Employer Policies and the NLRA: How Handbook Provisions Can Violate Employee Rights

By Robert Baror

Telling employees to "be respectful" is illegal. That's right. According to the National Labor Relations Board (NLRB), an employer policy stating "be respectful to the company, other employees, customers, partners, and competitors" is illegal. *See NLRB Memorandum GC 15 – 04, Report of the General Counsel Concerning Employer Rules*, March 18, 2015. This is because the NLRB General Counsel found that "employees reasonably would construe" this policy "to ban protected criticism or protests regarding their supervisors, management, or the employer in general."

The specific "protected criticism" to which the General Counsel is referring is protected "concerted activity" under Section 7 of the National Labor Relations Act (NLRA). Section 7 applies to most private employers, whether unionized or not, with an annual inflow or outflow of over $50,000. 29 C.F.R. 104.204. Under Section 7, "Employees shall have the right to … engage in … concerted activities for the purpose of collectively bargaining or other mutual aid or protection." While the term "concerted activity" is not defined in the NLRA, "it clearly enough embraces the activities of employees who have joined together in order to achieve common goals." *Media General Operations, Inc. v. NLRB*, 394 F.3d 207, 211 (4th Cir. 2005). Moreover, "[a]n individual employee may be engaged in concerted activity when he acts alone if the purpose of his acts [is] to enforce a collective bargaining agreement, seeking to induce group action, or acting on behalf of a group." *Id*. Section 7 of the NLRA is enforced through Section 8(1)(a) of the NLRA, which makes it an unfair labor practice "'to interfere with, restrain, or coerce employees in the exercise of 'employees' section 7 right to 'engage in … concerted activities." *Healthbridge Management, LLC v. NLRB*, 798 F.3d 1059, 1067 (quoting 29 U.S.C. §§ 157, 158(a)(1)).

Many employers may not realize it, but their policies meant to enforce civility in the workplace or control how their employees depict them could easily run afoul of Section 7 of the NLRA. This is because "[w]here a rule is likely to have a chilling effect on Section 7 rights, the Board may conclude that its maintenance is an unfair labor practice." *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 655 (2004). The logic behind invalidating handbook rules concerning respectfulness is that these policies could have a chilling effect on criticism of management or the company, which may fall under Section 7 concerted activity, and the NLRB.

The NLRB General Counsel's March 18, 2015 memorandum concerning employer rules, which was meant to clarify the NLRB's positions, specifically addressed eight categories of employer rules: (1) rules regarding confidentiality; (2) rules regarding employee conduct toward the company and supervisors; (3) rules regulating conduct toward fellow employees; (4) rules regarding regulating third-party communications; (5) rules restricting the use of company logos, copyrights, and trademarks; (6) rules restricting photography and recording; (7) rules restricting employees from leaving work; and (8) employer conflict of interest rules.

Confidentiality Rules: Employers Cannot Generally Restrict the Sharing of Employee Information

Many employers believe that it is their right to restrict employees from discussing their compensation with co-workers or from sharing other basic information about the workplace. This is wrong. For instance, the NLRB found that the following policy was illegal: "Do not discuss 'customer or employee information' outside of work, including 'phone numbers [and] addresses." *Memorandum GC 15-04* at 4 (brackets in original). The rationale for finding this policy illegal was that "the blanket ban on discussing employee contact information, without regard for how employees obtain that information is … facially unlawful." *Id*. The underlying concern is that for employees to engage in "concerted activity," working together, they may need to share their contact information or other "employee information" (presumably such as salary data) with one another.

However, the NLRB has not taken the position that employers may not impose any restrictions on the confidentiality of their information. For instance, the NLRB found that a policy banning the "unauthorized disclosure of 'business secrets' or other confidential information" was sufficiently narrow to pass muster. *Id* at 6. Moreover, the NLRB has stated that "even when a confidentiality policy contains overly broad language, the rule will be found lawful if, when viewed in context, employees would not reasonably understand the rule to prohibit Section 7-protected activity." *Id*. For instance, where a prohibition on the "disclosure of all 'information acquired in the course of one's work'" was "nested among rules relating to conflicts of interest and compliance with SEC regulations and state and federal laws," this was found to be acceptable because "employees would reasonably understand the information described as encompassing customer credit cards, contracts, and trade secrets, and not Section 7-protected activity." *Id*.

Imposing "Respect" toward Supervisors Could Chill Protected Activity

The NLRB General Counsel opined that a policy stating "Do not make fun of, denigrate, or defame your co-workers, customers, franchisees, suppliers, the Company, or competitors" would be illegal because employees might reasonably construe this rule to "ban protected criticism or protests regarding their supervisors, management, or the employer in general." *Id.* at 7. The basic thrust that the NLRB seems to come back to again and again is that employees have a right to work together to advance their interests in the workplace, even if in advancing those interests they may do some "harm" to the employer—for instance, by making negative statements about the company through criticisms of management. These rights do not extend just to private instances of employees collaborating to advance their collective interests, but they also extend to a "public forum." *See Quicken Loans, Inc.*, 361 NLRB No. 94, slip op. at 1 n.1 (Nov. 3, 2014).

The NLRB's stance against employer civility rules seems to put employers in a quandary, because an employee's rude behavior can cost the employer precious business. Accordingly, the NLRB has carved out space for employers to enforce certain requirements for courteous behavior. For example, it is lawful for an employer to implement a policy prohibiting "rudeness or unprofessional behavior toward a customer, or anyone in contact with the company." *Memorandum GC 15-04* at 9. The distinction is that a rule regarding conduct toward a customer would not have a "chilling effect," because it does not handcuff employees in how they can speak about management, which is the NLRB's true concern.

Employees Have a Right to "Pick Fights"

The NLRB has found that a policy stating "don't pick fights online" is unlawful. *Id.* at 10. Of course, this does not mean that physical assault is acceptable, but it does mean that attempts to prevent employee conflict, even if well-intentioned, are prohibited "because debate about unionization and other protected concerted activity is often contentious and controversial." *Id*. at 10. However, policies designed to protect employee welfare, as opposed to simply stifling dissent among employees, are acceptable, such as a policy stating that "threatening, intimidating, coercing, or otherwise interfering with the job performance of fellow employees or visitors" is not allowed. *Id*. at 11.

Employers Cannot Prohibit Employee Communications with the Media, Etc.

"Another right employees have under Section 7 is the right to communicate with the news media, government agencies, and other third parties about wages, benefits, and other terms and conditions of employment." *Id.* at 12. *See Trump Marina Associates*, 354 NLRB 1027, 1027 n.2 (2009). Therefore, employers may have less control over how their business is portrayed than they would like. While employers can control who makes "official statements for the company," they cannot stop unauthorized employees from commenting to the media on company actions, etc. While this might prove unsettling to employers, again the fact that they must accept is that the NLRB is aggressively setting out to protect employees' rights to speak ill of their employers in order that they may engage in "concerted activity" to advance their interests in the workplace. Therefore, employers will have to be very cautious in promulgating policies or disciplining employees for negative statements, even when their conduct directly harms the employer. Clearly, now the "duty of loyalty" does not extend to employee speech.

Company Logos—Not Just for the Use of the Employer

While the NLRB has recognized that "copyright holders have a clear interest in protecting their intellectual property," it also opined that "employees have a right to use the name and logo on picket signs, leaflets and other protest material." *Id*. at 14. Accordingly, company policies, such as those stating that "Company logos and trademarks may not be used without written consent," are not lawful. *Id*. at 15. Employees' protected use of company logos extends to social media as well. *Id.* at 14. Therefore, read in conjunction with other sections of the General Counsel's Memorandum, an employee has the legal right to take an employer's logo, post it on Facebook, and say that the company is an exploitative and discriminatory enterprise. This can be viewed as a boon for employee rights or a damaging blow to employers which severely curtails their ability to manage their branding, but either way, it is the paradigm that now exists.

Employee Electronic Equipment—Employers Would Be Unwise to Ban Cellphones

Companies faced with the proliferation of electronic devices, which can distract employees from their duties, may wish to restrict employees from bringing these devices to work. This would be illegal. While an employer can restrict use of electronic devices during worktime, it cannot impose blanket restrictions on the use of these devices while an employee is on company property "while on breaks or other non-work time." *Id.* at 16. This is because employees have the right to use a camera or video recorder (now standard components of cell phones) for collective action purposes, such as documenting "health and safety violations." *Id*.

Despite the illegality of blanket prohibitions on electronic devices, when policies on electronic devices are "instituted in response to a breach of … privacy" or where the employer has a well-understood strong interest in protecting privacy, such as regarding patient medical information, the Board has found that employees would not reasonably understand a no-photography rule to have the purpose of chilling concerted action. *Id*. at 16. *See Flagstaff Medical Center*, 357 NLRB No. 65, slip op. at 5 (Aug. 26, 2011), *enforced in relevant part*, 715 F.3d 928 (D.C. Cir. 2013). Thus, when crafting electronic-device policies, it is important for employers to clearly articulate the purpose of the policy and to tailor it to be as narrow as possible to accomplish the legitimate aims of the policy.

Employees Have a Right to Walk off the Job

Policies that state that "walking off the job is prohibited" are facially overbroad. *Memorandum GC 15-04*, at 17. This is because, whether unionized or not, employees have the right to strike or walk out, and a blanket ban on "walk offs" could be interpreted to interfere with this right. "If, however, such a rule makes no mention of 'strikes,' 'walkouts,' 'disruptions,' or the like, employees will reasonably understand the rule to pertain to employees leaving their posts for reasons unrelated to protected concerted activity, and the rule will be found lawful." *Id*.; *see also 2 Sisters Food Group*, 357 NLRB No. 168, slip op. at 2 (Dec. 29, 2011). As is a recurrent theme, the NLRB has emphasized that policies must be analyzed within the context in which they are promulgated. For instance, even a policy that specifically prohibits "walking off shift" could be acceptable—although it seems facially invalid—when viewed in the context that it applies to employees "directly responsible for patient care … [and] is reasonably read as ensuring that patients are not left without adequate care, not as a complete ban on strikes." *Memorandum GC* 15-04 at 18.

Conflict of Interest Rules—"Conflict" Needs to be Clearly Defined

The NLRB has taken the reasonable position that employees' financial conflicts with their employers can be prohibited. For example, an employer can adopt a rule that prevents employees from engaging in a competing business. *Id*. at 19. However, broad provisions, such as one stating "Employees may not engage in 'any action' that is 'not in the best interest of [the Employer],'" would be illegal. *Id*. at 18 (brackets in original). This is a commonsense approach that allows employers to restrain employees from taking financial positions adverse to their companies, but it still gives employees ample latitude to take "collective action," even if this action might contravene what the employer views as its "best interests," which may not be those of the employees.

Conclusion

From even a quick scan of the General Counsel's Memorandum, it is evident that the main current of the NLRB's position is that employees have broad "concerted activity" rights that must be protected. These rights can be circumscribed if prohibitory rules are not phrased as "blanket" restrictions, but are instead rather narrowly tailored to protect legitimate interests that do not relate to "chilling" employees' ability to band together to advance their interests in the workplace. Therefore, careful drafting of handbook provisions and other policies and procedures can rescue employers from potential liability while preserving some of their rights to regulate the workplace and defend their legitimate interests. Ultimately, the NLRB has created a balancing act between aiding employees in the cause of improving their working conditions, which are often disregarded in the at-will employment regime, and the rights that employers deserve to advance their interests by promoting generally-lauded values, such as civility and the protection of privacy. ■

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