Uh-oh... Your Employee Handbook is Illegal!

Understand new labor rules & protect your home care agency

with attorney Eileen M. Maguire of The Gilliland Law Firm, P.C.
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About the presenter

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The materials and opinions presented by the speaker represent the speaker’s views, are for educational and informational purposes only, are not intended to be legal advice and should not be used for legal guidance or to resolve specific legal problems.

In all cases, legal advice applicable to your organization’s own specific circumstances should be sought.
National Labor Relations Act
Non-Union Agencies & Hospices

• Enacted in 1935
• Not just about unions
• Provides protections for employees who seek to better their working conditions
• If your agency grosses more than $100,000 annually, you are covered
Definition of “employee” is extremely broad

Supervisors are generally NOT covered employees:

“Supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibility to direct them, ... if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires independent judgment.”
“Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized [by the labor law].”
What Employee Rights Look Like

- Two or more employees asking for a raise
- One employee asking for a raise for a group of employees
- One, two or more employees asking for improved conditions of employment
- Two or more employees discussing their salaries and wages with others, including third parties
- One, two or more employees protesting an employer policy or condition of employment for the betterment of others
For non-union agencies, it is an unfair labor practice:

“To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the NLRA.”
The NLRB has the power to:

1. Reinstate an employee to his or her former position
2. Order back wages, taxes and benefits
3. Order disciplinary records be removed from personnel files
4. Order removal of an unlawful employee policy
5. Post notices advising employees about the employer's violation of the law and about their right to unionize
6. Order any other remedy the NLRB determines desirable
• Make it easier to organize

• Expand interpretation of “employee rights”

• Expand labor’s reach into non-union settings
If an employee files an unfair labor practice charge... the NLRB will request to review the Employee Handbook even if the unfair labor practice charge has nothing to do with a workplace rule.
Employee Policies Under Attack

- Behavior
- Social Media
- Confidentiality
- At-Will Employment
- Emails
Common Behavior Policy:

Is it Lawful or Unlawful?

Insubordination will not be tolerated...
Unlawful Behavior Policy

Courtesy is the responsibility of every employee. Everyone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language which injures the image or reputation of the [company].
Unlawful Behavior Policy

Employees are not to engage in or listen to negativity or gossip.
Lawful Behavior Policy – But Beware
The Distinction? Different Board Members.

Employees must use appropriate business decorum in communication with others.
Employees are prohibited from participating in outside activities that are detrimental to the company’s image or reputation, or where a conflict of interest exists.
Lawful Behavior Policy – But Beware
The Distinction? Different Board Members.

Employees are prohibited from any conduct on or off duty that tends to bring discredit to, or reflects adversely on [the company].
Unlawful Behavior Policies
Can Conflict With Client Respect Policies

Unlawful: “Disrespect to our guests including discussing tips, profanity and negative comments or actions [is prohibited].”

Unlawful: “Insubordination ... or lack of respect and cooperation with fellow employees and guests [is prohibited].”
Unlawful Behavior Policies Can Conflict With Sexual Harassment Policies

NLRB condoned male employee’s cursing and sexually harassing language to female employees, including the following notes he wrote to them:

- “Dear P#@*#, Please Read!”
- “Hey cat food lovers, how’s our income doing?”
- “Warehouse workers, RIP.”
NLRB condoned male employee’s sexually offensive gesture to female employees...

The Board reasoned that, although the gesture ... was unpleasant, it was not considered sexual harassment..., did not carry an implied threat of violence...and likely did not discourage the non-union employee from reporting to work during a strike.
One NLRB Member Objects ...

“I specifically dispute .... that profanity in the course of labor relations is the presumptive and permissible norm in any workplace....that comments which coworkers reasonably view as harassing and sexually insulting are not disruptive of productivity, and that threatening speech alone cannot warrant loss of statutory protection.”
“[I]t is essential for an employer to proscribe profane behavior that could under other employment laws be viewed as harassing, bullying, creating a hostile work environment, or a warning of workplace violence. The Board is not an ‘uberagency’ authorized to ignore those laws in its efforts to protect... Section 7 rights....”
Why Are Behavior Polices Unlawful?

- They are vague and overbroad
- Policies may inhibited employees from exercising their right to engage in protected activity, such as being critical of their pay, other conditions of employment, co-workers, supervisors or employer.
Confidentiality Policies

• Confidentiality of Agency Information

• Confidentiality of an Agency’s Disciplinary Investigations
Confidential Information:
[The Agency’s] confidential and proprietary information includes (among other items) business, financial and marketing plans, personnel information, inventions, research, and confidential information entrusted to the [Agency] by vendors, customers and others. Confidential information must be used only by authorized persons and only in accordance with [the Agency’s] policies and procedures.
What Is Confidential Information?

- Your Agency’s Proprietary Information (not commonly known to the public)
- Your client’s Protected Health Information under HIPAA
What Is **Not** Confidential Information?

- Wages and other compensation data
- Terms and conditions of employment

**HEY! CAN YOU KEEP A SECRET?!!**
Confidentiality During Agency Investigations: A Cautionary Tale

Male employee is disciplined for harassing female employee. He vocally complains to coworkers during work hours and shows them his employer’s disciplinary memo. He is discharged for disrupting work and for sharing confidential information.

Memo says employees “are aware that disciplinary action forms are confidential and should not be shared...”
NLRB upheld the discharge but found that the employer violated labor law nonetheless.

NLRB found that the employer violated the NLRA by maintaining the *unwritten* confidentiality rule prohibiting employees from discussing discipline.
The NLRB explains its reasoning:
Under established NLRB precedent, “an employer violates [the NLRA] 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.”
Important Takeaway

The NLRB will look at your written policies and your employment practices, including any documentation in an employer’s records, to determine if you are maintaining “illegal” policies.
Social Media Policies

- The new “water cooler”
- Can you control off-duty behavior?
- Can you control clients’ protected health information?
Terminating an employee for “liking” a posting that complains about the employer.

Is “liking” a protected concerted activity under the National Labor Relations Act?
“Do not make comments or otherwise communicate about customers, coworkers, supervisors, the Company or [Company] vendors or suppliers in a manner that is vulgar, obscene, threatening, intimidating, harassing, libelous, or discriminatory on the basis of age, race, religion, sex, sexual orientation, gender identity or expressions, genetic information, disability, national origin, ethnicity, citizenship, marital status, or any other legally recognized protected basis under federal state or local laws, regulations or ordinances.”
Adding a “Savings Clause”

This policy is not designed to interfere with, restrain, or prevent employee communications or activities regarding wages, hours or other terms and conditions of employment.
At-Will Employment Policy

- The importance of your “At-Will Employment” policy
- How to protect the “At-Will Employment” relationship
[You] agree that the at-will employment relationship cannot be amended, modified or altered in any way.
Why Unlawful?

The employee is forced to waive their rights under the NLRA’s Section 7 rights to contract for employment with a union and his or her employer.

The at-will disclaimer policy was “essentially a waiver of the employee’s right to advocate… to change his/her at-will status.”
You agree that the at-will employment policy cannot be amended, modified or altered in any way unless an agreement is reached in writing and signed by the President [or another titled agent] of the Agency, who is authorized by the Agency’s board of directors to sign such an agreement.
NLRB ruled in December 2014 that employers CANNOT prohibit employees from using their work emails for protected communications and union organizing activities during non-working time.

This decision overturned a 2007 case that said employers could prohibit such use.
Unlawful Employer Email Policies

Employers may attempt to justify “special circumstances” that make banning off-duty use of emails necessary, but...

“[I]t will be the rare case where special circumstances justify a total ban on non-work email use by employees,” according to the NLRB.
What **Can** Your Email Policies Say?

- That the employer will continue to monitor employee computers and emails for legitimate management reasons, such as ensuring productivity and preventing harassment or other activities that could give rise to employer liability.
What **Can** Your Email Policies Say?

- That employees should not have an expectation of privacy in their use of the employer’s email system.
A Cautionary Word About Monitoring Emails

Do not change your monitoring procedures (i.e., increase monitoring) in reaction to union organizing activities!

Do not target certain employees who are engaged in such union organizing activity!
Also in December 2014, the NLRB published its revised rule shortening union election procedures.

“How Ambush Elections” Rule

How much more pro-union can the NLRB get?

The new elections rule is effective April 14, 2015.
So, Can You Draft Compliant Policies?

- Redraft policies and provide examples of misbehavior to avoid a “vague and over broad” finding? *Simply not practical.*
- Include a “savings clause” within proximity to each risky policy? *Maybe.*
- Delete all offending policies and hope for the best? *Maybe.*
- Weigh the importance of each risky policy. *Yes, but consult with legal counsel in this process.*
How to Stay Union Free

1. Develop and maintain positive relationships between employees and management.

2. Communication is KEY! Create and publicize an open door policy to hear concerns and ideas.

3. Assess your vulnerability for unionization in your workforce and in your geographic area.

4. Train your managers and supervisors to recognize early signs of union organizing activities.
5. Train your supervisors and managers on the do’s and don’ts of union avoidance.

6. Train your supervisors and managers on the do’s and don’ts of protected employee communications and activities.

7. If you need help with any of the above, seek knowledgeable labor advice.
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