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NLRB Scrutiny of Employee Handbook Restrictions Continues

Section 7 of the National Labor Relations Act grants employees the right to discuss or criticize management, their wages, hours and other working conditions. An employer's interference with these so-called section 7 rights can result in an unfair labor practice charge for adjudication by the National Labor Relations Board. The Act applies to employers, whether or not your employees are represented by a labor union.

A favorite target for employee or union complaints has been the employee handbook and restrictive company policies applicable to employee conduct – such as social media, use of email, workplace recordings, confidentiality and conflict of interests.

Even where a policy does not expressly prohibit an employee from exercising these rights, they can be viewed as “overly broad” and therefore unlawful because the text could reasonably be understood by a worker to interfere with those rights. (Example: “Be respectful of others and the Company” is an illegal rule according to the NLRB because an employee might refrain from criticizing a supervisor, co-worker or the employer.)

As the cases below illustrate, the NLRB can now pluck a sentence, or a phrase, out of a comprehensive handbook or policy and declare that the offending text violates employees' section 7 rights.

No-Recording Policy Found Unlawful

Whole Foods Market adopted a workplace no-recording policy that stated:

“It is a violation of Whole Foods Market policy to record conversations with a tape recorder or other device (including a cell phone or any electronic device) unless prior approval is received from your store or facility leadership.”

In explaining its purpose, the policy continued:

“The purpose of this policy is to eliminate a chilling effect on the expression of views that may exist when one person is concerned that his or her conversation with another is being secretly recorded. This concern can inhibit spontaneous and honest dialogue especially when sensitive or confidential matters are being discussed.”

A union organizing committee complained to the NLRB that the policy was overbroad. The NLRB agreed (3-1 vote) and found the policy illegal because “employees could reasonably construe the language to prohibit” workplace recordings protected by section 7 (e.g., recording evidence for use in employment-related judicial proceedings, documenting unsafe working conditions,

recording evidence of unfair labor practice). On appeal, the U.S. Court of Appeals for the 2nd Circuit agreed with the NLRB. (*Whole Foods Market Group, Inc. v. NLRB*, No. 16-0002).

Administrative Law Judge Declares 17 Rules in Employee Handbook Illegal

An employer's first hurdle in an unfair labor practice charge is a trial in front of an administrative law judge. Appeals from that ruling may be taken to the NLRB, then to a federal appeals court and potentially to the U.S. Supreme Court. A real estate management company recently had its employee handbook eviscerated by an administrative law judge in Tucson. (*BCG Partners, Inc. dba Newark Grubb Knight Frank*, No. 28-CA-178893). There the ALJ ruled that seventeen policies were unlawful restrictions on employee section 7 rights. A few are recapped below.

- “Responsive Action” policy, which subjects workers who non-maliciously provide false information during investigations to potential discipline and discharge.
- “Conflicts of Interest” policy, which bans employee conflicts of interest and has an ongoing disclosure requirement.
- “Reference Inquiries and Requests for Employment Information” policy, which bans workers from supplying employee information to outside entities without authorization.
- “Confidentiality” policy, which subjects employees who disclose confidential company information to disciplinary action.
- “Telecommunications Usage” policy, which bans employees from using company telephones and other employer communication systems during non-working time for non-business purposes.
- “Tape Recording” policy, which bans all workplace recordings not authorized by the employer.
- “Respectful Workplace” policy, which bans any negative commentary towards supervision that might be deemed disrespectful.
- “Social Media” policy, which requires employees to obtain consent prior to posting anything concerning the company on social media.
- “Cooperation in Investigations and Litigation” policy, which compels employees to cooperate in all workplace investigations, including unfair labor practice investigations.
- “Personal Appearance” policy, which prohibits an employee from wearing any clothing with printed slogans and promotions.

It appears the employer will appeal this decision to the NLRB. This decision is at: <https://www.nlr.gov/case/28-CA-178893>

Source: NAW

Conclusion

It seems any employer policy or rule faces legal challenge if it could conceivably be construed by an employee to limit his or her exercise of section 7 rights, without proof that an employee's rights have been violated by the rule, or even if the rule has never been applied to restrict those rights. One must wonder what workplace rule that is limiting or restrictive in any way is capable of surviving an unfair labor charge.

Department of Justice and FTC Issue Guidance for HR Professionals

In October, 2016 the Department of Justice and the Federal Trade Commission jointly issued guidance for Human Resource Professionals. The Guidance cautions employers not to enter into agreements or understandings with other employers to fix or limit compensation paid to its employees. In addition, the guidance states that the employer must avoid any agreement or understanding with one or more other employers not to solicit, "poach" or hire others' employees. Further the Agencies noted, noted in their view, such agreements were "hardcore cartel conduct" that could result in criminal enforcement action.

It is important to note that the marketplace is defined as the "employment" market without regard to whether the firms sell the same products or provide similar services. Therefore, companies should take "steps to ensure that interactions with other employers competing with them for employees do not result in an unlawful agreement not to compete for employees".

Note that the guidance does not address the legality of specific terms contained in contracts between an employer and employee, including non-compete clauses.

A copy of guidance is available at <https://www.justice.gov/atr/file/903511/download>