Guide to Employee Work Rules

Prepared by: Christal Key, Field Attorney, Region 14

RESENTATION

I. Employee Work Rules – The Analytical Framework

The Board has recognized that determining the lawfulness of an employer's work rules requires balancing competing interests. Resolution of the issue presented by contested rules of conduct involves "working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments. … Opportunity to organize and proper discipline are both essential elements in a balanced society."[1]

In *Lafayette Park Hotel*,[2] the Board held an employer may violate Section 8(a)(1) through the **mere maintenance** of certain work rules even in the absence of enforcement. The appropriate inquiry is:

> **whether the rule in question "would reasonably tend to chill employees in the exercise of their Section 7 rights."**

The Board refined this standard in *Lutheran Heritage Village*[3] by articulating a two-step inquiry for determining whether the maintenance of a rule violates Section 8(a)(1).

> ***First*, a rule is unlawful if it explicitly restricts Section 7 activities.**
>
> ***Second*, if the rule does not explicitly restrict protected activities, it will nonetheless be found to violate the Act upon a showing that:**
>
> 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.**[4]

Additionally, the Board has cautioned against "reading particular phrases in isolation," and will not find a violation simply because a rule could conceivably be

---

[1] *Lafayette Park Hotel*, 326 NLRB 824 (1998), citing *Republic Aviation v. NLRB*, 324 U.S. 793, 797-798 (1945).
[2] *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd mem., 203 F.3d 52 (D.C. Cir. 1999).
[3] *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-647 (2004).
[4] *Lutheran Heritage* at 647.

read to restrict Section 7 activity.[5] The rule must be given a reasonable reading and the Board will not presume improper interference with employee rights.[6]

The potentially violative phrases must be considered in the proper context.[7] Some additional circumstances to consider are:

> Does the rule address legitimate business concerns?
> Is the rule ambiguous as written?
> Has the Employer exhibited antiunion animus?[8]
> Has the Employer by other action led employees to believe the rule prohibits Section 7 activity?[9]

Rules that are ambiguous as to their application to Section 7 activity, and that contain no limiting language or context that would clarify to employees that the rule does not restrict Section 7 rights, are unlawful.[10] In contrast, rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such that they could not reasonably be construed to cover protected activity, are not unlawful.[11]

---

[5] *Lutheran Heritage* at 646-647. See also *Palms Hotel and Casino*, 344 NLRB 351, 355-356 (2005) ("We are simply unwilling to engage in such speculation in order to condemn as unlawful a facially neutral work rule that is not aimed at Section 7 activity and was neither adopted in response to such activity nor enforced against it.")

[6] *Lutheran Heritage* citing *Lafayette* at 827.

[7] Compare *Flex Frac Logistics, LLC*, 358 NLRB No. 127, slip op. at 3 (2012); The *Roomstore*, 357 NLRB No. 143, slip op. at 1 n.3, 1617 (2011); *Wilshire at Lakewood*, 343 NLRB 141, 144 (2004).

[8] Questions 1-3 are from *Lafayette Park Hotel*, 326 NLRB 824, 825-826 (1998).

[9] *Lafayette Park Hotel*, 326 NLRB 824, 826 (1998); *Tradesman Intl*., 338 NLRB 460, 461 (2002).

[10] *Claremont Resort and Spa*, 344 NLRB 832, 836 (2005) (rule proscribing "negative conversations" about managers that was contained in a list of policies regarding working conditions, with no further clarification or examples, was unlawful because of its potential chilling effect on protected activity.) *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992), quoting *Paceco*, 237 NLRB 399 fn. 8 (1978) ("Where ambiguities appear in employee work rules promulgated by an employer, the ambiguity must be resolved against the promulgator of the rule rather than the employees who are required to obey it."). Board precedent holds the mere maintenance of an ambiguous or overly broad rule is unlawful because it tends to inhibit employees from engaging in otherwise protected activity. *Ingram Book Co*., 315 NLRB 515, 516 (1994); *J. C. Penney Co.*, 266 NLRB 1223, 1224 (1983).

[11] *Tradesman Intl*., 338 NLRB 460, 460-462 (2002) (prohibition against "disloyal, disruptive, competitive, or damaging conduct" would not be reasonably construed to cover protected activity, given the rule's focus on other clearly illegal or egregious activity and the absence of any application against protected activity.)

II. Categories of Work Rules

The following sections contain rules the Board has already decided are lawful or unlawful. For the rules in categories A-F (employee communications, confidential and proprietary information, employee conduct, walking off the job, fraternization, and social media), the Board usually analyzes these rules under the principles of *Lafayette* and *Lutheran*.

In categories G-H (arbitration and dispute resolution and at-will employment), the Board sometimes refers to *Lafayette* and *Lutheran* in its analysis of such rules. And in the last categories I-L (solicitation and distribution, access, use of employer's equipment, and dress code), you will see the Board has developed different specific criteria to determine whether rules under these topics are unlawful.

A. Employee Communications

1. Unacceptable conduct: Making false, vicious, profane, or malicious statements toward or concerning the Lafayette Park Hotel or any of its employees.

   Unlawful – *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998)

   The Board has found the maintenance of similar rules to violate Section 8(a)(1) of the Act. In *Cincinnati Suburban Press*, 289 NLRB 966, 975 (1988), the Board found unlawful a handbook provision, similar to this one, which prohibited employees from making "false, vicious or malicious statements concerning any employee, supervisor, the Company, or its product." The Board relied on *American Cast Iron Pipe Co.*, 234 NLRB 1126 (1978), enfd. 600 F.2d 132 (8th Cir. 1979), which invalidated a similar provision on the ground that it prohibited and punished merely "false" statements, as opposed to maliciously false statements, and was therefore overbroad. In enforcing the Board's Order, the court stated that "[p]unishing employees for distributing merely 'false' statements fails to define the area of permissible conduct in a manner clear to employees and thus causes employees to refrain from engaging in protected activities." 600 F.2d at 137.

   Additionally, the Employer in *Lafayette* attempted to distinguish those cases on the ground that in *Lafayette*, unlike those cases, there is no context of other unfair labor practices to cause employees to reasonably fear being disciplined for unknowingly false statements. But the Board did not find this distinction significant. The Board said, "In our view, the rule has a reasonable tendency to chill protected activity even in the absence of other unlawful conduct." (At 828, fn 17.)

2. Employees should not participate in rumors and gossip…that could cause any type of damage to the facility or anyone employed by the facility. Disciplinary action can be taken against an employee whose statements slander or cause pain to anyone with malicious intent.

   Lawful – *Wilshire at Lakewood*, 343 NLRB 141 (2004)

   The Board adopted the ALJ's rationale for finding that the rule is not unlawful on its face. Thus, the rule is not vague, broad, or ambiguous. Further, it states disciplinary action could be instituted against an employee whose statements "slander or cause pain to anyone with a malicious intent." While the Board has held it is overly broad and restrictive for an employer to prohibit merely "false" statements, the same is not true for a prohibition against "malicious" statements. The term "malicious intent" denotes deliberate conduct sufficiently egregious to alert employees that such conduct will not be tolerated. Thus, the rule would not have a chilling effect on employees' Section 7 rights.

3. Prohibited: Verbal or other statements which are slanderous or detrimental to the company or any of the company's employees.

   Lawful – *Tradesman Intl*, 338 NLRB 460 (2002)

   The Board found employees would not reasonably believe the Employer's rule applies to statements protected by the Act. The rule here prohibits statements that are "slanderous or detrimental" rather than merely false. "Slander" is the utterance of false charges or misrepresentations which defame and damage another's reputation. "Detrimental" means obviously harmful. The Board has found similar rules to be lawful.

4. Offenses: Using abusive or profane language in the presence of, or directed toward, a supervisor, another employee, a resident, a doctor, a visitor, a member of a resident's family, or any other person on company property (the premises). (Threats and intimidation are covered by a different rule, as is verbal abuse.)

   Lawful – *Lutheran Heritage Village*, 343 NLRB 646 (2004)

   A rule prohibiting "abusive language" or "profane language" is not unlawful on its face. The Board found the rules serve legitimate business proposes: they are designed to maintain order in the workplace and to protect the employer from liability by prohibiting conduct that, if permitted, could result in such liability. The Board said it would not conclude that a reasonable employee would read the rule to apply to protected activity simply because the rule *could* be interpreted that way. To take a different analytical approach would require the Board to find a violation whenever the rule could

conceivably be read to cover Section 7 activity, even though that reading is unreasonable.

The Board declined to assume employees will be deterred from engaging in protected activities simply because the use of abusive or profane language might subject them to discipline. Rather, the Board agreed with the court in *Adranz ABB Daimlet-Benz Transp*., *N.A. Inc. v. NLRB*, 253 F.3d 19 (D.C. Cir. 2001), denying enf. in pertinent part to 331 NLRB 291 (2000), that "it is preposterous [to conclude] that employees are incapable of organizing a union or exercising their other statutory rights under the NLRB without resort to abusive or threatening language." (*Lutheran* at 648.)

5. While on duty you must follow the chain of command and report only to your immediate supervisor. If you are not satisfied with your supervisor's response, you may request a meeting with your supervisor and his or her supervisor. If you become dissatisfied with any other aspect of your employment, you may write the Manager or any member of management. …Do not register complaints with any representative of the client.

   Unlawful – *Guardsmark*, 344 NLRB 809 (2005)

   The Board found the rule explicitly trenches upon the right of employees under Section 7 to enlist the support of an employer's clients or customers regarding complaints about terms and conditions of employment.

6. Negative conversations about associates and/or managers are in violation of the Standards of Conduct that may result in disciplinary action.

   Unlawful – *Claremont Resort & Spa*, 344 NLRB 832 (2005)

   The rule provided no clarification or examples of conduct that would violate its rule. The Board concluded the rule would reasonably be construed by employees to bar them from discussing with their coworkers complaints about their managers that affect working conditions, thereby causing employees to refrain from engaging in protected activities.

7. Absolutely NO confrontation on the floor. Any type of negative energy or attitudes will not be tolerated [and] you will be sent home for THREE days and terminated if it happens again. If you cannot be a positive part of the team I don't want you on the team.

   Unlawful – *The Roomstore*, 357 NLRB No. 143 (2011)

The Board emphasized the rule cannot be read in isolation. Given the Employer's repeated warnings linking "negativity" to the employees' protected discussions concerning the effect of the commission discounts on their terms and conditions of employment, the employees would reasonably interpret the "negativity" rule as applying to protected activity.

8. Employees are subject to disciplinary action for: (1) indulging in harmful gossip and (2) exhibiting a negative attitude toward or losing interest in your work assignment.

   Lawful – *Hyundai*, 357 NLRB No. 80 (2011)

   The Board explained that in *Claremont Resort*, 344 NLRB 832, 832 (2005), the Board found a rule that prohibited "negative conversations about associates and/or managers" violated Section 8(a)(1) because employees would reasonably construe the prohibition to bar them from discussing concerns about their managers that affect working conditions. However, in *Hyundai*, the Employer's "harmful gossip" rule does not mention managers. Moreover, although the rule in *Claremont Resort* dealt with employee conversation generally, which would implicitly include protected concerted activity, the Employer's rule here merely prohibits gossip, which is defined as a "rumor or report of an intimate nature" or "chatty talk." Given all the circumstances, employees would not reasonably construe the Employer's rule against "indulging in harmful gossip" to prohibit Section 7 activity.

   The Board further explained the Employer's rule that prohibits "exhibiting a negative attitude toward or losing interest in your work assignment" does not expressly encompass protected activity and it applied only to "your work assignment." Thus, the wording of the Employer's rule is significantly less likely to be construed by employees as prohibiting protected activity.

9. Employees should refrain from saying anything to each other that might be deemed offensive or evoke a response from another employee.

   Unlawful – *Tenneco Automotive*, 357 NLRB No. 84 (2011)

   The Board found the directive was initiated as a response to union activity, i.e., the strike that just ended (timing), and the rule would reasonably be construed as referencing discussions about Section 7 activity. Because the directive would have tended to chill the exercise of employees' Section 7 rights to discuss the strike and the Union, it was unlawful regardless of whether the Employer intended it to have that effect.

10. Employees are subject to discipline for the inability or unwillingness to work harmoniously with other employees.

    Unlawful – *2 Sisters Food Group*, 357 NLRB No. 168 (2011)

    The Board found the rule does not define what it means to "work harmoniously" (or to fail to do so). Its patent ambiguity distinguishes it from those conduct rules found to be lawful in other cases. Thus, the rule is sufficiently imprecise that it could encompass any disagreement or conflict among employees, including those related to discussions and interactions protected by Section 7. Employees would reasonably construe the rule to prohibit such activity.

11. We will not tolerate any River's Bend employee being harassed or threatened for any reason, and ask that you report any such conduct to management so we can ensure you can continue to work in a non-threatening environment.

    Lawful – *River's Bend Health*, 350 NLRB 184 (2007)

    The Board found there was nothing unlawful in the Employer's request that employees report *threats* by other employees because there was evidence that an employee had been threatened. Under similar circumstances, the Board has held an employer may lawfully assure employees it will not allow them to be threatened by anyone and it may ask them to report such threats.

    The Board also found the Employer's request to report *harassment* was lawful. The Employer's policy did not explicitly restrict protected activity. As stated in *Lutheran*, "some instances of harassment are not protected by the Act." 343 NLRB at 648. Thus, a request that employees report instances of harassment to management is not tantamount to a request that employees report protected activity. Further, the Employer described its concern as the limited one of ensuring all employees can continue to work in a non-threatening environment. Reading it as a whole, employees would not reasonably construe the Employer's message as requesting reports on protected activity. Also, the Employer issued the policy in response to unprotected conduct (employee threatened) and the policy was not applied to protected conduct.

12. Courtesy is the responsibility of every employee. Everyone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership.

    Unlawful – *Knauz BMW*, 358 NLRB No. 164 (2012)

The Board found this rule unlawful because employees would reasonably construe its broad prohibition against "disrespectful" conduct and "language which injures the image or reputation of the Dealership" as encompassing Section 7 activity, such as employees' protected statements—whether to coworkers, supervisors, managers, or third parties who deal with the Employer— that object to their working conditions and seek the support of others in improving them. First, there is nothing in the rule, or anywhere else in the employee handbook, that reasonably suggests employee communications protected by Section 7 of the Act are excluded from the rule's broad reach. Second, an employee reading this rule would reasonably assume the Employer would regard statements of protest or criticism as "disrespectful" or "injur[ious] [to] the image or reputation of the Dealership." Ambiguous employer rules are construed against the employer.

13. Memo to Employees: Operational Changes – For several days now, we have been hearing that employees are intimidating other employees with comments that lack truthfulness and which only have the intention of affecting their emotional health. These employees have to desist from making these comments immediately (regarding subcontracting). …

    Unlawful – *Hospital San Cristobal*, 358 NLRB No. 89 (2012)

    The Board affirmed the ALJ's decision that the rule unlawfully prohibits employees from having discussions related to the Employer's plan to subcontract the work performed by its respiratory therapy technicians. Under Section 7 of the Act, employees have the right to engage in concerted activities for their mutual aid or protection. Section 8(a)(1) of the Act makes it unlawful for an employer (via statements, conduct, or adverse employment action such as discipline or discharge) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. See *Brighton Retail, Inc*., 354 NLRB No. 62, slip op. at 7 (2009). Employees would reasonably construe it to prohibit Section 7 activity. The rule was also issued in response to union activity.

B. Confidential and Proprietary Information

14. The amount of your paycheck is a confidential matter between you and the managers of LWD, Inc. Please do not discuss it with any employee of the company other than your supervisor or plant manager.

    Unlawful – *LWD, Inc*., 309 NLRB 214 (1992)

The Board affirmed the ALJ's decision which cited *Triana Industries*, 245 NLRB 1258 (1979). In *Triana*, the Board held Section 7 "encompasses the right of employees to ascertain what wage rates are paid by their employer, as wages are a vital term and condition of employment." Furthermore, such discussion may be necessary as a precursor to seeking union assistance and is clearly concerted activity. Thus, here the rule's existence constitutes a clear restraint on employees' Section 7 right. (See also *Bigg's Foods*, 347 NLRB 425 n.4 (2006), a rule prohibiting employees from discussing their own or their "fellow employees" salaries with "anyone outside the company" violates Section 8(a)(1).)

15. Pursuant to Company policy…you may be required to deal with many types of information that are extremely confidential and … the utmost discretion must be observed. It is essential that no information of this kind is allowed to leave the department, other than by activity/job requirements, either by documents or verbally. A list, which is not all-inclusive, of the types of information considered confidential is shown below: disciplinary information; grievance/complaint information; performance evaluations; salary information; salary grade; types of pay increases; termination data for employees who have left the company.

    Information should be provided to employees outside the department or to those outside the Company only when a valid need to know can be shown to exist. Check with Management if you have any doubt or questions.

    Unless there is a need for it in the normal course of business, personal information concerning individual employees should not be discussed with members of your own group. …Any breach or violation of this policy will lead to disciplinary action up to and including termination.

    Unlawful – *Double Eagle Hotel & Casino*, 341 NLRB 112 (2004)

    The Board found the Employer's confidentiality rule leaves employees with nothing to construe – it specifically defines confidential information to include wages and working conditions. It also explicitly warns employees that any violation of this policy could lead to termination. Thus, this rule that on its face threatens discipline, expressly prohibits the discussion of wages and other terms and conditions of employment, plainly infringes upon Section 7 rights.

16. Employee also understands that the terms of this employment, including compensation, are confidential to Employee and the NLS Group. Disclosure of these terms to other parties may constitute grounds for dismissal.

Unlawful – *The NLS Group*, 355 NLRB No. 169 (2010)

In *The NLS Group*, 352 NLRB 744 (2008), with just two members, the Board disagreed with the ALJ and the Board found this rule unlawful. The Board concluded that by the rule's clear terms, it precludes employees from discussing compensation and other terms of employment with "other parties." Employees would reasonably understand that language as prohibiting discussions of the compensation with union representatives. Accordingly, the rule is unlawfully overbroad. In 2010 a three-member Board affirmed its earlier conclusion that the rule is unlawful.

17. Unacceptable conduct: Divulging Hotel-private information to employees or other individuals or entities that are not authorized to receive that information.

Lawful – *Lafayette Park Hotel*, 326 NLRB 824 (1998)

The Board concluded the rule reasonably is addressed to protect the Employer's interest in confidentiality and does not implicate employee Section 7 rights. The Board explained businesses have a substantial and legitimate interest in maintaining the confidentiality of private information, including guest information, trade secrets, contracts with suppliers, and a range of other proprietary information. Although the term "hotel-private" is not defined in the rule, employees in the Board's view would reasonably understand the rule is designed to protect that interest rather than to prohibit the discussion of their wages. Thus, just as employees would not reasonably construe the rule as precluding them from disclosing their wage information in the normal course of events to banks and credit agencies, they also would not reasonably construe the rule as precluding them from discussing their wage information with other employees.

18. Employees will not reveal confidential information regarding our customers, fellow employees, or Hotel employees.

Unlawful – *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999)

The Board majority distinguished this rule from the confidentiality rule found lawful in *Lafayette* on the basis that, unlike that rule, which made no reference to disclosure of information about employees, the rule in *Flamingo* specifically prohibited employees from revealing confidential information about "fellow employees."

19. You're responsible for the appropriate use and protection of company and third party proprietary information, including information assets and intellectual property. Information is any form (printed, electronic or inherent knowledge) of company or third party proprietary information.

Intellectual property includes, but is not limited to: …trade secrets and non-public information; customer and employee information, including organizational charts and databases; financial information; patents, copyrights, trademarks, service marks, trade names and goodwill.

While it's not improper for you to use proprietary information in the general course of doing business, you must safeguard it against loss, damage, misuse, theft, fraud, sale, disclosure or improper disposal. Always store proprietary information in a safe place.

You may not use or access the proprietary information of the company or others for personal purposes or disclose non-public information outside the company. Doing so could hurt the company, competitively or financially. …

Lawful – *Mediaone*, 340 NLRB 277 (2003)

The Board concluded the rule to be reasonably read as it only prohibits disclosure of the Employer's information assets and intellectual property, which is private business information the Employer has a right to protect. Although the phrase "customer and employee information, including organizational charts and databases" is not specifically defined in the rule, it appears within the larger provision prohibiting disclosure of "proprietary information, including information assets and intellectual property." Thus, employees, reading the rule as a whole, would reasonably understand it was designed to protect the confidentiality of the Employer's proprietary business information rather than to prohibit the discussion of employee wages.

20. To ensure the company presents a united, consistent voice to a variety of audiences, these are some of your responsibilities related to communications . . . . Do not contact the media, and direct all media inquiries to the Home Services Communications department.

Unlawful - *DirectTV U.S. DirecTV Holdings*, LLC, 359 NLRB No. 54 (2013).

The Board concluded employees would reasonably construe the unequivocal language in the rule as prohibiting any and all protected communications to the media regarding a labor dispute. It is settled that Section 7 of the Act encompasses employee communications about labor disputes with newspaper reporters. See *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007). The Board noted that the rule does not distinguish unprotected communications, such as statements that are maliciously false, from those that are protected.

21. Without appropriate approval, under no circumstances shall you provide information about the company to the media. The external communications of our employees are critical to the way the Company is perceived by guests, business associates, the press, regulators and the general public. … You are not, under any circumstances permitted to communicate any confidential or sensitive information concerning the Company or any of its employees to any non-employee without approval from the General Manager or the President.

    Unlawful – *Double Eagle Hotel & Casino*, 341 NLRB 112 (2004)

    The Board found this rule specifically referenced an unlawful confidentiality rule elsewhere in the rules and this part specifically prohibits "communicat[ion of] any confidential or sensitive information concerning the Company or any of its employees to any non-employee" without the Employer's approval. Thus, employees seeking to understand this rule must consider it in tandem with the fact that confidential information is defined as wages and working conditions elsewhere in the rules. Thus, in light of the link, there is a violation. (See also *Crowne Plaza Hotel*, 352 NLRB 382 (2008) regarding rules about communicating with the media.)

22. If law enforcement wants to interview or obtain information regarding a DIRECTV employee, whether in person or by telephone/email, the employee should contact the security department in El Segundo, Calif., who will handle contact with law enforcement agencies and any needed coordination with DIRECTV departments.

    Unlawful - *DirectTV U.S. DirecTV Holdings*, LLC, 359 NLRB No. 54 (2013)

    The Board concluded the Employer's broadly written rule would lead reasonable employees to conclude that they would be required to contact Respondent's security department before cooperating with a Board investigation. The Respondent's employees would reasonably construe Board agents as "law enforcement" with respect to the labor matter under investigation. The Board also concluded that the rule was overbroad insofar as it affects employee contact with other law enforcement officials about wages, hours, and working conditions.

23. Employees making a complaint are not to discuss the matter with their coworkers while the Employer's investigation is ongoing.

    Unlawful – *Banner Estrella Medical Center*, 358 NLRB No. 93 (2012)

    In *Banner*, the HR Consultant routinely asked employees making a complaint not to discuss the matter with their coworkers while the

Employer's investigation was ongoing. (The rule was not in writing.) The Board explained that to justify a prohibition on employee discussion of ongoing investigations, an employer must show that it has a legitimate business justification that outweighs employees' Section 7 rights. See *Hyundai America Shipping Agency*, 357 NLRB No. 80, slip op. at 15 (2011) (no legitimate and substantial justification where employer routinely prohibited employees from discussing matters under investigation). In *Banner* the Board found the Employer's generalized concern with protecting the integrity of its investigations is insufficient to outweigh employees' Section 7 rights. Rather, in order to minimize the impact on Section 7 rights, it was the Employer's burden "to first determine whether in any give[n] investigation witnesses need[ed] protection, evidence [was] in danger of being destroyed, testimony [was] in danger of being fabricated, or there [was] a need to prevent a cover up." *Hyundai* at 15. The Employer's blanket approach clearly failed to meet those requirements. Accordingly, the rule violates Section 8(a)(1) of the Act.

Further, in *Fresh & Easy Neighborhood Market*, 358 NLRB No. 65 (2012), the Board found that when a supervisor told an employee it was none of his business to talk about another employee's discipline if the employee did not want to share that information and he could be disciplined if he did not stop, the Board found the Employer orally promulgated an unlawful rule.

Yet compare *Caesar's Palace*, 336 NLRB 271 at 272 (2001), where the confidentiality rule imposed during a drug investigation was held lawful where the rule was necessary to ensure the safety of witnesses and to preserve the integrity of the investigation.

24. Record of Counseling forms state: This counseling session is confidential and should only be discussed with management or Human Resources.

Unlawful – *Station Casinos, LLC*, 358 NLRB No. 153 (2012)

The Board adopted the ALJ's finding that the Employer violated Section 8(a)(1) by maintaining and enforcing an overly-broad confidentiality rule. Employees could reasonably construe the rule to prohibit Section 7 activity such as expressing concerns about discipline to union representatives or other employees. Although the rule does not specify a consequence for employees who did not comply with the rule, the rule remains coercive and violates Section 8(a)(1) because it could reasonably be interpreted as presenting employees with the unlawful choice of either complying with the rule (at the expense of exercising their Section 7 rights) or breaking the rule and risking the ire of their employer.

C. Employee Conduct

25. Unacceptable conduct: Being uncooperative with supervisors, employees, guests and/or regulatory agencies or otherwise engaging in conduct that does not support the Lafayette Park Hotel's goals and objectives.

    Lawful – *Lafayette Park Hotel*, 326 NLRB 824 (1998)

    The GC and Union argued that employees may reasonably believe it is unacceptable to actively support union organizing and that the rule prohibits them from participating in protected activities. But the Board concluded the mere maintenance of this rule would not reasonably tend to chill employees in the exercise of their Section 7 rights. In providing that it is unacceptable for employees to engage in conduct that does not support the Employer's "goals and objectives," the rule addresses legitimate business concerns, including, as the rule specifically states, being "uncooperative with supervisors, employees, guests and/or regulatory agencies." The Board found no ambiguity in this rule as written. Rather, any arguable ambiguity arises only through parsing the language of the rule, viewing the phrases "goals and objectives" in isolation, and attributing to the Employer an intent to interfere with employee rights. Further, the Employer has not by other actions led employees reasonably to believe the rule prohibits Section 7 activity, the rule has not been enforced against employees for engaging in such activity, there is no evidence the Employer promulgated the rule in response to protected activity, and there is no antiunion animus.

26. Unacceptable conduct: Unlawful or improper conduct off the hotel's premises or during non-working hours which affects the employee's relationship with the job, fellow employees, supervisors, or the hotel's reputation or good will in the community.

    Lawful – *Lafayette Park Hotel*, 326 NLRB 824 (1998)

    In the Board's view employees would not reasonably fear the Employer would use this rule to punish them for engaging in protected activity that the employer may deem to be improper. Employees would believe this rule was intended to reach serious misconduct, not conduct protected by the Act. The Board has stated the maintenance of a similar rule (which, however, additionally prohibited "unseeming" conduct) is unlawful. See *Cincinnati Suburban Press,* 289 NLRB 966 (1988). That finding, however, was made in the context of the employer's "actions" in that case, which were the rule had been enforced against union activity in violation of Section 8(a)(3). 289 NLRB at 967-968. Here,

there is no such context and no factual basis for reasonable employees to view the rule as prohibiting Section 7 activity. Thus, we are left with the language of the rule itself.

27. Employees are expected to represent the company in a positive and ethical manner and have an obligation both to avoid conflicts of interest and to refer questions and concerns about potential conflicts to their supervisor….

    Employees are not to engage, directly or indirectly either on or off the job, in any conduct which is disloyal, disruptive, competitive, or damaging to the company. Such prohibited activity also includes any illegal acts in restraint of trade. Tradesmen defines such disloyal, disruptive, competitive, or damaging conduct as including, but not limited to, employment with another employer or organization while employed….

    Lawful – *Tradesmen Intl*, 338 NLRB 460 (2002)

    The Board found that like the rules at issue in *Lafayette,* the Employer's rule here addresses legitimate business concerns. Moreover, unlike the rules in *Lafayette*, the Employer's rule also gives examples of types of conduct it proscribes. These examples – illegal acts in restraint of trade and employment with another organization while employed by the Employer – would clarify to a reasonable employee that Section 7 activity is not the type of conduct proscribed by the rule. The Board does not believe that the Employer's prohibition on "disloyal, disruptive, competitive, or damaging" conduct can reasonably be read as encompassing Section 7 activity. Reading this language in context, employees would recognize it was intended to reach conduct similar to the examples given in the rule, not conduct protected by the Act. See *Aroostook County Regional Ophthalmology Center*, 81 F.3d 209, 212-213 (D.C. Cir. 1996) (relying on context of rule and its location in the manual to conclude that rule was not unlawful on its face.) The GC must prove the rules can reasonably be interpreted in a way that infringes on Section 7 activity. (at 460)

28. Employees are prohibited from engaging in off-the-job conduct which has a negative effect on the Company's reputation or operation or employee morale or productivity.

    Lawful – *Albertson's*, 351 NLRB 254 (2007)

    The Board found employees reasonably would believe the rule was intended to reach serious misconduct, not protected activity.

29. Offenses: Harassment of other employees, supervisors and any other individuals in any way. ("Sexual harassment" is covered by a different rule.)

    Lawful – *Lutheran Heritage Village*, 343 NLRB 646 (2004)

    Employees would not be discouraged from engaging in Section 7 activity for fear of contravening the Employer's rule. The Board saw no justification for concluding that employees will interpret the rule unreasonably to prohibit conduct that does not rise to the level of harassment, or to presume that the Employer will unreasonably apply it in that manner.

30. Employees are forbidden from engaging in any type of conduct, which is or has the effect of being injurious, offensive, threatening, intimidating, coercing, or interfering with fellow Team Members or patrons.

    Lawful – *Palms Hotel & Casino*, 344 NLRB 1363 (2005)

    The Board found the prohibited conduct is not inherently entwined with Section 7 activity. Nor are the rule's terms so amorphous that reasonable employees would be incapable of grasping the expectation that they comport themselves with general notions of civility and decorum in the workplace. Although ambiguities in a document are to be construed against its drafter, here the rule does not address Section 7 activity, and the mere fact that it could be read in that fashion will not establish its illegality.

31. The use of portable electronic equipment during worktime is prohibited, and the use of cameras for recording images of patients, and/or hospital equipment, property, or facilities is prohibited.

    Lawful – *Flagstaff Medical Center*, 357 NLRB No. 65 (2011)

    The Board found the rule is not overbroad. Employees would reasonably interpret the rule as a legitimate means of protecting the privacy of patients and their hospital surroundings, not as a prohibition of protected activity.

D. Walking Off the Job

32. Offenses: Engaging in unlawful strikes, work stoppages, slowdowns, or other interference with production at any Martin Luther Memorial Home facility or official business meeting.

    Unlawful – *Lutheran Heritage Village*, 343 NLRB 646, 655 (2004)

The rule can reasonably be read as encompassing Section 7 activity. For example, the rule as written, would prohibit employees from engaging in protected concerted activities concerning wages, conditions of employment, or safety issues if it interfered with production or a business meeting. It could be construed to prohibit employees from voicing concerns over terms and conditions of employment during a group meeting if the concerns escalated so as to interfere with production. While the first portion of the rule regarding unlawful strikes, work stoppages, and slowdowns protects legitimate business interests, the later portion of the rule is overly broad and has a tendency to chill employees in the exercise of their protected rights.

33. Prohibited: Abandoning your job by walking off the shift without permission of your supervisor or administrator.

    Lawful – *Wilshire at Lakewood*, 343 NLRB 141 (2004)

    The Board found employees would not reasonably read the rule as prohibiting them from engaging in all strikes or similar protected concerted activity. The Employer operates a nursing home. Thus, in context, employees would necessarily read the rule as intended to ensure that nursing home patients are not left without adequate care during an ordinary workday. The Board has made clear that strikers may lose the protection of the Act if they fail to take reasonable precautions to protect the employer's operations from foreseeable imminent danger due to sudden cessation of work. *Bethany Medical Center*, 328 NLRB 1094 (1999) (catheterization laboratory employees).

34. Leaving a department or the plant during a working shift without a supervisor's permission, stopping work before shift ends, or taking unauthorized breaks is prohibited.

    Lawful - *2 Sisters Food Group*, 357 NLRB No. 168 (2011)

    The Board found these rules do not explicitly restrict Section 7 activities and an employee reading these rules would not reasonably construe them to prohibit protected activity. In *Labor Ready, Inc*., 331 NLRB 1656 at fn. 2 (2000), the Board held that a rule prohibiting walking off the job was unlawfully overbroad. Employees would reasonably understand such a rule to prohibit Section 7 activity, such as a strike, given the common use of the term "walk out" as a synonym for a strike. In contrast, the rules here prohibit only leaving a department or plant during a shift without permission, stopping work before a shift ends, and taking unauthorized breaks.

35. Prohibited: Walking off the job and/or leaving the premises during working hours without permission.

    Unlawful – *Ambassador Services, Inc*., 358 NLRB No. 130 (2012)

    Consistent with the precedent in *Labor Ready*, supra, where the Board found substantially identical language to be overly broad, the Board here found this rule that prohibits "walking off the job" would also reasonably be construed as prohibiting Section 7 activity. Additionally, in *Ambassador* the Board distinguished this rule from a similar rule in *Wilshire at Lakewood*, supra (rule 33). In *Wilshire*, the employer's handbook prohibited employees from abandoning [their] job by walking off the shift without the permission of [their] supervisor or administrator. The employer, however, operated a nursing home for sick or infirm elderly patients whose "mission" was "to ensure adequate care for its patients." The Board held that, considering the rule in this context, employees would necessarily read the rule as intended to ensure that nursing home patients are not left without adequate care during an ordinary workday. In *Ambassador* the Board refused to apply its rationale from the *Wilshire* case and specifically noted that it has never extended *Wilshire* beyond the context of employees who are directly responsible for patient care.

36. (1) You are expected to be at your work station during working hours and you should obtain permission from your supervisor or the plant manager before leaving the work station or plant. (2) Leaving the plant without your supervisor/group leader's permission is considered a major violation of the attendance policy and such an incident will be treated as a voluntary quit. (3) Leaving your work station without permission or approval will be considered cause for disciplinary action. (4) Walking off the job or leaving the plant without permission or notifying the supervisor will be considered cause for immediate discharge. (5) Willfully restricting production, impairing or damaging product or equipment, interfering with others in the performance of their jobs or engaging or participating in any interruption of work will be considered cause for immediate discharge.

    1-3 **Lawful**, 4-5 **Unlawful** – *Heartland Catfish Co*., 358 NLRB No. 125 (2012)

    For 1-3, the Board found a reasonable employee would read these rules to prohibit only unauthorized leaves or breaks, not to prohibit conduct protected by Section 7. For 4, the Board found it to be overbroad. For 5, the Board concluded employees would reasonably interpret the Employer's rule to prohibit participation in a protected strike.

E. Fraternization

37. Employees are not permitted to use the restaurant or cocktail lounge for entertaining friends or guests without the approval of the department manager.

    Lawful – *Lafayette Park Hotel*, 326 NLRB 824 (1998)

    In the Board's view, a reasonable employee would not interpret this rule as requiring prior approval for Section 7 activity. There are legitimate business reasons for such a rule. Thus, mere maintenance of this rule would not reasonably tend to chill employees in the exercise of their Section 7 rights. Compare *Brunswick Corp*., 282 NLRB 794, 795 (1987). There the Board found unlawful a rule which required employees to obtain the employer's permission before engaging in union solicitation in work areas during nonworking time, and required the employer's authorization in order to solicit in the lunchroom and lounge areas during breaks and lunch periods. Thus, in *Brunswick*, union solicitation was directly implicated.

38. Employees are not allowed to fraternize with hotel guests anywhere on hotel property.

    Lawful – *Lafayette Park Hotel*, 326 NLRB 824 (1998)

    The Board found that even though "fraternize" is not defined, the rule is not ambiguous. Employees would recognize the legitimate business reasons for which such rule is promulgated, and would not reasonably believe it reaches Section 7 activity. Thus, the maintenance of this rule does not chill employee rights.

F. Social Media

The General Counsel has three reports concerning social media cases (OM 12-59 on May 30, 2012, OM 12-31 on January 24, 2012, and OM 11-74 on August 18, 2011) and Advice keeps issuing more memos on the matter. The memos explain that to determine whether the various rules could reasonably chill Section 7 protected activity in violation of Section 8(a)(1), we apply the principles in *Lafayette* and *Lutheran*. Below we will review some of rules that apply to social media.

39. No Team Member is required to participate in any social media or social networking site (unless required as a part of the job), and no Team Member should ever be pressured to "friend," "connect," or otherwise communicate with another Team Member via a social media outlet.

Lawful – *Giant Eagle*, 6-CA-37260, Advice Memorandum dated June 22, 2011

Advice concluded the Employer's admonition in the first paragraph that no employee should ever be pressured to 'friend" or otherwise connect with a co-employee via social media cannot be reasonably read to restrict Section 7 activity. The rule is sufficiently specific in its prohibition against pressuring co-employees and clearly applies only to harassing conduct. It cannot reasonably be interpreted to apply more broadly to restrict employees from attempting to "friend" or otherwise contact their colleagues for the purpose of engaging in protected activity.

40. Team Members may not reference (including through use of photographs), cite, or reveal personal information regarding fellow Team Members, company clients, partners, or customers without their express consent.

Unlawful – *Giant Eagle*, 6-CA-37260, Advice Memorandum dated June 22, 2011

Advice concluded "personal information" is unduly broad and can reasonably be interpreted as restraining Section 7 activity is unlawful. A rule that precludes employees from discussing terms and conditions of employment, or sharing information about themselves or their fellow employees with each other or with non-employees violates Section 8(a)(1). Nothing clarifies or narrows the scope of this guideline so as to exclude Section 7 activity. Thus, the rule would reasonably be interpreted as prohibiting employees' rights to discuss wages and other terms and conditions of employment.

G. Arbitration and Dispute Resolution

41. Open Door Policy: The Company promotes an atmosphere whereby employees can talk freely with members of the management staff. Employees are encouraged to openly discuss with their supervisor any problems so appropriate action may be taken. If the supervisor cannot be of assistance, Human Resources is always available for consultation and guidance.

    Resolution Opportunity Program: Employees are encouraged to bring their concerns about work-related situations to the attention of management through the "open door" atmosphere. If the employee believes that his or her concern would best be addressed using a more formal procedure, he or she may use the [ROP] process to seek management review of his or her concern, including concerns dealing with workplace conditions, conditions of employment, treatment of the

employee by management, supervisors, or other employees, or the application of Company policies, practices, rules, regulations, and procedures to the employee's individual situation. Each employee using the resolution opportunity program must represent his or her self in the process – no employee may represent, appeal, or speak on behalf of another employee during the process except as a witness as needed by the investigating manager.

Lawful – *Internet Stevensville,* 350 NLRB 1349 (2007)

The Board found the resolution opportunity program does not foreclose employees from using other avenues (e.g., the union, fellow employees, the NLRB) to address their workplace concerns, or require employees to invoke the resolution opportunity program first, or at all. Indeed, the policy makes clear that employees "may," in their discretion, invoke it if they believe that "their concerns about work-related situations" would "best be addressed" using the procedure set forth in the policy. Therefore, the resolution opportunity program would not reasonably be understood to forestall employees from acting in concert to deal with management about matters affecting their terms and conditions of employment.

42. As a condition of employment, all current Employees must execute the Employer's "Mutual Arbitration Agreement" (MAA), which provides that:

All disputes and claims relating to the employee's employment with the Employer will be determined exclusively by final and binding arbitration;

The arbitrator may hear only Employee's individual claims, will not have the authority to consolidate the claims of other employees, and does not have authority to fashion a proceeding as a class or collective action or to award relief to a group or class of employees in one arbitration proceeding; and

The signatory employee waives the right to file a lawsuit or other civil proceeding relating to Employee's employment with the Employer and the right to resolve employment-related disputes in a proceeding before a judge or jury.

Unlawful – *D.R. Horton*, 357 NLRB No. 184 (2012)

The Agreement requires employees, as a condition of employment, to refrain from bringing collective or class claims in any forum: in court, because the Agreement waives their right to a judicial forum; in arbitration, because the Agreement provides that the arbitrator cannot consolidate claims or award collective relief. The Agreement thus clearly and expressly bars employees from exercising substantive rights that have long been held protected by

Section 7. Employees reasonably could believe the Agreement bars or restricts their right to file charges with the NLRB.

See also *Supply Technologies*, 359 NLRB No. 38 (2012), where the Board found a violation because the ambiguity of the mandatory grievance-arbitration program is such that reasonable employees would construe it as interfering with their right to file ULP charges or access other Board processes.

H. At-Will Employment

43. Agreement and Acknowledgement of Receipt of Employee Handbook: … I further agree that the at-will employment relationship cannot be amended, modified or altered in any way.

    Unlawful – *American Red Cross Arizona Blood Services*, Case 28-CA-23443, JD(SF)-04-12 at 20-21 (February 1, 2012)

    The ALJ held that by specifically agreeing the at-will agreement could not be changed in any way, the employee essentially waived the right to advocate concertedly to change his at-will status. For all practical purposes, the clause in question premises employment on an employee's agreement not to enter into any contract, to make any efforts, or to engage in conduct that could result in union representation and in a collective-bargaining agreement, which would amend, modify, or alter the at-will relationship. Such a clause would reasonably chill employees who were interested in exercising their Section 7 rights.

44. The relationship between you and Mimi's Café is referred to as "employment at will." This means that your employment can be terminated at any time for any reason, with or without cause, with or without notice, by you or the Company. No representative of the Company has the authority to enter into any agreement contrary to the foregoing "employment at will" relationship. Nothing contained in this handbook creates an express or implied contract of employment.

    Lawful – *SWH Corp. d/b/a Mimi's Café*, 28-CA-084365, Advice Memorandum dated October 31, 2012

    Advice concluded the policy stating that "[n]o representative of the Company has authority to enter into any agreement contrary to the … 'employment at will' relationship" does not violate Section 8(a)(1). Advice concluded this provision would not reasonably be interpreted to restrict an employee's Section 7 right to engage in concerted attempts to change his at-will status. The provision does not require employees to refrain from seeking to change their at-will status or to agree their at-will status cannot be changed in any way, but merely highlights the Employer's policy that its own

representatives are not authorized to modify an employee's at-will status.

Advice also concluded, for the same reasons as in *Mimi's Café*, that the following at-will employment policies are lawful:

> *Rocha Transportation*, 32-CA-086799, Advice Memorandum dated October 31, 2012 ("No manager, supervisor, or employee … has any authority … to make an agreement for employment other than at-will. Only the president of the Company has the authority to make any such agreement and then only in writing.").
>
> *Fresh & Easy Neighborhood Market*, 21-CA-085615, Advice Memorandum dated February 4, 2013 ("Any such agreement that changes your at-will employment status must be explicit, in writing, and signed by both a[n Employer] executive and you. … I further understand that the foregoing provision regarding my status as an at-will employee may only be changed by a written agreement signed by a[n Employer] executive and me that refers specifically to this provision.")
>
> In *Windsor Care Centers*, 32-CA-087540, Advice Memorandum dated February 4, 2013, the agreement in part states, "Only the Company President is authorized to modify the Company's at-will employment policy or enter into any agreement contrary to this policy. Any such modification must be in writing and signed by the employee and the President." Advice distinguished this rule from the rule that was found unlawful by an ALJ in *American Red Cross Arizona Blood Services*, Case 28-CA-23443, JD(SF)-04-12, which is described above in rule 48.

I. Solicitation and Distribution

The right of employees to solicit on an employer's premises must generally be afforded subject only to the restriction that it be on non-working time. The right of employees to distribute literature on an employer's premises must also generally be afforded subject to the restrictions that it be done on non-working time and in non-working areas of the employer's facility. *See Stoddard-Quirk Mfg. Co*., 138 NLRB 615 (1962). Solicitation by employees may not be prohibited during "company time" or during "working hours" as these terms connote periods from the beginning to the end of the workshift that include an employee's own time. *See Our Way, Inc*., 268 NLRB 394 (1983). Distribution of literature may be prohibited even in non-working areas if an employer establishes a business justification for such a rule (i.e. in a high explosives plant the distribution of materials may present a safety hazard that justifies a ban on

all distribution of materials). *Id.* at 621. A no-solicitation or no-distribution rule which is presumptively valid on its face may, however, be unlawful if the rule was discriminatorily promulgated or enforced. *See, e.g., Reno Hilton Resorts, 320 NLRB 197 (1995).*

The Board has carved out, for certain industries, special rules for assessing the legality of employee no-solicitation rules. For example, an employer in the health care industry must generally allow solicitation and distribution of literature by employees on non-working time in non-working areas absent a showing by the employer that such conduct will disrupt healthcare operations or disturb patients. *See Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978); *St. John's Hospital & School of Nursing*, 222 NLRB 1150 (1976).

Employers in the retail industry may prohibit solicitation by employees in the sales area even on their nonworktime because such solicitation may disrupt a retail store's business. *See J.C. Penney Co*., 266 NLRB 1223 (1983). The Board has treated gambling casinos as akin to retail stores. Employers who operate gambling casinos may prohibit employees from soliciting in the casino's gambling areas and adjacent aisles and corridors frequented by customers. *See Double Eagle Hotel & Casino*, 341 NLRB 112 (2004). In cases involving hotels, the Board has recognized that a hotel has some customer service areas that are not easily identifiable. A hotel employer's interest in customer service, however, does not entitle it to designate all public areas of its facility, including parking lots, sidewalks, and public restrooms, to be guest service areas and thereby permit an employer to prohibit employee solicitation at any time. *See Crowne Plaza Hotel*, 352 NLRB 382 (2008).

No-talking rules are analyzed under a different standard than no-solicitation rules. An employer can prohibit employees from talking about a union or about their terms and conditions of employment during times when they are supposed to be working if that prohibition also extends to other subjects not associated or connected with the employees' work tasks. See *Scripps Memorial Hospital Encinitas*, 347 NLRB 52 (2006).

Here are some examples of rules involving solicitation and/or distribution rules.

45. Employees shall not engage in any kind of solicitation during times they are expected to be working.

    Lawful – *Tradesman Intl*, 338 NLRB 460 (2002)

    For reasons stated by the judge, the Board agreed this rule was lawful. The Employer did not prohibit employees from carrying on casual conversation with one another during the course of their workday over such subjects as sports. The GC did not allege the

policy is facially invalid. The GC rather alleges the rule "disparately" prohibits employees from engaging in protected activity. No evidence was introduced to show the Employer's no-solicitation rule was ever disparately, or otherwise, invoked to prohibit employees from engaging in concerted protected activity, including union activity. Thus, the rule does not violate Section 8(a)(1) of the Act.

46. You may not solicit employees on company property. The company firmly believes that to help employees do their jobs effectively, they shouldn't be disturbed or disrupted by solicitors as they perform their duties. You may not solicit another employee in work areas during work time.

Lawful – *Mediaone*, 340 NLRB 277 (2003)

The first sentence above, which is the overview of the employee solicitation policy, appears on page 45 of the employee handbook and directs the reader to page 69. The last two sentences above, which appear on page 69 of the employee handbook under the heading "Non-Solicitation", set forth the pertinent portion of the full policy regarding employee solicitation. The Board noted that the provision on page 45 of the handbook, if read alone, would be unlawful. *J.C. Penney Co*., 266 NLRB 1223, 1224 (1983) (restrictions on "solicitation in nonworking areas during nonworking time are presumptively invalid"). But the Board stated that the no-solicitation provisions on page 45 cannot be read in isolation, particularly given the fact that the reader is directed to page 69 where the actual no-solicitation policy is set forth in detail. Thus, the Board concluded employees would clearly understand that the valid rule on page 69 is the employer's sole no-solicitation policy and that the material on page 45 is merely an incomplete and shorthand reference to the complete policy found on page 69.

47. Never discuss Company issues, other employees, and personal problems to or around our guests. Be aware that having a conversation in public areas with another employee will in all probability be overheard.

Unlawful – *Double Eagle Hotel & Casino*, 341 NLRB 112 (2004)

The Board viewed this rule analogous to a no-solicitation rule and found it went too far. The rule is not limited to the casino floor, but extended to all "public areas," which could include restrooms, public bars and restaurants, sidewalks and parking lots.

48. Selling or soliciting anything in the building or on company property (the premises) whether you are on duty or off duty, unless you have been given written permission by the Administrator.

Unlawful – *Lutheran Heritage Village*, 343 NLRB 646 (2004)

The Board adopted the ALJ's conclusions that the rule has a reasonable tendency to chill employees in the exercise of their Section 7 rights. The rule prohibits soliciting anything in the building whether an employee is on duty or off duty. It makes no allowances for solicitation while an employee is on break, before or after regular duty hours and does not exclude from its coverage the cafeteria or parking areas. Moreover, the rule requires employees to obtain the employer's permission before engaging in solicitation. Such a requirement as a precondition to engaging in protected activity on an employee's free time and in nonwork areas is unlawful. *Brunswick Corp*., 282 NLRB 794 (1987).

See also *2 Sisters Food Group*, 357 NLRB No. 168 (2011), where the Board found a violation for rule that prohibited unauthorized soliciting of contribution on [Employer] premises.

49. Solicitation and distribution of literature not pertaining to officially assigned duties is prohibited at all times while on duty or in uniform, and any known or suspected violation of this order is to be reported to your immediate supervisor immediately.

Unlawful – *Guardsmark*, 344 NLRB 809 (2005)

The Board stated it is well established that employees have the right under Section 7 to engage in union solicitation on the employer's premises during nonwork time, unless the employer can demonstrate the need to limit the exercise of that right in order to maintain production or discipline. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 (1945), enfd. 142 F.2d 1009 (5th Cir.), cert. denied 323 U.S. 730 (1944). Accordingly, the Board has consistently held that (absent such a justification) "a rule prohibiting employee solicitation, which is not by its terms limited to working time, would violate [Section] 8(a)(1) …" *Lutheran* at 646 fn. 5. Here, the rule undoubtedly places restrictions on protected off-work solicitation. Further, a reasonable employee could read the rule as applying to all solicitation by employees wearing all or part of their uniforms, regardless of whether the Employer's insignia were visible.

J. Access

The Board analyzes rules governing the access rights of off-duty employees to an employer's facility under the three part test articulated in

Tri-County Medical Center, 222 NLRB 1089, 1089 (1976). There, the Board held that a rule prohibiting access to off-duty employees would be valid only if it

(1) limits access solely to the interior of the facility and other working areas,
(2) is clearly disseminated to all employees, and
(3) applies to off-duty employees seeking access to the plant for any purposes, not just union activity.

In addition, a rule denying off-duty employees access to parking lots, gates, and other outside nonworking areas is invalid unless sufficiently justified by business reasons.

50. Solicitation and distribution "at all times on Target premises" for "commercial purposes and solicitation for "personal profit"

Unlawful – *Target, Corp.,* 359 NLRB No. 103 (2013)

During the Employer's anti-Union campaign it had characterized the Union as a business attempting to make money, employees would reasonably conclude that the ban on solicitation for "commercial purposes" included lawful solicitation on behalf of the Union.

51. Unauthorized presence on the premises while off duty is prohibited.

Unlawful – *TeleTech Holdings*, 333 NLRB 402, 404 (2001)

Applying *Tri-County,* the Board found the rule is both substantially overbroad and improperly requires prior authorization for off-duty access. See *Brunswick Corp*., 282 NLRB 794, 795. (1987)

52. Off-duty employees barred employees from the premises during their off-duty hours.

Unlawful – *Target, Corp.,* 359 NLRB No. 103 (2013)

The Board ruled the policy violated the Act because the bar on access was not limited to the interior of the store as required by *TeleTech Holdings, Inc.*, 333 NLRB 402 (2001), and the Employer failed to provide a sufficient justification for its prohibition on access to areas outside of the store, such as parking lots, as required by *Tri-County Medical Center*, 222 NLRB 1089 (1976).

53. Returning to Work Premises: Associates are not permitted in the interior areas of the hotel more than fifteen minutes before or after their work shift. Occasionally, circumstances may arise when you are permitted to return to interior areas of the hotel after your work shift is over or on your days off. On these occasions, you must obtain prior approval from your manager. Failure to obtain prior approval may be

considered a violation of Company policy and may result in disciplinary action. This policy does not apply to parking areas or other outside nonworking areas.

Unlawful – *Marriott Intl*, 359 NLRB No. 8 (2012)

Under *Tri-County*, as applied in *Sodexo* supra, the Board found this rule is unlawful. Additionally, the Board found the rule runs afoul of the general test applied in *Lutheran*. The rule allows off-duty access where unspecified "circumstances…arise." But it does not explain the circumstances the access may be granted. Further, the rule requires employees to secure managerial approval for off-duty access. Thus, reasonable employees would believe Section 7 activity is prohibited without prior management permission.

54. No solicitation is allowed on any NSU campus or facility without the permission of the NSU Executive Administration. (Rule was applied to contractors' employees and employer's own employees.)

Unlawful - *Nova Southeastern Univ*., 357 NLRB No. 74 (2011)

As the rule was applied to the Employer's own employees, it is unlawful because any rule that requires employees to secure permission from their employer prior to engaging in protected concerted activities on an employee's free time and in nonwork areas is unlawful. *Brunswick Corp*., 282 NLRB 794, 795 (1987).

The rule is also unlawful when applied to contracted employees. In *Nova*, contracted employee McGonigle distributed flyers to his coworkers before the start of his shift on the Nova campus. The Employer directed McGonigle to stop based on the above rule. The Board applied *New York New York*, 356 NLRB No. 119 (2011). There the Board addressed the situation where a property owner sought to exclude, from nonworking areas open to the public, the off-duty employees of a contractor who operated restaurants inside the Employer's hotel and casino facility. The Board noted that the contractor's employees were regularly employed on the property in work integral to the owner's business and seeking to engage in organizational handbilling directed at potential customers of the employer and the property owner. The Board held that the property owner may lawfully exclude such employees only where the owner is able to demonstrate that their activity significantly interferes with his use of the property or where exclusion is justified by another legitimate business reason, including, but not limited to, the need to maintain production and discipline (as those terms have come to be defined in the Board's case law).

Thus, in *Nova*, the Board first found that McGonigle's handbilling took place in an exterior, nonwork area on Nova's campus where he was most likely to encounter his coworkers, which were his target audience. Second, the Board considered Nova's asserted interests in maintaining and enforcing its rule. Nova contended that its prohibition of solicitation is justified by its need to ensure security on its open campus and to ensure its contractors' employees remained in their work area. But, the Board found Nova's interests are not likely to be adversely affected when contractors' employees, lawfully on the premises, also pass out flyers in the exercise of their organization rights in exterior, nonwork areas. Thus, these interests do not support Nova's blanket restriction on handbilling by contractors' employees.

Further, in *Rite Aid of Ohio*, Case 8-CA-39376, Advice Memorandum dated June 2, 2011, Advice explained that *New York New York* made clear that any distinction based solely on employees' target audience is no longer valid and that *Tri-County* sets forth the applicable standard. Under *Tri-County*, an employer may not deny employees entry to parking lots and other outside nonworking areas, unless justified by business needs.

K. Use of Employer's Equipment

55. Company communication systems and the equipment used to operate the communication system are owned and provided by the Company to assist in conducting the business of The Register-Guard. Communications systems are not to be used to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations.

Lawful — *Register-Guard*, 351 NLRB 1110 (2007)

The Board noted that like other employer-owned equipment (such as bulletin boards, copy machines, and telephones) employees do not have a Section 7 right to use an employer's e-mail system. Rather, the employer's basic property right in regulating and controlling its e-mail system was greater than any employee right to use that system, so long as the employer's policy was nondiscriminatory. The Board ruled that although the policy in question did restrict "solicitation" on its face, it did not limit face-to-face solicitations, and therefore did not run afoul of cases like *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). Similarly, while recognizing e-mail has substantially changed how employees communicate, it has not eliminated face-to-face communication, and therefore a restriction on e-mail use does not eliminate all possibilities of protected Section 7 communication among employees.

56. Any communication transmitted, stored, or displayed electronically must comply with the policies outlined in the Costco Employee Agreement. Employees should be aware that statements posted electronically (such as [to] online message boards or discussion groups) that damage the Company, defame any individual or damage any person's reputation, or violate the policies outlines in the Costco Employee Agreement, may be subject to discipline, up to and including termination of employment.

    Unlawful – *Costco Wholesale Corp*., 358 NLRB No. 106 (2012)

    The Board cites *Lutheran* and *Lafayette.* The Board found the rule clearly encompasses concerted communications protesting the Employer's treatment of its employees. Employees would reasonably conclude the rule requires them to refrain from engaging in certain protected communications (i.e., those that are critical of the Employer or its agents). The rule does not present accompanying language that would tend to restrict its application. Thus, maintenance of the rule has a reasonable tendency to inhibit employees' protected activity, and, as such, violates Section 8(a)(1).

    Additionally, in *Costco* at slip op. 2 fn. 6, the Board states this rule does not implicate the Board's holding in *Register Guard*, supra. The issue in *Register Guard* was whether employees had a statutory right to use their employer's email system for Section 7 purposes. The Board found the employer did not violate Section 8(a)(1) by prohibiting the use of the employer's email for nonjob-related solicitations. In *Costco*, the rule at issue does not prohibit using the electronic communications system for all non-job purposes, but rather is reasonably understood to prohibit the expression of certain protected viewpoints. In doing so, the rule serves to inhibit certain kinds of Section 7 activity while permitting others and, for this reason, violates Section 8(a)(1).

While the *Register Guard* case involved employee use of the employer's computer equipment, there are similar holdings involving employee use of other types of employer property. See *Mid-Mountain Foods*, 332 NLRB 229 (2000), enfd. 269 F.3d 1075 (D.C. Cir. 2001) (no statutory right to use the television in employer's break room to show a prounion campaign video); *Eaton Technologies,* 322 NLRB 848, 853 (1997) (no statutory right of employees or a union to use an employer's bulletin board); *Champion International Corp.,* 303 NLRB 102, 109 (1991) (stating that an employer has "a basic right to regulate and restrict employee use of company property" such as a copy machine); *Churchill's Supermarkets,* 285 NLRB 138, 155 (1987) (an employer has a right to restrict use of company telephones to "business-related" conversations); *Health Co.,* 196 NLRB

134 (1972) (employer may bar a prounion employee from using the public address system to respond to antiunion broadcasts).

L. Dress Code

An employee's right to wear union insignia while at work generally is protected by Section 7 of the Act, and an employer may not interfere with that right absent a showing of special circumstances. *See Albertson's Inc*., 351 NLRB 254, 256-257 (2007); *Albis Plastics*, 335 NLRB 923, 924 (2001) and cases cited therein. Special circumstances include situations where display of union insignia might "jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established, as part of its business plan, through appearance rules for its employees." *Bell-Atlantic-Pennsylvania*, 339 NLRB 1084, 1086 (2003), enfd. 99 Fed. Appx. 233 (D.C. Cir. 2004), citing *Nordstrom, Inc.*, 264 NLRB at 700. The Board has consistently held that customer exposure to union insignia, standing alone, is not a special circumstance which permits an employer to prohibit display of such insignia. *Meijer, Inc.*, 318 NLRB 50 (1995), enfd. 130 F.3d 1209 (6th Cir. 1997); *Nordstrom, Inc.*, 264 NLRB at 700. Nor is the requirement that employees wear a uniform a special circumstance justifying a button prohibition. *United Parcel Service*, 312 NLRB 596, 596-598 (1993), enf. denied 41 F.3d 1068 (6th Cir. 1994). Finally, the fact that the prohibition applies to all buttons, not solely union buttons, is not a special circumstance. *Harrah's Club*, 143 NLRB 1356, 1356 (1963), enf. denied 337 F.2d 177 (9th Cir. 1964); *Floridan Hotel of Tampa*, 137 NLRB 1484 (1962), enfd. as modified 318 F.2d 545 (5th Cir. 1963).

The special circumstances argument was also considered by the Board in the context of employees wearing so-called "Prisoner" shirts to work. The Board concluded that special circumstances were not established because the shirt was not reasonably likely, under the circumstances, to cause fear or alarm among the employer's customers. Thus, a technician first calls the customer before arriving for an appointment and then arrives at a customer's home in an employer-owned truck wearing an employer identification card. Additionally, the shirt was mainly plain white with "Inmate #" in relatively small print on the front and "Prisoner of AT$T" printed on the back between two sets of vertical stripes. The AT$T was about twice the size of the word "Prisoner". The Board concluded that the totality of the circumstances would make it clear that the technician wearing the "Prisoner" shirt was one of the employer's employees and not a convict. *AT&T Connecticut*, 356 NLRB No. 118 (2011). The Board did find that special circumstances existed in a case involving employees who worked in a grocery store and wore shirts that said "Don't Cheat About the Meat!" The Board concluded that the shirts reasonably threatened to create concern among store customers that they may be cheated which

raised the possibility of harm to the employer's customer relationships. *Pathmark Stores*, 342 NLRB 378, 379 (2004).

57. No pins or buttons other than those issued by Foodtown to promote our programs such as Fresh Friendly, and Rewards, etc. … You may run the risk of being sent home for the day if you do not follow this policy. If the problem persists with the same associates, further disciplinary action could ensue.

Unlawful – *P.S.K. Supermarkets, Inc*., 349 NLRB 34 (2007)

The Board found the Employer failed to satisfy its burden of proving that special circumstances justified its prohibition on the wearing of buttons, and thus, the Employer violated Section 8(a)(1) by posting an overly broad prohibition against wearing buttons. Absent special circumstances, Section 7 entitles employees to wear union insignia, including union buttons, in the workplace. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *Nordstrom, Inc*., 264 NLRB 698, 700 (1982). The burden is on the respondent to prove the existence of special circumstances that would justify a restriction. *W San Diego*, 348 NLRB No. 24, slip op. at 2 (2006).

III. Remedies

A. What to do about employee handbooks and policies?

As the Board explained in *Guardsmark, LLC*, 344 NLRB 809, (2005), where an overbroad rule is maintained as a companywide policy the Board will order a notice posting at all facilities where the unlawful policy has been or is in effect. Indeed, only a company wide remedy extending as far as the company wide violation can remedy the damage. Further, the employer is to rescind the handbook provisions in one of two ways:

1. Furnish all current employees with inserts for the current employee handbook that

   (a) advise that the unlawful rules have been rescinded,

   (b) or provide the language of lawful rules.

2. Publish and distribute revised handbooks that

   (a) do not contain the unlawful rules,

   (b) or provide the language of lawful rules.

See also *DirectTV U.S DirecTV Holdings, LLC*, 359 NLRB No. 54 (2013), where the Board also ordered a nationwide posting because the Employer's unlawful rules were in effect at the Employer's facilities nationwide.

B. Are disciplines and terminations under an unlawful rule automatically found unlawful too?

In *The Continental Group, Inc.,* 357 NLRB No. 39 (2011), the Board initially noted it had long adhered to and applied the principle that discipline imposed pursuant to an unlawfully overbroad rule is unlawful (the "*Double Eagle* rule"), *Double Eagle Hotel & Casino*, 341 NLRB 112 (2004). In *Continental*, however, the Board decided to limit the application of the *Double Eagle* rule as follows:

> Discipline imposed pursuant to an unlawfully overbroad rule violates the Act in those situations in which an employee violated the rule by
>
> 1. engaging in protected conduct or
>
> 2. engaging in conduct that otherwise implicates the concerns underlying Section 7 of the Act.

Nevertheless, an employer will avoid liability for discipline imposed pursuant to an overbroad rule if it can establish that the employee's conduct actually interfered with the employee's own work or that of other employees or otherwise actually interfered with the employer's operations, and that the interference, rather than the violation of the rule, was the reason for the discipline. *Miller's Discount Dept. Stores*, 198 NLRB 281 (1972), enfd. on other grounds sub nom. *NLRB v. Daylin, Inc.*, 496 F.2d 484 (6th Cir. 1974); see also *Switchcraft, Inc.*, 241 NLRB 985 (1979), enfd. 631 F.2d 734 (7th Cir. 1980); *Wayne Home Equipment Co.*, 229 NLRB 654 (1977); *Singer Co.*, 220 NLRB 1179 (1975).

It is the employer's burden, not only to assert this affirmative defense, but also to establish that the employee's interference with production or operations was the actual reason for the discipline. In this regard, an employer's mere citation of the overbroad rule as the basis for discipline will not suffice to meet its burden. Rather, assuming that the employer provides the employee with a reason (either written or oral) for its imposition of discipline, the employer must demonstrate that it cited the employee's interference with production and not simply the violation of the overbroad rule. See, e.g*., Gerry's I.G.A.*, 238 NLRB 1141, 1151 (1978). The Board noted that this formulation of the *Double Eagle* rule, including their allocation of the burdens of proof, reflects a deliberate balancing of employees' Section 7 rights and employers' legitimate interest in establishing work rules for the purpose of maintaining discipline and production. Moreover, in the Board's judgment, the available affirmative defense described above properly acknowledges the employer's legitimate interests, yet simultaneously discourages post-hoc rationalization of disciplinary decisions, and minimizes the likelihood of a chilling effect on employees' Section 7 rights.

In the *Continental* case an employee was discharged for sleeping on the job in violation of a rule prohibiting off-duty employees from coming on the employer's property except to collect their paychecks or when "otherwise advised by" designated managers. While the Board noted that the rule was overly broad and therefore unlawful, the enforcement of the rule relating to an employee sleeping on the job was not unlawful because sleeping on the job is neither protected concerted activity nor conduct that otherwise implicates the concerns underlying Section 7 of the Act.

In *Taylor Made Transportation Services*, 358 NLRB No. 53 (2012), the Employer maintained an unlawful rule that prohibited employees from disclosing their wage rates. The Board applied its *Continental* rationale and concluded that the suspension and discharge of an employee for violation of said rule was unlawful. The Board noted that the discharged employee engaged in conduct implicating Section 7 concerns by disclosing her wage rate to fellow employees and that her suspension and discharge was therefore unlawful.

In *The Wedge Corporation d/b/a The Rock Wood Fired Pizza & Spirits*, 19-CA-32981, Advice Memorandum dated September 19, 2011, Advice concluded that an employee's Facebook activities were not protected under the Act since her Facebook posts were motivated by a concern that the service her Employer was providing to customers was deficient. The Board concluded that the link between the subject of the Facebook posts and any terms or conditions of employment was too attenuated to implicate the concerns underlying Section 7 of the Act. Advice concluded that the employee's discharge was lawful even though the discharge resulted from the Employer's enforcement of an unlawful rule which prohibited "disrespectful conduct" and "inappropriate conversations" by employees.