

EMPLOYEE HANDBOOKS AND NLRB REQUIREMENTS: CAN YOUR POLICIES WITHSTAND INCREASED GOVERNMENT SCRUTINY?

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INTRODUCTION

- There has recently been significant increased scrutiny by the government of employment policies, practices and procedures
- The impact has been felt by union and non-union employers to the same degree

FEDERAL LABOR LAW

- NLRA – National Labor Relations Act (the “Act”)
 - Enacted by Congress in 1935 “to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy”
- NLRB – National Labor Relations Board
 - Independent “neutral” federal agency with power to enforce the NLRA

WHAT EMPLOYERS ARE COVERED BY THE NLRA?

- Most private sector employers – whose activity in interstate commerce exceeds a minimal level:
 - Even non-unionized workforces
 - Including manufacturers, retailers, private universities, and health care facilities
- Does *not* apply to federal, state, or local governments; religious organizations
- Does *not* apply to employers who employ only agricultural workers; and employers subject to the Railway Labor Act (interstate railroads and airlines)

WHAT EMPLOYEES ARE PROTECTED?

- Most employees in the private sector
 - Including those that do not belong to a union
- Employees of government, agricultural and other exempt employers are not covered
- “True” independent contractors and supervisors (with limited exceptions) are not covered

SECTION 7 RIGHTS

- Section 7 of the National Labor Relations Act (the Act) guarantees employees:

“The right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection,” as well as the right "to refrain from any or all such activities"

SECTION 7 RIGHTS (CONT.)

- Protected Concerted Activity:
 - Protected concerted activities by most private-sector non-supervisory employees is protected
 - (NLRB definition) “the right to act together to try to improve [employees’] pay and working conditions, with or without a union”; (i.e., to join together to advance their interests as employees)
 - No union or organizing campaign is necessary
 - For an employee’s act to be “concerted”, s/he must act with, or as authorized by, other employees

SECTION 7 RIGHTS (CONT.)

- The definition includes those circumstances where individual employees seek to initiate, to induce or to prepare for “group action”
- A core activity protected by Section 7 is the right of employees to discuss, debate and communicate with each other regarding their workplace terms and conditions of employment. This guarantee includes both the right of union officials to discuss organization with employees and the right of employees to discuss organization among themselves.

ILLEGAL EMPLOYER CONDUCT

- Section 8(a)(1) of the Act makes it an unfair labor practice for an employer:
 - "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7" of the Act
- This includes retaliating against (or disciplining) employees for engaging in protected concerted activity

WHAT DOES MY HANDBOOK HAVE TO DO WITH THIS?

- The NLRB will strike down employee policies and Handbook provisions that specifically violate Employee Section 7 rights
- Recently, there has been an emphasis on striking down employee Handbook provisions and policies found by the Board to “chill” employee rights under the Act
- Number of recent NLRB decisions focusing on the lawfulness of employer rules/policies
- NLRB’s Office of the General Counsel Memorandum (GC 15-04) released March 18, 2015

<https://www.nlr.gov/reports-guidance/general-counsel-memos>

THE GC GUIDANCE STATES

“Although I believe that most employers do not draft their employee handbooks with the object of prohibiting or restricting conduct protected by the National Labor Relations Act, **the law does not allow even well-intentioned rules that would inhibit employees from engaging in activities protected by the Act.**”

“Under the Board's decision in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), **the mere maintenance of a work rule may violate Section 8(a)(1) of the Act if the rule has a chilling effect on employees' Section 7 activity.**”

EVEN IF AN EMPLOYMENT POLICY DOES NOT EXPLICITLY “PROHIBIT SECTION 7 ACTIVITY”, THE POLICY/RULE COULD STILL BE UNLAWFUL IF

- The policy is written so broadly that employees would reasonably construe the rule's language to prohibit Section 7 activity
- The rule was promulgated in response to union or other Section 7 activity
- The rule was actually applied to restrict the exercise of Section 7 rights”

CHILLING OF SECTION 7 RIGHTS

- “An employer rule is unlawfully overbroad when employees would reasonably interpret it to encompass protected activities.” *Triple Place Sports Bar, 361 NLRB No. 31 (2014)*
- The self-appointed task of the NLRB is to determine how a reasonable employee would interpret the action or statement of the employer, appropriately taking into account all surrounding circumstances. See *Roomstore, 351 NLRB No. 1690 (2011)*
- The Board is to give the policy a reasonable reading and “**must refrain** from reading particular phrases in isolation, and it must not presume improper interference with employee rights.” (*Emphasis supplied*) *Lutheran Heritage NLRB No. 646 (2004)*
- When policy language is ambiguous, if the intent (not to extend to protected activities) is not sufficiently communicated to employees, the ambiguity will be construed against the employer as the drafter of the rule

CHILLING OF SECTION 7 RIGHTS (CONT.)

- The subjective feelings of an employee that s/he was actually intimidated, is not conclusive
- As stated, the Board test is an objective test – whether the rule or policy in question would reasonably have a tendency to interfere with, restrain or coerce employees in the exercise of Section 7 rights
- Context of the policy language and surrounding circumstances do matter in evaluating whether the text has a reasonable tendency to coerce employees
- The determination of overbroad or coercive language is to be made on a case-by-case basis following a review of all relevant facts and circumstances

CONSEQUENCES OF AN UNLAWFUL WORK RULE

In the event the NLRB finds that an employer issued an unlawful work rule, the employer may be ordered to:

- Rescind the unlawful work rule and re-issue a work rule in compliance with the NLRA
- Post notices at the work place informing employees of their rights under the NLRA and that the employer had issued an illegal work rule
- Reinstate and make whole (through back pay) any employee terminated under an illegal work rule
- Vacate the results of a union election if any illegal work rule was deemed to adversely impact the “laboratory conditions”

TARGETED POLICIES

- Confidentiality policies
- Social media rules
- Anti-harassment rules
- Non-solicitation policies
- Code of conduct rules:
 - Employee conduct towards the employer
 - Regulating conduct towards fellow employees
- Communication with outside parties (i.e., the media) policies
- Rules restricting photography and recording
- Restricting employees from leaving work
- Conflict of interest policies
- Restricting use of company logos, copyrights and trademarks

CONFIDENTIALITY PROVISIONS

- Will be scrutinized whether in a signed Agreement; a stand alone policy; or included with social media or employee conduct policies
- Definition of “confidential information” must be specific and not overly broad
- By law, employees have the right to discuss, and to disclose some business information

UNLAWFUL CONFIDENTIALITY RULES

- **Illegitimate employee concern:** Restricting employee communication about terms and conditions of employment
- Prohibition on employee discussions of terms and conditions of employment—such as wages, hours, or workplace complaints:
 - Michigan law on disclosure of wage information
 - “Non-public financial or operational information” and “anything with a dollar figure attached to it (rights, programs, quotes, client information, salaries, etc.) has been held overly broad and illegal”
- Prohibition on employee discussion of "employee" or "personnel" information, without further clarification

LAWFUL CONFIDENTIALITY RULES – EXAMPLES

- Lawful:
 - **Legitimate employer concern:** Maintaining trade secrets; sensitive client financial information
 - Prohibition on disclosure of confidential information that does not reference information regarding employees or employee terms and conditions of employment
- No unauthorized disclosure of “business secrets” or other confidential information
- Misuse or unauthorized disclosure of confidential information [properly defined] not otherwise available to persons or firms outside the employer
- Do not disclose confidential financial data, or other non-public proprietary company information
- Do not share confidential information regarding business partners, vendors or customers

SOCIAL MEDIA

- Social media issues are an **enforcement priority** for the NLRB
- The Board actively scrutinizes and strikes down many employer social media policies
- Policies that generally monitor, analyze and prohibit certain employee social media use is overly broad

SOCIAL MEDIA (CONT.)

- Certainly excessive, defamatory and irresponsible employee messages can be actionable by the Employer:
 - The Board does not clarify when an employer can act on social media information
 - The Board has validated social media policies urging employees not to post any company or job related information that “could lead to morale issues in the workplace or detrimentally affect the company’s business”
 - The Board reinstated an employee who called his boss derogatory vulgar names on Facebook, finding that such comments were directed towards the overall environment of the workplace and constituted protected concerted activity

SOCIAL MEDIA (CONT.)

- A well-crafted social media policy can still prohibit unprotected speech that may damage an employer
- A “civility policy” that prohibited employees from engaging in “disruptive behavior” on social media or elsewhere was found to be overly broad
- Rules prohibiting disparagement of the employer are usually found to be unlawfully broad

SOCIAL MEDIA/PROFESSIONALISM RULES

- Unlawful:
 - **Illegitimate employee concern:** Restricting right to criticize or protest employer's labor policies or treatment of employee
 - Blanket prohibition on employees criticizing or protesting their employer's labor policies or treatment of employee
 - Prohibitions on criticism in public forum
 - Prohibitions on disrespectful conduct that does not rise to insubordination
- Lawful:
 - **Legitimate employee concern:** Prohibiting insubordination and requiring courteous and respectful conduct
 - Requiring employees to be respectful to customers, competitors, and the like, with no mention of the employer or management
 - Requiring employees to cooperate with each other and the employer in the performance of their work

SOCIAL MEDIA PROFESSIONALISM – EXAMPLES

- Unlawful:
 - “Be respectful to the company, other employees, customers, partners, and competitors”
 - “Refrain from any action that would harm persons or property or cause damage to the Company's business or reputation”
 - "Chronic resistance to proper work-related orders or discipline, even though not overt insubordination will result in discipline”

- Lawful:
 - “No rudeness or unprofessional behavior toward a customer, or anyone in contact with the company”
 - "Each employee is expected to work in a cooperative manner with management / supervision, coworkers, customers and vendors”

ANTI-HARASSMENT RULES

- Unlawful:
 - **Illegitimate employee concern:** Restricting employees' right to argue and debate with each other about unions, management, and their terms and conditions of employment
 - Prohibitions on "negative" or "inappropriate" discussions among employees, without further clarification
 - Restricting protected discussions among coworkers
- Lawful:
 - **Legitimate employee concern:** Maintaining a harassment-free workplace
 - Requiring employees to be respectful to customers or competitors
 - Directing employees not to engage in unprofessional conduct

ANTI-HARASSMENT RULES – EXAMPLES

- Unlawful:
 - "Don't pick fights online"
 - "Show proper consideration for others' privacy and for topics that may be considered objectionable or inflammatory, such as politics and religion"
 - "Do not send unwanted, offensive, or inappropriate e-mails"
- Lawful:
 - "Do not make inappropriate gestures, including visual staring"
 - "No use of racial slurs, derogatory comments, or insults"

SOLICITATION POLICIES

- A blanket prohibition against soliciting, collecting funds or distributing literature about proper approvals is unlawfully overbroad – employees have the right to solicit on non-work time and distribute literature in non-work areas
- Problems with solicitation policies is more in the enforcement than in the language

A lawful solicitation provision:

- “It is our policy to prohibit the distribution of literature in work areas and to prohibit solicitation during employees working time. These guidelines also apply to solicitation and/or distribution by electronic means.”
 - Define working time and/or work areas

CODE OF CONDUCT POLICIES

- Rules broadly prohibiting criticism or protest regarding supervisors, management or the employer in general are more likely to be found to be overbroad
- The Act does not protect employee conduct aimed at disparaging an employer's products, as opposed to conduct critical of the employer's labor policies or working conditions
- To be valid, such rules must be aimed only at unprotected conduct
- Generally prohibiting "disrespectful conduct", especially when defined in the "sole discretion of the company" is overly broad

LAWFUL RULES REGULATING EMPLOYEE CONDUCT TOWARDS THE EMPLOYER

- Behavior that does not mention the company or its management may be enforceable
- No “rudeness or unprofessional behavior towards a customer or anyone in contact with” the company
- “Employees shall not be discourteous or disrespectful to a customer or any member of the public in the course and scope of [company’s] business
- Each employee is expected to work in a cooperative manner with management/supervision, coworkers, customers and vendors
- Each employee is expected to abide by company policies and to cooperate fully in any investigation that the company may undertake

RULES OF CONDUCT – EMPLOYEE ON EMPLOYEE CONDUCT

- Debate about unionization and other protected concerted activity is deemed by the board to often be contentious and controversial, but that does not terminate it's protected status
- Bans on “offensive”, “derogatory”, “insulting” or “embarrassing” comments improperly limit employee’s ability to honestly discuss such topics
- A listing of banned behavior, including “profane, obscene, **intimidating, defamatory** or **otherwise** unlawful or **inappropriate behavior**” has been deemed ambiguous and/or including protected activity

LAWFUL EMPLOYEE ON EMPLOYEE CONDUCT RULES

- Again, removal of protections for the company or its management employees helps in the determination of enforceability
- Examples of valid language:
 - Making inappropriate gestures, including “visual staring”
 - “Threatening, intimidating, coercing, or otherwise interfering with the job performance of fellow employees or visitors”
 - No “harassment of employees, patients or facility visitors”
 - Any logos or graphics worn by employees “must not reflect any form of violent, discriminatory, abusive, offensive, demeaning or otherwise unprofessional message”

MEDIA CONTACT RULES

- The Board takes the position that there can be protected employee communications with the media
- Blanket prohibitions/restrictions on employee responses to media inquiries are overbroad

LAWFUL REGULATION OF MEDIA COMMUNICATIONS

- “The company strives to anticipate and manage crisis situations in order to reduce disruption to our employees and the maintain our reputation as a high quality company. To best serve these objectives, the company will respond to the news media in a timely and professional manner only through the designated spokespersons”.
- “Events may occur at our stores that will draw immediate attention from the news media. It is imperative that one person speaks for the company to deliver an appropriate message and to avoid giving misinformation in any media inquiry ... Every ... employee is expected to adhere to the following media policy: ... to answer all media/reporter questions like this: ‘I am not authorized to comment for [the employer] (or I don’t have the information you want). Let me have our public affairs office contact you.’”

PHOTOGRAPHY AND RECORDING RULES

- Unlawful:
 - **Illegitimate employee concern:** Restricting right to photograph and make recordings in furtherance of their protected concerted activity, including the right to use personal devices to take such pictures and recordings
 - Placing a total ban on photography or recordings
 - Banning the use or possession of personal cameras or recording devices
- Lawful:
 - **Legitimate employee concern:** Protecting a privacy interest, such as patient privacy
 - Limiting the prohibition on photography and recording to protect legitimate privacy interests and/or operational concerns

PHOTOGRAPHY AND RECORDING RULES – EXAMPLES

- Unlawful:
 - "Taking unauthorized pictures or video on company property is prohibited"
 - "No employee shall use any recording device including but not limited to, audio, video, or digital for the purpose of recording any Company employee or Company operation"

- Lawful:
 - "Do not take pictures of any patient information"
 - "Do not record any individual without their express consent"
 - Cell phones and/or cameras are not allowed to be possessed or used by employees in work areas during work hours

RESTRICTION ON EMPLOYEES LEAVING WORK

- Unlawful:
 - **Illegitimate employee concern:** Restricting the right to strike
 - Broad prohibitions on walking off the job, which reasonably would be read to include protected strikes and walkouts
 - Example: “Walking off the job is prohibited”
 - Example: “Failure to report to your scheduled shift for more than three consecutive days without prior authorization or 'walking off the job' during a scheduled shift is prohibited”

- Lawful:
 - **Legitimate employee concern:** Prohibiting insubordination and ensuring continuity of business operations
 - No universal example provided by NLRB

OVERRIDING PRINCIPLES FOR DRAFTING POLICIES

- Do's:
 - Handbook rules should be drafted to **specifically** address legitimate concerns of the employer, customers, vendors and other employees
 - Handbook rules should be drafted to **clearly** address legitimate concerns
- Don'ts:
 - Handbook rules should not be so **overbroad** as to arguably restrict Section 7 rights
 - Handbook rules cannot be so **vague** as to allow for a reasonable interpretation that Section 7 rights have been restricted
 - If any portion (or word) of a policy/rule is found to be unlawful, the whole rule is unlawful

QUESTIONS?



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THANK YOU

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