



PUNCH LIST

The voice of the **Subcontractor's Industry**

GUACAMOLE SNOW DAYS TWEET ALL ABOUT IT

NLRB ruling exposes employers to greater risk and penalties

Section 7 of the National Labor Relations Act guarantees employees the “right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection”

With that statutory language as a backdrop, the NLRB recently issued a decision further limiting an employer’s ability to issue and enforce various behavior and social media policies.

In *Chipotle Services, LLC* 04-CA-1437314, the NLRB found that Chipotle wrongfully terminated employee James Kennedy because of Kennedy’s attempts to have co-workers sign a petition regarding his allegations that Chipotle was denying breaks to its employees. At or around the time Kennedy was circulating this petition, he also authored the following tweets:

In response to a news article concerning hourly workers having to work on snow days when certain other employees were off and public transportation was shut down, the employee addressed Chipotle’s communications director and stated: “Snow day for ‘top performers’ Chris Arnold?”

In response to a customer who tweeted “Free chipotle is the best thanks”, the employee tweeted “nothing is free, only cheap #labor. Crew members make \$8.50hr how much is that steak bowl really?”

In response to a tweet posted by a customer about guacamole, the employee wrote “it’s extra not like #Qdoba, enjoy the extra \$2” – a reference to the fact that Chipotle charges extra for guacamole, whereas the restaurant chain Qdoba does not.

The location manager and an area manager called Kennedy into the restaurant office, provided him a copy of Chipotle’s social media policy, and asked him to delete the tweets, to which Kennedy agreed. Later, Kennedy circulated a petition alleging that Chipotle was denying breaks to its employees. The location manager asked him to stop circulating the petition, but Kennedy refused to do so unless he was fired. Chipotle subsequently fired Kennedy for insubordination, and Kennedy sued, with the assistance of the Pennsylvania

Workers Organizing Committee, an element of the Fast Food Workers Committee. It remains unknown whether Kennedy was an agent of these entities.

What is certain is that the NLRB found that Chipotle wrongfully terminated Kennedy in violation of Section 8(a)(1) of the NLRA, by preventing proper use of the petition. Penalties included an order that Kennedy be re-hired. That decision was not surprising, but there were other matters, relevant to SAM members which were also considered by the NLRB, including findings that the following elements of Chipotle’s policy were unlawful:

1. A social media policy that prohibited “false” and “misleading” social media posts, on the basis that “an employer may not prohibit employee postings that are merely false or misleading . . . it must be shown that the employee had a malicious motive,” as well as the provision of the policy prohibiting the disclosure of “confidential” information, where the term “confidential” was vague and undefined;
2. A policy prohibiting “improper use” of Chipotle’s name or trademarks, on the basis that “employees would reasonably interpret any non-work-related use of [Chipotle’s] name to be improper”;
3. An “ethical communication” policy that “prohibit[ed] exaggeration, guesswork and derogatory characterizations of people and their motives,” on the basis that it could be read to prohibit criticism of managerial decisions.

SAM’S CONTRACT LANGUAGE SEMINAR

April 11, 2019

Park Central 7 - Education Center

11:00 a.m. - 4:00 p.m.

Members: \$50

Non-Members: \$80

Subcontractors are often asked to sign contracts that can be later used as cudgels to beat the profit out of a project. Learn where to look for the hidden clauses that could be used to deny you your rights or cut into your profit. Spike Cutler will guide us through the traps that create an uneven playing field. Find out what clauses really mean, and what you can do to arrive at a fair and equitable contract.

Plan to attend even if you attended last year. Every year brings new information.

GUACAMOLE SNOW DAYS TWEET ALL ABOUT IT , CONT.



Brian Benitez
Park Central 7
12750 Merit Drive
Suite 1450
Dallas, Texas 75251
214.219.0800

WHAT TO DO?

The easy answer is to Automate. Embrace the Age of the Machines.

But if you are not yet ready for the Robot Revolution, then take heart that employers still retain some capacity to enforce communication and social media policies protecting trade secrets and other sensitive data, such as personally identifiable information, along with those prohibiting threats, etc. On the other hand, the federal agencies will no doubt continue to restrict an employer's freedom to enforce communication and social media policies.

For now, there remain two touchstones for determining whether a communication policy remains enforceable: (i) whether there is any way a federal agency can rationalize a finding that the complained-of communication relates to wages, hours, or working conditions; (ii) whether there is any way a federal agency can rationalize that the complained-of employee communication is "concerted activity" (meaning taken in concert with others, but even the action of a single employee can be considered "concerted" if the agency finds that the employee consulted co-workers before acting, or acts on behalf of others). If the answer to either of these questions is "yes," then the answer to whether you can enforce your policy is probably "no."

Nonetheless, there remain three prudent steps you can take to protect your company in light of this, and similar decisions. First, review your communication / social media policies for any broad-brush prohibitions, and replace them with narrowly-tailored restrictions. Second, re-read your policies to ensure that any restrictions closely relate with legitimate business interests. Third, ensure that the language of your relevant policies make it clear to a "reasonable employee" that your policy is not intended to prohibit speech on protected matters. "Reasonable employee" is a legal standard essentially meaning an average person similarly situated to the employee.

A policy could be found to improperly restrict protected speech if it contains references to subjective standards, so don't use language like "employees may not divulge confidential information." Among other things, prohibiting employees from discussing salary (common use for this

language) has not been a thing for a long time, and the NLRB will not burden an employee with knowing what is "confidential." Don't condition employee communications with requirements for things like "accuracy," or require that employees "use their head." The NLRB will not uphold any policy dependent on such standards, because they do not provide clarity to the average employee with regard to what is prohibited and what is expected.

Don't say "it would be unfortunate for our company, and everyone who depends on its success, if you divulged the recipe for the secret sauce." Instead, say "The recipe to the secret sauce is protected trade information and intellectual property owned by the Company, and which is vital to the success of the Company, and which may only be used, disseminated, or otherwise discussed with written permission from [a specific person or job title]. Without such express written permission, you are prohibited from revealing or discussing the recipe to the secret sauce, or any element thereof, without any regard to the time, place, and nature of any such communication. The Company will vigorously prosecute any violation of this policy to the fullest extent of the law."

Policies more focused on comportment, rather than content, will likely remain enforceable on a case-by-case basis, but the touchstones will continue to be protected speech and concerted activity. Firing someone for communicating "my boss is a jerk because he shorted my pay" is going to be penalized because it relates to protected speech. Firing someone for saying "I talked to Jim and Sally, and they believe their pay was shorted" will also be penalized, because it is concerted activity. Firing someone for saying "my boss is a jerk" may be OK. Firing someone for saying "my boss is a jerk and I am going to stab him with a fork because he shorted my pay" is probably OK.

CONGRATULATIONS

ANDERSON PAVING

The Women's Business Council – Southwest (WBCS), is honored to name Anderson Asphalt and Concrete Paving the Women's Business Enterprise (WBE) of the Year for the 5 to 20 million dollars in revenue category. This award recognizes a woman-owned business that exemplifies outstanding business acumen, industry leadership, community service, and a commitment to doing business with fellow WBEs. The 2019 WBCS award winners were unveiled at the annual Parade of Stars Awards Gala on January 31st in Dallas, Texas.

MEMBER SPOTLIGHT: INDEPENDENT INSURANCE GROUP

This month's Member Spotlight is Independent Insurance Group, also known as IIGI to some of our members. Ricky Locke has attended SAM meetings for many years. Recently Eric Hernandez has become active in SAM for IIGI. You may be more familiar with his alias Mr. Bingo. IIGI has been a loyal sponsor for SAM for several years, and I am certain a good part of our membership growth is attributed to their involvement. Ricky answered a few questions for me so that you can learn more about Independent Insurance Group and one of its founders.

When was Independent Insurance Group established? 1993

What work does IIGI primarily focus on? Our focus is commercial insurance, and our specialization is trade contractors. Approximately 75% of our business is with trade contractors or businesses that support construction. Most of our contractors are in the commercial arena as opposed to residential.

Do you take clients outside of the DFW region? Our primary market is the DFW area, but we have accounts in most major cities now and some out of state as a result of referrals.

What type of insurance coverage/packages do you specialize in? Our primary focus is insurance designed to protect contractors and that can encompass many coverages. As the work in construction changes, for example, the use of technology in construction, we are constantly seeking new products to help protect the contractor where they feel a transfer of risk to an insurance carrier is a good business decision.

How did you get started in the insurance industry? I was working with an employment agency that sent me on a job interview with an insurance company when I graduated from college. It was as a claim's adjuster. I loved the work, getting to go out and meet various businesses and understand their operations while investigating claims. I did that work for 9 years and ended up as a teacher, surprise, of new claims adjusters. I then had the opportunity to go into commercial sales with that carrier. In 1982 I moved my family to DFW and began working as an independent agent.



What are some of your hobbies? I love to travel, and I've been fortunate that my wife and I have made several wonderful trips. One that stands out was a trip to Scotland where my wife and I ate dinner at a castle while we were dressed up in local costumes. I actually wore a kilt! My favorite place to visit is Kauai. We try to go every 3 or 4 years, and we are planning to return later this year. It is a place of pure relaxation. When I am not traveling, I enjoy reading, golfing, and weight lifting.

I also enjoy start-up businesses. Over my career, I have started 7 successful businesses and 1 business that did not make it.

Finally, I enjoy teaching and helping others learn. I've published several articles and done numerous seminars. In fact, I was a guest speaker at the National Subcontractors Alliance a few years back when they met in Tampa, Florida.

How long have you been involved with SAM? I was introduced to SAM as a guest speaker. It was a dark and rainy night and only 5 people showed up for the event. I could not tell you the year but suffice to say, it was a long time ago. That is when I first met Spike, and that has developed into a long and wonderful friendship.

What do you enjoy most about SAM? Of the many associations I have been involved with, SAM has been the friendliest. The casual atmosphere at SAM creates a terrific opportunity to not only gain knowledge useful to the industry but to meet and get to know people in the construction trades.

What more would you like to get out of SAM? I think SAM is on a great path. It is growing and yet maintains its original character. Personally, I think SAM members need to be more involved in the politics of construction. If you are not sitting at the table of politics, then you are often on the menu. Trade contractors have been slow to get involved and it is evident in the way the current laws favor owners, lenders, and GC's. Over the last 15 years some great changes have come about, but there is so much left to do. I do not see a sense of urgency in this area, and I fear that future changes will take longer unless more contractors get involved.

**INDEPENDENT
INSURANCE
GROUP**

STRENGTH | STABILITY | BALANCE

3030 LBJ Freeway
Suite 1300
Dallas, Texas 75234
972.231.8277

Send us news and pictures for the Punch List!

execdir@sam-dfw.org

WHY OSHA 10 CONSTRUCTION OUTREACH TRAINING?

Our main workplace safety and health law is the Occupational Safety and Health Act of 1970. Since 1970 OSHA has worked to reduce workplace injuries and fatalities through training and safety standards. Compliance with OSHA standards can not only help prevent needless workplace tragedies from accidents, but also help minimize the number of injury related employees' absences, keep workers' compensation and other insurance costs to a minimum, and promote higher productivity from employees who can feel secure that the company is looking out for their safety and can thus concentrate on doing their job well.

A myth about OSHA is that the regulations are too complex to understand. Although the regulations are numerous and occasionally very comprehensive and detailed, almost all of them stem directly from common sense, best practices, and what experienced and prudent employees would do in their jobs anyway.

Workers who fall under the definition of "construction worker" must receive training about certain job-specific safety concerns, such as general safety and health provisions, personal protective equipment and other topics as defined by OSHA standards. OSHA created the Outreach training program by providing access to training by OSHA Authorized Trainers. Outreach training, along with specific on-site instruction by the employer, will help employers meet many of the required training provisions under OSHA standards. Although some jobsite and employers require OSHA certification, it is important to understand that Outreach

training is not specifically required by OSHA; as with all other OSHA training courses, it is a voluntary program. Employers are responsible for providing additional training on specific job hazards and that their employees receive appropriate training on recognition, avoidance, abatement, and prevention of workplace hazards.

The OSHA 10 Hour Construction Outreach Safety training offered thru SAM, March 29-30, is designed for construction workers as an ideal orientation to those who are new to the industry and as a reminder to those who have been working in the industry to the hazards associated with the work. All participants successfully completing the course will be issued a Certificate of Completion at the end of the course and an official Department of Labor (DOL) OSHA card, also known as an OSHA 10 card, will be sent within 2-3 weeks.

Morris Jett, Jett Services

OSHA 10 CERTIFICATION CLASS

March 29, 5:30 - 8:00 p.m.

&

March 30, 8:00 a.m. - 4:00 p.m.

More and more General Contractors are requiring their subs to have an OSHA 10 Certification. Join us on March 29-30 to obtain this certification for your employees. The class is limited to 40 participants.

Certification, Lunch, and Snacks - \$85

OUR ASSOCIATION LEADERSHIP

Board of Directors

Gary Ardis

Anderson Asphalt & Concrete Paving

Doug Cook

City Wide Mechanical

Paul Holden

Facility Construction Services

Rocky Epps

Complete Landsculpture

MaryEllen Evans

Trade Management

George McGraw

Plains Capital Bank

Billy Neu

Neuco & Associates

Don Weempe

Master Construction and Engineering

Selena Zarate

Groves Electric

Executive Director

Carrie Edomm

Committee Chairs

BPI: Gary Ardis

Membership: MaryEllen Evans

Programs: Selena Zarate

TCA Representative: Paul Holden

Legal Counsel

Spike Cutler

Cutler-Smith, PC

scutler@cutler-smith.com

If you're not a member of SAM, contact us for an application!

execdir@sam-dfw.org



Subcontractors Association of the Metroplex
P.O. Box 210261 | Bedford, Texas 76095
972.482.6677

