

# Heard It Through The Grapevine: Weeding Out Gossip In The Workplace

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# Scope of the Problem

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- Gossip can be detrimental to morale, productivity, and individual employees as well as to the organization's reputation in the community and the industry.
- Gossip can lead to legal claims by employees such as defamation, intentional infliction of emotional distress, negligent supervision/retention, harassment or discrimination based on a protected class, and retaliation.

# Limiting Rumors and Gossip

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- **Keep workers informed** – When employees know what's going on within an organization, they do not need to guess or speculate as much. Use newsletters, weekly meetings, or regular updates via the Intranet to let people know what's happening.

# Limiting Rumors and Gossip

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- **Communicate** – When you face adversity in your business or industry, keep the lines of communication open.
- **Establish transparency within your systems** – Develop a promotion and transfer process that is clear and easy to follow. Hold meetings behind closed doors only when absolutely necessary. Share industry reports and company performance data regularly.

# Limiting Rumors and Gossip

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- **Practice MBWA** -- It is easier to communicate when you work closely with your team and easier to hear rumors and stop them at the start before they get out of control.

# Limiting Rumors and Gossip

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- **Let employees know that rumors are unacceptable** – Establish a **policy** for dealing with rumors, gossip, and other similar inappropriate conduct and enforce the policy.

# No-Gossip Policies

- What are the legal issues that might interfere with management's right to establish a no-gossip policy?
- Are the legal issues different for public/private employers?
- What are the recommended best practices to limit legal risks when drafting and implementing a no-gossip policy?

# Primary Legal Risks

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- Will your policy violate the National Labor Relations Act's protection for employees who engage in protected concerted activities?
- Will your policy discourage employees from complaining about working conditions or conduct at work that they believe violates the ADAAA, Title VII, OSHA, FLSA, FMLA, and others?
- Public Employers: Are you violating the Constitutional protections for free speech?

# National Labor Relations Act

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- Section 7 of the NLRA
- "[e]mployees 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.**"

# National Labor Relations Act

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- Section 7 basically provides that employees have the right to engage in concerted activities for the purpose of mutual aid or protection.
- Section 7 rights belong to non-supervisory employees in all types of workplaces including those that do not have unions.
- Section 7 does not, however, apply to governmental employees (federal or state).

# Tests For An **Unlawful** No-Gossip Policy:

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- Does your no-gossip policy reasonably tend to chill employees in the exercise of their Section 7 rights under the NLRA?
- The same test applies to other laws – Does your no-gossip policy reasonably tend to chill employees in exercising their right to complain about potentially unlawful conduct under ADAAA, Title VII, OSHA, FLSA, FMLA and others.

# Under the NLRA your no-gossip policy will be unlawful if:

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- It directly restricts employees from exercising their Section 7 rights; or
- Employees would reasonably construe the language in the policy to prohibit Section 7 protected activity; or
- The policy was implemented in response to union activity; or
- The policy has been applied to restrict Section 7 activity.

# National Labor Relations Board

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- Has already ordered two employers in 2014 to rescind no-gossip policies on the basis that the policies **could be construed to prohibit employees from discussing the terms and conditions of their employment with other employees.**

*See Hills and Dales General Hospital*, 360 NLRB No. 70 (April 1, 2014); *Laurus Technical Institute*, 260 NLRB 133 (June 13, 2014)

# ***Laurus Technical Institute***

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- On June 13, 2014, the NLRB affirmed an ALJ decision issued in *Laurus Technical Institute*, 360 NLRB No. 133 where an employer's no-gossip policy was found to violate Section 7 of the NLRA.

# Laurus No-Gossip Policy

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- The Policy stated that “[e]mployees that participate in or instigate gossip about the company, an employee, or customer will receive disciplinary action...[that] may include termination.”
- The Policy was published in the school’s employee handbook.

# Laurus No-Gossip Policy

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- Examples of prohibited gossip :
  - “[t]alking about a person’s personal life when they are not present,”
  - “[t]alking about a person’s professional life without his/her supervisor present,”
  - Negative, or untrue, or disparaging comments or criticisms of another person or persons;
  - Creating, sharing, or repeating information that can injure a person’s credibility or reputation; and
  - “Creating, sharing, or repeating” rumors about another person, that are overheard, or that constitute hearsay.

# The Facts in *Laurus*

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- Nine months after implementing the no-gossip policy, Laurus terminated an employee for unsatisfactory performance including:
- “multiple complaints about repeated violations of ‘the company’s written ‘no gossip policy,’ as outlined in the company’s handbook,’ which had ‘a direct and negative impact on [her] coworker’s ability to effectively perform their job responsibilities,’” and “attempts to actively solicit and recruit coworkers to work for another company, a direct competitor.”

# The ALJ's Initial Decision

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- The ALJ explained in *Laurus* that because “[t]he language in the no gossip policy is overly broad, ambiguous, and severely restricts employees from discussing or complaining about any terms and conditions of employment,” the policy prohibits employees from exercising their rights under Section 7 of the NLRA.

# The ALJ's Initial Decision

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- Similarly, the ALJ noted that the school's Policy further chills employees' protected rights because it "narrowly prohibits virtually all communications about anyone, including the company or its managers."
- The NLRB agreed with the ALJ and affirmed the ruling striking the policy and reinstating the employee with back pay.

# The NLRB struck down the policy because:

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- it was “overly broad, ambiguous, and severely restrict[ed] employees from discussing or complaining about any terms and condition of employment.”
- The definitions of “gossip” were an expansive ban on making any negative or disparaging comments or criticisms of another person and of any discussion of one’s personal life when that person is not present.

# The NLRB also noted

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- The policy likely prohibited even positive comments about someone's personal or professional life if s/he were not present or the employee's supervisor was not present.
- *Laurus has appealed the decision.*

# Hills and Dales General Hospital No-Gossip Policy

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- Employees will not make “negative comments about our fellow team members,” including coworkers and managers;
- Employees will “represent the Company in the community in a positive and professional manner in every opportunity;”
- Employees “will not engage in or listen to negativity or gossip.”

# Hills and Dales General Hospital Ruling

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- Employees could reasonably construe prohibitions of “negative comments” and “negativity” to prohibit them from engaging in protected concerted activity to raise concerns about the terms and conditions of employment.

# Hills and Dales General Hospital Ruling

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- Employees could reasonably view the language proscribing them from engaging in any public activity or making any public statements that are not perceived as “positive” towards the Company on work-related matters as prohibiting the exercise of their Section 7 rights.
- **NOTE:** Employee involvement in drafting the policy was not a valid defense.

# Hills and Dales General Hospital Ruling

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- The language regarding positive comments would discourage employees from engaging in protected public protests of unfair labor practices, or from making statements to third parties protesting their terms and conditions of employment—activity that may not be “positive” towards the Company but is clearly protected by Section 7.

# Fine Lines . . .

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- The NLRB has found a requirement for employees to represent the Company in a “positive and ethical” manner to be lawful where the policy was in the context of a conflict of interest policy.
- The NLRB found the phrase “positive and professional” in the no-gossip policy to be unlawful because it was overly broad and too easily capable of being construed by employees to prohibit anything negative.

# Does The NLRB Approve Any No-Gossip Policy Language?

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- In *Laurus*, it was noted that some policy provisions could be lawful if:
  - the rules could not reasonably be construed to cover protected activity
  - and the rules clarified their scope by including examples of clearly illegal or unprotected conduct.

# Examples of lawful policies

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- *Palms Hotel and Casino*, 344 NLRB 1363, 1367 (2005) (policy against “injurious, offensive, threatening, intimidating, coercing” conduct aimed at ensuring “civility and decorum” in the workplace, and not referring to conduct that is an inherent aspect of Section 7 activity found to be lawful).

# Examples of lawful policies

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- *Lutheran Heritage Village-Livonia*, 343 NLRB 64620 (2004) (rules prohibiting “abusive and profane language,” “harassment,” and “verbal, mental and physical abuse” were lawful because they were intended to maintain order in the employer’s workplace and did not explicitly or implicitly prohibit Section 7 activities)

# Lessons Learned From NLRB Decisions

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- The key in drafting no-gossip policies is to avoid broadly worded language that could silence employees' discussions about working conditions or their legitimate protected complaints about unlawful conduct.
- Focus on specific examples of illegal or unprotected conduct.
- Avoid ambiguous, generalized statements.

# Policies For Public v. Private Employers

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- Remember public employers are limited by the Constitution from infringing on the free speech of employees with some exceptions. Seek qualified counsel.
- Tennessee's new Healthy Workplace Act will provide public employers with a model policy in March 2015 aimed at eradicating bullying from the workplace and other abusive conduct.

## **“Abusive conduct” means:**

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Acts or omissions that would cause a reasonable person, based on the severity, nature, and frequency of the conduct, to believe that an employee was subject to an abusive work environment.

# Examples

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**(A)** Repeated verbal abuse in the workplace, including derogatory remarks, insults, and epithets;

**(B)** Verbal, nonverbal, or physical conduct of a threatening, intimidating, or humiliating nature in the workplace; or

**(C)** The sabotage or undermining of an employee's work performance in the workplace.

# Best Practices For No-Gossip Policies

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- Determine whether to take action steps to try and limit gossip in the workplace.
- Develop a policy that your organization is comfortable with in terms of the parameters established by NLRB decisions and other applicable laws.
- Implement the policy through employee discussions and training on acceptable versus unacceptable behavior.

# Best Practices For No-Gossip Policies

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- Take adverse action against employees only after a thorough investigation.
- Take adverse action against employees only after giving them the right to explain their behavior.
- Take adverse action against employees under the policy only after considering recent NLRB decisions setting parameters to applying no-gossip policies.
- Make the subject of respect in the workplace a source of discussion on a regular basis.