NLRB General Counsel Issues Guidance to Employers on 'Chilling Effects' of Personnel Policies under National Labor Relations Act

By Matthew D. Freeman, Philip B. Rosen, Howard M. Bloom, Richard I. Greenberg and Daniel D. Schudroff

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In its bid to make the National Labor Relations Act more relevant, especially to unrepresented employees who comprise a large majority of the nation's workforce, the National Labor Relations Board is policing aggressively employee handbooks and other employer policies that it believes "chill" employee rights under the NLRA. Following a number of recent NLRB decisions focusing on the lawfulness of employer rules/policies, the NLRB's Office of the General Counsel has issued guidance for the stated purpose of assisting employers in reviewing internal personnel policies to ensure compliance with the NLRA. Memorandum GC 15-04 was released to the public on March 18, 2015.

The General Counsel's Office is responsible for enforcing the unfair labor practice provisions of the Act by investigating charges of violation and bringing complaints before administrative law judges and the Board. General Counsel Richard F. Griffin, Jr. said in a letter accompanying the Memorandum that he believes "most employers do not draft their employee handbooks with the object of prohibiting or restricting conduct protected by the National Labor Relations Act," but that "even well-intentioned rules that would inhibit employees from engaging in activities protected by the Act" are not allowed.

Mr. Griffin noted that under the Board's decision in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), "the mere maintenance of a work rule" may violate the NLRA if the rule "has a chilling effect on employees' Section 7 activity." Section 7 of the NLRA gives employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." Mr. Griffin explained that even if a work rule does not explicitly prohibit such activity, it still will be found unlawful if "employees would reasonably construe the rule's language to prohibit Section 7 activity."

Of course, determining what language employees would "reasonably construe" as prohibiting Section 7 activity is a challenge for employers. The Memorandum offers a mixed bag. Reviewing several categories of employer rules/policies relating to: confidential information; employee misconduct; employee communications with third parties; use of logos, copyrights and trademarks; use of photography and recording devices; restrictions on employees leaving work; and conflicts of interest, the General Counsel presents examples that variously were found to be lawful or unlawful.

But many employers will find the Memorandum falls short. Well-intentioned as it may be, it fails to bring significant clarity to the handbook rule/employer policy issue. Throughout the Memorandum, the General Counsel distinguishes strikingly similar language found lawful in one instance, but unlawful in another, often opaquely, by citing "context." Take the following example:

> Unlawful: "'Taking unauthorized pictures or video on company property' is prohibited."
>
> Lawful: "No cameras are to be allowed in the store or parking lot without prior approval from the corporate office."

While these two rules seem to convey the same message, the General Counsel reached different results. The General Counsel concluded that the former rule could be read to unlawfully prohibit all employee use of cameras, including attempts to document health and safety violations. The latter rule, on the other hand, was lawful, according to the General Counsel, because it was located in a manual following a separate rule regarding how to deal with reporters, so that employees would read the rule as prohibiting "news cameras" rather than employees' own cameras.

The lesson from this example, and the Memorandum overall, is that employers who simply copy the

Meet the Authors

Matthew D. Freeman

Principal
Boston 617-367-0025
Email

Philip B. Rosen

Principal
New York Metro
New York City 212-545-4001
Email

Howard M. Bloom

Principal
Boston 617-367-0025
Email

language the General Counsel considers “lawful” in the Memorandum do so at their peril. The language always must be viewed in context and in light of the employer’s practices, other policies, and procedures.

The General Counsel also described a number of policies the NLRB found unlawful in a case involving a large franchise food operation. The General Counsel published the policies as they were revised pursuant to an informal, bi-lateral Board settlement agreement with the employer. While this offers some insight, it does not obscure the warning which is conveyed: context matters.

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Although the General Counsel Memorandum provides some insight into how the NLRB and General Counsel have viewed employer policies and their potential “chilling” effect on employees, it is important to note that simply utilizing the language, or even individual policies, referred to as “lawful” in the Memorandum will not ensure compliance with the NLRA. Additionally, any policy review cannot be accomplished in a vacuum and should include non-NLRA-related considerations, such as wage-and-hour and privacy issues.

If you have questions about this General Counsel Memorandum or workplace policies, please contact the Jackson Lewis attorney with whom you regularly work.

Richard I. Greenberg

Principal
New York Metro
New York City 212-545-4080
Email

Daniel D. Schudroff

Principal
New York Metro
New York City 212-545-4000
Email