



**Client Alert: NLRB General Counsel Issues Report  
On Employer Handbook Rules**

The NLRB's General Counsel recently issued a report offering guidance on drafting lawful rules for employer handbooks and other company documents concerning employees. The *Report of the General Counsel Concerning Employer Rules*, issued on March 18, 2015, and available at [www.nlr.gov/reports-guidance/general-counsel-memos](http://www.nlr.gov/reports-guidance/general-counsel-memos), contains two parts. Part 1, *Examples of Lawful and Unlawful Handbook Rules*, discusses subjects typically covered in employer handbooks, focusing on drafting rules that will not violate employees' rights under Section 8(a)(1) of the National Labor Relations Act (NLRA). Part 2, *The Settlement with Wendy's International LLC*, describes the handbook rules approved in the settlement of an unfair labor practice case brought against Wendy's International LLC. Employers with questions or concerns about particular rules they are considering implementing, or that already appear in company handbooks, can contact HRW attorneys.

**The NLRB's Discussion of Lawful and Unlawful Handbook Rules**

Part 1 of the NLRB General Counsel's Report presents examples of rules, covering the subjects listed below, that the Board found unlawful and lawful, with explanations of the reasons for the Board's decisions. The Report looks at rules that overtly violated employees' rights to engage in protected concerted activity under Section 7 of the NLRA. Even more important to note, the Report also discusses rules that might appear lawful on their face, but were found to be unlawful because employees could "reasonably construe" their language as prohibiting lawful activity under Section 7. For example, a rule stating "Be respectful of others and the Company," was found to be unlawfully overbroad because employees could reasonably construe the rule as banning protected criticism or protests about their supervisors or the employer generally.

In presenting examples of lawful and unlawful rules on the topics noted below, the General Counsel emphasized that the *overall context* of a rule is an important factor in determining if a provision is lawful. For example, a rule banning disclosure "of all information acquired in the

course of one's work," read in isolation, could be considered to prohibit disclosures about employees' wages and benefits, and therefore violate employees' rights to disclose such information. Read in context, however, the rule was found to be lawful because it was embedded with rules about conflicts of interest and compliance with SEC regulations and state and federal laws. The NLRB found that employees "would reasonably understand" that the rule covered disclosures about customers' credit cards, contracts, and trade secrets, but not activity protected under Section 7.

The Report discusses lawful and unlawful rules on the following subjects:

- *Employer Handbook Rules Regarding Confidentiality*

The General Counsel notes that a confidentiality rule or policy that explicitly forbids employees from discussing the terms and conditions of employment, including wages, hours, or workplace complaints, would be unlawful. A general rule broadly including "employee" or "personnel" information as prohibited topics of discussion, would also be considered to violate employees' rights. A broad prohibition on disclosing "confidential" information, however, would be lawful as long as such a rule does not refer to anything relating to the terms or conditions of employees' employment. An otherwise unlawful rule on confidentiality could also be found lawful when considered in context.

- *Employer Handbook Rules Regarding Employee Conduct toward the Company and Supervisors*

The Report states that a rule banning "disrespectful," "negative," "rude," or "inappropriate" conduct towards management will "usually" be found unlawful, unless the context clarifies that the rule does not violate employees' right to criticize or protest an employer's labor policies. Moreover, a rule prohibiting false statements will be unlawfully overbroad unless only "maliciously false" statements are banned. On the other hand, a rule requiring employees to be respectful towards coworkers, clients, or others, but does not include the employer or management, will usually be found lawful. Rules that employees would reasonably consider as forbidding insubordination will also be lawful.

- Employer Handbook Rules Regulating Conduct Towards Fellow Employees*

The General Counsel notes that employees have the right under the NLRA to argue with coworkers about unions, management, and the terms and conditions of their employment. Rules against harassment cannot be overly broad so that they prohibit “vigorous debate” or even “intemperate comments” on subjects protected under Section 7 of the NLRA.
- Employer Handbook Rules Regarding Employee Interaction with Third Parties*

Employees also have the right under Section 7 to communicate with news media, government agencies and other third parties about the conditions of their employment, including wages and benefits. Rules that could be read as restricting such communications would be unlawfully overbroad.
- Employer Handbook Rules Restricting Use of Company Logos, Copyrights, and Trademarks*

The NLRB has ruled that employer handbooks cannot ban employees’ “fair protected use” of employers’ logos, copyrights, or trademarks on picket signs, leaflets, and other protest materials that do not implicate a company’s proprietary interest in protecting their intellectual property. A broad ban could be considered unlawful.
- Employer Handbook Rules Restricting Photography and Recording, including Rules Banning Photography, Recordings, or Personal Electronic Devices*

A rule banning photography, recordings, or the use of personal cameras or recording devices, would be unlawfully overbroad if the rule could reasonably be read as forbidding photographs or recordings made on non-work time.
- Employer Handbook Rules Restricting Employees from Leaving Work*

General rules that prohibit employees from leaving their worksite, for reasons not related to protected concerted activities, will be considered lawful. Rules that could reasonably read as forbidding protected activities such as strikes or walkouts, however, are unlawful.

- *Employer Conflict-of-Interest Rules*

A rule against activity that would create a conflict-of-interest will be lawful if the rule is clearly limited to legitimate business interests. Such a rule can include examples explaining the types of activities prohibited. A rule concerning conflicts-of-interest may not prohibit an employee's protected concerted activity, such as protesting or soliciting for a union on non-work time

### **The Settlement with Wendy's International LLC**

Part 2 of the General Counsel's Report discusses the 2014 settlement with Wendy's International LLC of unfair labor practice charges concerning the company's employee handbook rules. The Report presents (1) the rules that the NLRB found to be unlawfully overbroad; and (2) the revised rules adopted as part of the settlement agreement. The Report discusses the reasons each rule was found to be unlawful. The rules cover the following topics:

- Handbook disclosure provision
- Social Media Policy
- Conflict-of-Interest Provision
- Company Confidential Information Provision
- Employee Conduct
- No Distribution/No Solicitation Provision
- Restaurant Telephone; Cell Phone; Camera Phone/Recording Devices Provision

Employers with questions concerning the NLRB's report, their own handbook rules, or plans for implementing or revising rules for employees, can contact HRW attorneys.