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Common Employee Handbook Policies Raising Red Flags with the NLRB

The National Labor Relations Board ("NLRB") is taking aim at workplace policies that are commonly used by non-union employers and invalidating them because, in the view of the current NLRB, these policies could reasonably be construed to limit employee unionizing and other activities protected by the National Labor Relations Act ("NLRA").

Section 7 of the NLRA gives employees the right to organize, to bargain collectively, and "to engage in other concerted activities." More simply put, Section 7 gives employees the right to act for the benefit of, or on behalf of, themselves and their co-workers regarding wages, hours and other terms and conditions of employment. This includes activities such as complaining about pay and benefits or discipline at work or on social media and taking more assertive action such as walking off the job, picketing, or filing a petition with the NLRB for an election. Section 7 is broadly written and it is an unfair labor practice under the NLRA to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.

Employers should take note that any policy that could be interpreted to prohibit the discussion of, or the disclosure of information about, employees' terms and conditions of employment, is likely to raise a red flag with the NLRB. Each of the following has been found to violate the NLRA, either because it explicitly restricts Section 7 activity or because an employee

would reasonably understand it to restrict Section 7 activity:

- A Proprietary/Confidential Information Policy that defined confidential information as "non-public information relating to ... the Company's business, personnel ... all personnel lists, personal information of co-workers ... personnel information such as home phone numbers, cell phone numbers, addresses and email addresses." Quicken Loans, Inc., 359 NLRB No.141 (June 21, 2013).
- A compensation program that was described as confidential between the employee and the employer, and that prohibited disclosure of wages or compensation to any third party or other employee. Design Technology Group LLC d/b/a Bettie Page Clothing, 359 NLRB No.96 (April 19, 2013).
- A policy that included "employee records" as one of the categories of "company information" that must be kept confidential and also stated, "Never discuss details about your job, company business or work projects with anyone outside the company" and "Never give out information about customers or DIRECTV employees." DirecTV, 359 NLRB No.54 (January 25, 2013).
- An at-will agreement that included a section entitled "Confidential Information" and defined the term to include "personnel information and documents," and prohibited

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the disclosure of such confidential information outside of the organization. *Flex Frac Logistics*, 358 NLRB No.127 (September 11, 2012).

- A policy prohibiting employees from discussing “private matters of members and other employees … includ[ing] topics such as, but not limited to, sick calls, leaves of absences, FMLA call-outs, ADA accommodations, workers’ compensation injuries, personal health information, etc.” and from sharing “sensitive information such as … payroll … without prior management approval.” *Costco Wholesale Corp.*, 358 NLRB No.106 (September 7, 2012).
- A policy requiring employees to get authorization before contacting the media, or commenting or giving information to the media. *DirecTV*, 359 NLRB No.54 (January 25, 2013).
- A policy that required employees to contact their employer’s security department if “law enforcement” wanted to interview them or obtain information, and failed to contain an exception for NLRB agents. *DirecTV*, 359 NLRB No.54 (January 25, 2013).
- A policy that provided “No one should be disrespectful or use profanity or any other language which injures the image or reputation of the [company].” *Knauz BMW*, 358 NLRB No.164 (2012).
- A policy that required employees to voice complaints directly to their immediate supervisors or human resources. *Hyundai America Shipping Agency*, 357 NLRB No.80 (August 26, 2011).

A case that received much adverse commentary by employer groups and

advocates involved the NLRB’s invalidation of an at-will disclaimer that required the employee to agree that “the at-will employment relationship cannot be amended, modified or altered in any way.” The NLRB’s reasoning was that such a statement may chill the exercise of employees’ Section 7 rights to engage in union organizing or to participate in collective bargaining that might lead to a change in the at-will status. The NLRB subsequently clarified its position and found that a policy that provided the company president with the authority to alter the at-will relationship with employees was permissible because it did not require the employee to acknowledge that their at-will status could not be changed in any way.

Merely maintaining an unlawful policy in an employee handbook is also a violation of the NLRA, even if it has never in fact been applied to restrict any Section 7 activity.

Employers who use or maintain workplace policies that are inconsistent with the current NLRB’s view of the law may face unfair labor practice charges, the penalties for which would include rescission of the policy and the posting of a notice. If an employee is disciplined or terminated for violating an unlawful policy, the discipline would be invalidated, and a terminated employee would be reinstated with back pay and interest.

Employers wanting to avoid a confrontation with the NLRB should review their workplace policies and assess whether they could be read to restrict employees from communicating with each other or with the outside world about wages, hours, and other terms and conditions of employment. If they do or could be perceived as doing so, some editing would be advisable.

This publication is a summary of legal principles. Nothing in this article constitutes legal advice, which can only be obtained as a result of a personal consultation with an attorney. The information published here is believed accurate at the time of publication, but is subject to change and does not purport to be a complete statement of all relevant issues.