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EMPLOYMENT LAWSCENE ALERT: NLRB GENERAL COUNSEL ISSUES GUIDANCE ON EMPLOYEE HANDBOOKS

On March 18, 2015, the NLRB General Counsel issued a report concerning recent cases that raise significant legal and policy issues regarding employee handbook rules. Recently, the NLRB has been focusing on non-union employer's handbooks and whether they violate Section 7 of the NLRA, which permits employees to discuss wages, hours, and other terms and conditions of employment and to otherwise engage in protected concerted activity. The most clear violation of Section 7 would be a ban on union activity; however, if an employee could reasonably construe a rule or policy to prohibit activities protected by Section 7, the NRLB will find that it is in violation of the law. The report gives specific examples of handbook policies that were found lawful and unlawful and why. The report specifically states that even well-intentioned rules that would inhibit employees from engaging in activities protected by the Act are not allowed under the law. The rules and policies that are most frequently called into question are those covering confidentiality, professionalism, anti-harassment, trademark, photography/recording, and media contact.

Confidentiality policies cannot specifically prohibit employees from discussing the terms and conditions of their employment (e.g., wages, hours, workplace complaints), nor can the policies be reasonably understood to prohibit such discussions. Policies cannot broadly define "employee" or "personnel" information as confidential. However, the NLRB does recognize that employers have a substantial and legitimate interest in maintaining the privacy of certain business information.

Employee conduct policies will run afoul of the NLRA if they prohibit employees from engaging in disrespectful, negative, inappropriate, or rude conduct toward the employer or management absent sufficient clarification or context. Even false or defamatory statements can find protection under Section 7 unless they are "maliciously false." Employers can promulgate blanket rules that require employees to be respectful and professional to clients and competitors because there is a sufficient business interest in that behavior. Employers are also permitted to ban insubordinate behavior. However, employers cannot ban employees from negative or inappropriate discussions with their fellow employees because employees have the right to argue and debate with each other about unions, management, and the terms and conditions of employment, which can sometimes be contentious.

Therefore, anti-harassment rules cannot be overly broad either. Employers cannot ban employees from discussing terms and conditions of employment with third parties, including news media. Although employers may designate who can make official statements to the media on behalf of the company, they cannot ban employees from speaking to third parties on their own behalf or on behalf of other employees.

Although employers have an interest in protecting their intellectual property, the NLRB has taken the stance that rules prohibiting employees' fair use of that property are unlawful. This "fair use" includes using things such as company names and logos on picket signs, leaflets, and other protest material because these are non-commercial uses. According to the report, employees have a Section 7 right to photograph and make recordings in furtherance of their protected concerted activity, including the right to use personal devices to take such pictures and recordings. Therefore, a total ban on photography, recordings, or use of personal devices is overbroad if it can be read to prohibit use during breaks and other non-work time.

Employer rules regulating when employees can leave work are unlawful if employees could reasonably read them as forbidding protected strikes and walkouts, as the right to go on strike is a fundamental Section 7 right. Policies should reflect that leaving their posts for reasons unrelated to protected activity will subject employees to discipline.

Because Section 7 allows employees to engage in activity to improve their terms and conditions of employment, which may be in conflict with the interests of an employer, broad conflict-of-interest policies are unlawful. Employer policies should be limited to legitimate business interests.

The differences between what is lawful and what is not are incredibly nuanced, and the General Counsel's report did not present what could be considered "bright line" rules. The NLRB has stated that it will read rules in context with other rules and not in isolation, which could lead potentially unlawful policies to be held lawful in context. Overall, the emphasis is that rules need to be narrowly tailored and include context and examples in order to steer clear of violating the NLRA.

It should be noted that the General Counsel's report is not law but, instead, represents the current enforcement policy of the NLRB. However, given the NLRB's recent aggressive position relative to enforcing Section 7 rights in non-union workplaces, employers should review their handbooks to determine if any of their rules or policies may run afoul of the NLRB's current set of enforcement policies concerning employee handbooks.