

PRIVATE/NON-UNIONIZED EMPLOYERS – BE PREPARED FOR THE NLRB’S BROAD EXPANSION OF EMPLOYEE RIGHTS AND CO-EMPLOYMENT LIABILITY

Introduction: Section 7 of the National Labor Relations Act gives Employees the right to engage in concerted activities for the purpose of mutual aid or protection. This includes private/non-unionized companies.

I. SOCIAL MEDIA POLICY

- A. Include a disclaimer for speech protected by law to comply with the National Labor Relations Act
- B. Do not prevent employees from identifying themselves as the employer’s employees
- C. Clearly identify that social media does not reflect the opinion of the Company
- D. Compliance with Michigan’s Internet Privacy Protection Act, effective December 27, 2012
- E. Determine owner of Company’s Linked-In Account

II. VIDEO AND AUDIO SURVEILLANCE POLICY

- A. Do not record any activity that could be considered Section 7 rights
- B. Authorize third parties to conduct surveillance and receive recordings
- C. Have the policy cover all areas except where privacy is expected (i.e. bathrooms)
- D. Include a liability disclaimer

III. OPEN DOOR POLICY

- A. Encourage open communication between all employees and management
- B. In some cases Employees have a responsibility to bring issues to management’s attention

IV. OFF-DUTY CONDUCT

- A. Do not prohibit any type of activity or conduct that does not look favorably upon the company
- B. The employees could interpret any such activity as “chilling” their Section 7 rights

V. SOLICITATION / DISTRIBUTION

- A. May Prohibit:
 - 1. Employees from soliciting during working hours
 - 2. Employees from distributing during working hours **and** in working areas
 - 3. Non-employees from soliciting and distributing
- B. May Not Prohibit:
 - 1. Employees from soliciting and distributing during breaks
 - 2. Employees from distributing in break rooms
 - 3. Employees from engaging in concerted activity or discussing unionization

VI. COMPUTER USAGE

- A. Employer may prevent non-business use of its computers
- B. This policy must be applied equally to prevent all non-business use and not only Section 7 activity

VII. HARASSMENT

- A. Define the definition of harassment and provide examples
- B. For example: repeated solicitations shall **not** be deemed harassment

VIII. ARBITRATION

Although an employee can be required to arbitrate claims, there should be a **carve-out** for class actions claims relating to the enforcement of Section 7 rights

IX. CONFIDENTIALITY

- A. Define confidentiality narrowly so that such provision does not “chill” employees right to engage in protected activity
- B. Do not prevent employees from discussing wages and/or other working conditions
- C. This should be contained in a separate agreement since the terms will survive the separation of employment
- D. Michigan Wages and Fringe Benefits Act, MCL 408.483a
- E. Rules Regarding Confidentiality. Confidential Information is: "All information in which its [sic] loss, undue use or unauthorized disclosure could adversely affect the [Employer's] interests, image and reputation or compromise personal and private information of its members.
 - 1. Unlawful Confidentiality Rules
 - a. Do not discuss "customer or employee information" outside of work, including "phone numbers and addresses."
 - b. 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).
 - c. Never publish or disclose the Employer's or another's confidential or other proprietary information. Never publish or report on conversations that are meant to be private or internal to the Employer.
 - d. Prohibiting employees from disclosing details about the Employer.
 - e. Sharing of overheard conversations at the work site with your coworkers, the public, or anyone outside of your immediate work group is strictly prohibited.
 - f. Discuss work matters only with other [Employer] employees who have a specific business reason to know or have access to such information. Do not discuss work matters in public places.

- g. If something is not public information, you must not share it.
- 2. Lawful Confidentiality Rules
 - a. No unauthorized disclosure of "business 'secrets' or other confidential information."
 - b. Misuse or unauthorized disclosure of confidential information not otherwise available to persons or firms outside Employer is cause for disciplinary action, including termination.
 - c. Do not disclose confidential financial data, or other non-public proprietary company information. Do not share confidential information regarding business partners, vendors or customers.
 - d. Prohibition on disclosure of all "information acquired in the course of one's work."

XI. NON-DISPARAGEMENT

- A. There should be a carve-out so that this provision is not deemed from preventing employees from discussing their working conditions or engaging in union activity
- B. This should be contained in a separate agreement since the terms will survive the separation of employment

XII. EMPLOYEE CONDUCT TOWARD THE COMPANY AND SUPERVISORS

- A. Unlawful Rules Regulating Employee Conduct towards the Employer
 - 1. Be respectful to the company, other employees, customers, partners, and competitors.
 - 2. Do "not make fun of, denigrate, or defame your co-workers, customers, franchisees, suppliers, the Company, or our competitors.
 - 3. Be respectful of others and the Company.
 - 4. No defamatory, libelous, slanderous or discriminatory comments about the Company, its customers and/or competitors, its employees or management.

5. Disrespectful conduct or insubordination, including, but not limited to, refusing to follow orders from a supervisor or a designated representative.
6. Chronic resistance to proper work-related orders or discipline, even though not overt insubordination" will result in discipline.
7. Refrain from any action that would harm persons or property or cause damage to the Company's business or reputation."
8. It is important that employees practice caution and discretion when posting content [on social media] that could affect the Employer's business operation or reputation."
9. Do not make "statements" that damage the company or the company's reputation or that disrupt or damage the company's business relationships.
10. Never engage in behavior that would undermine the reputation of the Employer, your peers or yourself.

B. Lawful Rules Regulating Employee Conduct towards the Employer

1. No "rudeness or unprofessional behavior toward a customer, or anyone in contact with" the company.
2. 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.
3. Each employee is expected to work in a cooperative manner with management/supervision, coworkers, customers and vendors.
4. Each employee is expected to abide by Company policies and to cooperate fully in any investigation that the Company may undertake.
5. Being insubordinate, threatening, intimidating, disrespectful or assaulting a manager/supervisor, coworker, customer or vendor will result in" discipline.

XIII. RULES REGULATING CONDUCT TOWARDS FELLOW EMPLOYEES

A. Unlawful Employee-Employee Conduct Rules

1. "Don't pick fights" online.

2. Do not make "insulting, embarrassing, hurtful or abusive comments about other company employees online," and "avoid the use of offensive, derogatory, or prejudicial comments."
3. Show proper consideration for others' privacy and for topics that may be considered objectionable or inflammatory, such as politics and religion.
4. Do not send "unwanted, offensive, or inappropriate" e-mails.
5. Material that is fraudulent, harassing, embarrassing, sexually explicit, profane, obscene, intimidating, defamatory, or otherwise unlawful or inappropriate may not be sent by e-mail.

B. Lawful Employee-Employee Conduct Rules

1. Making inappropriate gestures, including visual staring.
2. Any logos or graphics worn by employees "must not reflect any form of violent, discriminatory, abusive, offensive, demeaning, or otherwise unprofessional message.
3. Threatening, intimidating, coercing, or otherwise interfering with the job performance of fellow employees or visitors.
4. No "harassment of employees, patients or facility visitors.
5. No "use of racial slurs, derogatory comments, or insults.

XIV. RULES REGARDING EMPLOYEE INTERACTION WITH THIRD PARTIES

A. Unlawful Rules Regulating Third Party Communications

1. 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.
2. Associates are not authorized to answer questions from the news media. When approached for information, you should refer the person to the Employer's Media Relations Department.
3. All inquiries from the media must be referred to the Director of Operations in the corporate office, no exceptions.
4. If you are contacted by any government agency you should contact the Law Department immediately for assistance.

B. Lawful Rules Regulating Employee Communications with Outside Parties

1. 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.
2. Events may occur at our stores that will draw immediate attention from the news media. It is imperative that one person speaks for the Company to deliver an appropriate message and to avoid giving misinformation in any media inquiry. While reporters frequently shop as customers and may ask questions about a matter, good reporters identify themselves prior to asking questions. Every employee is expected to adhere to the following media policy: Answer all media/reporter questions like this: "I am not authorized to comment for the Employer (or I don't have the information you want). Let me have our public affairs office contact you."

XV. RULES RESTRICTING USE OF COMPANY LOGOS, COPYRIGHTS, AND TRADEMARKS

A. Unlawful Rules Banning Employee Use of Logos, Copyrights, or Trademarks

1. Do "not use any Company logos, trademarks, graphics, or advertising materials" in social media.
2. Do not use "other people's property," such as trademarks, without permission in social media.
3. Use of the Employer's name, address or other information in your personal profile is banned. In addition, it is prohibited to use the Employer's logos, trademarks or any other copyrighted material.
4. Company logos and trademarks may not be used without written consent.

B. Lawful Rules Protecting Employer Logos, Copyrights, and Trademarks

1. 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.

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

XVI. RULES RESTRICTING PHOTOGRAPHY AND RECORDING

A. Unlawful Rules Banning Photography, Recordings, or Personal Electronic Devices

1. "Taking unauthorized pictures or video on company property" is prohibited.
2. 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.
3. A total ban on use or possession of personal electronic equipment on Employer property.
4. A prohibition on personal computers or data storage devices on employer property.
5. Prohibition from wearing cell phones, making personal calls or viewing or sending texts "while on duty."

B. Lawful Rules Regulating Pictures and Recording Equipment

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

XVII. RULES RESTRICTING EMPLOYEES FROM LEAVING WORK

A. Unlawful Handbook Rules Relating to Restrictions on Leaving Work

1. "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.
2. "Walking off the job" is prohibited.

- B. Lawful Handbook Rules Relating to Restrictions on Leaving Work
 - 1. Entering or leaving Company property without permission may result in discharge.
 - 2. Walking off shift, failing to report for a scheduled shift and leaving early without supervisor permission are also grounds for immediate termination.

XVIII. EMPLOYER CONFLICT-OF-INTEREST RULES

- A. Unlawful Conflict-of-Interest Rules
 - 1. Employees may not engage in "any action" that is "not in the best interest of the Employer."
- B. Lawful Conflict-of-Interest Rules
 - 1. 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."
 - 2. As an employee, "I will not engage in any activity that might create a conflict of interest for me or the company," where the conflict of interest policy devoted two pages to examples such as "avoid outside employment with an Employer, customer, supplier, or competitor, or having a significant financial interest with one of these entities."
 - 3. Employees must refrain "from any activity or having any financial interest that is inconsistent with the Company's best interest" and also must refrain from "activities, investments or associations that compete with the Company, interferes with one's judgment concerning the Company's best interests, or exploits one's position with the Company for personal gains."

XIX. TIP 1 – CONTRACTUAL DISCLAIMER (IT'S AN EMPLOYEE NOT EMPLOYER HANDBOOK

- A. Such provision is necessary to reduce the likelihood that an employee will sue an employer for breaching the terms and conditions of the Employee Handbook

- B. Employees should sign a separate contract agreeing to follow the Employee Handbook

XX. TIP 2 – SUMMARY OF DISCUSSION

- A. Understand which provisions need to be specific in scope and which provisions need to be broad in scope
- B. Examples:
 - 1. Definitions should be **SPECIFIC** enough so that they are not interpreted as “**chilling**” Section 7 activity
 - 2. Policies should be **BROAD** so the application of such policies equally applies to non Section 7 activity

XXI. CO-EMPLOYMENT/JOINT EMPLOYER LIABILITY

- A. The NLRB ruled that McDonald’s (as opposed to only the franchisees) could be held jointly liable for labor and wage violations by its franchise operators. McDonald’s allegedly supplied software (telling how many employees to use at a given hour) and at one point mentioned a franchisee was paying employees too much.
- B. “Control”-This issue is whether the franchisor requires franchisees to strictly follow employment practices determined by the franchisor. In 1982, a federal appeals court ruled that a company was considered a joint employer in situations where two or more employers exerted “significant control” over the same employees. The NLRB adopted a narrower standard that applies when there is “direct control” of employment practices of a franchisee, temp agency, etc. NLRB General Counsel Richard Griffin advocates that an entity is considered a joint employer if it has the potential to control terms and conditions of employment or such entity is essential to meaningful collective bargaining.
- C. This concept could apply to businesses that use subcontractors or temp agencies, car dealerships, etc.
- D. On April 28, 2015, the NLRB General Counsel issued a memorandum that concluded a franchisee, franchisor, and development agent were not joint employers under the NLRA. In this case there was no direct or indirect control over the terms and conditions of employment of the franchisee employees since the franchisor and development agent were merely involved with protection and maintenance of brand quality.