Has The NLRB Outlawed Courtesy?

Insights
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The National Labor Relations Board (NLRB) has attracted attention in recent years for its scrutiny of employer rules and policies regulating conduct of employees – including employees who are not represented by unions or attempting to organize a union. While much of this attention has been focused on decisions of the Board and guidance issued by its Acting General Counsel regarding social networking policies, the Board has addressed other employee conduct rules as well.

Case law on this topic pre-dates the current Board, and it is grounded in Section 7 of the National Labor Relations Act (NLRA) which protects the right of employees to form or join unions or otherwise engage in concerted activity for their mutual aid and protection. But some employers are left puzzled by recent Board decisions invalidating employee-conduct policies that seem to have nothing to do with preventing employees from forming or joining unions. Policies requiring employees to be courteous to one another and to customers and vendors are the latest to be struck down by the Board.

In two cases decided in September of this year the NLRB addressed the lawfulness of employer rules requiring courtesy and decorum on the part of employees, and it came to opposite conclusions. While these cases might be read to suggest that an employer risks violating federal law by requiring its employees to behave civilly at work, a closer reading indicates that employers still may lawfully promulgate basic employee-conduct standards, provided those standards are narrowly and carefully written.

Costco

The first case was *Costco Wholesale Corporation*. There the Board found that an employee handbook rule requiring employees to use "appropriate business decorum" in communicating with others was lawful under the NLRA. But the Board went on to hold that the employer's rule prohibiting the posting of messages that "damage the Company, defame any individual or damage any person's reputation" was unlawful.

In *Costco* the Board reiterated its approach taken in earlier cases to determine whether a workplace rule or policy violates the Act i.e., where the rule would "reasonably tend to chill

employees" in the exercise of their Section 7 rights. If the rule explicitly restricts Section 7 rights, said the Board, it is obviously unlawful.

If it does not, a violation depends on a showing of one of the following: 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. Most of the Board's decisions in this area fall under the first test, with the Board attempting to determine whether employees "reasonably would construe" a particular rule or policy as interfering with their Section 7 rights. The Board never inquires of actual employees as to how they construe these policies, however. Instead the Board imagines how "reasonable" employees would view the policy.

As to the rule requiring appropriate decorum in communications, the Board agreed that it was intended to promote "a civil and decent workplace" and not to restrict Section 7 activity. But it disagreed regarding the rule against damaging or defamatory communications. It found that employees reasonably would interpret that rule as prohibiting certain protected communications, such as communications critical of the employer or its terms and conditions of employment. *Costco*, then, appears to approve of rules that require courtesy and decorum in workplace communications and that prohibit harassment, verbal abuse, and profanity. It disapproves of broad rules against making damaging or defamatory statements about the company or another person, at least where nothing in the rule clarifies that protected communications (such as those concerning wages or working conditions) are not covered.

Knaus Motors

Three weeks later, however, the Board issued its decision in *Karl Knaus Motors, Inc.* concerning an employee handbook rule that stated:

Courtesy: Courtesy is the responsibility of every employee. Everyone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership.

Applying the same test it applied in *Costco*, the Board found this courtesy rule unlawful. It determined that employees would construe the rule's broad prohibition against "disrespectful" conduct and "language which injures the image or reputation of the dealership" to cover Section 7 activity such as employees' statements – to coworkers, supervisors or third parties who deal with the employer – that object to their working conditions and seek the support of others in improving them.

The Board noted, as it did in *Costco*, that nothing in the rule suggested that communications protected by Section 7 were exempt. According to the Board, if the rule only *encouraged* "courteous, polite and friendly" behavior it might pass muster, but the rule's prohibition against "disrespectful" conduct that damages the employer's reputation would lead reasonable employees

to believe that expressions of disagreement with their employer's employment practices would constitute grounds for discipline.

Knaus Motors might appear to hold that employers may not lawfully require their employees to be courteous and professional in dealing with co-workers, supervisors, customers and clients. While future Board decisions might go so far, given the liberal bent of the current Board and the Board's continued focus on this area, *Knaus Motors* need not be read that way.

The problem with the policies struck down in *Costco* and *Knaus Motors* is that they were overbroad. They combined valid rules requiring courtesy and decorum with invalid rules against disrespectful and defamatory behavior. Any prohibition against employees disparaging or "defaming" their employer or their supervisors will not likely survive scrutiny of the current Board, which will almost certainly find such rules to interfere with employees' right under Section 7 to complain about management and working conditions.

Employee-Conduct Policies Are Lawful If They Are Focused And Narrow

The lesson to be taken from these cases is not that you should abandon Workplace-conduct standards, but rather that you should review those standards to ensure that they are not overbroad or ambiguous. Policies must be specific. A policy against harassing language or discriminatory conduct based on race, sex, national origin, or other protected categories will remain lawful so long as it does not contain overbroad language that strays from the purpose of the policy. For example, a policy that prohibits verbal or physical harassment based on enumerated protected categories will be safe. A policy that prohibits "all forms of harassing, annoying or disrespectful language and conduct" is too broad and will be vulnerable to attack.

Likewise, avoid broad policies against disrespectful conduct. The Board will likely strike down a policy requiring that employees "respect" their supervisors and one another on the ground that such a policy is ambiguous and could be read to restrict employees from challenging their employer over wages or working conditions, or challenging one another over the merits of unionism. By contrast, a policy against insubordination would likely survive the Board's scrutiny if it defined insubordination as the failure or refusal to follow directions or an order from a supervisor. Employees have the right under Section 7 to voice their disagreement with their employer's policies but they do not have the right to refuse to follow management's direction as it relates to their work.

Rules against bullying, threats, and intimidation should remain valid, The Board in *Knaus Motors* highlighted the distinction between invalid employer restrictions on the *content* of speech and valid restrictions on the manner of speaking. While employees have the right to voice their opposition to employer policies, they do not have the right to do so in a menacing manner.

These cases also suggest that policies regulating employee communication and behavior might have been deemed lawful had they contained a proviso stating that speech or conduct protected by Section 7 is not prohibited by those policies. But think carefully before including such a disclaimer.

The Board's Acting General Counsel issued guidance earlier this year that such disclaimers were not sufficient to save policies regulating social networking that were deemed to infringe on employees' Section 7 rights. So whether such a disclaimer would actually be found by the Board to validate an otherwise invalid policy is far from clear.

Moreover, telling employees that the rules of conduct in an employee handbook do not apply when employees are attempting to form or join unions or are otherwise engaged in concerted activity for their mutual aid and protection is likely to lead to confusion, if not some other undesired results. The better approach is simply to ensure that rules of conduct are stated narrowly and specifically.

Our Advice

Review your employee-conduct policies to determine if they would pass muster in the event of a challenge before the NLRB. Vague or overbroad policies should be rewritten so as to be more narrow and focused on the types of employee conduct that are not protected. If you'd like help doing that, give us a call.

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