EMPLOYER HANDBOOKS: EMERGING ISSUES

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OR

NLRB CONTINUED ATTACK ON EMPLOYER HANDBOOKS[1]

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Over the past several years there have been a flood of NLRB decisions on issues that have, in years past, rarely captured the NLRB's attention. These cases involve employer handbooks, and other related issues such as employer social media policies. Many of these cases arise from non-union settings and outside the context of union organizing drives.

If one looks at employer internet postings on these issues, one might think that the end of the world is upon us.[2] Union counsel believes that the title of this workshop reflects this unfortunate over reaction. The decisions that have been rendered reflect careful application of long time traditional NLRB principles to factual situations that were previously rarely addressed by the NLRB. One suspects greater attention has been focused on these cases because, in the union context, such issues were generally previously addressed in arbitration and collective bargaining.

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[1] The proper title seems to depend on one's point of view of these cases.

[2] Postings have such titles as " NLRB Continues Attack on Employer Handbooks", "NLRB targets Employee Handbooks", and "NLRB Continues Aggressive Crackdown on Social Media Policies"

Many of these cases, in applying the general principles, are very fact specific. Respectfully, while there is careful scrutiny being given to employer handbooks, there is not a broad based "attack" by the NLRB on such handbooks.

Basic Principles Applied By the Board

In order to a understand how the Board arrives at its current decisions, it is helpful to step back to look at the language of the Act as well as to look at earlier cases decided by the NLRB

NLRB. Section 7 of the Act gives employees the right to"------engage in ------– concerted activities for the purpose of collective bargaining or other mutual aid and protection—". Section 8(a) (1) of the Act makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157[7] of this title."

A work rule maintained by an employer that reasonably tends to "chill employees in the exercise of their Section 7 rights" violates Section 8(a) (1) of the Act. *Lafayette* Park *Hotel,* 326 NLRB 824, 825(1998) enf'd. 203 F.3d52 (D.C. Cir.1999). A rule that explicitly restricts Section 7 rights will be deemed unlawful. *Lutheran Heritage Village Livonia* 343 MLRB 646(2004). That case went on to address the far more common situation as to what analysis to apply where the rule or policy does not explicitly restrict Section 7 activity. The analysis consists of three prongs under which a rule not explicitly prohibiting Section 7 activity may still be found unlawful.

1. The rule will be found to be unlawful if employees would reasonably construe the language of the rule to prohibit Section 7 activity;

2. The rule will be found to be unlawful if it was issued in response to union or other concerted activity ; and
3. The rule will be found to be unlawful if it has in fact been applied or otherwise used to restrict the exercise of Section 7 rights.

Where a violation is found the standard remedy is to have the employer revise or rescind the questioned rule. The Board has long considered that the standard remedy will hopefully assure that employees may engage in protected concerted activity without a fear they would be subjected to an unlawful rule. *Guardsman, LLC* 334 NLRB 809,812(2005) enf'd in relevant part 475 F3d 369 (D.C.Cir.2005)

What Issues Are Being Scrutinized?

Most employer handbooks have historically had, or may currently have, policies or rules that conflict with decisions of the NLRB. In response to these decisions it would appear that some/many employers are revising such policies to avoid litigation of these issues. Following are the principal issues that have been addressed in the recent Board cases.

1. Confidentiality Policies and Agreements: In general the Board will find that employees have the right to discuss among themselves issues related to wages, hours, and other terms and conditions of employment.
2. Non –Disparagement Clauses: Clauses that prohibit disparagement of the employer, managers, or other employees will be closely scrutinized .An exception will likely be product disparagement or the *commercial* use of company intellectual property.

3. Employee Behavior and Conduct: Policies that require employees to show respect to the company, managers, co-workers, and customers, will, depending on factual circumstances and the language, be seen as interfering with protected Section 7 rights.
4. Policies on Media Contact: Rules that require an employee to refer all media inquiries to management or to not speak to the media concerning the company will be viewed with disfavor as unlawfully interfering with the right of employees to talk about wages, terms, and other conditions of employment.
5. Employer Access Policies: Prohibitions on employees returning to the work site during non-working time are likely to be viewed as too broad. Policies that are enforced to allow access to employees for non-work related purposes while denying it for employees that wish to discuss work issues, will be deemed to have a disparate impact.
6. Arbitration Policies and Agreements: There is an increasing and widespread use of mandatory arbitration agreements by employers at the point employees are hired. Many such policies also prohibit proceeding as a group or a class in arbitration or in court. The NLRB has found this to be a violation of the Act in that it unlawfully interferes with the right to engage in protected concerted activities. The Fifth Circuit has rejected this view, and this issue seems headed for the Supreme Court.

Summaries of Recent Relevant Board Decisions

Following are brief summaries from many of the recent Board cases that seem to have caused much consternation for employers.

1. *Flex Frac Logistics LLC*, 358 NLRB No. 127, slip op. at 2(2012). There the Board stated that:

> "Board law is settled that ambiguous employer rules that reasonably could be read to have a coercive meaning—are construed against the employer. This principle follows from the Act's goal of preventing employees from being chilled in the exercise of their Section 7 rights, whether or not that is the intent of the employer---"

2. *Banner Health System d/b/a Estrella Medical Center and James A. Navarro* 358 NLRB No. 93 (2012). The Board found that the actions of a human resources consultant asking employees making complaints not to discuss such matters with co-workers, coupled with that point being included on a Complainant Form" Introduction for All Interviews" was a violation of the Act. The Board found that such a statement "had a reasonable tendency to coerce employees, and so constituted an unlawful restraint of Section 7 rights." In order to justify a prohibition of employee discussions of employee investigations an employer must show a business justification that outweighs an employee's Section 7 rights.

3. *Costco Wholesale Corporation and United Food and Commercial Workers Union*, Local *371*,358 NLRB No. 106 (2012).[3] The Board found unlawful rules that:

a. Prohibited unauthorized posting, distribution, removal of any material on Company property;

b. Prohibiting employees from discussing private matters of members and other employees --including topics such as sick calls, leave of absences, FMLA, call outs, ADA accommodations, workers compensation injuries, etc.

c. Prohibited discussion of sensitive information such as membership, payroll etc.[4]

d. Prohibited employees from sharing confidential information such as employees' names, addresses, phone numbers, and e mail addresses.

e. Prohibited, without limitation, posting electronically statements that damage the company, defame any individual, or violate policies outlined in the Costco Employee Agreement.

4. *Karl Knauz* Motors, *Inc. d/b/a Knauz BMWE and Robert* B*ecker*, 358 NLRB No. 164(2012) A courtesy rule requiring everyone to be polite to customers, vendors, and suppliers was deemed unlawful, in relevant part, because there was nothing in the rule that stated employee communications protected by Section 7 of the Act were to be excluded from the broad language of the rule.

[3] Also see *First Transit and Amalgamated Transit Union Local 1433*,360 NLRB No. 72(2014) addressing many of the same issues

[4] Also see *MCPc. Inc. and* 360 NLRB No. 39(2014)

5. *Direct TV US Direct TV Holdings LLC and IAM District Lodge 947* 359 NLRB No. 54(2013) There the Board found unlawful handbook provisions restricting communication with the media, restricting communication with the NLRB, as well as containing broad confidentiality rules. A belated attempt to clarify the rules was found not to have amounted to a necessary repudiation of unlawful conduct.

6. Hills and Dales General Hospital and Danielle Corlis, 360 NLRB No. 70(2014). Here the Board found unlawful a work rule that prohibited negative comments about fellow employees and prohibited employees from engaging in or listening to negativity.

7.. D.R. Horton Inc. and Michael Cuda, 357 NLRB No. 184(2012) and *Murphy oil USA Inc. and Sheila M. Hobson*, 361 NLRB No. 72(October 28, 2014); In *DR Horton* the Board found unlawful agreements which require employees, as a condition of employment, to sign an agreement the prohibits the employees from filing joint, group, or class claims addressing wages, hours, or other working conditions in any forum such as arbitration and court. The rationale of the Board in these cases is that such an "agreement" unlawfully restricts the right of employees to engage in concerted action for mutual aid and protection protected by Section 7 .Despite a contrary holding by the Fifth Circuit on the appeal of that decision the Board very recently affirmed its positon in these matters in *Murphy Oil USA Inc.*

8. Social Media cases: Social media policies are often contained in employer handbooks. For a fuller discussion of those cases please see General Counsel Memorandum 12-31 (Report of the Acting General Counsel Concerning Social Media Cases (January 24, 2012). That is attached to this paper.

. **Administrative Law Judge Decisions (A Sampling):**

1. *Martin Luther Memorial Home Inc., d/b/a Lutheran Heritage Village Livonia and Vivian Formeman,* Case No.7-CA-44877(2003), finding unlawful work rules forbidding "loitering" on the premises without permission and a work rule forbidding engaging in unlawful strikes, work stoppages etc..

2. *American Red Cross Arizona Blood Services Region and Lois Hampton*, Case No.28-CA0-23443(2012) finding unlawful an overly broad statement in an employee handbook form stating"I further agree that the at will employment relationship cannot be amended, modified, or altered in any way."

3. *Advanced Services, Inc. and Tabita Howard and Princess* Ballard, Case nos. 26-CA-63184 and 26-CA-71805(2012) finding unlawful, among other things, rules prohibiting discussions by employees about terms and conditions of employment, including discipline.

4.. *Professional Electrical Contractors of Conn., Inc. and IBEW Local No. 35,* Case No. 34-CA-071532(2014), finding unlawful, among other things, a handbook provision prohibiting employees from engaging in boisterous activities.

What Does This All Mean?

Employee and union counsel will look carefully at Handbooks and other written policies. The Board will closely scrutinize handbook provisions and work rules that:

1. Have general provisions and general prohibitions;
2. Use very broad and undefined terms;
3. Fail to provide specific examples of what precise conduct is prohibited or controlled;
4. Has no clause(s) stating the policy is not intended to restrict Section 7 rights;
5. Appears to prohibit discussion by employees of wages, hours, and other terms and conditions of employment.