

# The Employee Right to be Disloyal

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Few things raise the ire of an employer more than a disloyal employee. We're not talking about the ineffective, unproductive, seemingly never-at-work employee. We're talking about the employee who challenges management authority, sows dissention among co-workers and confronts customers and clients with critical remarks about their employer's business. What employer would take it? Every employer, says the Board responsible for enforcing the National Labor Relations Act.

Consider these employer policies, all found to be illegal restraints on the rights granted to employees under the Act:

1. Employees may not engage in a "disruption of any kind" during their working hours [*Purple Communications, Inc.*, 32, NLRB, No. 43 (9/24/14)].
2. Employees may not show "[i]nsubordination to a manager or a lack of respect and cooperation with fellow employees or guests" [*Hoot Winc, LLC*, NLRB ALJ, No. 31-CA-104872 (5/19/14)].
3. Employees may not make "negative, or untrue, or disparaging comments or criticisms of another person" and may not create, share or repeat "information that can injure a person's credibility or reputation" [*Laurus Technical Inst.*, 360 NLRB, No. 133 (6/3/14)].
4. Employees must "represent [Employer] in the community in a positive and professional manner" [*Hills and Dales General Hospital*, 360 NLRB, No. 70 (4/1/14)].

As these decisions indicate, employees have a right to be disloyal. Whether an employee is in a union or not, they can protest the "terms and conditions" of their employment by stopping work, by challenging and criticizing managers, by rallying other employees to their cause, and by taking their protest to customers, clients and the public.



Even so, there are limits to an employee's right to be disloyal. Legitimate protests turned threatening or violent, or calculated to inflict maximum damage, lose legal protection. Many employers choose not to define these limits. To do so leaves far too much room for acts of disloyalty an employer would prefer to discourage.

Other options include watering down your "loyalty" policies to read something like the following [borrowed from a policy approved for use by the NLRB's Acting General Counsel on May 30, 2012]: "Integrity, Accountability and Respect are core [Employer] values. [Employer] expects you to use your best judgment and exercise personal responsibility in your interactions with others. Remember, there can be consequences to your actions, both internally, if your interactions violate [Employer] policies, and with outside individuals and/or entities."

An employer could also use a "savings clause" to immunize "loyalty" policies that would otherwise be viewed as illegal. See *Tiffany and Co.*, NLRB ALJ, No. 1-CA-111287 (8/5/14), approving use of the following disclaimer: "This policy does not apply to employees who speak, write or communicate with fellow employees or others about their wages, benefits, or other terms of employment in the exercise of their statutory rights to organize or to act for their individual or mutual benefits under the National Labor Relations Act."

Neither option offers much, leading many employers to dispense with "loyalty" policies and to leave questions of discipline for acts of disloyalty to opposites: common sense and lawyers.

**cq**

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