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Legal Update

Unclear About What Provisions In Your Employee Handbook May Be Unlawful? The NLRB Tries To Help

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Over the past few years, the National Labor Relation Board or "NLRB" has made headlines by penalizing employers for relatively common employee handbook provisions that it believes violate the National Labor Relations Act. The Act is a federal statute that regulates Labor Unions and employers, collective bargaining, and unfair labor practices. It also guarantees certain employee rights, including the rights to join or assist Labor Unions, and to engage in other concerted activity for mutual aid or protection. Although the Act focuses largely on union-related issues, it actually applies to all private-sector employers, and makes it unlawful to interfere with employee rights, even where no union is involved at all.

In order to protect employee rights to the greatest extent possible, the NLRB has aggressively attacked policies that it believes may discourage employees from exercising their rights. Even where handbook policies do not explicitly prohibit legally-protected activity by employees, the NLRB has interpreted many policies expansively and found them unlawful if employees would reasonably understand the rules to prohibit protected activity.

Unlawful handbook provisions can trigger unfair labor practice charges, which in turn can result in awards of back-wages, reinstatement, injunctive relief, fines, and other penalties. The NLRB has invalidated a number of workplace rules it perceived to be overly broad, including policies regulating social media, use of company e-mail, internet, and electronic communication systems, confidentiality, codes of conduct, and at-will employment acknowledgements.

If you are unclear about what provisions can lawfully be used in handbooks, and what language will trigger NLRB criticism, you are not alone. Consistent guidance from the NLRB on these topics has been scarce. However, in an effort to summarize and explain its many rulings on these issues, on March 18, 2015 the NLRB Office of General Counsel issued **Memorandum GC 15-04** comparing and contrasting handbook provisions it found to be lawful or unlawful and explaining the distinctions between the two.

For example, in general, employees have a legally-protected right to discuss wages, compensation, hours, and other terms and conditions of employment with other employees, as well as non-employees like union representatives and investigative agencies. Overly restrictive confidentiality policies that prohibit or discourage discussion of such topics will be viewed as unlawful by the NLRB.

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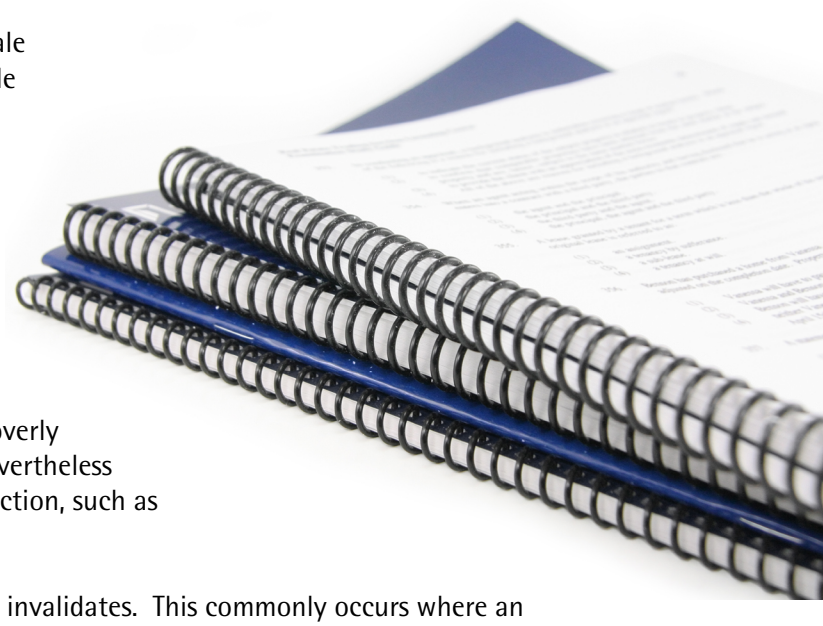

Similarly, in an effort to discourage conduct that may lower morale or disrupt the workplace environment, many companies have code of conduct policies that prohibit negative, disrespectful, or rude conduct toward management. However, employees have a legally-protected right to communicate and even complain about the terms and conditions of their employment and genuine workplace issues like working conditions and safety.

Employers cannot lawfully penalize employees for communicating or complaining about these work-related topics, even if those complaints are unflattering or critical of company management. The NLRB has therefore struck down policies that are overly broad and discourage this legitimate criticism. Employers can nevertheless prohibit serious misconduct that falls outside of any lawful protection, such as conduct that is insubordinate, threatening, or intimidating.

Over-breadth is a common flaw in many of the policies the NLRB invalidates. This commonly occurs where an employer restricts or prohibits certain activity, but uses policy language that is so broad or vague that it can be interpreted to discourage lawful employee activity. For example, confidentiality policies that prohibit employees from discussing anything "relating to the company" or any "work-related" information, are deemed unlawful. But confidentiality policies that are carefully tailored to protect only non-public confidential financial data, proprietary information, and trade secrets, are more likely to pass muster.

The NLRB Memo also repeatedly recommends the use of specific examples to provide context about what a rule may or may not encompass.

The NLRB's guidance is a positive first step, although the distinctions it draws between lawful and unlawful provisions are not entirely consistent. While the Memo highlights provisions it finds unlawful, its examples of acceptable policy language are somewhat less helpful. The Memo leaves a number of questions unanswered and an incorrect word or two can apparently tip the scales one way or the other.

Unfortunately for employers, the NLRB is just one of several federal agencies actively scrutinizing workplace policies. The Department of Labor Wage & Hour Division and the Equal Employment Opportunity Commission are also regulating and litigating policies on topics such as medical, pregnancy, and maternity leave, overtime eligibility, and criminal background checks, just to name a few. Frequent legislative changes and constantly shifting interpretations in the courts also impact workplace policies on these important topics.

This combination of aggressive regulatory oversight and limited advance guidance highlights the risk of a "DIY" approach to company handbooks and workplace policies. Employers are wise to have their policies drafted by legal and HR professionals and periodically reviewed for continued compliance with these ever-changing regulatory standards.

Chad Willit's *practice is concentrated on employment law, admiralty and maritime law, insurance coverage, and general civil litigation in Ohio and Indiana. He has extensive experience and an active pre-trial, trial, and appellate practice in these areas. Chad also assists businesses and organizations with risk management and related proactive planning to prevent or resolve claims before they escalate into expensive lawsuits.*

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