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Employer Confidentiality Rules and Other Policies: NLRB Report Discusses Lawful and Unlawful Language

Legal Update

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On March 18, 2015, the National Labor Relations Board's General Counsel issued a 30-page memorandum (GC Memorandum) offering guidance on several common employer policies and handbook rules. In recent years, the NLRB has aggressively scrutinized and challenged employers' rules covering a variety of topics. The GC Memorandum provides useful information for nearly all employers, whether unionized or not.

BACKGROUND

Under the National Labor Relations Act, which applies to most private-sector employers, employers may not interfere with employees' right to engage in "concerted activities for the purpose of . . . mutual aid or protection." This includes, for example, the right to discuss wages, hours, and other terms and conditions of employment. A work rule that has a "chilling effect" on employees may be unlawful even if the employer never disciplines an employee for violating the rule. Under this rubric, the NLRB will find a rule unlawful if it believes that: (1) employees would reasonably construe the rule's language to prohibit protected activity; (2) the rule was promulgated in response to union or other protected activity; or (3) the rule was actually applied to restrict the exercise of protected rights.

THE GC MEMORANDUM

The first part of the GC Memorandum compares rules that the NLRB found unlawful in various cases with rules that it found lawful, explaining the reasoning for the different findings. The second part reviews several handbook rules of fast food chain Wendy's that the NLRB determined were unlawful, and lists the modified rules Wendy's adopted as part of a settlement with the NLRB. While the GC Memorandum is worth a read in its entirety, examples of some of the rules discussed by the General Counsel are provided below:

Confidentiality

“Never publish or disclose [the Employer’s] or another’s confidential or other proprietary information. Never publish or report on conversations that are meant to be private or internal to [the Employer].” *UNLAWFUL*

“Do not disclose confidential financial data, or other non-public proprietary company information. Do not share confidential information regarding business partners, vendors, or customers.” *LAWFUL*

Employee Conduct

“Disrespectful conduct or insubordination, including, but not limited to, refusing to follow orders from a supervisor or a designated representative.” *UNLAWFUL*

“Employees will not be discourteous or disrespectful to a customer or any member of the public while in the course and scope of [company] business.” *LAWFUL*

Employee Use of Logos, Copyrights, or Trademarks

“Respect copyright and similar laws. Do not use any copyrighted or otherwise protected information or property without the owner’s written consent.” *UNLAWFUL*

“Respect all copyright and other intellectual property laws. For [the Employer’s] protection as well as your own, it is critical that you show proper respect for the laws governing copyright, fair use of copyrighted material owned by others, trademarks, and other intellectual property, including [the Employer’s] own copyrights, trademarks, and brands.” *LAWFUL*

Photography, Recordings, or Personal Electronic Devices

“Taking unauthorized pictures or video on company property” is prohibited. *UNLAWFUL*

“No cameras are to be allowed in the store or parking lot without prior approval from the corporate office.” *LAWFUL*

Restrictions on Leaving Work

“Walking off the job without authorization.” *UNLAWFUL*

“Walking off shift, failing to report for a scheduled shift and leaving early without supervisor permission are also grounds for immediate termination.” *LAWFUL*

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TAKEAWAY

Small differences in language can make a significant difference in whether a challenged policy will survive NLRB scrutiny. Likewise, context matters. Some of the rules described in the GC Memorandum were lawful only because of the specific context in which they were found, and might have been unlawful in different circumstances. The GC Memorandum is not binding law, but provides helpful guidance for employers as they draft new policies and review existing ones. For additional information or assistance, please contact any member of Fredrikson & Byron's Employment & Labor Group.