Employee Handbooks Continue To Bring NLRB Scrutiny

In recent years, the National Labor Relations Board has dramatically increased its scrutiny of nonunion employee handbook policies and procedures, finding a number of them violate employees' rights under Section 7 of the National Labor Relations Act.

Section 7 provides that all employees — not just employees in labor unions — may engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." Because restrictions on Section 7 rights are rarely "explicit," the NLRB generally looks at whether: (1) employees would reasonably construe the language to prohibit Section 7 activity, (2) the rule was promulgated in response to union activity or (3) the rule has been applied to restrict the exercise of Section 7 rights.[1]

Recently challenged policies and provisions include: (1) prohibitions on certain employee communications and behavior, both inside and outside the workplace; (2) employers' confidentiality policies, including provisions regarding internal employee complaints and investigations; (3) social media policies; and (4) rules regarding employees' access to employer property.

Although not the focus of this article, there is an added layer of complexity accompanying some of these NLRB decisions. In early 2012, President Obama made recess appointments to the NLRB that have since been challenged in federal court, with litigation reaching the U.S. Supreme Court in NLRB v. Noel Canning.

The Noel Canning case remains pending before the Supreme Court for determinations on whether President Obama's recess appointments were constitutional, and also likely whether the hundreds of decisions rendered by the new appointees were valid (or, if invalid, whether the decisions must be reviewed again by a proper and constitutional NLRB).

Thus, if the Supreme Court finds the recess appointments invalid, some of these prior NLRB's decisions on this topic may need to be re-examined.
Turning back to the topic at hand, this article first examines two very recent employee handbook NLRB decisions issued by the current board — which includes no recess appointments, Hills and Dales General Hospital and Danielle Corlis and First Transit Inc. and Amalgamated Transit Union Local #1433, AFL-CIO, and then reviews lessons learned from this recent and expanding body of NLRB law.

**Hills and Dales General Hospital and Danielle Corlis**

In the NLRB’s April 1, 2014, Hills and Dales General Hospital and Danielle Corlis[2] decision, the board analyzed the Hospital’s employee policy on "Values and Standards of Behaviors." Among other provisions, the policy provided as follows:

- Provision 11: We will not make negative comments about our fellow team members and we will take every opportunity to speak well of each other.
- Provision 16: We will represent Hills & Dales in the community in a positive and professional manner in every opportunity.
- Provision 21: We will not engage in or listen to negativity or gossip. We will recognize that listening without acting to stop it is the same as participating.

The Hospital argued that Provisions 11 and 21 could only be unlawful if they were linked to employees’ engagement in Section 7 activities. The NLRB disagreed, ruling that Provisions 11 and 21 were "unlawfully overbroad and ambiguous" by their own terms. The NLRB also clarified that, contrary to the employer’s assertion, these provisions were not necessarily lawful simply because employees participated in their drafting.

The NLRB had a split opinion on Provision 16, however. In a prior decision, Tradesmen International,[3] the NLRB found that a rule requiring employees to represent their organization in a "positive and ethical manner" was lawful. The NLRB majority distinguished Tradesmen International on two points.

First, the Tradesmen policy was contained in a conflicts of interest policy and not proximate to any unlawful rule. Second, the NLRB found that the term "positive" coupled with "ethical" in a conflict of interest policy has a significantly narrower scope than when the term "positive" is coupled with the term "professional." The NLRB explained that "positive" and "professional" have a broader, more flexible concept when applied to employee conduct generally.

**First Transit Inc. and Amalgamated Transit Union Local #1433 AFL-CIO**

In the NLRB’s decision in First Transit Inc. and Amalgamated Transit Union Local #1433 AFL-CIO[4], which was issued the following day, the board questioned a number of First Transit’s employee handbook provisions.

First, the NLRB examined whether a prohibition on the "use of company property for activities not related to work anytime" violated Section 7. As it has done in other recent decisions, the NLRB looked at the context of the prohibition, which was embedded in the part of the handbook addressing stealing, unauthorized removal and inappropriate use of company property and failure to account for company funds. The NLRB found that this prohibition on the use of company property related to theft or misappropriation — which is unprotected activity — and did not create a "ban" against protected
activity on the employer's premises.

Second, the NLRB examined a policy prohibiting "poor work habits," including loafing, wasting time, loitering or excessive visiting. Although the NLRB has struck down "no loitering" policies in other cases, where the provision or policy has prohibited loitering outside employees' working hours, the board found this restriction lawful because employees would reasonably construe loitering in the context of poor work habits referred only to a failure to perform job duties at times when the company expects productivity.

Third, the NLRB analyzed a prohibition on discourteous or inappropriate attitude or behavior toward passengers, other employees and the public. Unlike the provisions above, which the NLRB upheld, the board found that this prohibition was unlawfully overbroad. The NLRB explained that the patent ambiguity in the prohibition would allow employees to reasonably construe the provision as limiting their communications concerning employment, including communications that Section 7 protects.

Lastly, the NLRB looked at a prohibition on profane or abusive language that is uncivil, insulting, contemptuous, vicious or malicious. Again looking at the language in its context, the NLRB found that reasonable employees would construe this prohibition as merely requiring that they act in accordance with "general notions of civility and decorum." The NLRB determined that this language was not so patently ambiguous as to render it unlawfully overbroad.

Towards the end of its decision, the NLRB also addressed First Transit's argument that its freedom of association policy informed all handbook provisions, essentially saving it from a finding that its handbook provisions unlawfully restricted Section 7 rights. The policy read, "[D]uring union organizing campaigns, management shall support the employee's individual right to choose whether to vote for or against union representation without influence or interference from management."

The NLRB said that, while a freedom of association policy may sometimes clarify the scope of an otherwise ambiguous and unlawful rule, it did little here to ensure that employees would not read certain provisions as infringing on their Section 7 rights. The NLRB further noted that First Transit's policy would not insulate it from liability because the policy focused solely on union organizational rights and its location in the employee handbook was not proximate to the provisions in question.

Bottom Line

These very recent decisions found several policies unlawful under the NLRA and found others lawful, distinguishing them from prior decisions in which seemingly similar language was deemed unlawful. These should remind practitioners that:

1. The NLRB is likely to scrutinize employee handbook policies that contain broad language concerning employee conduct and will find them unlawful if employees reasonably could construe them as tending to chill their Section 7 rights.
2. While there may be legitimate reasons for employee involvement in drafting employee handbook policies, their involvement will not insulate employers against the NLRB finding they are overly broad and, thus, impinge on employees' Section 7 rights.
3. Context is important. When drafting employee handbook provisions, where you include prohibitions against certain employee conduct matters, the NLRB will review such language in its context to determine whether it is likely to interfere with employees' Section 7 rights.
4. Employers should be mindful that savings clauses may be effective if they are proximate to policies that otherwise might imply that the employer is prohibiting conduct Section 7 protects. This may mean that savings clauses may need to be repeated within the employee handbook.

Now that the NLRB has a full panel of members that have been validly appointed for the first time in years, union and nonunion employers alike can expect the NLRB to continue to closely examine their employee handbook policies. Before drafting or revising a handbook policy that could potentially impact employees’ Section 7 rights, employers should consult with counsel.

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[2] 360 NLRB No. 70 (April 1, 2014)

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