SEBRIS BUSTO JAMES Employment Law Note May 2015

Employers Need to Review Their Handbooks and Policies Now to Avoid NLRB Scrutiny

by Matthew W. Lynch

The National Labor Relations Board (NLRB) has been busy rewriting the rules on union organizing, employee use of e-mails, NLRB jurisdiction and workplace investigations. These initiatives, along with others, weigh heavily in favor of unions and employees. Perhaps the most impactful document on employer day-to-day operations, however, came with the March 18, 2015 issuance of the NLRB General Counsel's *Memorandum GC 15-04* ("GC Memo" or "Memo"), which gives detailed guidance regarding the types of employer handbook policies and rules that NLRB investigators and regional offices will consider to be lawful, and those which the NLRB will construe as unlawfully interfering with employees' rights under the National Labor Relations Act ("NLRA").

The GC Memo pertains to policies and rules that are often found in employee handbooks in both union and non-union workplaces. The Memo is significant because NLRB review of such policies often arises because a discharged employee (or attorney or union on the former employee's behalf) wants to reverse the discharge, or because a union that has lost a representation election seeks to overturn the loss by claiming the employer maintained employer policies that hindered union organizing. It is for these reasons that employers should pay close attention to the GC Memo, and should modify their policies to avoid these undesired outcomes.

NLRB Basic Standard on Employer Rules and Policies

The Memo first sets forth the legal standard derived from NLRB case law regarding employer policies and work rules. The mere maintenance of a work rule or policy may violate Section 8(a)(1) of the NLRA if the rule has a chilling effect on employees' statutory right to engage in concerted activity for mutual aid or protection (i.e., Section 7 activity). The most obvious way a rule would violate the NLRA is by explicitly restricting protected concerted activity such as banning union activity. Even if a rule does not explicitly prohibit Section 7 activity, however, it will still 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. Part 1 of the Memo focuses on NLRB decisions in eight categories of policies, with examples of policy language that the NLRB has found to unlawfully interfere with employees' section 7 rights, as well as language that would be considered lawful. Part 2 of the Memo addresses the General Counsel's settlement with Wendy's International, in which the General Counsel found portions of the Wendy's employee handbook to be unlawfully overbroad. This Note addresses Part 1 of the Memo only.

Eight Problem Policies and Rules

Confidentiality. The Memo reviews NLRB precedents holding that "Employees have a Section 7 right to discuss wages, hours, and other terms and conditions of employment with fellow employees, as well as nonemployees such as union representatives." The Memo also states that "broad prohibitions on disclosing 'confidential' information are lawful so long as they do not reference information regarding employees or anything that would reasonably be considered a term or condition of employment, because employers have a substantial and legitimate interest in maintaining the privacy of certain business information." The Memo states that the General Counsel will consider the context of a handbook or policy statement: "[A]n otherwise unlawful confidentiality rule will be found lawful if, when viewed in context, employees would not reasonably understand the rule to prohibit Section 7 protected activity."

Employee Conduct toward the Company and Supervisors. The Memo states that employees "have the Section 7 right to criticize or protest their employer's labor policies or treatment of employees." The Memo offers an overview of case law involving rules that "prohibit employees from engaging in 'disrespectful,' 'negative,' 'inappropriate,' or 'rude' conduct towards the employer or management, absent sufficient clarification or context." It is still OK to prohibit insubordination, provided the prohibition does not extend to disrespectful conduct. Also, employee criticism of the employer "will not lose the Act's protection simply because the criticism is false or defamatory." Though employer policies requiring respectful conduct towards management are unlawful, an employer can require respectful conduct towards co-workers and customers.

Conduct Towards Other Employees. Employees have the protected right to "to argue and debate with each other about unions, management, and their terms and conditions of employment... even if it includes intemperate, abusive and inaccurate statements." Rules restricting this right violate the NLRA. On the topic of harassment, the Memo states that "although employers have a legitimate and substantial interest in maintaining a harassment-free workplace, anti-harassment rules cannot be so broad that employees would reasonably read them as prohibiting vigorous debate or intemperate comments regarding Section 7 protected subjects."

Employee Interaction with Third Parties. Employers cannot maintain policies that regulate or restrict employee communications with the media, government agencies and third parties relating to their wages, benefits and other terms and conditions of employment. Such rules "that reasonably would be read to restrict such communications are unlawful." Employers "may lawfully control who makes official statements for the company," but employers must draft such rules "to ensure that their rules would not reasonably be read to ban employees from speaking to the media or third parties on their own (or other employees") behalf."

Use of Company Logos, Copyrights and Trademarks. The Board has found many employer policies that broadly prohibit employees from using logos, copyrights and trademarks to unlawfully interfere with employees' Section 7 rights. In this regard the Memo states that "employees have a right to use the name and logo on picket signs' leaflets, and other protected materials," and that "[e]mployers' proprietary interests are not implicated by employees' non-commercial use of a name, logo, or other trademark to identify the employer in the course of Section 7 activity."

Photography and Recording. The Memo states that employees have the Section 7 right to photograph and make recordings in furtherance of their protected concerted activity, including the right to use personal devices to take pictures or make recordings. The Memorandum further notes that such policies will be found to be overbroad "where they would reasonably be read to prohibit the taking of pictures or recordings on non-work time."

Restrictions on Employees Leaving Work. Restrictions on employees leaving the workplace or failing to report when scheduled are also problematic to the NLRB. "[O]ne of the most fundamental rights employees have under Section 7 of the Act is the right to go on strike," and therefore "rules that regulate when an employee can leave work are unlawful if employees reasonably would read them to forbid protected strike actions and walkouts." A rule would be lawful if "such a rule makes no mention of 'strikes,' 'walkouts,' 'disruptions' or the like" since employees should "reasonably understand the rule to pertain to employees leaving their posts for reasons unrelated to protected concerted activity."

Conflict of Interest Rules. Employees have the right to engage in concerted activity to improve their terms and conditions of employment, even if that activity is in conflict with the employer's interests. Examples of such activities that can violate broad conflict of interest policies are protests outside the employer's business, organizing a boycott of the employer's products and services and solicitation of support for a union while on non-work time. When a conflict of interest policy "includes examples or otherwise clarifies that it is limited to legitimate business interests, employees will reasonably understand the rule to prohibit only unprotected activity."

Conclusion

The GC Memo offers many examples of lawful and unlawful employer policies. Employers are well advised to compare these examples with their own handbooks and policies to ensure employer policies do not run afoul of the NLRA. The failure to be proactive in this regard can result in significant costs associated with reinstatement and back pay of employees whom the employer terminated under an unlawful policy. Perhaps of greater significance, an employer that maintains unlawful policies is giving a union grounds to appeal an election loss that, an appeal that, if granted by the NLRB, will result in a new election and a second chance for the union. When considered in conjunction with NLRB's new "quickie" election rules, the GC Memo makes it imperative that employers act now to fix their policies before those policies become a weapon in the hands of a union.

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