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Enforcing Civility in the Workplace is a Potentially Risky Proposition, According to the NLRB

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Does your employee handbook discourage negative comments or encourage positive behavior? Such provisions are likely unlawful, according to the National Labor Relations Board (NLRB). For example, consider the case of *Hills and Dales General Hospital*, 360 NLRB No. 70 (April 1, 2014).

According to Edgar Schein, Professor Emeritus at the MIT Sloan School of Management, "[t]he only thing of real importance that leaders do is to create and manage culture." In *Hills and Dales*, the managers of the Michigan hospital, which had been "struggling with a poor work environment," were trying to do just that when they created a policy outlining various standards of behavior for employees. In fact, improving the culture was so important to the hospital that it allowed a group of employees to help draft the policy. But the NLRB was not impressed. The Board determined that several guidelines in the policy infringed on employees' right to join together and complain under Section 7 of the NLRA.

Specifically, the NLRB found the following guidelines to be unlawful:

- 11. We will not make negative comments about our fellow team members and we will take every opportunity to speak well of each other.
- 16. We will represent [the hospital] in the community in a positive and professional manner in every opportunity.
- 21. We will not engage in or listen to negativity or gossip. We will recognize that listening without acting to stop it is the same as participating

The NLRB faulted the hospital for discouraging "negative comments" in paragraph 11 and "negativity or gossip" in paragraph 21. The Board considered this language to be "unlawfully overbroad and ambiguous," which caused the provisions to be unlawful "because employees could reasonably construe them to prohibit protected Section 7 activity." The Board similarly condemned the hospital's encouragement to its employees in paragraph 16 to "represent it in the community in a positive and professional manner…." The Board argued that employees could "reasonably view" this paragraph as "proscribing [employees] from engaging in any public activity or making any public statements (i.e., 'in the community') that are not perceived as 'positive' towards the [hospital] but is clearly protected by Section 7."

The employee who may "reasonably view" these rules as limiting her ability to complain about a workplace grievance could not be reached for comment—because she does not exist. In fact, no employee asked that the NLRB preemptively look into these rules because she felt that they threatened her rights. The paragraphs instead came to the NLRB's attention the way problems typically reach it, though a combination of yogurt and Facebook. After an employee was terminated for throwing a cup of yogurt at her boss (they *really* needed to improve the culture at the hospital), an employee posted the following on Facebook:

"Holy s-- rock on [S]! Way to talk about the d-- you used to work with. I LOVE IT!!!"

She didn't love it for long though, because she was disciplined for her post and paragraph 16 was cited in the disciplinary action. This, of course, eventually resulted in the NLRB's investigators picking through the hospital's handbook for anything that could possibly be construed as objectionable.

What did the hospital get for its attempt to improve the tone around the water cooler? An order from the NLRB requiring it to: 1) revise or rescind the three guidelines cited above; 2) provide all employees with the revised guidelines; and 3) post a notice to its employees for 60 days inviting them to, among other things, "form, join, or assist a union," and apprising them of the forced rule changes. To add insult to injury, the hospital undoubtedly incurred significant attorneys' fees fighting the government, and it will only incur more if it appeals the decision.

Is this the new normal? With the decline of unions throughout the country, the NLRB is searching for a purpose, and under the current administration, it has plenty of resources at hand. So its recent practice of nit-picking employee handbooks and challenging disciplinary actions stemming from social media posts will likely continue. In fact, a similar opinion was released the day after this one: *In First Transit, Inc*., 360 NLRB No. 72. *See also In Karl Knauz Motors Inc*., 358 NLRB 164.

Here are three steps employers can take now:

1. Review your employee handbook for civility rules such as the ones cited above and consider whether they are worth the risk. If not, delete them.
2. If you want to maintain or implement rules like this, tighten them up and use NLRB-approved statements such as encouraging employees "to represent the company in a positive and ethical manner," which was approved in a Conflicts of Interest policy. If there is any consistency in these rulings, the Board typically prefers aspirational guidelines to those that prohibit certain conduct. Just remember, what you draft will be construed against you.
3. Include a clause following any such rules that states that they are not designed or intended to infringe on any employee's rights under Section 7 of the NLRA. The hospital didn't include one, though it's not clear whether it would have saved these guidelines.