National Labor Relations Board General Counsel Issues Guidance on Employee Handbook Rules

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Issues Guidance on Employee Handbook Rules

On March 18, 2015, the NLRB Office of General Counsel issued comprehensive guidance concerning employee handbook rules which, although "well-intentioned," would inhibit employees from engaging in protected activity under the National Labor Relations Act ("NLRA" or "the Act"). The General Counsel's comprehensive report reminds employers that under the Board's decision in *Lutheran Heritage Village*, 343 NLRB 646 (2004), the mere maintenance of a work rule may violate Section 8(1)(a)[1] of the Act if the rule has a "chilling effect" on employee's Section 7 activity.[2]

Under *Lutheran Heritage Village*, a rule will be found unlawful if 1) employees would reasonably construe the rule's language to prohibit Section 7 activity; 2) the rule was promulgated in response to union or other Section 7 activity; or 3) the rule was actually applied to restrict the exercise of Section 7 rights.

The General Counsel's recent guidance outlines examples of employee rules found lawful and unlawful under the *Lutheran Heritage Village* test in the context of confidentiality, employee conduct, restrictions on leaving work, and other policies.

Confidentiality Policies

Under Section 7 of the Act, employees have the right to discuss wages, hours, and other terms and conditions of employment with other employees and non-employees. Thus, a confidentiality policy which prohibits employees from discussing these terms or otherwise restricts this right will be found to violate the Act. A confidentiality rule may broadly prohibit the disclosure of "confidential information," provided it does not reference information regarding the terms and conditions of employment. However, employers must be cautious that their rules do not broadly encompass "employee" or "personnel" information.

The Report provides the following examples of confidentiality policies that the Board has determined unlawfully overbroad:

- "Do not discuss customer or employee information outside of work"
- "Employees must not disclose proprietary or confidential information about [Employer], or other associates (if the proprietary or confidential information relating to [Employer's] associates was obtained in violation of law or lawful company policy"

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[1]Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7" of the Act.

[2]Section 7 of the 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 or protection," as well as the right "to refrain from any or all such activities."

- "Employees are prohibited from disclosing details about [Employer]"
- "Discuss work matters only with other [Employer] employees who have a specific business reason to know or have access to such information . . . Do not discuss work matters in public places"

The Report provides the following examples of confidentiality policies that the Board has determined are facially lawful because they do not contain language which can reasonably be construed to prohibit Section 7 communications:

- Employees are not permitted to "disclose business 'secrets' or other confidential information"
- "Misuse or unauthorized disclosure of confidential information not otherwise available to persons or firms outside of [Employer] is cause for disciplinary action . . ."
- "Do not disclose confidential financial data, or other non-public proprietary company information . . ."

The Report further notes that even where a confidentiality policy contains overly broad language, a rule may be found lawful if, when viewed in context, employees would not reasonably construe the language to prohibit Section 7 communications. For example, the Board found a rule prohibiting disclosure of "all information acquired in the course of one's work" to be lawful, where the rule was nested among rules relating to compliance with SEC regulations and state and federal laws. Thus, the Board determined that employees would reasonably understand the rule to prohibit the disclosure of customer credit information, contracts and trade secrets, and not Section 7 communications.

Employee Conduct Policies

Under Section 7 of the Act, employees have the right to criticize or protest their employer's labor practices or treatment of employees. Therefore, rules broadly prohibiting criticism of the employer may be found unlawful under the Act. The Report provides the following examples of Employee Conduct policies that the Board has determined unlawfully overbroad under the Act as to ban protected criticism or protests regarding management, supervisors, or the employer in general:

- "Be respectful to the company, other employees, customers, partners and competitors"
- "Do not make fun of, denigrate, or defame your coworkers, customers, franchisees, suppliers, the company, or our competitors"
- "Disrespectful conduct or insubordination, including but not limited to, refusing to follow orders from a supervisor, will result in discipline"
- "Refrain from any action that would harm persons or property or cause damage to the company's business or reputation"

In contrast, the Report provides the following examples of conduct policies that the Board has determined are lawful, where they simply require employees to be respectful to customers and competitors, but do not mention the company or management:

- "No rudeness or unprofessional behavior toward a customer, or anyone in contact with the company"
- "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"

Restrictions on Leaving Work

Under Section 7 of the Act, Employees are granted the right to go on strike, and employer rules which regulate when employees may leave work are unlawful if employees could reasonably construe them to forbid strike actions and walkouts. The Report provides the following examples of a rule found to be unlawful on this basis:

- "Failure to report for your scheduled shift for more than three consecutive days without prior authorization or 'walking off the job' during a scheduled shift is prohibited"

In contrast, the following rule was determined lawful because it did not include terms such as "work stoppage," or "walking off the job:"

- "Entering or leaving company property without permission may result in discharge"

In addition to the specific rule examples set forth in the Report, the General Counsel further summarized its recent settlement with a large fast food chain to provide further examples of policies which have been found unlawful under the Act.

The Report concisely summarizes the General Counsel's position as to language that is likely to be found unlawful in future proceedings before the Board. Although each unfair labor practice charge is decided on its specific facts, the Report is helpful for employers seeking to draft policies which will withstand review by the General Counsel in future proceedings. Therefore, it is recommended that employers review the Report and consider adjusting policies accordingly.

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