

# IS IT TIME TO REVIEW YOUR EMPLOYEE HANDBOOKS?



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On March 18<sup>th</sup>, National Labor Relations Board (“NLRB”) General Counsel Richard F. Griffin, Jr., issued [a report](#)<sup>1</sup> (“the Report”) concerning employer rules and employee handbooks in light of recent employer rule cases. Most of the violations found in these cases occurred under the first prong of the two-prong test in *Lutheran Heritage Village-Livonia*,<sup>2</sup> which looks to whether an employer rule explicitly restricts protected activity under Section 7 of the National Labor Relations Act (“NLRA”). The Report used these cases as a guide to provide clear examples of both illegal rules and their legal counterparts, giving employers a valuable tool in evaluating employee handbooks and workplace rules.

The Report singled out specific categories of impermissible employer rules: confidentiality rules; employee conduct rules (towards the company, towards other employees and towards customers); rules that govern employee interaction with third parties; restrictions on employee usage of logos and other intellectual property; rules restricting photography and recording; rules concerning

1 NLRB General Counsel Memorandum 15-04 (Mar. 18, 2015)

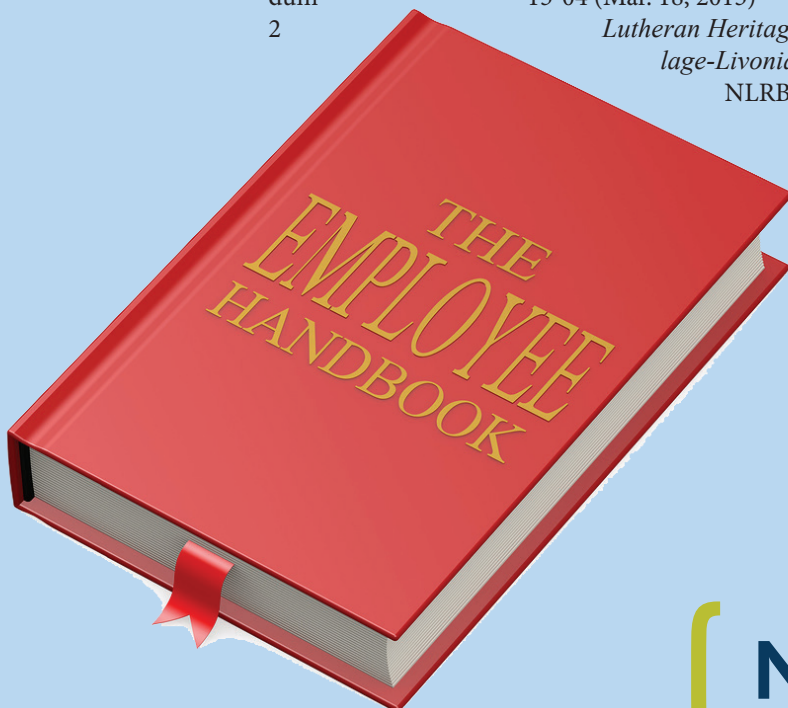
2 *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004)

leaving work; and conflict of interest rules. For instance, a rule banning discussion of customer or employee information outside of work or a ban on non-work discussion of confidential information that could affect the employer’s image, reputation or interests are both invalid, according to the NLRB. These rules are overbroad and conceivably have a chilling effect on protected employee communications. Lawful versions of these rules narrowly restrict unauthorized disclosure of business secrets.

The important difference between unlawful and lawful versions of employee handbook rules is that the lawful versions narrowly classify impermissible behavior in such a way as to exclude employee discussion of other employees or working conditions from the scope of the rules. Some of the differences between the two questions may seem inconsequential, but the primary focus of the analysis is how employees would view the rules as applied to their protected activities.

With these employee handbook provisions in mind, it is likely that many employee handbooks currently contain impermissible rules and restrictions. Employers should begin the process of reviewing employee handbooks using the NLRB General Counsel Report as a guide.

For comparison, on the next page are select illegal employee handbook rules and their lawful counterparts from the Report.



Category	Unlawful Rule	Lawful Counterpart
Confidentiality	“You must not disclose proprietary or confidential information about [the Employer, or] other associates (if the proprietary or confidential information relating to [the Employer’s] associates was obtained in violation of law or lawful Company policy).”	“Do not disclose confidential financial data, or other non-public proprietary company information. Do not share confidential information regarding business partners, vendors or customers.”
Employee Conduct Towards Employer	“[B]e respectful to the company, other employees, customers, partners, and competitors.”	“Employees will not be discourteous or disrespectful to a customer or any member of the public while in the course and scope of [company] business.”
Employee Conduct Towards Fellow Employees	Do not make “insulting, embarrassing, hurtful or abusive comments about other company employees online,” and “avoid the use of offensive, derogatory, or prejudicial comments.”	“[T]hreatening, intimidating, coercing, or otherwise interfering with the job performance of fellow employees or visitors.”
Employee Interaction with Third Parties	Employees are not “authorized to speak to any representatives of the print and/or electronic media about company matters” unless designated to do so by HR, and must refer all media inquiries to the company media hotline.	“The company strives to anticipate and manage crisis situations in order to reduce disruption to our employees and to maintain our reputation as a high quality company. To best serve these objectives, the company will respond to the news media in a timely and professional manner only through the designated spokespersons.”
Restrictions on Use of Company Logos, Copyrights and Trademarks	Do “not use any Company logos, trademarks, graphics, or advertising materials” in social media.	“Respect all copyright and other intellectual property laws. For [the Employer’s] protection as well as your own, it is critical that you show proper respect for the laws governing copyright, fair use of copyrighted material owned by others, trademarks and other intellectual property, including [the Employer’s] own copyrights, trademarks and brands.”
Restrictions on Photography and Recording	“No employee shall use any recording device including but not limited to, audio, video, or digital for the purpose of recording any [Employer] employee or [Employer] operation..”	Rules limited in scope for permissible purposes, such as to protect patient privacy or to protect a proprietary interest.
Rules Restricting Leaving Work	“Failure to report to your scheduled shift for more than three consecutive days without prior authorization or ‘walking off the job’ during a scheduled shift” is prohibited.	“Entering or leaving Company property without permission may result in discharge.”
Conflict-of-Interest Rules	Employees may not engage in “any action” that is “not in the best interest of [the Employer].”	Do not “give, offer or promise, directly or indirectly, anything of value to any representative of an Outside Business,” where “Outside Business” is defined as “any person, firm, corporation, or government agency that sells or provides a service to, purchases from, or competes with [the Employer].” Examples of violations include “holding an ownership or financial interest in an Outside Business” and “accepting gifts, money, or services from an Outside Business.”