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NLRB General Counsel Issues Report Concerning Legality of Common Employer Rules

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On March 18, 2015, NLRB General Counsel Richard Griffin issued a *Report Concerning Employer Rules*, in a stated effort to provide guidance on the intersection of employer rules and the National Labor Relations Act (NLRA). The Report includes conclusions about common handbook policies that employers—both nonunion and unionized—may find surprising. Because even unintentionally maintaining overly broad rules or policies that violate the NLRA can have potentially far-reaching effects, employers should pay careful attention to this new guidance.

Background on the Board's Scrutiny of Workplace Rules and Policies

An employer violates Section 8(a)(1) of the NLRA by maintaining rules or policies that interfere with, restrain or coerce employees in the exercise of rights guaranteed in Section 7 of the Act, even if the employer did not adopt them in response to union or protected concerted activities, and even if it has not enforced them, through disciplinary action or otherwise, in a manner that results in actual interference with employee rights. *Lafayette Park Hotel*, 326 NLRB 824 (1998). The Board's test is whether the rules reasonably would tend to chill employees in the exercise of their Section 7 rights.

The most obvious example of an unlawful rule would be the explicit prohibition on conduct that the NLRA makes lawful. For instance, a provision that prohibits employees from discussing their wages or working conditions with one another would be unlawful, as would a rule barring lawful, economic strike activities.

In *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004), the Board described its test for determining when a rule that does not explicitly prohibit Section 7 activity nevertheless chills protected conduct. In pertinent part, the Board ruled that a chilling effect occurs whenever employees would reasonably construe the rule to prohibit protected activities. The rule is broad, and the Board has applied it to find unlawful a wide variety of rules that employers have understandably promulgated attempting to prohibit otherwise unacceptable workplace conduct. Some examples are rules prohibiting offensive, disruptive and harassing workplace conduct, use of the employer's trademarked property on the internet, publishing false or derogatory statements about management, and walking off the job.

Anticipating when the Board will find that a workplace rule interferes with protected employee rights can be difficult. After all, *Lutheran Heritage* penalizes rules not based on evidence of how they are applied, or even how they actually are interpreted by management or employees, but how the Board considers employees reasonably would construe them. *Lutheran Heritage* states that the Board will give rules a “reasonable” reading, refrain from reading particular phrases in isolation, and not presume improper interference with employee rights. Nevertheless, as the agency charged with enforcing employee rights to engage in zealous union organizing and advocacy, the Board’s own views about what provisions employees would consider chilling frequently seem surprising and idiosyncratic to management.

More recently, the Board has placed an even higher burden on employers. Since at least 2012, the Board has expanded *Lutheran Heritage*, reasoning that employers are responsible for drafting their rules to prevent misunderstandings that could inhibit protected rights. While the Board continues to use the rubric of *Lutheran Heritage* in analyzing rules, and it continues to strike down rules that reasonably would be read by employees to interfere with rights under the NLRA, it resolves ambiguous rules decidedly against the employer.

A charge alleging a rule or policy interferes with employee rights can result in action by the GC to compel the employer to remove that language and post and distribute Notices to all employees previously covered by the rule or policy. In the Notices, management must acknowledge the overbreadth of previous rules, inform employees the provisions will be removed or replaced and will not be maintained in the future, and provide information to employees about their rights under the NLRA. For employers that communicate electronically with employees, this also can mean distribution of the Notices to all employees via email, as well as an electronic posting for employees on an intranet.

Distribution of Notices can result in undesirable publicity, and provide ammunition for a disgruntled employee or former employee, or for a union organizer, virtually any time it occurs. A poorly drafted handbook can, under some circumstances, be used as evidence of employer animus toward protected activities in an NLRB case alleging retaliation against employees. The maintenance of overly broad rules or policies also can cause the NLRB to reverse an otherwise valid discharge decision. It can also result in an unsuccessful union election being overturned and rerun, or otherwise give a union organizer a second bite at the apple after an unsuccessful election campaign.

The GC Report Provides a Guide to the Lawfulness of Some Common Workplace Rules

Acknowledging the NLRB’s *Lutheran Heritage* test provides little guidance to employers in drafting and maintaining lawful rules under the NLRA, the GC’s Report provides illustrations of provisions the GC considers lawful, or unlawful, in an effort to provide direction about a few of the most frequently litigated handbook topics.

For employers that have not recently reviewed their handbooks with an eye toward compliance with the NLRA, this Report is likely to be an eye-opener. The GC points out in introducing the Report that “even well-intentioned rules” violate the Act when in the Board’s estimation they “would inhibit employees from engaging in [protected] activities.” Even for employers experienced with NLRB procedures, there are surprises. The Report, time and again, describes workplace rules as unlawful not only when they reasonably would be read to prohibit protected activities, but when the rules simply seem ambiguous. The plain implication is the GC will continue to push the envelope in employer rules cases by challenging provisions that do not *preclude an interpretation* that would be unlawful.

The Report is divided into separate parts. First, it reviews illustrative rules on subjects that are commonly at issue in unfair labor practice cases, including confidentiality rules; collegiality and professionalism rules; anti-harassment rules; trademark rules; photography / recording rules; and media contact rules. Second, the Report discusses handbook rules from a recently settled unfair labor practice charge. The rules and policy provisions the GC concluded were unlawful, together with a summary of the reasons the GC provides for those conclusions, follow.

Rules Requiring Confidentiality of Employee Information or Workplace Conditions

Employers and the GC’s office routinely square off over whether confidentiality rules are designed to protect legitimate business interests, or impermissibly inhibit discussions among employees of wages, hours or workplace complaints. The Report attempts to draw a line at rules that encompass employee or personnel information as virtually always unlawful, absent further clarification. This includes prohibitions on disclosure of employee lists, contact information, personnel file materials, handbooks and policies, or pay or benefits information. Lawful rules, the Report explains, should not “reference information about employees or anything that would reasonably be considered a term or condition of employment.” Broad rules that explicitly or implicitly encompass employment information or workplace conditions will be considered unlawful if they fail to clarify that they exclude discussions protected by the NLRA.

- A rule prohibiting discussions of “customer or employee information” including employee “phone numbers and addresses” was *unlawful*.
- Rules prohibiting disclosure of “another’s confidential or other proprietary information” or requiring confidentiality of “private or internal” conversations was *unlawful*.
- Rules that prohibit discussions about “work matters,” or any employer information that is “not public,” are *unlawful* unless they specifically exclude wages, hours and working conditions.

The NLRB’s precedents regarding confidentiality frequently raise employer objections concerning threatened disclosures of highly sensitive, protected information such as social security numbers, financial account numbers, passwords and other materials. With a nod toward these concerns, the GC’s Report notes that in one case, a rule prohibiting disclosure of “information acquired in the course of one’s work” was considered lawful, because it was nested among rules pertaining to compliance with SEC regulations and state and federal laws. The GC concluded the rule would be understood to be limited to “customer credit cards, contracts and trade secrets” and therefore would not inhibit employee discussion of their or their coworkers’ information.

Rules Restricting Criticism of Management

Rules that allegedly restrict criticism of the employer are another common source of litigation before the NLRB. The NLRA broadly protects the right of employees to criticize or protest labor policies or alleged mistreatment by management. The Report identifies as unlawful rules the GC found explicitly or implicitly limited employees’ rights to engage in zealous advocacy and criticism of their employers. These rules included some requiring civility toward management or prohibiting employees from engaging in “disrespectful,” “negative,” “inappropriate,” or “rude” conduct directed at supervisors.

- A rule requiring employees to be “respectful of others and the company” was *unlawful*.
- Do “not make fun of, denigrate, or defame your co-workers, customers, franchisees, suppliers, the Company, or our competitors” was *unlawful*.
- A rule prohibiting “rudeness or unprofessional behavior toward a customer,” that did not include the same requirement about treatment of managers or supervisors, was *lawful*.

Rules Restricting Advocacy, Argument and Debate among Employees

The Act protects the right of employees to argue and debate with one another about unions, management, and workplace conditions. As the GC explained, these discussions can become “contentious,” but they do not lose the protection of the Act even if they include debate tactics that are “intemperate, abusive and inaccurate.” As a result, prohibitions on “negative” or “inappropriate” discussions, or prohibitions on harassment of coworkers as a general matter, are considered unlawful by the GC.

- A rule stating “don’t pick fights” online is *unlawful* because employees could construe it to restrict “protected discussions with their coworkers.”
- A rule prohibiting making “insulting, embarrassing, hurtful or abusive comments about other employees” is *unlawful* because “debate about unionization...is often contentious and controversial” and the rule could be viewed as “limiting [employees’] ability to honestly discuss such subjects.”
- A rule requiring employees to “show proper consideration for others’ privacy and for topics that may be considered objectionable or inflammatory” was *unlawful* because protected “discussion of unionization ... can be an inflammatory topic.”

Insubordination and “Walking Off the Job”

Employees may not create their own job requirements. The NLRB recognizes that reasonable work rules and directives must be followed. Nevertheless, while rules prohibiting insubordinate conduct in the workplace are lawful, broader rules that prohibit a lower level of employee resistance generally are not. Moreover, rules that would prohibit employees from protesting their workplace by engaging in outright strike activities also are considered unlawful.

- A rule prohibiting “chronic resistance to proper work-related orders or discipline, even though not overt insubordination” is *unlawful*.
- A rule prohibiting “walking off the job” is *unlawful*.

Rules Requiring Submission of Grievances and Complaints to Management

Exclusive complaint reporting requirements that can be construed to restrict protected complaints to coworkers or the public will be found overly broad. The GC’s Report makes it clear that even the suggestion that employees use an internal complaint procedure rather than communicating to coworkers or others was unlawful.

“If you wish to make a complaint or report a complaint or troubling behavior, please follow the complaint procedure in the applicable Company policy (e.g., Speak Out)” was unlawful because, the GC contends, it “chilled employees’ Section 7 right to communicate employment-related complaints to persons and entities other than the employer.

Rules Prohibiting Negative Publicity about the Employer

The right to criticize the employer includes the right to do so publicly. The NLRB therefore considers rules that restrict employees from seeking public support in labor disputes unlawful. The GC acknowledges that employees lawfully may be prohibited from disparaging their employer’s product. Nevertheless, the Report describes several rules as overbroad because they would restrict some publicity the GC views as protected under the NLRA.

- A rule prohibiting employees from creating “a blog or online group related to your job” was *unlawful*.
- A rule prohibiting conduct that would “harm persons or property or cause damage to the Company’s business or reputation” was *unlawful*.
- A rule requiring employees not to respond when they discover “negative statements, emails or posts about you or the Company” online, and to “seek help from the Legal and Communications Departments,” was unlawful because “employees would reasonably read the rule to require that they obtain permission from [the Company] before responding to a co-worker’s complaint about working conditions or a protest of unfair labor practices.”

Rules Restricting Media Communications

Workplace rules restricting or requiring preapproval of public statements about the employer interfere with rights protected by the Act because they restrict employees’ ability to publicize labor disputes with management. The most frequent offenders in this category are rules pertaining to media communications. In summary, while employers may lawfully control who makes official statements for them, they must ensure that the rules cannot be read to prevent employees from speaking to the media or others on their own behalf or for their coworkers.

- A rule requiring employees to refer all media inquiries to the Company was *unlawful*.

Rules Restricting False Statements about the Employer

Employee criticism of management at times loses the protection of the Act when it is *maliciously* motivated. Frequently employer rules will restrict criticism by requiring only truthful statements about the employer, or prohibiting false statements. The GC explains such rules are unlawful because they restrict protected statements. Even rules prohibiting “defamatory” conduct, which imply a malicious motivation, will not avoid being considered unlawful by this GC.

- A rule prohibiting “[d]efamatory, libelous, slanderous or discriminatory comments about [the Company], its customers and/or competitors” is *unlawful* because it could prevent employees from criticizing the employer in public.
- A rule prohibiting “false accusations against the Company and/or against another employee” was *unlawful*.

Conflict of Interest Rules

The Act protects the right of employees to engage in concerted activities, such as criticism of management and protests related to the workplace, even when that activity “is in conflict with the employer’s interests.” The Report explains that, for instance, “employees may protest in front of the company, organize a boycott, and solicit support for a union while on nonwork time.” A conflict of interest rule that would prohibit such activities will be considered unlawful by this GC.

- A rule that “employees may not engage in ‘any action’ that is ‘not in the best interest of’ the Employer” was *unlawful* because “it did not include any clarifying examples or context that would indicate that it did not apply to Section 7 activities.”
- A rule that prohibited “any conflict between your personal interests and those of the Company” was *unlawful* because the requirement would be read to restrict “union organizing activity, demanding higher wages, or engaging in boycotts or public demonstrations” that would conflict with management’s interests.

Rules Requiring Self-Identification in Social Media Posts

The GC takes the position that requiring employees to self-identify in order to participate in protected activity “imposes an unwarranted burden on Section 7 rights.” As a result, self-identification and disclosure rules generally will be challenged as unlawful.

- A rule prohibiting employees from publishing any “email, post, comment or blog anonymously” was *unlawful*.

Rules Prohibiting Use of the Employer’s Logos, Copyrights and Trademarks

While the GC acknowledges copyright holders’ interest in protecting their intellectual property, the Report concludes that workplace rules cannot prohibit employees’ fair protected use of that property. Fair use in the GC’s estimation includes, among others, using the employer’s name and logo on picket signs, leaflets and other protest material. A broad ban on use of copyrighted material without any clarification in this respect will generally be found unlawful.

- Do “not use any Company logos, trademarks, graphics, or advertising materials” in social media was *unlawful*.
- “Respect copyrights and similar laws. Do not use any copyrighted or otherwise protected information or property without the owner’s written consent” was *unlawful* because it prohibited “any employee use of copyrighted information.”
- A rule requiring employees not to use “other people’s property” without permission was *unlawful* because it included the use of trademarks, and could be read to ban “fair use of the employer’s intellectual property in the course of protected concerted activity.”

Rules Limiting Solicitation and Distribution of Literature

Traditionally, the NLRB has approved rules prohibiting oral solicitations by employees during working time, defined specifically as the time the employee is expected to be performing job functions. The NLRB has considered less specific rules, for instance banning solicitation during work “hours” or “business hours,” presumptively invalid. In recent cases, the Board has resolved ambiguity in such rules against the employer, as the drafter of the rules. In the Report, the GC makes it clear that solicitation rules should be drafted specifically to allow employee solicitation during non-work time rather than the converse.

- A rule prohibiting “soliciting, collecting funds, distributing literature on Company premises without proper approvals or outside the guidelines established in the ‘No Solicitation/No Distribution’ Policy” was *unlawful* because it did not inform employees of their right to solicit during non-working time.

Electronic Distribution is Equated with Solicitation

The Report also makes it clear that the GC will treat electronic distributions of literature, such as through email, as coworker *solicitations* and subject to the rule permitting such communications during non-working times. The GC reasons that “unlike distribution of paper literature, which can create a production hazard even when it occurs on nonworking time, electronic distribution does not produce litter and only impinges on the employer’s management interests if it occurs on working time.”

- A rule prohibiting “distribution of literature in work areas” was *unlawful* because it specifically applied to “distribution by electronic means.”

Rules Restricting Photography and Recording in the Workplace

The GC takes the position that employees have a Section 7 right to photograph and make recordings in the workplace, including the right to use personal devices for that purpose, during nonworking times. The Report explains that restricting that right could prevent employees from engaging in concerted activities, such as “posting a photo of employees carrying a picket sign..., documenting a health or safety concern, or discussing or making complaints about statements made by [the employer] or fellow employees.” As a result, rules placing a total ban on recordings, or banning possession of personal cameras or recording devices, are overbroad when they would be read to prohibit taking pictures or recordings on non-working time.

- A rule prohibiting “taking unauthorized pictures or video on company property” is *unlawful*.
- A rule prohibiting wearing cell phones, making personal calls or viewing or sending text messages “while on duty” was *unlawful* because it was not limited to an employee’s “working time.”
- A rule prohibiting posting “photographs of Company employees without their advance consent” was *unlawful*.

Rules Requiring Participation in Workplace Investigations

The Report recognizes that rules requiring employees to participate in investigations of workplace misconduct generally are lawful under the NLRA. In order to prevent coercive interrogations, however, the Board traditionally requires employers to inform employees at the outset of an investigatory interview regarding alleged unfair labor practices, of: the purpose of the questioning; the fact that no retaliation will occur; that the employee’s participation is *voluntary*; the interview is conducted in an atmosphere free from hostility or coercion; and no improper questions are posed about the employee’s subjective state of mind. The GC points out that a rule that requires employees to cooperate with internal investigations generally is unlawfully overbroad because an employee participating in an investigation into alleged unfair labor practices could become confused about the voluntary nature of the interview required by the Board’s precedents.

How Can Employers Prepare for NLRB Scrutiny of Their Policies?

As described above, the NLRB’s focus when reviewing policies and handbook provisions is on what a reasonable employee would infer, or may infer, after reviewing them. Innocent mistakes and misunderstandings, or lack of intent to mislead employees or restrict the exercise of their rights is no defense to a claim that a rule interferes with the exercise of Section 7 rights.

Employers are well-advised to carefully review their handbooks, with experienced counsel as necessary, and assure that all of their workplace policies comply with the NLRB’s current precedents before a charge is ever filed. While the NLRB’s case law is rapidly evolving in this area, reviewing the GC’s Report is a good place to start when reviewing handbooks for the types of provisions that are likely to be challenged in the near term.

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The attorneys in Littler’s Traditional Labor Practice Group are available to review your handbook and flag areas of concern under the NLRB’s rulings, as well as the GC’s recent Report.