



Insights: Alerts

NLRB General Counsel Issues Report Discussing Unlawful Personnel Policies Under the National Labor Relations Act

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In recent years, the National Labor Relations Board ("NLRB") has increasingly turned its attention to employee handbooks, closely scrutinizing both union and non-union employers' personnel policies for potential violations of Section 7 of the National Labor Relations Act (the "Act"), which gives employees a right to form or join a union and to engage in concerted activities regarding wages, hours, and working conditions. As a result of this increased scrutiny, some of the most common employment policies found in company handbooks have been deemed unlawful by the NLRB.

On March 18, 2015, the General Counsel of the NLRB issued a 30-page report providing an extensive review of recent cases addressing various employee handbook policies. General Counsel Richard Griffin explained that he was issuing the report "to offer guidance on my views of this evolving area of labor law, with the hope that it will help employers to review their handbooks and other rules, and conform them, if necessary, to ensure that they are lawful." The General Counsel pointed out that a workplace rule or policy will ordinarily violate the Act if it expressly prohibits employees from engaging in conduct protected by Section 7, if it is applied to protected Section 7 activity, if it is adopted in response to protected Section 7 activity, or if employees would reasonably construe a facially neutral rule or policy to prohibit protected Section 7 activity.

The report is divided into two parts. The first part provides illustrative examples of policies that the NLRB has found to be unlawful followed by similar policies that the NLRB has found to be lawful. The second part of the report discusses handbook rules examined in connection with an unfair labor practice charge against a nationwide restaurant company, setting forth the policies that were deemed unlawful, along with the revised versions of those policies approved as lawful by the NLRB's General Counsel and adopted by the company pursuant to a settlement of the unfair labor practice charge.

The report examines common handbook policies frequently challenged before the NLRB, including confidentiality policies, professionalism policies, anti-harassment policies, trademark-use policies, photography/recording policies, and media-contact policies. Below are a few examples of the policies that the NLRB has found to be unlawful under the Act, as set forth in the General Counsel's report.

"Never publish or disclose [the Employer's] or another's confidential or other proprietary information. Never publish or report on conversations that are meant to be private or internal to [the Employer]."

Although the NLRB recognizes that an employer has a right to protect its trade secrets and confidential information, it found that this policy's broad reference to "another's" confidential information would reasonably be construed by employees to include information about other employees' wages and terms and conditions of employment – something employers generally cannot lawfully prohibit employees from discussing or disclosing.

"Be respectful of others and the Company"

This policy was found to be unlawful because employees reasonably would construe this language to ban protected criticism regarding their supervisors, management or the employer in the context of criticizing the employer's labor policies or treatment of employees.

Employees may not make "insulting, embarrassing, hurtful or abusive comments about other company employees online."

The NLRB determined that this policy was unlawful because debates about unionization and other protected concerted activity are often contentious and controversial and employees would reasonably construe this policy as restricting their right to engage in such debates as well as limiting protected criticism of supervisors and managers, since they are also "company employees."

Employees are prohibited from sending "unwanted, offensive, or inappropriate e-mails."

The NLRB found that this policy was unlawful because it was overbroad and vague and could encompass communications protected by the Act.

"Associates are not authorized to answer questions from the news media... When approached for information, you should refer the person to the employer's Media Relations Department."

The NLRB recognizes that an employer may lawfully control who may make official statements on behalf of the employer. However, this policy was found to be unlawful because employees have a Section 7 right to speak to the media on their own behalf regarding wages, hours, and working conditions, and the policy's blanket restrictions on responses to media inquiries would be reasonably construed by employees to apply to all media contacts, not just those seeking an official employer response.

Employees must "respect copyrights and similar laws. Do not use any copyrighted or otherwise protected information or property without the owner's written consent."

The NLRB found this policy to be unlawful because employees would reasonably construe its broad prohibition of the use of copyrighted or other protected information to prohibit Section-7-protected communications involving, for example, copyrighted handbooks or use of trademarks/names in a wage comparison.

Policy prohibits employees from "[t]aking unauthorized pictures or video on company property."

The Board held that this policy was unlawful because employees would reasonably construe this rule to prohibit attempts to document health and safety violations and other protected concerted activity.

Practical Implications

Employers should be aware that they can be found to be in violation of the Act merely by maintaining a workplace rule or policy that can reasonably be construed as restricting the exercise of Section 7 rights, even if the rule or policy has never been enforced against an employee who was exercising those rights. As the General Counsel's report makes clear, the difference between a lawful and an unlawful workplace rule can often turn on the presence of even a single word, the context in which the rule appears, or the inclusion of clarifying language or examples. While the report provides helpful guidance to employers in drafting their policies in a way that will minimize the risk of unfair labor practice charges, it also provides an effective guide for unions and employees to use in identifying workplace rules that may run afoul of the Act and provide a basis for an unfair labor practice charge against an employer. Thus, both unionized and non-unionized employers should carefully review their employee handbooks and consult with counsel to ensure that their personnel policies are lawful in light of the NLRB's recent decisions and guidance.

Related People



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