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Employee Handbooks in the Age of Trump

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LEGAL AND EMPLOYMENT UPDATE:
NON-COVID

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SJ CHAMBER HR BOOT CAMP SERIES

DAY 2

November 4, 2020

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Federal Law and Cases

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Discrimination and LGBTQ Rights

Bostock v. Clayton County, Georgia

140 S. Ct. 1731 (2020)

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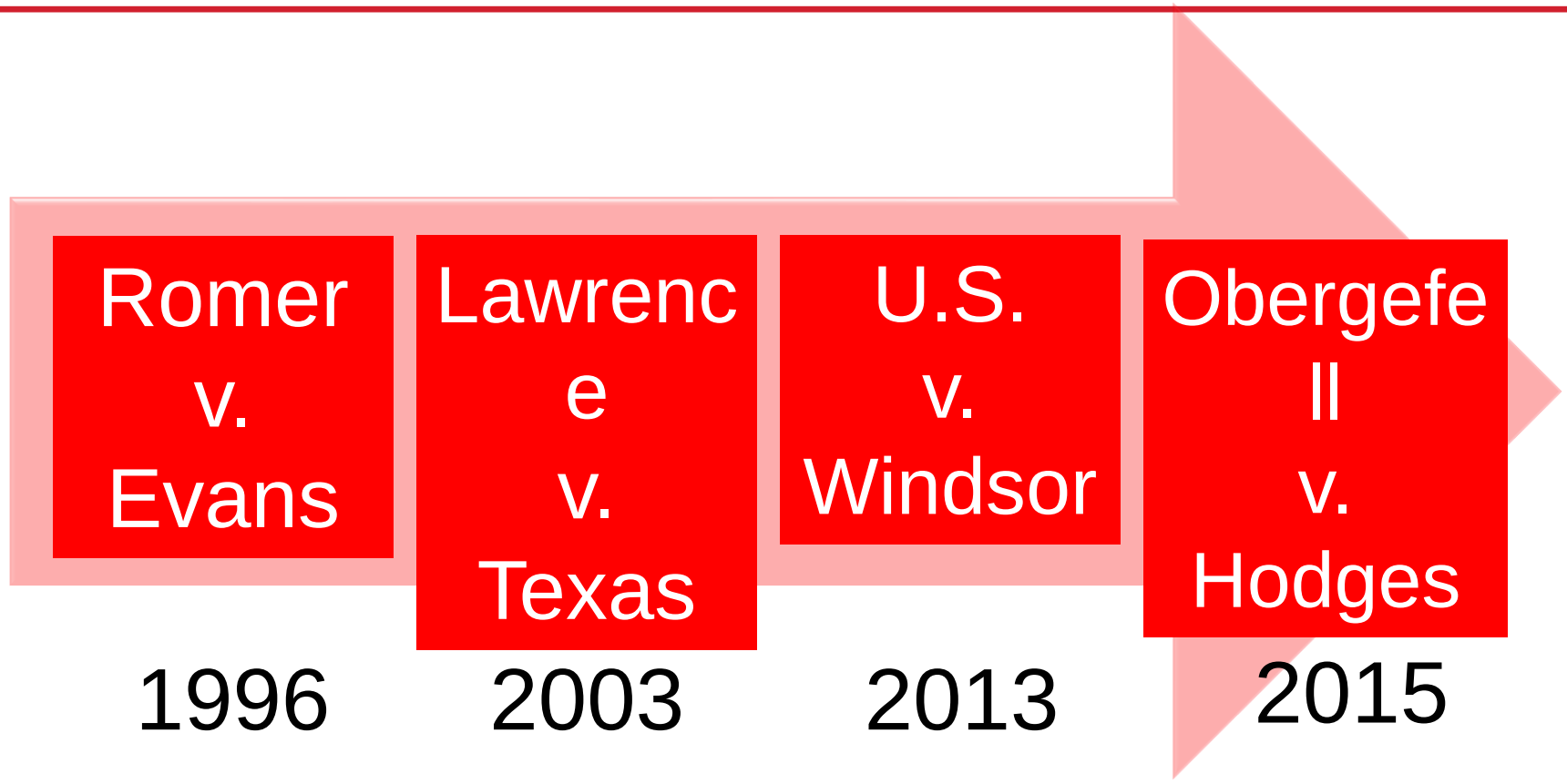
LGBTQ Landmark Decisions

The Bostock Decision was the most recent victory in a series of landmark decisions for the LGBTQ community



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LGBTQ Landmark Decisions

- In 1996, the U.S. Supreme Court ruled for the first time that a state's discrimination against "homosexuals" violated the 14th Amendment's Equal Protection Clause. Romer v. Evans, 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996).
- In 2003, the Supreme Court held that a state law making gay sex a crime was unconstitutional in violation of the guarantee of liberty in the 14th Amendment's Due Process clause. Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003).
- In 2013, the Court struck down Section 3 of the Defense of Marriage Act, limiting the definition of marriage to different-sex couples. In effect, the federal government must recognize same-sex marriages authorized by states. United States v. Windsor, 570 U.S. 744, 133 S. Ct. 2675, 186 L. Ed. 2d 808 (2013).
- In 2015, the Court held that gay individuals have the same fundamental right to marriage under the Due Process and Equal Protection Clauses of the 14th Amendment, which was previously limited to straight individuals. Obergefell v. Hodges, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015)

Bostock

- The four previous landmark decisions involved interpretations of Constitutional Due Process and Equal Protection
- *Bostock* was a matter solely of Title VII's statutory interpretation
- Title VII prohibits discrimination on the basis of race, color, religion, sex, and national origin in the employment context
  - Specifically Title VII makes it "unlawful…for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual…because of such individual's race, color, religion, sex, or national origin." 42 U. S. C. §2000e–2(a)(1).
- In *Bostock*, the issue was whether Title VII's prohibition against discrimination based on sex, encompassed discrimination based on sexual orientation and gender identity

Bostock

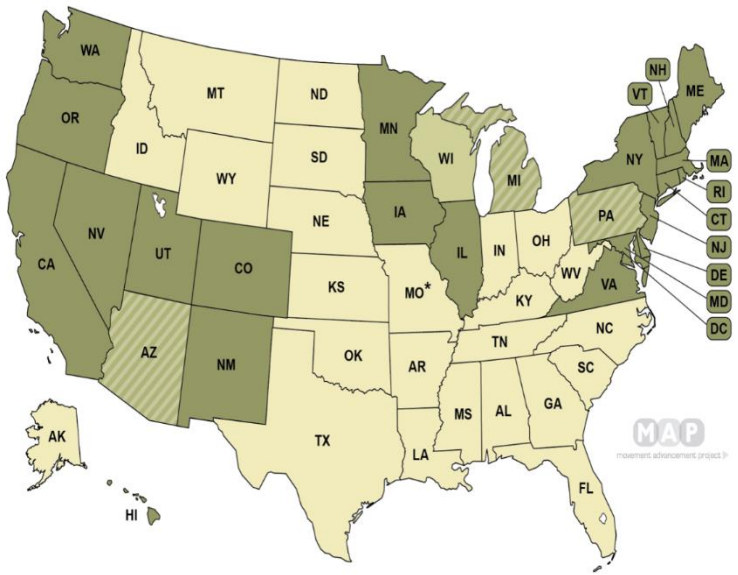
- The Supreme Court held that sex-based discrimination includes discrimination based on sexual orientation and gender identity
- Employees, through Title VII, are now protected against such discrimination on a federal level
- Employers are prohibited from making employment decisions based on an individual's sexual orientation and gender identity

Exception!
Affirmative Defense

- Bona Fide Occupational Qualification
  - Employers can discriminate against employees on the basis of a protected category, including sex, if it is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise
- Note: the exception never applies to discrimination based on race

Impact of the decision

- Historically, there were less than 25 states that had states laws that protected discrimination based on sexual orientation and gender i



State law explicitly prohibits discrimination based on sexual orientation and gender identity *(22 states, 2 territories + D.C.)*

State explicitly interprets existing prohibition on sex discrimination to include sexual orientation and/or gender identity (see note) *(3 states, 0 territories)*

State law explicitly prohibits discrimination based on sexual orientation only *(1 state, 0 territories)*

No explicit prohibitions for discrimination based on sexual orientation or gender identity in state law *(24 states, 3 territories)*

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Bostock Implications

- Justice Samuel Alito in his dissent said: “What the Court has done today — interpreting discrimination because of ‘sex’ to encompass discrimination because of sexual orientation or gender identity — is virtually certain to have far-reaching consequences." He also added that "Over 100 federal statutes prohibit discrimination because of sex.”
- Religious Freedoms ?
  - As a result of *Bostock*, it may negatively impact an employer’s ability to claim religious exceptions to their hiring practices.

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Transgender Accommodations in the Workplace

- *Bostock* decision did not address whether employers have to provide reasonable accommodations to transgender employees
- Reasonable accommodations are NOT governed by Title VII, but by Americans with Disabilities Act (ADA)
- ADA only requires reasonable accommodations for persons with disabilities, not anything “because of” sex

Transgender Accommodations in the Workplace

- Are accommodations required?
- UNCLEAR under federal law
- Trend is towards expanding employee rights, such as happened in *Bostock*
- BUT transgender accommodations are covered by ADA carve-out
- State laws may require accommodations above federal law
  - Example: New York City Human Rights Law guidance prohibits an employer mandate that transgender or non-binary employees use a single occupancy restroom or restroom that does not align with gender identity

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Transgender Accommodations in the Workplace

- BUT, an employee's transgender status is arguably a disability, and there are possible accommodations
  - Right to use bathroom of gender opposite of what person was born as
  - Right to use employee uniform of opposite sex
  - Medical/other procedures during sex-change
- Court decisions on whether accommodations required by ADA are limited and mixed
  - ADA definition of "disability" expressly EXCLUDES "transvestism, transsexualism . . . and gender identity disorders not resulting from physical impairments": Section 12211(b)(1) of ADA
  - Issue is whether the mental/emotional impacts of transgender status is part of that exclusion
- *Bostock* provides possible pattern change but no direct legal impact

FLSA: Joint Employer Test

- USDOL issued new test for joint employers on January 12, 2020
- Issue: when is employer a joint employer of its workers
- Examples:
  - Temp agency
  - Corporate parents and affiliates

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FLSA: Joint Employer Test

- New four factor balancing test:
  - Hire/fire employees
  - Supervises/controls work schedule/conditions
  - Determines rate and method of payment
  - Maintains employment records
- No one factor controls
- Exercising control is required; not ability to control

FLSA: Joint Employer Test

- Factors NOT relevant to determination:
  - Employee economically dependent on supposed employer
  - Mere franchise business model
- New USDOL is more business-friendly
- BUT remember other federal tests (NLRA) and state tests more restrictive

New Overtime Rules: Federal

- Federal minimum salary for exempt employees:
  - $684 per week ($35,569 annually)
  - Effective January 1, 2020
- NOT adjusted for inflation

State Law and Cases

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New Overtime Rules: State

- Pennsylvania issued new regulations effective October 2020
- Minimum salary for exempt workers:
  - 10/3/20: $684 per week ($35,568 per year)
  - 10/3/21: $780 per week ($40,560 per year)
  - 10/3/22: $875 per week ($45,500 per year)
- 2023 and beyond: adjust per average wage and 10th percentile

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New Jersey Law/Regulations

- NJ Mini-WARN Act amended Jan. 21, 2020
  - Effective July 19, 2020
- Amendments:
  - One week of severance per year of service, EVEN if employer gives 60+ days' notice
  - No cap on severance
  - 90 days' notice required
  - Part-time employees count towards 100-employee threshold for law to apply

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New Jersey Law/Regulations

- More Amendments:
  - 50-employee layoff threshold includes all employees within New Jersey
  - Broader definition of employer, to include affiliates and management decision-makers
- Note: release in severance agreement must include compensation above that required by law

New Jersey Law/Regulations

- NJDOL new wage/hour penalties
  - Effective January 20, 2020
- Revisions:
  - DOL can issue stop work orders for wage, tax or benefit law after audit/determination (on 7 days' notice w/only 72 hours to appeal)
  - Misclassified worker penalties: $250 for 1st violation; $1,000 each add'l violation; PLUS up to 5% of misclassified pay

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New Jersey Law/Regulations

- More Revisions:
  - DOL and Treasury Dept can share info.
  - Joint and several and individual liability among employers and contractors for misclassification
  - NJDOL will post violator names on website
  - New misclassification posters (required after April 1, 2020)

New Jersey Cases

- Skuse v. Pfizer, Inc. (N.J., 8/18/20)
- New Jersey Supreme Court reaffirmed that continued employment can be sufficient to enforce arbitration agreement
- Court also upheld Employee assent to arbitration agreement via email and electronic acknowledgment (so actual signed contract not required)
- BUT . . .

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New Jersey Cases

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New Jersey Cases

- Skuse v. Pfizer, Inc. related to an arbitration agreement BEFORE eff. Date of new NJ Law, which included add'l restrictions on arbitration agreements
- New NJ Law (2019) amended NJLAD to prohibit waiver of substantive or procedural rights in LAD Claims: arguably forbids jury trial waiver of arb. Agreement
- N.J. Civ. Justice Inst. V. Grewal (DNJ, 7/21/20): lawsuit by US Chamber of Commerce and employer group allowed to proceed, to see if new NJ law violates Federal Arbitration Act

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New Jersey Cases

- Delanoy v. Twp. Of Ocean (N.J. App. Div., 1/3/20)
- Employer policy allowed injured workers and pregnant workers with limitations to work light duty
- Workers required to exhaust paid leave, but exception for non-pregnant workers to waive the requirement
- Employees successfully sued under NJ's Pregnant Workers Fairness Act
- Court found discrimination in treating pregnant workers differently, even if those workers could not perform essential functions of the job

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Pennsylvania Cases

- Rullex Co. v. Tel-Stream (PA., 6/16/20)
- Penna Supreme Court addressed consideration req't for non-compete agreements for employees
- Affirmed req't of consideration OR as part of job offer
- Issue: Must non-compete agreement be signed prior to OR on Day 1 to be effective?
- Court held that can be signed post-Day 1 as long as "contemplated and intended to be part" of employment terms and conditions
- Court rejected non-compete because employee signed it months later AND b/c offer discussions said for employee to review and advise if any problems

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Employee Handbooks in the Trump Era

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The National Labor Relations Board

NRLB? Wait a minute … What do you mean NLRB? Why am I here? We don't have a union!

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Employee Protections

National Labor Relations Act ("NLRA")

Section 7: "right to self-organization … and to engage in other concerted activities for the purpose of collective bargaining **or other mutual aid or protection**." 29 U.S.C. § 157 (1935)

Section 8: makes it an unfair labor practice for an employer to "interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7 29 U.S.C. § 158 (b)(1)(A) (1935)

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Concerted Activity

- Activities that are engaged in on behalf of a group of employees, with the object of initiating group action, or logically would lead there.
- Key rights: to discuss terms and conditions of employment such as wages, hours, workplace complaints, concerns with co-workers or supervisors, etc.
- **Applies to both union and non-union employees and workplaces.**

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The NLRB Standard Before 2017 (Lutheran Heritage)

- If a Rule/Policy explicitly restricted activities protected by Section 7, it was unlawful.
- If not explicit restriction, a Rule/Policy unlawful if:
  - Employees would reasonably construe the language to prohibit Section 7 activity;
  - The Rule/Policy was adopted in response to Union action;
  - The Rule/Policy was applied to restrict the exercise of Section 7 rights.

Examples of the Application of Lutheran Heritage - Recordings (Verizon Wireless)

- The provision precluded employees from "engaging in unauthorized recording, photographing or videotaping of other employees without their knowledge and approval restricts them in the furtherance of their Section 7 protected activity."
- **UNLAWFUL** because it was a broad prohibition of all activity of this nature, regardless of whether it was or was not protected activity.

Examples of the Application of Lutheran Heritage

- "Do not use any company logo's trademarks, graphics or advertising materials in posts." – **UNLAWFUL**
- "You may not email, use social media or blog anonymously. You may think it is anonymous, but it is most likely traceable to you and the company." – **UNLAWFUL**
- If you discover negative statements or posts about the company, do not respond. Seek help from the legal and communications departments." – **UNLAWFUL**

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Examples of the Application of Lutheran Heritage - Social Media (Hispanics United of Buffalo)

The Facebook post:

Marianna (a) alerted fellow employees that Lydia, another employee, had criticized them, saying they “don't help our clients enough” and she “about had it” with the complaints, and (b) solicited her coworkers' views about Lydia’ criticism.

Co-Workers respond – NOT AMUSED

Lydia responds and complains about bullying

Employer TERMINATES five employees

Examples of the Application of Lutheran Heritage - Social Media (Hispanics United of Buffalo)

- **TERMINATION UNLAWFUL**
  - (1) the activity engaged in by the employee was "concerted" within the meaning of Section 7 of the Act;
  - (2) the employer knew of the concerted nature of the employee's activity;
  - (3) the concerted activity was protected by the Act; and
  - (4) the discipline or discharge was motivated by the employee's protected, concerted activity.
  - Concerted activity because Facebook post was made for the mutual aid and protection because it alerted other employees of another employee's complaint and made a common cause.

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The NLRB Standard Post 2017 (Boeing)

- **Category 1:**
- **Category 2:**

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The NLRB Standard Post 2017 (Boeing)

- **Category 1: GENERALLY LAWFUL**

The Rule, when reasonably interpreted, does not prohibit or interfere with the exercise of rights guaranteed by the Act, OR the potential adverse impact on protected rights is outweighed by the business justifications associated with the rule.

Boeing Standard (Cont.)

- **Category 2: NOT OBVIOUSLY LAWFUL OR UNLAWFUL**

Rule must be evaluated on a case-by-case basis to determine whether it would interfere with rights guaranteed by the NLRA, and if so, whether any adverse impact on those rights is outweighed by legitimate justifications.

Boeing Standard (Cont.)

- **Category 3: GENERALLY UNLAWFUL**

Rules in this category are generally unlawful because they would prohibit or limit NLRA-protected conduct, and the adverse impact on the rights guaranteed by the NLRA outweighs any justifications associated with the rule.

The Impact of Boeing on Recording Policies (Boeing)

- This provision prohibited the use of camera-enabled devices without "a valid business need and an approved Camera Permit."

- **LAWFUL** - Category 1 Rule: Even though employees have a right to record protected concerted activities, the employer's justifications for this provision, such as limiting the employer's risk of being exposed to terrorist attacks, outweighed the employee's interest.

The Impact of Boeing on Recording Policies (G&E Real Estate)

- "[I]t is a violation of Company policy for an employee ... to record conversations at or related to their work or services at the Company with a tape recorder, mobile device or any other recording device or to make a video recording in a work-related setting unless (1) prior approval has been granted by the Company..., or (2) use of the device has been otherwise properly authorized in connection with the employee's ... performance of his ... assigned duties...."
- **LAWFUL** - Category 1 Rule - Even though this encompassed recordings created for an employee's own mutual aid and protection, the employer had a strong justification for this provision because it wanted to control unauthorized recordings of its own business operations.

Social Media Policies Under Boeing (CVS Health)

"Distinguish personal social media and work social media. Personal opinions should be stated as such. CVS Health colleagues who choose to mention or discuss their work, CVS Health, colleagues, or CVS Health products or services in personal social media interactions must identify themselves by their real name and, where relevant, title or role. You must also identify that you work for CVS Health and make clear in your postings that you are not speaking for or on behalf of CVS Health."

UNLAWFUL - Requiring employees to self-identify when discussing terms and conditions of employment with each other or third parties violates Section 7. Confidentiality rules broadly encompassing employee information fall into Category 2 of the Boeing Co. categories.

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Social Media Policies Under Boeing (CVS Health)

Protect personal and confidential information. Our Code of Conduct makes clear the importance of protecting the privacy and security of PHI [protected health information], PII [personally identifiable information], and employee information. It is not permissible to disclose this information through social media or other online communications."

UNLAWFUL – An employee could conclude that "employee information" includes employee *confidential* information. Since the handbook is void of any definition of employee information, it is subject to the employee's interpretation.

Professionalism/Dress Code Policies Under Boeing (Coastal Industries)

"Maintaining a professional, business-like appearance is very important to the success of [the Employer]—we should always seek to project an image of a professional, productive, and reliable provider of security services."

Restricted commercial logos that are unprofessional or inappropriate

LAWFUL – Employees would not reasonably understand the rule to prohibiting union advertising. Employer had legitimate business interest in maintaining a work environment that is void of inappropriate imagery.

Professionalism/Dress Code Policies Under Boeing (Coastal Industries)

"Rude, discourteous or unbusinesslike behavior; creating a disturbance on Company premises or creating discord with clients or fellow employees" is prohibited.

- **LAWFUL** – Category 1: Employers may maintain rules that require harmonious relationships and to uphold basic standards of civility. Employers also have a substantial interest in preventing violence, and its interest in avoiding unnecessary conflict or a toxic work environment that could interfere with productivity.

Social Media Policies Under Boeing (Colorado Professional Security Services)

Employee who had been disciplined for not wearing uniform fired after posting to Facebook, while on job, to complain, including crude jokes about supervisor.

- Policy prohibiting criticisms of employer on Social Media – **UNLAWFUL** as overbroad
- Discharge of employee – **LAWFUL**! Posting was not concerted, and was so egregious it would not be connected to the overbroad aspect of the Policy

Confidentiality Provisions Under Boeing (Nuance Transcription)

"[T]his handbook and the information in it should be treated as confidential. No portion of this handbook should be disclosed to others, except [the Employer's] employees and others affiliated with [the Employer] whose knowledge of the information is required in the normal course of business."

- Category 3 Rule: This was facially **UNLAWFUL** because it had the effect of precluding employees from discussing their pay, benefits, and working conditions with unions and other third parties.
- Category 2 Rule: This was still **UNLAWFUL** because the adverse impact on the employee's Section 7 rights (restricting employees from discussing the terms and conditions of employment with others) outweighed Nuance's business justification (to prevent a main competitor from obtaining the handbook).

Confidentiality Provisions Under Boeing (Nuance Transcription)

Payroll and Other Information Provision: "During your employment with [the Employer], you may have access to commercially valuable technical and non-technical information. In order to protect the legitimate business interests of the Company, it is necessary that, as an employee, you respect and maintain the confidentiality of information, including processes, machinery, product designs, inventions, customer lists, supplies, payroll, and miscellaneous data from computer printouts, software, profits, costs, and any other information not available to the public."

- Category 3 Rule: This was facially **UNLAWFUL** to the extent it restricted employees' discussion of payroll information to third parties.
- Category 2 Rule: This was **UNLAWFUL** because employees would reasonably construe this restriction to include a discussion of wages and benefits. The Board found the employee's interest in speaking on these matters outweighed the employer's justification for this provision (keeping sensitive information from a competitor).

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Confidentiality Provisions Under Boeing (Motor City Pawn Brokers)

Four employees were terminated after refusing to sign employment documents, including an employee handbook.

- **Confidentiality Provision:** "Confidential information, including without limitation, information about marketing plans, costs, earnings, documents, notes, files, lists and medical files, records, oral information, computer files or similar materials (except in the ordinary course of performing duties on behalf of Company) may not be removed from Company's premises without permission. Employees must not disclose confidential information, confidential financial data, or other non-public proprietary information of the Company, nor may employees share confidential information regarding business partners, vendors, or customers."
- Category 2 Rule: This was **UNLAWFUL** because the employer's justification (a former employee previously provided proprietary information to a competitor) did not outweigh the employees' interest in speaking on these topics.

The Takeaway!
(Is There Really a Takeaway???)

Category 1	
Civility Rules	"Conduct . . . that is inappropriate or detrimental to patient care of [sic] Hospital operation or that impedes harmonious interactions and relationships will not be tolerated." *William Beaumont Hospital*, 363 NLRB No. 162, slip op. at 1 (Apr. 13, 2016)
No-Camera Rules	[U]se of [camera-enabled devices] to capture images or video is prohibited . . . *Boeing Co.*, 365 NLRB No. 154, slip op. at 17-19, 19 n.89.
Insubordination Rules	"Being uncooperative with supervisors . . . or otherwise engaging in conduct that does not support the [Employer's] goals and objectives" is prohibited. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998)

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Category 1	
Disruptive Behavior Rules	“Boisterous and other disruptive conduct.” *Component Bar Products*, 364 NLRB No. 140, slip op. at 6 (Nov. 8, 2016)

Category 2: Warrants more scrutiny

- Confidentiality rules broadly encompassing “employer business” or “employee information”
- Rules regarding disparagement or criticism of the *employer*
- Rules generally restricting speaking to the media or third parties

Category 3: Unlawful	
Confidentiality rules regarding wages, terms and conditions	Employees are prohibited from disclosing “salaries, contents of employment contracts *Long Island Association for AIDS Care, Inc.*, 364 NLRB No. 28, slip op. at 1 n.5 (June 14, 2016)

CYA – THE HANDBOOK DISCLAIMER

- “Nothing in this policy is intended to or should be interpreted to limit any employee from engaging in any activity that is protected by Section 7 of the National Labor Relations Act.”
- Not dispositive, but generally helpful

GUIDING PRINCIPLES – DORAN'S DISCLAIMER

- Harmonizing or predicting NRLB decisions is difficult
- Frame policies that encourage positive behavior
- Prohibit activity during working time (block sites)
- Avoid blanket prohibitions
- Avoid restricting content, particularly "negative" statements
- Use extreme caution in taking disciplinary action, particularly terminations (BACK PAY IS NOT FUN!)

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- In a COVID-19 world, it’s important that as employees spend more time at home and online that employers review their handbook policies and evaluate if there are any policies that may appear neutral but could violate Section 7 in application.

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