

# The NLRB Issued Employee Handbook Guidance With All You Need To Know In A Single Source?

## Labor & Employment Law Update

on April 16, 2015

Not exactly—but it is quite useful, nonetheless.

Recently, the Office of the General Counsel for the National Labor Relations Board issued a report on lawful and unlawful employee handbook rules. And while the information provided in the report does not have the force of law, the guidance is quite detailed and it provides insight into what, for the moment, is the board's approach to enforcement on employee handbooks.

What the report makes clear is that context is key to determining whether an employee handbook provision will be considered lawful or not. For instance, it is perfectly acceptable to have a policy that states: "Do not make negative comments about our customers in any social media." However, if an employer prohibited "negative" comments about the employer, itself, or its management personnel, that would almost certainly be considered unlawful.

Similarly, while a policy that generally prohibits "derogatory comments" is likely to be found unlawful, a ban on derogatory comments that is included within a policy prohibiting sexual harassment is likely to be acceptable. The report includes guidance like this on several categories of employee handbook policies, including: treatment of customers, competitors, and the public; treatment of confidential and proprietary business information; harassment in the workplace and online; and employee communication with the media.

The report also provides specific examples of actual employee handbook language that the NLRB considers unlawful, along with a brief explanation of why the language is considered unlawful. Following that, the report then provides examples and explanations of similar policies that are facially acceptable.

As one would expect, the report is not perfect, and it does not have the force of law—which is to say that reliance on the report will not be an absolute defense to an unfair labor practice charge. This is especially so in light of the fact that the acceptable policies included in the report are considered "facially" lawful, which means, essentially, that the board believes those policies can and should be

interpreted in a way that does not unlawfully restrict employee rights.

However, if an employer enforces what would be a facially valid policy in a way that is unlawful (e.g., enforcing a facially valid confidentiality policy by terminating employees who discuss their pay rates), the employer should not be surprised to find itself charged with an unfair labor practice.

That said, despite any flaws the report may have, the report is the most comprehensive and extensive guidance issued by the NLRB on this subject, and it is a good starting point for employers who have not yet revised their policies in response to the NLRB's increased enforcement in this area over the past several years.

The NLRB  
Issued  
Employee  
Handbook  
Guidance  
With All You  
Need To  
Know In A  
Single Sour-  
ce?