

NEWSLETTERS

Employee Handbooks Under Attack—Will Yours Hold Up?

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Employee handbooks are an important tool to assist employers in clearly communicating policies, procedures and expectations. A well-written employee handbook defines the employment relationship and establishes a code of conduct for employees to follow, as well as informing employees about the workplace and their benefits. They also provide a framework for management when addressing violations of policies and codes of conduct. Handbooks that establish standard, non-discriminatory personnel policies are a first line of defense against lawsuits by employees.

Most employees in the private sector are not represented by a union; indeed, as of the end of 2015, the Bureau of Labor Statistics indicated that only 6.7 percent of private sector employees were members of unions. However, recently, the National Labor Relations Board (NLRB) has begun carefully scrutinizing employee handbook provisions that have, for many years, raised no issues or controversy. All employers, whether union or non-union, are impacted by this change of course by the NLRB.

Over the last few years, the NLRB has issued inconsistent and confusing decisions declaring long used handbook policies unlawful under the National Labor Relations Act (NLRA). In light of the confusion, the NLRB general counsel issued a guidance memorandum to assist employers in updating their handbooks to comply with the NLRA. The memorandum clearly portrays the NLRB's expansive view regarding employee rights under the NLRA.

While the NLRA is generally intended to protect union workforces, employers with non-union workforces are still at risk. Particularly, the NLRB seems to be engaged in a concentrated effort to expand and solidify employee rights under Section 7 of the NLRA, which gives both union and non-union employees the right to engage in "concerted activities for mutual aid or protection." In Section 7 of the NLRA, employers cannot interfere with employees' right to engage in these concerted activities. If employers violate an employee's Section 7 rights, an employee could file an unfair labor practice with the NLRB. If an employer is found to have committed an unfair labor practice, it may be liable for financial penalties and other non-monetary relief.

The NLRB's memorandum summarizes various rulings on employer handbook policies and provides examples of policies that it has found to be lawful and unlawful. The policies that the NLRB has recently found to be unlawful include many policies that have been historically accepted and are widely used in employee handbooks. The handbook policies that

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have received the most scrutiny by the NLRB include confidentiality; employee conduct towards the company, supervisors and fellow employees; employee interaction with third parties; use of company logos, copyrights and trademarks; workplace photography and recording; employees leaving work; and conflicts of interest.

In many of its decisions, the NLRB relied on the standard of what employee's might "reasonably" construe as infringing upon their Section 7 rights in order to determine whether a handbook policy violates the NLRA. The NLRB's broad method of determination will allow employees to more easily argue that company policies hinder their ability to engage in concerted activities. The NLRB seems to be targeting overly broad language that contains any possibility that employees may find it to violate their Section 7 rights. Examples include:

- The following policy regarding conduct towards fellow employees is considered to be unlawful because the terms would be reasonably construed to limit protected criticism of supervisors or managers.

"Do not make insulting, embarrassing, hurtful, or abusive comments about other company employees online" and "avoid the use of offensive, derogatory or prejudicial comments."

- The following policy regarding confidentiality is considered to be unlawful because employees have a Section 7 right to discuss wages, hours and other terms and conditions of employment. In addition, the term "another's confidential information" could be interpreted to mean no disclosure of another employee's information as to wages or other terms and conditions of employment.

"Never publish or disclose the employer's or another's confidential or other proprietary information."

- The following policy regarding employee conduct toward the company and supervisors is considered to be unlawful because employees have a Section 7 right to criticize their employer's policies or treatment of employees, and can do so publicly.

"No defamatory, libelous, slanderous or discriminatory comments about the Company, its customers and/or competitors, its employees or management."

It is highly likely that many employers currently have handbook policies that if challenged would be found to violate the NLRA. As you can see the NLRB has included in its memorandum examples of handbook policies it considers lawful under the NLRA. Employers should carefully review existing employee handbooks and either attempt to use language approved by the NLRB or contact a knowledgeable labor attorney to

discuss the issue. Now that the NLRB has issued guidance and established its intended course of conduct as to handbook policies, it is more important than ever for employers to update their policies in an effort to avoid litigation or handbook violations.

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