

## Policy Statement of the Federal Trade Commission on Franchisors' Use of Contract Provisions, Including Non-Disparagement, Goodwill, and Confidentiality Clauses<sup>1</sup>

### I. Introduction

The Federal Trade Commission (“Commission” or “FTC”) is charged with protecting franchisees from unfair methods of competition and unfair and deceptive practices.<sup>2</sup> Communications with franchisees are essential for the Commission to accomplish this statutory mandate. The FTC is concerned that franchisees are reluctant or unwilling to voluntarily discuss or file reports about their experiences with franchisors, even if the franchisees believe a law violation has occurred.<sup>3</sup> The Commission is issuing this Policy Statement to make clear its view that provisions included in franchise agreements or other contractual documents between franchisors and franchisees<sup>4</sup> may not restrict franchisees’ communications with the Commission or any other state or federal law enforcer or regulator about potential law violations.<sup>5</sup>

In 2022, after hearing that franchisees may have had difficulty filing reports using the Commission’s [reportfraud.ftc.gov](https://reportfraud.ftc.gov) portal, the Commission streamlined the reporting process.<sup>6</sup> Since then, the number of reports has increased but the FTC remains concerned that some franchisees continue to report that they feel chilled or even contractually prohibited from

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<sup>1</sup>This Policy Statement does not confer any rights on any person and does not operate to bind the FTC or the public. In any enforcement action, the Commission must prove the challenged act or practice violates one or more existing statutory or regulatory requirements. In addition, this Policy Statement does not preempt federal, state, or local laws. Compliance with those laws, however, will not necessarily preclude Commission law enforcement action under the FTC Act or other statutes.

<sup>2</sup>15 U.S.C. 41-58, as amended; Franchise Rule, 16 C.F.R. pt. 436. The Franchise Rule is a pre-sale disclosure rule, which requires franchisors to provide prospective franchisees with material information to help prospective franchisees determine whether a franchise deal is in his or her best interest. 72 FR 15444 (Mar. 30, 2007).

<sup>3</sup> This concern is not unique to franchising. *See, e.g.*, Contracts that Impede Bureau of Competition Investigations, FED. TRADE COMM’N (June 15, 2023), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/Formal-Analysis.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/Formal-Analysis.pdf).

<sup>4</sup> Typically, a written contractual agreement – often called a “franchise agreement” – is entered into between a franchisee and franchisor. (That agreement also typically references, incorporates, or attaches the franchisor’s Operating Manual.) Once signed, the franchise agreement remains in effect for a specified period of time stated in the agreement. As part of the Franchise Disclosure Document required by the FTC’s Franchise Rule, franchisors must provide prospective franchisees with copies of all contracts, including the franchise agreement, at least fourteen days before the prospect signs any contract or makes any payment to the franchisor or an affiliate.

<sup>5</sup> The Commission does not intend to provide legal advice to any potential report filers or witnesses and advises anyone with concerns about liability to consult an attorney. The Commission takes no issue with a company’s legitimate interest in protecting its intellectual property rights. The Commission notes that it will continue to analyze, on a case-by-case basis, whether contract provisions, such as confidentiality clauses, are unfair or deceptive under Section 5.

<sup>6</sup> *ReportFraud*, FED. TRADE COMM’N, <https://reportfraud.ftc.gov> (last visited June 6, 2024); Lesley Fair, *Franchise Fundamentals: Reducing the risks – and reporting if things go awry*, FED. TRADE COMM’N (Sept. 5, 2023), <https://consumer.ftc.gov/consumer-alerts/2023/09/franchise-fundamentals-reducing-risks-and-reporting-if-things-go-awry> (describing how to file a report via [reportfraud.ftc.gov](https://reportfraud.ftc.gov)).

reporting to the FTC.<sup>7</sup> Franchisee reports and voluntary interviews are a critical part of FTC investigations. If franchisees are unwilling or unable to file reports and discuss their experiences, the FTC's ability to protect franchisees is weakened. Furthermore, the competitive and consumer protection benefits that flow from the franchise business model are undermined.

## II. Responses to Request for Information

For several years, the Commission has been concerned that current and former franchisees are reluctant to file reports or speak with Commission staff about their experiences with particular franchises. Franchisee advocates have stated that franchisees fear retribution for speaking out against the franchisor.<sup>8</sup> Franchisees may even be worried about speaking with regulators anonymously.<sup>9</sup>

In 2023, the Commission issued a Request for Information (“RFI”) related to franchise agreements and franchisor business practices in order to explore the ways in which franchisors may exert control over franchisees and their workers, including the effect certain contractual provisions have on franchisees’ ability to file reports with regulators.<sup>10</sup> The RFI sought public comment on several topics, including whether non-disparagement, goodwill, and similar clauses inhibit franchisees from filing reports with regulators or from providing information to prospective franchisees or third parties about their experience with a franchise system.<sup>11</sup>

The Commission posted approximately 2,200 public comments in response to the RFI.<sup>12</sup> Among the commenters who addressed the question of whether such clauses impact franchisees’ ability to speak with regulators, some expressed concerns that such clauses are likely to impede franchisees from speaking with the government.<sup>13</sup> Some of those commenters filed their

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<sup>7</sup> See *infra* n.13 (comments filed in response to the Request for Information); FED. TRADE COMM’N, CONSUMER SENTINEL NETWORK BOOK 2023, [https://www.ftc.gov/system/files/ftc\\_gov/pdf/CSN-Annual-Data-Book-2023.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/CSN-Annual-Data-Book-2023.pdf). Of the 110,504 reports related to business and job opportunities, 3,232 pertained to franchises.

<sup>8</sup> See e.g. *Federal Trade Commission: Actions Needed to Improve Education Efforts and Awareness of Complaint Process for Franchise Owners*, GOVERNMENT ACCOUNTABILITY OFFICE (Apr. 5, 2023), <https://www.gao.gov/assets/gao-23-105338.pdf>.

<sup>9</sup> See *infra* n.13.

<sup>10</sup> Fed. Trade Comm’n, Solicitation for Public Comments on Provisions of Franchise Agreements and Franchisor Business Practices, [https://www.ftc.gov/system/files/ftc\\_gov/pdf/Franchise-RFI.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/Franchise-RFI.pdf).

<sup>11</sup> *Id.*

<sup>12</sup> The Commission received 5,291 comments. Of those, 2,216 were publicly posted on the docket; the remainder were nonresponsive.

<sup>13</sup> FTC-2023-0026-0042, filed by Anonymous (“Even submitting comments such as this one, to a governmental agency, is fraught due to the non-disparag[e]ment clauses included in all Franchise Agreements.”); FTC-2023-0026-0049, filed by Anonymous (“Furthermore, the non-disparagement and goodwill clauses are concerning. Franchisors often enforce these clauses to prevent franchisees from filing complaints about unfair or deceptive conduct. This not only harms franchisees but also consumers and workers.”); FTC-2023-0026-0167, filed by Caroline Fichter (“The mere presence of a non-disparagement clause in the franchise agreement has an immediate and devastating effect on the franchisee’s behavior. It prevents them from providing honest feedback to prospective franchisees and from reporting unfair and deceptive practices to federal or state authorities.”); FTC-2023-0026-1034, filed by Coalition of Franchisee Associations (“Non-disparagement clauses contained in the FA further prohibit franchisees from

comments anonymously.<sup>14</sup> At least one commenter stated that a franchisor threatened to terminate franchisees who spoke with regulators.<sup>15</sup> Some noted a fear of retaliation for filing reports or otherwise communicating with regulators about their experience.<sup>16</sup> Commenters disagreed about the extent to which franchisors use non-disparagement clauses, but agreed that confidentiality clauses are often included in settlement agreements and that goodwill clauses are very common. For example, one commenter noted that, while historically common in settlement agreements, non-disparagement and goodwill clauses are routinely included in franchise agreements and have expanded dramatically over the past several years.<sup>17</sup> Others noted that, in their experience, specific non-disparagement clauses are uncommon, but clauses that prohibit the franchisee from doing anything that reflects negatively on the franchisor's goodwill are very

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discussing their concerns with prospective franchisees or anyone at all - including government agencies.”); FTC-2023-0026-1093, filed by Maryland State Bar Association (“[W]e encourage the FTC to make a clear distinction between clauses that prohibit disparaging the franchisor or the brand in consumer-facing public forums, as opposed to clauses that inhibit franchisee communications with prospective franchisees, their fellow active franchisees, or with governmental agencies or in courts with regard to the franchise relationship.”); FTC-2023-0026-1557, filed by Anonymous (“Non-disparagement, goodwill or similar clauses, by their very nature, ABSOLUTELY inhibit franchisees from filing complaints with state, local, or federal agencies related to unfair or deceptive conduct by franchisors. As a franchisee, the fear of retribution and legal action is too great to justify risking a complaint that can be tied back to them.”); FTC-2023-0026-2104, filed by North American Securities Administrators Association (“Nondisparagement and goodwill clauses are also ubiquitous in franchising. Those agreements that limit franchisees’ ability to complain to government agencies are of particular concern. One such agreement states that the franchisee ‘must covenant never to commence any action or proceeding against [the franchisor], file any complaint with any regulatory authority concerning [the franchisor] or otherwise assert any claim against [the franchisor].’”); FTC-2023-0026-2062, filed by National Owners Association (“The nondisparagement clause, paired with systemic threats, intimidation, and retaliation, significantly inhibits franchisees from filing complaints with state, local, or federal agencies related to unfair or deceptive conduct by franchisors, or even from speaking publicly or participating in franchisee-only organizations designed to protect and pursue franchisee interests.”).

<sup>14</sup> FTC-2023-0026-0042, filed by Anonymous; FTC-2023-0026-0049, filed by Anonymous; FTC-2023-0026-1557, filed by Anonymous.

<sup>15</sup> FTC-2023-0026-1952, filed by Thomas Ayres, Warner, Federico & Ryan LLP (“The franchisor has threatened to terminate franchisees that sought clarification from regulators on new policies and that were quoted in trade publications because such actions falsely stating [sic] that the comments reflected materially and unfavorably upon the operation and reputation of the system and disclosed sensitive and confidential information.”).

<sup>16</sup> FTC-2023-0026-2062, filed by National Owners Association; FTC-2023-0026-2123, filed by North American Subway Association of Franchisees (“Franchisees, anecdotally, are and have been fearful of retribution for launching complaints to proper authorities.”); FTC-2023-0026-2170, filed by American Association of Franchisees and Dealers (“Many franchise agreements now consider anything said negatively about the brand, no matter who it is said to, a violation of the non-disparagement clause. This includes between franchisees that are part of a chapter or franchisee association or a franchisee post on their private discussion groups. Often any negative discussion is followed by a threatening legal letter to the franchisee which quickly silences them. But it often does not stop there; increased inspections follow and amazingly, these franchisees are found in default for another reason. The retaliation is obvious, but often hard to prove, especially since in many businesses it is not that hard to find some level of default.”); FTC-2023-0026-1943, filed by Independent Association of Home Instead Franchisees, Inc (“We are aware of at least one case in our network where a franchisee was sanctioned for communications with government regulatory authority but will not provide additional details for fear of further retaliation against the franchisee.”)

<sup>17</sup> FTC-2023-0026-1941, filed by Bundy & Fichter; *see also* FTC-2023-0026-2104, filed by North American Securities Administrators Association (“Non-disparagement and goodwill clauses are also ubiquitous in franchising”).

common.<sup>18</sup> A few commenters stated that, while franchise agreements may include non-disparagement or goodwill clauses, the franchisors either do not enforce them or such provisions do not inhibit franchisees' ability to communicate with regulators.<sup>19</sup>

### III. Analysis

The Commission has seen contract provisions that may restrict current and former franchisees from speaking about potential law violations. These provisions may take the form of non-disparagement clauses ("franchisee shall not disparage the brand in any way"), confidentiality or non-disclosure clauses ("franchisee is prohibited from sharing *any* information about the franchise or their experience"), goodwill clauses ("franchisee shall not engage in any conduct that may tarnish the goodwill of the brand"), and similar clauses. They are sometimes included in franchise agreements or may be entered into post-sale, including at termination of the relationship.<sup>20</sup>

Generally, case law establishes that clauses that impair or prohibit free communication about potential law violations with an administrative agency acting within its statutory mandate are void and unenforceable. For example, courts have struck down contractual clauses that otherwise prevent a government agency from seeking and obtaining complete, candid information in

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<sup>18</sup> FTC-2023-0026-1093, filed by Maryland State Bar Association ("It is our experience that these clauses are not usually present in Franchise Agreements, other than a general clause that the Franchisee does not do anything that can reflect negatively on the Franchisor's goodwill."); FTC-2023-0026-1936, filed by Lathrop GPM, LLP ("We are aware of very few instances where non-disparagement provisions are used in standard franchise agreements, with such provisions appearing in approximately 6% of the FDDs we surveyed. Such clauses are generally used in termination, release, and settlement agreements to resolve disputes and prevent adverse actions by both parties. It is not clear what is meant in the RFI by "goodwill" clauses. If this is intended to mean that the trademark goodwill arising from the franchisee's use of the franchised brand inures to the benefit of the franchisor, then such clauses are likely universal in franchising...").

<sup>19</sup> FTC-2023-0026-1724, filed by Wyndham Hotels & Resorts ("The existence of the goodwill provision in our franchise agreements does not inhibit franchisees from pursuing claims they feel they may have relating to unfair or deceptive conduct or from providing non-confidential, non-trade secret information to prospective or current franchisees or third parties."); FTC-2023-0026-2152, filed by International Franchise Association ("IFA believes that franchisees generally support such clauses and that the clauses do not inhibit franchisees from sharing information with other franchisees, prospective franchisees or with regulators."); FTC-2023-0026-2129, filed by Domino's Pizza, Inc. ("The SFA contains a non-disclosure provision which is intended, in part, to prohibit franchisees from disclosing non-public information about Domino's or the Domino's system to others outside the Domino's system, including financial analysts, or from disparaging Domino's or the Domino's system in the manner that would harm the Domino's brand. The provision is not intended to prohibit franchisees from communicating with other franchisees, prospective franchisees, or federal, state, or local government agencies, nor has Domino's sought to enforce this provision to prevent any such communication.").

<sup>20</sup> The Franchise Rule requires franchisors to disclose the use of confidentiality clauses, and nothing in this Statement alters that requirement. *See* 16 C.F.R. § 436.5(t)(7). To the extent, however, such clauses, as drafted, impair or prohibit the free communication about potential law violations with a government agency acting within its statutory mandate, the Commission views such clauses as void and unenforceable and in violation of Section 5 of the FTC Act. To the extent such clauses narrowly articulate a company's legitimate interest in protecting its intellectual property rights, however, they raise no concern under this Statement. *See supra* n.5.

furtherance of a statutory mandate.<sup>21</sup> Such clauses cannot operate to inhibit a franchisee from reporting potential law violations to the government.

Similarly, the FTC has challenged companies' use of tactics, including non-disparagement clauses, that discourage purchasers from speaking or publishing truthful or non-defamatory negative comments or reviews as unfair practices under the FTC Act. For example, in *FTC v. Roca Labs, Inc.*, the court found on summary judgment that Defendants' use of gag clauses to prohibit purchasers from speaking or publishing truthful or non-defamatory negative comments or reviews about the Defendants, their products, or their employees was an unfair practice in violation of Section 5 of the FTC Act.<sup>22</sup>

A practice is unfair if it causes or is likely to cause substantial consumer injury, which consumers cannot reasonably avoid, and which is not outweighed by benefits to consumers or competition.<sup>23</sup> Clauses that prohibit a franchisee from reporting potential law violations to the government are unfair. Similarly, implicit or explicit threats of retaliation, by legal action or otherwise, against a franchisee for reporting potential law violations to the government are unfair.

By suppressing reports of potential legal violations by franchisors to the government, franchisors impede the flow of franchisee reports and voluntary interviews that are critical to government

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<sup>21</sup> See, e.g., *EEOC v. Astra USA*, 94 F.3d 738, 744–45 (1st Cir. 1996) (holding that employers may not use confidentiality agreements to interfere with or restrict law enforcement agencies' ability to interview their employees); *FTC v. AMG Services, Inc.*, No. 2:12-cv-00536-GMN-VCF, 2013 WL 12320929, at \*2 (D. Nev. Aug. 20, 2013) (“[T]he court finds that the confidentiality agreements at issue before the court are unenforceable to prohibit former employees from willingly cooperating with the FTC.”); *Sparks v. Seltzer*, No. 05-CV-1061 (NG) (KAM), 2006 WL 2358157, at \*4 (E.D.N.Y. Aug. 14, 2006) (“Indeed, agreements restricting former employee revelation of events in the workplace which are not privileged but may involve violations of federal law have the effect of hindering implementation of the Congressionally mandated duty to enforce the provisions of federal statutes.”) (internal quotations and citation omitted); *EEOC v. Int’l Profit Assocs.*, No. 01 C 4427, 2003 U.S. Dist. LEXIS 6761 at \*6 (N.D. Ill. Apr. 21, 2003) (“[A]ny contractual impairment of present or former [] employees’ ability to communicate freely with the EEOC is void as against public policy.”); *Hoffman v. Sbarro, Inc.*, No. 97 CIV. 4484(SS), 1997 WL 736703, at \*1 (S.D.N.Y. Nov. 26, 1997) (“To the extent that the [nondisclosure] agreement might be construed as requiring an employee to withhold evidence relevant to litigation designed to enforce federal statutory rights, it is void.”).

<sup>22</sup> *FTC v. Roca Labs, Inc.*, 345 F. Supp. 3d 1375, 1393-96 (M.D. Fla. 2018); see also *FTC v. World Patent Mktg., Inc.*, No. 17-CV-20848-DPG (S.D. Fla. May 25, 2017) (in entering a preliminary injunction, court found that “by intimidating, threatening, and coercing consumers from reporting Defendants’ misrepresentations, Defendants are able to hinder competition and harm legitimate competitors in the marketplace.”), 2017 WL 3508639, Preliminary Injunction entered August 16, 2017; *id.*, Compl. ¶ 36 (alleging that “if consumers do complain to the BBB or law enforcement about Defendants’ business practices, Defendants and their lawyers often make legal threats against the complainants until they retract their complaints.”).

The Consumer Review Fairness Act (CRFA), 15 U.S.C. § 45b, makes it illegal for companies to include standardized contract provisions that threaten or penalize people for posting honest reviews. Regardless of whether the franchisor/franchisee relationship would fall outside of the CRFA, the Commission is of the view that any contract provision that directly or indirectly restricts or chills communications between franchisees and law enforcers or regulators is an unfair or deceptive act or practice, or an unfair method of competition under Section 5 of the FTC Act. To the extent a contract provision chills communications outside of law enforcers or regulators, the Commission will evaluate its legality on a case-by-case basis.

<sup>23</sup> 15 U.S.C. § 45(n); see also Federal Trade Commission Policy Statement on Unfairness, appended to *Int’l. Harvester Co.*, 104 F.T.C. 949, 1070-76 (1984).

investigations.<sup>24</sup> Suppressing such information undermines the government’s ability to learn about practices that violate the Franchise Rule, the FTC Act, and other laws. It also impedes the ability of franchisees to demand lawful conduct from the franchisor by exposing such conduct to the government. These limitations undermine the government’s ability to police the marketplace and the ability of prospective and existing franchisees to protect themselves, and are thus likely to cause substantial harm. For example, prospective franchisees may not learn about deceptive practices before they invest. Such harm, resulting from the franchisor’s contract provisions or communications, is not reasonably avoidable. Most prospective and existing franchisees would need to seek legal counsel on such contractual terms to understand that they are illegal, thus effectively chilling truthful communication with government agencies.<sup>25</sup> No benefits flow from the suppression of truthful information to the government. Indeed, the competitive and consumer protection benefits that flow from the franchise business model are compromised.<sup>26</sup>

Other federal agencies, including the Securities and Exchange Commission, the National Labor Relations Board, the Federal Aviation Administration, and the National Highway Traffic Safety Administration, have determined that such contractual provisions can impede agencies’ ability to conduct lawful investigations and, as a result, run contrary to public policy.<sup>27</sup>

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<sup>24</sup> See also *supra* n.22.

<sup>25</sup> *C.f.* Complaint, *United States v. Square One Dev. Grp.*, (E.D. Mo. Nov. 21, 2022) (No. 4:22-cv-01243) (complaint alleged unfairness where defendants induced consumers into signing contracts for timeshare exit services containing non-negotiable and unenforceable terms). See also Complaint ¶¶ 30-34, 56-58, *United States v. Asset Acceptance Corp.* (M.D. Fla. Jan. 30, 2012) (No. 8:12-cv-182-T-27-EAJ), <https://www.ftc.gov/sites/default/files/documents/cases/2012/01/120130assetcmpt.pdf> (alleging deception where defendant failed to disclose in debt collection activities that it cannot require that consumers pay debts beyond the statute of limitations).

<sup>26</sup> To be clear, this Statement is focused on clauses that restrict or inhibit franchisees from discussing their experience with law enforcers and regulators. The concern is that these types of contract provisions are obstructing the Commission’s statutory mandate to protect consumers, including franchisees, from unfair methods of competition and unfair or deceptive acts or practices. This issue is distinct from the potential harm analyzed by the Commission as part of the 2007 rulemaking proceeding for the Franchise Rule focused on whether such clauses would inhibit prospective franchisees’ ability to conduct due diligence regarding particular franchise opportunities. 72 Fed. Reg. 15444, 15454-55, 15504-07 (Mar. 30, 2007). Notably, in the amended Franchise Rule, the Commission limited the definition of “confidentiality clause” in a way that it would apply only to restricted speech to *prospective franchisees* and not to regulators. 16 C.F.R. § 436.1(c). At least one commenter noted in the rulemaking that the use of confidentiality clauses may restrict franchisees’ willingness to talk to regulators, but the Commission’s analysis focused on the harm such clauses would have on prospective franchisees. 72 Fed. Reg. at 15505 (“In addition, one franchisee representative, contended that the harm flowing from confidentiality provisions goes beyond individual franchise sales, noting that such provisions intimidate franchisees into not testifying before legislative committees and public agencies, such as the Federal Trade Commission.”).

<sup>27</sup> The U.S. Securities and Exchange Commission adopted Rule 21F-17, which prohibits enforcing or threatening to enforce a confidentiality agreement that would impede communications with the agency. 17 C.F.R. § 240.21F-17. The National Highway Transportation Safety Administration has stated that it is unlawful to use confidentiality and non-disclosure provisions to impede oversight and enforcement-related regulatory obligations. See, e.g., Neal Boudette, *Tesla Model S Suspension Failures Under Scrutiny by Safety Agency*, N.Y. TIMES, June 9, 2016, <https://www.nytimes.com/2016/06/10/business/tesla-model-s-nhtsa-suspension-failure.html>; see also Fed. Aviation Admin., *Impact of Non-Disclosure and Confidentiality Covenants on Agency Investigations*, [https://www.faa.gov/sites/aa.gov/files/about/office\\_org/headquarters\\_offices/agc/Non\\_Disclosure\\_Guidance.pdf](https://www.faa.gov/sites/aa.gov/files/about/office_org/headquarters_offices/agc/Non_Disclosure_Guidance.pdf); Complaint and Consent Decree, *EEOC v. Baker & Taylor, Inc.*, No. 13-cv-03729 (N.D. Ill. May 20, 2013), ECF

#### IV. Conclusion

The FTC takes seriously its statutory obligation to enforce the FTC Act. Whether the contract includes a non-disparagement, non-disclosure, goodwill, or similar clause, the caselaw is clear that such clauses cannot operate to inhibit a franchisee from reporting potential law violations to the government. Clauses prohibiting franchisees from reporting potential law violations to the government are considered unfair and unenforceable. Further, the use of implicit or explicit threats to sue or otherwise retaliate against a franchisee who reports potential law violations to the government is also an unfair practice.

For purposes of this policy statement, it is immaterial when the contract containing the provision was entered, and it is immaterial whether the clause is in a binding contract or any other document. In addition, the principles set forth in this policy statement apply to any communications invoking or referencing the types of clauses described in this statement. Accordingly, any such communications must be consistent with this policy statement.

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Nos. 1, 14 (requiring that employee agreements include language protecting the right to communicate with the EEOC and comparable regulatory agencies).