NLRB SCRUTINY OF EMPLOYEE HANDBOOK POLICIES RELAXED: *GC MEMO PROVIDES UPDATED GUIDANCE ON COMMON EMPLOYER WORK RULES*

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BACKGROUND ON THE NLRA

- Congress enacted the NLRA in 1935. (*See* 29 U.S.C. §§ 151-169.)
- The Act regulates the relationship between most employees and employers in the private sector, setting forth rules related to unionization, collective bargaining, and the right to engage in "protected concerted activity" under Section 7.
- The Act does *not* cover public employees, agricultural workers, independent contractors, railroad laborers, and supervisors (although supervisors who have been discriminated against for refusing to violate the NLRA may be covered).

BACKGROUND ON THE NLRA

- Is there a union at your company?
- Chances are pretty good that the answer is “no.”
- Only about 7% of the private sector is unionized.
- However, the NLRA doesn’t just protect employees who are in a union.
- The Act protects the rights of all employees to organize, discuss the terms and conditions of employment, and take action together to try to improve their jobs.

BACKGROUND ON THE NLRB

- The National Labor Relations Board ("NLRB" or the "Board") is the independent federal agency tasked with enforcing the NLRA.
- It is composed of three main units: (1) regional offices under the direction of the NLRB General Counsel; (2) the Division of Administrative Law Judges ("ALJs"); and (3) a five-member board.

BACKGROUND ON THE NLRB

- A fully constituted NLRB is comprised of five members.
- Decisions are typically issued by three-member NLRB panels.
- Three is also the minimum number of members the NLRB must have to issue a decision.
- By custom, the NLRB will only overrule existing precedent when the Board has at least four members and at least three of them vote to overrule the extant precedent.

BACKGROUND ON THE NLRB

- A full-term for an NLRB member is five years with the terms staggered such that one member's term expires each year.
- Historically, the President has appointed from his political party the General Counsel and three of the five Board members, with the two remaining Board members coming from the other political party.
- Thus, the party holding the White House typically has a three to two advantage on the NLRB.

BACKGROUND ON THE NLRB

- When a Republican is in the White House, the NLRB has a more employer-friendly bent.
- When a Democrat is in the White House, the NLRB has a more employee-friendly outlook.

BACKGROUND ON THE NLRB

- As a result, labor law typically changes when the White House changes parties, and unlike with other employment laws such as Title VII, NLRB decisions regularly shift back and forth as presidential administrations change between the political parties.
- So, while the NLRA has been essentially unchanged for 70 years, there have been significant swings in how it has been interpreted and applied over that time.

SECTION 7

- For employment lawyers and human resources professionals, the key provision of the NLRA is Section 7. (29 U.S.C. § 157.)
- This section establishes employees' right to engage in *concerted activity* for their *mutual aid or protection*. Specifically, Section 7 provides that:

SECTION 7

- “Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities...”

SECTION 8

- If employers “interfere with, restrain or coerce employees in the exercise of the rights guaranteed in [Section 7]”, then they violate Section 8(a)(1) of the NLRA. (29 U.S.C. § 158.)

CONCERTED ACTIVITY

- Concerted activity occurs when an employee acts "with or on the authority of other employees and not solely by and on behalf of the employee himself."
- Even when the employee is acting alone, concerted activity can still be found if the employee "seeks to initiate or to induce or to prepare for group action" or is bringing "truly group complaints to the attention of management."

CONCERTED ACTIVITY

- If the employee merely complains about concerns specific to the individual, the action is not concerted activity.
- The more an employee links his conduct to other employees, the more likely the employee's actions will be considered concerted, *e.g.*, "I and my co-workers want to know why . . ."

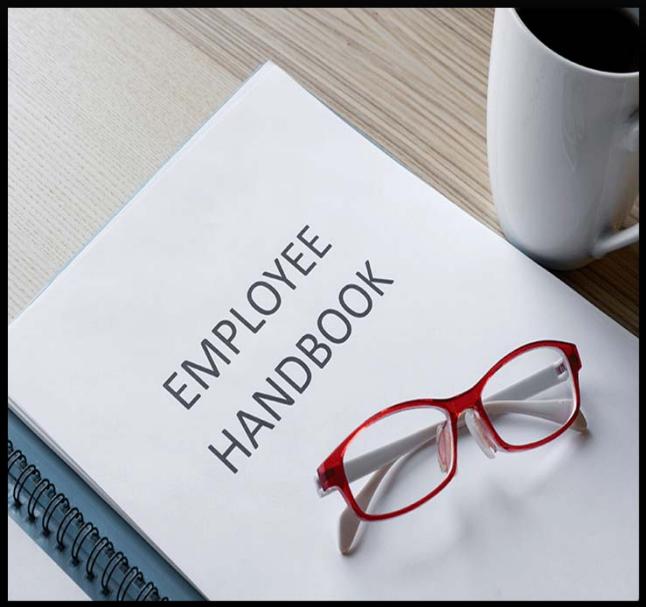
MUTUAL AID AND PROTECTION

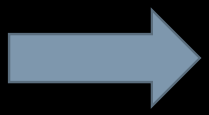
- The action must not only be concerted, but the employee must be acting for the purpose of mutual aid or protection.
- In other words, an employee's actions must be aimed at improving the working conditions for more than just him/herself.

EMPLOYEE HANDBOOK POLICIES

- For non-union workforces, the NLRA most frequently comes into play when employees take action that the employer alleges violated its workplace policies.
- The question then becomes whether the workplace policy unlawfully restricted employees' exercise of Section 7 rights, such that any adverse action taken against the employee constituted a violation of Section 8.

WHY HAVE AN EMPLOYEE HANDBOOK?





A WELL-DRAFTED EMPLOYEE HANDBOOK HAS MANY BENEFITS, INCLUDING:

- LEGAL PROTECTION
- The most vital benefit of having an employee handbook is that it often protects companies from employees' legal claims.

HANDBOOK BENEFITS – LEGAL PROTECTION

- For example, in most states, employment is considered “at will,” *i.e.*, both the employer and employee have the right to end the employee’s employment at any time, with or without advance notice and with or without cause.
- It is advisable for companies to have a disclaimer in their employee handbooks stating that the employee’s employment is considered “at will,” and that the employee does not have a contract of employment.
- This way, should the employee be terminated, it will be extremely difficult for that employee to claim that he/she had a contract of employment and was wrongfully discharged.

HANDBOOK BENEFITS – LEGAL PROTECTION

- Another area in which an employee handbook can provide valuable legal protection is sexual harassment.
- Employers are allowed to make use of an “affirmative defense” when one of their employees alleges that a manager or supervisor has subjected him/her to a “hostile work environment.”
- Part of this defense involves the employer demonstrating that it maintained an effective anti-harassment policy, and the easiest and most efficient way of doing this is by being able to produce an employee handbook with well-drafted anti-harassment language and a clear complaint/reporting procedure.
- The successful assertion of this defense allows an employer to either reduce its damages or avoid liability all together.

HANDBOOK BENEFITS

- SETTING EXPECTATIONS
- An employee handbook should clearly describe an employer's policies.
- Doing so allows all employees to gain access to the same information, and allows employers to set forth their expectations in a comprehensible and consistent manner.

HANDBOOK BENEFITS

- GUIDANCE FOR MANAGERS
- Employers can also use employee handbooks as a way of providing managers/supervisors with information on key management policies, such as how to recognize the signs of substance abuse, performance counseling and corrective action, and interviewing and hiring guidelines.

HANDBOOK BENEFITS

- ORIENTATION AND TIME MANAGEMENT
- An employee handbook can be a valuable orientation tool for a new employee who has just joined a company.
- The handbook can describe the background of the company and include the employer's "mission statement," providing new employees with a preview of their new employer's "company culture."
- In addition, a comprehensive employee handbook gives employees a source of information to consult when questions arise which can be easily answered without having to approach management.

HANDBOOK BENEFITS

- INTERNALIZING DISPUTES
- An employee handbook should contain a policy which describes where to go and whom to seek out in the event that an employee has a problem or grievance.
- Having such a policy prominently displayed in an employee handbook stresses the notion that employees should seek resolution to their problems from within a company, as opposed to immediately bringing in an outside lawyer or government agency whenever a problem/disagreement arises.

PRO TIP

- Don’t let your handbook sit and collect dust.
- An employee handbook should be a “living document,” which gets reviewed and updated frequently (at the very least once every two years).
- This will ensure that the handbook is both narrowly tailored to reflect your company’s policies and is in compliance with state/local laws (which change frequently).

THE OLD STANDARD

- In 2004, the NLRB issued *Lutheran Heritage Village-Livonia*, 343 NLRB 646 ("Lutheran Heritage").
- In that decision, the Board held that the mere maintenance of a neutral work rule violated Section 8 if employees could "reasonably construe" the rule to prohibit protected concerted activity.
- A "neutral work rule" is one that does not explicitly reference or restrict Section 7 conduct.

THE OLD STANDARD

- In the ensuing years, primarily during the Obama administration, the Board relied on *Lutheran Heritage's* "reasonably construe" standard to invalidate countless neutral work rules to the point that practically every employer in America was placed at risk of being found to be in violation of the NLRA by virtue of the wording found in their employment agreements, employee handbooks and work rules.

THE NEW STANDARD

- On December 14, 2017, in a decision called *The Boeing Company*, 365 NLRB No. 154 (“Boeing”), the new Republican NLRB majority articulated a new method for testing the facial validity of work rules, overturning *Lutheran Heritage*.
- In the *Boeing* Board’s view, *Lutheran Heritage* needed to be replaced because its overly simplistic approach prevented the Board from giving meaningful consideration to the real world complexities associated with many employment policies, work rules and handbook provisions.

THE NEW STANDARD

- The *Boeing* Board announced a new standard that the NLRB will follow when it evaluates a facially neutral work rule that could potentially interfere with the exercise of Section 7 rights.
- Under this new standard, the *Boeing* Board emphasized the Agency's duty to strike the proper *balance* between asserted *business justifications* and the invasion of *employee rights*, and stated that it will now evaluate two things when testing the facial validity of work rule language:
- (1) the nature and extent of the rule's potential impact on NLRA rights; and
- (2) an employer's legitimate justification associated with the rule.

BOEING

- The *Boeing* Board identified three categories of work rules that would likely result from the new balancing test.

CATEGORY 1

- Includes rules that the Board designates to be *facially lawful* either because:
- (i) the rule, when reasonably interpreted does not prohibit or interfere with the exercise of NLRA rights; or
- (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule.

CATEGORY 2

- Includes rules that warrant *individualized scrutiny* in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.

CATEGORY 3

- Includes those rules that the Board will designate as *unlawful* because they would prohibit or limit NLRA-protected conduct and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule.

BOEING

- *Boeing* was welcome news for employers.
- The decision provides for a balanced and even-handed assessment, as opposed to the *Lutheran Heritage* approach, which easily allowed findings that neutral rules constituted automatic, *per se* violations of the law.

GC MEMORANDUM 18-04

- On June 6, 2018, NLRB General Counsel Peter Robb issued GC Memorandum 18-04, *Guidance on Handbook Rules Post-Boeing*.
- GC Memo 18-04 contains updated guidance on how the regional offices should review and interpret unfair labor practice charges involving employer handbook language and work rules.
- The Memo provides employers with the first substantive guidance regarding workplace policies since the Board's *Boeing* decision.
- Specifically, it provides employers with guidance regarding the placement of various types of workplace policies into the three categories set out in *Boeing*.

GC MEMORANDUM 18-04

- Essentially, GC Memo 18-04 provides a road map for employers on the lawfulness of workplace rules

GC MEMORANDUM 18-04

- Going forward, regions that receive claims of unlawful employment policies are instructed to consider whether the rules *would*, rather than *could conceivably*, be interpreted to interfere with the exercise of NLRA rights.
- Ambiguous handbook rules are no longer construed against the employer and generalized provisions should not be interpreted as banning all activity that *might* fall under them.

GC MEMORANDUM 18-04

- The Guidance summarizes, *as a matter of enforcement policy*, the placement of common workplace policies into *Boeing's* three categories of employment policies, work rules, and handbook provisions as follows:

CATEGORY 1: RULES THAT ARE GENERALLY LAWFUL TO MAINTAIN

- The types of rules in this category are generally lawful, either because the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of rights guaranteed by the Act, or because the potential adverse impact on protected rights is outweighed by the business justifications associated with the rule.

CATEGORY 1: RULES THAT ARE GENERALLY LAWFUL TO MAINTAIN

- Memorandum GC 18-04 advises NLRB Regional Directors that "charge allegations alleging that rules in this category are facially unlawful should be *dismissed*, absent withdrawal."
- However, "if a Region believes that special circumstances render a normally lawful rule under Category 1 to be unlawful, *e.g.*, due to a unique industrial setting, the history of the rule's application, or direct evidence of employee chill, the Region should submit the case to Advice.

EXAMPLES OF CATEGORY 1 POLICIES THAT ARE LAWFUL TO MAINTAIN

- CIVILITY RULES
- Rules that require courteousness in the workplace, that prohibit rude or unbusinesslike behavior and that prohibit an employee from disparaging another employee.

APPLICATION OF THE BALANCING TEST TO CIVILITY RULES

- IMPACT ON NLRA RIGHTS
- “The vast majority of conduct covered by [civility rules], including name-calling, gossip, and rudeness, does not implicate Section 7 at all.”
- “Even if some rules of this type could potentially interfere with Section 7 rights, any adverse effect would be comparatively slight since a broad range of activities protected by the NLRA are consistent with basic standards of harmony and civility.”
- While protected concerted activity may involve criticism of fellow employees or supervisors, “the requirement that such criticism remain civil does not unduly burden the core right to criticize. Instead, it burdens the peripheral Section 7 right of criticizing other employees in a demeaning or inappropriate manner.”

APPLICATION OF THE BALANCING TEST TO CIVILITY RULES

- LEGITIMATE JUSTIFICATIONS
- Civility rules advance substantial employee and employer interests, including the employer's legal responsibility to maintain a workplace free of unlawful harassment, its substantial interest in preventing violence, and its interest in avoiding unnecessary conflict or a toxic work environment that could interfere with productivity and other legitimate business goals.

APPLICATION OF THE BALANCING TEST TO CIVILITY RULES

- LEGITIMATE JUSTIFICATIONS
- “Industries that rely on close teamwork or that are particularly vulnerable to toxic work environments may have further legitimate interests in promoting civility.”
- “Nearly every employee would desire and expect his or her employer to foster harmony and civility in the workplace.”

EXAMPLES OF LAWFUL CIVILITY RULES

- Conduct that is inappropriate or detrimental to business operations or that impedes harmonious interactions and relationships will not be tolerated;
- Behavior that is rude, condescending or otherwise socially unacceptable prohibited;
- Employees may not make negative or disparaging comments about the professional capabilities of an employee;

EXAMPLES OF LAWFUL CIVILITY RULES

- Disparaging the company's employees is prohibited;
- Rude, discourteous or unbusinesslike behavior is forbidden;
- Disparaging, or offensive language is prohibited; and
- Employees may not post any statements, photographs, video or audio that reasonably could be viewed as disparaging to employees.

CASE IN POINT

- *T-Mobile USA, Inc. and Communications Workers of America and Communications Workers of America Local 7011, AFL–CIO* (April 2016)
- The NLRB found the following employment policies *unlawful*:

CASE IN POINT

- “[T-Mobile] expects all employees to behave in a professional manner that promotes efficiency, productivity, and cooperation. Employees are expected to maintain a positive work environment by communicating in a manner that is conducive to effective working relationships with internal and external customers, clients, co-workers, and management.”
- The NLRB found that employees could reasonably construe the language to restrict potentially controversial or contentious discussions, including those protected under Section 7, out of fear that the employer would deem the discussions inconsistent with a “positive work environment.”
- Fifth Circuit Court of Appeals ultimately overturned the NLRB’s conclusion.

EXAMPLES OF CATEGORY 1 POLICIES THAT ARE LAWFUL TO MAINTAIN

- NO PHOTOGRAPHY/NO RECORDING RULES
- Rules that prohibit photography in the workplace and that forbid recording conversations, meetings and phone calls with co-workers, supervisors, and third parties unless such recordings are approved.

APPLICATION OF THE BALANCING TEST TO NO PHOTOGRAPHY/NO RECORDING RULES

- IMPACT ON NLRA RIGHTS
- No-photography rules have little impact on NLRA-protected rights, since photography is not central to protected concerted activity.
- Such rules may occasionally chill employees from taking pictures of their protected concerted activity, or from taking pictures of their working conditions as part of a larger protected concerted campaign.
- No-recording rules implicate the same logic, “but it is also possible that no-recording rules may promote Section 7 activity by encouraging open discussion and exchange of ideas.”

APPLICATION OF THE BALANCING TEST TO NO PHOTOGRAPHY/NO RECORDING RULES

- LEGITIMATE JUSTIFICATIONS
- Employers have a legitimate and substantial interest in limiting recording and photography on their property.
- This interest may involve security concerns, protection of property, protection of proprietary, confidential, and customer information, avoiding legal liability, and maintaining the integrity of operations.
- Restricting audio recordings can also encourage open communication among employees.

NOTE ON PHOTOGRAPHY/NO RECORDING RULES

- Although the Board addressed rules prohibiting the use of camera-enabled cell phones to take photographs, it did not address the use or possession of cellphones for communication purposes.
- The Division of Advice has concluded that a ban on mere possession of cell phones at work may be unlawful where the employees' main method of communication during the work day is by cell phone.

EXAMPLES OF LAWFUL NO PHOTOGRAPHY/NO RECORDING RULES

- Use of camera-enabled devices to capture images or video is prohibited;
- Employees may not record conversations, phone calls, images or company meetings with any recording device without prior approval; and
- Employees may not record telephone or other conversation they have with their coworker, managers or third parties unless such recordings are approved in advance.

EXAMPLES OF CATEGORY 1 POLICIES THAT ARE LAWFUL TO MAINTAIN

- ON THE JOB CONDUCT RULES
- Rules that prohibit insubordination, being uncooperative or otherwise engaging in conduct that does not support the employer's goals and objectives.

APPLICATION OF THE BALANCING TEST TO ON THE JOB CONDUCT RULES

- IMPACT ON NLRA RIGHTS
- The vast majority of activity covered by these rules is unprotected, and employees would not usually understand such rules as covering protected concerted activity.
- Even prior to *Boeing* the Board has always been careful to note that employees would not, without more, read rules against improper or unlawful conduct as applying to Section 7 activity.
- Even rules that prohibit employees from engaging in any conduct that merely "does not support" the employer would not reasonably be understood by employees to cover Section 7 activity, absent language that explicitly lists examples of protected concerted activity that is covered.

APPLICATION OF THE BALANCING TEST TO ON THE JOB CONDUCT RULES

- LEGITIMATE JUSTIFICATIONS
- An employer has a legitimate and substantial interest in preventing insubordination or non-cooperation at work.
- Furthermore, during working time an employer has every right to expect employees to perform their work and follow directives.

EXAMPLES OF LAWFUL ON THE JOB CONDUCT RULES

- Being uncooperative with supervisors or otherwise engaging in conduct that does not support the employer's goals and objectives is prohibited; and
- Insubordination to a manager or lack of cooperation with fellow employees or guests is prohibited.

EXAMPLES OF CATEGORY 1 POLICIES THAT ARE LAWFUL TO MAINTAIN

- DISRUPTIVE BEHAVIOR RULES
- Rules that prohibit boisterous or other disruptive conduct.

APPLICATION OF THE BALANCING TEST TO DISRUPTIVE BEHAVIOR RULES

- IMPACT ON NLRA RIGHTS
- The majority of conduct covered by this type of rule is unprotected roughhousing, dangerous conduct, or bad behavior.
- Thus, employees often will not interpret such rules as applying to Section 7 activity.
- On the other hand, some such rules might, depending on the context, appear to apply to classic core protected concerted activity such as walk-outs, protests, picketing, strikes, and the presentation to management of petitions or grievances, since these activities are often considered disorderly or disruptive.

APPLICATION OF THE BALANCING TEST TO DISRUPTIVE BEHAVIOR RULES

- Indeed, such activity is often engaged in because it is disruptive, in order to draw attention, underline seriousness, or be used as an economic weapon.
- Nevertheless, even if employees would read such rules as applying to strikes and walkouts, as opposed to only unprotected conduct, employees would not generally refrain from such activity merely because a rule bans disruptive conduct.
- Rule or no, in these circumstances employees know that they are discomfiting their employer and are acting anyway.

APPLICATION OF THE BALANCING TEST TO DISRUPTIVE BEHAVIOR RULES

- LEGITIMATE JUSTIFICATIONS
- Rules of this type discourage conduct that could result in injury to employees and others.
- “Such rules enhance workplace productivity and safety by preventing fighting, roughhousing, horseplay, tomfoolery, and other shenanigans.”
- Depending on the workplace, such rules may also address issues created by yelling, profanity, hostile or angry tones, throwing things, slamming doors, waving arms or fists, verbal abuse, destruction of property, threats, or outright violence.

EXAMPLES OF LAWFUL DISRUPTIVE BEHAVIOR RULES

- Boisterous and other disruptive conduct is not permitted;
- Creating a disturbance on company premises or creating discord with clients or fellow employees is prohibited; and
- Disorderly conduct on company premises and/or during working hours for any reason is strictly prohibited.

EXAMPLES OF CATEGORY 1 POLICIES THAT ARE LAWFUL TO MAINTAIN

- RULES PROTECTING CONFIDENTIAL, PROPRIETARY AND CUSTOMER INFORMATION
- Rules that prohibit the discussion and dissemination of confidential, proprietary or customer information that make no mention of employee or wage information.
- These types of rules, when reasonably interpreted, are not related to protected activity.
- These types of rules allow an employer to protect confidential and proprietary information, as well as customer information.

EXAMPLES OF LAWFUL RULES PROTECTING CONFIDENTIAL, PROPRIETARY AND CUSTOMER INFORMATION

- Information concerning customers shall not be disclosed, directly or indirectly or used in any way;
- Do not disclose confidential financial data, or other non-public proprietary company information;
- Do not share confidential information regarding business partners, vendor, or customers;
- Divulging private company information to employees or other individuals is prohibited; and
- No unauthorized disclosure of business secrets or other confidential information.

EXAMPLES OF CATEGORY 1 POLICIES THAT ARE LAWFUL TO MAINTAIN

- RULES AGAINST DEFAMATION OR MISREPRESENTATION
- Rules that prohibit defamatory messages and misrepresent the employer's products, services, or employees.
- These types of rules, when reasonably interpreted, will not refrain or prevent an employee from engaging in protected activity.
- These types of also allow an employer to protect themselves, their reputation, and their employees from misrepresentation, defamation and slander.

EXAMPLES OF LAWFUL RULES AGAINST DEFAMATION OR MISREPRESENTATION

- Misrepresenting the company's products or services or its employees is prohibited; and
- Do not email messages that are defamatory.

EXAMPLES OF CATEGORY 1 POLICIES THAT ARE LAWFUL TO MAINTAIN

- RULES AGAINST USING AN EMPLOYER'S INTELLECTUAL PROPERTY
- Rules that prohibit the use of Employer logos, trademark, or graphics without prior written approval.
- These types of rules, when reasonably interpreted, will not refrain or prevent an employee from engaging in protected activity.
- These types of rules allow an employer to protect their intellectual property.

EXAMPLES OF LAWFUL RULES AGAINST USING AN EMPLOYER'S INTELLECTUAL PROPERTY

- Employees are forbidden from using the Company's logos for any reason; and
- Do not use any Company logo, trademark, or graphic without prior written approval.

EXAMPLES OF CATEGORY 1 POLICIES THAT ARE LAWFUL TO MAINTAIN

- RULES THAT REQUIRE AUTHORIZATION TO SPEAK FOR THE COMPANY
- Rules that prohibit employees to comment on behalf of the employer and to respond to media request only through designated spokespersons.
- These types of rules, when reasonably interpreted, do not refrain or prevent an employee from engaging in protected activity.
- These types of rules allow an employer to designate who should speak on behalf of the employer.

EXAMPLES OF LAWFUL RULES THAT REQUIRE AUTHORIZATION TO SPEAK FOR THE COMPANY

- The company will respond to media requests for the company's position only through the designated spokespersons; and
- Employees are not authorized to comment for the employer.

EXAMPLES OF CATEGORY 1 POLICIES THAT ARE LAWFUL TO MAINTAIN

- RULES BANNING DISLOYALTY, NEPOTISM, OR SELF-ENRICHMENT
- Rules that prohibit disloyal conduct, conduct that is damaging to the employer, and conduct that competes with the employer and/or interferes with an employee's judgment concerning the employer's best interests.
- These type of rules, when reasonably interpreted, have no meaningful impact on Section 7 rights.
- These type of rules allow an employer to prevent a conflict of interest, self-dealing or maintaining a financial interest in a competitor.

EXAMPLES OF LAWFUL RULES BANNING DISLOYALTY, NEPOTISM, OR SELF-ENRICHMENT

- Employees may not engage in conduct that is disloyal, competitive, or damaging to the company such as illegal acts in restraint of trade or employment with another employer; and
- Employees are banned from activities or investments that compete with the company, interfere with one's judgment concerning the company's best interests, or exploit one's position with the company for personal gain.

CATEGORY 2 POLICIES WARRANTING INDIVIDUALIZED SCRUTINY

- Memorandum GC 18-04 explains that rules in this category are not obviously lawful or unlawful, and must be evaluated on a case-by-case basis to determine whether the rule would interfere with rights guaranteed by the NLRA, and if so, whether any adverse impact on those rights is outweighed by legitimate justifications.
- Often, the legality of such rules will depend on context.
- In interpreting context, such rules should be viewed as they would by employees as they apply to the everydayness of their jobs.
- Evidence that a rule has actually caused employees to refrain from Section 7 activity is a useful interpretive tool.

EXAMPLES OF CATEGORY 2 POLICIES WARRANTING INDIVIDUALIZED SCRUTINY

- Broad conflict-of-interest rules that don't specifically target fraud and self-enrichment or restrict membership in, or voting for, a union;
- Confidentiality rules broadly encompassing "employer business" or "employee information" (as opposed to confidentiality rules regarding customer or proprietary information or more specifically directed at employee wages, terms of employment, or working conditions);
- Rules regarding disparagement or criticism of the employer (as opposed to civility rules regarding disparagement of employees);
- Rules regulating the use of the employer's name (as opposed to its logo or trademark);

EXAMPLES OF CATEGORY 2 POLICIES WARRANTING INDIVIDUALIZED SCRUTINY

- Rules generally restricting employees from speaking to the media or third parties (as opposed to rules restricting speaking to the media on the employer's behalf);
- Rules banning off-duty conduct that might harm the employer (as opposed to rules banning insubordinate or disruptive conduct at work) or rules specifically banning participation in outside organizations; and
- Rules against making false or inaccurate statements (as opposed to defamatory statements).

CATEGORY 3 POLICIES THAT ARE UNLAWFUL TO MAINTAIN

- Rules in this category are generally unlawful because they would prohibit or limit NLRA-protected conduct, and the adverse impact on the rights guaranteed by the NLRA outweighs any justifications associated with the rule.
- Memorandum GC 18-04 directs Regions to issue complaint on these rules, absent settlement.
- However, “if a Region believes that special circumstances render lawful a rule that normally would fall in Category 3, it should submit the case to Advice.”

EXAMPLES OF CATEGORY 3 POLICIES THAT ARE UNLAWFUL TO MAINTAIN

- CONFIDENTIALITY RULES ABOUT WAGES, BENEFITS, AND WORKING CONDITIONS
- The ability to freely discuss terms and conditions of employment is a cornerstone of Section 7 rights.
- There are no legitimate business justifications in banning employees from discussing wages or working conditions.

EXAMPLES OF UNLAWFUL CONFIDENTIALITY RULES ABOUT WAGES, BENEFITS, AND WORKING CONDITIONS

- Employees are prohibited from disclosing salaries, contents of employment contracts;
- Employees shall not disclose any information pertaining to the wages, commissions, performance, or identity of employees of the employer; and
- Employees are prohibited from disclosing to any media source information regarding employment at employer, the workings and conditions of employer, or any staff member.

EXAMPLES OF CATEGORY 3 POLICIES THAT ARE UNLAWFUL TO MAINTAIN

- RULES AGAINST JOINING OUTSIDE ORGANIZATIONS OR VOTING ON MATTERS CONCERNING THE EMPLOYER
- Employees have a right to join outside organizations, specifically unions.
- While employers have a legitimate and substantial interest in preventing nepotism, fraud, self-dealing, and maintaining a financial interest in a competitor, rules that prohibit membership in outside organizations or from participation in any voting concerning the employer, unduly infringes Section 7 rights.

UNLAWFUL RULES AGAINST JOINING OUTSIDE ORGANIZATIONS OR VOTING ON MATTERS CONCERNING THE EMPLOYER

- IMPACT ON NLRA RIGHTS
- Rules regulating membership in outside organizations cover some unprotected activity, but also clearly encompass protected activity. A core aspect of protected concerted activity under the NLRA is that employees may desire to have “outside organizations,” specifically unions, represent them.
- Example: Where an employer’s conflict-of-interest policy includes a rule that would be interpreted as restricting membership or work for a union, it would naturally cause more timid employees to refrain from such activity. Employees may be more reluctant to go to meetings, sign authorization cards, or join employee committees.

UNLAWFUL RULES AGAINST JOINING OUTSIDE ORGANIZATIONS OR VOTING ON MATTERS CONCERNING THE EMPLOYER

- LEGITIMATE JUSTIFICATIONS
- Employers have a legitimate and substantial interest in preventing nepotism, self-dealing, fraud, or maintaining a financial interest in a competitor, and rules against these “conflict of interest” activities fall in Category 1.
- However, rules specifically prohibiting membership in outside organizations or participation in any “voting” concerning the employer do not address those concerns, or at least do not address them narrowly so as to accommodate legitimate concerns without infringing on significant Section 7 rights.

CONCLUSION: EMPLOYER TAKEAWAYS

- Employers can take back some control of the work environment and confidently institute common-sense rules that protect their good-will and the workplace in general.
- The NLRB's new guidance will help employers establish or refine policies or procedures that foster communication, improve safety, protect corporate assets, and resolve conflict.
- Unfair labor practice charges based on discipline or a termination are less likely to result in handbook complaints than in the past several years.

EMPLOYER TAKEAWAYS

- While the pendulum could swing back in a new administration, the Board's return – at least for now – to allow employers to require employees to maintain a reasonable level of civility in the workplace is a refreshing victory for employers.
- Both the *Boeing* decision and General Counsel Memorandum 18-04 demonstrate that the Board understands that the prior standard laid out in *Lutheran Heritage*, which prohibited any rule that could reasonably be interpreted as covering Section 7 activity, was unduly burdensome, oppressive, and an operational hindrance.

EMPLOYER TAKEAWAYS

- In light of the employer-friendly GC memo, businesses may wish to revise their handbook policies and reinstitute commonsense provisions that were previously omitted in response to the Obama Board's decision in *Lutheran Heritage*.
- *However, continue to use caution.*
- GC Memo 18-04 applies only to an employer's maintenance of facially neutral rules.
- Applying a facially neutral rule against an employee engaged in protected concerted activity or promulgating such a rule solely in response to a union organizing campaign is still unlawful.


Thank
you!!