Labor & Employment
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March 2015

National Labor Relations Board's General Counsel Issues Memorandum Addressing Employee Handbooks

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Over the past year, the National Labor Relations Board (NLRB) has issued a number of decisions that found various workplace policies and rules contained in employee handbooks to be unlawful under the National Labor Relations Act (NLRA). To the consternation of the employer community many of the policies and rules that the NLRB has held to be in violation of the NLRA are typical, generic policies and rules found in many employee handbooks.

In an attempt to provide guidance to the employer community about which policies and rules are permissible and which are not, on March 18, 2015, the NLRB's General Counsel, Richard F. Griffin, Jr., issued a memorandum discussing recent NLRB case developments that arose in the context of employee handbook rules. Though seemingly benevolent in its purpose, the opinions expressed in the memorandum have a dramatic impact upon what an employer can place in its employee handbook and their workplace policies and practices.

As an initial matter, many private-sector employers believe that the NLRA only applies to unionized workforces. This is not true. Generally, the NLRA's provisions apply to all private-sector workforces, other than railroads and air carriers. Therefore, even if the employer's workforce is not unionized, the employer must still comply with the NLRA and the employer cannot institute policies and rules that violate the NLRA. Under the NLRA, an employer cannot interfere or constrain employees from engaging in "concerted activities for the purpose of [their] mutual aid or protection." This has been interpreted by the NLRB and the courts to prohibit employers from instituting rules and policies that prevent employees from discussing or complaining about their terms and conditions of employment among themselves or with other third parties.

In his memorandum, the General Counsel addressed a number of rules and policies typically found in employee handbooks, including confidentiality, employee conduct towards managers and supervisors, employee interaction with their colleagues, communications with third parties, the use of company intellectual property, photography and recording in the workplace, e-mail communications, social media and employee conflicts of interest.

Examples of some of the opinions expressed by the general counsel in the memorandum include:

- Broad confidentiality provisions that do not specifically advise employees what constitutes confidential information or carve out an exception for their ability to discuss topics protected by the NLRA are prohibited as they infringe upon employees' right to discuss wages, hours and other terms and conditions of employment.

- Employers are prohibited from enacting rules that prohibit employees from engaging in disrespectful, negative, inappropriate or rude conduct towards their employer or management as they may be construed to prohibit protected concerted criticism of the employer.
- Rules that prohibit employees from sending unwanted emails to other employees or from discussing topics that others might find objectionable or inflammatory, such as politics, would violate the NLRA because these rules would prevent or chill employees from discussing unionization or raising complaints about their terms and conditions of employment.
- Blanket rules prohibiting employees from commenting on their employer's business or policies or employees on social media or online, without authorization, was an improper restriction of rights under the NLRA.
- Rules that prohibit employees from blogging, posting or emailing anonymously violate the NLRA because it "imposes an unwarranted burden" on employees and may restrain them from discussing their terms and conditions of employment.

These are just a few of the many policies addressed by the NLRB that many employee handbooks may violate.

The release of this memorandum will likely lead to a flood of litigation over the contents of employee handbooks. Furthermore, this is an ever-changing area of the law and due to the peculiarities of the NLRB, a handbook policy that the NLRB found lawful in a prior administration might not be lawful today. Accordingly, it is imperative that employers work with counsel to constantly review and revise their employee handbooks to ensure compliance with the NLRA.

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