

Workplace Civility Is Back In Style: Employee Handbooks, Work Rules, And Codes Of Conduct

**Workplace Civility Is Back In Style:
Employee Handbooks, Work Rules,
And Codes Of Conduct**

Presented by
Timothy C. Kamin (Milwaukee)



METRO MILWAUKEE SHRM

**Ogletree
Deakins**
Employees. Always. Working together.

ogletree.com

It's Alive!... ALIVE!!

- “Workplace Civility Is Dead, And The NLRB Killed It”
 - Law360 Headline from 2014
- “The reports of my death are greatly exaggerated”
 - Samuel Clemens, 1897

**Ogletree
Deakins**

Atlanta / Austin / Baltimore / Birmingham / Boston / Charlotte / Chicago / Cleveland / Columbia / Dallas / Denver / Detroit Metro / Denver / Houston / Indianapolis / Jackson / Kansas City / Las Vegas / London / Los Angeles / Memphis / Miami City / Miami / Milwaukee / Minneapolis / Nashville / New Orleans / New York City / Oklahoma City / Orange County / Park / Philadelphia / Phoenix / Pittsburgh / Portland (ME) / Portland (OR) / Raleigh / Richmond / Sacramento / Salt Lake City / San Diego / San Francisco / Seattle / St. Louis / St. Thomas / Tampa / Toronto / Wichita

Metro Milwaukee SHRM Fall Forum - November 8, 2018

Balance or Imbalance of Power?

- Employer rights to regulate the conduct of employees in the workplace...

vs

- Rights of employees to engage in “protected activities”

**Ogletree
Deakins**

Atlanta / Austin / Baltimore / Birmingham / Boston / Charlotte / Chicago / Cleveland / Columbia / Dallas / Denver / Detroit Metro / Denver / Houston / Indianapolis / Jackson / Kansas City / Las Vegas / London / Los Angeles / Memphis / Miami City / Miami / Milwaukee / Minneapolis / Nashville / New Orleans / New York City / Oklahoma City / Orange County / Park / Philadelphia / Phoenix / Pittsburgh / Portland (ME) / Portland (OR) / Raleigh / Richmond / Sacramento / Salt Lake City / San Diego / San Francisco / Seattle / St. Louis / St. Thomas / Tampa / Toronto / Wichita

Metro Milwaukee SHRM Fall Forum - November 8, 2018

Workplace Civility Is Back In Style: Employee Handbooks, Work Rules, And Codes Of Conduct

What Protected Activities?

- The NLRA – Not just for unions anymore!
- Section 7:
 - ...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 ... other mutual aid or protection...**

The NLRB? Why Do We Care?

- These issues have been in the media for years
- Employees – Disgruntled former employees – Are aware
- More importantly – The plaintiffs' bar is aware
- No protected class status? Try this!

Where We've Been

- Under the Obama-era NLRB:
 - Basic, common-sense rules declared unlawful
 - Offensive, even threatening conduct deemed "protected, concerted activity" or PCA
 - Massive wave of handbook and code of conduct revisions

Workplace Civility Is Back In Style: Employee Handbooks, Work Rules, And Codes Of Conduct

Radical Interpretation of Rules

- 2004 - *Lutheran Heritage*: “Reasonably construe”
- Established a framework to declare a “facially neutral” policy to be unlawful
- The Obama Board took that baton and ran
- If the rule could be *construed* to infringe upon protected rights - UNLAWFUL

Ogletree Deakins Metro Milwaukee SHRM Fall Forum - November 8, 2018

“Reasonably Construed” To Be Illegal

- Rules prohibiting conduct:
 - “Negative or disparaging comments about the moral character or professional capabilities of an employee”
 - “That impedes harmonious interactions and relationships”
 - “Disclosure of confidential information”
 - “Profanity and abusive language”
 - “Gossip and negativity”

Ogletree Deakins Metro Milwaukee SHRM Fall Forum - November 8, 2018

How Bad Did It Get?

- “Courtesy: 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 Dealership”

ILLEGAL!

Ogletree Deakins Metro Milwaukee SHRM Fall Forum - November 8, 2018

Workplace Civility Is Back In Style: Employee Handbooks, Work Rules, And Codes Of Conduct

Disciplinary Action Deemed Illegal

- Employee called supervisor “f#cking motherf#cker” and a “f#cking crook”
- Employee wrote graffiti on bulletin board:
 - “Dear Pussies, Please Read!”
 - “Warehouse workers, RIP”
- Facebook comments:
 - “Bob is such a NASTY MOTHER F#CKER,”
 - “F@ck his mother and his entire f@cking family!!!!”

Ogletree Deakins Metro Milwaukee SHRM Fall Forum - November 8, 2018

The Net Result

- Rules declared invalid, handbooks revised
- PCA “offenders” had more security, but...
- What about offenders not engaged in PCA?

Ogletree Deakins Metro Milwaukee SHRM Fall Forum - November 8, 2018

The Tide Has Turned

- Restoring “balance” – *The Boeing Company* (December 14, 2017)
- GC Memorandum 18-04 (June 6, 2018)
- A balancing test:
 - Legitimate business justifications for the rule
- vs
- Potential infringement on Section 7 rights

Ogletree Deakins Metro Milwaukee SHRM Fall Forum - November 8, 2018

Workplace Civility Is Back In Style: Employee Handbooks, Work Rules, And Codes Of Conduct

Three Categories of Rules

- Category 1 – Rules That Are Generally Lawful
 - Civility Rules
 - "Rude, condescending or socially unacceptable"
 - "Disparaging of other employees"
 - "Rude, discourteous or unbusinesslike behavior"

Ogletree Deakins
Atlanta / Austin / Baltimore / Birmingham / Boston / Charlotte / Chicago / Cleveland / Columbia / Dallas / Denver / Detroit Metro / Denver / Houston / Indianapolis / Jackson / Kansas City / Las Vegas / London / Los Angeles / Miami / Minneapolis / New York City / Oklahoma City / Orange County / Phoenix / Pittsburgh / Portland (ME) / Portland (OR) / Raleigh / Richmond / Sacramento / San Antonio / San Diego / San Francisco / Seattle / St. Louis / St. Thomas / Stamford / Tampa / Toronto / Wichita
Metro Milwaukee SHRM Fall Forum - November 8, 2018

Three Categories of Rules

- Category 1 – Rules That Are Generally Lawful
 - No-Photography/No-Recording Rules
 - "Employees may not record conversations or meetings without prior approval"
 - "Use of camera enabled devices to capture images or video is prohibited"

Ogletree Deakins
Atlanta / Austin / Baltimore / Birmingham / Boston / Charlotte / Chicago / Cleveland / Columbia / Dallas / Denver / Detroit Metro / Denver / Houston / Indianapolis / Jackson / Kansas City / Las Vegas / London / Los Angeles / Miami / Minneapolis / New York City / Oklahoma City / Orange County / Phoenix / Pittsburgh / Portland (ME) / Portland (OR) / Raleigh / Richmond / Sacramento / San Antonio / San Diego / San Francisco / Seattle / St. Louis / St. Thomas / Stamford / Tampa / Toronto / Wichita
Metro Milwaukee SHRM Fall Forum - November 8, 2018

Three Categories of Rules

- Category 1 – Rules That Are Generally Lawful
 - Rules Against Insubordination, etc.
 - "Being uncooperative with supervisors or other conduct that does not support the employer's goals and objectives"
 - "Insubordination to a manager or lack of cooperation with fellow employees..."

Ogletree Deakins
Atlanta / Austin / Baltimore / Birmingham / Boston / Charlotte / Chicago / Cleveland / Columbia / Dallas / Denver / Detroit Metro / Denver / Houston / Indianapolis / Jackson / Kansas City / Las Vegas / London / Los Angeles / Miami / Minneapolis / New York City / Oklahoma City / Orange County / Phoenix / Pittsburgh / Portland (ME) / Portland (OR) / Raleigh / Richmond / Sacramento / San Antonio / San Diego / San Francisco / Seattle / St. Louis / St. Thomas / Stamford / Tampa / Toronto / Wichita
Metro Milwaukee SHRM Fall Forum - November 8, 2018

Workplace Civility Is Back In Style: Employee Handbooks, Work Rules, And Codes Of Conduct

Three Categories of Rules

- Category 1 – Rules That Are Generally Lawful
 - Disruptive Behavior Rules
 - "Boisterous and other disruptive conduct"
 - "Creating a disturbance on Company property or creating discord with fellow employees"
 - "Disorderly conduct on premises or during working hours"

Ogletree Deakins
Atlanta / Austin / Baltimore / Birmingham / Boston / Charlotte / Chicago / Cleveland / Columbia / Dallas / Denver / Detroit / Miami / Minneapolis / Phoenix / Portland / Raleigh / Richmond / Sacramento / San Antonio / San Diego / San Francisco / Seattle / St. Louis / St. Thomas / Tampa / Toronto / Washington, DC / Wichita / York
Metro Milwaukee SHRM Fall Forum - November 8, 2018

Three Categories of Rules

- Category 1 – Rules That Are Generally Lawful
 - Confidentiality Rules
 - "Information concerning customers"
 - "Financial data or other non-public information"
 - "No authorized disclosure of business secrets or other confidential information"

Ogletree Deakins
Atlanta / Austin / Baltimore / Birmingham / Boston / Charlotte / Chicago / Cleveland / Columbia / Dallas / Denver / Detroit / Miami / Minneapolis / Phoenix / Portland / Raleigh / Richmond / Sacramento / San Antonio / San Diego / San Francisco / Seattle / St. Louis / St. Thomas / Tampa / Toronto / Washington, DC / Wichita / York
Metro Milwaukee SHRM Fall Forum - November 8, 2018

Three Categories of Rules

- Category 1 – Rules That Are Generally Lawful
 - Rules against defamation or misrepresentation
 - Rules against use of company logo or I.P.
 - Requiring authorization to speak for company
 - Disloyalty, nepotism or self-enrichment

Ogletree Deakins
Atlanta / Austin / Baltimore / Birmingham / Boston / Charlotte / Chicago / Cleveland / Columbia / Dallas / Denver / Detroit / Miami / Minneapolis / Phoenix / Portland / Raleigh / Richmond / Sacramento / San Antonio / San Diego / San Francisco / Seattle / St. Louis / St. Thomas / Tampa / Toronto / Washington, DC / Wichita / York
Metro Milwaukee SHRM Fall Forum - November 8, 2018

Workplace Civility Is Back In Style: Employee Handbooks, Work Rules, And Codes Of Conduct

Three Categories of Rules

- Category 1 – Rules That Are Generally Lawful
 - But... and it's a big but!
 - Establishing the rule presumptively lawful, **but**...
 - Enforcement in specific instances against protected activities may still violate the law

Ogletree Deakins Metro Milwaukee SHRM Fall Forum - November 8, 2018

Three Categories of Rules

- Category 2 – Rules That Warrant Scrutiny
 - Rules that appear to prohibit some protected activities...
 - How do we decide whether the rule violates the law by its mere existence?
 - The employer's business justification, and
 - Whether the rule is narrowly tailored to meet that purpose

Ogletree Deakins Metro Milwaukee SHRM Fall Forum - November 8, 2018

Three Categories of Rules

- Category 2 – Rules That Warrant Scrutiny
 - Broad conflict-of-interest rules
 - Confidentiality rules that extend to "employee information"
 - Disparagement of *employer*, not just other employees or customers

Ogletree Deakins Metro Milwaukee SHRM Fall Forum - November 8, 2018

Workplace Civility Is Back In Style: Employee Handbooks, Work Rules, And Codes Of Conduct

Three Categories of Rules

- Category 2 – Rules That Warrant Scrutiny
 - Use of employer's name (rather than logo/I.P.)
 - Speaking to the media at all
 - Regulation of off-duty conduct
 - False or inaccurate statements, as opposed to intentionally false, malicious, defamatory

Ogletree Deakins Metro Milwaukee SHRM Fall Forum - November 8, 2018

Context is Key

- How compelling is the business purpose?
- What about your workplace necessitates the rule?
- Does the business need outweigh the risk of infringing upon employee rights?

Ogletree Deakins Metro Milwaukee SHRM Fall Forum - November 8, 2018

Three Categories of Rules

- Category 3 – Rules That Are Facially Unlawful
 - Confidentiality regarding wages, benefits or other working conditions
 - Rules against joining outside organizations, or voting on matters concerning the employer

Ogletree Deakins Metro Milwaukee SHRM Fall Forum - November 8, 2018

Workplace Civility Is Back In Style: Employee Handbooks, Work Rules, And Codes Of Conduct

So, Now What?

- Lawful to regulate how employees treat one another, and management
- Take another look at rules
- Dust off the old version for perspective?

Ogletree Deakins
Metro Milwaukee SHRM Fall Forum - November 8, 2018

So, Now What?

- What rules establish your culture?
- Keep context in mind: Purpose and effect
- Look before enforcing – Is there actual PCA being affected?

Ogletree Deakins
Metro Milwaukee SHRM Fall Forum - November 8, 2018

Questions?



Ogletree Deakins
Metro Milwaukee SHRM Fall Forum - November 8, 2018

Workplace Civility Is Back In Style: Employee Handbooks, Work Rules, And Codes Of Conduct

Thank You!

Timothy C. Kamin

Ogletree Deakins

The Pabst Boiler House

1243 North 10th Street, Suite 200

Milwaukee, WI 53205

414-239-6403

timothy.kamin@ogletree.com

www.ogletree.com



Atlanta / Austin / Baltimore / Birmingham / Boston / Charlotte / Chicago / Cleveland / Columbia / Dallas / Denver / Detroit Metro / Des Moines / Houston / Indianapolis / Jackson / Kansas City
LA Metro / London / Los Angeles / Memphis / Miami / Miami City / Miami Beach / Minneapolis / New Haven / New York City / Oklahoma City / Orange County / Palm Beach / Phoenix
Pittsburgh / Portland (ME) / Portland (OR) / Raleigh / Richmond / Sacramento / San Antonio / San Diego / San Francisco / Seattle / St. Louis / St. Thomas / Tampa / Toronto / Toronto /
Tucson / Vancouver / Washington DC / Wichita

Metro Milwaukee SHRM Fall Forum - November 8, 2018
