National Labor Relations Board General Counsel Issues Guidance on Employee Handbook Provisions

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On March 18, 2015, the Office of the General Counsel of the National Labor Relations Board (NLRB), the federal agency primarily responsible for administering and enforcing the National Labor Relations Act, issued guidance regarding certain common employee handbook provisions that may violate the Act. The recent guidance will likely require changes to many standard employment policies governing, among other areas, workplace civility among employees and toward employers, confidentiality, harassment, conflicts of interest, use of computers, email and social media, and employee use of employer trademarks and other protected property.

The Act establishes the rights and obligations of employees, employers and labor organizations with respect to collective bargaining and related activity. Section 7 of the Act, in particular, gives employees the right to form, join or assist labor unions and engage in other "concerted activities for the purpose of collective bargaining or other mutual aid or protection." Such protected "concerted activities" (referred to as "Section 7 activity") include employee communications with each other and certain outside parties regarding wages, hours, benefits and other terms and conditions of employment. The Act makes it an "unfair labor practice" for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." The Act's protections apply to most private-sector employees, regardless of whether they belong to a union or the size of their employer.

A workplace policy that does not explicitly prohibit Section 7 activity nonetheless violates the Act if employees reasonably would interpret the policy to prohibit protected activity. According to the General Counsel's recent guidance, the following common employee handbook provisions may violate the Act because they are overbroad or otherwise could have a chilling effect on permitted Section 7 activity:

- Policies that prohibit, or reasonably could be construed to prohibit, employees from discussing their working conditions, including wages, hours, benefits, workplace complaints, safety and personnel information, or that do not allow employee disclosure to third parties of employee handbooks or other workplace policies. For example, policies permitting employees to discuss work matters with other employees only when there is a specific business reason to do so, or prohibiting them from discussing salaries, bonuses or other "confidential employee information," generally have been found to violate the Act.

- Policies that require employees to be respectful of their employer or that prohibit conduct that would damage the employer's business or reputation, including public criticism of the employer. Even

policies prohibiting only false employee statements that are critical of or damaging to an employer may nonetheless violate the Act.

- Policies that prohibit "offensive," "derogatory," "insulting," "embarrassing," "intimidating" or "inappropriate" comments to fellow employees have been found to be unlawfully overbroad because, in certain cases, they limit employees' rights to engage in protected discussions regarding unionization, criticism of supervisors or managers, or other protected concerted activity.

- Policies that prohibit employee use of the employer's name, logos, trademarks or copyrighted material without the consent of the employer have been deemed unlawfully overbroad and violative of employee rights under Section 7.

- Policies that contain blanket prohibitions on employees taking unauthorized workplace pictures or video, or using or possessing personal electronic equipment or data storage devices on employer property, could violate the Act.

- Policies prohibiting employee conduct that conflicts with the employer's interests, absent clarification that the policy excludes protected Section 7 activity, generally violate the Act.

The General Counsel's guidance finds unlawful a number of widely used employment policies on the basis that they are vague and overbroad and, whether or not intended, could be construed as prohibiting protected employee conduct. Unfortunately, the guidance does not provide a clear roadmap to help employers appropriately tailor their workplace policies to protect legitimate business interests without restraining employees' exercise of rights protected under Section 7. The guidance is fact specific and, in some respects, nuanced and difficult to apply. For example, certain handbook provisions, standing alone, are deemed overbroad as impinging on Section 7 activity, while similarly worded provisions are deemed lawful when viewed in context or accompanied by examples to clarify that the policies are not intended to prohibit discussion of working conditions or other protected activity. As a result, it is not always clear under the guidance why one policy is lawful and another policy, seemingly intended to address the same workplace conduct, is not.

Employers are always well-advised to review their employee handbooks on a regular basis to help ensure their compliance with rapidly evolving employment laws and changes in employer policies and procedures. While courts may ultimately disagree with the position of the NLRB in certain instances, employers who ignore the recent guidance of this agency would do so at their own peril.

In addition, in view of the recent flurry of NLRB decisions and other guidance impacting employer policies, including the recent handbook guidance discussed above, it would be especially prudent for employers to review their employee handbooks with their counsel to help ensure that they are up-to-date and compliant with the standards enunciated by the NLRB.

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