

If You Can't Say Something Nice...

If you can't say something nice about your job, your co-workers, your employer's products or services, say nothing or find your source of career opportunities elsewhere.

Once upon a time, this was an unwritten rule that existed as a matter of common sense and courtesy. In recent times, with what many see as the decline of American values, employers have found it necessary to remind employees that their jobs (and those of their co-workers) depend upon business success and that trash-talking is a job-killer.

The Rise of the Non-Disparagement Clause

Enter the "Non-Disparagement" clause. In policy handbooks and employment contracts, Non-Disparagement clauses exist to assure that workplace issues are addressed privately and that public statements support business objectives. Consider the following Non-Disparagement clause, as appears in the form of an employment contract signed by non-management employees of Quicken Loans, Inc., a Detroit-based company employing more than 8,000 employees:

"The Company has internal procedures for complaints and disputes to be resolved. You agree that you will not (nor will you cause or cooperate with others to) publicly criticize, ridicule, disparage or defame the Company or its products, services, policies, directors, officers, shareholders, or employees, with or through any written or oral statement or image (including, but not limited to, any statements made via websites, blogs, postings to the Internet, or emails and whether or not they are made anonymously or through the use of a pseudonym)."

Fair enough? How else to strip a disgruntled employee of the ability to hold their employer hostage with destructive displays of bitterness and threaten the livelihoods of its entire workforce?

The Fall of the Non-Disparagement Clause

Enter the federal National Labor Relations Board (NLRB). Charged with the responsibility of enforcing the National Labor Relations Act, most HR professionals now know that the NLRB's reach goes far beyond matters involving union representation, and extends to the regulation of any practice or policy that

restricts an employee's right to engage in "protected concerted activities" (i.e., legitimate activities aimed at improving working conditions).

And so it was, on January 8, 2013, that an NLRB Administrative Law Judge struck down, as an illegal restraint, the Quicken Loans Non-Disparagement clause, stating:

"In determining whether an employer's maintenance of a work rule reasonably tends to chill employees in the exercise of [their] rights [to engage in protected concerted activities], the Board will give the work rule a reasonable reading and refrain from reading particular phrases in isolation.' There can be no doubt that an employee reading [the restrictions imposed by the Quicken Loans Non-Disparagement clause] could reasonably construe them as restricting his rights to engage in protected concerted activities. Within certain limits, employees are allowed to criticize their employer and its products as part of their [protected] rights, and employees sometime do so in appealing to the public, or to their fellow employees, in order to gain their support. A reasonable employee could conclude that the prohibitions contained in the [Non-Disparagement clause] prohibited them from doing so. The Non-Disparagement provision therefore violates [the National Labor Relations] Act."

The Bottom-Line

Remember that the NLRB enforces the rights of non-supervisory, non-management employees. In other words, when it comes to supervisors and managers, a Non-Disparagement clause is not illegal. However, as to all other employees, an employer's options are limited, so much so that there is little room to quickly rein in the destructive behavior of a disgruntled employee. Nevertheless, in the experience of this writer, disgruntled employees invariably, over time, serve up legitimate grounds for their termination. Separating the legitimate grounds from those that are protected—and having the patience to do so—is the challenge.

Davis & Campbell law firm, located in Peoria, Illinois, exclusively serves business clients in employment, labor, employee benefits, corporate, and tax matters.