LEGAL UPDATES

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More Micromanagement by the NLRB

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The General Counsel of the National Labor Relations Board (NLRB) recently issued a 30-page report that summarizes its position on employer work rules and provides examples of what does and does not have a "chilling effect" on protected concerted activity as defined by Section 7 of the National Labor Relations Act (NLRA).

Specifically, the report provides guidance within a framework articulated by the Board's decision in *Lutheran Heritage Village-Livonia*. In that decision, the Board found that the mere existence of a work rule – no matter how well-intended – can have a chilling effect on an employee exercising his or her Section 7 rights if: (1) employees would reasonably construe the rule's language to prohibit Section 7 activity; (2) the rule was promulgated in response to union or other Section 7 activity; or (3) the rule was actually applied to restrict the exercise of Section 7 rights. Not surprisingly, the vast majority of violations are found under the first prong of this test.

The report provides the following categories of rules with specific examples of what does and does not pass muster:

1. **Rules Regarding Confidentiality**

Applicable Standard: Employees have a Section 7 right to discuss wages, hours, and other terms and conditions of employment with fellow employees and other non-employees, including union representatives. The confidentiality provisions of employee handbooks can violate the law if not artfully prepared.

2. **Rules Regarding Employee Conduct Toward the Company and Supervisors**

Applicable Standard: Employees have a Section 7 right to criticize or protest their employers' labor policies or treatment of employees, both while at

work and in the public forum. While rules banning "insubordination" are generally permissible, rules that amount to a blanket ban of "disrespectful," "negative," "inappropriate" or "rude" conduct toward management might be unlawful, depending on the context.

3. **Rules Regarding Employee Conduct Toward Fellow Employees**

   Applicable Standard: In addition to employees' rights to discuss their terms and conditions of employment and/or criticize their employers' labor practices, employees also have a right to argue and debate with each other about unions, management, and the like. Thus, when an employer bans all "negative" or "inappropriate" discussions among employees, without further clarification, such rules can be reasonably read to prohibit discussions and interactions that are protected.

4. **Rules Regarding Employee Interaction with Third Parties**

   Applicable Standard: Employees have a right to communicate with news media, government agencies or other third parties regarding the terms and conditions of their employment. Handbook rules that unreasonably restrict such communication are unlawful.

5. **Rules Regarding Use of Company Logos, Copyrights, and Trademarks**

   Applicable Standard: Though copyright holders have a right to protect their intellectual property, company rules cannot prohibit employees' fair protected use of them. The easiest example of this is an employee's right to use company logos on picket signs, leaflets, etc.

In addition to the foregoing topics, the report discussed company rules regarding photography and recording, restrictions on leaving work, and certain conflict of interest issues.

What This Means to You

The report provides guidance on a "safe harbor" approach regarding certain work rules. It should be particularly helpful to those entities with multiple locations, as the NLRB's Regional Offices have not been consistent in their determinations in this area. However, employers should avoid relying solely on the content of the report, as the guidance can be subject to change. Please see our Labor Relations Law Insider blog post for a more in depth analysis.