

ALERTS

Labor & Employment Law Alert - Not April Foolin': National Labor Relations Board Finds Employer Rule Requiring Positivity And Professionalism Unlawful

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On April 1, the National Labor Relations Board (NLRB) ruled unlawful an employer policy requiring that employees refrain from negativity in the workplace and in the community. In *Hills and Dales General Hospital*, Case No. 07-CA-053556, the NLRB continued its recent trend of finding that common employer policies, including policies limiting or requiring civility in social media use, those describing the at-will relationship between an employer and its employees, and certain confidentiality provisions, are overbroad.

At issue in *Hills and Dales* were the following three paragraphs in the employer's Values and Standards of Behavior Policy: 1.) Paragraph 11 prohibited employees from making "negative comments about our fellow team members," including coworkers and managers; 2.) Paragraph 16 required employees to represent the employer "in the community in a positive and professional manner in every opportunity;" and 3.) Paragraph 21 prohibited employees from engaging or listening to "negativity or gossip."

While the NLRB agreed with the administrative law judge that the prohibition on negativity found in paragraphs 11 and 21 was unlawful because employees could construe the prohibition as forbidding lawful activity, it overturned the administrative law judge and found paragraph 16 unlawful also.

In finding paragraph 16 overbroad and ambiguous, the NLRB stated "particularly when considered in context with these other unlawful paragraphs, employees would reasonably view that language . . . as proscribing them from engaging in any public activity or making any public statements . . . that are not perceived as positive toward the [employer] on work-related matters." According to the NLRB, this language could discourage employees from engaging in protected activity, such as protests of unfair labor practices or complaints to third parties regarding working conditions. Contrary to the administrative law judge, the NLRB did not find previous precedent involving extremely similar language persuasive.

While the NLRB previously found lawful a policy requiring employees "to represent the company in a positive and ethical manner," the current NLRB distinguished ethical manner from professional manner, as used in the *Hills and Dales* policy. Specifically, the NLRB stated that combining positive with ethical was significantly narrower in scope than combining positive with professional, and that professional is a "broad and flexible concept as applied to employee behavior." Thus, despite the similarity to the previously permitted policy, the *Hills and Dales* language was unlawful

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as overbroad and ambiguous.

While the Hills and Dales decision will likely surprise some employers with its prohibition on seemingly rational and well-meaning policies, it serves as a strong reminder that the current NLRB remains interested in policing employer rules for potentially overbroad or ambiguous language.

To steer clear of these negative outcomes, it is important for employers to work closely with counsel to draft and periodically review their employment policies.

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