

# EMPLOYER ALERT: Protecting Your Trade Secrets and Preventing Sexual Harassment May Give Rise to Unfair Labor Practices.

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In a continuing troubling trend to marginalize an employer's ability to protect their informational assets and to comply with its federal and state obligations under discrimination laws a National Labor Relations Board judge has ruled that employee handbook rules implemented by an information technology staffing company, Insight Global LLC, are illegal. On one of the primary purposes of the workplace rules was to protect the unlawful dissemination of confidential information and trade secrets and to enforce its sexual harassment policy. Yet, the court was not persuaded and found commonly used confidentiality and e-mail harassment policies illegal.

To understand the court's puzzling decision a little review is in order. Section 8(a)(1) of the Act 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 [of the Act]." Section 7, the cornerstone of the Act, provides that:

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 such activities.

An employer violates Section 8(a)(1) of the Act if it maintains workplace rules that would reasonably tend to chill employees in the exercise of their Section 7 rights. A work rule is unlawful if "the rule explicitly restricts activities protected by Section 7." If the work rule does not explicitly restrict protected activities, it nonetheless will violate Section 8(a)(1) if "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights."

In *Insight Global*, the government argued that several typical and commonly used handbook provisions were overbroad on their face such that employees would reasonably construe the language in the policies at issue to prohibit their Section 7 activities. Despite *Insight Global's* legitimate concerns over dissemination of its own trade secrets and those of its customer information and its lawful implementation of its discrimination policies, the Court agreed with the government's position. In doing so, the Court found various policies unlawful on their face. The policies included:

- "Confidentiality and Data Security" that prohibits disclosure of all information relating to the business operations of the Respondent or its customer without the prior written consent of the Respondent or its customer; and prohibits disclosure by employees, or use for their own benefit, confidential information belonging to *Insight Global* or its customer related to their respective business methods, strategies, and practices, internal operations, pricing and billing, financial data, costs, and personnel information.
- "E-Mail and Internet Policy" that limits employee use of *Insight Global's* customer's email and internet systems solely for the purposes of completing the contract assignment, and prohibits use of the customer's systems to transmit, download, or distribute offensive materials, language, offensive images, or any other inappropriate material, and provides that the employee has no individual rights to the contents or use of the customer's computer resources.
- "Non-Disparagement" that prohibits employees, after their employment with *Insight Global* ends, from making any derogatory or disparaging statements about *Insight Global*, its customer, or any of their products or services, employees, consultants, officers, directors, or shareholders, and prohibits, directly or indirectly, taking any action which is intended to embarrass any of them.
- "Neutral binding arbitration, waiver of trial before judge or jury, and waiver of class or representative claims" that requires any employment dispute or claim to be resolved solely and exclusively by final and binding arbitration; expressly precludes employees from filing joint, class actions.

The court entered a cease and desist order against the enforcement of the above policies and mandated that *Insight Global* revise its policies.

**Employer Take Away:** The common phrase "no good deed goes unpunished" is alive and well with the NLRB and its judges. Although employers should continue to protect their informational assets and implement their legitimate discrimination policies they must do so in a prudent manner that does not create alternate liability. To this end, we recommend that employers consult with their employment counsel to ensure their handbook policies do not "somehow" chill employees' Section 7 rights.

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