



Board Issues New Guidance On Employee Handbooks

Insights

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Yesterday the National Labor Relations Board (NLRB) General Counsel issued a lengthy memorandum regarding his position on the recent developments in the context of employer handbook rules. Although lengthy at 30 pages, the GC's memorandum, [GC 15-04](#), is a must read for all employers – both union and nonunion.

Background

Over the past few years, one of the NLRB's focuses has been on employer handbook policies, particularly those policies dealing with confidentiality, social media, employee communications, the use of the employer's email systems for union activity, and rules relating to employee conduct. Overwhelmingly these cases resulted in the NLRB ruling that facially valid and logical business policies were unlawful.

The GC Examines Handbook Policies

The General Counsel's memorandum examines a broad array of employer policies, targeting those he believes would prohibit or restrict conduct protected by the National Labor Relations Act, even if those policies do not explicitly prohibit the conduct. Under *Lutheran Heritage-Livonia*, a rule or policy violates the Act if: 1) employees would reasonably construe the rule's language to prohibit Section 7 activity; 2) the rule was promulgated in response to the union or other Section 7 activity; or 3) the rule was actually applied to restrict the exercise of Section 7 rights. Most of the cases decided by the Board are based on the first prong of the *Lutheran* test, interpreting whether "employees would reasonably construe" the employer's rule to prohibit Section 7 activity.

The GC's report scrutinizes those policies considered unlawful, specifically, confidentiality rules, professionalism rules, anti-harassment rules, trademark rules, photography or recording rules, and media-contact rules. It also provides specific examples of lawful and unlawful handbook policies and rules. For example, the Board has found numerous variations of confidentiality rules unlawful because they restricted the disclosure of employee information and were overbroad. The General Counsel also sets forth the criteria for establishing a facially lawful rule.

The new memorandum also offers guidance in the form of "model" policies from a recent case, which, if implemented, the General Counsel believes would not violate the Act.

Impact Of The Memorandum

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Although the General Counsel's memorandum is not "law," it has far reaching ramifications that may affect your company. We recommend companies review their policies and practices, including their handbooks, to ensure that they do not run afoul of current NLRB law, taking into consideration the guidance provided in the General Counsel memorandum. Any policies that do not comply with NLRB law, even if they are not enforced, can give rise to unfair labor practice charges. Fisher Phillips will be issuing a memo in the near future with more details.

For more information on whether your policies and handbook are compliant with current NLRB law, visit our website at www.fisherphillips.com or contact your regular Fisher Phillips attorney.

This Legal Alert presents an overview of a particular agency memorandum. It is not intended to be, and should not be construed as, legal advice for any specific fact situation.

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