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PRESENTATION TO SOBEL'S LITIGATION ROUNDTABLE

DOES YOUR EMPLOYEE HANDBOOK VIOLATE THE NLRA?

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INTRODUCTION

This information is intended for general information purposes only. It does not constitute legal advice. The reader should consult with knowledgeable legal counsel to determine how applicable laws apply to specific facts and situations. This information is based on the most current regulation at the time it was presented. Since it is possible that the laws or other circumstances may have changed since that time, please contact Kenneth A. Rosenberg to discuss any action you may be considering as a result of reading this publication.



INTRODUCTION

- Why is NLRB Provoking Change?
 - Declining union membership
 - To maintain relevant &
 - To fulfill mission of enforcing the NLRA.

NLRB's Jurisdiction

- Jurisdiction over entities engaged in interstate commerce at certain monetary thresholds.
- Commerce includes:
 - Trade, traffic, transportation or communications.
- Enterprise does not have to be unionized to be governed by NLRA and thus subject to NLRB jurisdiction.
 - Many recent NLRB decisions involve non-unionized employers' policies.



NLRA PROTECTIONS

- NLRA prohibits employers and unions from engaging in activities that violate an employee's Section 7 rights.
- Section 7 gives employees the right to:
 - Self organize, 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, and refrain from any or all such activities.



Examples of Section 7 Rights

- Examples of Employees' Section 7 rights include:
 - Form/attempt to form/join a union;
 - Assist a union organize employees;
 - Collectively bargain;
 - Process grievances;
 - Strike to secure better working conditions;
 - Refrain from union related activity.



Section 7 rights continued

- Protects the rights of employees to discuss working conditions where:
 - They are not represented by a union;
 - Do not have a collective bargaining agreement and;
 - Even if they have no intention of forming a union.



Violation of Section 7 rights

- Violation occurs where:
 - Employer interferes with, restrains or coerces employees in the exercise of rights guaranteed in Section 7.
- Rule will violate Section 7 by explicitly restricting protected activity – banning union activity.
 - Employers cannot institute work rules that prevent employees from engaging in concerted activities for the purpose of their mutual aid or protection.
 - Work rules/policies that prevent employees from discussing/complaining about terms and condition of employment amongst themselves or with other third parties is a violation.



Section 7 rights continued

- Even if a rule does not explicitly prohibit Section 7 activity, it will still be found unlawful if it has a chilling affect.
 - 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, or
 - The rule was actually applied to restrict the exercise of Section 7 rights.



General Counsel's Memo on Employer's Rules

- 3/18/2015 NLRB's General Counsel issued memo as to prohibited/acceptable employer rules/policies under Section 7.
- Memo addresses the following rules:
 - Confidentiality,
 - Employee conduct towards managers/supervisors,
 - Employee interaction with co-workers,
 - Communications with third parties,
 - Use of Company intellectual property,
 - Photography and recording in the workplace,
 - E-mail communications,
 - Social media, and
 - Employee conflicts of interest.



Confidentiality rules

- Employees have Section 7 rights to discuss wages, hours and other terms and conditions of employment with co-workers and non-employees such as union representatives.
- Confidentiality provisions violate Section 7 if they either:
 - Specifically prohibit employee discussions of terms and conditions of employment or workplace complaints; or
 - Employees would reasonably understand them to prohibit such discussions.



Confidentiality rules

- Prohibitions on disclosing “confidential” information is lawful so long as they do not:
 - Reference information regarding employees or;
 - Anything that would reasonably be interpreted as a term or condition of employment.
- Confidentiality rules are still lawful because employers have a substantial and legitimate interest in maintaining the privacy of certain business information.



Unlawful Confidentiality Rule

- “Do not discuss customer or employee information outside of work including phone numbers and addresses.”
 - Phrase “employee information” is overbroad.
 - Can’t ban discussing contact information without regard as to how information was obtained, i.e. – Improperly accessed.

Unlawful Confidentiality Rule

- “Do not discuss your compensation/pay with your co-workers or third parties. Violators will be disciplined up to and including discharge.”
 - Violates Section 7 rights;
 - Violates NJ’s Equal Pay Act
 - Executive Order 13665 – “Non-Retaliation for Disclosure of Compensation Information”
 - Both make it illegal for an employer to retaliate against any employee who discloses their rate of compensation (including benefits).



Lawful Confidentiality Rules

- Confidential information rules are lawful where:
 - They do not reference information regarding employees or terms and conditions of employment,
 - They do not define the term “confidential” in an overbroad manner, and
 - They do not contain language that would reasonably be construed to prohibit Section 7 communications.
 - “No unauthorized disclosure of business secrets or other confidential information.”
 - Don’t disclose confidential financial data... Do not share confidential information regarding business partners, customers or vendors.



Employee Conduct Rules towards the Company and Supervisors

- Employees have Section 7 rights to criticize or protest their employer's labor policies or treatment of employees.
- Rules that can reasonably be read to prohibit protected concerted criticism of the employer will be found unlawfully overbroad.
- Rules that prohibit employees from engaging in “disrespectful,” “negative,” “inappropriate,” or “rude” conduct towards the employer/management, absent sufficient clarification or context will usually be found unlawful.



Employee Conduct Rules towards the Company and Supervisors

- Employee criticism of an employer will not lose the Act's protection simply because the criticism is false or defamatory, so rules that ban false statements will be deemed unlawful unless it specifies that only maliciously (knowing/reckless) false statements are prohibited.
- Rules that require employees to be respectful and professional to coworkers, clients or competitors but not the employer are lawful because employers have a legitimate business interest in having employees act professionally and courteously in their dealings with these groups.
- Rules prohibiting insubordination are ok.



Unlawful Employee Conduct Rules

- “Be respectful to the company, other employees, customers, partners and competitors.”
- “Do not make fun of, denigrate or defame your co-workers, customers, franchisees, suppliers, the company or our competitors.”
- “Do not defame or make libelous, slanderous or discriminatory comments about the Company, its customers, employees or management.”
- These rules are overbroad because ban criticism of the employer, supervisors, and management.



Unlawful Employee Conduct Rules

- “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.”
- “Do not make statements that damage the company or its reputation or that disrupt its business relationships.”
- These rules were deemed unlawful because employees are allowed to criticize employers in public.



Lawful Employee Conduct Rules

- Employers can prohibit employee conduct aimed at disparaging an employer's product, as opposed to labor policies or working conditions.
- “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.
- Employees can be expected to work together with civility.



Lawful Employee Conduct Rules

- “Being insubordinate, threatening, intimidating, disrespectful or assaulting a manager/supervisor, coworker, customer or vendor will result in discipline.”
- Although ban on disrespectful conduct alone is unlawful, the term above is contained in a larger provision that is clearly focused on serious misconduct, and thus employees would not reasonably believe this rule bans protected criticism.



Employer Rules Regulating Employee Conduct towards Co-workers

- Section 7 protects right of employees to argue and debate with each other about unions, management and their terms and conditions.
- Such speech will not lose its protections even if it is intemperate, abusive and inaccurate.
- Can't ban negative or inappropriate discussions among employees without further clarification, i.e. "during work time".



Unlawful Employee-Employee Conduct Rules

- “Don’t pick fights online”.
 - Deemed unlawful because it could reasonably be construed as encompassing unionization debates.
- Do not make insulting embarrassing, hurtful or abusive comments about other company employees online and avoid the use of offensive, derogatory or prejudicial comments.
 - Deemed unlawful because it could be reasonably construed as limiting ability of employees to honestly discuss unionization and/or to limit protected criticism of supervisors/managers.



Unlawful Employee-Employee Conduct Rules

- “Show proper consideration for others’ privacy and for topics that may be considered objectionable or inflammatory such as politics and religion.”
 - Unlawful because Section 7 protects discussions about political matters, such as right-to-work legislation.
- “Material that is fraudulent, harassing, **embarrassing**, sexually explicit, profane, obscene, **intimidating**, **defamatory** or **otherwise** unlawful or **inappropriate** may not be sent by email.”
 - Unlawful because the bolded terms are ambiguous as to their application to Section 7.



Lawful Employee-Employee Conduct Rules

- Rule is lawful if simply requires employees to be respectful to customers/competitors and directs employees not to engage in unprofessional conduct and does not mention the company or management.
- “Making inappropriate gestures including staring is prohibited”
- No “harassment of employees, patients or visitors”
- “No use of racial slurs, derogatory comments or insults.”
 - This rule ok because of context - it was in section involving unlawful harassment/discrimination.



Social Media policies

- Subject to same Section 7 issues as other work rules.
- Employers have a legitimate interest in ensuring employee communications are not construed as misrepresenting employer's official position.
 - But NLRB has limited employer's attempt to limit employees ability to comment about Company's business, policies or employees without prior authorization.
 - Attempts to require employees to file complaints internally only prohibits right to make complaints outside of the Company.
- Use of the "Like" Facebook button constitutes protected activity.
 - Employee discussion about tax withholdings which included derogatory comments and profanities directed towards the Company were protected where another employee liked the post.



Implications

- Failing to review policies and procedures can result in:
 - NLRB investigation on its own initiative or after complaint filed by union or employee;
 - NLRB can prosecute unfair practice charge or force conciliation agreement.
 - Bad media - NLRB will publicize.
 - NLRB can order reinstatement, back pay and interest to employee who has been disciplined/discharged for violating illegal rule.
 - NLRB can require employer to revise and reissue work rule/handbook/policy.



Recommendations

- Keep abreast of NLRB guidance and cases as law is fluid.
- Periodically review and if necessary revise policies and procedures to ensure compliant.
 - Draft rules consider context, breadth, and legitimate business reasons.
 - Choose words carefully.
- When in doubt seek assistance.



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