DEEP DIVE REPORT

The National Labor Relations Act, Concerted Activity and Your Handbook

HR Employment Law *Advisor*

Contents

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Executive Summary

The National Labor Relations Act is one of the oldest federal labor laws, and its protections go way beyond the right of employees to unionize. It applies to almost all private-sector employers whether they're a union workplace or not. First passed in 1935 during the Great Depression, it predates its more famous cousin, the Fair Labor Standards Act. Congress passed both laws in response to labor unrest.

While the FLSA dictates the federal minimum wage and sets the requirements for overtime pay, the NLRA extends much further. For private-sector employers, it picks up where the FLSA ends, adding robust protections for non-management-level employees who seek to form a union and otherwise improve their working conditions.

Strict NLRA rules require all private-sector employers with two or more workers to allow workers to engage in "concerted activity" aimed at bettering working conditions whether there's a union or not. Concerted activity is defined as any action two or more employees take for their mutual aid or protection regarding terms and conditions of employment.

The National Labor Relations Board administers the NLRA. Its duties include managing union elections, investigating and adjudicating unfair labor practices, and setting limits on workplace rules like those commonly found in employee handbooks.

This special report will walk you through your obligation under the NLRA, focusing on the non-union aspects of the law like avoiding unfair labor practice charges and drafting handbook rules that don't violate the NLRA while still accomplishing your management goals. This may save you from the unpleasant surprise of being charged with having committed an unfair labor practice.

The NLRB, the NLRA and workers' rights

The National Labor Relations Board is an independent federal agency that enforces the National Labor Relations Act, a federal law that guarantees the right of most private-sector employees to organize, engage in group efforts to improve their wages and working conditions, determine whether to have unions represent their interests, engage in collective bargaining or refrain from any of these activities. It acts to prevent and fix unfair labor practices that interfere with the right of workers to improve their working conditions.

The NLRB has 26 regional offices. Each investigates and prosecutes alleged violations on behalf of the NLRB's general counsel. The general counsel is independent from the board and is appointed for a four-year term by the president and confirmed by the Senate.

The NLRB itself has five members, who act as a court to adjudicate alleged violations of the NLRA such as charges of unfair labor practices. The members are each appointed by the president to serve five-year terms, with one expiring each year. That way, the board usually has members from across the political spectrum.

Protected concerted activity

When workers act together to try to improve their pay and working conditions, they engage in what the NLRA calls concerted activity. This is also often referred to as protected Section 7 rights, named for the section of the NLRA where the term appears. That activity is protected under the NLRA and thus is referred to as protected concerted activity.

A few examples of protected concerted activities are:

- Two female employees approach their supervisor about a pay raise. They complain that they haven't received a raise in two years and that inflation is eating away at their wages. They claim to know that workers in a different division that's predominantly male have received raises. Because the two

workers are trying to improve their pay, they are engaged in protected concerted activity.

- Four employees form an informal committee to go to management about what they perceive as a serious safety issue. They claim a metal press does not have an operational emergency off switch, and they are worried that someone using the press will lose a hand. They are engaged in protected concerted activity.
- An employee speaks with a co-worker who is having trouble arranging breaks so she can pump breast milk. She volunteers to bring the issue up with their supervisor when the co-worker says she's afraid to. When the employee goes to their supervisor with the problem, she is engaging in protected concerted activity even though she's only one employee. That's because she's championing her co-worker's request for better working conditions.

You may notice that some of the problems workers raised in these examples would also be potential protected activity under other laws like Title VII, the Occupational Safety and Health Act or the PUMP Act. There is considerable overlap between the NLRA and other federal and state laws protecting workers from discrimination, safety hazards and other workplace dangers. That's why it's not unusual for an employer to be hit with multiple lawsuits from different agencies or under different laws. Unfortunately, because many employers don't realize they may be covered by the NLRA, unfair labor practice charges sometimes are a surprise.

Unfair labor practice charges

Employers may not interfere with protected concerted activity. Interference includes things like disciplining a worker for supporting the formation of a union or firing a worker for breaking a handbook rule against discussing pay. Many unfair labor practice charges closely resemble charges of retaliation against employers by workers alleging discrimination at work or who report safety concerns to OSHA, the agency responsible for enforcing the

Occupational Safety and Health Act. Common unfair labor practice charges allege employer threats, interrogations and unlawful disciplinary actions against employees for their union activity and the promise of benefits if employees do not support unionization.

If a worker believes their rights under the NLRA have been violated, they can file a charge with the NLRB. The board receives between 20,000 and 30,000 charges per year. These may come from individual employees, unions or employers. The NLRB goes to bat for workers who claim their right to act together to improve their pay and working conditions. If workers are fired, suspended or otherwise penalized for taking part in protected group activities, and they bring this to the NLRB's attention, the board will file unfair labor practice charges against the employer. They will seek reinstatement as well as a full slate of remedies, including payment for any consequences like lost wages and benefits. In recent years, the NLRB has even ordered employers to reimburse workers for things like increased rent or penalties for being late on rent, for the consequences of having an auto repossessed and increased credit card interest because the worker missed a payment after being terminated because the worker no longer had a paycheck.

Until a few years ago, most employees not working in a union environment did not realize they could file unfair labor practice charges with the NLRB. That has changed in recent years. One reason is there has been lots of recent press coverage of the board. For example, the NLRB has received numerous unfair labor practices complaints from employees at Starbucks cafes as small groups of baristas have increasingly tried to unionize. These workers are predominately young and adept at using social media to get the word out. This has led to greater worker awareness of their right to raise workplace complaints and go to the NLRB when they believe they have been punished for doing so.

You may be familiar with what happens when an employee files an EEOC complaint. There's an investigation followed by a finding of merit or not. If there's merit to the complaint, the EEOC will try to reach a settlement between the employer and employee. If

that's not possible, the EEOC tells the employee that it will either take the case to court on their behalf or allow the employee to sue in federal court. In addition, if the EEOC concludes there was no merit, the employee can still sue in federal court.

The process is more complicated for NLRB unfair labor practice charges (and thus potentially more time-consuming and expensive). The process, shown in the chart on page 8, includes a potential NLRB trial if the NLRB believes the case has merit. In other words, the initial adjudication happens at the NLRB; employers that lose a case then have the option of going to the federal court system.

How the NLRA and NLRB affect handbooks

It may come as a surprise to many employers that their handbooks can become the basis for an NLRB unfair labor practices charge. The NLRB has long taken the position that anything that would dissuade workers from engaging in protected concerted activities may amount to an unfair labor practice. In other words, when employers do things like threatening to fire any workers who walk out, strike, stage a boycott or generally complain about working conditions, the threats themselves are unfair labor practices.

Where do employee handbooks fit into this? Handbooks set rules for employee conduct. Breaking those rules generally carries a penalty such as discipline or discharge. If a rule can be seen as forbidding or discouraging employees from engaging in protected concerted activity, then the rule may be an unfair labor practice if it dissuades workers from violating the rule.

During the Obama administration, the NLRB general counsel issued a "Report of the General Counsel Concerning Employer Rules." It stated that the NLRB believed many employer rules interfered with an employee's right to engage in protected concerted activities. Much of the report focused on common

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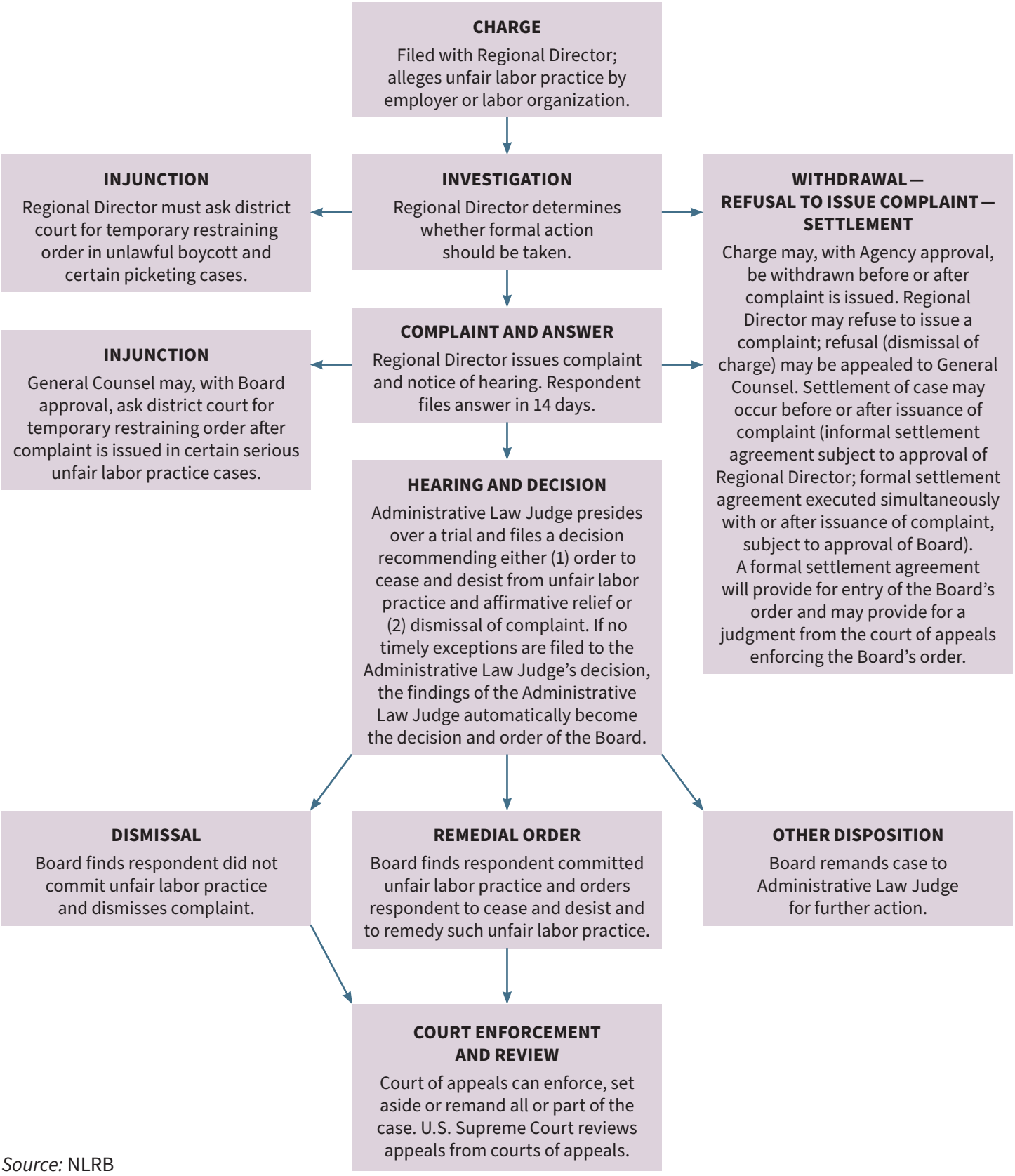
NLRB Unfair Labor Practice Charge



Source: NLRB

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handbook rules that employers have been using for years or even decades. Employers had to make changes or face potential unfair labor practice charges before the NLRB.

During the Trump administration, the NLRB produced a test for balancing employees' right to engage in concerted activity against employers' right to manage their workplaces. In 2017, questions in an NLRB case against the Boeing Co. asked whether a handbook rule banning cameras in the workplace violated the NLRA. The board developed a test to balance the rights of employer and employee. In that case, the employer wanted to protect government-classified documents from being copied and said that concern justified the ban even though it might have affected employees' right to engage in concerted activity (such as documenting bad working conditions). The test discarded the previous test of whether employees "would reasonably" construe the handbook language to prohibit protected concerted activity.

Then came the Biden administration. The latest NLRB ruling on allowable and unallowable rules in employee handbooks was announced in August 2023 in what's known as the *Stericycle* rule. The NLRB said handbook and other workplace rules require case-by-case reviews. No handbook rule is regarded as automatically legal. Instead, for each rule, determining whether it is legal turns on:

- Whether the rule *could* be viewed as limiting a worker's NLRA concerted activity rights, and
- Whether an *economically dependent* employee could view the rule as prohibiting concerted activity if they were contemplating engaging in protected concerted activity.

In announcing the reversal, the NLRB chair wrote, "*Boeing* gave too little consideration to the chilling effect that work rules can have on workers' Section 7 rights. Under the new standard, the board will carefully consider both the potential impact of work rules on employees and the interests that employers articulate in

support of their rules. By requiring employers to narrowly tailor their rules to serve those interests, the board will better support the policies of the National Labor Relations Act."

That new standard means it is crucial for you to conduct a thorough review of all your handbook rules to see if any may violate the NLRA. Ask yourself whether the rule could be interpreted by an economically dependent employee (and, of course, all employees are economically dependent) as prohibiting concerted protected activity.

Here are two examples of recent NLRB actions:

- Five employees of Hispanics United, a social services organization for low-income clients, took to Facebook commenting on their working conditions, including their workload and staffing issues. Other employees commented, too, discussing working conditions. Firings followed since the organization's handbook rules prohibited discussing Hispanics United on social media. The NLRB ruled in favor of the employees and ordered them reinstated.
- An employer had a handbook policy that prohibited discussing pay. The employer then gave raises to everyone and told each worker to keep their raise a secret. Two workers compared raises; one went to HR to ask why his was less than his co-worker's. The worker who shared his salary was fired and went to the NLRB. The NLRB found the policy violated the NLRA.

Review your handbook!

Get out your handbook and begin a thorough review with the new *Stericycle* rules in mind. You're looking for any rules that could be interpreted as discouraging employees from discussing workplace issues among themselves or with outside parties such as labor organizations, the media and federal, state or local agencies in

charge of employment discrimination, wage-and-hour rules or health and safety.

You're also looking for rules that require workers to keep silent on workplace issues or bar discussing pay, supervisors or company policies and actions with co-workers, investigators, reporters or anyone else not on an approved list. The same goes for not discussing investigations or being barred from participating in a lawsuit filed by a co-worker, applicant or former employee over working conditions.

As you review the rules in your employee handbook, evaluate each of them by addressing two points:

- Does the rule have a reasonable tendency to chill employees from exercising their rights under the NLRA? If so, the rule is presumptively unlawful. It will have to be changed or dropped.
- If you want to keep a version of the rule that's presumptively unlawful, rebut that presumption by proving that the rule advances a legitimate and substantial business interest, and that you are unable to advance that interest with a more narrowly tailored rule. In other words, rewrite the rule as tightly as possible and justify its language by showing your legitimate and important business need. That justification should be in a separate document in case the rule is later challenged.

As you review your handbook, scrutinize at-will employment statements and NLRA disclaimers. In addition, pay special attention to rules addressing dress and grooming, salary secrecy, use of foreign languages at work, confidentiality and civility.

At-will employment statements

At-will employment statements are common in employee handbooks. In fact, every handbook should have one. At-will status means the employer can terminate any employee for any reason or no reason, as long as it is not an illegal reason like race or

sex discrimination. All states allow at-will employment except Montana, which only allows it during the initial six months of employment.

Your at-will statement must be carefully crafted to avoid NLRB scrutiny. The NLRA forbids rules that ban unions. If an at-will employment statement isn't worded correctly, it might be seen as just that. Why? Because many at-will statements are worded something like this:

> "All employees of [company name] are hired on an 'at-will' basis. Each person's employment is for no specific term. Either party may terminate the employment relationship at any time, with or without notice, and with or without cause. I understand that the at-will employment relationship cannot be amended, modified or altered in any way. Nothing in this employee handbook should be construed as a contract or a guarantee of continued employment."

The problematic language says that "the at-will employment relationship cannot be amended, modified or altered in any way." That might make an employee think that organizing a union would be prohibited since a union would be able to modify the at-will relationship when negotiating a collective bargaining agreement. That, in effect, makes the policy a no-union rule. Collective bargaining agreements almost always do away with at-will employment and replace it with some form of fault-based discharge.

What's a more limited way to say that the employer is an at-will workplace?

> "All employees of [company name] are hired on an 'at-will' basis. Each person's employment is for no specific term. Either party may terminate the employment relationship at any time, with or without notice, and with or without cause. Nothing in this employee handbook should be construed as a contract or a guarantee of continued employment. No manager, supervisor or employee has any authority to enter into an agreement for employment for any specified period or to

> make an agreement for employment other than at-will. Only the president of the company [or owner, board of directors, etc.] has the authority to make any such agreement and then only in writing."

This version of the rule doesn't preclude a change. It contemplates a situation in which the employer bargains with a union and signs off on a collective bargaining agreement.

NLRA disclaimers

It's a good idea to clarify that none of your rules are meant to interfere with employees' NLRA rights. Place an NLRA disclaimer near the front of your handbook. It's a way to tell workers that you believe your rules are legal and don't intend to interfere with their right to engage in protected concerted activity. An NLRA disclaimer essentially says you won't punish workers for exercising their Section 7 rights. Example: "Nothing in these rules is meant to restrict rights under the National Labor Relations Act."

This statement alerts anyone reviewing the handbook that your organization is aware of your obligations under the NLRA. It says you intend your handbook rules to be interpreted as ways to further company interests without interfering with worker rights to protected concerted activity. It does so subtly, without telling employees what their NLRA rights are.

Dress and grooming rules

Most employers have rules governing dress and grooming. These rules have faced criticism because they may discriminate on the basis of protected classifications like race, sex and religion. However, those rules often violate the NLRA. Here's a common handbook rule that should be revised to be nondiscriminatory. The part of the rule that may violate the NLRA is in italics.

> "Employees are expected to dress professionally and consistent with their position with the company. Men must be clean-shaven and have their hair no longer than the collar.

> Women must wear their hair in a professional style consistent with their position. *Employees may not wear any logos other than the employer's.*"

Here's a better overall rule:

> "All employees must dress for their position and must be clean, neat in appearance and free of any distractions that may impair health or safety in the workplace. Employees may not wear or display anything that would be deemed offensive by a reasonable co-worker, customer or client or that violates the right to be free of workplace harassment or discrimination. Employees with questions about what is acceptable may contact the HR office for guidance. Our company remains committed to supporting our employees' religious, ethnic and cultural beliefs and identity and will modify the dress code accordingly. Our company does not enforce the dress code in a way that reinforces stereotypes about how a particular gender should look and dress. Nothing in this rule is meant to interfere with rights under the National Labor Relations Act."

Note that the better rule removes any mention of the wearing of logos other than the company's. That's because such a rule would preclude workers from wearing buttons, shirts or other items emblazoned with a union's name or logo. Prohibiting the wearing of garb in support of forming a union or a union already in place interferes with the right to engage in protected concerted activity such as showing one's support for a union. The revised rule still prevents co-workers from being harassed based on a protected characteristic by limiting what can be on garments like a T-shirt to words and images that do not create a hostile work environment.

The new rule also allows for grooming and dress that is protected by other federal laws. For example, requiring men to be clean-shaven may violate religious grooming requirements or the ADA for those with medical conditions that are aggravated by shaving.

Salary secrecy rules

Employers often don't want their employees to discuss individual compensation and benefits either with co-workers or outside parties such as union recruiters. The reasons are obvious. Employees may discover what they perceive as discriminatory differences in pay even if you have good and legal reasons for paying someone more than another. And if employees talk with union organizers about their pay, they're likely to hear that having a union will lead to better pay and benefits. Either way, sharing pay data can mean litigation or a full-scale union drive.

The problem with that approach is two-fold. First, many states and municipalities now prohibit rules that say employees can't share compensation data. And under the NLRA, employees are inherently allowed to discuss pay information in order to engage in protected concerted activity to improve their pay.

Here's an example of a common handbook rule:

> "Do not discuss pay or benefits with co-workers or outside parties. This is confidential information is to be shared only with your supervisor and human resources staff."

Such a rule directly violates the NLRA. If you have any rule that limits employees from discussing compensation in any way, delete it.

English-only rules

Many employers have rules that require workers to speak English at work. Employers may have such a rule for what they perceive as legitimate business reasons. The rule may look like this:

> "Employees must speak English in the workplace. This rule is intended to make co-workers, customers and clients comfortable and ensure that everyone is communicating appropriately."

This rule is problematic. Employees who want to engage in protected concerted activity to better their working conditions must

be able to communicate with one another. If you have workers who speak other languages fluently but struggle with English, forcing them to speak only English will make discussing working conditions difficult.

The rule should be dropped in its entirety.

Confidentiality rules

Many employers have handbook rules addressing investigations into various types of complaints of things like harassment or discrimination. The rule may say that workers questioned during that investigation must keep confidential information they provide or learn about.

A policy that requires those who participate in a workplace investigation to keep their participation secret likely violates the NLRA. That's because a workplace investigation into harassment, safety or other workplace problems is by its nature relevant to protected concerted activity to end harassment, fix safety problems and so on. That is, all these complaints relate to either pay or working conditions that workers may want to change.

A confidentiality rule often looks like this:

> "Do not discuss an internal investigation with anyone other than company employees who are investigating this issue. Refer any co-workers or managers who want to discuss the investigation to the HR representative handling the investigation."

Drop such a rule in its entirety. Note also that you should not guarantee confidentiality to workers who file complaints except to say that no one in the HR office investigating the case will share the information.

Civility rules

In recent years, there seems to have been an epidemic of workplace incivility. Employees seem less likely to treat one another

with respect. Discourse has become coarse. As a result, there has been a proliferation of handbook rules aimed at fostering a more civil workplace.

Civility rules often look like this:

> "We do not allow negative comments about our fellow team members, including co-workers and managers. Employees will not engage in or listen to negativity or gossip and will represent the company in the community in a positive and professional manner at every opportunity."

This rule violates the NLRA on multiple levels. First, it seems to bar any discussion of working conditions by telling employers they cannot criticize management or present the employer in a negative light. That means workers can't go to the press, carry picket signs or even discuss poor wages and benefits.

This rule should be modified to clarify that employees may discuss workplace problems among themselves or with outside parties:

> "We expect all our employees to treat each other and our customers and clients with dignity and respect. That means we do not use words that could be construed as harassing, degrading or offensive. That means not using demeaning language, telling offensive jokes or stories or using gestures and facial expressions that could be construed as sexually, racially, ethnically, religiously or otherwise offensive. If you have any questions about what is appropriate and what is not, please consult an HR representative."

No argument rule

Some employers have rules that prohibit all arguments in the workplace. The idea is that allowing arguments may lead to violence or harassment. The rule may look like this:

> "Employees are expected to refrain from shouting, yelling or making gestures that indicate disrespect for co-workers or

> supervisors. If you have a problem, resolve it by following proper channels."

Such a rule would prevent workers from exchanging views on matters such as pay and benefits and the pros and cons of joining a union. In other words, it would interfere with protected concerted activities. In recent years, the NLRB has found employers who punish workers for using strong words while discussing workplace conditions liable for unfair labor practices. It has even ordered arguing workers to be reinstated with back pay.

What can you do to make it clear that employees may not engage in loud and disruptive arguments or violence and not violate the NLRA while complying with anti-harassment rules? This leaves employers in a bind: Comply with anti-harassment rules or the NLRA. The EEOC and NLRB are currently working together to develop a policy that harmonizes the standards. For now, it's probably better to add a simple statement as follows:

> "The company has a no violence and no argument rule. Employees are expected to refrain from shouting, yelling and other gestures that indicate disrespect for co-workers or supervisors. If you have a problem, resolve it by following proper channels. *Nothing in this rule is intended to interfere with rights under the National Labor Relations Act.*"

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