

# Davis Brown Employment and Labor Law Blog

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Can I Tell my Employee to Please Shut Up? – January 27, 2020

Jo Ellen Whitney

Sometimes the school teacher refrains, “everyone be quiet” or “back to your corners” can feel like an excellent tool for managing employees. However, there are some pitfalls to be aware of when you ask your employees to avoid certain topics of conversation or to behave in a certain way.

## Nonwork-related chatter or just being a jerk

As employers, we already ask people to avoid certain kinds of language or conversations within the workplace. For example, we do not allow our employees to discuss their sexual activities; we don't allow them to use racial epithets or to make discriminatory statements about people and their physical or mental abilities.

However, when it is not something that is clearly within EEOC guidelines, it can be a bit more difficult to determine what an employee may or may not talk about in the workplace. This has been particularly true during intense political seasons when both local and national conversations can step well over the line of basic politeness.

In general, if an employee's comments about something innocuous like preferred television programs or opinions on the designated hitter in MLB, or a colleague's child's rehab become disruptive in the workplace, you can ask those employees to cease conversations of that type. While it is very difficult to police personal discussions, employers have the right to request that people stop discussing certain topics. There are certainly workplaces that have banned discussions of football or baseball during hard-fought athletic seasons and plenty of employees have been disciplined for inappropriate political commentary which edged over into national origin or sex discrimination. Employees who do not comply can be disciplined for insubordination for failing to abide by a workplace request as well as for interfering with other people's work.

## Trade Secrets and Confidential Employee Data

Most workplaces have significant amounts of confidential data, not only company trade secrets but also employee data such as Social Security numbers, credit card numbers, and medical information.

You have good reason to tell your employees to not talk about this information.



Employers should clearly define what is and is not a trade secret and protect that information with trade secret and confidential information agreements as well as copyright or patents where applicable. These agreements can be entered into and enforced by employers to protect critical information.

Other data that is less likely to be subject to a secondary agreement may include HIPAA or patient-related data, credit card or other financial information, or employee data such as social security numbers. Employers can protect this data with a policy stating that this information is confidential and not subject to release without appropriate authority and permission. Enforcement mechanisms would include internal discipline as well as potential contract enforcement actions should there be a breach of confidential data. In some instances, this may also be subject to reporting under Iowa data rules, including Iowa Code 715C, HIPAA, or similar governing statutes.

## Media Requests

Many employers want to implement policies preventing employees from speaking with the media, however, the National Labor Relations Board (NLRB) has generally indicated that employees cannot be prohibited from speaking to the media, particularly if it is about the conditions of employment such as safety concerns, wages or benefits.

However, you can prevent employees from making statements on behalf of the company or representing themselves as a company spokesperson if there is a media inquiry. Your policies should provide a clear-cut path for employees to direct any media inquiries to the appropriate person.

## Conditions of Work

As mentioned above, the EEOC and NLRB have consistently indicated that you cannot prohibit employees from discussing “conditions of work.” This could include wage rates or salary information, whether a male is paid more than a female, various benefit accruals, how people are disciplined, whether discipline is consistent, overtime schedules, work hours and a wide array of other matters.

The NLRB has ruled that prohibitions against employees discussing conditions of work impact upon employees’ Section 7 rights. The EEOC views certain kinds of prohibitions as impeding civil rights; for example, it would prohibit someone who is older from discovering that younger employees are paid more.

## Investigations

Investigations are a regular component of the HR practice. Every workplace has a periodic investigation, whether it relates to a workers’ compensation matter, an OSHA concern, or a claim of employment discrimination.

For several years, the NLRB’s position was that policies requiring employees to keep investigations confidential impeded Section 7 rights.

The NLRB’s December 17, 2019 decision in *Apogee Retail, LLC* reversed that position in part stating that policies requiring investigative confidentiality on the part of witnesses and others during an investigation are “presumptively lawful.” Note that this relates exclusively to the information during a *pending* investigation and does not address employers who prohibit employees from discussing the ultimate outcome of investigations or disciplinary actions.

In the *Apogee* case, company rules were not limited to the period of investigation, so the NLRB sent the case back to the administrative law judge for further consideration. Other pending cases relate to this issue, including

concerns about potential retaliation by co-workers after an investigation is completed and how this could impact future reports of problems. You are encouraged to keep an eye on this issue and consult with an attorney to ensure that your policies are compliant.

## The Big Picture – Confidentiality is not One-Size-Fits-All

Rules and policies relating to confidentiality should be carefully tailored to your workplace. You need to assess whether you have trade secret or similar information which will require separate and specific agreements as well as how you deal with and approach political conversations, gossip, media requests, and water cooler chit chat without violating your employees' rights.

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