

**Rochester Human Resources
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Protected Concerted Activity and Company Policies

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Section 7 of the NLRA: “Employees shall have the right. . .to engage in other concerted activities for the purpose of improving the terms and conditions of employment.”




An activity is concerted when an employee acts “with or on the authority of other employees and not solely by and on behalf of the employee himself.”




Employees have a right under Section 7 of the NLRA to discuss their wages and other terms and conditions of employment, both among themselves and with non-employees.




The definition of concerted activity encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action.



Expression of an individual gripe is not concerted activity.



Section 8(a)(1) of the NLRA makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.



An employer violates Section 8(a)(1) of the NLRA if a work rule “would reasonably tend to chill employees in the exercise of their Section 7 rights.”



A rule is clearly unlawful if it explicitly restricts
Section 7 rights.



If the rule does not expressly restrict protected activities, it will violate Section 8(a)(1) if:

- Employees would reasonably construe the language to prohibit Section 7 activities;
- The rule was promulgated in response to union activity; or
- The rule has been applied to restrict the exercise of Section 7 rights.

Confidentiality Policies

Broad prohibitions on disclosing confidential information are lawful so long as they do not reference information regarding employees or anything that would reasonably be considered a term or condition of employment, because employers have a substantial and legitimate interest in maintaining the privacy of certain business information.

Confidentiality Policies

Although these policies do not refer to terms and conditions of employment or employee information, the rules do clarify that they do not restrict Section 7 communications.

Confidentiality Policies

Unlawful: Do not discuss customer or employee information outside of work, including phone numbers and addresses.

Unlawful: Prohibiting employees from “[d]isclosing...details about the [Employer].”

Unlawful: “Sharing of [overheard conversations at the work site] with your co-workers, the public, or anyone outside of your immediate work group is strictly prohibited.”

Confidentiality Policies

Unlawful: “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.”

Unlawful: “[I]f something is not public information, you must not share it.”

Confidentiality Policies

Lawful: Do not disclose confidential financial data, or other non-public proprietary company information. Do not share confidential information regarding business partners, vendors or customers.

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Confidentiality Policies

These rules are lawful because:

1. They do not reference information regarding employment.
2. They do not define “confidential” in an overbroad manner.
3. They do not otherwise contain language that would reasonably be construed to prohibit Section 7 communications.

Confidentiality Policies

Lawful: No unauthorized disclosure of “business ‘secrets’ or other confidential information.”

Lawful: “Misuse or unauthorized disclosure of confidential information not otherwise available to persons or firms outside [Employer] is cause for disciplinary action, including termination.”

Confidentiality Policies

The NLRB found the following rule to be lawful because of its context—it was nested among rules relating to conflicts of interest and compliance with SEC regulations and state and federal laws.

Lawful: Prohibition on disclosure of all information acquired in the course of one's work.

Confidentiality and Investigation of Employee Misconduct

In *Banner Health System*, a 2015 NLRB case, the NLRB invalidated an employer's confidentiality policy regarding workplace investigations.

“Employees have a Section 7 right to discuss discipline or ongoing disciplinary investigations involving themselves or coworkers.”

Confidentiality and Investigation of Employee Misconduct

An employer may only restrict discussions “where the employer shows that it has a legitimate and substantial business justification that outweighs employees’ Section 7 rights.”

Confidentiality and Investigation of Employee Misconduct

Examples:

- witnesses need protection
- evidence is in danger of being destroyed
- testimony is in danger of being fabricated
- need to prevent a cover up

Policies on Employee Conduct Toward the Employer and Supervisors

A rule that prohibits employees from engaging in “disrespectful,” “negative,” “inappropriate” or “rude” conduct towards the employer or management, absent clarifications or context, will be found to be unlawful.

Employee criticism of an employer will not lose the Act’s protection because the criticism is false or defamatory.

Policies on Employee Conduct Toward the Employer and Supervisors

Unlawful: No defamatory, libelous, slanderous or discriminatory comments about the Company, its customers and/or competitors, its employees or management.

Unlawful: “[B]e respectful to the company, other employees, customers, partners, and competitors.”

Unlawful: Do “not make fun of, denigrate, or defame your coworkers, customers, franchisees, suppliers, the Company, or our competitors.”

Unlawful: “Be respectful of others and the Company.”

Policies on Employee Conduct Toward the Employer and Supervisors

Unlawful: “Refrain from any action that would harm persons or property or cause damage to the Company’s business or reputation.”

Unlawful: “[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.”

Policies on Employee Conduct Toward the Employer and Supervisors

Unlawful: Do not make “[s]tatements “that damage the company or the company’s reputation or that disrupt or damage the company’s business relationships.”

Unlawful: “Never engage in behavior that would undermine the reputation of [the Employer], your peers or yourself.”

Policies on Employee Conduct Toward the Employer and Supervisors

A rule that requires employees to be respectful and professional to coworkers, clients or competitors will be lawful. Employers have a legitimate business interest in having employees act professionally and courteously in dealings with coworkers, customers, employer business partners, and other third parties.

Policies on Employee Conduct Toward the Employer and Supervisors

Lawful: Disrespectful conduct or insubordination, including, but not limited to, refusing to follow orders from a supervisor or a designated representative.

Policies Regarding Employee Conduct Towards the Employer

Lawful: No “rudeness or unprofessional behavior toward a customer, or anyone in contact with” the company.

Lawful: “Each employee is expected to work in a cooperative manner with management/supervision, coworkers, customers and vendors.”

Lawful: Each employee is expected to abide by Company policies and to cooperate fully in any investigation that the Company may undertake.”

Policies Regarding Employee Conduct Towards the Employer

The NLRB does not read rules in isolation. This rule was found to be lawful because the clear intent was to address serious misconduct, not protected criticism of the employer.

Lawful: “Being insubordinate, threatening, intimidating, disrespectful or assaulting a manager/supervisor, coworker, customer or vendor will result in discipline.”

Policies Regarding Employee Conduct Towards the Employer

Employers should limit the requirement to be respectful to customers, competitors and other business partners. The NLRB will consider a policy which requires employees at all times to be respectful to management to prohibit Section 7 protected criticism of the employer.

Rules Regulating Conduct Towards Fellow Employees

Employees have a right under the Act to argue and debate with each other about unions, management, and their terms and conditions of employment.

Rules Regulating Conduct Towards Fellow Employees

When an employer bans “negative” or “inappropriate” discussions among its employees without further clarification, employees reasonably will read those rules to prohibit discussions and interactions that are protected under Section 7.

Employee-Employee Conduct Rules

Unlawful: Material that is fraudulent, harassing, embarrassing, sexually explicit, profane, obscene, intimidating, defamatory or otherwise unlawful or inappropriate may not be sent by email. . . .

Unlawful: “[D]on’t pick fights” online.

Unlawful: Do not make “insulting, embarrassing, hurtful or abusive comments about other company employees online,” and “avoid the use of offensive, derogatory, or prejudicial comments.”

Employee-Employee Conduct Rules

- Unlawful: “[S]how proper consideration for others’ privacy and for topics that may be considered objectionable or inflammatory, such as politics and religion.”
- Unlawful: Do not send “unwanted, offensive or inappropriate” emails.

Employee-Employee Conduct Rules

When an employer's professionalism rule requires employees to be respectful to customers or competitors, or directs employees not to engage in unprofessional conduct, and does not mention the company or its management, the rule will be lawful.

Employee-Employee Conduct Rules

Lawful: “Making inappropriate gestures, including visual staring.”

Lawful: “[T]hreatening, intimidating, coercing, or otherwise interfering with the job performance of fellow employees or visitors.”

Lawful: No “use of racial slurs, derogatory comments, or insults.”

Lawful: Any logos or graphics worn by employees must not reflect any form of violent, discriminatory, abusive, offensive, demeaning or otherwise unprofessional message.

Rules Regarding Employee Interaction with Outside Parties

Another right employees have under Section 7 is the right to communicate with the news media, government agencies, and other third parties about wages, benefits, and other terms and conditions of employment. Handbook rules that reasonably would be read to restrict such communications are unlawfully overbroad.

Rules Regarding Employee Interaction with Outside Parties

Unlawful: 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.

Rules Regarding Employee Interaction with Outside Parties

Unlawful: “[A]ssociates are not authorized to answer questions from the news media. . . . When approached for information, you should refer the person to [the Employer’s] Media Relations Department.”

Unlawful: “[A]ll inquiries from the media must be referred to the Director of Operations in the corporate office, no exceptions.”

Unlawful: “If you are contacted by any government agency you should contact the Law Department immediately for assistance.”

Rules Regarding Employee Interaction with Outside Parties

Media contact rules are lawful if they can be interpreted to mean that employees should not speak on behalf of the company, not that employees cannot speak to outsiders on their own (or other employees') behalf.

Rules Regarding Employee Interaction with Outside Parties

Lawful: The company strives to anticipate and manage crisis situations in order to reduce disruption to our employees and to maintain our reputation as a high quality company. To best serve these objectives, the company will respond to the news media in a timely and professional manner *only* through designated spokespersons.

Rules Regarding Employee Interaction with Outside Parties

Lawful: “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: 2. 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.’”

Rules Restricting Use of Company Logos, Copyrights and Trademarks

Employers have a right to protect their intellectual property, but handbook rules can't prohibit employees' "fair protected use" of that property.

Rules Restricting Use of Company Logos, Copyrights and Trademarks

Employees have the right to use their employer's name and logo on picket signs, leaflets and other protest material.

Rules Restricting Use of Company Logos, Copyrights and Trademarks

Unlawful: 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.

Rules Restricting Use of Company Logos, Copyrights and Trademarks

Unlawful: Do not use “other people’s property,” such as trademarks, without permission 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.”

Rules Restricting Use of Company Logos, Copyrights and Trademarks

Lawful: 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 law governing copyright, fair use of copyrighted material owned by others, trademarks and other intellectual property, including the Employer's own copyrights, trademarks and brands.

Rules Restricting Use of Company Logos, Copyrights and Trademarks

Lawful: “DO respect the laws regarding copyrights, trademarks, rights of publicity and other third-party rights. To minimize the risk of a copyright violation, you should provide references to the source(s) of information you use and accurately cite copyrighted works you identify in your online communications. Do not infringe on [Employer] logos, brand names, taglines, slogans, or other trademarks.”

Rules Restricting Photography and Recording

Employees have a Section 7 right to photograph and make recordings in furtherance of their protected concerted activity, including the right to use personal devices to take such pictures and recordings.

Rules Restricting Photography and Recording

Whole Foods' case - ban on recording was found to be unlawful: "It is a violation of Whole Foods Market policy to record conversations with a tape recorder or other recording device (including a cell phone or any electronic device) unless prior approval is received from your store or facility leadership. The purpose of this policy is to eliminate a chilling effect on the expression of views that may exist when one person is concerned that his or her conversation with another is being secretly recorded. This concern can inhibit spontaneous and honest dialogue especially when sensitive or confidential matters are being discussed."

Rules Restricting Photography and Recording

Other Unlawful Policies: Prohibition from wearing cell phones, making personal calls or viewing or sending texts “while on duty.”

Rules Restricting Photography and Recording

Lawful: No cameras are to be allowed in the store or parking lot without prior approval from the corporate office.

This rule was embedded in a lawful media policy and immediately following instructions on how to deal with reporters in the store. In such a context, employees would read the rule to ban *news* cameras, not their own cameras.

Rules Restricting Photography and Recording

Rules regulating pictures and recording equipment are lawful if their scope is appropriately limited.

Lawful: In cases where a no-photography rule is instituted in response to a breach of patient privacy, where the employer has a well-understood, strong privacy interest, the Board has found that employee would not reasonably understand a no-photography rule to limit pictures for protected concerted purposes.

Rules Restricting Employees from Leaving Work

One of the most fundamental rights employees have under Section 7 is the right to go on strike. Rules that regulate when employees can leave work as unlawful if employees reasonably would read them to forbid protected strike actions and walkouts.

Rules Restricting Employees from Leaving Work

Unlawful: 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.

Walking off the job...is prohibited.

Rules Restricting Employees from Leaving Work

Lawful: Entering or leaving Company property without permission may result in discharge.

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

Although this rule includes the term “walking off shift,” which usually would be considered an overbroad term that employees reasonably would understand to include strikes, this rule was found to be lawful in the context of the employees’ health care responsibilities.

Rules Regarding Conflict of Interest

Unlawful: Employees may not engage in “any action” that is “not in the best interest of [Employer].”

Lawful: Do not “give, offer or promise, directly or indirectly, anything of value to any representative of an Outside Business,” where “Outside Business” is defined as “any person, firm, corporation, or government agency that sells or provides a service to, purchased from, or competes with [the Employer].” Examples of violations include “holding an ownership or financial interest in an Outside Business” and “accepting gifts, money, or services from an Outside Business.”

Dispute Resolution Provisions

In *D.R. Horton and Michael Cuda* (2012), the NLRB found that an agreement which employees must sign as a condition of their employment, which precludes them from filing joint, class, or collective claims addressing their wages, hours or other working conditions against the employer in any forum, whether arbitral or judicial, violates Section 8(a)(1).

No Solicitation Rules

In *Dish Network, LLC and David Rabb* (2016), the NLRB found as unlawful an employee handbook policy that prohibits employees from engaging in solicitation in work areas during non-work time and requires management's approval prior to engaging in such solicitation.

Employee Use of Employer Email

Previous law in the *Register Guard* case: A policy prohibiting the use of email for non-business purposes was lawful, provided it did not discriminate against unions.

Purple Communications, Inc., 361 NLRB No.
126 (2014)

In December 2014, the NLRB overruled the holding in the *Register Guard* case.

Purple Communications, Inc., 361 NLRB No. 126 (2014)

In *Purple Communications* the NLRB held that employees are allowed to use an employer's email system for union organizing efforts unless it can be shown that special circumstances make a ban of such communications necessary to maintain production or discipline.

Purple Communications, Inc., 361 NLRB No.
126 (2014)

The NLRB did not explain what such special communications would be other than to say that “it will be the rare case where special circumstances justify a total ban on non-work email use by employees.”

Purple Communications, Inc., 361 NLRB No. 126 (2014)

Concern – when an employer reviews employee email messages (provided the employer’s written policy allows the employer to read and monitor employee email messages) and discovers union organizing efforts. In this circumstance, an employer must be very cautious in its use of this information.

Purple Communications, Inc., 361 NLRB No.
126 (2014)

Purple Communications does not grant non-employees, such as labor unions, the right to access an employer's email system.

Purple Communications, Inc., 361 NLRB No.
126 (2014)

Employers are not required to provide email access to all employees.

Purple Communications, Inc., 361 NLRB No.
126 (2014)

Employers can still restrict an employee's personal email use during work time.

Questions???

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