Drawing Back the Curtains

An Inside Look at Legal and Human Resources Issues Affecting the Hotel Industry

Sean P. O’Connor

October 2016

Morgan, Brown & Joy, LLP

- Nationwide, Regional & Local practice
  - Employment law
  - Traditional labor
- Founded in 1923 – the original labor & employment boutique law firm
- Training, Advice, Litigation
- Chambers USA 2016 Survey
  - Rated in “Band 1” → the top tier of rankings for Mass. management-side L&E firms
Agenda

- Wage & Hour Countdown: Are you prepared to comply with the new FLSA overtime regulations?
- The National Labor Relations Board: Not Only the Concern Of Unionized Workplaces

Wage & Hour Countdown

Are you prepared to comply with the new FLSA overtime regulations?
Wage & Hour – FLSA Overview

- W-H laws regulate wages, hours of work, minors & recordkeeping
- Federal: FLSA of 1938 - min. wage, overtime law
  - FLSA designed to encourage employers to reduce working hours & increase hiring

Wage & Hour – FLSA Overview

- State v. Federal: law of the higher standard
  - FLSA applies to larger employers
  - Record-Keeping requirements
- Increased litigation
- Stiff penalties
Overtime Rules

- Non-exempt employees must be paid at least one and one-half times their regular rate of pay for all hours worked in excess of 40 per work week
- Workers presumed to be non-exempt
- An employee who works overtime, even without permission, is entitled to overtime pay

Current Overtime Exemption Fundamentals

- “White Collar” Executive, Administrative, Professional Exemptions, Outside Sales. Three Part Tests:
  1. Salary Level at Least $455 Per Week ($23,660)
  2. Guaranteed Salary Basis
     - No Docking
     - Salary Plus
     - Exceptions
     - Evidence of salary arrangement
  3. Job Duties Tests
Overtime Duties Test Summaries

- **Executive**
  Primary duty managing; customarily supervise two or more in a recognized dept.; and decision maker or recommendations given weight in employment decisions.

- **Administrative**
  Primary duty directly related to management or internal or client bus. operations with discretion and independent judgment on significant matters.

- **Learned Professional**
  Primary duty involves work requiring advanced knowledge attained through prolonged study, advanced degree in recognized field of higher learning, or equivalent.

Current Overtime Exemption: Highly Compensated Work

- **Highly Compensated Workers**
  - Total annual compensation of at least $100,000
  - Customarily and regularly perform one or more of the duties of an executive, administrative, or professional exempt employee
  - Earn at least $455/week in salary or fee basis
    - Remainder of the total annual compensation may include commissions, nondiscretionary bonuses, and other nondiscretionary compensation
    - Doesn’t include “fringe benefits”
  - End of year makeup payments allowed
Other Exemptions

- Combination - primary duty involves a combination of exempt duties
- Teaching Professionals
- Academic Administrative Workers
- Outside Sales, Motor Carriers – drivers (and certain helpers) of larger vehicles, regulated under MCA

Background: Changes to OT Regulations

- March 13, 2014 – President Obama signed a Presidential Memorandum directing DOL to “modernize and simplify” white collar OT exemption regulations
- Reason: too many workers exempt from overtime requirement
- DOL embarked on outreach program 2014-2015
- Several deadlines missed
Background: Changes to OT Regulations

- July 6, 2015 – NPRM draft regulations released, with comment period – closed September 2015
- 289,918 comments received
- Regs. initially expected in early 2016
- May 18, 2016 regulations issued - published in Fed. Register May 23
- Effective December 1, 2016

USDOL-WHD Changes: Salary Level Test

- Focus almost exclusively on salary level test
- Increases the minimum salary level to the 40th percentile of full-time salaried employees in the lowest-wage Census Region

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<tr>
<th>Salary Level Change</th>
<th>Current</th>
<th>Final</th>
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<tbody>
<tr>
<td></td>
<td>$455/week</td>
<td>$913/week</td>
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<tr>
<td></td>
<td>$23,660/year</td>
<td>$47,476/year</td>
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Certain Non-Discretionary Incentives Included

- Salary basis test now allows nondiscretionary bonuses and incentive payments, including commissions, to satisfy salary level test
- Only up to 10 percent of the new standard salary level
- Incentive must be paid quarterly or more frequently

Non-Discretionary Incentive Catch-Up

- Nondiscretionary bonuses and incentive payment shortfall
- Catch-up payment permitted
- Lump sum of no more than 10% of salary level
- Amounts capped
- Maximum of quarterly
- No more than one pay period after quarter ends
Catch-Up Limits

<table>
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<tr>
<th>Description</th>
<th>Amount</th>
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<tbody>
<tr>
<td>Base Pay</td>
<td>$821.70/week</td>
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<tr>
<td>Amount below minimum salary level</td>
<td>$91.30/week</td>
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<tr>
<td>Quarterly incentive pay (max. creditable)</td>
<td>$1186.90</td>
</tr>
<tr>
<td>Required “true up” to maintain exempt status during “grace period”</td>
<td>$1186.90</td>
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</table>

USDOL-WHD Changes: Highly Compensated Employees

- Salary threshold for the streamlined duties test applicable to “highly compensated employees” increased
- Raised to 90th percentile of full-time salaried workers nationally
  - $100,000 → $134,004

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<thead>
<tr>
<th>Salary Level Change</th>
<th>Current</th>
<th>Final</th>
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<tbody>
<tr>
<td></td>
<td>$100,000/year</td>
<td>$134,004/year of this 5913 must be paid on a salary basis</td>
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</table>
Automatic Adjustments

- Mechanism automatically updates salary level every three years starting January 1, 2020
- Automatic updates to both salary level and highly compensated employee compensation levels
- Earnings percentiles to prevent thresholds from becoming outdated
- Requires ER review every three years and salary adjustment
- Estimated $984 by 2020
- Estimated $147,524 Highly Comp. by 2020

<table>
<thead>
<tr>
<th>Current regulations (2004 until effective date of Final Rule, 2016)</th>
<th>NPRM</th>
<th>Final Rule</th>
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<tbody>
<tr>
<td>Salary Level</td>
<td>$455 weekly</td>
<td>$970 weekly (if finalized as proposed)</td>
</tr>
<tr>
<td>HCE Total Annual Compensation Level</td>
<td>$100,000 annually</td>
<td>$122,148</td>
</tr>
<tr>
<td>Automatic Adjusting</td>
<td>None</td>
<td>Annually, with request for comment on a CPI or percentile basis</td>
</tr>
<tr>
<td>Bonuses</td>
<td>No provision to count nondiscretionary bonuses and commissions toward the standard salary level</td>
<td>Request for comment</td>
</tr>
<tr>
<td>Standard Duties Test</td>
<td>See WHD Fact Sheet #17A for a description of EAP duties.</td>
<td>No changes proposed</td>
</tr>
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Commentary

- **AFL-CIO**
  - Changes needed, but salary level should be higher
    - Weekly salary ~$1,000
  - Supports salary threshold updating automatically, but calculation based on Employee Cost Index (ECI)
  - Duties test should be changed – employees who spend more than 50% of their time performing non-exempt work should receive overtime

Commentary

- **U.S. Chamber of Commerce**
  - DOL should withdraw changes
  - Negative impact on flexibility, benefits, opportunities for advancement
  - Nonprofit, medical, small businesses most acutely affected
  - “Being eligible for overtime is not the same thing as earning overtime[.]”
Commentary

- National Retail Federation
  - Negative impact for workers and business
  - If employers made no changes to their pay and scheduling structure, overtime costs would run businesses $9.5 billion under the proposed changes
  - Particularly concerned about retailers in rural locations and other low-cost areas of the country that could see a disproportionate impact on their payrolls as a result of the increase in their salary level

Hypothetical

- Amy, an assistant office manager who also works to staff daily school events, earns $40,000 a year ($770/week), plus quarterly bonus and usually works 50 hours a week
  A. Is Amy entitled to overtime under current law?
  B. Will she be entitled to OT under the new regulations?
A. Yes

- Duties test: what is primary duty? Supervision? Executive? Another exemption?
- Presumed non-exempt
- Salary basis test? Impact of bonus?

*Need much more information about job duties to meet burden to show Amy is exempt*

B. Yes

- Salary level test under new regs
- Salary basis? Bonus issue?
- Duties test questions do not change

*Solutions:*
- Drop her hourly rate to account for OT
- Cut schedule to fewer than 50 hours
- Maintain existing salary – review benefits
- Must track time
Compliance Perspectives

What should employers consider in anticipation of the December 1st deadline?

- Who is it important to educate and include in the process?
- How do I explain to an employee that they are being reclassified to overtime eligible status?
- How do I address employee concerns that re-classification is a demotion?
- Is it necessary to change time-keeping policies?
- Should I designate a point person?

Compliance Strategies

- Salary Level
  - Increase salary or re-structure guarantee for some
- Reclassify salaried employees as hourly
  - Closer management; limit weekly hours to 40
- Reclassify as non-exempt but pay salary
  - Require salaried workers to record working time – flexibility issues
Compliance Strategies

- Compliance audits
  - Duties test analysis
  - Salary basis review
    - Payroll deductions practices
    - PTO/vacation advances
    - Debts
    - Partial day absences

- Correcting misclassification
- Liability, Private & Government
  - Statutes of Limitations
  - FLSA Releases
  - Agreements
- Communicating changes and corrections
- Attorney-Client privilege issues
The National Labor Relations Board

Not Only the Concern Of Unionized Workplaces

Section 7 Of The National Labor Relations Act

- “Employees shall have the right to ... form, join, or assist labor organizations, ... and to engage in other concerted activities for the purpose of ... mutual aid or protection ...”
Section 8(a)(1) Of The National Labor Relations Act

- “(a) It shall be an unfair labor practice for an employer – (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7[.]”

Work Rules: A Moving Target...

- The Board has found numerous work rules that “employees would reasonably construe” as prohibiting Section 7 activity
Determining Whether Certain Work Rules Violate § 8(a)(1)?

- The Board has determined that “the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their § 7 rights.”

Three Possible Violations

- Even if the work rule does not explicitly restrict activity protected by § 7, the Board will find a violation upon showing that:
  - 1) The rule was promulgated in response to union activity;
  - 2) The rule has been applied to restrict the exercise of § 7 rights; or
  - 3) Employees would reasonably construe the language to prohibit § 7 activity
Policies Or Rules That MIGHT Violate Section 8(a)(1)

- Limits on employee discussions with each other
- Limits on employee use of social media, other websites
- Limits on employee civility or respectfulness
- Limits on employee criticism or negative comments
- Limits on employee contact with the media
- Limits on employee contact with “law enforcement”

Policies Or Rules That MIGHT Violate Section 8(a)(1)

- Limits on employee travel around the workplace
- Limits on disclosure of confidential information
- Limits on discussion of employee investigations
- Limits on employee mode of dress
- Limits on employee use of company insignia, logos
General Counsel Memorandum

- On March 18, 2015, the Office of the General Counsel issued a report (Memorandum GC 15-04) concerning recent NLRB work rule cases
- Includes two sections:
  1) Compares employer rules the Board found to be unlawful with those it found to be lawful, with explanations
  2) Discusses the handbook rules from a recently settled unfair labor practice charge against Wendy’s International

General Counsel Memorandum

- Focuses on specific work rules relating to:
  - Confidentiality
  - Conduct toward the company and supervisors
  - Conduct toward fellow employees
  - Interaction with third parties
  - Restrictions on the use of company logos, copyrights and trademarks
  - Photography/recording rules
  - Restrictions on leaving work
  - Conflicts of interest
What Does This Mean for You?  
- Practical Application -

- Handbooks and work rules are still important
- How can you avoid issues?
  - Review your current policies:
    » Are they overbroad?
    » Are all of them necessary?
    » What specific issues are you trying to address?

Other Important Developments

- Confidentiality during investigations
  - Boeing Co., 362 NLRB No. 195 (Aug. 27, 2015)

- Message Pins
  - In-N-Out Burger, Inc., No. 16-CA-156147 (N.L.R.B. Div. of Judges, July 11, 2016)
  - Boch Imps. Inc. v. NLRB, 826 F.3d 558 (1st Cir., June 17, 2016)
**Boeing Co., 362 NLRB No. 195 (Aug. 27, 2015)**

- Employer routinely distributed a notice to employee witnesses during HR investigations, “recommending” that the employee “refrain from discussing the case” with other employees
- Boeing previously “directed” employees to refrain from discussing the investigation but altered the language, presumably in response to the Board’s decision in Banner Health System, 358 NLRB No. 93 (2012)
  - The Board found no difference between “recommending” and “directing” due to the employer’s “clear desire” for confidentiality, because the employer routinely requests that employees sign the notice, and because there was no reasonable assurance in the notice that employees were free to disregard the employer’s recommendation

**Takeaways From Boeing**

- Employers cannot ask employees to keep their participation in HR investigations confidential UNLESS “its need for confidentiality with respect to that specific investigation outweighs employees’ Section 7 rights.”
  - A generalized concern for protecting the integrity of all investigations is insufficient
Takeaways From *Boeing*

- Specific concerns an employer might have that would allow a confidentiality directive:
  - Witness intimidation or harassment
  - Destruction of evidence
  - “other misconduct” tending to compromise an investigation
- Employers must show *why* they have these concerns on a case-by-case basis

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*In-N-Out Burger, Inc.*, No. 16-CA-156147 (N.L.R.B. Div. of Judges, July 11, 2016)

- An In-N-Out restaurant had a policy prohibiting employees from wearing pins or buttons aside from their name tag and other company-provided buttons (e.g. Christmas promotion buttons)
- An ALJ found that the policy violated employees’ Section 7 rights because it interfered with their right to engage in concerted activity (e.g. wearing union clothing, Fight for $15 pins, etc.)
- In-N-Out asserted that its goal was to create a very clean public image where all the employees were identically dressed
- The ALJ rejected the argument and held that In-N-Out did not demonstrate that “special circumstances” existed to justify the restrictions and that the restrictions were narrowly tailored to those circumstances
**Boch Imps. Inc. v. NLRB, 826 F.3d 558**
(1st Cir., June 17, 2016)

- Boch Honda in Massachusetts barred all employees from wearing pins, insignia and message clothing in the workplace
- Boch claimed that one of the reasons for the ban was that pins could damage the vehicles that they worked on and sold
- The NLRB held, and the First Circuit Court of Appeals affirmed, that Boch failed to demonstrate that “special circumstances” existed to justify such restrictions and that the restrictions were narrowly tailored to those circumstances
  - E.g. Boch could not offer a reason for why employees who didn’t come in contact with the inside of the automobiles were also banned from wearing pins

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**Takeaways from In-N-Out and Boch**

- Employers are only allowed to maintain policies that prohibit pins, buttons and message clothing in “special circumstances”
  - E.g. when the wearing of the insignia would jeopardize employee safety, damage products or machinery or products, exacerbate dissension or unreasonable interfere with employee image
  - Employers needs to prove how the wearing on a button would negatively impact their business, public image or ability to achieve their mission
- Policies still must be narrowly tailored in order to strike a balance between the employer’s legitimate interests and the employees’ protected rights
The Equal Employment Opportunity Commission

Where Something New Is Always Happening

TRUE/FALSE

- It is entirely the applicant’s obligation to request a religious accommodation; thus, it is not religious discrimination to refuse to hire an individual whose religious attire (which she wore to the interview, but did not indicate any accommodation needed) will violate the company’s dress code.
FALSE

- **EEOC v. Abercrombie & Fitch**
- Issue: Can an employer be held liable under Title VII only if the employer has actual knowledge that a religious accommodation is required, and the actual knowledge arose from direct, explicit notice from the applicant/employee?
- EEOC’s argument: management should have informed applicant of the dress code thus giving her an opportunity to seek an accommodation to wear her religiously motivated headscarf.
- Abercrombie’s argument: Applicant’s wearing of a head scarf not clearly stated as a religious belief requiring accommodation. Therefore they didn’t know she may need an exception to dress code.

EEOC v. Abercrombie & Fitch

- An employer may not refuse to hire an applicant if the employer was motivated by avoiding the need to accommodate a religious practice
- Employers must make exceptions to neutrally written employment policies where they conflict with an individual’s religious practices, unless doing so would present undue hardship
- Ruling left open the possibility that an employer may still violate the law by failing to hire someone who follows a religious practice, even if the employer was completely ignorant of the fact
EEOC Guidelines on Dress Codes: Religious and Disability Accommodations

- If an employee requests an exception in order to accommodate sincerely held religious beliefs or a disability, an employer must grant an exception (unless it would pose an “undue hardship” on employer)
- Should be determined on a case-by-case basis.
  - For example asking an employee to cover religious attire at work may be either reasonable or unreasonable depending on if employee’s religion permits covering the attire
- It is never permissible for an employer to exclude an employee from a position or assignment out of concern that customers or co-workers may react negatively to attire or grooming
  - For example, if an employee needs to wear orthopedic sneakers for a health condition, an employer cannot prohibit the employee from working in a position where he/she regularly interacts with clients or guests

Guidance for Employers

- Employers shouldn’t ask applicants about religious beliefs or disabilities during the interview process or assume, based on appearance, that an applicant has certain religious beliefs, disabilities or related accommodation needs
- Employers may explain to all applicants the job requirements—e.g., the work schedule—and ask if they can meet those requirements
- If an applicant or employee requests an accommodation, an employer should engage in an interactive process to determine what accommodation is needed and the effect it will have on the business
- Employers may be required to accommodate dress and grooming habits based on a disability or religious practice or belief if there is a policy against the dress or grooming habits that is justified by a business necessity
  - For example, employers aren’t required to accommodate head scarves or long garments in an industrial plant where loose clothing may get caught in moving machinery
The Bathroom Bill Movement

- In 2016 alone, 19 states have considered legislation regarding so-called “Bathroom Bills” containing restrictions on which restrooms transgender people can use
- North Carolina is currently the only state where such a law has gone into effect, with the Governor signing the state’s controversial House Bill 2 (HB2) into law in March
- HB2 has faced numerous and immediate challenges. Relevant for most employers is Carcano v. McCrory, which claims, amongst other things, that HB2 violates Title VII by discriminating against transgender people

EEOC Guidance on Employee Restroom Access

- The EEOC has taken the position that Title VII prohibits discrimination based on transgender status
- As it relates to bathrooms, the EEOC says that employers are prohibited employers from:
  - denying employees equal access to a common restroom corresponding to the employee’s gender identity;
  - conditioning this right on employees undergoing or providing proof of surgery or other medical procedures; or
  - restricting transgender employees to a single-user restroom.
EEOC Guidance on Employee Restroom Access

- Per the EEOC, confusion or anxiety from other coworkers cannot justify discriminatory terms and conditions of employment.

- State law is not a defense under Title VII, so employers will assume significant risk by refusing to adhere to the EEOC’s mandates on employee restroom access.

- Other federal agencies, including the U.S. Occupational Safety and Health Administration, have issued similar guidance stating that transgender employees should have access to restrooms that correspond to their gender identity.
Fresh & Easy Neighborhood Market, 361 NLRB No. 8 (2014)

A Board panel majority found that the employer violated Section 8(a)(1) by maintaining a rule in its Code of Business Conduct that required employees to keep employee information “secure,” and to use information “fairly, lawfully, and only for the purpose for which it was obtained.”

In reversing the Administrative Law Judge, the Board held that “employees would reasonably construe the admonition to keep employee information secure to prohibit discussion and disclosure of information about other employees, such as wages and terms and conditions of employment.”

Member Johnson, dissenting, agreed with the Judge's dismissal of the complaint, and found that the rule did not violate Section 8(a)(1). Contrary to the majority, Member Johnson agreed with the Judge that employees would not reasonably construe the rule to prohibit Section 7 activity.

Philips Electronics North America Corporation, 361 NLRB No. 16 (2014)

A Board panel majority reversed the Administrative Law Judge and found that the employer violated Section 8(a)(1) by maintaining a rule that discipline is confidential and prohibiting its employees from discussing or sharing their discipline with their coworkers. Citing Verizon Wireless, 349 NLRB 640, 658 (2007), the Board stated that:

[i]t is important that employees be permitted to communicate the circumstances of their discipline to their co-workers so that their colleagues are aware of the nature of discipline being imposed, how they might avoid such discipline, and matters which could be raised in their own defense.

An employer violates Section 8(a)(1) when it prohibits employees from speaking with coworkers about discipline and other terms and conditions of employment absent a legitimate and substantial business justification for the prohibition.

Member Miscimarra, dissenting in part, found that the rule was not unlawful.
Battle’s Transportation, Inc., 362 NLRB No. 17 (2015)
The employer required its employees to sign a “Confidentiality Agreement” that they would not “disclose or divulge” “for his or her own benefit or the benefit of others” confidential information, which included, among other things:

- human resources related information
- investigations by outside agencies (formal and informal)
- financial information
- supplier lists and prices
- marketing plans.

A Board panel majority held this Agreement to be unlawful, holding that employees would reasonably understand “human resources related information” and “investigations by outside agencies” “to encompass terms and conditions of employment or to restrict employees from discussing protected activity, such as Board complaints or investigations.”

Member Johnson cited his dissent in Fresh & Easy Neighborhood Market and stated that the Board must give work rules a “reasonable reading” and “refrain from reading particular phrases in isolation.”

The Board was unanimous in finding the following memo issued to the employees to be unlawful:

It is important to correct this miscommunication and to advise all drivers that you are not to communicate any Battle’s company business with our clients. If there is information to communicate, the management staff will handle these matters.

The Board found that “employees would reasonably interpret that instruction to prohibit employees from discussing matters affecting their terms and conditions of employment, including the expiration of their collective-bargaining agreement, with clients.”

DirectTV U.S. DirecTV Holdings, LLC, 359 NLRB No. 54 (2013)
The Board struck down various provisions of an Employee Handbook and two corporate policies maintained by the employer on its intranet system. The Board said generally that the policies under review could reasonably be construed by employees as prohibiting Section 7 activity.

1. The first policy directly stated: “Do not contact the media.”
   a. The Board noted it was “settled” law that Section 7 encompasses employee communications about labor disputes with newspaper reporters.
2. The second policy statement struck down was: “Public Relations. Employees should not contact or comment to any media about the company unless pre-authorized by Public Relations.”
   a. The Board explained that any rule that requires employees to secure permission from their employer as a precondition to engaging in protected concerted activity on an employee’s free time and in non-work areas is unlawful. *Brunswick Corp.* 282 NLRB 794 (1987)

3. Also struck down: “If law enforcement wants to interview or obtain information regarding a DIRECTV employee, whether in person or by telephone/email, the employee should contact security department in El Segundo, Calif. who will handle contact with law enforcement agencies and any needed coordination with DIRECTV departments.”
   a. This was struck down because it could be construed to force employees to contact security before cooperating with an NLRB investigation. An employee might reasonably construe Board agents as “law enforcement.”

4. Also struck down: “Confidentiality. ‘. . .never discuss details about your job, company business or work projects with anyone outside the company and never give out information about customers or DIRECTV employees.’”
   a. The rule also interpreted “company information” to include “employee records.” The Board said this would reasonably be understood to restrict discussion of their wages and working conditions. Also, the rule does not exempt protected communications with third parties such as union representatives, Board agents or other government officials.

5. On the intranet policy, the Board struck down the following: “Employees may not blog, enter chat rooms, post messages on public websites or otherwise discuss company information that is not already disclosed as a public record.”
   a. The ambiguity of the term “company information” could lead an employee to believe information about employee wages, discipline or performance records might be included. Ambiguity will be construed against the company.

*Remington Lodging & Hospitality, LLC*, 359 NLRB No. 95 (2013)

The Board adopted the finding of the Administrative Law Judge that the hotel maintained a number of unlawful rules:

1. The rule restricting employees to their job assignment area and barring them from “other parts of the hotel, parking lots, or outside facilities without permission of the immediate Department Head.”;
2. The rule prohibiting distribution of literature in guest areas or work areas, solicitation during working time, or solicitation of guests at any time for any purpose;
3. The rule against having a conflict of interest with the hotel;
4. The rule against behavior that violates common decency or morality or public embarrasses the hotel;
5. The rule against insubordination or failure to carry out a job assignment.

The Board found these five (5) rules unlawful because the employer cited them when it unlawfully disciplined employees for presenting a petition to the hotel’s general manager. The Board also found three (3) additional rules to be facially unlawful:

1. An access restriction rule under which each employee “agree[s] not to return to the hotel before or after my working hours without authorization from my manager”;
2. A confidentiality rule that prohibits disclosure of confidential or proprietary information; examples of confidential and proprietary information are personnel files and labor relations information;
3. A media restriction rule whereby employees must “agree not to give any information to the news media regarding the [hotel, guests, and employees] without prior authorization from…and to direct such inquiries to…”

_Design Technology Group, 359 NLRB No. 96 (2013)_

The employer maintained a “Wage and Salary Disclosure” rule that prohibited the disclosure of wages or compensation to any third party or other employee. The Board agreed with the Administrative Law Judge’s finding that this rule violated the Act explaining that Section 7 protects the right of employees to discuss the wages and other benefits with each other and with nonemployees.

_Target Corporation, 359 NLRB No. 103 (2013)_

Relying on, _inter alia, DirectTV, 359 NLRB No. 54 (2013)_ , the Board found the following employer policies unlawful:

1. Information security policies that prohibited employees from disclosing “confidential information” and broadly categorized all non-public Target information as confidential and listed employee personnel records as one example of confidential information;
2. A rule which, _inter alia_, prohibited soliciting at all times on Target premises for commercial purposes.

The Board did reverse the Judge’s finding that Target violated the Act by maintaining a parking lot policy advising employees to notify security or their supervisor if they saw people they didn’t know “loitering around the team member parking area.” The Board concluded that a reasonable person would know that the rule was designed to ensure employee safety and not to restrict Section 7 activity.
**Dish Network Corporation, 359 NLRB No. 108 (2013)**

The Board adopted the Judge’s finding that the employer violated the Act by maintaining certain handbook rules prohibiting employees from:

1. Electronically posting critical comments about Dish on or outside of “Company time”;
2. Speaking about the employer to news media outlets or at public hearings without management authorization; and
3. Communicating with governmental agencies about Dish Network without management approval.

**Weyerhaeuser Company, 359 NLRB No. 138 (2013)**

The Board upheld as lawful a work rule which restricted employee use of its electronic media to “business purposes only” and provided for limited personal use only with management consent. The employer also permitted union representatives to use its e-mail system to communicate about contract administration matters. However, when the employer believed the union representatives at a particular facility were spending too much work time sending e-mails, it promulgated an informational notice at the facility placing limitations only on e-mail messages sent by union representatives and related to union business. The Board found these limitations facially discriminatory and therefore unlawful.

**Quicken Loans, Inc., 359 NLRB No. 141 (2013)**

A non-disparagement provision in the Mortgage Banker Employment Agreement (MBEA) required employees to agree not to “publicly criticize, ridicule, disparage or defame the Company or its products, services, policies, directors, officers, shareholders or employees…” The Board found this to be unlawful. The Board similarly held unlawful the non-disclosure provision in the MBEA which prohibited employees from disclosing proprietary/confidential information which was defined as including non-public information relating to or regarding personnel and personal information, including personnel lists, rosters and personal information of co-workers.


After hearing certain complaints, the University held one-on-one meetings with team members seeking an evaluation of a certain supervisor and her leadership abilities, as well as an assessment of team moral. The human resource professional conducting the one-on-one told an employee to keep confidential whatever they talked about in the meeting. The Board found this oral rule to be unlawful.
World Color (USA) Corp., 360 NLRB No. 37 (2014)

The employer had a policy prohibiting employees from wearing any baseball caps other than company caps. The Board held the policy to be overly broad because on its face it prohibited employees from engaging in the protected activity of wearing caps bearing union insignia.

Pacific Bell Telephone Company, NLRB ALJ, No. 20-CA-80400 (Apr. 23, 2014)

Over 1,500 employees began wearing union stickers and buttons, some of which stated the following: “WTF, Where’s The Fairness,” “FTW, Fight To Win,” and “CUT the CRAP! Not My Healthcare.” The dispute arose when those employees were sent home for displaying those messages in front of customers. While the collective bargaining agreement permitted the company to implement appearance standards or a dress code requiring “a professional appearance,” there were no contractual rules regarding the wearing of buttons and insignia.

In finding that the employer committed an unfair labor practice, the Administrative Law Judge held that employees generally have a right to wear union buttons and insignia, absent “special circumstances” limiting that right, “including maintaining production and discipline, ensuring safety, maintaining an image that does not alienate customers, or where the message itself is offensive.” The Judge held that the fact an employer’s customer may be exposed to union insignia “that may cause an adverse reaction does not establish special circumstances since employees’ rights do not depend on reactions of an employer’s customers.”

Lastly, the Judge held that the content of the insignia was not “so vulgar or offensive to take it outside the protection of the Act.” The Judge based this finding, in part, on the fact that the full text “clarified” what the abbreviations meant.

MCPc, Inc., 360 NLRB No. 39 (2014)

The employer had a confidentiality rule that stated “dissemination of confidential information within [the company], such as personal or financial information, etc., will subject the responsible employee to disciplinary action or possible termination.” The Board concluded that the employer violated the Act because the rule was overly broad and employees would reasonably construe it to prohibit discussion of wages or other terms and conditions of employment.

Copper River of Boiling Springs, LLC, 360 NLRB No. 60 (2014)

The Board affirmed the Administrative Law Judge’s conclusion that three (3) work rules were lawful.

1. The first rule prohibited “unauthorized dispersal of sensitive company operating materials or information to any unauthorized person or party. This includes but is not limited to policies, procedures, financial information, manuals, or any other information contained in Company records.”
a. The Judge concluded the rule does not suggest that information on employee’s pay stubs is “sensitive company” information and employees would not understand the rule as prohibiting employees from discussing and disclosing information about their wages, hours, and working conditions.

2. The second rule prohibited any other action or activity which the employer believed “represents an actual or potential threat to the smooth operation, goodwill or profitability of its business.”

3. The third rule prohibited “insubordination to a manager or lack of respect and cooperation with fellow employees or guests. This includes displaying a negative attitude that is disruptive to other staff or has a negative impact on guests.”
   a. Chairman Pearce would have found this rule unlawful, believing that employees would reasonably interpret a “negative attitude” as one that is critical of the employer and, therefore, the rule would inhibit employees from discussing controversial topics, including terms and conditions of employment.

*California Institute of Technology Jet Propulsion Laboratory, 360 NLRB No. 63 (2014)*

The Board affirmed the Administrative Law Judge’s finding that a rule instructing employees to avoid any action which “could reasonably be expected to discredit” the employer, was lawful. The Judge found that employees would not reasonably read the rule as forbidding activity protected by Section 7.

*Hill and Dales General Hospital, 360 NLRB No. 70 (2014)*

The Board considered the facial validity of three (3) work rules.

1. The first rule stated, in relevant part, that employees will not make “negative comments about our fellow team members,” including co-workers and managers.
   a. In agreement with the Administrative Law Judge, the Board found the rule prohibiting of “negative comments” and “negativity” was unlawful.

2. The second rule stated that employees will “represent [the employer] in the community in a positive and professional manner in every opportunity.”
   a. Contrary to the Judge’s finding, the Board held this rule was unlawful. Particularly in context with the other unlawful rules, Board found that employees would reasonably view the rule as prohibiting them from engaging in any public activity or making any public statement that were not perceived as “positive” to the employer.

3. The third rule stated that employees “will not engage in or listen to negativity or gossip.”
   a. The Board adopted the Judge’s finding that this rule was unlawful.
First Transit, Inc., 360 NLRB No. 72 (2014)

The Board considered the validity of a variety of rules in the employer’s employee handbook.

1. The Board disagreed with the Administrative Law Judge’s decision regarding a rule in the stealing/theft portion of the rulebook which prohibited employees from “using Company property for activities not related to work anytime.”
   a. The Judge found that employees would reasonably construe the words “using Company property” to encompass a physical presence in non-working areas where employees could lawfully engage in union and protected activities during non-working time. However, the Board believed that the rule, when read in context, would reasonably be understood as applying to theft or misappropriation of property and not covering activity on the physical premises.

2. The Board found the disloyalty rules prohibiting employees from participating “in outside activities that are detrimental to the company’s image or reputation or where a conflict of interest arises” or “conducting oneself during non-working hours in such a manner that the conduct would be detrimental to the interest or reputation of the Company” were unlawfully overbroad.
   a. The Board agreed with the Administrative Law Judge’s view that the first portion of the rule would reasonably be read to mean outside activities could include public union rallies, informational picketing or public expressions of workplace dissatisfaction. Similarly, the latter portion of the rule would reasonably be read to comprise any behavior, however proper and protected, that the employer considered detrimental to its image or reputation.

3. The Administrative Law Judge found the rule prohibiting “poor work habits, including loafing, wasting time, loitering or excessive visiting” to be overbroad as employees could interpret it as prohibiting protected activities during non-worktime in non-work areas.
   a. The Board disagreed, finding that employees would reasonably construe “poor work habits” to refer to a failure to perform job duties when an employee is expected to be working productively.

4. Another rule prohibited “discourteous or inappropriate attitude or behavior to passengers, other employees, or members of the public. Disorderly conduct during work hours.”
   a. Contrary to the Administrative Law Judge, the Board found this rule unlawfully overbroad because “inappropriate attitude or behavior” could reasonably be construed by employees as limiting their communications concerning employment.
   b. An additional portion of the above rule prohibited “profane or abusive language where the language used is uncivil, insulting, contemptuous, vicious or malicious.”
i. The Board found the rule was not unlawfully overbroad because employees would reasonably construe this rule as simply requiring that they comport themselves with “general notions of civility and decorum.”

5. Another handbook policy stated in part, that “during union organizing campaigns, management shall support the employee’s individual right to choose whether to vote for or against union representation without influence or interference from management.” The Board found the policy to be overbroad.
   a. The Board noted that the rule focused solely on union organizational rights and did not include the broader panoply of Section 7 rights.
   b. Second, the policy’s placement in the handbook was, according to the Board, neither prominent nor proximate to the challenged rules.
   c. Finally, the Board found the employer had committed unfair labor practices contradicting the terms of the policy and therefore, could not use the policy to insulate it from liability.

*Kroger Co. of Michigan*, NLRB ALJ, No. 07-CA-098566 (Apr. 22, 2014)

An Administrative Law Judge found several provisions of an employer’s communications policy were unlawful.

1. “If you identify yourself as an associate of the Company and publish any work-related information online, you must use this disclaimer: ‘The postings on this site are my own and don’t necessarily represent the positions, strategies or opinions of The Kroger Co. family of stores.’”
   a. The Administrative Law Judge held the rule was “manifestly broader” than the company’s legitimate interest in avoiding confusion about whether it supported particular comments on the Internet or social networking sites, and found that the disclaimer requirement would discourage employees from engaging in NLRA-protected activity.
      i. The company relied on a 2012 memorandum (OM 12-59, 5/30/12) in which then-Acting General Counsel Lafe E. Solomon reported that his office found an employer lawfully required employees to state that online postings were their own and did not represent their employer’s “positions, strategies or opinions.” However, the Administrative Law Judge stated that opinions from the general counsel’s office lack precedential value and he was not persuaded by the 2012 memorandum and would not follow it.

2. “You must comply with copyright, fair use and financial disclosure laws, and you must not use without permission or compromise in any way the Company’s intellectual property assets (like copyrights, trademarks, patents or trade secrets—including, for example, Kroger or banner logos, or trade names of products, or non-public information about the Company’s business processes, customers or vendors).”
a. The Administrative Law Judge found the rule would prohibit any use of the employer’s insignia, banners or logos without permission and was overly broad because it would prevent employees from engaging in “nonoffensive uses” of an employer’s “intellectual property” that the NLRB considers legally protected.
   i. The employer relied on the NLRB’s Division of Advice which concluded in a 2012 memorandum (McKesson Corp., NLRB Div. of Advice, No. 6-CA-66504, 3/1/12) that a regional director should not challenge a company rule requiring employees to “[r]espect all copyright and other intellectual property laws.” However, the Administrative Law Judge said this case was different. “This is a far cry from and far less than the complete prohibition of the unapproved use of employer logos, banners, and trade names barred by Kroger’s policy.”

3. “Confidential and proprietary information should not be discussed in any public forum unless it has been publicly reported by the Company. Confidential and proprietary information includes but is not limited to: financial results, new store designs, current or future merchandising initiatives, and planned technology uses or applications. Do not comment on rumors or speculation related to the Company’s business plans.”
   a. The Administrative Law Judge determined that the rule would lead employees to believe they are prohibited from discussing their own employment conditions, including transfers of employees, potential shutdowns, closures, layoffs and transfer of work, and chill the exercise of NLRA rights.

4. “When online, do not engage in behavior that would be inappropriate at work— including, but not limited to, disparagement of the Company’s (or competitors’) products, services, executive leadership, employees, strategy, strategy and business prospects.”
   a. The Administrative Law Judge held that the rule extended to “disparagement” of the company and its leaders without providing examples of forbidden conduct and the employees would reasonably understand the policy to prevent them from engaging in communications that would be protected by the Act.

Design Technology Group, LLC, 359 NLRB No. 96 (2013)

The Board found that two employees engaged in protected concerted activity when they presented concerns about working late in an unsafe neighborhood. Further, they found the employees’ Facebook postings to be complaints among employees about the conduct of their supervisor and management’s refusal to address employee concerns. The employees also discussed on Facebook looking at a book on the rights of workers in California. The Board found these Facebook postings to be protected concerted activity and agreed with the Administrative Law Judge that the discharge of these employees violated Section 8(a)(1) of the Act. The Board also affirmed the finding of an unlawful discharge of an employee based on her continued association with the two others unlawfully discharged a month earlier.
Encino Hospital Medical Center, 360 NLRB No. 52 (2014)

The Board affirmed the Administrative Law Judge’s finding that the union steward’s discharge was lawful where she engaged in deception and dishonesty while assisting a former co-worker in an unemployment compensation hearing. “The Board has held that, in certain circumstances, an employee may lose the protection of the Act by engaging in conduct that is deliberately deceptive or maliciously false where there is no necessary link between the deception or falsification and the protected conduct.” The Board agreed that the discharge was based on this unprotected conduct.

New York Party Shuttle, LLC, 359 NLRB No. 112 (2013)

A New York tour guide sent an e-mail to employees of another tour company and posted a message on a Facebook site called NYC bus guides. In those communications, he spoke of his efforts to get a union and the need for a union, as well as many harsh words about the company, including it having committed safety violations, having bounced checks to employees, and having lousy employee benefits. The Board agreed that the employee’s discharge for his e-mail and Facebook communications was unlawful.

World Color (USA) Corp., 360 NLRB No. 37 (2014)

The Board reversed the Administrative Law Judge and found the evidence failed to establish that an employee’s Facebook postings constituted protected activity. The evidence indicated only that the employee posted unspecified criticisms of the employer and unspecified comments about the union over a 5-6 month period. Based on that limited evidence, the Board refused to infer that the employee’s posts amounted to protected concerted activity.

MCPc, Inc., 360 NLRB No. 39 (2014)

The Board agreed with the Administrative Law Judge that an employee engaged in concerted activity when discussing staffing shortages resulting in heavy workloads with other employees. Accordingly, the employee’s discharge for this protected concerted activity was unlawful. The employer argued it fired the employee for obtaining confidential information about executive pay when she commented at a group meeting that the $400,000 given to a newly hired executive could have been better spent in hiring additional staffers.

Murtis Taylor Human Services Systems, 360 NLRB No. 66 (2014)

The Board held the employer’s suspension of a union delegate was unlawful where it was based on his conduct representing an employee during an investigatory interview. The Board disagreed with the employer’s contention that the employee/union delegate impeded the investigation where he used a loud voice, told the employee not to incriminate herself, and repeatedly asked questions about the purported conflict of interest being investigated. The Board found the union delegate’s conduct within the permissible bounds of protected Weingarten representation.