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NLRB's Guidance on Lawful Company Policies

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# Corporate Policy Management

*What You Don't Know Can Hurt You*

## COMPLIANCE WEEK

Compliance Week, published by Wilmington plc, is an information service on corporate governance, risk, and compliance that features a weekly electronic newsletter, a monthly print magazine, proprietary databases, industry-leading events, and a variety of interactive features and forums.

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# How Policy and Corporate Culture Can Collide

Avoiding tight-fisted policies that discourage or demoralize employees is a key part of an effective policy management program and can empower staff to act responsibly

By Matt Kelly

Elsewhere on Compliance Week's website, you can find an excellent article on the policy management questions about that most difficult of policies a compliance officer has to manage: business travel. If you're looking for a good overview of the latest risks a travel policy should address, and how to impose one, give it a read.

Here, however, I want to approach business travel from a different angle—because I can't cite a better example of how companies try to implement a well-meaning policy and poison their culture along the way. Business travel is the perfect case-study of the limits of policy management butting up against the desire for a strong corporate culture.

The subject has been on my mind ever since an acquaintance called me to complain about his own company's horrendous new policy for business travel. For reasons unclear to him—because the compliance department at his organization hasn't explained why its new policy is necessary—he must now follow this procedure to book a flight:

1. He searches for flights on Kayak or Expedia or some similar website;
2. He takes a screen shot of his preferred flights and submits them for review to an outside travel-management company;
3. The travel-management company reviews those choices, and sends back some smaller number that are acceptable under the new policy;
4. He then chooses his actual flight from that filtered group, and sends that request back to the travel-management company;
5. The travel-management company then books his final choice.

This ridiculous rigmarole can take two weeks to arrange a single trip, my friend tells me. What's more, his company now generally permits only the cheapest flights, which means he usually needs to make a connection—an extra hassle and risk I wouldn't wish on anyone in the

United States. My friend must make four trips from Chicago to Miami this spring. None of them will be nonstop, even though 102 nonstop flights happen between those cities every day.

Now consider the travel policy for a company run here in Boston by another friend of mine: Don't buy an airline ticket that costs more than \$550 without asking first, and nobody ever flies first class at company expense. Don't stay in a hotel room that costs more than \$300 a night without asking first. Don't spend more than \$60 per person on dinner, \$30 per person on lunch or breakfast. If you do, either prove how your spending was an emergency or cover the expense yourself.

That policy, in a slim 70 words, hits all the principles a compliance officer would want a travel policy to address: spending limits, permitted practices, exception requests, and punishment for deviation from the policy. Now, perhaps a large global company needs more detailed procedures for international travel and business, as our other article this week addresses. Tax, security, and anti-bribery

Tax, security, and anti-bribery risks can be many and diverse while trotting around the globe and a 70-word policy won't cover all of them.

risks can be many and diverse in while trotting around the globe, and a 70-word policy won't cover all of them. Appending some more detailed list of procedures for specific risks would be perfectly reasonable—even if those procedures achieve that same mix of Dilbert and Kafka that my first friend described above.

Success, however, hinges on this: the second company drafts policies with an eye towards empowering employees to act, and empowered workers make for a stronger corporate culture. The first company drafts policies as nothing more than a series of compliance procedures to follow, and that sucks the spirit right out of your culture. Once an employee gets the idea in his head that the company is rescinding his freedom—which my first friend's company is very much doing—you've lost the culture war.

If you don't give workers tools to empower them to do their jobs, they will seek ways to evade the obstacles (read: policies) you put between them and doing their jobs. This is an axiom of business life, and as anyone who has encountered a stupid policy knows, you will often go to great, foolish lengths to evade a policy you don't like. If you remove an employee's freedom to think and exercise judgment while following a policy, the employee stops thinking and exercising judgment entirely. And then those precise policies and embedded controls do you the compliance officer no good at all. ■

## RELATED CONTENT

Below is an excerpt from NAVEX Global on “Workplace Drug Policies and Your Corporate Culture: Four Tough Questions to Ask and Answer,” which provides a clear example of where a company’s culture and policies can clash.

For employers, enforcing workplace drug policies in states where medical marijuana use is legal could boil down to workplace values and culture. And it’s an issue companies will be facing more and more.

More than 25 years ago, Congress enacted the federal Drug-Free Workplace Act, which allowed the government and companies that contracted with the government to incorporate drug-testing policies. Soon thereafter, many companies followed suit, and today more than one-third of private employers have drug-testing policies, according to the Department of Labor.

But the Act took effect long before many states—23, in fact, as well as Washington, D.C.—began legalizing marijuana for medical use, raising a host of cultural and ethical questions for employers.

### Case in Point

Take the case of Brandon Coats, a Dish Network employee, who became quadriplegic after a serious car accident when he was 16. Years later, Coats still suffered from pain and muscle spasms, so a doctor prescribed him marijuana for pain management. Dish, like many employers, has taken a zero-tolerance stance on its drug policy. This means that, despite the fact that Coats legally took the drug for a medical reason, he was let go when he tested positive during a random drug test. Coats sued Dish, and a lower court ruled in Dish’s favor. The case is now waiting to be heard by the Colorado Supreme Court.

While Coats’ case may be among the first of its kind, it certainly won’t be the last. Among the states that allow marijuana for medical use, very few offer protection for employees if they test positive. And because marijuana (for any use) is still illegal under federal law, the Americans with Disabilities Act doesn’t offer protection either.

### Four Tough Questions to Ask About Your Organization’s Drug Policies and Culture

As a result, the onus is on employers to consider these four tough but important questions:

1. Do we take a zero-tolerance stance on our drug policy?
2. Which states allow medical use and provide employees with job protection?
3. Do we allow employees to use medical marijuana in states where it’s legal (but no legal protections are afforded to employees)?

4. And if we allow use of medical marijuana where it’s legal, would we still take a zero-tolerance policy in states where it isn’t?

The answers to these questions—which employers should be thinking about now rather than waiting for the situation to arise—should be found within an organization’s corporate culture. Considering its culture can help a company decide if it should take a hard stance on the issues of marijuana despite its legality, or be more flexible in how its employees legally address their medical issues.

### Gaining Consensus Around Your Organization’s Stance

But coming to that decision is far from easy—nor is it the job for a single company executive or department. It’s important for decision-makers to sit down with all of the company’s relevant stakeholders to determine how the application of its drug policy fits into the company’s culture.

When the Colorado Supreme Court ultimately decides the Dish Network case, we will be a step closer to answering that million-dollar question. But as the laws continue to change, the country appears to be moving in the direction of more legalization of medical marijuana. The question will be tested time and time again, and employers should be ready to address these issues before their own situations arise.

### Taking a Deeper Dive: Aligning Corporate Values With Policies

In addition, employers need to ask themselves tough questions to resolve the legal and values-based questions that will almost inevitably arise around employees recreational or medical marijuana use:

1. If you have a zero tolerance policy, how will you deal with employee recreational use that is permitted by law? Will you look to federal law to justify a true zero tolerance policy? Are you an organization that is required to abide by federal law?
2. Have you considered how you will deal with positive test results knowing that traces of marijuana can remain in the system long after actual use? Will your processes vary if use is recreational vs. for a legitimate medical use?
3. Have you trained your managers about confidentiality relating to sensitive employee information—including drug testing results and requests for accommodations for medical conditions where marijuana is prescribed (especially under state law).

Source: Ingrid Fredeen, Vice President, Online Learning Content, NAVEX Global.

# Optimizing Your Policy Management Program

## EIGHT ESSENTIALS

By Andrew Foose, J.D., Vice President, Advisory Services, NAVEX Global  
Randy Stephens, J.C., CCEP, Vice President, Advisory Services, NAVEX Global

**B**est practice policy management means managing the entire lifecycle of policies and procedures to make the processes efficient, repeatable, auditable, and defensible.

To accomplish this, programs must be comprehensive and ensure that all stakeholders—including document owners, subject matter experts, auditors, investigators, and end users—have appropriate access.

When this process breaks down, it leaves organizations open to legal, reputational, and financial risk. Nonetheless, policy management has been—and remains—a not-quite fully formed business practice. As a result, many ethics and compliance officers are not working against industry benchmarks to answer such critical program-related questions as:

- » How much should I consider investing in policy management—both in dollars and FTEs?
- » Are my top policy management challenges similar to those of my peers?
- » What metrics can I use to measure my program's effectiveness, and how does my performance compare to my peers?

To provide the E&C industry with data to answer these questions and more, NAVEX Global partnered with an independent research agency to survey nearly 900 professionals from a wide range of industries about their approach to policy

management. The findings are detailed in the report, “2015 Ethics & Compliance Policy Management Benchmark Report.”

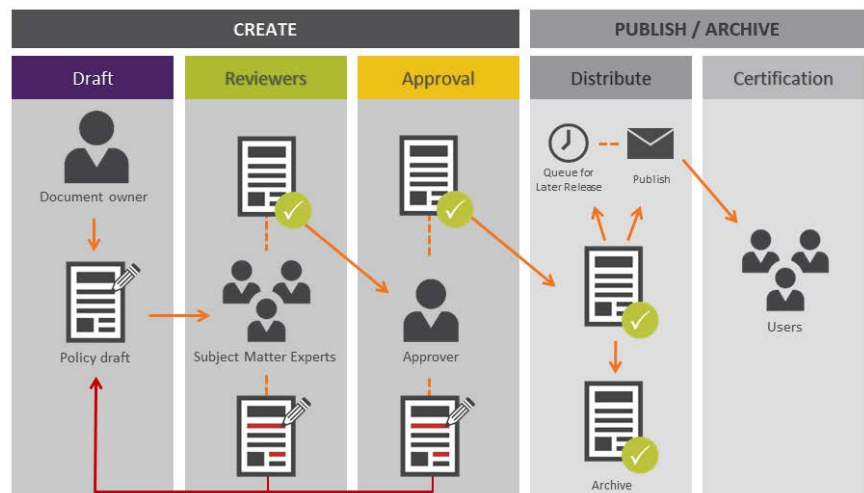
A number of key themes and insights about the current state of policy management emerged from the research report, including:

- » **Policy management is still a maturing business function.** Twenty percent of survey respondents indicated that they do not have a centralized ap-

proach to policy management, and 48 percent have no automated processes for tasks such as authoring, reviewing, and publishing policies. The majority of respondents are still handling policies within departmental silos, thereby limiting access to policies, creating unnecessary re-work, and exposing their organizations to significant risk.

- » **Organizations dedicate relatively few resources to policy management.** Many respondents note that

### Best Practice Policy Lifecycle Processes are Efficient, Repeatable, Auditable and Defensible



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*Respondents with automated policy management software rated their effectiveness nearly three times as high than respondents without software.*

their organizations have very limited funding and staff dedicated to policy management. This is true even for organizations managing hundreds—or even thousands—of policies. Just over 40 percent of respondents indicated that their organization has no dedicated budget for policy management; the remaining respondents most commonly said that their organization dedicates \$25,000 or less annually to policy management. However, there is some evidence that policy management is becoming a higher priority, with almost a third of respondents saying they expect their policy management budget to increase over the next year.

- » **Policy management effectiveness is a blind spot.** Nearly 60 percent of respondents indicate that they track no metrics related to the use or effectiveness of their policies. Respondents that do use metrics most commonly track only the accessibility of policies (24 percent). This indicates that many organizations have little or no information about the impact, accessibility or awareness of their policies.
- » **Training is practitioners' biggest policy-related challenge.** "Training em-

ployees on policies" was the top challenge cited by respondents, followed by aligning policies with regulations and improving version control. These challenges are even more difficult to overcome for organizations that have not centralized policy management.

- » **Very few organizations have guidelines for policy creation.** Nearly 60 percent of survey respondents reported that they do not have documented guidelines (sometimes called a "policy on policies" or a "meta-policy") for creating and distributing new policies. Without these guidelines in place, organizations face serious operational and legal risks and may suffer misalignment between governance, strategy, and execution.
- » **Organizations that use automated policy management software report dramatically better policy-related outcomes.** Twenty-five percent of the survey respondents report that they use policy management software. These respondents are far more likely to rate key aspects of their policy management program as very good or excellent than respondents without automated software. Of particular note:
  - ✓ **Access to policies:** Respondents with software rated their effectiveness as twice as high than respondents without (56 percent versus 28 percent).
  - ✓ **Compliance with policies:** Respondents with software rated their effectiveness nearly three times as high than respondents without (52 percent versus 15 percent).
  - ✓ **Defensibility of policies:** Respondents

with software rated their effectiveness nearly three times as high than respondents without (29 percent versus 10 percent).

- ✓ **Workflow between writers and approvers:** Respondents with software rated their effectiveness nearly three times as high than respondents without (30 percent versus 10 percent).

Based on our research and our firsthand experience with clients, we can confidently recommend that taking some or all of the following steps will significantly strengthen an organization's policy management program—and reduce risk:

1. **Define a comprehensive, ongoing, risk-based approach to policy management.** If your organization has not yet taken a broader approach to policy management, create a vision for the creation, regular review, training, and assessment of policies across your organization.
- 20% of survey respondents do not have a centralized approach to policy management.*
2. **Understand your universe of risks.** An effective policy management program relies on an understanding of all the potential risks to which your organization may be exposed. Create or enhance your policy management system around policies that address each of these risks.

3. **Assess your vulnerabilities.** Assess your current approach to policy management and determine where there are opportunities to improve. Focus on key areas, including the regular review and updating of policies, targeted training, and documented guidelines or rules for creating new policies.

*60% of respondents track no metrics related to the use or effectiveness of their policies.*

4. **Track program effectiveness.** A policy management system cannot fully support your organization without regular assessment of its effectiveness. Don't let anecdotal comments serve as program success determinants. Establish baselines and goals for improvement, and put processes in place to measure the effectiveness of the systems and training you deploy.
5. **Establish training on policies that address key risk areas.** Training and policy management programs must work hand-in-hand to address organizational risk. No training program can tackle every risk area every year. Effective programs incorporate data-driven decisions, training curriculum maps, and an array of training methods to drive home key messages.
6. **Align resources with policy management efforts.** Your policy management program should be assigned a budget, staff time, and accountability for program success. Policy management activities should be centralized so that every department has immediate access to appropriate documents and there is

a streamlined approach to creating, reviewing, and updating policies. Consider establishing a document control administrator to oversee the entire lifecycle for all policies, including drafting, reviewing, and editing policies before final approval, distribution, and training.

7. **Be ready to handle legal action.** Every organization must be prepared to face legal action related to its policies. This includes establishing consistent legal counsel input, recordkeeping, policy review, and attestation requirements.
8. **Implement automated software.** With the right automated policy management software solution, the impact on your policy practice can be broad and deep, providing both human and financial efficiencies. Software offers speedy and continuous access to policies through a central repository. Look for software that is easy to navigate, has a powerful search tool, automatically notifies employees when policies have been updated, and has a compliant electronic signature to avoid having hard copies outside the system.

## Conclusion

A strong policy management program results in improved performance and enhanced corporate culture. It also empowers employees, vendors, and executives with the tools and knowledge they need to support an organization's standards for individual and business conduct.

A high-functioning policy management program does not have to be complex. Overall, the findings in our report underscore the importance of having a central-

ized approach to policy management. They also reveal that leveraging policy management software for authoring, implementing, and maintaining your organization's policies can yield substantial benefits and business value. ■

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**Download our 2015 Ethics & Compliance Policy Management Benchmark Report and our eBook, The Definitive Guide to Policy Management, at [www.navexglobal.com/resources](http://www.navexglobal.com/resources).**

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# Policy Engagement Starts With Policy Writing

## A Good Policy Starts With an Effective Code of Conduct

By Michael Rasmussen

**P**olicy engagement: There is a lot to be said for how technology can make policies easier to find, social, and interactive. In fact, I have been on my soapbox proclaiming next-generation policy and training management for the past decade in which organizations deploy a portal that brings together policies, training, and related resources in one integrated interface that is intuitive and engaging for employees to use.

Policies define boundaries for the behavior of individuals, business processes, relationships, and systems. At the highest level, policy starts with a code of conduct, establishes ethics and values to extend across the enterprise, and authorizes other policies to govern the entire organization. These filter down into specific policies for business units, departments, and individual business processes.

To deliver engaging policy requires a firm foundation. We might be quick to think this foundation is technology itself. No. Technology is important, but the foundation for good policy is a well-written policy. A policy that is clear, void of cluttered language, written in the active voice, and delivers the message.

The typical organization is a mess when it comes to policies. Policies are scattered across the organization, reside in a variety of formats ranging from printed documents to internal portals and fileshares, are out of date and poorly written. Policy writing that is wordy and confusing is damaging to the corporate image and leads to confusion and misunderstanding, which then costs time and money. Organizations are not positioned to drive desired behaviors or enforce accountability if policies are not clearly written and consistent.

Well-written and presented policies aid in improving performance, producing predictable outcomes, mitigating compliance risk, and avoiding incidents and loss. Good policy writing and layout:

- » Articulates corporate culture
- » Shows that the organization cares about policy
- » Demonstrates professionalism
- » Avoids expensive misunderstandings
- » Aids those that struggle with reading or do not speak the language natively
- » Provides consistency across policies

Consider a supply chain code of conduct I was asked to review for a global brand with thousands of suppliers. This code of conduct had long paragraphs that were written in the passive voice. It was cluttered with unnecessary and complex language. The audience for this code of conduct was an international group of employees, many of whom did not speak the language of the code of conduct as their

native tongue. Further, the first sentence of the first paragraph stated “Company believes ...” and the next paragraph began, “Company strongly believes ...” Do we have different levels of belief in the code of conduct?

We are working against ourselves when we deliver such rubbish. As a native English speaker this might be quick to glance over, but for someone that has English as a second language, they will analyze every word and come to the erroneous conclusion that the second paragraph is more important than the first. Organizations are full of individuals who are not native speakers (or in this case readers) of the language policies are written in. We do them a disservice when we write policy that is not clear and to the point.



Rasmussen

Good policy writing is not just about clear and concise language but also about layout and design. How we structure paragraphs and present them in print or digital form matters.

I have three sons; two are now adults and the third is in his last year of high school. The oldest and youngest do well academically. My middle son is very reliable and can be counted on to get things done but has struggled academically. He is brilliant but has been plagued with a learning disability—

dyslexia—his whole life. In educating him, my wife and I tried a variety of options. I remember giving him something to read that was a page of nearly solid text in just a few paragraphs. He struggled to get through it. I then gave him the same text broken out into many paragraphs with plenty of white space between them. His comprehension of the text skyrocketed with the revised version. The text itself did not change, simply the presentation of it.

When we break policies out into shorter paragraphs and utilize white space it aids in the comprehension of the policy. White space, and in that context design and layout of the policy, is just as important as the actual written words of the policy.

Critical to the success of policy engagement is a policy style guide. Every organization should have a policy style guide in place to provide clear and consistent policy. This establishes the language, grammar, and format guidance to writing policies. It expresses how to use active over passive voice, avoid complicated language and “legalese,” how to write for impact and clarity, use of common terms, how to approach gender in writing, and even internationalization considerations. ■

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# NLRB's Guidance on Lawful Company Policies

The NLRB appears to be concerned that the mere existence of a handbook policy could restrict an employee's ability to organize

By Jaclyn Jaeger

New guidance from the National Labor Relations Board should be a big help for companies trying to draft lawful employee handbook policies.

Issued in March by NLRB General Counsel Richard Griffin, the 30-page memo explores several categories of handbook rules, and offers a case-by-case comparison of why the NLRB found certain rules unlawful. "This is really the first time the general counsel has comprehensively reported on the NLRB's treatment of employer rules and policies under the National Labor Relations Act," says Frederick Miner, a shareholder with law firm Littler.

The NLRB appears to be concerned that the mere existence of a handbook policy could restrict an employee's ability to organize or discuss workplace concerns, if employees would "reasonably construe" the language as prohibiting activities protected under Section 7 of the National Labor Relations Act.

"Although I believe that most employers do not draft their employee handbooks with the object of prohibiting or restricting conduct protected by the [National Labor Relations Act], the law does not allow even well-intentioned rules that would inhibit employees from engaging in activities protected by the Act," Griffin said in an accompanying statement. Thus, the intent of the guidance is to clarify which handbook rules are acceptable, he said.

The memo should come as welcome news to companies that have been wrestling for awhile now with how to construct lawful handbook rules. "Employers have struggled mightily with trying to read the tea leaves as to what the NLRB might say about a particular policy," says Daniel Pasternak, a partner with law firm Squire Patton Boggs. With this guidance, employers now have "a glimpse into how the NLRB's chief prosecutor is making decisions about whether to charge an employer with unfair labor practices based upon their policies," he says.

Below are policy categories discussed in the guidance and examples of lawful and unlawful language cited under each.

## Confidentiality Rules

Under Section 7, employees have a right to discuss wages, hours, and other terms and conditions of employment. So any handbook rule that restricts disclosure of employee information would be unlawful.

For example, the NLRB found unlawful a handbook rule that stated: "Do not discuss customer or employee information outside of work, including phone numbers [and] addresses." In this case, the NLRB took issue with the over-

broad reference to "employee information" and the blanket ban on discussing employee contact information.

Generally speaking, rules that prohibit disclosure of confidential information are only lawful where they don't reference information regarding employees or employee conditions of employment; and where the term "confidential" is not defined in an overbroad manner.

For those above reasons, the NLRB also gave several examples of rules prohibiting disclosure that are lawful:

- » No unauthorized disclosure of business "secrets" or other confidential information.
- » Misuse or unauthorized disclosure of confidential information not otherwise available to persons or firms outside [employer] is cause for disciplinary action, including termination.
- » No disclosure of confidential financial data, or other non-public proprietary company information. Do not share confidential information regarding business partners, vendors, or customers.

"This is really the first time the general counsel has comprehensively reported on the NLRB's treatment of employer rules and policies under the National Labor Relations Act."

Frederick Miner, Shareholder, Littler

"The devil is in the details," Pasternak says. "The board is not going to take the position that an employer doesn't have the right to protect its legitimate confidential sensitive business information." What the board does say, however, is that companies should draft a confidentiality policy that narrowly defines what they are trying to protect, he says.

## Employee Conduct Rules

Employees also have a right under Section 7 to criticize or protest their employer's labor policies or treatment of employees. The guidance clarifies that "a rule that prohibits employees from engaging in 'disrespectful,' 'negative,' 'inappropriate,' or 'rude' conduct toward the employer or management, *absent sufficient clarification or context*, will usually be found unlawful."

Examples of unlawful rules include: do not make fun of, denigrate, or defame your co-workers, customers, franchisees, suppliers, the company, or our competitors; or make no defamatory, libelous, slanderous, or discriminatory comments about the company, its customers, or competitors, its employees or management.

In comparison, rules that require employees to be respectful and courteous to customers, business partners, and other third parties—and do not mention the company

or its management—are lawful, because employees cannot construe that as forbidden legally protected criticism of the company. A rule that bans “rudeness or unprofessional behavior toward a customer, or anyone in contact with the company,” for example, is lawful. Similarly, it’s lawful to state that “employees will not be discourteous or disrespectful to a customer or any member of the public while in the course and scope of company business.”

### Third-Party Communication Rules

Employees also have a Section 7 right to communicate with the news media, government agencies, and other third parties about wages, benefits, and other conditions of employment. So any rule employees might interpret as banning such protected communications would be unlawful.

For example, a rule that bars employees from speaking “to any representatives of the print and/or electronic media about company matters” is unlawful because employees would reasonably construe the phrase “company matters” to encompass employment concerns and labor relations, the guidance stated.

Another rule the NLRB found overbroad: “If you are contacted by any government agency you should contact the law department immediately for assistance.” The NLRB explained this rule is unlawful because employees could reasonably believe that they may not speak to a government agency without management approval, or even provide information in response to an NLRB investigation.

### Room for Interpretation

The guidance underscores the increasingly high burden the NLRB is placing on employers “to prevent misunderstandings—even inadvertent misunderstandings—by employees about what is meant in a rule or policy if it could arguably chill protected activities,” Miner says. “The general counsel is challenging even ambiguous workplace rules as being overbroad and, therefore, unlawful.”

The guidance leaves a lot of room for interpretation. “The memo is intended to put the NLRB’s position all in one place, instead of having to read multiple cases and trying to understand the threads that run through them,” says Steve Lyman, a member of law firm Hall Render. The problem is that “the threads that run through them are all over the place. Even this memo is internally confusing,” he says. The NLRB is parsing words so finely that it’s essentially “guesswork” for employers as to whether a particular policy is lawful or not, he says.

“The report really illustrates how expansive the NLRB’s test is for determining lawful rules,” Miner says. “The test can be difficult to apply, and it can be challenging to anticipate when the NLRB will find a rule unlawful.”

Other rules addressed in the guidance deal with conflicts of interest; restrictions on leaving work; restrictions on logos, copyrights, and trademarks; and restrictions on photography, recordings, or personal electronic devices.

A second part of the guidance cites specific rules addressed in an unfair labor practice case against food chain Wendy’s International. In that case, the NLRB found that several of Wendy’s handbook rules violated Section 7. The guidance goes on to explain what rules were approved as

part of Wendy’s resolution with NLRB.

Pasternak warns that companies shouldn’t simply assume that their policies will pass muster with the NLRB if they adopt identical lawful rules addressed in this guidance. “It’s by no means the answer to everyone’s problems,” he says. “It’s not a magic bullet, and employers should not interpret it as a magic bullet.”

At the very least, employers need to review the report, including Wendy’s resolution, and then revisit their handbooks to assess which policies could be interpreted as interfering with employees’ Section 7 rights. “They should do that before a challenge comes along in the form of an unfair labor practice charge or otherwise,” Miner says.

Although the NLRB doesn’t have the force of law, Lyman says, “You might as well go with what the NLRB is suggesting to avoid problems down the road.” ■

### LAWFUL V. UNLAWFUL HANDBOOK RULES

The following are examples from the National Labor Relations Board’s guidance comparing lawful and unlawful employer handbook rules.

#### Confidentiality Rule

**Unlawful:** Never publish or disclose [the employer’s] or another’s confidential or other proprietary information. Never publish or report on conversations that are meant to be private or internal to [the employer].

**Lawful:** Misuse or unauthorized disclosure of confidential information not otherwise available to persons or firms outside [employer] is cause for disciplinary action, including termination.

#### Employee Conduct Rules

**Unlawful:** Do not make statements that damage the company or the company’s reputation or that disrupt or damage the company’s business relationships.

**Lawful:** Employees will not be discourteous or disrespectful to a customer or any member of the public while in the course and scope of [company] business.

#### Third-Party Communication Rules

**Unlawful:** Associates are not authorized to answer questions from the news media...When approached for information you should refer the person to [the employer’s] media relations department.

**Lawful:** The company strives to anticipate and manage crisis situations in order to reduce disruption to our employees and to maintain our reputation as a high quality company. To best serve these objectives, the company will respond to the news media in a timely and professional manner only through the designated spokespersons.”

Source: National Labor Relations Board.

# Imposing a Travel Policy Without Strangling Anyone

By Karen Kroll

Compliance officers can pick fights with employees over any number of workplace policies. But if you really want daggers drawn, venom, and subversive battles at every turn—impose a policy on business travel.

Most corporate road warriors can book airfare, hotel, and rental cars simply by clicking onto one of the many travel websites blanketing the Internet. That makes persuading them to use the corporate-sanctioned process all the more difficult, if nearly impossible. “I can get a flight/hotel/car cheaper on my own and with less hassle,” is a common response.

Obviously compliance with company travel policy has its value. To start, it helps to manage costs, says Ramon Tavares, co-founder of Blackspark Corp., a vendor of corporate travel software. Although employees can occasionally find better deals on their own, a comprehensive program lets organizations negotiate rates that typically beat most one-off deals. And reasonable policies, like requirements to book flights at least two weeks in advance when possible, also help keep travel expenses in line.

Getting employees to follow travel policies also cuts the risk of abuse and fraud. Questionable expenses are harder to uncover when travelers go around the system, as many aren’t automatically flagged.

When employees go outside the system and then run into problems—say, medical emergencies or natural disasters—a company might struggle to respond quickly, if it doesn’t have fast access to trip details. Circumventing procedures also hampers a company’s efforts to ensure it is covering any tax obligations incurred by traveling employees.

Several techniques can foster compliance. One is communicating with employees in engaging ways, such as short videos and e-learning modules, says Yon Abad, senior director with Carlson Wagonlit Travel’s CWT Solutions Group. Written policy documents still are available to provide detail.

Some companies use online travel solutions that automatically steer employees to suppliers with which the company has contracted, and to options that fall within their policies, Abad says. On a practical level, that limits an employee’s ability to flout the rules.

Other solutions show all options, but place those that meet the organizations’ policies first, says Doug Anderson, vice president at Concur, another software vendor that helps to manage travel expenses. If the options that meet the guidelines aren’t practical—say, no flights on the preferred carrier allow enough time for a worker to make an important meeting—the travel department knows why the employee booked a non-compliant flight. “Sometimes, employees book outside the policies, and the business needs to know why,” he says.

To curtail the potential for fraud, the system should flag transactions that appear suspicious, Tavares says. One example: duplicate receipts submitted for the same trip. Some companies also impose more reviews on expenses if an employee pays for expenses with personal credit cards or cash, Abad says.

## Winning the Policy War

So let’s get back to the venom, subversion, and employees hating new policy. A sticks-only approach, with no carrots to encourage compliance, will do a chief compliance officer no favors.

Some companies encourage compliance by recognizing employees who are booking travel according to the rules, Tavares says. “They share success stories.” Others initiate competitions between departments to see which ones can boost compliance the most, Abad says. “Liberate their competitive mindset.”

Some organizations send automated text messages or e-mails to travelers, reminding them that, for example, the hotel rate already includes Internet access, so they shouldn’t pay extra for it, Abad says. These messages also can keep travelers abreast of flight delays and other information relevant to their trips.

The communication can flow both ways. A growing number of organizations collect employee reviews on the travel services they’ve used, Abad says. “It gives voice to the

**“While everyone wants to look like a hero for saving costs, you have to understand the culture and engage with stakeholders.”**

Anita Salvatore, EVP, Global Account Services, Travizon

traveler, and it helps ensure they have the tools they need to be productive on the road.”

Along with employees, the budget owners—that is, the department and business unit heads—need to be engaged, says Anita Salvatore, executive vice president at Travizon, a provider of travel management services and technology. “Find out what makes them tick and how to help them achieve their goals,” while still maintaining a reasonable budget, she says.

That’s key. Draconian policies can reduce morale and hamper employees’ ability to do their jobs. “While everyone wants to look like a hero for saving costs, you have to understand the culture and engage with stakeholders,” Salvatore says.

When employees try to circumvent the rules, the organization should know. Many systems require management approval if a proposed trip doesn’t meet the organization’s guidelines, Salvatore says. Of course, approval should be used with discretion. As she points out, companies that grant every exception request undermine their own policies.

## Other Obligations

Employees aren’t the only ones with compliance responsibilities arising from their travel. Some countries, as well as some U.S. states, impose tax and reporting requirements on business activities that occur within their borders, even if the workers are just traveling through. “Different obligations accrue to the company, and you need a system



to summarize travel data to bubble up any obligations,” Tavares says.

This risk has become more pronounced over the past few years, says Kerry Weinger, a partner with law firm Baker & McKenzie. Partly that’s because advances in technology, as well as cost concerns, have prompted some companies to use traveling employees rather than expatriates to handle assignments outside their home countries. Often, “cross-border travelers fly under the radar,” Weinger says. Because this group of employees typically isn’t covered by employers’ global mobility programs, no single individual or department is watching for any tax obligations incurred.

At the same time, countries are enacting new laws or more aggressively enforcing existing ones to generate tax revenue from cross-border travelers. The proliferation of electronic identification systems at many border crossings also provides authorities with greater ability to identify which individuals and companies entering their countries might be incurring tax obligations, Weinger says.

Meeting these obligations requires communication, often across a range of departments: the traveling employees, their business managers, tax, compliance, immigration, payroll, and human resources, Weinger says. Employers also need to understand the tax requirements in the jurisdictions where employees travel, implement solid extended traveler policies, and designate an individual(s) to own these processes.

Given the complexities inherent in tracking all traveling employees, companies may want to limit their focus, at least initially. It may make sense to focus on those who rack up many frequent flyer miles, and especially those who travel on business visitor visas, rather than work permits.

Organizations also assume “a moral, ethical, fiduciary, and legal duty to take care of employees when they cross borders,” says Robert Quigley, senior vice president of medical assistance with International SOS, a provider of medical and travel security assistance. Mishandling an emergency can lead to legal, financial, and reputational damage, he adds.

U.S. courts have held organizations responsible for the well being of individuals traveling with them or on their behalf. For instance, in *Munn et al. v. Hotchkiss School*, the plaintiffs sued on behalf of their daughter, a student traveling abroad when she was bitten by a tick. She suffered long-term physical and cognitive disabilities as a result of the bite. The suit alleged the school was careless in planning the trip and supervising the students while they were traveling. The court awarded the plaintiffs \$41 million for medical costs and pain and suffering, although the decision has been appealed.

“This is one of the most under-managed risks for all businesses,” Anderson says. Organizations must develop protocols for communicating with, safeguarding, and assisting employees who run into danger while traveling.

In today’s world, almost all organizations employ workers who must travel to conduct business. That brings some level of risk. Mitigating it requires establishing and enforcing reasonable policies for booking travel services, establishing procedures for managing through emergencies, and paying attention to any tax or reporting obligations incurred because of the travel. ■

## PROCEDURAL HISTORY

Below is an excerpt from *Orson D. Munn III et al. v. The Hotchkiss School*, detailing the travel complaints filed against the school and the final outcome.

On June 11, 2009, Orson and Christine Munn filed this lawsuit as next friend to their daughter, Cara, alleging that Hotchkiss’s negligence in the execution of its 2007 China Summer Program caused Munn’s injuries while Munn was a student in Hotchkiss’s care. Specifically, the Munns alleged that Hotchkiss was negligent in (1) failing to properly warn Munn and her parents of the risks of insect-borne diseases, specifically viral encephalitis; (2) failing to provide proper protective clothing, insect repellent, or vaccination by its employees and agents; (3) failing to provide appropriate medical personnel on the trip who could diagnose or arrange treatment for students on the trip; (4) failing to establish procedures for identifying medical emergencies, notifying parents of seriously ill children, and transporting seriously ill students to the United States for treatment; and (5) failing to advise the Munns of the availability of vaccines against viral encephalitis for children of Munn’s age traveling to rural areas of northeastern China in summer 2007 ...

... At trial, the Munns abandoned the majority of these grounds for liability, proceeding with their arguments regarding Hotchkiss’s alleged failure to adequately warn of the risks of insect-borne disease on the China trip, and the alleged failure by its employees and agents to provide proper protection or prophylaxis (e.g., clothing, insect repellent, vaccination).

In addition to denying the allegations of negligence, Hotchkiss asserted several affirmative defenses, including that the Munns’ claims were barred by the doctrine of assumption of risk when the Munns signed the school’s pre-trip “Agreement, Waiver, and Release of Liability”; Munn’s injuries were the result of force majeure or caused by third parties; Munn’s injuries were caused by her parents’ contributory negligence; and finally, that with the exception of injuries caused solely by Hotchkiss’s negligence or willful misconduct, the Munns’ claims were barred by a signed release and waiver ...

... At the culmination of the trial, the jury found that the Munns met their evidentiary burden in showing (1) Hotchkiss was negligent in failing to warn Munn of the risk of insect-borne illnesses; (2) Hotchkiss was negligent in failing to ensure Munn used protective measures to prevent insect-borne infection; (3) Munn was infected by an insect-borne disease while visiting Mount Panshan; (4) one or more of Hotchkiss’s negligent acts or omissions was the cause in fact of Munn’s injuries; and (5) Hotchkiss’s negligent acts or omissions were a substantial factor that, acting alone or in conjunction with other factors, brought about Munn’s injuries ... The jury further found that Munn had not contributed to her injuries, and it awarded Munn \$450,000 in past economic damages, \$9,800,000 in future economic damages, and \$31,500,000 in non-economic damages ...

Source: *Orson D. Munn III et al. v. The Hotchkiss School*.

A close-up photograph of two hands interacting with a tablet device. The hands are positioned over the screen, with fingers touching and moving across it. The background is blurred, showing what appears to be a person's torso and arms, suggesting a professional or office setting. The lighting is warm and focused on the hands and the tablet.

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