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NLRB GENERAL COUNSEL ISSUES GUIDANCE ON COMMON EMPLOYEE HANDBOOK POLICIES THAT HIS OFFICE OR NLRB CONSIDERS UNLAWFUL

On March 18, 2015, NLRB General Counsel Dick Griffin reported on recent NLRB cases arising in the context of employee handbook rules. In recent years, the NLRB General Counsel, in concert with the NLRB (a Board that is controlled by Democrats), has pursued complaints against employers relating to the employers' employee handbooks. In short, the NLRB theorizes that certain common employee handbook policies are unlawful because of the mere possibility that an employee may interpret an otherwise reasonable workplace policy as one that inhibits employees' rights to act in concert with one another with regard to terms and conditions of employment (referred to as an employee's right to engage in Section 7 activity). These complaints have nothing to do with a change in the law, but rather are about a different and aggressive interpretation of existing law.

Clearly, workplace rules put into place in response to union or other Section 7 activity in an effort to infringe upon employees' Section 7 rights are unlawful. However, the General Counsel and NLRB have expanded its reach into the workplace by holding that even if an employer implements, for legitimate, lawful reasons, a workplace policy that does not prohibit Section 7 activity, the policy will still be unlawful if the NLRB determines that employees could reasonably interpret the policy to prohibit Section 7 employee activity.

Under the NLRB's decision in Lutheran Heritage Village-Livonia, the mere maintenance of a work rule may violate Section 8(a)(1) of the National Labor Relations Act if the rule has a chilling effect on employees' Section 7 activity. The Board's new standard presents a difficult challenge for employers as there need not be any evidence of an unlawful application of an otherwise reasonable workplace policy. Instead, an employer can run afoul of the law, according to the NLRB, simply because the NLRB, in its subjective opinion, thinks that it is possible an employee could misunderstand a policy and mistakenly interpret a policy to inhibit Section 7 rights. According to the NLRB, employers are now lawfully mandated to draft policies to prevent employee misunderstandings.

Here are some examples of policies found unlawful by the NLRB:

Confidentiality Rules – the NLRB considers policies that include a prohibition against disclosing employee information or work information generally as unlawfully overly broad. According to the NLRB, employees may interpret such policies to prohibit them from sharing with one another information about terms and conditions of employment, including wage information. Confidentiality rules that focus on specific types of confidential information that could not reasonably be construed to include terms and conditions of employment for employees are lawful. As a plus for employers, the NLRB will read prohibitions in the context in which they are presented. A statement that might be considered overly broad could be lawful if nested in a policy addressing a topic that is unrelated to employees' terms and conditions of employment, such as an anti-harassment policy.

Rules Governing Civility – Fortunately, a rule that requires employees to be respectful and professional to coworkers, clients, or competitors (but does not include the employer or management) will generally be found lawful. However, a rule that prohibits employees from engaging in disrespectful, negative, inappropriate or rude conduct towards the employer or management could be found unlawful if proper clarification and context is not provided so that employees understand that the rule does not prohibit employees from engaging in their right to criticize management (and do so even in a defamatory manner). Rules prohibiting insubordination remain lawful.

Unfortunately, it is not always easy to determine what the NLRB will consider overly broad and what the Board will find lawful. In one case, the NLRB General Counsel took the position that the following prohibition was unlawful:

Material that is fraudulent, harassing, embarrassing, sexually explicit, profane, obscene, intimidating, defamatory, or otherwise unlawful or inappropriate may not be sent by email…

The General Counsel found that the terms intimidating, defamatory and embarrassing were too ambiguous and an employee might interpret the policy to prohibit the employee from discussing terms and conditions of employment in a critical manner. However, the General Counsel found the following prohibition lawful:

Threatening, intimidating, coercing, or otherwise interfering with the job performance of fellow employees or visitors.

The General Counsel approved of this prohibition because it was part of a policy that addressed unlawful harassment and discrimination and therefore, an employee would read this statement in context as dealing with those types of unlawful activity.

Rules Relating to Photography, Recording, Employer Logos and More – The General Counsel has also found unlawful a policy prohibiting the use of an employer's logos and trademarks, a policy restricting photography and recording in the workplace, and a policy requiring self-identification in social media posts.

If you are pulling your hair out after reading this e-alert, then you are not alone! The law relating to employee handbook policies is evolving. Employers are encouraged to review and update their handbooks regularly. If you have any questions or would like assistance in reviewing and updating an employee handbook, please contact Peter Bennett (pbennett@thebennettlawfirm.com) or Rick Finberg (rfinberg@thebennettlawfirm.com).