Is This The Beginning Of The End Of The NLRB's War On Employer Rules?

ALJ RULES BROAD CONFIDENTIALITY AND TEXTING RULES LAWFUL

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Employers who have been keeping up with the National Labor Relations Board's (NLRB) decisions over the past eight years may be pleasantly shocked to learn that an Administrative Law Judge (ALJ) just upheld an employer's seemingly broad rule providing that "all documents are considered confidential" and are not to be "taken off the premises." They also will be shocked to learn that the same ALJ upheld the employer's blanket rule prohibiting texting anywhere.

The October 19, 2017 decision is a hopeful sign that employers will soon be able to impose reasonable measures over their workers without fear of reprisal from the Labor Board. But take this victory with a grain of salt; it is just an initial step in a conflict that will almost certainly take additional twists and turns along the way. (*Green Apple Supermarket of Jamaica, Inc.*).

Background: NLRB Clamps Down On Broad Workplace Rules
In 2004, the NLRB issued a key decision in the *Lutheran Heritage Village-Livonia* case holding that a work rule is not only unlawful if it explicitly restricts employees' rights to engage in union or protected concerted activity, but also if employees would "reasonably construe" the language to prohibit protected activities. The decision became increasingly troublesome for employers in the past eight years, as a union-friendly Labor Board aggressively expanded its reach.

Soon, commonplace and seemingly innocuous employer policies were found to be unlawful by the NLRB, forcing employers to reevaluate and revise their handbooks at the expense of losing control in the workplace. Among the policies now found to be offensive to the Obama-era NLRB were ones that prohibited employees from photographing anything on work premises without permission or from revealing company information to anyone outside of the organization.

Light At The End Of The Tunnel: *Green Apple Supermarket*
Green Apple Supermarket is a full-service supermarket located in Queens, New York. In May 2016, it fell under the scrutiny of a local branch of the United Food and Commercial Workers (UFCW) union upon the commencement of an organizing drive. As part of this campaign, the union examined the company handbook under a microscope and found a number of provisions it believed violated the NLRA. The two critical portions for purposes of this analysis were the following two rules:

- *"All documents are considered confidential and the sole property of Green Apple Supermarket and are not to be distributed or taken off the premises. There is to be no copying, faxing or photographing of documents. Failure to comply may result in dismissal and legal action."*
- *"Texting and playing electronic games is strictly prohibited and will result in a warning: 3 warnings will result in a dismissal."*

The union filed an unfair labor practice charge against the company, alleging the rules interfered with, restrained, or otherwise coerced employees in the exercise of their rights under the National Labor Relations Act (NLRA). The case went to trial before ALJ Kenneth Chu and wrapped up in June 2017; Judge Chu issued his opinion rejecting the complaint on October 19.

Although he acknowledged that a rule or policy could violate the NLRA if it reasonably would be read by employees to chill their rights to engage in union or protected concerted activities, Judge Chu found no evidence that was the case with respect to Green Apple employees. He pointed out that no testimony was taken from any witness, and no evidence was proffered, to show how and in what manner these rules actually affected the employees from exercising their rights. He also noted the rules were promulgated and maintained before the union even came on the scene, meaning that they could not have been put in place in response to union activity, and that the record is "void of any evidence that the rules has been applied in this situation to coerce or interfered/restrained with employees' rights."

What Does This Mean For Employers?

If the current Republic-controlled NLRB hears this case on appeal, it could be the end of *Lutheran Heritage*'s "reasonably construe" standard. Since early 2016, now-Chairman Philip Miscimarra has advocated for a new standard of review of employer policies. According to Miscimarra, *Lutheran Heritage*'s "reasonably construe" standard entails a single-minded consideration of NLRA-protected rights without taking into account the legitimate justifications of particular policies, rules, and handbook provisions. Miscimarra has articulated his own proposed standard through a number of dissenting opinions he has authored in cases decided by the previously Democratic-controlled NLRB. Now he is the Chairman of a Republican-controlled NLRB.

Although he did not directly say so, Judge Chu's decision in *Green Apple Supermarket* sets the stage for Miscimarra's proposed standard to be adopted and applied by the NLRB. For Judge Chu, examining just the plain language of the challenged rules was not enough. What mattered was how and in what manner the rules affected employees. In other words, Judge Chu demanded more than just a "single-minded" consideration of NLRA-protected rights.

In our September 2017 newsletter article, "A New Era For Labor Relations? Fisher Phillips Lawyers Predict Fate Of Top 10 Key Issues," we predicted that the NLRB would soon begin to reverse some of the more expansive decisions issued by the Obama-era Labor Board. One of the key predictions discussed in that article is the eventual reining in of the *Lutheran Heritage* standard, with the hopes that employers would once again be able to publish and enforce common sense workplace rules

providing a reasonable modicum of privacy and confidentiality in the workplace. If the *Green Apple Supermarket* decision is heard by the full Labor Board, it could be the case that begins to tilt the scales back into a more balanced position.

Until that day, however, employers should be cautious with respect to their work rules, especially those involving privacy and confidentiality. If you have questions about whether your handbook complies with current Board thinking, ask your regular Fisher Phillips attorney or any member of our Labor Relations Practice Group.

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

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