NLRB Continues to Find Common Handbook Policies to be Unlawful

Employee handbooks are an important way for employers to set forth general policies and procedures governing how employees should act in the workplace, among other things. These policies normally include advising employees to act civilly and respectfully toward coworkers and management, to dress appropriately and to keep certain company information confidential.

Over the past several years, however, the National Labor Relations Board ("NLRB" or the "Board"), which generally presides over unionized workforces, has been focusing on non-unionized, private employers and finding basic employment policies to be unlawful.

As a result of the Board's campaign, seemingly innocuous policies have come under scrutiny, in particular those addressing "confidentiality rules, professionalism rules, anti-harassment rules, trademark rules, photography/recording rules, and media contact rules." At one point, the NLRB's Office of General Counsel (OGC) called into question employer "at will" disclaimer policies but has since backed away from that position.

In questioning these handbook policies, the Board has held that these types of policies violate employee rights under the National Labor Relations Act (the "Act"), which precludes employers from preventing employees from engaging in "protected concerted activities." *See also* our article titled, NLRB Takes Aggressive Action on Social Media Use by Non-Union Workforce.

Despite finding that "most employers do not draft their employee handbooks with the object of prohibiting or restricting conduct protected by the [Act]," the OGC nevertheless found in a memorandum, dated March 18, 2015 (the "OGC Memo"), that policies that employees could "reasonably construe" as restricting protected activities were still unlawful. As a result of this broad interpretation of the Act, non-unionized employers are now more vulnerable to an unfair labor practice charge for basic, common sense policies such as:

- ✓ **Confidentiality Policies**. Confidentiality policies exist to protect an employer's confidential information, which can include information about a company's business including their employees. The OGC, however, has construed many of these policies as precluding employees from discussing terms and conditions of employment, such as compensation, hours or workplace complaints, and therefore, has found many such policies to be unlawful. The OGC even found a provision in a handbook stating that the handbook is confidential and cannot be reproduced or transmitted to be unlawful, as it prohibited disclosure to third parties such as union representatives and the Board.

- ✓ **Policies Concerning Employee Conduct Toward Company or Supervisors**. Many handbook policies address employee conduct in the workplace and make clear that employees are to treat each other, management, customers and others with respect. These policies state that certain behavior, such as failing to follow directions, engaging in harm to persons or property, damaging or disparaging the company's reputation or business relationships, or engaging in disrespectful conduct, can all result in disciplinary action up to and including termination. To the extent these policies "ban protected criticism or protests" of supervisors, management or the employer, they are unlawful. The OGC even found that false claims by an employee about the employer could be a protected activity.

- ✓ **Policies Concerning Employee Conduct Toward Coworkers**. As noted above, handbook policies frequently require coworkers to treat each other with respect. Employer policies, however, that ban "negative," "inappropriate" or harassing behavior between coworkers will be found unenforceable if the policy "prohibit[s] vigorous debate or intemperate comments" concerning protected topics. Thus policies directing personnel not to be "insulting, embarrassing, hurtful or abusive" toward coworkers online are unlawful, according to the OGC. Likewise, a policy requiring coworkers to "avoid the use of offensive, derogatory, or prejudicial comments" or telling coworkers to respect each other's privacy will be held to be overbroad. Even a policy that prevents employees from sending "unwanted, offensive or inappropriate" emails is unlawful. The Board has held that a "no gossip" policy that forbade discussing employees' personal lives and creating or sharing rumors interfered with employees' ability to exercise their rights under the Act.

- ✓ **No Pin Policies**. With the exception of jewelry, many employers prohibit employees from wearing pins, insignias or other "message clothing" in the workplace. A recent Board decision found that such a policy was unlawful because it precluded employees from wearing union paraphernalia and no special circumstances existed justifying the prohibition.

- ✓ **Company Media Policies**. Employers often want to control statements to the media or other third parties. Policies, however, that ban employees from speaking to the media or other third parties on their behalf or on behalf of other employees concerning terms or conditions of employment or other protected activities are unlawful.

- ✓ **Use of Company Logos, Copyrights and Trademarks**. Employers have a legal right to protect their intellectual property ("IP") and often reiterate in the company handbook that employees are restricted from using the company's logo or name. According to the OGC, an employer cannot restrict the use of its IP by an employee for a protected activity, such as picketing or placing a logo on protest materials. This includes precluding the use of the company's IP on social media sites.

- ✓ **Policies Restricting Photography or Recordings**. Employee policies that ban the use of cameras, recording devices, personal computers or data storage devices are unlawful, unless they make clear that employees may take pictures, make recordings etc. on non-work time, including breaks and meal times. Employers cannot ban employees from documenting protected concerted activities or safety violations.

- ✓ **No Solicitation/No Distribution Policies**. Another common policy is that postings or distributions be business-related and should be posted on the company's bulletin board with prior company approval. The OGC found this to violate an employee's right to organize during non-work time and to distribute literature in non-work areas. In addition, as a result of a recent Board decision, employers may not restrict employees from using work email to distribute union-related literature electronically.

- ✓ **Prohibiting Employees from Leaving Work**. The OGC found policies that could be interpreted as preventing employees from striking to be unlawful. This includes forbidding employees to leave work during the day. If there is no mention of "strikes," "walkouts" or "disruptions," then the policy most likely will be found to be lawful.

- ✓ **Conflict of Interest Rules**. Since the right to engage in a concerted activity may conflict with the company's interests, an employer may not have a policy that could be read to prohibit certain activities, such as protests, boycotts etc.

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In sum, the NLRB and OGC are reading employee handbooks not as guidance to private sector employees as they were intended, but as impeding rights of workers to voice dissension and organize. Employers should review their handbooks to make sure their policies comply with the Board's and OGC's interpretations. Further, employers must be careful not to terminate an employee for violating a policy that could be found to be overly broad and a violation of an employee's protected concerted activity.

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