

## Applying the NLRB's Handbook Guidance

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# The Starting Point – NLRA Section 7

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- The National Labor Relations Act (“NLRA”) applies to both union and nonunion employers.
- Section 7 of the NLRA allows employees to engage in “concerted activity” for “mutual aid or protection” or to refrain from doing so. These are called “Section 7 rights” a/k/a “protected concerted activity.”
- Concerted activity is defined as activity “engaged in with or on the authority of other employees,” and it includes activity intended to incite group action or speaking on behalf of other employees about terms and conditions of employment.
- Employers may not “interfere with, restrain, or coerce employees in the exercise of” their Section 7 rights.



# The Starting Point – NLRA Section 8

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## Prohibits Unfair Labor Practices

- Interfering with employees as they engage in concerted activity.
- Dominating or assisting a labor union.
- Discriminating against any worker because of union activity.
- Punishing working for filing charges with labor board.
- Refusing to bargain collectively in good faith with the union.

# The Starting Point – NLRB

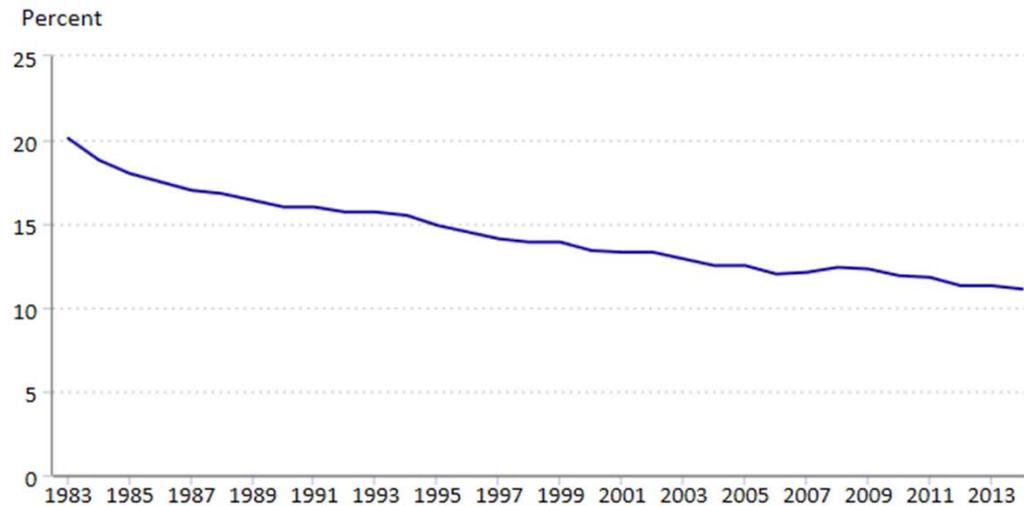
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- FIVE-MEMBER QUASI-JUDICIAL BODY APPOINTED BY THE PRESIDENT FOR FIVE-YEAR TERM
- PURPOSE: ENFORCE THE NLRA
- WHAT DOES THE NLRB DO?
  - Investigate/Hold hearings on unfair labor practices
  - Take action against employers for violations
  - Determine bargaining units
  - Supervise union certifications
  - Create rules and regulations to carry out NLRA

# Union Membership is Declining ...

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Union membership as a percent of employed wage and salary workers, 1983–2014 annual averages



Hover over chart to view data.  
Source: U.S. Bureau of Labor Statistics.



## 2014 Numbers

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- Private industry – 6.6%
- Public sector – 35.7%
- MS – 3.7%

Source: Bureau of Labor Statistics

## Focus on Policies

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- In assessing an employer’s policies, the NLRB analyzes whether the rule would “reasonably tend to chill employees in the exercise of their Section 7 rights.”
- If the rule explicitly restricts protected concerted activity, it is unlawful.
- If the rule does not explicitly restrict protected concerted activity, it is unlawful if:
  - (1) employees would reasonably construe the language to prohibit Section 7 activity;
  - (2) the rule was promulgated in response to union activity; or
  - (3) the rule has been applied to restrict the exercise of Section 7 rights.



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**NATIONAL LABOR RELATIONS BOARD  
OFFICE OF GENERAL COUNSEL**

**REPORT CONCERNING EMPLOYER RULES**

**MARCH 18, 2015**

## “Unlawful” Confidentiality Rules

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- Do not discuss "customer or employee information" outside of work, including "phone numbers [and] addresses."
- "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)."
- "Discuss work matters only with other [Employer] employees who have a specific business reason to know or have access to such information.... Do not discuss work matters in public places."
- Confidential Information is: "All information in which its loss, undue use or unauthorized disclosure could adversely affect the [Employer's] interests, image and reputation or compromise personal and private information of its members."

## “Lawful” Confidentiality Rules

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- No unauthorized disclosure of "business 'secrets' or other confidential information."
- "Do not disclose confidential financial data, or other non-public proprietary company information. Do not share confidential information regarding business partners, vendors or customers."
- Prohibition on disclosure of all "information acquired in the course of one's work."

# “Unlawful” Rules re Employee Conduct Toward Employer

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- "Be respectful to the company, other employees, customers, partners, and competitors."
- Do "not make fun of, denigrate, or defame your co-workers, customers, franchisees, suppliers, the Company, or our competitors."
- "Chronic resistance to proper work-related orders or discipline, even though not overt insubordination" will result in discipline.
- "[I]t is important that employees practice caution and discretion when posting content [on social media] that could affect [the Employer's] business operation or reputation."
- Do not make "[s]tatements "that damage the company or the company's reputation or that disrupt or damage the company's business relationships."

## “Lawful” Rules re Employee Conduct Toward Employer

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- No "rudeness or unprofessional behavior toward a customer, or anyone in contact with" the company.
- "Each employee is expected to work in a cooperative manner with management/supervision, coworkers, customers and vendors."
- "Each employee is expected to abide by Company policies and to cooperate fully in any investigation that the Company may undertake."
- "Being insubordinate, threatening, intimidating, disrespectful or assaulting a manager/supervisor, coworker, customer or vendor will result in" discipline.

## “Unlawful” Rules re Co-Workers

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- “[D]on't pick fights" online.
- Do not make "insulting, embarrassing, hurtful or abusive comments about other company employees online," and "avoid the use of offensive, derogatory, or prejudicial comments."
- “[S]how proper consideration for others' privacy and for topics that may be considered objectionable or inflammatory, such as politics and religion."
- "Material that is fraudulent, harassing, embarrassing, sexually explicit, profane, obscene, intimidating, defamatory, or otherwise unlawful or inappropriate may not be sent by e-mail. ..."

## “Lawful” Rules re Coworkers

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- "Making inappropriate gestures, including visual staring. "
- Any logos or graphics worn by employees "must not reflect any form of violent, discriminatory, abusive, offensive, demeaning, or otherwise unprofessional message. "
- "[T]hreatening, intimidating, coercing, or otherwise interfering with the job performance of fellow employees or visitors. "
- No "harassment of employees, patients or facility visitors. "
- No "use of racial slurs, derogatory comments, or insults.

## “Unlawful” Rules re Third Party Communications

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- 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.
- "If you are contacted by any government agency you should contact the Law Department immediately for assistance."

## “Lawful” Rules re Third Party Communications

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"Events may occur at our stores that will draw immediate attention from the news media. It is imperative that one person speaks for the Company to deliver an appropriate message and to avoid giving misinformation in any media inquiry. While reporters frequently shop as customers and may ask questions about a matter, good reporters identify themselves prior to asking questions. Every employee is expected to adhere to the following media policy: Answer all media/reporter questions like this: 'I am not authorized to comment for [the Employer] (or I don't have the information you want). Let me have our public affairs office contact you.'"

# “Unlawful” Rules re Logos, Copyrights and Trademarks

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- Do "not use any Company logos, trademarks, graphics, or advertising materials" in social media.
- "Use of [the Employer's] name, address or other information in your personal profile [is banned].... In addition, it is prohibited to use [the Employer's] logos, trademarks or any other copyrighted material."

## **“Lawful” Rules re Logos, Copyrights and Trademarks**

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"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."

## “Unlawful” Rules re Photography, Records and Personal Electronic Devices

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- "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....,"
- A total ban on use or possession of personal electronic equipment on Employer property.
- Prohibition from wearing cell phones, making personal calls or viewing or sending texts "while on duty."
- No cameras are to be allowed in the store or parking lot without prior approval from the corporate office.

## **“Unlawful” Restrictions on Leaving Work**

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"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.

## **“Lawful” Restrictions on Leaving Work**

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"Walking off shift, failing to report for a scheduled shift and leaving early without supervisor permission are also grounds for immediate termination."

## **“Unlawful” Conflict of Interest Rules**

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Employees may not engage in "any action" that is "not in the best interest of [the Employer]."

## Takeaways

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Lessons  
Learned

- Update your Employee Handbook to ensure compliance.
- Give as many specific examples in your policies as possible.
- Train your managers and supervisors to understand when, where, and how employees are permitted to engage in various types of organizing activities.
- Periodically audit compliance with policies. Policies only protect you if they are consistently applied.
- Once your employees turn to a union, it is too late to update and enforce your policies. Delaying these steps could have consequences.
- Make informed risk assessments. Sometimes business interests outweigh the risk of a NLRB charge.

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