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NLRB'S HELPING HANDBOOK RULES

By Vito A. Gagliardi, Jr.

Last month, the General Counsel to the National Labor Relations Board ("NLRB") issued a report offering guidance on how to craft employee handbooks without violating worker rights under the National Labor Relations Act ("NLRA" or "the Act"). In continuing the trend in recent years to assert its role throughout all aspects of the employer-employee relationship, the NLRB has issued findings against numerous employers for handbook rules that negatively impact workers' rights to engage in "concerted activity" under the NLRA. This report from the NLRB General Counsel provides useful guidance for employers about what he references as an "evolving area of labor law."

Under Section 7 of the NLRA, employees have a right to engage in "concerted activity" on issues related to the terms and conditions of their employment. Significantly, even if a rule or policy does not expressly prohibit Section 7 activity, it will be found to be unlawful if employees could "reasonably construe the rule's language to prohibit Section 7 activity." It is through this lens that the NLRB will review any workplace rule or policy.

This report provides many examples of lawful and unlawful handbook rules, broken down in the following categories:

- Employer handbook rules regarding confidentiality:**
 "Employees have a Section 7 right to discuss wages, hours, and other terms and conditions of employment with fellow employees, as well as non-employees, such as union representatives. Thus, an employer's confidentiality policy that either specifically prohibits employee discussion of terms and conditions of employment - such as wages, hours, or workplace complaints - or that employees would reasonably understand to prohibit such discussions, violates the Act."

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Employer handbook rules regarding employee conduct toward the company and supervisors: "Employees also have the Section 7 right to criticize or protest their employer's labor policies or treatment of employees." As the report sets forth in detail, any rules that "can reasonably be read to prohibit protected, concerted criticism of the employer" will be deemed unlawful. Rules that prohibit employees generally from engaging in "disrespectful," "negative," "inappropriate," or "rude" behavior toward management are likely to be found unlawful, absent sufficient justification or context.

- **Employer handbook rules regulating conduct towards fellow employees:** The report reminds employers that all employees also have a right under the Act "to argue and debate with each other about unions, management, and their terms and conditions of employment." Concerted speech will not lose its protection even if it includes "intemperate, abusive and inaccurate statements." Thus, employees are reminded that rules addressing behavior towards management are not the only rules that need to be reexamined for compliance with the Act; rules covering employee conduct toward each other are also within the reach of the NLRB.
- **Employer handbook rules regarding employee interaction with third parties:** "Another right employees have under Section 7 is the right to communicate with the news media, government agencies, and other third parties about wages, benefits and other terms and conditions of employment. Handbook rules that reasonably would be read to restrict such communications are unlawfully overbroad."
- **Employer handbook rules restricting use of company logos, copyrights and trademarks:** While a company's name and logo typically are protected by intellectual property laws, "employees have a right to use the name and logo on picket signs, leaflets and other protest material. Employer proprietary interests are not implicated by employees' non-commercial use of the name, logo, or other trademark to identify the employer in the course of Section 7 activity."
- **Employer handbook rules restricting photography and recording:** The report cautions that "rules placing a total ban on ... photography or recordings, or banning the use or possession of personal cameras or recording devices, are unlawfully overbroad where they would reasonably be read to prohibit the taking of pictures or recordings on non-work time."
- **Employer handbook rules restricting employees from leaving work:** While employees are subject to rules that prohibit them from leaving their posts for reasons unrelated to protected concerted activity, blanket rules prohibiting employees from "walking off the job" are prohibited; employers cannot forbid protected strike actions and walkouts.
- **Employer conflict-of-interest rules:** Employees have a right to engage in concerted activity, "even if that activity is in conflict with the employer's interests. For instance, employees may protest in front of the company, organize a boycott, and solicit support for a union while on non-work time."

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The 30-page report provides numerous examples of what would and would not be acceptable in connection with the foregoing rules and includes a detailed autopsy of a

settlement involving an unfair labor practice charge against Wendy's International, LLC, in connection with its employee handbook. All employers must be mindful of the NLRB's stand on workplace rules and policies. The NLRB is not shy about taking employers to task for the most benign policies, should they be capable of being construed as restricting concerted activity. Indeed, as the report itself cautions, "the law does not allow even well-intentioned rules that would inhibit employees from engaging in activities protected by the Act."

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