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# Employers Need to Review Their Handbooks and Policies Now to Avoid NLRB Scrutiny

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As you know, the National Labor Relations Board (NLRB) has been busy rewriting the rules on union organizing, employee use of e-mails, NLRB jurisdiction and workplace investigations. The latest salvo impacting hospitals' day-to-day operations is the March 18, 2015 issuance of the NLRB General Counsel's *Memorandum GC 15-04* ("GC Memo" or "Memo"), which outlines employer handbook policies and rules that NLRB investigators and regional offices will consider to be lawful and unlawful under the National Labor Relations Act ("NLRA"). The GC Memo pertains to policies and rules that are often found in employee handbooks in both union and non-union workplaces. NLRB review of such policies often arises because a discharged employee may seek reversal of the discharge, or because a union that has lost a representation election seeks to overturn the loss by claiming the employer maintained employer policies that hindered union organizing.

In essence, the maintenance of a work rule or policy violates the NLRA if the rule has a chilling effect on employees' statutory right to engage in concerted activity for mutual aid or protection (i.e., Section 7 activity). If a rule does not explicitly prohibit Section 7 activity, it will still be found unlawful 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. The Memo reviews eight problem areas often found in employer policy documents, including handbooks, and gives examples of lawful and unlawful policies.

**Confidentiality.** "Employees have a Section 7 right to discuss wages, hours, and other terms and conditions of employment with fellow employees, as well as nonemployees such as union representatives." "Broad prohibitions on disclosing 'confidential' information are lawful so long as they do not reference information regarding employees or anything that would reasonably be considered a term or condition of employment, because employers have a substantial and legitimate interest in maintaining the privacy of certain business information." The GC will consider the context of a handbook or policy statement when considering lawfulness: "[A]n otherwise unlawful confidentiality

rule will be found lawful if, when viewed in context, employees would not reasonably understand the rule to prohibit Section 7 protected activity."

**Employee Conduct toward the Company and Supervisors.** Employees "have the Section 7 right to criticize or protest their employer's labor policies or treatment of employees." Because of this, rules prohibiting employees from engaging in "disrespectful," "negative," "inappropriate," or "rude" conduct towards the employer or management, are unlawful without sufficient clarification or context." It is still OK to prohibit insubordination, provided the prohibition does not extend to disrespectful conduct. Also, employee criticism of the employer "will not lose the Act's protection simply because the criticism is false or defamatory."

**Conduct Towards Other Employees.** Employees have the right to "to argue and debate with each other about unions, management, and their terms and conditions of employment… even if it includes intemperate, abusive and inaccurate statements." Furthermore, "anti-harassment rules cannot be so broad that employees would reasonably read them as prohibiting vigorous debate or intemperate comments regarding Section 7 protected subjects."

**Employee Interaction with Third Parties.** Employers cannot maintain policies that regulate or restrict employee communications with the media, government agencies and third parties relating to their wages, benefits and other terms and conditions of employment.

**Use of Company Logos, Copyrights and Trademarks** – "Employees have a right to use the name and logo on picket signs' leaflets, and other protected materials." An employer's proprietary interests are not implicated by employees' non-commercial use of a name, logo, or other trademark to identify the employer in the course of Section 7 activity.

**Photography and Recording.** The Memo states that employees have the right to photograph and make recordings in furtherance of their protected concerted activity, including the right to use personal devices to take pictures or make recordings. Policies are unlawfully overbroad if "they would reasonably be read to prohibit the taking of pictures or recordings on non-work time."

**Restrictions on Employees Leaving Work.** Employees have the right to strike, therefore "rules that regulate when an employee can leave work are unlawful if employees reasonably would read them to forbid protected strike actions and walkouts." A rule would be lawful if "such a rule makes no mention of 'strikes,' 'walkouts,' 'disruptions' or the like" since employees should "reasonably understand the rule to pertain to employees leaving their posts for reasons unrelated to protected concerted activity."

**Conflict of Interest Rules.** Employees have the right to engage in concerted activity to improve their terms and conditions of employment, even if that activity is in conflict with the employer's interests. Examples are protests outside the employer's business, organizing a boycott of the employer's products and services and solicitation of support for a union while on non-work time. When a conflict of interest policy "includes examples or otherwise clarifies that it is limited to legitimate business interests, employees will reasonably understand the rule to prohibit only unprotected activity."

*Conclusion*

Employers are well advised to read the Memo and its examples, and compare those examples with their own handbooks and policies to ensure their policies are lawful. The failure to do this can result in significant costs associated with reinstatement and back pay of employees whom the employer terminated under unlawful policies, or in the reversal of an employer election "win" in a union organizing campaign. When considered in conjunction with NLRB's new "quickie" election rules, the GC Memo makes it imperative that employers act now to fix their policies before those policies become weapons in the hands of a union.

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