New Light On Handbooks And Work Rules

Insights
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During the Obama administration, the National Labor Relations Board (NLRB) rocked the HR world for employers, both union and non-union, by interpreting federal law to create broad restrictions on employer work rules, social media policies, trade secret and confidentiality policies, and employee handbooks generally. If a rule or a policy had any "chilling effect" on an employee's rights with respect to wages, benefits, terms and conditions of employment, and protected concerted activity, the Board would find that it violated the National Labor Relations Act (NLRA).

Employers were routinely charged with unfair labor practices for policies as simple as requiring employees to treat each other with respect or not use foul language. This stance was particularly harmful for retailers whose policies and practices are often intertwined with practices designed to deter theft and protect customers. For example, a "no cell phone" policy is not just designed to prevent employee distraction, but also to prevent unscrupulous employees from taking pictures of customer credit cards.

Light At The End Of The Tunnel: Board Changes Gears
Fortunately, in late December 2017, the NLRB reversed its course and jettisoned the speculative "chilling effect" standard. In its place, the NLRB established a balancing test as to work rules and policies, weighing an employer's interest in maintaining the rules against their effects on workers' rights to engage in concerted activity:

When evaluating a facially neutral policy, rule, or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the NLRB will evaluate: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule.

The NLRB further identified three categories in which rules and policies would fall: (1) presumptively valid; (2) requiring individual scrutiny; or (3) presumptively invalid. The NLRB made clear, however, that this test was for considering an employer having a rule, not for considering whether applying a rule to an employee was an unfair labor practice. Even rules that are lawful to maintain can be applied in a discriminatory fashion.

Shedding New Light: Board Releases Advice Memos
Within the past few months, the NLRB's Division Advice—which answers legal questions posed by the agency's regional officials about active cases—issued two guidance memoranda that applied the

new balancing test. These memoranda addressed a variety of rules employers commonly maintain. Here is a listing of the decisions made in the advice memoranda and our comments on the practical impacts of each.

1. 1. **A rule that employee handbooks and their contents are confidential and may not be disclosed to third parties violates the Act, unless tailored to protect specific employer proprietary information unrelated to terms and conditions of employment.**

   The Advice Division concluded that a rule making an employee handbook confidential was a Category 3 rule—presumptively invalid. An employee's ability to discuss the terms and conditions of employment with third parties such as unions is considered a core protected right necessary to employees' abilities to exercise their NLRA rights. The memorandum gave virtually no weight to the employer's justification that it was trying to prevent the handbook from being provided to a business competitor.

   It noted that if an employee handbook contained confidential and proprietary information, the employer could maintain a rule to protect those identifiable pieces of information. But in the case before it, the handbook did not contain any such information. If a realistic concern exists that a business competitor obtaining your employee handbook could cause harm, then a limited rule applying to disclosure to business competitors would be more appropriate.

2. **A rule restricting workers' non-business use of company email violates the law since it extends to non-working time, and an "incidental personal use" provision did not cure the violation.**

   One decision employers are hoping will be reversed under the new NLRB is the one holding that neutral policies prohibiting employee use of company email for personal business were unlawful (*Purple Communications*). To date, however, that has not happened. Therefore, the memorandum noted that because the "no personal email" rule was maintained by an employer whose employees worked remotely with no ability to converse face-to-face, and there was no established workplace to exchange personal contact information, the rule violated the Act.

   Under these circumstances, the rule was significantly impeding the employees' core right to communicate among themselves regarding the terms and conditions of employment. It further noted that a provision of the rule prohibiting communications that were "not in support of the employer's objectives" was too broad, and thus illegal, because union organizing activity or workplace protests could clearly be considered against an employer's objectives. Also fatal to the employer's rule is that it applied too broadly to all time at work, including non-working time such as breaks and lunch.

3. **A rule restricting disclosure of payroll information violates the law since its context did not indicate that it referred to some aspect of the employer's payroll system other than wages and benefits.**

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The interesting aspect of this decision is that the rule being considered was not one prohibiting discussion of wages among employees—an always impermissible rule—but instead one that prohibited disclosure of confidential trade secret information including processes, designs, customer lists, profits, and costs. The problem found by the memorandum was the inclusion of the word "payroll" in the listing.

While the employer claimed that the inclusion of "payroll" was to prohibit its competitors from obtaining its payroll information and did not apply to discussions of employees about their wages with unions, the rule on its face was quite broad. The memorandum noted that the rule would have been permissible had the word "payroll" been excised, as confidentiality of trade secret information had no impact on protected rights.

4. **A rule requiring employees to cooperate with company investigations does not violate the law where it did not reference unfair labor practice charges or government regulations.**

   The advice memorandum said the rule is legal because a reasonable reading of the rule by employees is only asking them to cooperate with workplace misconduct investigations. The memorandum concluded that rules requiring employees to participate in company investigations fell into the second category of rules that must be assessed on a case-by-case basis. It noted that an employee cannot be legally compelled to participate in an employer's investigation of an unfair labor practice, and noted that in prior cases, rules that referenced investigations into violations of government regulations went too far by not recognizing this.

   But the rule in question did not reference any form of government investigation or violation of any occurrence other than company policies, such as harassment and discrimination. Under these circumstances, it concluded that the rule could only be reasonably read to require employees to cooperate in investigations of misconduct and did not violate the Act.

5. **A rule that employees not wear items of apparel "with inappropriate commercial advertising or insignia" is legal. The memo found that it was not reasonable for employees to read the rule as outlawing items bearing union logos (which would violate the NLRA), especially in the context of the many other professional, business-like appearance requirements of the rule.**

   The rule addressed by the memorandum was a comprehensive business dress policy that identified 22 ways in which dress might not be professional such as being dirty, transparent, comprised of beach or athletic wear, or too revealing. The memorandum concluded that under these circumstances, the challenged provision that prohibited only "inappropriate commercial advertising or insignia" could not be reasonably read to prohibit union buttons or other references to the union. Instead, it noted that by including the term "inappropriate," the employer intended to prohibit items that might have violated its other policies such as sexually suggestive or racially derogatory depictions.

6. **A rule requiring workers to exercise a "high degree of caution" when handling specific sensitive information, and allowing only certain spokespeople to be the employer's public communicator was found to be legal. The rule only restricted employees who have access to the information as part of their jobs, and the rule merely regulated who may speak on an employer's behalf.**

   Employees have the right under federal labor law to disseminate information about co-employees to third parties such as unions, including names and addresses. The rule at issue prohibited employees who, as part of their job, had access to confidential information about co-employees from revealing that information. It defined confidential information to include "name, address, social security, credit card, and bank account numbers, and similarly personally identifiable information." Because the prohibition only applied to information coming from the employer's files, and not information that employees gathered on their own, the memo concluded it could not reasonably be read to restrict employee rights.

7. **A rule restricting employees from using their personal cell phones during "working hours" violated the law since employees have the right to communicate with each other through non-employer monitored channels during lunch or break periods.**

   Cell phones have become an increasingly common source of concern by employers due to the relative ease with which workers can use them to engage in non-work activities. Employers have the ability to lawfully require employees to stay off their cell phones while engaged in work activities. However, the key problem with the rule at issue was that it made the prohibition "during work hours."

   In other contexts, the NLRB has concluded that the term "work hours" includes breaks and meal times. Because employees have the right to discuss the terms and conditions of employment with each other during these times, prohibiting the use of cell phones during these times was found to be overly broad. "No cell phone use" policies should make clear that the prohibitions do not apply to breaks and non-working time.

Let There Be Light!

The new NLRB balancing test standard, along with these recent Advice Memoranda from the NLRB's General Counsel, signal a new, more common-sense approach to employer policies and work rules. Yet the memoranda indicate that even with the new balancing test, many employers still have HR policies, work rules, social media policies, and confidentiality or trade secret policies that violate the law. There is no substitute for a regular review by your legal counsel—at least annually—of your policies and rules.

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