Obama NLRB Finds Common Employee Handbook Policies Unlawful

The first thing that a union does after it has identified a "target" for organizing is to look at the company's employee handbook. Their intent is to find rules that the National Labor Relations Board ("NLRB" or "the Board") has found to be violations of the National Labor Relations Act ("NLRA" or "the Act"). Recently, the Obama NLRB has struck down common employee handbook rules as violating employees' Section 7 rights. The union then files an unfair labor practice (ULP) charge with the Board's Regional Office. If the Regional Director decides there is a violation, it issues a Complaint, and the case is set for trial.

Once a Complaint issues, the union tells the employees it is trying to organize that, if something happens to them, such as a discharge, they, the union, will get them their job back, because they have the power of the Federal government through the NLRB behind them. Therefore, all employee handbook provisions that are potentially unlawful should be removed prior to a union campaign.

Recent decisions by the Obama NLRB have delved into such policies as, (1) email use by employees during nonwork time, (2) "no disruptions" and (3) confidentiality.

The NLRB's recent focus on employer policies is based upon its decision in ***Lutheran Heritage Village – Livonia***. **An employer's policies or rule violates Section 8(a)(1) of the Act if it would "reasonably tend to chill employees in the exercise of their Section 7 rights."** Section 7 of the Act is the one that sets forth employees' rights "to self-organization, to form, join or assist labor organizations," and to engage in concerted activity for the purpose of their mutual aid or protection. It is a violation of Section 8(a)(1) for an employer to interfere with, restrain or coerce employees in the exercise of their Section 7 rights.

Under the Board's holding in ***Lutheran Heritage***, it developed a two-step inquiry to determine if a rule would "reasonably tend to chill employees in their exercise of their Section 7 rights." First, if a rule explicitly restricts Section 7 activities, it is unlawful. Next, if the rule does not explicitly restrict protected activities, it will violate Section 8(a)(1) of the Act if it can be shown that:

(1) employees would reasonably construe the language to prohibit Section 7 activity;

(2) the rule was promulgated in response to union activity; or

(3) the rule has been applied to restrict the exercise of Section 7 rights.

The vast majority of violations pertaining to company policies and rules are found under the first prong of the ***Lutheran Heritage*** test, that is, will employees reasonably construe the language of the rule to prohibit Section 7 activity.

Employee Use of Company Email

Some policies state that email may only be used for business purposes. In ***Purple Communications, Inc.***, (2014), a three member majority of the Obama NLRB (Chairman Pierce, Members Hirozawa and Schiffer, all Democrat appointees) held that the company's electronic communications policy that prohibited employees from using its email system for any nonbusiness reason violated Section 8(a)(1) of the National Labor Relations Act ("NLRA or the Act"). (Members Miscimarra and Johnson, both Republican appointees, dissented).

The Board majority found that "employee use of email for statutorily protected communications on nonworking time must presumptively be permitted by employers who have chosen to give employees access to their email systems." By this finding, the Obama NLRB majority overruled the Board's 2007 decision in ***Register Guard***.

Nonwork time is defined by the NLRB as the time when employees are not performing their assigned tasks, whether this time is paid or unpaid time. Conversely, work time is when an employee is performing their assigned tasks.

Confidentiality Rules

According to the NLRB, employees "have a Section 7 right to discuss wages, hours and other terms and conditions of employment with fellow employees, as well as with nonemployees, such as union representatives." An employer's confidentiality policy that either specifically prohibits employee discussions 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. Similarly, a confidentiality policy that broadly encompasses 'employee' or 'personal' information, without further clarification, will reasonably be construed by employees to restrict Section 7 protected communications. See ***Flamingo-Hilton Laughlin***, (1999) NLRB Gen. Counsel Memo 15-04 (March 18, 2015).

Also, in 2014, the NLRB adopted its ALJ's finding that the Company's confidentiality rule was overly broad. The employee handbook rule stated that "dissemination of confidential information within [the company] such as personal or financial information, etc., will subject the responsible employee to disciplinary action or possible termination." According to the Board, employees "would reasonably construe this rule to prohibit discussion of wages or other terms and conditions of employment with their coworkers – activity protected by Section 7 of the Act."

Non-Disparagement Rules

Other Company rules or policies may prohibit sending messages or material derogatory to the Company or that damage or could damage the Company's image or reputation.

The NLRB in 2013 found as unlawful a non-disparagement provision in the company's policies. "That provision states that the employees will not 'publicly criticize, ridicule, disparage or defame the Company or its products, services, policies… through any written or oral statement…." The NLRB found that since employees, within certain limits, are "allowed to criticize their employer and its products as part of their Section 7 rights, and employees do so in appealing to the public, or to their fellow employees, in order to gain support," a "reasonable employee could conclude that the prohibitions contained in the [Non-Disparagement] Agreement, prohibited them from doing so."

Findings of unfair labor practices by the NLRB at the inception of an organizing campaign can be used by a union to discredit the employer's message. For that reason, companies should review their policies and handbooks in light of these recent NLRB holdings. Please consult with your labor law (NLRB) attorney for any questions you may have regarding the lawfulness of your policies and employee handbooks.

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