

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: February 13, 2017

TO: Garey E. Lindsay, Regional Director
Region 9

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Diversified Restaurant Holdings, Inc. d/b/a 512-5012-0125
Bagger Dave's Burger Tavern 512-5012-3322
Case 09-CA-181503 512-5012-8320-5033
512-5072-2000
512-7550-0143

The Region submitted this case for advice as to (1) whether the Employer violated Section 8(a)(1) by terminating the Charging Party for sharing a picture ^{(b) (6), (b) (7)(C)} took of one of the Employer's computers, which displayed employee wage information, with ^{(b) (6), (b) (7)(C)} co-workers; and (2) whether several of the Employer's handbook policies are lawful, including the confidential information policy that the Employer relied upon in terminating the Charging Party. We conclude that the Charging Party's conduct was protected because ^{(b) (6), (b) (7)(C)} ascertained the employee wage information during the ordinary course of ^{(b) (6), (b) (7)(C)} work activity and the information was not confidential. ^{(b) (6), (b) (7)(C)} termination for sharing the wage information with co-workers thus violated Section 8(a)(1). We also conclude that, while the Employer's confidential information policy is not facially overbroad, it is nonetheless unlawful because the Employer applied it unlawfully by relying on it to discharge the Charging Party for sharing wage information with ^{(b) (6), (b) (7)(C)} co-workers. We further conclude that the Employer's other handbook policies violate Section 8(a)(1) because employees would reasonably construe the language to prohibit Section 7 activity.

FACTS

Diversified Restaurant Holdings Inc. d/b/a Bagger Dave's Burger Tavern ("Employer") operates a restaurant in Centerville, Ohio. In ^{(b) (6), (b) (7)(C)} 2015, the Charging Party began working for the Employer in the ^{(b) (6), (b) (7)(C)}.

1. The Charging Party Shares Wage Information Obtained from the Employer's Computer and is Discharged.

On July 26, 2016,¹ the Employer's assistant manager asked the Charging Party for (b) (6), (b) (7)(C) assistance in filling out the manager's annual evaluation report on the office computer. Filling out this report was not part of the Charging Party's normal work duties, but the assistant manager requested the Charging Party's help because (b) (6) was a more proficient typist. The assistant manager later escorted the Charging Party to the restaurant's office—a small, windowless room—and set a spiral notebook onto the desk with a user name and password for the Charging Party to use when needed for logging into the Employer's human resources website. The assistant manager then left the Charging Party alone in the office.

The Charging Party sat at the computer, which the assistant manager had already logged into for (b) (6), (b) (7)(C). When the Charging Party opened the internet browser to access the Employer's HR website, the internet browser had already been logged into and was displaying the Employer's proprietary scheduling web portal. The screen that the Charging Party had inadvertently accessed contained a list of all the Employer's kitchen employees and also listed their hourly wages. The Charging Party noticed that several less senior employees were making more money than the more senior employees. The Charging Party took out (b) (6), (b) (7)(C) personal cell phone and took a picture of the computer screen. (b) (6), (b) (7)(C) then proceeded to work on the assistant manager's annual appraisal report but was unable to submit the report because the computer froze.

The next day, on July 27, the Charging Party approached a co-worker in the Employer's kitchen. The Charging Party told (b) (6), (b) (7)(C) co-worker that a less senior employee was making \$11.00 an hour. The Charging Party then showed (b) (6), (b) (7)(C) co-worker the photo that (b) (6), (b) (7)(C) took of the employees' wages from the Employer's computer. The Charging Party's co-worker responded that (b) (6), (b) (7)(C) was upset that a very junior employee was making \$11.00 an hour when it took him a long time to get to that wage rate. The co-worker then called over two other employees to view the photo.

Later that day, the Employer asserts that an anonymous employee told another assistant manager that the Charging Party had been showing various employees a picture on (b) (6), (b) (7)(C) cell phone that allegedly contained confidential and proprietary business information.

¹ All dates hereinafter are in 2016, unless otherwise stated.

On July 28, the Employer's general manager summoned the Charging Party to (b) (6), (b) (7) office. The general manager asked the Charging Party where (b) (6) obtained the picture (b) (6) was showing employees. The Charging Party admitted that (b) (6) took the picture, and the general manager told (b) (6), (b) (7) that it was not any of (b) (6) business. When the general manager asked the Charging Party why (b) (6) took the picture, the Charging Party responded that (b) (6) was angry that (b) (6) had not yet received a raise (b) (6) was promised. The general manager told the Charging Party that discussing (b) (6) wage with other employees was a "fireable offense" but stated that the Charging Party was a good worker and (b) (6) did not intend to fire (b) (6). Instead, the general manager issued a corrective action form documenting the issuance of a written warning to the Charging Party for violating the Employer's Confidential Information policy.²

The July 28 corrective action form stated that the Charging Party "took a picture of the computer screen in the office w/ employee pay rate info on it and was sharing it with other employees. To protect [the Employer's] interest, it is prohibited to divulge or share proprietary and confidential data with third parties." The form further stated that the Charging Party "ha[d] been told not to share info w/ other employees."

On July 31, another employee asked the Charging Party to see the photograph of employees' wages and pay. The Charging Party showed the photograph to this employee, who became upset over the wage disparity. On August 2, the general manager summoned the Charging Party to (b) (6), (b) (7) office again. At this meeting, the general manager informed the Charging Party that (b) (6) was being terminated for showing the picture of employees' wages to another employee on July 31. The corrective action form memorializing the Charging Party's termination once again stated that the Charging Party "[v]iolated the Confidential Information Policy" for taking a picture of employees' names and pay rates and sharing it with (b) (6), (b) (7) co-workers.

In defending its decision to terminate the Charging Party, the Employer argues that the scheduling system that contains employees' wage rates also contains additional proprietary and confidential information that could prove harmful in a competitor's hands.³ However, to date, the Employer has not attempted to force the Charging Party to destroy the picture (b) (6) took or otherwise confiscate it. Additionally, the Employer asserts that, during its investigation into the Charging Party, it uncovered surveillance footage from inside its office showing the Charging Party

² The Confidential Information policy is contained in the Employer's employee handbook. It and the other handbook provisions at issue in this case are described in Section 2, *infra* pp. 4–5.

³ The picture of employees' wage information that the Charging Party provided the Region only shows employees' wage information.

standing over the assistant manager's shoulder while he was working on the computer, apparently taking pictures of the computer screen without the assistant manager's consent.⁴ The Employer presented no evidence that it asked the Charging Party about this conduct during the general manager's meetings with the Charging Party on July 28 and August 2, and presented no evidence that it relied on this conduct in deciding to terminate the Charging Party on (b) (6), (b) (7)(C)

2. The Employer's Handbook Rules

The Employer's employee handbook addresses the Employer's confidential information in several places. Initially, the handbook contains a "Confidential Information" policy, which states:

During your employment with [the Employer], you may have access to confidential and proprietary data that is not known by competitors or within our industry. Such confidential information constitutes a valuable asset to [the Employer] developed over a long period of time and at substantial expense. To protect [the Employer's] interest, it is prohibited to divulge or share proprietary and confidential information with third parties. Examples of confidential information include, but are not limited to:

- Customer information;
- Financial information;
- Marketing strategies;
- New ventures;
- Pending projects and proposals;
- Product development information;
- Product source information;
- System passwords

Sharing this information with the media, customers, members of the financial community, or your own friends and family is prohibited. If you are asked direct questions of a sensitive nature, do not answer or even speculate, always refer inquiries to the President of the Company.

The handbook also contains a "General Computer Usage Guidelines" provision, which states that employees "are not allowed to copy, take a picture of, or otherwise record any confidential information." The General Computer Usage Guidelines

⁴ The videos the Employer provided the Region do not clearly show whether the Charging Party was taking pictures while standing over the assistant manager's shoulder or what information was on the screen.

provision also states: “Please do not share the following information: Do not publish, post, or release information that is considered confidential or not public.” The last section of the General Computer Usage Guidelines provision, titled “Private and Personal Information — Yours, Bagger Dave’s Customers and Co-workers,” states:

To ensure your safety, be careful about the type and amount of personal information you provide. Avoid talking about personal schedules or situations. NEVER share personal information regarding customers or team members. If you make a MAJOR mistake (e.g., exposing private customer or team member information or sharing confidential information), tell your manager or leadership immediately so we can take the proper steps to help minimize the impact it may have.

The handbook also includes a “Payments” provision, which states that “[the Employer] believe[s] your pay is confidential between you and the Company. We encourage you to protect that confidence.”

ACTION

We conclude that the Charging Party’s conduct was protected because [REDACTED] ascertained the employee wage information during the ordinary course of [REDACTED] work activity and the information was not confidential. [REDACTED] termination for sharing the wage information with co-workers thus violated Section 8(a)(1). We also conclude that, while the Employer’s confidential information policy is not facially overbroad, it is nonetheless unlawful because the Employer applied it unlawfully by relying on it to discharge the Charging Party for sharing wage information with [REDACTED] co-workers. We further conclude that the Employer’s other handbook policies violate Section 8(a)(1) because employees would reasonably construe the language to prohibit Section 7 activity.

1. The Employer Terminated the Charging Party in Violation of Section 8(a)(1).

The Board has long held that Section 7 protects “the right of employees to ascertain what wage rates are paid by their employer, as wages are a vital term and condition of employment.”⁵ Wage discussions among employees are considered to be

⁵ *Triana Industries, Inc.*, 245 NLRB 1258, 1258 (1979).

at the core of Section 7 rights, because wages, “probably the most critical element in employment,” are “the grist on which concerted activity feeds.”⁶

Additionally, employees are entitled to use for Section 7 purposes information and knowledge which comes to their attention “in the normal course of work activity and association.”⁷ Moreover, while an employer may place lawful restrictions on employees’ use of its business records, employees may for organizational purposes copy, distribute, or otherwise use freely accessible business records or documents that the employer has placed no obvious restrictions on.⁸ For instance, in *Gray Flooring*, the Board found an employee was engaged in protected activity when he copied down employee contact information from index cards kept by the employer on a desk in the main office.⁹ The Board found that the employee had no reason to believe the cards were confidential because the employer did not have a policy concerning the use of the note cards prior to the incident, the cards were not maintained in a place or manner that would indicate management considered them to be off-limits, and the type of information on the cards did not suggest that the employer wanted it kept secret.¹⁰ Similarly, in *Rocky Mountain Eye Center, P.C.*, the Board concluded that an employer unlawfully discharged an employee for sharing employees’ contact information with a union to aid organizing efforts that the employee obtained by accessing the employer’s computerized patient records system in the ordinary course of her work activity.¹¹ The discharged employee and others were routinely told to put their contact

⁶ *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995), *enforced in part*, 81 F.3d 209 (D.C. Cir. 1996); *see also Parexel International*, 356 NLRB 516, 518 (2011); *Whittaker Corp.*, 289 NLRB 933, 933–34 (1988).

⁷ *Ridgely Manufacturing Co.*, 207 NLRB 193, 196–97 (1973), *enforced*, 510 F.2d 185 (D.C. Cir. 1975).

⁸ *Id.* (finding protected employee’s copying of freely available timecards). *See Texas Instruments, Inc.*, 236 NLRB 68, 70–71 (1978) (finding employee distribution of wage survey data protected where employees did not steal information and employer sometimes made the data public), *enforcement denied*, 637 F.2d 822 (1st Cir. 1981); *Anserphone of Michigan, Inc.*, 184 NLRB 305, 306 (1970) (holding, in the alternative, that employee was protected because she received information from those rightfully in possession of it).

⁹ 212 NLRB 668, 669 (1974).

¹⁰ *Id.*

¹¹ 363 NLRB No. 34, slip op. at 1 n.1, 9 (Nov. 3, 2015).

information in the patient records system and access it for the purpose of obtaining employee contact information at later dates.¹² In finding that the discharged employee had not lost the Act's protection, the Board emphasized that she "did not sneak into the office and the office was not one where [the employee] had no right to be."¹³

However, if an employer has informed employees that certain documents are internal and confidential,¹⁴ or if employees ought to know that certain documents are confidential,¹⁵ use of those documents for non-business purposes will be found unprotected, even if those documents are used by employees in the normal course of their duties. In *Cook County College Teachers Union Local 1600*, for example, the employer was a union that maintained a directory with the home addresses of all union officers.¹⁶ While the office regularly used the directory for work purposes, the employer maintained a policy that the directory was confidential and should not be used for any unofficial purposes, and had in fact disciplined the secretary several years earlier for unofficial use of the directory.¹⁷ Thus, when the secretary gave the directory to her staff union and used it to mail a letter to all of the employer's officers in support of her union's position in a grievance, she breached her employer's confidentiality policy and engaged in unprotected activity.¹⁸

¹² *Id.*, slip op. at 4–5.

¹³ *Id.*, slip op. at 9.

¹⁴ *First Data Resources, Inc.*, 241 NLRB 713, 719 (1979) (finding employee conduct unprotected when she opened and read a personnel file she had been instructed not to look at while copying personnel files from a filing cabinet as part of her job).

¹⁵ *See Roadway Express*, 271 NLRB 1238, 1239 (1984) (holding that lack of confidentiality rule did not control where documents were clearly private business records taken from a place to which the employee had no proper access); *Vitronic, Inc.*, 183 NLRB 1067, 1078 (1970) (finding employees' copying of customer information from work order they regularly handled was unprotected despite lack of written confidentiality policy where employees admitted they knew copying the information was wrong).

¹⁶ 331 NLRB 118, 118 (2000).

¹⁷ *Id.* at 118–19.

¹⁸ *Id.* at 121.

In the instant case, the Charging Party's conduct was protected because (b) (6) used the Employer's computer system and ascertained the employee wage rate displayed on it during the ordinary course of (b) (6) work activity. While the Charging Party did not have regular access to the Employer's computer systems, the Charging Party was instructed by an assistant manager to access the computer to assist the manager in completing a report. And (b) (6) only obtained the Employer's wage information because it was left open in plain view by the assistant manager who last utilized the computer terminal.¹⁹ Indeed, unlike the discriminatee in *Rocky Mountain Eye Center*, who the Board nonetheless found retained the Act's protection, the Charging Party did not go out of (b) (6) way to access the screen displaying employee wage information. And, similar to the employer in *Gray Flooring*, the assistant manager's careless handling of the screen with employee wage information undercuts any argument that the Charging Party knew or should have known that the Employer considered that information to be off-limits.

The Charging Party's discharge violated Section 8(a)(1) because (b) (6) was explicitly terminated for his Section 7-protected conduct of sharing employees wage information for the Employer's computer with (b) (6) co-workers. Indeed, any claims that the Employer was concerned about the Charging Party disseminating other confidential information from its computer are belied by the fact that the Employer never asked the Charging Party to turn over any photographs (b) (6) took of the screen. Thus, because the Employer's stated reason for disciplining and then terminating the Charging Party was for sharing employee wage information with other employees, the Charging Party's discharge violates Section 8(a)(1).

We do not rely upon the frameworks established under either *Burnup & Sims*,²⁰ *Wright Line*,²¹ or *Continental Group*²² in concluding that the Charging Party's discharge violated Section 8(a)(1). The Employer explicitly terminated the Charging

¹⁹ *Compare Ridgely Manufacturing Co.*, 207 NLRB at 196–97 (finding employee engaged in protected activity where, for organizing purposes, he memorized the names of co-workers from timecards located near the time clock), *enforced*, 510 F.2d 185 (D.C. Cir. 1975), *with First Data Resources*, 241 NLRB at 719 (finding employee engaged in unprotected activity when she opened and read a personnel file the employer had instructed her not to look at while copying personnel files from a filing cabinet as part of her job).

²⁰ *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964).

²¹ 251 NLRB 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981).

²² *Continental Group, Inc.*, 357 NLRB 409 (2011).

Party for discussing employee wages with other employees as a violation of its Confidential Information policy. The framework set forth in *Burnup & Sims* applies when an employer disciplines or discharges an employee based on a good-faith belief that the employee engaged in misconduct during otherwise protected activity, if the evidence establishes that the employee was not, in fact, guilty of that misconduct.²³ Here, the Charging Party's discharge was motivated by (at best) a mistake of law, not of fact, therefore rendering *Burnup & Sims* inapplicable.²⁴

Similarly, when an employer discharges employees for activity directly protected by the Act, the mixed-motive analysis announced in *Wright Line* is inapplicable.²⁵ In the instant case, the very conduct for which the Charging Party was terminated was Section 7 activity—sharing a photograph that contained employee wage information with other employees. Under such circumstances, the Employer's actions should not be evaluated under the *Wright Line* mixed-motive analysis.

Finally, because we conclude that the Employer's Confidential Information policy is not unlawfully overbroad on its face, but only as applied, *see infra* pp. 11–12, it would be circular to argue that the Charging Party's discharge pursuant to the policy is unlawful under *Continental Group*.²⁶

2. The Employer's Handbook Rules Violate Section 8(a)(1).

In determining whether employer rules are facially unlawful, the appropriate inquiry is whether the rule in question “would reasonably tend to chill employees in the exercise of their Section 7 rights.”²⁷ The Board refined this standard in *Lutheran Heritage Village-Livonia* by articulating a two-step inquiry for determining whether the maintenance of a rule violates Section 8(a)(1).²⁸ First, a rule is clearly unlawful if

²³ *NLRB v. Burnup & Sims*, 379 U.S. at 23.

²⁴ *See Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. at 6 n.20 (Aug. 22, 2014) (concluding *Burnup & Sims* framework inapplicable to Section 8(a)(1) discharges premised on mistakes of law, rather than mistakes of fact), *aff'd mem.*, 629 F. App'x 33 (2d Cir. 2015).

²⁵ *See Rocky Mountain Eye Center, P.C.*, 363 NLRB No. 34, slip op. at 1 n.1, 9 & n.17, 11.

²⁶ 357 NLRB at 412.

²⁷ *See Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enforced*, 203 F.3d 52 (D.C. Cir. 1999).

²⁸ 343 NLRB 646, 647 (2004).

it explicitly restricts Section 7 activities. Second, if it does not, the rule will only violate Section 8(a)(1) upon a showing that “(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.”²⁹

The Board will not find a violation simply because a rule could conceivably be read to restrict Section 7 activity.³⁰ Normally, rules that are unclear regarding their application to Section 7 activity, and contain no limiting language or context that would clarify to employees that they do not restrict their Section 7 rights, are unlawful.³¹ In contrast, rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such that they would not reasonably be construed to cover protected activity, are not unlawful.³²

The Board has generally found broad prohibitions on disclosing confidential information lawful so long as they do not reference information regarding employees or anything that could be considered a term or condition of employment.³³ For example, in *Lafayette Park Hotel*, the Board found lawful the hotel’s rule prohibiting employees from “[d]ivulging Hotel-private information to employees or other

²⁹ *Id.*

³⁰ *Id.*

³¹ See *University Medical Center*, 335 NLRB 1318, 1320–22 (2001) (finding work rule that prohibited “disrespectful conduct towards [others]” unlawful because it included “no . . . limiting language which removes [the rule’s] ambiguity and limits its broad scope”), *enforcement denied in pertinent part*, 335 F.3d 1079 (D.C. Cir. 2003).

³² See *Tradesmen International*, 338 NLRB 460, 460–62 (2002) (holding broad disloyalty rule lawful due to its focus on clearly illegal and egregious activity).

³³ Cf. *Flamingo-Hilton Laughlin*, 330 NLRB 287, 288 n.3, 291–92 (1999) (holding unlawful rule that prohibited employees from revealing confidential information regarding “fellow employees”); *Cintas Corp.*, 344 NLRB 943, 943 (2005) (finding unlawful rule prohibiting release of “any information” concerning “the company, its business plans, its partners, new business efforts, customers, accounting and financial matters” because employees would reasonably interpret the inclusion of the term “partners”—a term used to refer to employees—to preclude discussion of wages and other terms and condition of employment), *enforced*, 482 F.3d 463, 469–70 (D.C. Cir. 2007).

individuals or entities that are not authorized to receive that information.”³⁴ Although the term “Hotel-private” was not defined within the rule, the Board found that employees would reasonably read the rule to cover “guest information, trade secrets, contracts with suppliers, and a range of other proprietary information” that employers have a legitimate and substantial interest in maintaining.³⁵

Here, while the Employer’s Confidential Information policy is not unlawfully overbroad on its face, the provision is nonetheless unlawful because the Employer applied it to restrict the exercise of Section 7 rights. The Employer’s Confidential Information policy is facially lawful under prong one of *Lutheran Heritage* because it does not explicitly reference information concerning employees or terms and conditions employment, and it does not otherwise contain language that would reasonably be construed to prohibit Section 7 communications.³⁶ In this regard, we would reject the argument that “[f]inancial information,” which is in the list of examples of confidential information, would reasonably be construed to include employee wages. First, the language preceding the list of examples emphasizes information “not known by competitors or within our industry” and which is a “valuable asset . . . developed over a long period of time and at substantial expense.” This suggests that “[f]inancial information” refers to the Employer’s proprietary financial data, rather than employee wages. Second, “[f]inancial information” is accompanied by other examples, e.g., product development information, new ventures, and system passwords, which employees would reasonably understand to reference

³⁴ 326 NLRB at 826.

³⁵ *Id.* See also *Super K-Mart*, 330 NLRB 263, 263 (1999) (finding lawful a rule that simply stated “[c]ompany business and documents are confidential. Disclosure of such information is prohibited”); *Ark Las Vegas Restaurant Corp.*, 335 NLRB 1284, 1284 n.2, 1290–91 (2001) (finding lawful a rule requiring employees to handle “confidential or proprietary information about Ark Las Vegas or its clients . . . in strict confidence”).

³⁶ We note that the facially unlawful references to “confidential” information in the General Computer Usage Guidelines and Payments provisions, discussed below, do not alter our conclusion that the Employer’s Confidential Information policy is not unlawfully overbroad under prong one of *Lutheran Heritage*. Given the Confidential Information policy’s placement several pages away from the other policies, in a different section of the handbook, and the specificity of the language utilized in the Confidential Information policy, employees would not reasonably construe that provision to include the overly broad definitions of “confidential information” contained in General Computer Usage Guidelines or the Payments provision.

legitimately confidential information that has no connection to Section 7 activity.³⁷ However, by utilizing the Confidential Information policy as a basis for disciplining and terminating the Charging Party for sharing employee wage information with other employees, the Employer has applied its otherwise lawful Confidential Information policy to restrict Section 7 activity. Accordingly, the Confidential Information policy is facially unlawful under the third prong of *Lutheran Heritage Village-Livonia*.

We also conclude that certain provisions in the Employer's General Computer Usage Guidelines are facially unlawful. Pursuant to this policy, employees are "not allowed to copy, take a picture of, or otherwise record confidential information." The Guidelines also state that employees are "not to publish, post, or release information that is considered confidential or not public." Finally, the Guidelines instruct employees to "[a]void talking about personal schedules or situations" and to "NEVER share personal information regarding customers or team members." Although the first two provisions do not explicitly reference employees or any terms or conditions of employment, employees would reasonably understand them to restrict Section 7 communications when read together with the Private and Personal Information provision, which references both ("team members" and "schedules"). Even though the latter provision states that the prohibition on sharing "personal information regarding . . . team members" is for employees' "safety," the Guidelines do not specify what safety concerns that the Employer is seeking to address. Moreover, the Guidelines prohibit employees from publishing, posting, or releasing "not public" information, in addition to "confidential" information. Without sufficient limiting language, employees would reasonably understand "not public" matters to include their terms and conditions of employment.³⁸

³⁷ See *Tradesmen International*, 338 NLRB at 460–62.

³⁸ See *Citizens Co-op, Inc.*, Case 12-CA-125333, Advice Memorandum dated Nov. 12, 2014, at p. 5 (without any limiting language, rule effectively prohibiting employees from discussing "nonpublic" "work matters" would be interpreted to prohibit discussion of wages, benefits, and other working conditions). The section of the Guidelines that prohibits employees from publishing, posting, or releasing "not public" information also states that employees should not "discuss numbers and other sales figures, strategies and forecasts, legal issues, customer names, or future activities online"; although some of these examples clearly would not encompass Section 7 communications, the vaguely worded "legal issues" and "future activities" create ambiguity as to whether the Guidelines cover Section 7 communications. See *Lafayette Park Hotel*, 326 NLRB at 828 (citing *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992)) (noting that ambiguity in an employer's rule is construed against the employer as the promulgator of that rule).

Finally, we conclude that the Payments provision is also facially unlawful. This policy explicitly restricts employees from communicating information about other employees because it states that employee pay information is “confidential.”

Based on the foregoing, the Region should issue a Section 8(a)(1) complaint, absent settlement.

/s/
B.J.K

ADV.09-CA-181503.BaggerDaves. (b) (6), (c)