

Practice Update

Employee Handbooks Should Be Reviewed in Light of NLRB Report

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by Richard D. Tuschman

Your employee handbook may be unlawful. That's the takeaway from a 30-page [report](#) issued by the National Labor Relations Board's Office of the General Counsel on March 18, 2015.

The report, entitled "Report of the General Counsel Concerning Employer Rules," presents recent developments on employee handbook rules arising in the context of NLRB cases that address whether particular rules violate the National Labor Relations Act by restricting rights guaranteed under section 7 of the Act. Section 7 gives workers the right to form unions and **engage in other types of concerted activity**, *i.e.*, when two or more employees act together to improve wages or working conditions. It is this highlighted section that gives the NLRB jurisdiction over non-union employees in certain circumstances. The NLRB says that employee handbook rules that have a "chilling effect" on section 7 rights violate the Act, which makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7" of the Act.

The most obvious way a rule can violate the law, the report notes, is to explicitly restrict section 7 rights, such as by banning unions. But that, of course, is not usually the case with employee handbooks. The

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more likely problem with employee handbooks is that certain provisions could be *reasonably construed* to restrict section 7 rights.

For example, the General Counsel deemed unlawful a rule that said: “Discuss work matters only with other [Company] employees who have a specific business reason to know or have access to such information... Do not discuss work matters in public places.” The report reasoned that employees would reasonably construe this rule to encompass other employees’ wages and terms and conditions of employment, which employees are free to discuss under section 7.

Similarly, the General Counsel found unlawful a rule that prohibited “walking off the job,” which could reasonably be construed to include strikes and walkouts, which are generally protected under section 7.

In contrast, the General Counsel approved of a rule that said: “Entering or leaving Company property without permission may result in discharge.” It was reasoned that such a rule would not reasonably be construed as encompassing strikes.

The report contains many other examples of policies that the General Counsel has opined are either lawful or unlawful, depending on whether they can reasonably be construed to restrict section 7 activities. The rules address a variety of workplace policies, including confidentiality, employee conduct both inside and outside the workplace, the use of company logos, copyrights and trademarks, restrictions on photography, recording and the use of personal electronic devices, leaving work, conflicts-of-interest, social media usage, solicitation, and restrictions on disclosing the employee handbook or its provisions.

Employee handbook policies on any of these issues may run afoul of the Act. But in many cases, employers may be able to bring an unlawful rule into

compliance by modifying the rule or adding an explanation or examples to make it clear that the rule is not intended to restrict section 7 rights.

Employers and their counsel should immediately review existing employee handbooks in light of the General Counsel's report to ensure compliance with the Act. As the report makes clear, it is not necessary for an employer to *apply* an unlawful policy in order to run afoul of the Act. The *mere maintenance* of an unlawful policy violates the Act and can give rise to an unfair labor practice charge.

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