

Bullet-Proofing Your Employee Handbook in the Wake of the NLRB General Counsel Guidance Regarding Lawful Handbook Policies

Delaware Valley Labor & Employment Conference

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AGENDA

- Legal and Political Background
- NLRB Publications on Handbooks and Social Media Policies
- What is lawful and unlawful?
 - Social Media Rules
 - Confidentiality Rules
 - Professionalism Rules
 - Anti-harassment Rules
 - Media Contact Rules
 - Trademark Rules
 - Photography/Recording Rules
 - Leaving Work Rules

MY WORKFORCE IS NOT UNIONIZED - WHY SHOULD I CARE WHAT THE NLRB HAS TO SAY?

- National Labor Relations Act (NLRA) covers most private sector employers
 - **NLRB has jurisdiction over union and non-union workplaces**
 - NLRB has jurisdiction over private sector employers whose activity in interstate commerce exceeds a minimal level
 - Federal or State governmental offices, the Federal Reserve Bank, employers subject to the Railway Labor Act, municipalities and religious organizations are excluded

UNDERSTANDING EMPLOYEE RIGHTS UNDER THE NLRA

- Section 7 of the NLRA gives employees the right to organize, strike, collectively bargain, and **engage in other protected concerted activity for the purpose of mutual aid and protection**
 - Concerted activity is much broader than union organizing
 - Section 7 grants employees the right to communicate about wages, hours, and any other terms and conditions of employment with fellow employees, as well as with nonemployees, such as union representatives
 - Such communication may occur at the water cooler or on social media
- Section 8 prohibits employers from any conduct that interferes, restrains, or coerces employees in the exercise of their protected Section 7 rights and also prohibits employers from retaliating against employees for engaging in such conduct

POLITICS ... BRIEFLY

- NLRB consists of five members appointed by the President and in most cases confirmed by the U.S. Senate
- Historically, a 3-2 arrangement with the President's political party holding a majority
- Under the Obama Administration, the NLRB has issued rules making it easier to form a union and expanding the rights of non-union employees

TRADITIONAL SECTION 7 TEST – CONDUCT MUST BE BOTH PROTECTED AND CONCERTED

- Conduct must be protected by the NLRA
 - Right to Organize
 - Statements or activity regarding an employee’s wages, working conditions or other terms of employment
- Conduct must involve concerted activity
 - Concerted activity occurs when “the employee is engaged with or on the authority of other employees, and not solely on behalf of the employee himself”
 - “Where individual employees seek to initiate or to induce or to prepare for group action”

COMMON WAYS TO VIOLATE AN EMPLOYEE'S SECTION 7 RIGHTS

- Interfering with an employee's right to organize a union or join a union
- Retaliating against employees for engaging in protected concerted activity
- Disciplining employees for engaging in protected concerted activity

SECTION 7 AND WORK RULES

- Under the Board's decision in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), **the mere maintenance of a work rule may violate Section 8(a)(1) of the Act if the rule has a chilling effect on employees' Section 7 activity**
- The most obvious way a rule would violate Section 8(a)(1) is by explicitly restricting protected concerted activity; by banning union activity, for example
- Even if a rule does not explicitly prohibit Section 7 activity, however, it will still be found unlawful if
 1. Employees would reasonably construe the rule's language to prohibit Section 7 activity
 2. The rule was promulgated in response to union or other Section 7 activity
 3. the rule was actually applied to restrict the exercise of Section 7 rights

CONSEQUENCES OF AN UNLAWFUL WORK RULE

In the event that the NLRB finds that an employer issued an unlawful work rule, the employer may be ordered to:

- Reinstatement and make whole (through backpay) any employee terminated under illegal work rule
- Rescind the unlawful work rule and issue a work rule in compliance with the NLRA
- Post notices at workplaces informing employees that the employer had issued an illegal work rule and of their rights under the NLRA

NLRB PUBLICATIONS ON HANDBOOKS AND SOCIAL MEDIA POLICIES

- In 2010, the NLRB began receiving an influx of charges related to social media
- In 2011 and 2012, Acting General Counsel Lafe Solomon released three memos detailing the results of investigations in dozens of social media cases
- In March 2015, General Counsel Richard Griffin, Jr. issued a report that attempted to summarize the types of rules that the NLRB has found illegal and lawful

UNIFYING PRINCIPLES . . . IF ANY

- Do's
 - Handbook rules should be drafted to **specifically** address the legitimate concern of the employee
 - Handbook rules should be drafted to **clearly** address the legitimate concern of the employee
- Don'ts
 - Handbook rules should not be so **overbroad** as to restrict Section 7 rights
 - Handbook rules should not be so **vague** as to allow an employee to reasonably interpret that Section 7 rights have been restricted

CONFIDENTIALITY RULES

- Unlawful
 - Illegitimate employee concern: Restricting employee communication about terms and conditions of employment
 - Prohibition on employee discussions of terms and conditions of employment— such as wages, hours, or workplace complaints
 - Prohibition on employee discussion of "employee" or "personnel" information, without further clarification

- Lawful
 - Legitimate employer concern: Maintaining trade secrets
 - Prohibition on disclosure of confidential information that does not reference information regarding employees or employee terms and conditions of employment

CONFIDENTIALITY RULES - EXAMPLES

- Unlawful
 - “Do not discuss customer or employee information outside of work, including phone numbers and addresses”
 - “Never publish or disclose the Employer's or another's confidential or other proprietary information. Never publish or report on conversations that are meant to be private or internal to the Employer.”
- Lawful
 - “No unauthorized disclosure of business secrets or other confidential information”
 - “Do not disclose confidential financial data, or other non-public proprietary company information”

PROFESSIONALISM RULES

- Unlawful
 - Illegitimate employee concern: Restricting right to criticize or protest employer's labor policies or treatment of employee
 - Blanket prohibition on employees criticizing or protesting their employer's labor policies or treatment of employee
 - Prohibitions on criticism in public forum
 - Prohibitions on disrespectful conduct that does not rise to insubordination
- Lawful
 - Legitimate employee concern: Prohibiting insubordination and requiring courteous and respectful conduct
 - Requiring employees to be respectful to customers, competitors, and the like, with no mention of the employer or management
 - Requiring employees to cooperate with each other and the employer in the performance of their work

PROFESSIONALISM RULES - EXAMPLES

- Unlawful
 - “Be respectful to the company, other employees, customers, partners, and competitors”
 - “Refrain from any action that would harm persons or property or cause damage to the Company's business or reputation”
 - "Chronic resistance to proper work-related orders or discipline, even though not overt insubordination will result in discipline”

- Lawful
 - “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”

ANTI-HARASSMENT RULES

- Unlawful
 - Illegitimate employee concern: Restricting employees' right to argue and debate with each other about unions, management, and their terms and conditions of employment
 - Prohibitions on "negative" or "inappropriate" discussions among employees, without further clarification
 - Restricting protected discussions among coworkers
- Lawful
 - Legitimate employee concern: Maintaining a harassment-free workplace
 - Requiring employees to be respectful to customers or competitors
 - Directing employees not to engage in unprofessional conduct

ANTI-HARASSMENT RULES - EXAMPLES

- Unlawful
 - "Don't pick fights online"
 - "Show proper consideration for others' privacy and for topics that may be considered objectionable or inflammatory, such as politics and religion"
 - "Do not send unwanted, offensive, or inappropriate e-mails"
- Lawful
 - "Do not make inappropriate gestures, including visual staring"
 - "No use of racial slurs, derogatory comments, or insults"

MEDIA CONTACT RULES

- Unlawful
 - Illegitimate employee concern: Restricting employees' right to communicate with the news media, government agencies, and other third parties about wages, benefits, and other terms and conditions of employment
 - Restricting or prohibiting protected media contact
 - Restricting speaking with the media on employees' own behalf
- Lawful
 - Legitimate employee concern: Controlling who makes official statements for the employer
 - Prohibiting statements to the media on behalf of the employer

MEDIA CONTACT RULES - EXAMPLES

- Unlawful
 - "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"
 - "Associates are not authorized to answer questions from the news media. When approached for information, you should refer the person to [the Employer's] Media Relations Department."
- Lawful
 - "The company strives to anticipate and manage crisis situations in order to reduce disruption to our employees and to maintain our reputation as a high quality company. To best serve these objectives, the company will respond to the news media in a timely and professional manner only through the designated spokespersons."

TRADEMARK RULES

- Unlawful
 - Illegitimate employee concern: Prohibiting employees' fair protected use of employers' intellectual property
 - Prohibiting right to use employer's name and logo on picket signs, leaflets, and other protest material
 - Prohibiting non-commercial use of a name, logo, or other trademark to identify the employer in the course of Section 7 activity
- Lawful
 - Legitimate employee concern: Protecting intellectual property
 - Requiring employees to respect trademark and intellectual property laws

TRADEMARK RULES - EXAMPLES

- Unlawful
 - “Company logos and trademarks may not be used without written consent”
 - “Do not use any Company logos, trademarks, graphics, or advertising materials in social media”
- Lawful
 - “Respect all copyright and other intellectual property laws. For the Employer's protection as well as your own, it is critical that you show proper respect for the laws governing copyright, fair use of copyrighted material owned by others, trademarks and other intellectual property, including the Employer's own copyrights, trademarks and brands.”

PHOTOGRAPHY AND RECORDING RULES

- Unlawful
 - Illegitimate employee concern: Restricting right to photograph and make recordings in furtherance of their protected concerted activity, including the right to use personal devices to take such pictures and recordings
 - Placing a total ban on photography or recordings
 - Banning the use or possession of personal cameras or recording devices
- Lawful
 - Legitimate employee concern: Protecting a privacy interest, such as patient privacy
 - Limiting the prohibition on photography and recording to protect legitimate privacy interests

PHOTOGRAPHY AND RECORDING RULES - EXAMPLES

- Unlawful
 - "Taking unauthorized pictures or video on company property is prohibited"
 - "No employee shall use any recording device including but not limited to, audio, video, or digital for the purpose of recording any Company employee or Company operation"

- Lawful
 - "Do not take pictures of any patient information"
 - "Do not record any individual without their express consent"

RESTRICTION ON EMPLOYEES LEAVING WORK

- Unlawful
 - Illegitimate employee concern: Restricting the right to strike
 - Broad prohibitions on walking off the job, which reasonably would be read to include protected strikes and walkouts
 - Example: “Walking off the job is prohibited”
 - Example: “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”

- Lawful
 - Legitimate employee concern: Prohibiting insubordination and ensuring continuity of business operations
 - No universal example provided by NLRB

QUESTIONS?



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THANK YOU

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