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COZEN O'CONNOR

NLRB General Counsel Offers Glimpse Into the Board's Approach to Employee Handbooks

Jason A. Cabrera

Member

jcabrera@cozen.com
Phone: (215) 665-7267
Fax: (215) 253-6797

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In a move that should remind all employers (whether unionized or non-unionized) to regularly review their employee handbooks, Richard F. Griffin, the General Counsel of the National Labor Relations Board (Board or NLRB), recently issued a memorandum addressing the kind of handbook language that could run afoul of the National Labor Relations Act.

While the new report is helpful in some respects, it also illustrates the uncertainty that plagues employers navigating this uncertain area of law. Griffin made a point of noting that the memorandum only contains his own thoughts on what he admits is "an evolving area of labor law," but it does offer employers some insight into recent NLRB developments regarding employee handbooks.

Unfortunately, perhaps the most concrete take-away in the memorandum is Griffin's statement that "[a]lthough I believe that most employers do not draft their employee handbooks with the object of prohibiting or restricting conduct protected by the National Labor Relations Act, the law does not allow even well-intentioned rules that would inhibit employees from engaging in activities protected by the Act." Thus, employers should be aware that "good intentions" and "ignorance of the law" are not defenses to an unfair labor practice charge alleging that an employment handbook provision violates the Act.

Examples of Language That Works and Language That Does Not

The first section of the memorandum provides a side-by-side analysis of language the NLRB has and has not considered to violate the right to engage in "protected concerted activities" under the Act. That analysis addressed eight different categories of rules: (1) confidentiality and non-disclosure; (2) employee conduct toward the company and its supervisors; (3) employee conduct toward co-workers; (4) interactions and communications with third parties and the general public; (5) the use of company logos, copyrights and trademarks; (6) workplace photography and recordings; (7) the ability of employees to leave work; and (8) conflicts of interest. Given the Board's ongoing interest in employee handbooks and application of Section 7 rights to unionized and non-unionized environments alike, it would behoove all employers to review the examples of lawful and unlawful provisions provided in the memorandum.

For example, the memorandum notes that an admonition to "[b]e respectful to the company, other employees, customers, partners, and competitors" is unlawfully overbroad, but an admonition that "[b]eing insubordinate, threatening, intimidating, disrespectful or assaulting a manager/supervisor, coworker, customer, or vendor will result in discipline" is lawful. When distinguishing those provisions, Griffin noted that the "disrespectful" provision of the latter rule, which would ordinarily be unlawful standing alone, was lawful because it appeared as part of a "larger provision" that was "clearly focused on serious misconduct."

Another example notes that an employer cannot use a policy that states "[y]ou must not disclose proprietary or confidential information about [the Employer, or] other associates (if the proprietary or confidential information relating to [the Employer's] associates was obtained in violation of law or lawful Company policy)," but a policy that states "no unauthorized disclosure of business secrets or other confidential information" or "do not disclose confidential financial data, or other non-public proprietary company information" is perfectly lawful. The memorandum explains that the prohibited language is overbroad because a reasonable employee would not understand how the employer determines what is lawful company policy, but the latter provisions are lawful because they do not reference information regarding employees or the terms and conditions of employment, do not define the general term "confidential," and do not otherwise contain language that would be

reasonably construed to violate the Act. Thus, the memorandum suggests that the NLRB could determine that essentially identical language violates the rule in some contexts, but not in others, without offering much guidance (if such guidance is even possible) on how the NLRB would make that call.

While the soundness of the lines the NLRB is drawing is up for debate, the examples provided in the memorandum are helpful to the extent that they allow employers to copy the exact language referenced therein as being lawful. Then, if the language becomes the subject of an unfair labor practices charge, the employer could point to the memorandum to argue that the language had the general counsel's blessing.

Unfortunately for employers, however, the examples that Griffin chose show just how uncertain or unclear the Board can be when reviewing an employee handbook, and the memo draws seemingly inconsistent conclusions.

Lessons Learned from Wendy's

The second section of the memorandum discusses a recent informal, bilateral settlement agreement that the restaurant chain Wendy's reached to avoid issuance of an unfair labor practice complaint stemming from a claim that its employee manual was overbroad. Various provisions of Wendy's manual were alleged to be unlawful because employees would reasonably construe those provisions to prohibit them from engaging in protected activity. In his memo, Griffin identified the language that sparked the complaint against Wendy's and the new language, which was approved by the general counsel's office, that Wendy's was required to use as part of the settlement agreement to avoid issuance of a complaint and formal proceedings.

For example, Wendy's was required to remove a provision that required employees to "[r]espect copyright and similar laws. Do not use any copyrighted or otherwise protected information or property without the owner's written consent." The NLRB deemed this provision unacceptable because "employees would reasonably construe that language to prohibit Section 7 communications involving … reference to the copyrighted handbook or Company website for the purposes of commentary or criticism." The memorandum identifies several other provisions — some plainly overbroad and others that would appear sufficiently limited — that Wendy's was required to change as part of the settlement.

The Bottom Line

For all its limitations, Griffin's memorandum is helpful in attempting to marshal the NLRB's most recent rulings on common categories of workplace rules. By reviewing recent Board case law and providing examples of language that the NLRB has found lawful, employers now have the ability to better align their written policies with the exact language that had been previously approved. Even though the memorandum is not binding law and may be reviewed or tested in the courts if its principles were applied to employers, employers should have a healthy respect for the NLRB's pronouncements on workplace policies to avoid becoming the Board's target and should seek assistance when drafting or reviewing your workplace policies.

Cozen O'Connor's Labor & Employment attorneys are available to provide counsel and guidance on the issues discussed in this Alert.