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Beware: Your Common(sense) Policies and Practices May Now Be an Unfair Labor Practice
Kimberly J. Korando
November 14, 2023
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NLRB leadership changes

Peter Robb
General Counsel
National Labor Relations Board
FIRED January 20, 2021

Jennifer Abruzzo
General Counsel
National Labor Relations Board
TAKES OFFICE July 22, 2021

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Abruzzo Focus Areas *(among many others)*

- Confidentiality (agreements, policies)
- Non-disparagement (agreements, policies)
- Workplace policies, rules
- Protected concerted activity

Other areas of focus discussed in **MEMORANDUM GC 21-04** (August 12, 2021) and **MEMORANDUM GC 23-04** (March 20, 2023): Mandatory Submissions to Advice

MEMORANDUM GC 23-02 (October 31, 2022): Electronic Monitoring and Algorithmic Management of Employees Interfering with the Exercise of Section 7 Rights

MEMORANDUM GC 23-08 (May 30, 2023): Non-Compete Agreements that Violate the National Labor Relations Act

Independent contractor status: The Atlanta Opera, Inc., 372 NLRB No. 95 (June 13, 2023)

Standard for Determining Joint Employer Status, 88 Fed. Reg. 73946 (Oct. 27, 2023)

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It's not just about unions…

National Labor Relations Act (NLRA) applies to…

. . . ***non-supervisory*** employees in ***union-free*** (and union) workplaces

Does NOT apply to supervisors and managers

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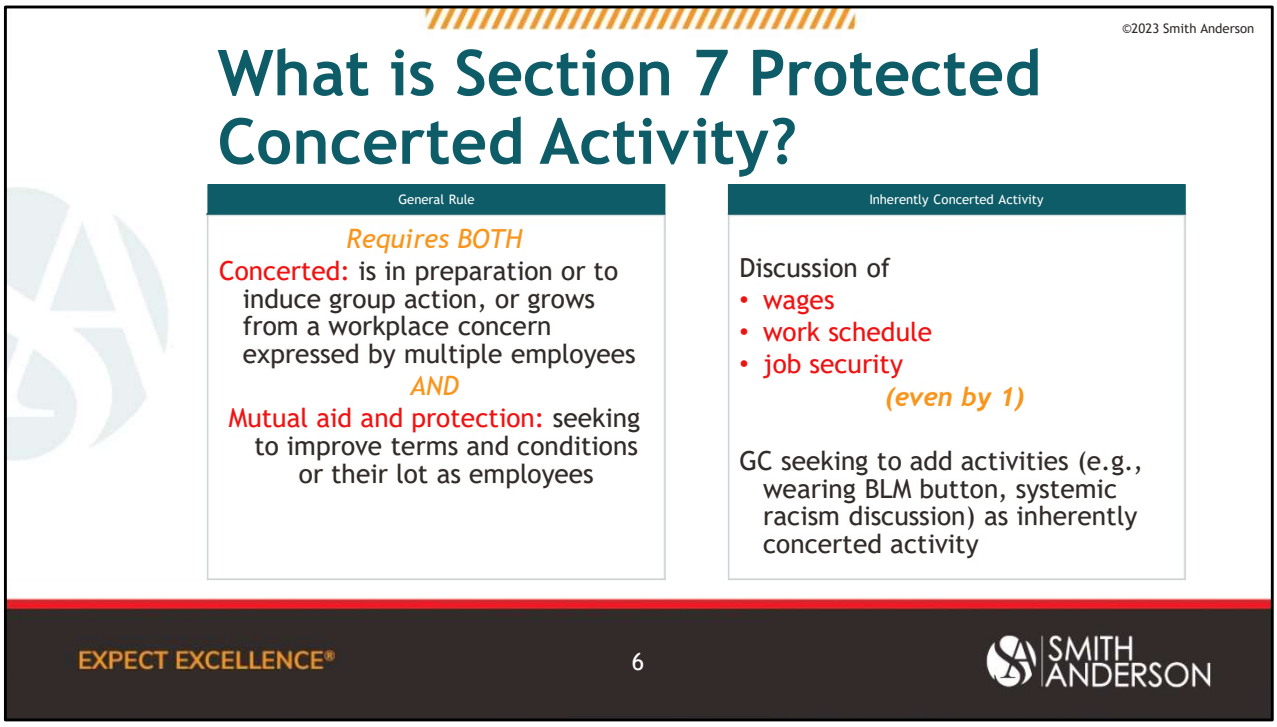
It's all about Section 7 rights

. . . gives right to engage in *concerted activities* for *mutual aid or protection* (aka *protected concerted activity*) *(Section 7)*

. . . outlaws rules or practices that interfere with Section 7 rights *(Section 8)*



Advice Memorandum (October 19, 2021), Kaiser Permanente Bernard J. Tyson School of Medicine

- GC contends: (1) the Charging Party's (physician and medical school professor) classroom conversation was inherently concerted because it discussed issues of race faced by Black faculty and students as well as systemic racism in medicine, and that conversation was for mutual aid or protection; (2) the Charging Party's tweets were a protected concerted activity on their own as well as being a logical outgrowth of the discussion.

Advice Memorandum (September 9, 2021), The Home Depot

- GC contends that: (1) employee discussions in the workplace regarding racism should be deemed inherently concerted because systemic racism, including an employer's racial discrimination or racial harassment, and/or tolerance of such discrimination or harassment, necessarily implicates significant terms and condition of employment and is of vital importance to employees; and (2) the Board should expand the circumstances under which it applies the inherently concerted doctrine beyond a conversation between two people to include the wearing of a slogan or button.

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What can interfere with Section 7 rights?

Overly broad rules, policies and practices that *reasonably chill* exercise of Section 7 rights

=> UNLAWFUL

Rule/policy that is *ambiguous* as to Section 7 application and contains *no limiting language or context* that clarifies otherwise

=> UNLAWFUL

How does NLRB evaluate "reasonably chill"?

- Effect of rule on a reasonable employee who is in position of economic vulnerability taking in totality of circumstances

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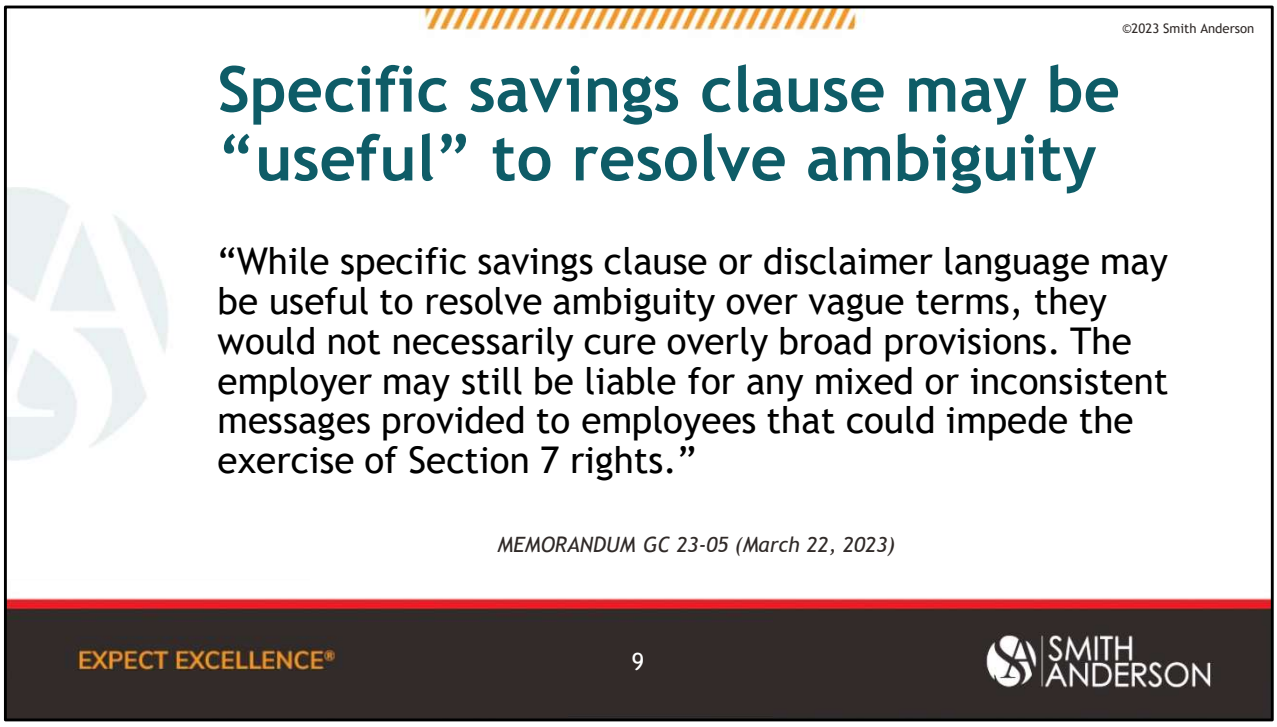
Generic savings clause will NOT cure overly broad

…administered in compliance with all applicable laws including Section 7 of NLRA

…not be applied or construed in a manner that improperly interferes with employee rights under NLRA

…not be interpreted or applied so as to interfere with employee rights to engage in concerted activities for mutual aid or protection



MEMORANDUM GC 23-05 (March 22, 2023):

As noted in my *Stericycle* brief to the Board regarding employer rules, I [GC] asked it to formulate a model prophylactic statement of rights, which affirmatively and specifically sets out employee statutory rights and explains that no rule should be interpreted as restricting those rights, that employers may—at their option—include in handbooks in a predominant way to mitigate the potential coercive impact of workplace rules on the exercise of Section 7 rights and simplify compliance, which could also easily apply to severance agreements. I noted that the description of statutory rights should focus on Section 7 activities that are of primary importance toward the fulfillment of the Act's purposes, commonly engaged in by employees (particularly in non-union workplaces, since they do not have union representatives available to bargain over rules and guide employees as to their rights), and likely to be chilled by overbroad rules, and provided suggested model language for inclusion to make it clear to employees that they had rights to engage in: (1) organizing a union to negotiate with their employer concerning their wages, hours, and other terms and conditions of employment; (2) forming, joining, or assisting a union, such as by sharing employee contact information; (3) talking about or soliciting for a union during non-work time, such as before or after work or during break times, or distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms; (4) discussing wages and other working conditions with co-workers or a union; (5) taking action with one or more co-workers to improve working conditions by, among other means, raising work-related complaints directly with the employer or with a government agency, or seeking help from a union; (6) striking and picketing, depending on its purpose and means; (7) taking photographs or other recordings in the workplace, together with co-workers, to document or improve working conditions, except where an overriding employer interest is present; (8) wearing union hats, buttons, t-shirts, and pins in the workplace, except under special circumstances; and (9) choosing not to engage in any of these activities.

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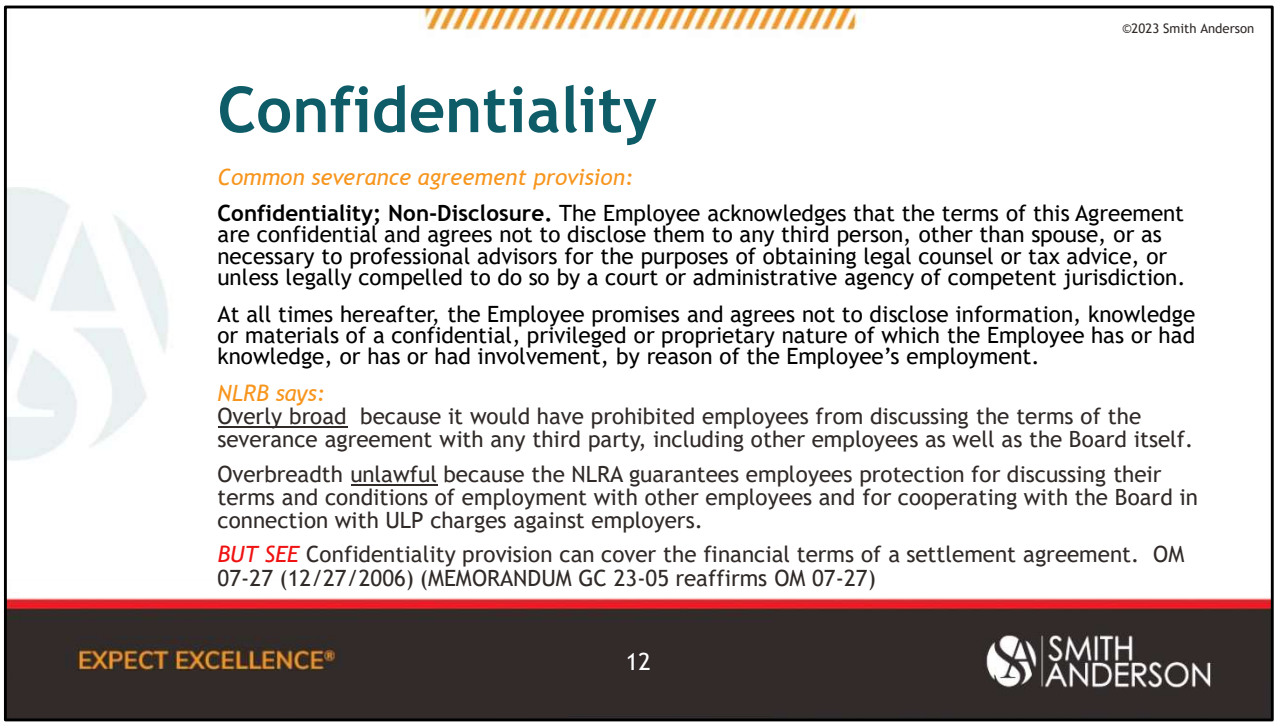
Is an overly broad policy okay, . . .

". . .if we **NEVER** enforce it against employees who have engaged in protected activity?"

Answer: **No.** Mere existence of overly broad policy without ANY evidence of unlawful application violates the law.

CONFIDENTIALITY AGREEMENTS AND POLICIES



McLaren Macomb, 372 NLRB No. 58 (2023):

Employees were offered severance agreements that included confidentiality, non-disclosure, and non-disparagement provisions. These provisions (1) required the employees to keep the terms of the severance agreement confidential; (2) prohibited the employees from disclosing confidential, privileged, or proprietary information they acquired in the course of their employment; and (3) restricted the employees from making any potentially disparaging or harmful public statements about the employer or its representatives. Further, the severance agreements included a provision authorizing the employer to seek and obtain injunctive relief in the event any of the employees violated the confidentiality, non-disclosure, or non-disparagement provisions.

6. **Confidentiality Agreement.** The Employee acknowledges that the terms of this Agreement are confidential and agrees not to disclose them to any third person, other than spouse, or as necessary to professional advisors for the purposes of obtaining legal counsel or tax advice, or unless legally compelled to do so by a court or administrative agency of competent jurisdiction.
7. **Non-Disclosure.** At all times hereafter, the Employee promises and agrees not to disclose information, knowledge or materials of a confidential, privileged, or proprietary nature of which the Employee has or had knowledge of, or involvement with, by reason of the Employee's employment. At all times hereafter, the Employee agrees not to make statements to Employer's employees or to the general public which could disparage or harm

the image of Employer, its parent and affiliated entities and their officers, directors, employees, agents and representatives.

ALJ says not a violation. Board disagreed and said provisions unlawful because they had a reasonable tendency to interfere with, restrain, or coerce employees' exercise of the rights afforded them by the NLRA.

Confidentiality provision was overly broad because:

- it would have prohibited employees from discussing the terms of the severance agreement with any third party, including other employees as well as the Board itself. This overbreadth was unlawful, the Board reasoned, because the NLRA guarantees employees protection for discussing their terms and conditions of employment with other employees and for cooperating with the Board in connection with ULP charges against employers.

Non-disparagement provision was unlawful because:

- "[p]ublic statements by employees about the workplace are central to the exercise of employee rights under the [NLRA]." The Board further emphasized that the prohibition lacked any temporal limitation and the Act's protections apply to employee activities regardless of whether they occur within the workplace.

The Board clarified that its decision did not preclude employers from lawfully offering severance agreements to employees, even where certain provisions in such agreements arguably interfered with Section 7 rights. Instead, the standard moving forward in analyzing severance agreements' lawfulness would be whether the waiver of Section 7 rights in an agreement's provisions was "narrowly tailored," though the Board declined to offer a definition or examples of provisions that would satisfy this standard.

Decision has retroactive effect and maintaining and/or enforcing a previously-entered severance agreement with unlawful provisions constitutes a continuing violation of the NLRA by the employer permitting the NLRB GC to timely assert ULP charges alleging violations based on severance agreements offered outside the six-month statute of limitations, potentially subjecting employers to liability for violations which they otherwise might expect to be time-barred.

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Confidentiality: Another Approach

Confidentiality

A. Subject to subparagraph []C below., Employee shall keep the financial terms and provisions of this Agreement confidential, and … will not disclose, such terms to third parties, except as follows: (i) s/he may reveal such terms to members of his/her immediate family or to an attorney whom s/he may consult for legal advice provided that such persons agree to maintain the confidentiality of the Agreement, or representatives of any governmental agency referenced in subparagraph []C below, and (ii) s/he may disclose such terms to the extent such disclosure is required by law.

****

C. Nothing in this section is intended, nor shall be construed, to (i) prohibit Employee from any communications to, or participation in any investigation or proceeding conducted by, U.S. Equal Employment Opportunity Commission, National Labor Relations Board or other governmental agency with jurisdiction concerning the terms, conditions and privileges of employment or jurisdiction over the Company's business, (ii) interfere with, restrain or prevent Employee communications regarding wages, hours or other terms and conditions of employment, or (iii) prevent Employee from otherwise engaging in any legally protected activity, including but not limited to exercising any rights under Section 7 of the National Labor Relations Act (if applicable), all of which Employee has the legal right to do.

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Confidentiality Prohibitions Apply To Policies Too

Common policy provision:

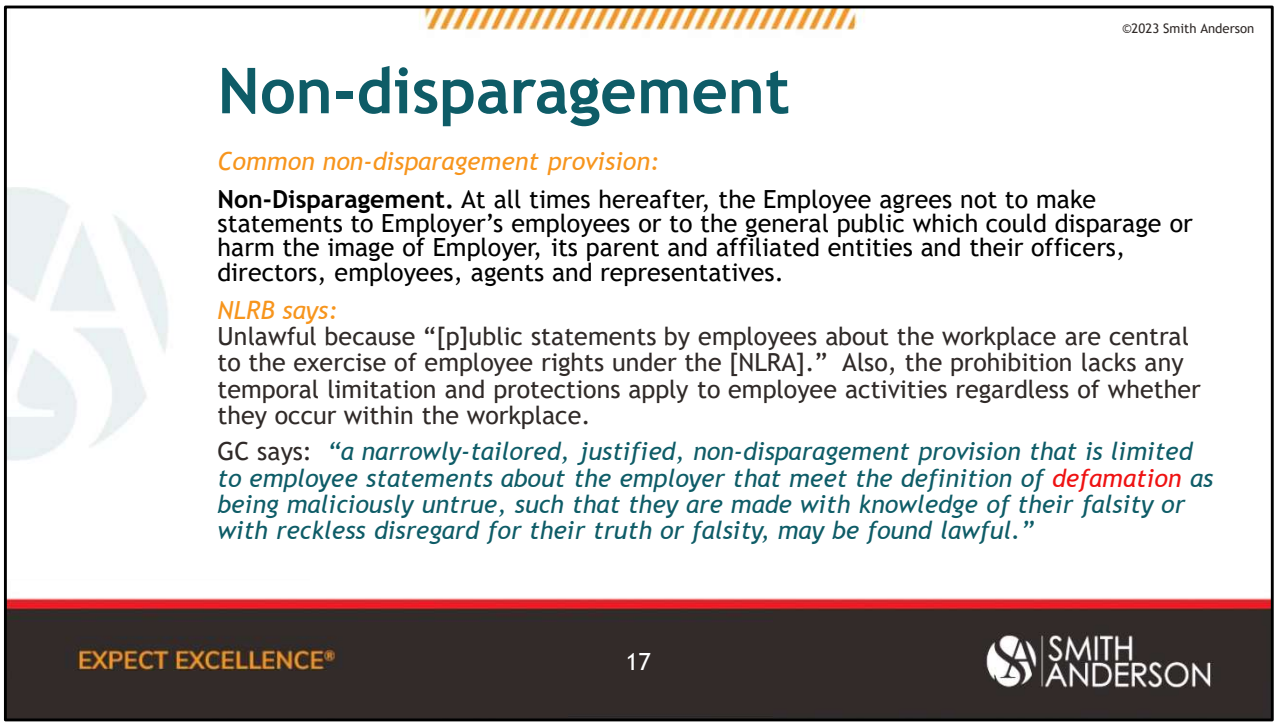
Confidential information includes, but is not limited to, non-public technical, business and financial information and plans, as well as private information about customers, suppliers and employees. Confidential information must not be disclosed to unauthorized persons, including competitors, reporters or to other employees whose duties do not require use of such information.

Red Flags in confidential information definitions:

- *Employee information, personnel information*
- *Pay, compensation*

Unlawful	Because
Don't disclose confidential customer, team member or company information. . . . You should never share confidential information with another team member unless they have a need to know the information to do their job. Marking handbook or policies confidential	…reasonably interpreted as prohibiting employees from discussing/disclosing information regarding their own or others' conditions of employment
Non-public information includes: • Any topic related to the financial performance of the company; • Information that has not already been disclosed by authorized persons in a public forum; and • Personal information about another employee, such as his or her medical condition, performance, compensation or status in the company.	…this explanation specifically encompasses topics related to Section 7 activities, employees would reasonably construe the policy as precluding them from discussing terms and conditions of employment among themselves or with non-employees.
Lawful	**Because**
Employees must maintain the confidentiality of the company's trade secrets and private and confidential information (i.e., information regarding the development of systems, processes, products, know-how, technology, internal reports, procedures or other internal business-related communications) Confidential information does not include information lawfully acquired by non-management employees about wages, hours or other terms and conditions of employment, if used by them for purposes protected by the National Labor Relations Act, engaging in concerted activity for their mutual aid or protection.	… it provides sufficient examples of prohibited disclosures for employees to understand that it does not reach protected communications about working conditions. … expressly excludes information about terms and conditions of employment

NON-DISPARAGEMENT



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> **6.** **Non-Disclosure.** At all times hereafter, the Employee promises and agrees not to disclose information, knowledge or materials of a confidential, privileged, or proprietary nature of which the Employee has or had knowledge of, or involvement with, by reason of the Employee's employment. At all times hereafter, the Employee agrees not to make statements to Employer's employees or to the general public which could disparage or harm the image of Employer, its parent and affiliated entities and their officers, directors, employees, agents and representatives.

ALJ says not a violation. Board disagreed and said provisions unlawful because they had a reasonable

tendency to interfere with, restrain, or coerce employees' exercise of the rights afforded them by the NLRA.

MEMORANDUM GC 23-05 (March 22, 2023):

Are there ever non-disparagement provisions in a severance agreement that could be found lawful?

It is critical to remember that public statements by employees about the workplace are central to the exercise of employees' rights under the Act. In *McLaren Macomb*, the Board referenced *NLRB v. Electrical Workers Local 1229 (Jefferson Standard Broadcasting Co.)*, 346 U.S. 464 (1953) and *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007), enfd. sub. nom. *Nevada Service Employees, Local 1107 v. NLRB*, 358 Fed. Appx. 783 (9th Cir. 2009), when finding an overly broad non-disparagement ban that encompassed all disputes, terms and conditions, and issues, without a temporal limitation and with application to parents and affiliates and their officers, representatives, employees, directors and agents. ***Thus, a narrowly-tailored, justified, non-disparagement provision that is limited to employee statements about the employer that meet the definition of defamation as being maliciously untrue, such that they are made with knowledge of their falsity or with reckless disregard for their truth or falsity, may be found lawful.***

MEMORANDUM OM 07-27 (December 27, 2023):

(3) … Clauses that Prohibit an Employee from Engaging in Non-defamatory Talk about the Employer

****

Similar to an overly broad confidentiality clause, non-Board adjustments that limit a discriminatee's ability to engage in discussions with other employees that include non-defamatory statements about the employer severely limits an employee's right to engage in concerted protected speech. Such a restriction on the Section 7 rights of an employee is repugnant to the purposes and policies of the Act. Therefore, Regions should not approve a withdrawal request where the non-Board adjustment prohibits the discriminatee from engaging in non-defamatory speech about the employer.

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Words May Matter-Defamation v. Disparagement

GC:

- Defamation: as being maliciously untrue, such that they are made with knowledge of their falsity or with reckless disregard for their truth or falsity

Merriam-Webster:

- Defamation: the action of damaging the good reputation of someone; slander (false spoken statement) or libel (false written statement)
- Disparage: to belittle the importance or value of (someone or something): to speak slightingly about (someone or something)

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Non-disparagement: Another Approach

Non-Defamation

B. Subject to subparagraph []C below, Employee represents and warrants that since receiving this Agreement, s/he (i) has not made, and going forward will not make, defamatory remarks about the Company or its products, services, business practices, directors, officers, managers or employees to anyone; nor (ii) has not taken, and going forward will not take, any action that may impair the relations between the Company and its vendors, customers, employees or agents or that may be detrimental to or interfere with the Company or its business.

****

C. Nothing in this section is intended, nor shall be construed, to (i) prohibit Employee from any communications to, or participation in any investigation or proceeding conducted by, U.S. Equal Employment Opportunity Commission, National Labor Relations Board or other governmental agency with jurisdiction concerning the terms, conditions and privileges of employment or jurisdiction over the Company's business, (ii) interfere with, restrain or prevent Employee communications regarding wages, hours or other terms and conditions of employment, or (iii) prevent Employee from otherwise engaging in any legally protected activity, including but not limited to exercising any rights under Section 7 of the National Labor Relations Act (if applicable), all of which Employee has the legal right to do.

MEMORANDUM GC 23-05 (March 22, 2023):

Are there other provisions typically contained in severance-related agreements that you view as problematic?

Confidentiality, non-disclosure and non-disparagement provisions are certainly prevalent terms. However, I believe that some other provisions that are included in some severance agreements might interfere with employees' exercise of Section 7 rights, such as: non-compete clauses; no solicitation clauses; no poaching clauses; broad liability releases and covenants not to sue that may go beyond the employer and/or may go beyond employment claims and matters as of the effective date of the agreement; cooperation requirements involving any current or future investigation or proceeding involving the employer as that affects an employee's right to refrain under Section 7, such as if the employee was asked to testify against co-workers that the employee assisted with filing a ULP charge.

STANDARDS OF CONDUCT (WORK RULES) AND PRACTICES

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Stericycle – A New Standard for Legality

Issue

Is a rule that does not ***expressly*** restrict employees' protected concerted activity under Section 7 nonetheless facially unlawful under Section 8?

REMEMBER

It's all about Section 7 rights

. . . gives right to engage in *concerted activities* for *mutual aid or protection* (aka *protected concerted activity*) *(Section 7)*

. . . outlaws rules or practices that interfere with Section 7 rights *(Section 8)*

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Stericycle Test

- Does the rule have a reasonable tendency to chill employees from exercising their Section 7 rights when viewed from the perspective of an employee who is economically dependent on the employer and who contemplates engaging in protected concerted activity?
- "Where the language is ambiguous and ***may be*** misinterpreted by the employees in such a way as to cause them to refrain from exercising their statutory rights, then the rule is invalid ***even if interpreted lawfully by the employer in practice***."
- Employer can rebut the presumption that a rule is unlawful by proving that it advances legitimate and substantial business interests that cannot be achieved by a more narrowly tailored rule.

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Message from the NLRB

"Our new standard gives employers the necessary leeway to maintain rules of their own choosing to advance legitimate and substantial business interests.

They simply need to narrowly tailor those rules to significantly minimize, if not altogether eliminate, their coercive potential.

If employers do so, their rules will be lawful to maintain."

Stericycle, Inc., 372 NLRB No. 113 (Aug. 2, 2023)

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The Lone Dissent

"…it is virtually impossible to craft work rules that are general enough to serve their intended lawful purpose without being susceptible to an interpretation that infringes on Section 7 rights. …

Employers therefore should assume that simply by maintaining work rules, they are violating the National Labor Relations Act. We have returned to a bygone era, from 2011 to 2017, when the Board majority rarely saw a challenged rule it did not find unlawful."

Marvin E. Kaplan, Member

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Stericycle in a Nutshell…

- NLRB allows employers to promulgate and maintain workplace rules only as long as they are narrowly tailored to "advance legitimate and substantial business interests," and minimize the risks of interfering with workers' rights to act collectively.
- A policy or rule is presumptively unlawful to maintain if an employee could reasonably interpret it to have a coercive meaning that in any way limits Section 7 rights to engage in concerted activity.

Virtually any workplace rule can be given an interpretation that deems it a restriction on Section 7 rights

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Take-aways

- No rule is automatically lawful based on its subject matter
- Particularized analysis required of
  - specific rule
  - its language
  - employer interest actually invoked to justify it
- Adoption and maintenance of rule is unlawful, even if never enforced

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Policies Warranting Close Review

- Civility, disruptive behavior and related conduct
- Use of company logos, IP
- Conduct harming business reputation, conflicts of interest
- Requiring complaints and investigations to be kept confidential
- No recording, use of personal devices
- Use of company communications systems
- Social media, media contact policies
- Dress code

Disciplinary Action for Misconduct During Section 7 Activity

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Protection from Disciplinary Action May Apply

When misconduct occurs while an employee is engaged in Section 7 activity, the employee is protected from disciplinary action that ordinarily would be taken unless the conduct forfeits the protection.

"…misconduct in the course of Section 7 activity is treated differently than misconduct in the ordinary workplace setting that is unrelated to Section 7 activity."

Lion Elastomers LLC, 372 NLRB No. 83 (May 1, 2023)

Rationale:

"The protections Section 7 affords would be meaningless were we not to take into account the realities of industrial life and the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses. Thus, when an employee is discharged for conduct that is part of the res gestae of protected concerted activities, the relevant question is whether the conduct is so egregious as to take it outside the protection of the Act, or of such a character as to render the employee unfit for further service." *Lion Elastomers LLC, 372 NLRB* at p.2 (quoting *Consumer Powers Co.,* 282 NLRB 130 (1986).

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How do you decide whether protection has been forfeited?

Context matters. 3 different settings with different rules:

- Conduct Toward Management
- Social Media Posts and Coworker Conversations
- Picket Line Misconduct

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Conduct Toward Management

4-factor Atlantic Steel test to determine whether an employee's outburst during a conversation with management retains protection:

- the place of the discussion
- the subject matter of the discussion
- the nature of the employee's outburst
- whether the outburst was, in any way, provoked by an employer's unfair labor practice

Lion Elastomers LLC, 372 NLRB No. 83 (May 1, 2023) citing Atlantic Steel Co., 245 NLRB No. 107, p. 816 (Sept. 28, 1979)

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Social Media Posts and Coworker Conversations

Totality of the circumstances test is considered to determine if the statements lost protection of the Act

Desert Springs Hospital Medical Center, 363 NLRB No. 185, slip op. at 1 fn. 3 (2016)

Pier Sixty, LLC, 362 NLRB 505, 506 (2015), enfd. 855 F.3d 115 (2d Cir. 2017) (the Board considered factors such as: employer antiunion hostility, provocation, impulsivity, location, subject matter, nature of the post in question, whether the employer maintained specific rules prohibiting the language at issue or otherwise previously deemed it offensive, and whether the discipline issued was typical as compared to similar offenses)

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Picket Line Misconduct

Clear Pine Mouldings, Inc. standard applies

- Employee loses protection where "the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act."

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Tips and Final Thoughts- Documents

- Review handbooks, policy statements, codes of conduct, agreements and other documents for provisions that could implicate Section 7 rights
- Decide whether/what remedial action is warranted. Possible options:
  - A. Remove provisions
  - B. Add clarifying/limiting verbiage
  - C. Add (moderately) robust safe harbor provision:
    - -Conspicuous upfront and referenced in individual provisions
    - -Embedded in individual provisions
  - D. B and C
  - E. Maintain status quo
- Consider adopting "dual tier" provisions with supervisors/managers being governed by the traditional policy provisions

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Tips and Final Thoughts-Actions

- Add Section 7 Concerted Activity analysis to discipline/termination risk analysis:
  - Was employee acting to benefit self as well as other employee(s)?
  - Had employee solicited other employee views/support?
  - Would action sought benefit employee as well as others?
  - Apply misconduct during Section 7 activity analysis (as applicable)
- Educate HR and supervisors on what constitutes Protected Concerted Activity

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Beware: Your Common(sense) Policies and Practices May Now Be an Unfair Labor Practice

Kimberly J. Korando

November 14, 2023

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