

The SESCO Report

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Your “Human” Resource Since 1945

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Critical NLRB Developments 9 Handbook Policies That Are Now Legal Again

There’s good news for employers. The National Labor Relations Board (NLRB) issued a memorandum on June 6th that declared nine (9) standard and commonsense employer policies **will now be presumed lawful under the National Labor Relations Act**. The memorandum was based on the Board’s decision in *The Boeing Company*, issued in December 2017. Before *Boeing*, the NLRB under the Obama Administration had taken the position that a number of policies were unlawful because they could have a “chilling effect” on employees’ exercise of their rights to engage in “protected concerted activity” under the Act.

As such, the following nine (9) workplace rules need to be addressed in every employer’s employee handbook.

1. **Civility rules** - Employers can establish “civility rules” in that an expectation of civility in the workplace does not interfere with the employee’s right to engage in protected concerted activity because they can almost always criticize the employer, or individual supervisors, in a civil manner. The Equal Employment Opportunity Commission will support this NLRB memorandum because their proposed guidance on workplace harassment recommended civility training for employees as a harassment-prevention measure.
2. **No photography, no recording** - For the most part, rules prohibiting unauthorized recordings and photography have no impact on Section VII rights and therefore are lawful. However, “a ban on mere possession of

cell phones at work may be unlawful where employees’ main method of communication during the workday is by cell phone. In other words, the ban or policy should reference an “unauthorized recording”, and not possession of a device that can record.

3. **Bans on insubordination, non-cooperation, adversely affecting operations** - “An employer has a legitimate and substantial interest in preventing insubordination or non-cooperation at work. Furthermore, during working time an employer has every right to expect employees to perform their work and follow directives.”

You would think that this would be commonsense policy but we must thank the current NLRB General Counsel Robb for making it clear.

4. **Bans on disruptive behavior** - Employers again have the right to prohibit “fighting, roughhousing, horseplay, tomfoolery, and other shenanigans.” Also, “yelling, profanity, hostile or angry tones, throwing things, slamming doors, waving arms or fists, verbal abuse, destruction of property, threats, or outright violence.”

Again, this is commonsense policy and now legal again and should be included in all employee handbooks.

5. **Protecting confidential and proprietary information, and customer information** - This is great news for employers as competitive as business is. Yes, it is again legal for employers to prohibit employees from disclosing confidential and proprietary information. “In addition, employees do not have a right under the Act to disclose *employee* information obtained from unauthorized access/use of confidential records, or to remove records from the employer’s premises.” To be lawful under the new standard, the employer should ban the **unauthorized** access or disclosure of **confidential** employee information rather than flatly banning disclosure of *any* employee

information.

6. **Bans on defamation or misrepresentation** - According to the NLRB General Counsel, because “defamatory” statements or “misrepresentations” imply some level of deliberate falsehood or misleading, “Employees will generally understand that these types of rules do not apply to subjectively honest protected concerted speech.”
7. **Bans on unauthorized use of company logo or intellectual property** - “Most activity covered by this type of rule is unprotected, including use of employer intellectual property for unprotected personal gain or using it to give the impression one’s activities are condoned by the employer.” And “Employers have a significant interest in protecting their intellectual property, including logos, trademarks, and service marks. Such property can be worth millions of dollars and be central to a company’s business model. Failure to police the use of such property can result in its loss, which can be a crippling blow to a company. Employers also have an interest in ensuring that employee social media posts and other publications do not appear to be official via the presence of the employer’s logo.”
8. **Requiring authorization to speak for the employer** - Another commonsense change - “Employers have a significant interest in ensuring that only authorized employees speak for the company.”
9. **Bans on disloyalty, nepotism, or self-enrichment** - Employers can develop rules that ban or require disclosure of conflicts of interest, or employees who had financial interest in competitors of the employer.

It seems for once there is some commonsense being applied in Washington, DC. Many employers did not know or appreciate the restrictions under the previous Obama administration but we’re thankful for our clients that the current NLRB has cleared up many of

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NLRB DEVELOPMENTS

these commonsense employer-employee issues.

Workplace Rules that are Presumed Unlawful

In addition to clearing up what is lawful as noted above, the memorandum also lists types of employer rules that will continue to be found unlawful, and we believe most employers are already aware of these and certainly SESCO's clients/employee handbooks are currently compliant thereof:

- **Prohibiting employees from discussing or disclosing information about wages, benefits or other conditions of employment.**
- **Prohibiting employees from joining outside organizations or "voting on matters concerning" the employer.**

These rules are directly related to activity protected by Section VII or the National Labor Relations Act. Therefore, they are obviously presumed unlawful. Certainly, SESCO's policies/handbooks do not contain these illegal statements but if you have an employee handbook that we have not reviewed or developed, we strongly recommend removing any language to include the above-noted restrictions immediately.

Workplace rules that require case-by-case assessment

Finally, the memorandum discussed some "gray area" rules which may or may not violate the NLRA depending on the circumstances. Please consider the following and we strongly suggest that if these topics are contained in your employee handbook that your employee handbook be reviewed by a professional SESCO consultant/attorney.

- **"Broad conflict-of-interest rules** that do not specifically target fraud and self-enrichment . . . and do not restrict membership in, or voting for, a union."
- **Broad or vague "employer confidentiality" rules** that don't focus on confidential and proprietary, or customer, information and that don't specifically restrict Section VII activity.
- **Rules prohibiting disparagement of the employer,** as opposed to disparagement of employees.
- **Rules restricting use of the employer's name,** rather than just its logo or trademarks.
- **Rules that prohibit employees from speaking to the media or third parties at all** (as opposed to communications to

third parties where the employee purports to represent the employer).

- **"Rules banning off-duty conduct that might harm the employer."** This is a little vague and a gray area and, again, should be discussed with your SESCO consultant/attorney.
- **"Rules against making false or inaccurate statements** (as opposed to rules against making defamatory statements)."

SESCO Staff Recommendations

While overall this is extremely good news for employers, it is critical that all employers do the following:

- **Develop and implement a compliant employee handbook**
- **Have SESCO review your current employee handbook to ensure compliance with the NLRB's directives but also ensure compliance with federal and state employment regulations. Many states are not passing their own specific employment regulations and as such, policy not only needs to reflect federal guidance but also state laws.**

SESCO retainer/service agreement clients receive a free review of their employee handbook. Association members also receive handbook reviews at reduced fees.

Please feel free to contact SESCO to receive a free employee handbook checklist or to discuss a review/update of your current employee handbook; as the employee handbook continues to be the cornerstone of the employer-employee relationship.

Special Thanks to New SESCO Clients!

Phoenix Systems International, Inc.
Kingston, TN
Randall's Tire Pros
Greensboro, NC
Bob Sumerel Tire Company, Inc.
Erlanger, KY
Harrisonburg Community Health Center
Harrisonburg, VA
Peninsulas Emergency Medical Services
Council, Inc.
Gloucester, VA
D&V Distributing Company
Knoxville, TN

SESCO Staff Recommendations on FMLA Return to Work

The Family and Medical Leave Act continues to be misunderstood and there is significant non-compliance based upon our employment law audits as well as daily contacts answering client questions. Initially, in applying Family and Medical Leave the process is rather straightforward and document driven. The only issue we see here is that employers wait for employees to request Family and Medical Leave when it is the employer's responsibility to apply it.

The most confusion/non-compliance results when there is a return-to-work situation. The Family and Medical Leave Act requires a number of things in a return-to-work case. These include:

- **Returning the employee to the same position** - Under the federal regulations, positions aren't equivalent unless they are identical in terms of pay, benefits, status and working conditions. Many times, our clients will ask whether or not they can place an employee in another position as long as there is the same pay and benefits. This is not compliant. The difference would be working conditions to include a commute to a different location, reporting to a different supervisor or even working with a different team of employees. As such, in a return to work to the same position, the Act, in essence, requires that the employee be returned to the exact same position.
- **Reasonable accommodation** - This requirement is probably one of the most difficult employers have to comply. Prior to the Americans with Disabilities Act Amendments, an employer could separate an employee if they had exhausted their Family and Medical Leave (and other leave that had been earned). Now, an employer is required to engage in the ADA's interactive communication process. What this basically means for our clients is that prior to separating with an employee who has exhausted their Family and Medical Leave allotted time is that the employer must contact the employee and have a discussion (preferably verbal

See "FMLA RETURN TO WORK," page 3

FMLA RETURN TO WORK

and documented) to determine whether or not the employer can accommodate the employee's continued medical leave. This may require accommodating an additional week or two of leave, it may require accommodating light or restricted duty requirements or a number of other items. What makes this so difficult for employers is that what is defined as "a reasonable accommodation" is not clear. Reasonable is different in every circumstance and as such, this discussion with the employee and determining whether or not a reasonable accommodation can be made is critical.

- **Fitness-for-duty certification** - It is critical that employers upon return to work whether it is Family and Medical Leave or other medical leaves conduct a fitness-for-duty exam to determine whether or not the employee is fit for duty with or without accommodation. Where we see non-compliance or difficulty in addressing this process is that many employers do not have compliant/accurate job descriptions that can be provided to the medical professional to make a proper determination for fitness for duty. A job description should identify the essential functions of the job as well as the physical, mental and sensory requirements

of the job. SESCO prepares job descriptions for clients and also provides proper forms and documentation to ensure that this fitness-for-duty process is not only compliant but helpful.

Contact SESCO to request:

- Family and Medical Leave Kit (forms and policies)
- Family and Medical Leave Administrative Guide
- Compliant Family and Medical Leave employee handbook policy
- SESCO's ADA checklist to attach to job descriptions

What Good Managers Do Daily

While hard work, dedication and skill make a great employee, these traits alone don't necessarily make a good manager. Good managers need other qualities to be effective.

According to a recent Gallop study, just 10% of the population has the talent needed to manage others. "Though many people are endowed with some of the necessary skills, few have the unique combination of talent needed to help a team achieve excellence in a way that significantly improves a company's performance" the study states.

So, what does it mean to be a good manager?

1. **Work and connect with your employees** - Working with your employees builds better relationships, and helps you learn about the strengths and opportunities for improvement for each team member. Your employees will also trust you more if you work with them.

"The best managers teach and motivate teams and individuals to achieve results by staying 'in the trenches' providing support and overseeing day-to-day workflows and priorities."

"By choosing to lead by example and demonstrating that you are an expert at what you are asking employees to do, will often result in more respect and productivity."

2. **Give credit where it is due** - A good manager recognizes their employees and gives credit when it's deserved. Employees want to feel appreciated and have their work noticed. When they receive credit and recognition,

it is motivation to keep working hard. If a manager fails to provide positive feedback, employees think their work goes unnoticed and will care less.

"If you want employees to be loyal to you, be loyal to them first by recognizing their accomplishments."

3. **Be a good communicator** - Great managers are clear in their communication and communicate often. They set expectations and effectively communicate with team members to ensure that everyone is on the same page.

"This keeps employees focused on the results without dictating the process.

Employees can find the best way of meeting expectations and creating improvements to processes."

It's important to have individual communications with team members to strategize, deliver coaching and praise.

"Good managers take the time to regularly meet face to face with their team members for open discussions about their workload and future with the company."

4. **Coach your team like good coaches** - Managers keep employees motivated and passionate about the work they do.

"Employees want to be happy with their job while developing a successful and fulfilling career."

"Be aware of your employees' goals and help them align their career accordingly."

Let employees know that you are about their future and career and provide them with the training and knowledge they need to be successful.

"An effective supervisor works hard on training their employees early on so that they can give employees the autonomy to work through their roles in their own way."

SESCO has been developing supervisors for over 70 years and we encourage you to consider SESCO's management/leadership training options to include:

- **Public Seminar Series** (see page 4 of this Fall's schedule in Richmond and Bristol)
- SESCO's in-house and **onsite Effective Leader training**
- **Vital Learning** (can be purchased by the client or delivered by SESCO)

We encourage you to consider developing your leadership team as it is now more important than ever given the pressure on attracting and retaining good employees. Your frontline managers and leaders are the key to employee retention, satisfaction and high morale, productivity. It is worth the investment.

Contact SESCO for a free Client Needs Training Assessment Checklist or request additional information on our professional training programs.



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SESCO's Fall Seminar Series 2018

The Effective Leader/Manager

Sept. 5-6, 2018 Bristol, VA

Sept. 26-27, 2018 Richmond, VA

This 2-day seminar focuses on utilizing proper behavioral based interview techniques for a comprehensive screening and hiring process, discussing the various employment regulations and application in daily management aspects, exploring the leader's role in compensation management, understanding yourself and others by completing the DiSC Personality Profile assessment, reviewing leadership qualities and skills sets to maximize professional growth and development, focusing on the importance of comprehensive employee performance management, properly resolving daily conflicts to avoid operational challenges, understanding generational diversity and inclusiveness, and utilizing appropriate disciplinary measures and termination procedures to negate organizational liability. This seminar is intended for Supervisors/Managers, Human Resource Generalists, Compliance and Administration Officers.

Human Resources: Understanding the Basics

Oct. 16-17, 2018 Bristol, VA

Oct. 9-10, 2018 Richmond, VA

This 2-day seminar focuses on understanding the role of HR Management, creating screening and hiring practices to attract and retain qualified individuals, reviewing required employment documentation to include personnel file management, navigating the complexities of employee relations, discussing the various employee regulations to negate liability, focusing on proper development and implementation of necessary HR Systems, engaging in practical HR Management focusing on practical tips and various scenarios and developing ability to properly engage in performance management and termination conversations. This seminar is intended for HR Assistants or Generalists, Office Managers, Payroll, Compliance and Administration Officers.

Human Resources for the Advanced Professional

Nov. 6-7, 2018 Bristol, VA

Nov. 14-15, 2018 Richmond, VA

This 2-day seminar focuses on understanding the importance of diversity and generational differences in the organization, developing and implementing proper compensation practices tied to performance criteria, recognizing how to properly handle internal investigations to best protect the organization, designing internal training and development programs for staff, reviewing various employment regulations and recent trends to include ADAAA, FMLA, Wage and Hour, discussing the complexities of EEO and related challenges, focusing on the importance of an employee handbook and required updates, and understanding the happenings within the organization via exit interviews, focus groups and personnel opinion surveys. This seminar is intended for HR Executives, Senior Managers, Benefits and Compensation Managers, Compliance and Administration Officers and Chief Financial Officers.

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