Schaffer Law, LLC
Labor and Employment Law

NLRB Provides Handbook Language Guidance

August 2015

The General Counsel for the National Labor Relations Board issued a report providing guidance to employers when drafting employee handbooks. Report. (GC 15-04). Over the past few years many standard handbook provisions have been found to violate section 7 of the National Labor Relations Act. That section allows both union and non-union employees to engage in protected concerted activity for their mutual aid and protection. Employers have struggled to keep current with the rapidly changing requirements, and have often found that their good faith efforts to comply fall short of the Board's expectations. The new report sheds greater light on what has become an extremely nuanced approach to handbook drafting.

The report dissects numerous case decisions and tries to explain the subtle differences between lawful and unlawful language. It covers the major areas which have been the focus of recent litigation. These include confidentiality rules, employee conduct toward the company and supervisors, employee conduct toward co-workers, employee interaction with third parties, use of company logos and trademarks, restrictions on video and audio recordings at work, restrictions on leaving work, and conflict of interest rules. Non-union employers in particular will likely be astonished when reading the Board's position on these issues, but failure to comply can lead to serious repercussions.

While lengthy, employers are encouraged to read the full report, however, the following summary provides a flavor for the types of issues companies need to be aware of when drafting

employee handbooks. Further, if your handbook has not been reviewed in the last year, it is likely to be out of compliance.

The general rule is that any policy violates the NLRA if it has a chilling effect on section 7 rights, even if it doesn't explicitly prohibit section 7 activity. The test is whether employees would reasonably construe the rule as prohibiting their section 7 rights. Of course rules or policies written in response to union organizing activity, or to expressly restrict employee rights is illegal per se.

With this background in mind, the Board's position is that employees have a section 7 right to discuss wages, hours, and other terms and conditions of employment with fellow employees and outsiders. Any attempt to restrict such discussion through a confidentiality provision is unlawful. Confidentiality provisions must be limited to protecting other forms of proprietary information unrelated to wages, hours and conditions of employment.

Perhaps the most alarming area is the scope of conduct employees may engage in when criticizing supervisors and management. The Board has found that rules prohibiting disrespectful, negative, inappropriate or rude conduct toward management are generally unlawful. Even if such statements are false or defamatory they are protected, unless they are made with "malice," Under the malice standard, an employer must prove the statement was knowingly false, or was made with reckless disregard for the truth. With the rise of social media, many of the offensive statements are now made online and reach an audience far greater than the water cooler talk of the past. Under the Board's rules, however, such statements are equally protected.

Employers have more leeway in prohibiting negative statements regarding co-workers, clients and competitors. Also, truly insubordinate statements are also prohibited, but given

recent rulings it is very difficult to determine when such statements may in fact be found lawful. In addition, rules limiting criticism of the employer's products are generally permitted.

Further, rules limiting the right to communicate with third parties, including government agencies, unions, or the press are generally illegal. Employees also have the right to use company names and logos in protest information such as signs and leaflets, provided they fall under the non-commercial fair use doctrine.

Another puzzling position is the right of employees to photograph, videotape and record activities in the workplace. Employers often prohibit such activity, but now do so at the risk of violating the NLRA. The Board takes the position that such recordings are permissible during non-work time if done in furtherance of section 7 rights. To defend such policies, employers must be able to show some strong privacy interest, and the example provided is patient privacy in a medical setting.

While the information above summarizes some of the Board's positions, it is critical that a careful review of the specific language used in handbooks be undertaken by labor counsel prior to publication in order to avoid unfair labor practice charges.

For more information contact scott@schaffer-law.com or (860) 216-1965.

www.schaffer-law.com