

NLRB 2020

Updates for All Private Sector Employers

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Overview



- Handbook Policies
- Email & Confidentiality
- Representation Procedures
- Union Issues



Policies

NLRA Section 7

Gives employees the rights:

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] the right to refrain from any and all such activities

NLRB Attack on Social Media Policies

- In early 2010s, NLRB started issuing restrictive decisions regarding workplace social media policies
- Startling limitations on requirements that employees be “respectful” and “honest” and maintain confidentiality
- Unions successfully challenged social media policies as part of organizing efforts
- Forced affected or proactive employers to water down their policies

Return to Normalcy

- December 2017 decision in *Boeing* case changed course
- Eliminated the apparent presumption that all policies unlawfully restricted Section 7 rights
- Facially neutral rules now more likely to be read as permissible direction to employees
- Subsequent guidance and rulings confirms this shift

Generally Lawful Rules

- Civility Rules
- No-Photography/Recording Rules
- Prohibitions of Insubordination, Non-Cooperation, & Conduct Negatively Affecting Operations
- Disruptive Behavior Rules
- Protections of Confidential, Proprietary, and Customer Information
- Prohibitions of Defamation or Misrepresentation
- Limits on Use of Employer Logos and Intellectual Property
- Restrictions on Who Speaks on Behalf of Company
- Bans on Disloyalty, Nepotism, and Self-Enrichment

Rules Warranting Individualized Scrutiny

- Legality depends on context
- “Viewed as they would be by employees who interpret work rules as they apply to the everydayness of their job”
- Factors include placement of rule among others, examples provided in the rule, and the type/character of the workplace
- Whether the rule has caused employees to refrain from Section 7 activity may be relevant

Unlawful Rules

- Restrictions on Discussing Wages, Benefits, or Working Conditions
- Prohibitions on Joining Outside Organizations or Voting on Matters Concerning the Employer



Social Media Policies Revisited

- In August 2019, NLRB released a 2018 internal memo analyzing various CVS (drug store) employee policies
- Focused on social media rules, but analysis applies more broadly
- Most rules were deemed lawful; a few were not

Lawful CVS Rules

- Employees who speak on social media about the company “in any way” must make it clear they are a company employee but are not speaking on behalf of the company.
- Use of any company or brand name or logo as part of a social media account requires prior company approval.
- Employees may not post anything “discriminatory, harassing, bullying, threatening, defamatory, or unlawful.”
- Taking or sharing photos from non-public areas or internal meetings is prohibited.
- Employees may not post “content, images or photos” that they don’t “have the right to use.”
- Internal communications and information must be kept confidential.
- Employees must use a disclaimer if they speak about the company on social media.
- Employees cannot give professional recommendations or references regarding current or former company employees through social media posts.

Unlawful CVS Rules

- “Our Code of Conduct makes clear the importance of protecting the privacy and security of protected health information (PHI), personally identifiable information (PII) and employee information. *It is not permissible to disclose this information through social media or other online communications.*”
- “Personal opinions should be stated as such. CVS Health colleagues who choose to mention or discuss their work, CVS Health, colleagues, or CVS Health products or services in personal social media interactions *must identify themselves by their real name and, where relevant, title or role.* You must also identify that you work for CVS Health and must make clear in your postings that you are not speaking for or on behalf of CVS Health.”



Email & More

Company Email Use

» *Purple Communications (2014)*

- Section 7 right includes use of company-provided email for protected purposes
- Could apply uniform and consistently enforced parameters on use



» *Rio All-Suites Hotel & Casino (2019)*

- Employers can restrict use of company email for non-work purposes, including activity protected by Section 7
- Possibly could be extreme scenarios where company email would be only effective means of communication between employees

Confidentiality in Workplace Investigations

» ***Banner Estrella Medical Center (2015)***

Companies must demonstrate a specific need for confidentiality regarding a particular investigation:

1. Witnesses need protection
2. Evidence in danger of destruction
3. Testimony in danger of fabrication
4. Need to prevent a cover-up

» ***Unique Thrift Store (2019)***

- Restores default of maintaining confidentiality to the extent possible
- Emphasizes importance of confidentiality to both employers and employees during ongoing investigation



Election Rules

2014 “Quickie Election” Rules

- Pro-union NLRB changed rules to reduce companies’ opportunity to respond to union organizing efforts
- Created a new “Position Statement” requirement for employers
- Allowed more employees to vote under challenge
- Employers wouldn’t always know who their “supervisors” were
- Reduced time from petition to election from 38 to 23 days

New Rules

Take effect April 16, 2020

» Position Statement

- Still required of employer, but more time to prepare (7 calendar days → 8 business days)
- Union now must respond with their own

» Election Scheduling

- Normally not before 20th business day after direction of election
- Returns closer to pre-2014 timeline

» Pre-Election Hearing

- More time to prepare (8 calendar days → 14 business days)
- More issues will be decided, incl. voter eligibility and unit inclusion
- Restores witnesses and post-hearing briefs

» Voter Lists

- Employer still required, as before 2014 rules, to provide voter list to union
- But now have more time to do so



Union Issues

Union Insignias

December 2019 *Wal-Mart* decision allowed company policy that employees could only wear “small, non-distracting” union buttons in customer-facing areas.



Union Dues Checkoff

- Unions typically negotiate to have employers deduct union dues from employees and send the money to the union
- Historically, employers could stop this when collective bargaining agreement expires
- In 2015, NLRB ruled dues checkoff obligation survives contract expiration [*Lincoln Lutheran of Racine*]
- December 2019 decision [*Valley Hospital Medical Center*] restores 1962 precedent allowing employers to stop deducting dues when no contract is in effect

Deferral to Arbitration Decisions

- Sometimes unions file grievances and unfair labor practice charges based on the same incidents
- *Babcock & Wilcox* (2014) heightened standard for NLRB deferral to a private arbitrator's decision
- Essentially allowed NLRB to second guess arbitrator in application of NLRB jurisprudence
- *United Parcel Service* (2019) restores less-stringent standard
- NLRB will defer as long as factual basis was parallel, even if arbitrator didn't expressly rule on unfair labor practice under NLRB standards

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Thanks for your time!

Questions?

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