

KDV Alert: NLRB - Your Employee Handbook Policies May be Unlawful!

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On March 18, 2015, the National Labor Relations Board (“NLRB”) issued new Guidance regarding the types of employer policies and rules - typically contained in employee handbooks - that actually interfere with employees’ Section 7 rights under the National Labor Relations Act (“Act”). Chief among these rights are the so-called “employee freedom of speech” rights, which can unintentionally be violated by otherwise benign rules.

The Guidance addresses several topical areas of concern for the business community:

Confidentiality Rules

Blanket prohibitions regarding the dissemination of employee information and employer businesses practices are considered unlawful to the extent that they interfere with employees’ rights to discuss wages, hours, and other terms and conditions of employment with fellow employees (or non-employees, such as union representatives). One example of an unlawful rule: “Never publish or disclose [the Employer’s] or another’s confidential or proprietary information. Never publish or report on conversations that are meant to be private or internal to [the Employer].”

Employee Conduct Rules

Rules that can be reasonably read to ban all criticism of an employer will be found unlawfully overbroad since employees have a right under Section 7 of the Act to criticize or protest their employer’s labor policies or treatment of employees. Accordingly, rules that would ban employee disapproval or protests regarding their supervisors, management, or employer are impermissible. For example, the following rules have been found to be unlawful: “Be respectful to the company, other employees, customers, partners, and competitors,” (emphasis added) and “Refrain from any action that would harm persons or property or cause damage to the Company’s business or reputation.”

Conduct Toward Fellow Employees

Employees have the right under the Act to argue and debate with each other about the terms and conditions of their employment, their supervisors and managers, and unions. Therefore, rules that categorically prohibit the possibility of meaningful but contentious dialogue among employees have been found to be unlawful. For example, the following rules are unlawfully overbroad: “Do not make insulting, embarrassing, hurtful or abusive comments about other company employees online and avoid the use of offensive, derogatory, or prejudicial comments,” and “Show proper consideration for others’ privacy and for topics that may be considered objectionable or inflammatory, such as politics and religion.”

Employee Interaction With Third Parties

Employees have the right pursuant to Section 7 of the Act to communicate with news media, government agencies, and other third parties about wages, benefits, and other terms and conditions of employment. Company rules that would be reasonably read to restrict such communications are impermissible. Examples include the following rule: “Employees are not authorized to speak to any representatives of the print and/or electronic media about company matters unless designated to do so by HR, and must refer all media inquiries to the company media hotline.”

Employee Use of Company Logos, Copyrights, and Trademarks

The NLRB acknowledges that employers have a right to restrict employee use of company logos, copyrights, and trademarks. However, such restrictions cannot violate the “fair use” rights of employees to use company logos, copyrights, and trademarks while exercising their non-commercial rights, such as through the dissemination of picket signs, leaflets, and other protest material with the company’s

information on it. An example of an impermissible rule cited in the Guidance is, “Company logos and trademarks may not be used without written consent...”

Photography and Recording Restrictions

Employees have the right to photograph and make recordings in furtherance of their “concerted activity,” including the right to use personal devices to take such pictures and recordings. Blanket prohibitions on the use of photography and recording equipment, such as the following, have been consequently found to be unlawful: “Taking unauthorized pictures or video in company property is prohibited.” The NLRB noted that such a rule is unlawfully overbroad because it would be reasonably read to prohibit, for instance, the taking of pictures and recordings to document employees’ health and safety concerns.

Employee Leave Restrictions

According to the NLRB, a rule that regulates when employees are permitted to leave the worksite may be unlawful if it would be reasonably read to forbid protected strike actions and walkouts, “fundamental rights of employees” under the Act. For instance, a rule that states, “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,” would be unlawful under the NLRB’s Guidance. The NLRB specifically states that this broadly written rule could be reasonably read to interfere with employees’ rights to engage in a work stoppage.

Best Practices

As detailed above, it is evident that the NLRB is intent on exercising its powers under the Act to enforce its pro-employee Guidance. Violating employers face penalties, including notice postings, on-site reading of orders by NLRB agents, and rescission of any unlawful policies and/or handbook provisions. In addition, should an employee be terminated for violating any policy the NLRB finds unlawful, the terminated employee may be entitled to reinstatement and a back pay award with interest.

Accordingly, even if your company’s handbook was recently revised, employers are highly encouraged to take this opportunity to revisit their employee handbooks and workplace policies to ensure compliance with the new NLRB Guidance.

The full text of the NLRB Guidance may be found by [clicking here](#).