OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 15- 04 March 18, 2015

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Richard F. Griffin, Jr., General Counsel

SUBJECT: Report of the General Counsel Concerning Employer Rules

Attached is a report from the General Counsel concerning recent employer rule cases.

Attachment

cc: NLRBU
Release to the Public

Report of the General Counsel

During my term as General Counsel, I have endeavored to keep the labor-management bar fully aware of the activities of my Office. As part of this goal, I continue the practice of issuing periodic reports of cases raising significant legal or policy issues. This report presents recent case developments arising in the context of employee handbook rules. Although I believe that most employers do not draft their employee handbooks with the object of prohibiting or restricting conduct protected by the National Labor Relations Act, the law does not allow even well-intentioned rules that would inhibit employees from engaging in activities protected by the Act. Moreover, the Office of the General Counsel continues to receive meritorious charges alleging unlawful handbook rules. I am publishing this report to offer guidance on my views of this evolving area of labor law, with the hope that it will help employers to review their handbooks and other rules, and conform them, if necessary, to ensure that they are lawful.

Under the Board's decision in *Lutheran Heritage Village-Livonia,* 343 NLRB 646 (2004), the mere maintenance of a work rule may violate Section 8(a)(1) of the Act if the rule has a chilling effect on employees' Section 7 activity. The most obvious way a rule would violate Section 8(a)(1) is by explicitly restricting protected concerted activity; by banning union activity, for example. Even if a rule does not explicitly prohibit Section 7 activity, however, it will still be found unlawful if 1) employees would reasonably construe the rule's language to prohibit Section 7 activity; 2) the rule was promulgated in response to union or other Section 7 activity; or 3) the rule was actually applied to restrict the exercise of Section 7 rights.

In our experience, the vast majority of violations are found under the first prong of the *Lutheran Heritage* test. The Board has issued a number of decisions interpreting whether "employees would reasonably construe" employer rules to prohibit Section 7 activity, finding various rules to be unlawful under that standard. I have had conversations with both labor- and management-side practitioners, who have asked for guidance regarding handbook rules that are deemed acceptable under this prong of the Board's test. Thus, I am issuing this report.

This report is divided into two parts. First, the report will compare rules we found unlawful with rules we found lawful and explain our reasoning. This section will focus on the types of rules that are frequently at issue before us, such as confidentiality rules, professionalism rules, anti-harassment rules, trademark rules, photography/recording rules, and media contact rules. Second, the report will discuss handbook rules from a recently settled unfair labor practice charge against Wendy's International LLC. The settlement was negotiated following our initial

determination that several of Wendy's handbook rules were facially unlawful. The report sets forth Wendy's rules that we initially found unlawful with an explanation, along with Wendy's modified rules, adopted pursuant to a informal, bilateral Board settlement agreement, which the Office of the General Counsel does not believe violate the Act.

I hope that this report, with its specific examples of lawful and unlawful handbook policies and rules, will be of assistance to labor law practitioners and human resource professionals.

Richard F. Griffin, Jr.
General Counsel

Part 1: Examples of Lawful and Unlawful Handbook Rules

A. Employer Handbook Rules Regarding Confidentiality

Employees have a Section 7 right to discuss wages, hours, and other terms and conditions of employment with fellow employees, as well as with nonemployees, such as union representatives. Thus, an employer's confidentiality policy that either specifically prohibits employee discussions of terms and conditions of employment—such as wages, hours, or workplace complaints—or that employees would reasonably understand to prohibit such discussions, violates the Act. Similarly, a confidentiality rule that broadly encompasses "employee" or "personnel" information, without further clarification, will reasonably be construed by employees to restrict Section 7-protected communications. *See Flamingo-Hilton Laughlin*, 330 NLRB 287, 288 n.3, 291–92 (1999).

In contrast, broad prohibitions on disclosing "confidential" information are lawful so long as they do not reference information regarding employees or anything that would reasonably be considered a term or condition of employment, because employers have a substantial and legitimate interest in maintaining the privacy of certain business information. *See Lafayette Park Hotel*, 326 NLRB 824, 826 (1998), *enforced*, 203 F.3d 52 (D.C. Cir. 1999); *Super K-Mart*, 330 NLRB 263, 263 (1999). Furthermore, an otherwise unlawful confidentiality rule will be found lawful if, when viewed in context, employees would not reasonably understand the rule to prohibit Section 7 protected activity.

Unlawful Confidentiality Rules

We found the following rules to be unlawful because they restrict disclosure of employee information and therefore are unlawfully overbroad:

- **Do not discuss "customer or employee information" outside of work, including "phone numbers [and] addresses."**

In the above rule, in addition to the overbroad reference to "employee information," the blanket ban on discussing employee contact information, without regard for how employees obtain that information, is also facially unlawful.

- **"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)."

Although this rule's restriction on disclosing information about "other associates" is not a blanket ban, it is nonetheless unlawfully overbroad because a reasonable employee would not understand how the employer determines what constitutes a "lawful Company policy."

- **"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]."**

While an employer may clearly ban disclosure of its own confidential information, a broad reference to "another's" information, without further clarification, as in the above rule, would reasonably be interpreted to include other *employees'* wages and other terms and conditions of employment.

We determined that the following confidentiality rules were facially unlawful, even though they did not explicitly reference terms and conditions of employment or employee information, because the rules contained broad restrictions and did not clarify, in express language or contextually, that they did not restrict Section 7 communications:

- **Prohibiting employees from "[d]isclosing . . . details about the [Employer]."**

- **"Sharing of [overheard conversations at the work site] with your co-workers, the public, or anyone outside of your immediate work group is strictly prohibited."**

- **"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."**

- **"[I]f something is not public information, you must not share it."**

Because the rule directly above bans discussion of all non-public information, we concluded that employees would reasonably understand it to encompass such non-public information as employee wages, benefits, and other terms and conditions of employment.

- **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."**

Employees not only have a Section 7 right to protest their wages and working conditions, but also have a right to share information in support of those complaints. This rule would reasonably lead employees to believe that they cannot disclose that kind of information because it might adversely affect the employer's interest, image, or reputation.

Lawful Confidentiality Rules

We concluded that the following rules that prohibit disclosure of confidential information were facially lawful because: 1) they do not reference information regarding employees or employee terms and conditions of employment, 2) although they use the general term "confidential," they do not define it in an overbroad manner, and 3) they do not otherwise contain language that would reasonably be construed to prohibit Section 7 communications:

- **No unauthorized disclosure of "business 'secrets' or other confidential information."**
- **"Misuse or unauthorized disclosure of confidential information not otherwise available to persons or firms outside [Employer] is cause for disciplinary action, including termination."**
- **"Do not disclose confidential financial data, or other non-public proprietary company information. Do not share confidential information regarding business partners, vendors or customers."**

Finally, even when a confidentiality policy contains overly broad language, the rule will be found lawful if, when viewed in context, employees would not reasonably understand the rule to prohibit Section 7-protected activity. The following confidentiality rule, which we found lawful based on a contextual analysis, well illustrates this principle:

- **Prohibition on disclosure of all "information acquired in the course of one's work."**

This rule uses expansive language that, when read in isolation, would reasonably be read to define employee wages and benefits as confidential information. However, in that case, the rule was nested among rules relating to conflicts of interest and compliance with SEC regulations and state and federal laws. Thus, we determined that employees would reasonably understand the information described as encompassing customer credit cards, contracts, and trade secrets, and not Section 7-protected activity.

B. Employer Handbook Rules Regarding Employee Conduct toward the Company and Supervisors

Employees also have the Section 7 right to criticize or protest their employer's labor policies or treatment of employees. Thus, rules that can reasonably be read to prohibit protected concerted criticism of the employer will be found unlawfully overbroad. For instance, a rule that prohibits employees from engaging in "disrespectful," "negative," "inappropriate," or "rude" conduct towards the employer or management, absent sufficient clarification or context, will usually be found unlawful. *See Casino San Pablo*, 361 NLRB No. 148, slip op. at 3 (Dec. 16, 2014). Moreover, employee criticism of an employer will not lose the Act's protection simply because the criticism is false or defamatory, so a rule that bans false statements will be found unlawfully overbroad unless it specifies that only maliciously false statements are prohibited. *Id.* at 4. On the other hand, a rule that requires employees to be respectful and professional to coworkers, clients, or competitors, but not the employer or management, will generally be found lawful, because employers have a legitimate business interest in having employees act professionally and courteously in their dealings with coworkers, customers, employer business partners, and other third parties. In addition, rules prohibiting conduct that amounts to insubordination would also not be construed as limiting protected activities. *See Copper River of Boiling Springs, LLC*, 360 NLRB No. 60 (Feb. 28, 2014). Also, rules that employees would reasonably understand to prohibit insubordinate conduct have been found lawful.

Unlawful Rules Regulating Employee Conduct towards the Employer

We found the following rules unlawfully overbroad since employees reasonably would construe them to ban protected criticism or protests regarding their supervisors, management, or the employer in general.

- **"[B]e respectful to the company, other employees, customers, partners, and competitors."**
- **Do "not make fun of, denigrate, or defame your co-workers, customers, franchisees, suppliers, the Company, or our competitors."**
- **"Be respectful of others and the Company."**
- **No "[d]efamatory, libelous, slanderous or discriminatory comments about [the Company], its customers and/or competitors, its employees or management.**

While the following two rules ban "insubordination," they also ban conduct that does not rise to the level of insubordination, which reasonably would be understood

as including protected concerted activity. Accordingly, we found these rules to be unlawful.

- **"Disrespectful conduct or insubordination, including, but not limited to, refusing to follow orders from a supervisor or a designated representative."**

- **"Chronic resistance to proper work-related orders or discipline, even though not overt insubordination" will result in discipline.**

In addition, employees' right to criticize an employer's labor policies and treatment of employees includes the right to do so in a public forum. *See Quicken Loans, Inc.*, 361 NLRB No. 94, slip op. at 1 n.1 (Nov. 3, 2014). Accordingly, we determined that the following rules were unlawfully overbroad because they reasonably would be read to require employees to refrain from criticizing the employer in public.

- **"Refrain from any action that would harm persons or property or cause damage to the Company's business or reputation."**

- **"[I]t is important that employees practice caution and discretion when posting content [on social media] that could affect [the Employer's] business operation or reputation."**

- **Do not make "[s]tatements "that damage the company or the company's reputation or that disrupt or damage the company's business relationships."**

- **"Never engage in behavior that would undermine the reputation of [the Employer], your peers or yourself."**

With regard to these examples, we recognize that the Act does not protect employee conduct aimed at disparaging an employer's product, as opposed to conduct critical of an employer's labor policies or working conditions. These rules, however, contained insufficient context or examples to indicate that they were aimed only at unprotected conduct.

<u>Lawful Rules Regulating Employee Conduct towards the Employer</u>

In contrast, when an employer's handbook simply requires employees to be respectful to customers, competitors, and the like, but does not mention the company or its management, employees reasonably would not believe that such a rule prohibits Section 7-protected criticism of the company. The following rules, which we have found lawful, are illustrative:

- **No "rudeness or unprofessional behavior toward a customer, or anyone in contact with" the company.**

- **"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."**

Similarly, rules requiring employees to cooperate with each other and the employer in the performance of their work also usually do not implicate Section 7 rights. *See Copper River of Boiling Springs, LLC*, 360 NLRB No. 60, slip op. at 1 (Feb. 28, 2014). Thus, we found the following rule was lawful because employees would reasonably understand that it is stating the employer's legitimate expectation that employees work together in an atmosphere of civility, and that it is not prohibiting Section 7 activity:

- **"Each employee is expected to work in a cooperative manner with management/supervision, coworkers, customers and vendors."**

And we concluded that the following rule was lawful, because employees would reasonably interpret it to apply to employer investigations of workplace misconduct rather than investigations of unfair labor practices or preparations for arbitration, when read in context with other provisions:

- **"Each employee is expected to abide by Company policies and to cooperate fully in any investigation that the Company may undertake."**

As previously discussed, the Board has made clear that it will not read rules in isolation. Even when a rule includes phrases or words that, alone, reasonably would be interpreted to ban protected criticism of the employer, if the context makes plain that only serious misconduct is banned, the rule will be found lawful. *See Tradesmen International*, 338 NLRB 460, 460–62 (2002). For instance, we found the following rule lawful based on a contextual analysis:

- **"Being insubordinate, threatening, intimidating, disrespectful or assaulting a manager/supervisor, coworker, customer or vendor will result in" discipline.**

Although a ban on being "disrespectful" to management, by itself, would ordinarily be found to unlawfully chill Section 7 criticism of the employer, the term here is contained in a larger provision that is clearly focused on serious misconduct, like insubordination, threats, and assault. Viewed in that context, we concluded that employees would not reasonably believe this rule to ban protected criticism.

C. Employer Handbook Rules Regulating Conduct Towards Fellow Employees

In addition to employees' Section 7 rights to publicly discuss their terms and conditions of employment and to criticize their employer's labor policies, employees also have a right under the Act to argue and debate with each other about unions, management, and their terms and conditions of employment. These discussions can become contentious, but as the Supreme Court has noted, protected concerted speech will not lose its protection even if it includes "intemperate, abusive and inaccurate statements." *Linn v. United Plant Guards*, 383 U.S. 53 (1966). Thus, when an employer bans "negative" or "inappropriate" discussions among its employees, without further clarification, employees reasonably will read those rules to prohibit discussions and interactions that are protected under Section 7. *See Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. at 7 (Aug. 22, 2014); *Hills & Dales General Hospital*, 360 NLRB No. 70, slip op. at 1 (Apr. 1, 2014). For example, although employers have a legitimate and substantial interest in maintaining a harassment-free workplace, anti-harassment rules cannot be so broad that employees would reasonably read them as prohibiting vigorous debate or intemperate comments regarding Section 7-protected subjects.

Unlawful Employee-Employee Conduct Rules

We concluded that the following rules were unlawfully overbroad because employees would reasonably construe them to restrict protected discussions with their coworkers.

- **"[D]on't pick fights" online.**

We found the above rule unlawful because its broad and ambiguous language would reasonably be construed to encompass protected heated discussion among employees regarding unionization, the employer's labor policies, or the employer's treatment of 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."**

Because debate about unionization and other protected concerted activity is often contentious and controversial, employees would reasonably read a rule that bans "offensive," "derogatory," "insulting," or "embarrassing" comments as limiting their ability to honestly discuss such subjects. These terms also would reasonably be construed to limit protected criticism of supervisors and managers, since they are also "company employees."

- **"[S]how proper consideration for others' privacy and for topics that may be considered objectionable or inflammatory, such as politics and religion."**

This rule was found unlawful because Section 7 protects communications about political matters, e.g., proposed right-to-work legislation. Its restriction on communications regarding controversial political matters, without clarifying context or examples, would be reasonably construed to cover these kinds of Section 7 communications. Indeed, discussion of unionization would also be chilled by such a rule because it can be an inflammatory topic similar to politics and religion.

- **Do not send "unwanted, offensive, or inappropriate" e-mails.**

The above rule is similarly vague and overbroad, in the absence of context or examples to clarify that it does not encompass Section 7 communications.

- **"Material that is fraudulent, harassing, embarrassing, sexually explicit, profane, obscene, intimidating, defamatory, or otherwise unlawful or inappropriate may not be sent by e-mail . . . ."**

We found the above rule unlawful because several of its terms are ambiguous as to their application to Section 7 activity—"embarrassing," "defamatory," and "otherwise . . . inappropriate." We further concluded that, viewed in context with such language, employees would reasonably construe even the term "intimidating" as covering Section 7 conduct.

Lawful Employee-Employee Conduct Rules

On the other hand, when an employer's professionalism rule simply requires employees to be respectful to customers or competitors, or directs employees not to engage in unprofessional conduct, and does not mention the company or its management, employees would not reasonably believe that such a rule prohibits Section 7-protected criticism of the company. Accordingly, we concluded that the following rules were lawful:

- **"Making inappropriate gestures, including visual staring."**

- **Any logos or graphics worn by employees "must not reflect any form of violent, discriminatory, abusive, offensive, demeaning, or otherwise unprofessional message."**

- **"[T]hreatening, intimidating, coercing, or otherwise interfering with the job performance of fellow employees or visitors."**

- **No "harassment of employees, patients or facility visitors."**

- **No "use of racial slurs, derogatory comments, or insults."**

With respect to the last example, we recognized that a blanket ban on "derogatory comments," by itself, would reasonably be read to restrict protected criticism of the employer. However, because this rule was in a section of the handbook that dealt exclusively with unlawful harassment and discrimination, employees reasonably would read it in context as prohibiting those kinds of unprotected comments toward coworkers, rather than protected criticism of the employer.

D. Employer Handbook Rules Regarding Employee Interaction with Third Parties

Another right employees have under Section 7 is the right to communicate with the news media, government agencies, and other third parties about wages, benefits, and other terms and conditions of employment. Handbook rules that reasonably would be read to restrict such communications are unlawfully overbroad. *See Trump Marina Associates*, 354 NLRB 1027, 1027 n.2 (2009), *incorporated by reference*, 355 NLRB 585 (2010), *enforced mem.*, 435 F. App'x 1 (D.C. Cir. 2011). The most frequent offenders in this category are company media policies. While employers may lawfully control who makes official statements for the company, they must be careful to ensure that their rules would not reasonably be read to ban employees from speaking to the media or other third parties on their own (or other employees') behalf.

Unlawful Rules Regulating Third Party Communications

We found the following rules were unlawfully overbroad because employees reasonably would read them to ban protected communications with the media.

- **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.**

We determined that the above rule was unlawful because employees would reasonably construe the phrase "company matters" to encompass employment concerns and labor relations, and there was no limiting language or other context in the rule to clarify that the rule applied only to those speaking as official company representatives.

- **"[A]ssociates 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."**

- **"[A]ll inquiries from the media must be referred to the Director of Operations in the corporate office, no exceptions."**

These two rules contain blanket restrictions on employees' responses to media inquiries. We therefore concluded that employees would reasonably understand that they apply to *all* media contacts, not only inquiries seeking the employers' official positions.

In addition, we found the following rule to be unlawfully overbroad because employees reasonably would read it to limit protected communications with government agencies.

- **"If you are contacted by any government agency you should contact the Law Department immediately for assistance."**

Although we recognize an employer's right to present its own position regarding the subject of a government inquiry, this rule contains a broader restriction. Employees would reasonably believe that they may not speak to a government agency without management approval, or even provide information in response to a Board investigation.

Lawful Rules Regulating Employee Communications with Outside Parties

In contrast, we found the following media contact rules to be lawful because employees reasonably would interpret them to mean that employees should not speak on behalf of the company, not that employees cannot speak to outsiders on their own (or other employees') behalf.

- **"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."**

We determined that this rule was lawful because it specifically referred to employee contact with the media regarding non-Section 7 related matters, such as crisis situations; sought to ensure a consistent company response or message regarding those matters; and was not a blanket prohibition against all contact with the media. Accordingly, we concluded that employees would not reasonably interpret this rule as interfering with Section 7 communications.

- **"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: . . . 2. 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.'"**

We concluded that the prefatory language in this rule would cause employees to reasonably construe the rule as an attempt to control the company's message, rather than to restrict Section 7 communications to the media. Further, the required responses to media inquiries would be non-sequiturs in the context of a discussion about terms and conditions of employment or protected criticism of the company. Accordingly, we found that employees reasonably would not read this rule to restrict conversations with the news media about protected concerted activities.

E. Employer Handbook Rules Restricting Use of Company Logos, Copyrights, and Trademarks

We have also reviewed handbook rules that restrict employee use of company logos, copyrights, or trademarks. Though copyright holders have a clear interest in protecting their intellectual property, handbook rules cannot prohibit employees' fair protected use of that property. *See Pepsi-Cola Bottling Co.*, 301 NLRB 1008, 1019–20 (1991), *enforced mem.*, 953 F.2d 638 (4th Cir. 1992). For instance, a company's name and logo will usually be protected by intellectual property laws, but employees have a right to use the name and logo on picket signs, leaflets, and other protest material. Employer proprietary interests are not implicated by employees' non-commercial use of a name, logo, or other trademark to identify the employer in the course of Section 7 activity. Thus, a broad ban on such use without any clarification will generally be found unlawfully overbroad.

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

We found that the following rules were unlawful because they contain broad restrictions that employees would reasonably read to ban fair use of the employer's intellectual property in the course of protected concerted activity.

- **Do "not use any Company logos, trademarks, graphics, or advertising materials" in social media.**

- **Do not use "other people's property," such as trademarks, without permission in social media.**

- **"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."**

- **"Company logos and trademarks may not be used without written consent . . . ."**

Lawful Rules Protecting Employer Logos, Copyrights, and Trademarks

We found that the following rules were lawful. Unlike the prior examples, which broadly ban employee use of trademarked or copyrighted material, these rules simply require employees to respect such laws, permitting fair use.

- **"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."**

- **"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."**

F. Employer Handbook Rules Restricting Photography and Recording

Employees also have a Section 7 right to photograph and make recordings in furtherance of their protected concerted activity, including the right to use personal devices to take such pictures and recordings. *See Hawaii Tribune-Herald*, 356 NLRB No. 63, slip op. at 1 (Feb. 14, 2011), *enforced sub nom. Stephens Media, LLC v. NLRB*, 677 F.3d 1241 (D.C. Cir. 2012); *White Oak Manor*, 353 NLRB 795, 795 (2009), *incorporated by reference*, 355 NLRB 1280 (2010), *enforced mem.*, 452 F. App'x 374 (4th Cir. 2011). Thus, rules placing a total ban on such photography or recordings, or banning the use or possession of personal cameras or recording devices, are unlawfully overbroad where they would reasonably be read to prohibit the taking of pictures or recordings on non-work time.

Unlawful Rules Banning Photography, Recordings, or Personal Electronic Devices

We found the following rules unlawfully overbroad because employees reasonably would interpret them to prohibit the use of personal equipment to engage in Section 7 activity while on breaks or other non-work time.

- **"Taking unauthorized pictures or video on company property" is prohibited.**

We concluded that employees would reasonably read this rule to prohibit all unauthorized employee use of a camera or video recorder, including attempts to document health and safety violations and other protected concerted activity.

- **"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 . . . ."**

We found this rule unlawful because employees would reasonably construe it to preclude, among other things, documentation of unfair labor practices, which is an essential part of the recognized right under Section 7 to utilize the Board's processes.

- **A total ban on use or possession of personal electronic equipment on Employer property.**

- **A prohibition on personal computers or data storage devices on employer property.**

We determined that the two above rules, which contain blanket restrictions on use or possession of recording devices, violated the Act for similar reasons. Although an employer has a legitimate interest in maintaining the confidentiality of business records, these rules were not narrowly tailored to address that concern.

- **Prohibition from wearing cell phones, making personal calls or viewing or sending texts "while on duty."**

This rule, which limits the restriction on personal recording devices to time "on duty," is nonetheless unlawful, because employees reasonably would understand "on duty" to include breaks and meals during their shifts, as opposed to their actual work time.

Lawful Rules Regulating Pictures and Recording Equipment

Rules regulating employee recording or photography will be found lawful if their scope is appropriately limited. For instance, in cases where a no-photography rule is instituted in response to a breach of patient privacy, where the employer has a well-understood, strong privacy interest, the Board has found that employees would not reasonably understand a no-photography rule to limit pictures for protected concerted purposes. *See Flagstaff Medical Center*, 357 NLRB No. 65, slip op. at 5 (Aug. 26, 2011), *enforced in relevant part*, 715 F.3d 928 (D.C. Cir. 2013). We also found the following rule lawful based on a contextual analysis:

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

This rule was embedded in a lawful media policy and immediately followed instructions on how to deal with reporters in the store. We determined that, in such a context, employees would read the rule to ban *news* cameras, not their own cameras.

G. Employer Handbook Rules Restricting Employees from Leaving Work

One of the most fundamental rights employees have under Section 7 of the Act is the right to go on strike. Accordingly, rules that regulate when employees can leave work are unlawful if employees reasonably would read them to forbid protected strike actions and walkouts. *See Purple Communications, Inc.*, 361 NLRB No. 43, slip op. at 2 (Sept. 24, 2014). If, however, such a rule makes no mention of "strikes," "walkouts," "disruptions," or the like, employees will reasonably understand the rule to pertain to employees leaving their posts for reasons unrelated to protected concerted activity, and the rule will be found lawful. *See 2 Sisters Food Group*, 357 NLRB No. 168, slip op. at 2 (Dec. 29, 2011).

Unlawful Handbook Rules Relating to Restrictions on Leaving Work

We found the following rules were unlawful because they contain broad prohibitions on walking off the job, which reasonably would be read to include protected strikes and walkouts.

- **"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.**

- **"Walking off the job . . ." is prohibited.**

Lawful Handbook Rules Relating to Restrictions on Leaving Work

In contrast, the following handbook rule was considered lawful:

- **"Entering or leaving Company property without permission may result in discharge."**

We found this rule was lawful because, in the absence of terms like "work stoppage" or "walking off the job," a rule forbidding employees from leaving the employer's property during work time without permission will not reasonably be read to encompass strikes. However, the portion of the rule that requires employees to

obtain permission before *entering the property* was found unlawful because employers may not deny off-duty employees access to parking lots, gates, and other outside nonworking areas except where sufficiently justified by business reasons or pursuant to the kind of narrowly tailored rule approved in *Tri-County Medical Center*, 222 NLRB 1089, 1089 (1976).

- **"Walking off shift, failing to report for a scheduled shift and leaving early without supervisor permission are also grounds for immediate termination."**

Although this rule includes the term "walking off shift," which usually would be considered an overbroad term that employees reasonably would understand to include strikes, we found this rule to be lawful in the context of the employees' health care responsibilities. Where employees are directly responsible for patient care, a broad "no walkout without permission" rule is reasonably read as ensuring that patients are not left without adequate care, not as a complete ban on strikes. *See Wilshire at Lakewood*, 343 NLRB 141, 144 (2004), *vacated in part*, 345 NLRB 1050 (2005), *enforcement denied on other grounds*, *Jochims v. NLRB*, 480 F.3d 1161 (D.C. Cir. 2007). This rule was maintained by an employer that operated a care facility for people with dementia. Thus, we found that employees would reasonably read this rule as being designed to ensure continuity of care, not as a ban on protected job actions.

H. Employer Conflict-of-Interest Rules

Section 7 of the Act protects employees' right to engage in concerted activity to improve their terms and conditions of employment, even if that activity is in conflict with the employer's interests. For instance, employees may protest in front of the company, organize a boycott, and solicit support for a union while on nonwork time. *See HTH Corp.*, 356 NLRB No. 182, slip op. at 2, 25 (June 14, 2011), *enforced*, 693 F.3d 1051 (9th Cir. 2012). If an employer's conflict-of-interest rule would reasonably be read to prohibit such activities, the rule will be found unlawful. However, where the rule includes examples or otherwise clarifies that it is limited to legitimate business interests, employees will reasonably understand the rule to prohibit only unprotected activity. *See Tradesmen International*, 338 NLRB 460, 461–62 (2002).

Unlawful Conflict-of-Interest Rules

We found the following rule unlawful because it was phrased broadly and did not include any clarifying examples or context that would indicate that it did not apply to Section 7 activities:

- **Employees may not engage in "any action" that is "not in the best interest of [the Employer]."**

Lawful Conflict-of-Interest Rules

In contrast, we found the following rules lawful because they included context and examples that indicated that the rules were not meant to encompass protected concerted activity:

- **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."**

We concluded that this rule is lawful because employees would reasonably understand that the rule is directed at protecting the employer from employee graft and preventing employees from engaging in a competing business, and that it does not apply to employee interactions with labor organizations or other Section 7 activity that the employer might oppose.

- **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 a[n Employer] customer, supplier, or competitor, or having a significant financial interest with one of these entities."**

The above rule included multiple examples of conflicts of interest such that it would not be interpreted to restrict Section 7 activity.

- **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."**

We also found this rule to be lawful based on a contextual analysis. While its requirement that employees refrain from activities or associations that are inconsistent with the company's best interests could, in isolation, be interpreted to include employee participation in unions, the surrounding context and examples ensure that employees would not reasonably read it in that way. Indeed, the rule is in a section of the handbook that deals entirely with business ethics and includes requirements to act with "honesty, fairness and integrity"; comply with "all laws,

rules and regulations"; and provide "accurate, complete, fair, timely, and understandable" information in SEC filings.

Part 2: The Settlement with Wendy's International LLC

In 2014, we concluded that many of the employee handbook rules alleged in an unfair labor practice charge against Wendy's International, LLC were unlawfully overbroad under *Lutheran Heritage*'s first prong. Pursuant to an informal, bilateral Board settlement agreement, Wendy's modified its handbook rules. This section of the report presents the rules we found unlawfully overbroad, with brief discussions of our reasoning, followed by the replacement rules, which the Office of the General Counsel considers lawful, contained in the settlement agreement.

A. Wendy's Unlawful Handbook Rules

The pertinent provisions of Wendy's handbook and our conclusions are outlined below.

Handbook disclosure provision

No part of this handbook may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or information storage and retrieval system or otherwise, for any purpose without the express written permission of Wendy's International, Inc. The information contained in this handbook is considered proprietary and confidential information of Wendy's and its intended use is strictly limited to Wendy's and its employees. The disclosure of this handbook to unauthorized parties is prohibited. Making an unauthorized disclosure of this handbook is a serious breach of Wendy's standards of conduct and ethics and shall expose the disclosing party to disciplinary action and other liabilities as permitted under law.

We concluded that this provision was unlawful because it prohibited disclosure of the Wendy's handbook, which contains employment policies, to third parties such as union representatives or the Board. Because employees have a Section 7 right to discuss their wages and other terms and conditions of employment with others, including co-workers, union representatives, and government agencies, such as the Board, a rule that precludes employees from sharing the employee handbook that contains many of their working conditions violates Section 8(a)(1).

Social Media Policy

Refrain from commenting on the company's business, financial performance, strategies, clients, policies, employees or competitors in any

social media, without the advance approval of your supervisor, Human Resources and Communications Departments. Anything you say or post may be construed as representing the Company's opinion or point of view (when it does not), or it may reflect negatively on the Company. If you wish to make a complaint or report a complaint or troubling behavior, please follow the complaint procedure in the applicable Company policy (e.g., Speak Out).

Although employers have a legitimate interest in ensuring that employee communications are not construed as misrepresenting the employer's official position, we concluded that this rule did not merely prevent employees from speaking on behalf of, or in the name of, Wendy's. Instead, it generally prohibited an employee from commenting about the Company's business, policies, or employees without authorization, particularly when it might reflect negatively on the Company. Accordingly, we found that this part of the rule was overly broad. We also concluded that the rule's instruction that employees should follow the Company's internal complaint mechanism to "make a complaint or report a complaint" chilled employees' Section 7 right to communicate employment-related complaints to persons and entities other than Wendy's.

Respect copyrights and similar laws. Do not use any copyrighted or otherwise protected information or property without the owner's written consent.

We concluded that this rule was unlawfully overbroad because it broadly prohibited *any* employee use of copyrighted or "otherwise protected" information. Employees would reasonably construe that language to prohibit Section 7 communications involving, for example, reference to the copyrighted handbook or Company website for purposes of commentary or criticism, or use of the Wendy's trademark/name and another business's trademark/name in a wage comparison. We determined that such use does not implicate the interests that courts have identified as being protected by trademark and copyright laws.

[You may not p]ost photographs taken at Company events or on Company premises without the advance consent of your supervisor, Human Resources and Communications Departments.
[You may not p]ost photographs of Company employees without their advance consent. Do not attribute or disseminate comments or statements purportedly made by employees or others without their explicit permission.

We concluded that these rules, which included no examples of unprotected conduct or other language to clarify and restrict their scope, would chill employees

from engaging in Section 7 activities, such as posting a photo of employees carrying a picket sign in front of a restaurant, documenting a health or safety concern, or discussing or making complaints about statements made by Wendy's or fellow employees.

[You may not u]se the Company's (or any of its affiliated entities) logos, marks or other protected information or property without the Legal Department's express written authorization.

As discussed above, Wendy's had no legitimate basis to prohibit the use of its logo or trademarks in this manner, which would reasonably be construed to restrict a variety of Section 7-protected uses of the Wendy's logo and trademarks. Therefore, we found this rule unlawfully overbroad.

[You may not e]mail, post, comment or blog anonymously. You may think it is anonymous, but it is most likely traceable to you and the Company.

Requiring employees to publicly self-identify in order to participate in protected activity imposes an unwarranted burden on Section 7 rights. Thus, we found this rule banning anonymous comments unlawfully overbroad.

[You may not m]ake false or misleading representations about your credentials or your work.

We found this rule unlawful, because its language clearly encompassed communications relating to working conditions, which do not lose their protection if they are false or misleading as opposed to "maliciously false" (i.e., made with knowledge of falsity or reckless disregard for the truth). A broad rule banning merely false or misleading representations about work can have a chilling effect by causing employees to become hesitant to voice their views and complaints concerning working conditions for fear that later they may be disciplined because someone may determine that those were false or misleading statements.

[You may not c]reate a blog or online group related to your job without the advance approval of the Legal and Communications.

We determined that this no-blogging rule was unlawfully overbroad because employees have a Section 7 right to discuss their terms and conditions of employment with their co-workers and/or the public, including on blogs or online groups, and it is well-settled that such pre-authorization requirements chill Section 7 activity.

Do Not Disparage:
Be thoughtful and respectful in all your communications and dealings with others, including email and social media. Do not harass, threaten, libel, malign, defame, or disparage fellow professionals, employees, clients, competitors or anyone else. Do not make personal insults, use obscenities or engage in any conduct that would be unacceptable in a professional environment.

We found this rule unlawful because its second and third sentences contained broad, sweeping prohibitions against "malign[ing], defam[ing], or disparag[ing]" that, in context, would reasonably be read to go beyond unprotected defamation and encompass concerted communications protesting or criticizing Wendy's treatment of employees, among other Section 7 activities. And, there was nothing in the rule or elsewhere in the handbook that would reasonably assure employees that Section 7 communications were excluded from the rule's broad reach.

Do Not Retaliate:
If you discover negative statements, emails or posts about you or the Company, do not respond. First seek help from the Legal and Communications Departments, who will guide any response.

We concluded that employees would reasonably read this rule as requiring them to seek permission before engaging in Section 7 activity because "negative statements about . . . the Company" would reasonably be construed as encompassing Section 7 activity. For example, employees would reasonably read the rule to require that they obtain permission from Wendy's before responding to a co-worker's complaint about working conditions or a protest of unfair labor practices. We therefore found this rule overly broad.

Conflict-of-Interest Provision

Because you are now working in one of Wendy's restaurants, it is important to realize that you have an up close and personal look at our business every day. With this in mind, you should recognize your responsibility to avoid any conflict between your personal interests and those of the Company. A conflict of interest occurs when our personal interests interfere—or appear to interfere—with our ability to make sound business decisions on behalf of Wendy's.

We determined that the Conflict-of-Interest provision was unlawfully overbroad because its requirement that employees avoid "any conflict between your personal interests and those of the Company" would reasonably be read to encompass Section 7 activity, such as union organizing activity, demanding higher

wages, or engaging in boycotts or public demonstrations related to a labor dispute. Unlike rules that provide specific examples of what constitutes a conflict of interest, nothing in this rule confined its scope to legitimate business concerns or clarified that it was not intended to apply to Section 7 activity.

Moreover, we concluded that the Conflict-of-Interest provision was even more likely to chill Section 7 activity when read together with the handbook's third-party representation provision, located about six pages later, which communicated that unions are not beneficial or in the interest of Wendy's: **[b]ecause Wendy's desires to maintain open and direct communications with all of our employees, we do not believe that third party/union involvement in our relationship would benefit our employees or Wendy's.**

Company Confidential Information Provision

During the course of your employment, you may become aware of confidential information about Wendy's business. You must not disclose any confidential information relating to Wendy's business to anyone outside of the Company. Your employee PIN and other personal information should be kept confidential. Please don't share this information with any other employee.

We concluded that the confidentiality provision was facially unlawful because it referenced employees' "personal information," which the Board has found would reasonably be read to encompass discussion of wages, hours, and terms and conditions of employment.

Employee Conduct

The Employee Conduct section of the handbook contained approximately two pages listing examples of "misconduct" and "gross misconduct," which could lead to disciplinary action, up to and including discharge, in the sole discretion of Wendy's. The list included the following:

Soliciting, collecting funds, distributing literature on Company premises without proper approvals or outside the guidelines established in the "No Solicitation/No Distribution" Policy.

The blanket prohibition against soliciting, collecting funds, or distributing literature without proper approvals was unlawfully overbroad because employees have a Section 7 right to solicit on non-work time and distribute literature in non-work areas.

Walking off the job without authorization.

We found that this rule was unlawfully overbroad because employees would reasonably construe it to prohibit Section 7 activity such as a concerted walkout or other strike activity. As discussed in Part 1 of this report, the Board has drawn a fairly bright line regarding how employees would reasonably construe rules about employees leaving work. Rules that contain phrases such as "walking off the job," as here, reasonably would be read to forbid protected strike actions and walkouts.

Threatening, intimidating, foul or inappropriate language.

We found this prohibition to be unlawful because rules that forbid the vague phrase "inappropriate language," without examples or context, would reasonably be construed to prohibit protected communications about or criticism of management, labor policies, or working conditions.

False accusations against the Company and/or against another employee or customer.

We found this rule unlawful because an accusation against an employer does not lose the protection of Section 7 merely because it is false, as opposed to being recklessly or knowingly false. As previously discussed, a rule banning merely false statements can have a chilling effect on protected concerted communications, for instance, because employees reasonably would fear that contradictory information provided by the employer would result in discipline.

No Distribution/No Solicitation Provision

[I]t is our policy to prohibit the distribution of literature in work areas and to prohibit solicitation during employees' working time. "Working time" is the time an employee is engaged, or should be engaged, in performing his/her work tasks for Wendy's. These guidelines also apply to solicitation and/or distribution by electronic means.

We concluded that this rule was unlawful because it restricted distribution by electronic means in work areas. While an employer may restrict distribution of literature in paper form in work areas, it has no legitimate business justification to restrict employees from distributing literature electronically, such as sending an email with a "flyer" attached, while the employees are in work areas during non-working time. Unlike distribution of paper literature, which can create a production hazard even when it occurs on nonworking time, electronic distribution does not

produce litter and only impinges on the employer's management interests if it occurs on working time.

Restaurant Telephone; Cell Phone; Camera Phone/Recording Devices Provision

Due to the potential for issues such as invasion of privacy, sexual harassment, and loss of productivity, no Crew Member may operate a camera phone on Company property or while performing work for the Company. The use of tape recorders, Dictaphones, or other types of voice recording devices anywhere on Company property, including to record conversations or activities of other employees or management, or while performing work for the Company, is also strictly prohibited, unless the device was provided to you by the Company and is used solely for legitimate business purposes.

We concluded that this rule, which prohibited employee use of a camera or video recorder "on Company property" at any time, precluded Section 7 activities, such as employees documenting health and safety violations, collective action, or the potential violation of employee rights under the Act. Wendy's had no business justification for such a broad prohibition. Its concerns about privacy, sexual harassment, and loss of productivity did not justify a rule that prohibited all use of a camera phone or audio recording device anywhere on the company's property at any time.

B. Wendy's Lawful Handbook Rules Pursuant to Settlement Agreement

Handbook Disclosure Provision

This Crew Orientation Handbook . . . is the property of Wendy's International LLC. No part of this handbook may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or information storage and retrieval system or otherwise, for any business/commercial venture without the express written permission of Wendy's International, LLC. The information contained in this handbook is strictly limited to use by Wendy's and its employees. The disclosure of this handbook to competitors is prohibited. Making an unauthorized disclosure of this handbook is a serious breach of Wendy's standards of conduct and ethics and shall expose the disclosing party to disciplinary action and other liabilities as permitted under law.

Social Media Provision

- Do not comment on trade secrets and proprietary Company information (business, financial and marketing strategies) without the advance approval of your supervisor, Human Resources and Communications Departments.

- Do not make negative comments about our customers in any social media.

- Use of social media on Company equipment during working time is permitted, if your use is for legitimate, preapproved Company business. Please discuss the nature of your anticipated business use and the content of your message with your supervisor and Human Resources. Obtain their approval prior to such use.

- Respect copyright, trademark and similar laws and use such protected information in compliance with applicable legal standards.

Restrictions:

YOU MAY NOT do any of the following:

- Due to the potential for issues such as invasion of privacy (employee and customer), sexual or other harassment (as defined by our harassment /discrimination policy), protection of proprietary recipes and preparation techniques, Crew Members may not take, distribute, or post pictures, videos, or audio recordings while on working time. Crew Members also may not take pictures or make recordings of work areas. An exception to the rule concerning pictures and recordings of work areas would be to engage in activity protected by the National Labor Relations Act including, for example, taking pictures of health, safety and/or working condition concerns or of strike, protest and work-related issues and/or other protected concerted activities.

- Use the Company's (or any of its affiliated entities) logos, marks or other protected information or property for any business/commercial venture without the Legal Department's express written authorization.

- Make knowingly false representations about your credentials or your work.

- Create a blog or online group related to Wendy's (not including blogs or discussions involving wages, benefits, or other terms and conditions of employment, or protected concerted activity) without the advance approval of the Legal and Communications Departments. If a blog or online group is approved, it must contain a disclaimer approved by the Legal Department.

<u>Do Not Violate the Law and Related Company Policies</u>:

Be thoughtful in all your communications and dealings with others, including email and social media. Never harass (as defined by our anti-harassment policy), threaten, libel or defame fellow professionals, employees, clients, competitors or anyone else. In general, it is always wise to remember that what you say in social media can often be seen by anyone. Accordingly, harassing comments, obscenities or similar conduct that would violate Company policies is discouraged in general and is never allowed while using Wendy's equipment or during your working time.

Discipline:
All employees are expected to know and follow this policy. Nothing in this policy is, however, intended to prevent employees from engaging in concerted activity protected by law. If you have any questions regarding this policy, please ask your supervisor and Human Resources before acting. Any violations of this policy are grounds for disciplinary action, up to and including immediate termination of employment.

Conflict of Interest Provision

Because you are now working in one of Wendy's restaurants, it is important to realize that you have an up close and personal look at our business every day. With this in mind, you should recognize your responsibility to avoid any conflict between your personal interests and those of the Company. A conflict of interest occurs when our personal interests interfere – or appear to interfere – with your ability to make sound business decisions on behalf of Wendy's. There are some common relationships or circumstances that can create, or give the appearance of, a conflict of interest. The situations generally involve gifts and business or financial dealings or investments. Gifts, favors, tickets, entertainment and other such inducements may be attempts to "purchase" favorable treatment. Accepting such inducements could raise doubts about an employee's ability to make independent business judgments and the Company's commitment to treating people fairly. In addition, a conflict of interest exists when employees have a financial or ownership interest in a business or financial venture that may be at variance with the interests of Wendy's. Likewise, when an employee engages in business transactions that benefit family members, it may give an appearance of impropriety.

Company Confidential Information Provision

During the course of your employment, you may become aware of trade secrets and similarly protected proprietary and confidential information

about Wendy's business (e.g. recipes, preparation techniques, marketing plans and strategies, financial records). You must not disclose any such information to anyone outside of the Company. Your employee PIN and other similar personal identification information should be kept confidential. Please don't share this information with any other employee.

Employee Conduct Provision

- Soliciting, collecting funds, distributing literature on Company premises outside the guidelines established in the "No Solicitation/No Distribution" Policy.

- Leaving Company premises during working shift without permission of management.

- Threatening, harassing (as defined by our harassment/discrimination policy), intimidating, profane, obscene or similar inappropriate language in violation of Company policy.

- Making knowingly false accusations against the Company and/or against another employee, customer or vendor.

No Distribution/No Solicitation Provision

Providing the most ideal work environment possible is very important to Wendy's. We hope you feel very comfortable and at ease when you're here at work. Therefore, to protect you and our customers from unnecessary interruptions and annoyances, it is our policy to prohibit the distribution of literature in work areas and to prohibit solicitation and distribution of literature during employees' working time. "Working Time" is the time an employee is engaged or should be engaged in performing his/her work tasks for Wendy's. These guidelines also apply to solicitation by electronic means. Solicitation or distribution of any kind by non-employees on Company premises is prohibited at all times. Nothing in this section prohibits employees from discussing terms and conditions of employment.

Restaurant Telephone/ Cell Phone/Camera Phone/Recording Devices Provision

Due to the potential for issues such as invasion of privacy (employee and customer), sexual or other harassment (as defined by our harassment /discrimination policy), protection of proprietary recipes and preparation techniques, Crew Members may not take, distribute, or post pictures, videos, or audio recordings while on working time. Crew Members also may not take pictures or make recordings of work areas. An exception to the rule concerning pictures and recordings of work areas would be to engage in

activity protected by the National Labor Relations Act including, for example, taking pictures of health, safety and/or working condition concerns or of strike, protest and work-related issues and/or other protected concerted activities.