

# The Bennett Law Firm

## *Client Update*

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### **NLRB ADMINISTRATIVE LAW JUDGE RULES NON-UNION EMPLOYER'S HANDBOOK POLICIES VIOLATE LABOR LAW**

We have written to alert you to the risks of employee handbooks running afoul of federal labor law even when an employer's policies have been issued with the best of intentions. During the current administration, the frequency of these prosecutions appears to have increased and the provisions being held illegal appear to be broadening. In this article, we highlight one recent and outrageous decision and suggest you consider whether it is time to have your company's handbook reviewed and updated.

Boch Honda is part of a retail empire and organizing its mechanics has been a goal of the Machinists union for several years. Boch has defended these intrusions successfully with the exception of a new decision issued last month that focuses on Boch's employee handbook and a rash of policies that the National Labor Relations Board's (NLRB) Boston office decided to challenge as violations of the Act.

What makes this decision somewhat peculiar and interesting is that after the unfair labor practice complaint issued, Boch allowed the NLRB to redraft its policies to whatever the Board's Boston regional office felt appropriate and, with only one exception, Boch agreed to change its policies. Nonetheless, the Administrative Law Judge found against Boch based on its rescinded policies, and seems to have gone to lengths to embarrass it with the breadth of the remedy despite Boch's over the top effort to comply.

Boch's Confidentiality Policy protected "information that has or could have commercial value or other utility in the Company's business." It specifically included compensation and incentive structures and similar types of data. The Judge found this policy to be too broad, and thus a violation because this type of language "could lead an employee to believe that his ability to discuss his terms and conditions of employment with fellow employees, the media or a union were limited by this provision."

Some aspects of another policy entitled the "Discourtesy Policy" included common sense ideas such as telling employees to be polite and friendly to customers and fellow employees. Boch's

policy further prohibited “any activity which could harm the image of the Company.” The Judge found this latter protection of the image language illegal because an employee might understand it to mean that he cannot engage in a strike or similar form of concerted activity.

Boch’s policy entitled “Inquiries Concerning Employees” appeared to be intended to reduce the risk of a defamation claim by directing all such inquiries to the human resources department and by making clear that employees are not authorized to give references. Yet again, the Judge found the language to be in violation because it would prevent an employee from discussing his or their terms and conditions of employment with a union, the media or governmental agencies.

Finally of note, Boch maintained an extensive social media policy that, amongst other things, prohibited employees from disclosing information about employees, from posting anonymous comments related to Boch, from making posts that would harm Boch’s reputation and from posting workplace video without permission. The policy also required the employee to allow Boch access to any posts the employee made. In the Judge’s words, “ (i)t requires little discussion to find that a number of these provisions clearly violate the Act as employees would reasonably construe these provisions as preventing them from discussing their conditions of employment with their fellow employees, radio and television stations, newspapers or unions, or limiting the subjects that they could discuss.”

When it came time to fashion the remedy, rather than limiting the notification to the Honda dealership which was the subject of the complaint and trial, the Judge required a remedy that applies throughout the myriad Boch dealerships since “it is appropriate that employees at all of these dealerships be aware of the findings herein.”

This decision is another reminder for employers that they must think through the ramifications of their policies to ensure that protected activity is not infringed upon.

While a company has the right to try to create a healthy work environment by providing guidelines of workplace behavior, caution in doing so is well advised.

In light of what we believe to be the NLRB’s more aggressive interpretation and enforcement, we are here to help you avoid potentially costly drafting mistakes. Please contact Peter Bennett ([pbennett@thebennettlawfirm.com](mailto:pbennett@thebennettlawfirm.com)) or Rick Finberg ([rfinberg@thebennettlawfirm.com](mailto:rfinberg@thebennettlawfirm.com)) of The Bennett Law Firm.