



# FIHRA DIGEST

## Fashion Industry Human Resource Association

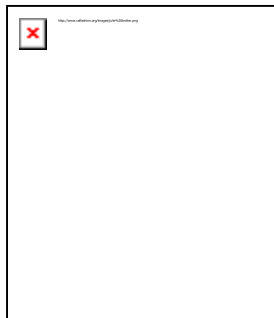
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### Introduction

The **California Fashion Association** implements the **Fashion Industry Human Resource Association ('FIHRA')**: an organization for the Human Resource Managers of manufacturing, distribution, and retailing groups within the fashion, apparel, and textile industry.

**FIHRA** organizes Roundtable meetings featuring experts in Labor and Employment, with emphasis on the application of state and federal laws for apparel manufacturers and retailers. Attendees have access to the latest and most specific information on pending legislation.

### Employer's Beware - Social media remains a hot bed for litigation



By Julie Trotter, Esq.

The federal National Labor Relations Board (NLRB) continues to scrutinize policies and employment decisions aimed at curbing employee use of social media as a forum to complain about their employer. A new decision has condemned employer policies that restrict employee speech related to the employee's terms and conditions of employment.

Case: a salesperson for a car dealership in Illinois was fired for posting pictures with critical and sarcastic remarks on his Facebook page. The pictures and comments dealt with (a) the food the dealership provided during a major sales event and (b) a minor car accident at the dealer's lot. Managers for the dealership learned about his posts and fired him.

The NLRB ruled that the posts about the sales event (a) were protected because the quality of food service at the event could have affected salespersons' commissions - i.e.: if a customer was turned off by the hot dog cart and chose not to buy a car, for example. However, his posts about the accident (b) were not protected because they were not connected to the terms or conditions of employment. They found that the termination was legal because the man was fired solely for his posts about the accident.

However, the National Labor Relations Board concluded that the **dealership's manual was unlawful** because it contained a broad prohibition against "disrespectful" conduct and "language which injures the image or reputation of the Dealership." They maintained that employees could read this as prohibiting them from objecting to or trying to improve their working conditions and they could believe that criticisms of the employer could result in discipline.

The car dealership case confirms that an employee can be terminated for comments made online that damage the employer. It is not always easy to determine whether comments are protected, so if you come across inappropriate comments online, please get advice from legal counsel before taking action.

The Board also struck down rules prohibiting employees from participating in "unauthorized interviews" and from answering "outside inquiries concerning employees" because these rules limited employees' ability to discuss working conditions. This echoes a similar ruling against Costco invalidating Costco's rules that prohibited employees from making statements damaging to the company or other individuals, including in social media.

**As these cases demonstrate, there is a trend in litigation regarding social media, and the NLRB has begun finding that rules limiting employee statements in social media and otherwise are too broad. Employers can** have rules aimed at ensuring their employees act with courtesy, respect, and loyalty, but those rules have to be crafted in a way that does not limit a discussion of wages or terms of employment.

Social media policies continue to be scrutinized by employees, courts and the NLRB. Employers should review (and re-review) their policies as this area continues to develop and revise them as needed.

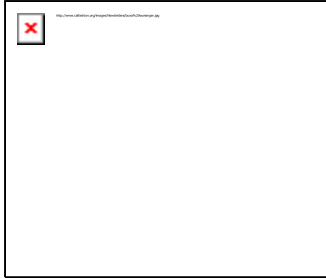
If you have any questions about the National Labor Relations Act or other issues, please contact:

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**Call & Jensen**

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## Ask an Apparel Attorney



### **'Non-Compete' Clauses are illegal in California!**

By Laura Worsinger, Esq.

Dear Apparel Attorney,

We are a California textile mill and garment manufacturer. Over the years we have spent a great deal of time and money training our staff, including designers and sales personnel. How can we prevent these knowledgeable, experienced workers from leaving and using the skills they acquired here to work for our competitors? We know that non-competes are generally not allowed in California but why can't we require our employees to sign agreements not to work for competitors and

simply use that as a deterrent?--50 Shades of Greige Goods

Dear Textile Mill Owner,

You are correct that employee agreements not to compete are strictly prohibited in California. This ban also applies to customer and employee non-solicitation agreements. The statute provides that "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."

There are certain exceptions, such as when a company's owners or the major stock holders sell the business to a third party, but these are extremely limited and do not apply in the vast majority of cases. Courts in California have sometimes upheld post-termination employee restrictions narrowly limited to protecting legitimate trade secret information of the employer. Employers can prohibit using trade secrets to compete or to solicit customers (e.g. confidential customer lists) or to raid employees (e.g. using confidential salary information). This often results in expensive litigation.

Suggestion: DO NOT simply include non-compete clauses in employment agreements, thinking employees might fear a lawsuit? Post-employment, non-competition clauses are pretty much verboten in California. Just putting a non-competition clause in an employment agreement is *deemed unfair competition* under Cal. Bus. & Prof. Code § 17200. If an employee is terminated for refusing to sign a non-compete it may be considered a wrongful termination in violation of public policy.

For questions regarding any Labor and Employment Issues, please contact:

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