

Publications

Labor and Employment Alert: The NLRB's Employee Handbook Policy Guidance — It's Not Just For Union Workplaces

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On March 18, 2015, the National Labor Relations Board (NLRB) general counsel released a report addressing “problematic” employee handbook provisions that could be “reasonably construed” as having a chilling effect on employees’ Section 7 activity under the National Labor Relations Act (basically, the right to engage in “concerted activities” for collective bargaining or “other mutual aid and protection”). Similar to three previous reports by the general counsel on social media, this report offers guidance on “this evolving area of labor law,” with hopes that it will motivate employers to review their handbooks and make any necessary changes.

The 30-page report is divided into two parts. The first 20 pages of the report compare various handbook rules that the NLRB has found to be lawful and unlawful. The last 10 pages analyze a large employer’s handbook rules that were recently found unlawful in an unfair labor practice charge, along with the revised rules implemented by the employer in settlement of the charge.

This report is a reminder that it is not just an employer’s (unionized or not) social media policy that the NLRB is concerned about. The report identifies eight other types of policies the NLRB frequently held to chill Section 7 rights and suggests employers carefully reevaluate existing policies on: (1) confidentiality; (2) employee conduct toward the company and/or supervisors; (3) employee conduct toward other employees; (4) interactions with third parties; (5) protection of employer logos, copyrights and trademarks; (6) photography and recording; (7) leaving work; and (8) conflicts of interest.

For each type of policy, the general counsel offers several examples of policies held lawful and unlawful:

- With respect to confidentiality, policies prohibiting employees from discussing “customer or employee information” or publishing “the employer’s or another’s confidential or other proprietary information,” without specific examples in the policy, are overbroad because they are reasonably interpreted to prevent employees from

discussing wages and terms of employment. On the other hand, confidentiality policies that identify specific types of confidential information not to be disclosed are lawful because employees would understand such policies do not address Section 7-protected activity.

- With respect to employee conduct, policies requiring employees to be “respectful,” or prohibiting “insubordination” or conduct that “damages the reputation of the company” are problematic. According to the general counsel, employees have a right to criticize an employer’s labor policies and treatment of employees, even in a public forum. Further, protected concerted speech does not lose its protection simply because it includes abusive or even inaccurate statements.
- With respect to company media policies, policies that require employees to refer all questions from the news media to the employer’s media relations department, without providing specific examples of inquiries which must be forwarded to an official spokesperson, are overly broad.
- The general counsel also warns against overly broad policies that prohibit employees’ non-commercial use of an employer’s name, logo, or trademark to identify the employer in the course of Section 7 activity.
- With respect to limitations on the use of camera phones and other recording devices, employers cannot establish a blanket prohibition of employees possessing or using personal electronic equipment or recording on employer property. While certain limitations can be imposed to protect confidentiality and employee privacy, employees must be permitted to take pictures or video of concerted protected activities.

While the general counsel’s latest report is helpful in giving employers a better understanding of the types of policies that are being targeted by the NLRB, employers must remember that there is no uniform policy language that will ensure the NLRB’s (or general counsel’s) blessing. The general counsel often bases his assessment on the entire context of the policy; so certain language which is otherwise unlawful in isolation may only be lawful based on the entire context and location of the policy in the handbook.

The handbook provisions the general counsel relies come from both NLRB decisions and the general counsel’s own enforcement position, which the NLRB may ultimately disagree with. This means that compliance with Section 7 remains a moving target as the NLRB continues to explore these issues with heightened scrutiny in both unionized and non-unionized workplaces. Employers may want to review their handbook policies in light of the general counsel’s views in this report. Contact your Vorys attorney for assistance in undertaking this review.