harassment and discrimination

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## COMMON TROUBLESOME HANDBOOK PROVISIONS

**At-will Employment Disclaimer:** Failure to include or improper definition

- General rule: Courts may hold an employer to express handbook provisions
- Many employers fail to include an at-will disclaimer that expressly states that employment is “at-will,” that is, the employer or employee may terminate the relationship at any time, with or without notice, and with or without cause
- Improperly defining the at-will relationship, or defining it in an overly broad manner, may destroy or limit an employer’s ability to make decisions in accordance with their expectations

**Progressive Discipline Procedures:** Including a policy

- Including a progressive discipline policy is common, but may expressly limit an employer’s ability to terminate an employee on an at-will basis
- For employers who want to have truly at-will relationships with their employees, they should: (1) omit a progressive discipline policy; or (2) carefully draft a progressive discipline policy to clearly state that such policy does not limit in any way the employer’s ability to terminate or discipline employees without adherence to any preconditions, including their own progressive discipline policy

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## TARGETED HANDBOOK POLICIES AND WORK RULES

- In March 2015, the NLRB's Office of the General Counsel released a report concerning employer handbook rules
- This report stressed that the NLRB "does not allow even well-intentioned rules that would inhibit employees from engaging in activities protected by the Act"
- The report laid out the "types of rules that are frequently at issue" before the NLRB, including
  - Social media rules
  - Confidentiality rules
  - Professionalism rules
  - Anti-harassment rules
  - Media communication rules
  - Logo, trademark, copyright rules
  - Photography and recording rules

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## CONCERN: WHAT ARE MY EMPLOYEES SAYING AND POSTING ON SOCIAL MEDIA?

- A well-crafted social media policy can prohibit unprotected speech that could potentially harm an employer
- NLRB will strike over broad social media policies that generally monitor, analyze, and prohibit employee social media use
- It is lawful to prohibit insubordination, require courteous and respectful conduct, and require cooperation
- It is unlawful to restrict the right to criticize or protest employer's labor policies or employee treatment
- There is currently legal uncertainty regarding the enforceability of social media policies
  - NLRB has indicated that certainly excessive, defamatory, and irresponsible employee messages can be actionable by an employer
  - However, NLRB has not clarified when an employer may act on social media information

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## CONCERN: WHAT ARE MY EMPLOYEES SAYING AND POSTING ON SOCIAL MEDIA? CONT.

- NLRB has held...
  - Social media policies to be lawful when they urge employees not to post any company or job related information that “could lead to morale issues in the workplace or detrimentally affect the company’s business”
  - Reinstatement was required for an employee who called his boss derogatory and vulgar names on Facebook, finding that such comments were directed towards the overall environment of the workplace and constituted protected concerted activity
- “Civility policies” that prohibit employees from engaging in “disruptive behavior” on social media or elsewhere will be deemed overbroad
- Rules prohibiting disparagement of employers will likely be deemed overbroad

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## POLL: SOCIAL MEDIA RULES

Which of the following social media rules is lawful?

- "Be respectful to the company, other employees, customers, partners, and competitors"
- "You may not email, post, comment, or blog anonymously. You may think it is anonymous, but it is most likely traceable to you and the Company."
- "Each employee is expected to work in a cooperative manner with management / supervision, coworkers, customers and vendors"
- "Refrain from any action that would harm persons or property or cause damage to the Company's business or reputation"

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## CONCERN: HOW DO WE PROTECT OUR CONFIDENTIAL INFORMATION AND TRADE SECRETS?

- Employers have a lawful and legitimate interest in keeping certain business information confidential and maintaining trade secrets
  - It is lawful to draft narrow confidentiality rules that specifically refer to the types of information the employer seeks to keep confidential
  - It is lawful to prohibit disclosure of confidential information that does not reference employees' terms and conditions of employment
- However, employers may not prohibit (or lead an employee to believe the employer is prohibiting) discussion of the terms and conditions of employment
  - It is unlawful to prohibit, without further clarification, employee discussion of wages, hours, workplace complaints, and/or "employee" or "personnel" information

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## POLL: CONFIDENTIALITY RULES

Which of the following confidentiality rules is lawful?

- “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”
- “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.”
- “Do not discuss customer or employee information outside of work, including phone numbers and addresses”
- “Do not disclose confidential financial data, or other non-public proprietary company information. Do not share confidential information regarding business partners, vendors, or customers.”

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## CONCERN: HOW DO WE ENSURE OUR EMPLOYEES BEHAVE PROFESSIONALLY?

- Employers have a lawful and legitimate interest in prohibiting employee insubordination and requiring courteous and respectful conduct
  - It is lawful to require employees to be respectful to customers, competitors, and the like, as long as the employer or management are not mentioned
  - It is lawful to require employees to cooperate with each other and the employer in the performance of their work
- Employers may not restrict employees' right to criticize or protest employers' labor policies or treatment of employees
  - It is unlawful to institute a blanket prohibition on employees criticizing or protesting their employer's labor policies or treatment of employee
  - It is unlawful to prohibit criticism of the employer in public forum and disrespectful conduct that does not rise to the level of insubordination

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## POLL: PROFESSIONALISM RULES

Which of the following professionalism rules is lawful?

- “Each employee is expected to work in a cooperative manner with management / supervision, coworkers, customers and vendors”
- “Be respectful to the company, other employees, customers, partners, and competitors”
- “Refrain from any action that would harm persons or property or cause damage to the Company's business or reputation”
- “Chronic resistance to proper work-related orders or discipline, even though not overt insubordination will result in discipline”

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## CONCERN: IS OUR ANTI-HARASSMENT POLICY ADEQUATE?

- Employers have a lawful and legitimate interest in maintaining a harassment-free workplace, and may do so by
  - Requiring employees to be respectful to customers and competitors
  - Directing employees not to engage in unprofessional conduct
- Employers may not restrict employees' right to argue and debate with each other about unions, management, and their terms and conditions of employment, specifically, the following are unlawful
  - Prohibitions on "negative" or "inappropriate" discussions among employees, without further clarification
  - Restricting protected discussions among coworkers

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## IMPORTANCE OF AN ANTI-HARASSMENT POLICY

- Employers may be liable for harassment or discrimination based on the conduct of supervisors and employees, but maintaining a well-crafted written anti-harassment policy is a required element for an employer to use the *Ellerth/Faragher* affirmative defense to avoid liability
- Key components of a sound anti-harassment policy
  - Identifies prohibited types of harassment (race/color, religion, national origin, sex, sexual orientation, gender identity, disability, age, and any other characteristic protected by federal or state law)
  - Clear complaint procedure (using “must”/“shall,” not “should”/“may;” identifies multiple management personnel to whom harassment may be reported)
  - Articulates a clear commitment to maintain harassment free workplace and to investigate all complaints
  - Includes a clear statement that those who file a good faith complaint or participate in an investigation will not be subject to retaliation
  - Does not promise absolute confidentiality, rather, promises confidentiality to the extent possible and consistent with employer’s need to investigate

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## POLL: ANTI-HARASSMENT RULES

Which set of anti-harassment rules are lawful?

- “Show proper consideration for others' privacy and for topics that may be considered objectionable or inflammatory, such as politics and religion”  
“Do not send unwanted, offensive, or inappropriate e-mails”
- “No threatening, intimidating, coercing, or otherwise interfering with the job performance of fellow employees or visitors”  
“No use of racial slurs, derogatory comments, or insults”

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## CONCERN: CAN WE PREVENT OUR EMPLOYEES FROM COMMUNICATION WITH THE MEDIA?

- Employers have a lawful and legitimate interest in controlling who makes official statements on their behalf
  - It is lawful to prohibit statements to the media on behalf of the employer
- Employers may not restrict employees' right to communicate with the news media, government agencies, and other third parties about wages, benefits, and other terms and conditions of employment
  - It is unlawful to restrict or prohibit protected media contact and employees speaking with the media on employees' own behalf

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## POLL: MEDIA CONTACT RULES

Which of the following media contact rules is lawful?

- "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"
- "Associates 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"
- "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."
- "All inquiries from the media must be referred to the Director of Operations in the corporate office, no exceptions"

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## CONCERN: CAN WE RESTRICT EMPLOYEE USE OF LOGOS, TRADEMARKS, AND COPYRIGHTS?

- Employers have a lawful and legitimate interest in protecting their intellectual property and may lawfully require employees to respect trademark and intellectual property laws
- Employers may not prohibit employees' fair protected use of employers' intellectual property
  - It is unlawful to prohibit employees' right to use employer's name and logo on picket signs, leaflets, and other protest material
  - It is unlawful to prohibit the non-commercial use of a name, logo, or other trademark to identify the employer in the course of Section 7 activity

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## POLL: LOGO, TRADEMARK, AND COPYRIGHT RULES

Which logo, trademark, and copyright rule is lawful?

- “Company logos and trademarks may not be used without written consent”
- “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 not use other people’s property, such as trademarks, without permission on social media”
- “Do not use any Company logos, trademarks, graphics, or advertising materials in social media”

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## CONCERN: CAN WE PREVENT EMPLOYEES PHOTOGRAPHY AND RECORDING?

- Employers have a lawful and legitimate interest in protecting a privacy interest, such as patient privacy
  - It is lawful to limit the prohibition on photography and recording to protect legitimate privacy interests
- Employers may not restrict employees' 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
  - It is unlawful to place a total ban on photography or recordings
  - It is unlawful to ban the use or possession of personal cameras or recording devices

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## POLL: PHOTOGRAPHY AND RECORDING RULES

The following photography and recording rule is lawful:

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

- True
- False

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## FINAL THOUGHTS

1. Ensure that employees are given or have access to employee handbooks
2. Ensure that managers are familiar with the content of employee handbooks
3. The most concise and well-drafted employee handbooks are irrelevant if employers do not abide by each provision and consistently enforce each enumerated policy
4. Ensure that managers are trained to handle complaints, particularly those of discrimination or harassment
5. Employers may unilaterally modify employee handbooks and policies without advanced notice, IF their employee handbook contains a provision expressly stating such; doing so makes the employer's right to change the handbook at any time with or without advance notice a term and condition of employment

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## QUESTIONS?



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# THANK YOU

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