

EMPLOYMENT POLICIES

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INTRODUCTION

- The NLRB's view of personnel policies
- The basis of the NLRB's attack on personnel policies
- Common policy mistakes
- How to draft compliant policies

SECTIONS 7 AND 8(A)(1) OF THE NLRB

- Section 7: “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 of 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)”
- Section 8(a)(1): It is an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7”

LAFAYETTE PARK HOTEL

- Where conduct rules are contested, the Board must work out an adjustment between the undisputed right of self-organization assured by the Act and the equally undisputed right of employers to maintain discipline in their establishments

- **A workplace rule violates the Act if it would reasonably tend to chill employees in the exercise of their Section 7 rights**

- The work rule is unlawful if:
 - The rule explicitly restricts activities protected by section 7

 - **Employees would reasonably construe the language to prohibit Section 7 activity**

 - The rule was promulgated in response to union activity

 - The rule has been applied to restrict the exercise of Section 7 rights

LAFAYETTE POLICIES

The following conduct is unacceptable:

- [6] Being uncooperative with supervisors, employees, guests and/or regulatory agencies or otherwise engaging in conduct that does not support the Lafayette Park Hotel's goals and objectives
- [17] Divulging Hotel-private information to employees or other individuals or entities that are not authorized to receive that information
- [18] Making false, vicious, profane or malicious statements toward or concerning the Lafayette Park Hotel or any of its employees
- [31] Unlawful or improper conduct off the hotel's premises or during non-working hours which affects the employee's relationship with the job, fellow employees, supervisors, or the hotel's reputation or good will in the community

***LAFAYETTE* POLICIES (CONT.)**

The following rules were also enforced:

- [6] Employees are not permitted to use the restaurant or cocktail lounge for entertaining friends or guests without the approval of the department manager.
- [7] Employees are not allowed to fraternize with hotel guests anywhere on hotel property.
- [4] Employees are required to leave the premises immediately after the completion of their shift and are not to return until the next scheduled shift.

ARBITRATION POLICY

The Binding Arbitration Agreement and Waiver of Jury Trial read in part:

Company and Individual agree to resolve any and all disputes or claims each may have against the other which relate in any manner whatsoever as to [sic] Individual's employment,. . . by binding arbitration. . .

By signing this Agreement, Individual and the Company waive their right to commence, be a party to, or [act as a] class member [in, any class] or collective action in any court action against the other party relating to employment issues. Further, the parties waive their right to commence or be a party to any group, class or collective action claim in arbitration or any other forum. The parties agree that any claim by or against Individual or the Company shall be heard without consolidation of such claim with any other person or entity's claim. Does this rule violate Section 7?

- A. Yes, it prohibits collective action by the employees
- B. No, arbitration of disputes is favored by the NLRA
- C. Maybe

CONFIDENTIALITY POLICY

Confidentiality: All employees are prohibited from disclosing to anyone outside the Company, indirectly or directly, any information about the Company which has not been shared by the Company with the general public. . . Exceptions to the rule include disclosures which are authorized by the Company or required or authorized by the law. This information includes, but is not limited to:

- Company financial data
- Plans and strategies (development, marketing, business)
- Organizational charts, salary structures, policy and procedures manuals
- Research or analyses
- Customer or supplier lists or related information

DOES THIS POLICY VIOLATE SECTION 7?

A. Yes

B. No

C. Maybe

CONFIDENTIALITY POLICY 2

The protection of confidential information, trade secrets, and company-specific operating procedures is vital to the interests and success of the Company. Additionally, in the line of duty, you may come into contact with our customer's confidential information.

Employees who improperly use, reveal, copy, disclose or destroy Company or client information will be subject to disciplinary action, up to and including termination of employment. They may also be subject to legal action even if they do not actually benefit from the disclosure. Such information includes any information considered proprietary by the Company or the client organization.

CONFIDENTIAL INVESTIGATIONS

The employer had a investigation interview form which was read to each witness before human resources conducted any disciplinary interview. The form stated, “[t]his is a confidential interview.” The investigator would explain that s/he “will keep [the] conversation confidential,” and to request the interviewee “not to discuss this with your coworkers while this investigation is going on, for this reason, when people are talking it is difficult to do a fair investigation and separate facts from rumors.”

Does this violate Section 7?

- A. Yes
- B. No
- C. Maybe

CONFIDENTIAL INVESTIGATIONS

- In any given investigation, employer must first determine if:
 - Witnesses needs protection
 - Evidence is in danger of being destroyed
 - Testimony is in danger of being fabricated
 - There is a need to prevent a cover up
- The Board found that the general assertion of protecting the integrity of an investigation “clearly failed to meet” that burden
- Decision applies equally to unionized and non-union settings
- **Compare – EEOC’s position to keep harassment investigations as confidential as possible**

CIVILITY POLICY

Conduct on the part of a Beaumont employee or physician that is inappropriate or detrimental to patient care of [sic] Hospital operation or that impedes harmonious interactions and relationships will not be tolerated. Transgressors shall be subject to appropriate remedial or corrective action.

- [4] Verbal comments or physical gestures directed at others that exceed the bounds of fair criticism.
- [5] Negative or disparaging comments about the moral character or professional capabilities of an employee or physician made to employees, physicians, patients, or visitors.
- [6] Behavior that is disruptive to maintaining a safe and healing environment or that is counter to promoting teamwork.

DO THESE RULES VIOLATE SECTION 7?

A. Yes

B. No

C. Maybe

CONFLICT OF INTEREST POLICY

Employees shall avoid activities that could appear to influence their objective decisions relative to their company responsibilities.

Continued employment with the company is dependent upon strict avoidance of:

- a. Conflicts of interest or the appearance of such conflicts.
- b. Conduct on or off duty which is detrimental to the best interests of the company or its employees.
- c. Employees shall avoid activities that might appear to result in fraud or waste.
- d. Employees may not engage in any activity, on or off company premises, or be employed in any capacity at Schwan which creates an actual or perceived conflict of interest (e.g. an employee may not supervise an immediate family member or a person with whom they have an intimate relationship; an employee may not have a financial interest in a supplier or competitor).

WHICH, IF ANY, OF THESE POLICIES VIOLATE SECTION 7?

- A. All the policies
- B. Paragraph a.
- C. Paragraph b.
- D. Paragraph c.
- E. Paragraph d.

ANTI-VIOLENCE IN THE WORKPLACE

- A. Don't pick fights.
- B. The Company defines workplace violence as any verbal, written, or physical activity that is intended to intimidate, threaten or harm any person... Conduct, which can reasonably be construed as hostile and threatening, may result in disciplinary action and possible termination of employment.
- C. Do not make "insulting, embarrassing, hurtful or abusive comments about other company employees online," and "avoid the use of offensive, derogatory, or prejudicial comments."

Which of these rules does not violate Section 7?

- A. Legal
- B. Legal
- C. Legal
- D. All are legal

E-MAIL POLICY

Computers, laptops, internet access, voicemail, electronic mail (email), Blackberry, cellular telephones and/or other Company equipment is provided and maintained by the Company to facilitate Company business. All information and messages stored, sent, and received on these systems are the sole and exclusive property of the Company, regardless of the author or recipient. All such equipment and access should be used for business purposes only.

Prohibited activities

Employees are strictly prohibited from using the computer, internet, voicemail and email systems, and other Company equipment in connection with any of the following activities:

- [2] Engaging in activities on behalf of organizations or persons with no professional or business affiliation with the Company.
- [5] Sending uninvited email of a personal nature.

DOES THIS RULE VIOLATE SECTION 7?

A. Yes

B. No

C. Maybe

WHAT TO DO AFTER *PURPLE*

- If your employees have been granted access to company email systems, they **must** be allowed to use them to engage in protected Section 7 communications during non-work time
- Uniform and consistently enforced controls over email systems may still be applied “to the extent that those controls are necessary to maintain production and discipline”
- Only rarely “where special circumstance” exist will a total ban on non-work email be lawful

POST-PURPLE ISSUES FOR EMPLOYERS

- **Employee Access:** How defined? Once granted, is it revocable? What if job duties change? Or, the email is used for harassment? Can “access” be withdrawn?
- **Storage Capacity:** Must employers buy capacity to store employee emails? Can they be freely purged? What if spam filters block a union email?
- **Monitoring Employee Emails:** Will this be unlawful surveillance in a union campaign? Privacy concerns?

OTHER POLICIES FOUND UNLAWFUL

- Access Rules
- Clothing Rules
- Distribution Rules
- Solicitation Rules
- Making False, Vicious or Malicious Statements
- No Gossip Rules
- Insubordination Rule
- Use of Company Logo
- Media Rules
- Social Media Rules

DISCLAIMERS

- The Board is not consistent in its treatment of language that informs the employees that policies are not meant to prevent employees from exercising their Section 7 rights
- “This policy will not be construed or applied in a manner that interferes with employees' rights under federal law” is too vague and will not save the policy from a Board challenge
- “Note that all employees have rights under the NLRA to engage in protected concerted activities including discussing your terms and conditions of employment, wages or benefits or work conditions. Nothing in this policy is meant to, nor should it be interpreted to, in any way limit your rights under any applicable federal, state, or local laws, including your rights under Section 7 of the National Labor Relations Act, including but not limited to the right to engage in protected concerted activities with other employees for the purposes of their mutual aid and/or protection, or to improve terms and conditions of employment, such as wages and benefits.”

DRAFTING COMPLIANT POLICIES

- Avoid ambiguous words and phrases, such as “offensive,” “improper conduct,” “inappropriate behavior,” “negative or disparaging comments,” “disruptive behavior,” and “harassment”
- Draft policies with specific examples that demonstrate the policies are not an attempt to curb employees’ Section 7 rights
- Use a disclaimer

QUESTIONS?



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THANK YOU

Note: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.

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