



Labor and Employment Law Breakfast FALL NEW DEVELOPMENT UPDATE

November 2012

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The NLRB & Private Employers



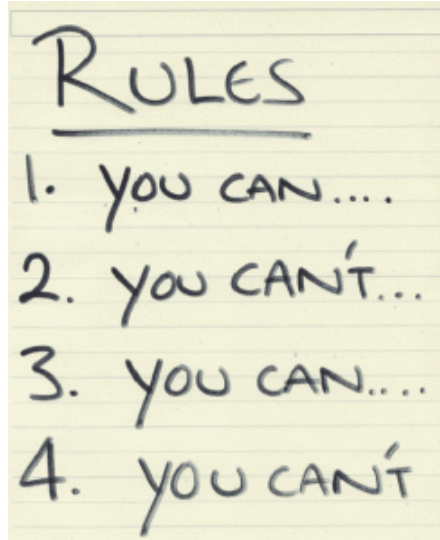
“Concerted Activity”



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NLRB's Attack On Rules Of Conduct



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NLRB's Attack On Rules Of Conduct



“No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership.”

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Karl Knauz Motors, Inc. d/b/a Knauz BMW and Robert Becker. Case 13-CA-046452
September 28, 2012
DECISION AND ORDER


ORDER

The National Labor Relations Board orders that the Respondent, Karl Knauz Motors, Inc., d/b/a Knauz BMW, Lake Bluff, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Maintaining the "Courtesy" rule in its employee handbook that prohibits employees from being disrespectful or using profanity or any other language which injures the image or reputation of the Dealership.
 - (b) Maintaining the "Unauthorized Interview" and "Outside Inquiries Concerning Employees" rules in its employee handbook that prohibit employees from discussing their terms and conditions of employment or information about other employees with third parties.
 - (c) In any like or related manner intimidating, straining, or coercing employees or interfering with rights guaranteed them by Section 7 of the National Labor Relations Act.
2. Take the following affirmative actions to effectuate the policies of the Act:
 - (a) Advise the employees that the unlawful rules have been rescinded, or
 - (b) Provide the language of lawful rules or publish and distribute a revised employee handbook that
 - a. does not contain the unlawful rules, or
 - b. provides the language of lawful rules.
 - (c) Within 14 days after service by the Region, post at its Lake Bluff, Illinois facility copies of the attached notice, in English and Spanish, marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered or removed.
 - (d) Furnish all current employees with inserts for the current employee handbook that
 1. state the rescission of the unlawful rules, and
 2. state the language of lawful rules.
 - (e) Obtain the attestation of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.


“... prohibits employees from being disrespectful or using profanity or any other language which injures the image or reputation of the Dealership.”

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NLRB's Attack On Rules Of Conduct



“We honor confidentiality. We recognize and protect the confidentiality of all information concerning the company, its business plans, its [employees], new business efforts, customers, accounting and financial matters.”

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Disseminating “[s]ubstantive information such as membership, payroll, confidential financial, credit card numbers, social security numbers, or employee personal health information.”

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Rules Of Conduct



Specific Prohibitions:

- Bullying
- Intimidation
- Insubordination
- Clear Bounds of Confidentiality Policies



Broad Prohibitions:

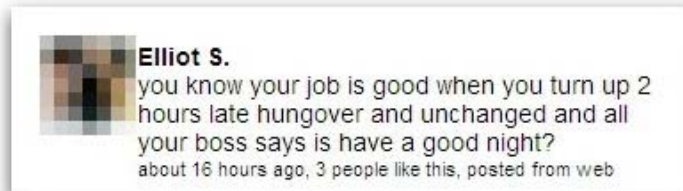
- “disrespectful language and behavior”
- “disparaging company”
- Confidentiality about “employees” generally

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Social Media In The Workplace



twitter

Home Profile Find People Settings Help

[REDACTED] i got caught stealing hours at my old job lmao thought i was gonna go to jail till my supervisor said fix mines to

about 17 hours ago from TweetDeck

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Social Media In The Workplace



7:29 PM Apr 5th from web

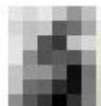
@ [REDACTED] Hum... hate my boss, she gave me a GOOD evaluation and i wanted an EXCELLENT one to not have another contract like this one

12:39 PM Aug 11th from TweetKu

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Social Media In The Workplace



Anastasia R.

Im getting so mad right now I hate my boss Jay I hope he dies better yet I feel like killin him if you in a bad mood don't take it out on everyone at the job like wtf its way to hot to take your sh** - #Piss off
about 5 days ago, no people like this, posted from Mobile

twitter

Login Join T

[redacted] i need a sassy and pineapple-y lawyer chick to sue my boss. you in?

6:33 PM Mar 6th via web

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Social Media In The Workplace

twitter

Home Profile Find People Settings Help Sign out

I wish my ~~boss~~ dickhead boss would stop sending us stupid emails!

10:47 AM Apr 8th from mobile web

I hate my boss on Mondays.

11:07 AM Aug 10th from TwitterFon

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Discussion Of Workplace Investigations?



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The NLRB's New Poster



Employee Rights Under the National Labor Relations Act

The National Labor Relations Act (NLRA) guarantees the right of employees to organize and bargain collectively with their employers, and to engage in other protected concerted activity or to refrain from engaging in any of the above activity. Employees covered by the NLRA are protected from certain types of employer and union misconduct. This Notice gives you general information about your rights, and about the obligations of employers and unions under the NLRA. Contact the National Labor Relations Board (NLRB), the Federal agency that investigates and resolves complaints under the NLRA, using the contact information supplied below, if you have any questions about specific rights that may apply in your particular workplace.

Under the NLRA, you have the right to:

- Organize a union to negotiate with your employer concerning your wages, hours, and other terms and conditions of employment.
- Form, join or assist a union.
- Bargain collectively through representatives of employees' own choosing for a contract with your employer setting your wages, benefits, hours, and other working conditions.
- Discuss your wages and benefits and other terms and conditions of employment or union organizing with your co-workers or a union.
- Take action with one or more co-workers to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government agency, and seeking help from a union.
- Strike and picket, depending on the purpose or means of the strike or the picketing.
- Choose not to do any of these activities, including joining or remaining a member of a union.

Under the NLRA, it is illegal for your employer to:

- Prohibit you from talking about or soliciting for a union during non-work time, such as before or after work or during break times; or from distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms.

Under the NLRA, it is illegal for a union or for the union that represents you in bargaining with your employer to:

- Threaten or coerce you in order to gain your support for the union.

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Other NLRB Updates

- Waiver of Class Actions
 - NLRB
 - Certiorari granted in *American Express Co. v. Italian Colors Restaurant*
- Confidentiality Provisions in Arbitration Agreement
- Proposed Rules for Union Elections



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Handbook Claims, Revisited

- At-will relationship modified by enforceable promises
- Must be *specific* representation(s)
 - Exclusive lists of reasons for discharge
 - Detailed procedures for discharge
 - Descriptions of conduct allowing immediate termination
 - Descriptions of conduct requiring warnings before termination



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Recent Discrimination Cases – Washington And Beyond

- *Loeffelholz v. University of Washington* (Wash. 2012)



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Failure To Accommodate Religious Beliefs?

- *Short v. Battle Ground School District* (Wash. App. 2012)



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Seattle Proposal To Prohibit Discrimination Against Individuals With Arrests/Convictions

- Rationale: employment prevents recidivism
- Exceptions:
 - Direct relationship
 - Risk of substantial harm to property or safety
 - Working with children or vulnerable adults
 - Background check laws still apply

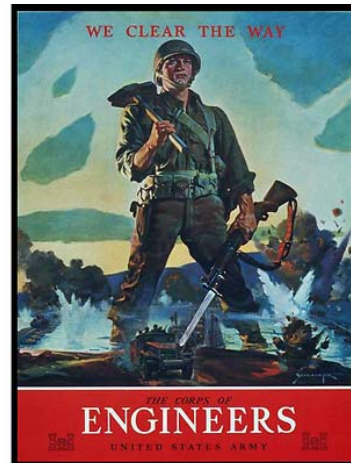


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Age Discrimination: *Shelly v. Geren* (9th Cir. 2012)

- Asking about retirement dates
- Qualification disparities??
- Shady decisionmakers



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Cat's Paw Liability

- “Judicial attractive nuisance”



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Class Action Update **WAL★MART®**



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Too Big to Sue?

- *McReynolds v. Merrill Lynch* (7th Cir. 2012)
- *Ellis v. Costco Wholesale Corp.* (9th Cir. 2011)



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Lessons?

- DON'T throw all company-wide promotion and pay policies out the window!
- DO: Collect data on pay disparities.



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Wage & Hour Update

- Salesmen Who Do Not Make Sales: *Christopher v. SmithKline Beecham Corp.* (2012)



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Wage & Hour Update

- When a Manager is Not a Manager: *Fiore v. PPG Industries* (Wash. App. 2012)



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Wage & Hour Update

- Audit Associates Are More Professional Than They'd Like To Believe: *Litchfield v. KPMG* (Wash. App. 2012)



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Marijuana and the Workplace



- Initiative 502
- *Roe v. Teletch Customer Care Management* (Wash. 2011)
- Marijuana and the ADA

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Computer Fraud Abuse Act ("CFAA")

- *United States v. Nosal* (9th Cir. 2012)



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Questions?

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