NLRB Gives Examples of "Illegal" and "Legal" Handbook Provisions and Work Rules

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On March 18th, the NLRB's General Counsel published a 30-page "Report of the General Counsel Concerning Employer Rules." The Report provides a fairly comprehensive summary of the types of rules the NLRB has found to be contrary to Section 7 of the National Labor Relations Act, the provision that guarantees employees—in both union and non-union workplaces—the right to engage in "concerted activity."

In his Introduction, the General Counsel 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 Act does not allow even well-intentioned rules that would inhibit employees from engaging in activities protected by the Act." He then summarized the legal standards the Board applies in reviewing handbooks and other work rules as follows:

The mere maintenance of a work rule may violate… the Act if the rule has a chilling effect on employees' Section 7 activity. The obvious way a rule would violate… [the Act] is by explicitly restricting protected concerted activity; by banning union activity, for example. 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 actual applied to restrict the exercise of Section 7 rights.

Throughout the Report, the General Counsel provides numerous examples of various handbook provisions including rules regarding: confidentiality; conduct towards the employer and supervisors; conduct towards fellow employees; employee interaction with third parties; use of employer logos, copyrights and trademarks; restricting photography and recording; employees leaving work; and conflicts of interests. As to each category, the General Counsel discusses why some rules on these topics are contrary to the Act, in the General Counsel's or NLRB's view, as well as why other rules on these topics survive their scrutiny. The Report also summarizes a settlement the NLRB reached with Wendy's under which Wendy's agreed to modify numerous policies, including its social media policy, which the NLRB believed to be so broad or vague that it either *did or could* inhibit employees from exercising their Section 7 rights.

For instance, the General Counsel opines that the following policies are likely unlawful:

- "You must not disclose proprietary or confidential information about [the Employer, or] other associates (if the proprietary or confidential information relating to [the Employer's] associates was obtained in violation of law or Company policy)."
- "Discuss work matters only with other [Employer] employees who have a specific business reason to know or have access to such information…. Do not discuss work matters in public places."
- "Be respectful to the company, other employees, customers, partners, and competitors."
- "No defamatory, libelous, slanderous or discriminatory comments about [the Company], its customers, and/or competitors, its employees or management."
- "Disrespectful conduct or insubordination, including, but not limited to, refusing to follow orders from a supervisor or a designated representative."
- "Refrain from any action that would harm persons or property or cause damage to the Company's business or reputation."
- "It is important that employees practice caution and discretion when posting content [on social media] that could affect [the Employer's] business operation or reputation."

- “Material that is fraudulent, harassing, embarrassing, sexually explicit, profane, obscene, intimidating, defamatory, or otherwise unlawful or inappropriate may not be sent by email…”
- “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.”
- “Do not use any Company logos, trademarks, graphics or advertising materials in social media.”
- “Company logos and trademarks may not be used without written consent.”
- “Taking unauthorized pictures or video on company property is prohibited.”
- “Walking off the job is prohibited.”

Many of the above policies appear to be common-sense rules applicable to most workplaces. The General Counsel believes, however, that except for some nuanced situations when they may be expressed in a narrow legal and factual context, they are facially illegal. They are usually illegal, in the General Counsel’s view, because an employee may construe them as restricting their right to strike, discuss unionization, complain about working conditions, or otherwise engage in protected concerted activity.

Significantly, many of these views have not been fully litigated. Rather, many of these examples have come from cases where the NLRB has decided to pursue unfair labor practices charges but the cases were settled short of litigation. Many employers are willing to conform their policies to the NLRB’s satisfaction rather than incur the expense of litigation. Thus, some of these views may be legally questionable. Nonetheless, the Report does reveal the NLRB’s perspective when it reviews work rules and how employers may attempt to modify their policies so that may survive the Board’s scrutiny.

What is also clear from the Report is that no private sector employer, whether unionized or non-union, is immune from the NLRB reviewing their policies and finding fault through a nuanced analysis based its speculation as how the policies may be perceived by employees. What is also clear is that common and even carefully written policies may be challenged by the NLRB.

Consequently, employers should review this Report and hold it up against their policies and work rules. By doing so, it is likely that a number will fall into the “questionable pot,” and those policies may need to be rewritten. Due to the nuanced nature of the NLRB’s perspective, employers should conduct this review with the assistance of skilled counsel.

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