

"Be Happy"; Not So Fast Says The NLRB

May 23 2016

Practice Area: Labor and Employment

On April 29, 2016, the National Labor Relations Board issued yet another decision striking down as unlawful an employer rule which required employees to "maintain a positive work environment by communicating in a manner conducive to effective working relationships." In finding the rule, along with other rules, to be unlawful, the NLRB held that such rules could be reasonably interpreted by employees as prohibiting protected concerted activity, which the NLRB observed includes the right to engage in "controversy, criticism of the employer (and co-workers), arguments and less-than-'positive' statements about terms and conditions of employment." *T-Mobile USA, Inc.*, 363 NLRB No. 171.

In the same decision, the NLRB also found the following policies to be unlawful, absent evidence of an overriding business justification for the rule:

- A policy prohibiting the use of audio or video recording devices in the workplace without prior permission, finding that such a policy would likely be interpreted by employees to prevent them from lawfully documenting unsafe workplace conditions, inconsistent enforcement of workplace rules, or recording images of other lawful activity, e.g., lawful picketing.
- A rule requiring that employees maintain the confidentiality of the names of employees involved in internal investigations whether as complainants, subjects or witnesses, which the NLRB found would discourage employees from discussing workplace concerns with their co-workers.
- A rule requiring all media inquiries be referred to the employer without comment by the employee, finding that such a rule would likely be interpreted by employees as preventing them from sharing with the media concerns over the workplace.
- An overly broad confidentiality provision which prohibited the disclosure of employee wage/salary information or contact information.
- A policy which required employees to bring to the attention of management any payroll irregularity or discrepancy they believe may have occurred, finding that the rule did not clearly advise employees of their right to pursue recourse outside of reporting the problem to management.
- A rule which prohibited employees from arguing with co-workers, subordinates or supervisors, failing to treat others with respect, or failing to demonstrate appropriate teamwork, where the rule did not precisely define those terms.

This decision continues a pattern of decisions which have subjected employer policies to ever exacting scrutiny based upon the NLRB's belief that such rules will discourage employees from engaging in protected concerted activity for fear of being disciplined. *See, e.g., First Transit, Inc.*, 360 NLRB No. 72 (2014) ("patent ambiguity" of rule prohibiting "inappropriate attitude or behavior ... to other employees" rendered rule unlawful as it could be reasonably construed as limiting communications regarding employment); *Hills & Dales General Hospital*, 360 NLRB No. 70 (2014) (finding rule requiring employees to represent the hospital "in the community in a positive and professional manner" just as overbroad and ambiguous as unlawful proscriptions of negative comments or attitude).

Under the NLRB's standard, rules which seek to restrict the exchange of information in any way related to the employees' terms and conditions of employment and which is found to be ambiguous in its intent or reach will be construed against the employer and likely found to be unlawful. In analyzing a particular rule, the NLRB will look both at context, as well as the overall policies of the employer. Rules which are tied to enforcement of unlawful harassment policies or compliance with particular state or federal laws are more likely to withstand challenge. Conversely, where certain rules are obviously unlawful, e.g., a prohibition on employees sharing their wage rates with one another, their inclusion in a set of work rules would likely be viewed as tainting other rules which might otherwise have not elicited a challenge. Moreover, even if the rule has never actually been enforced, its mere existence can be the basis for an unfair labor practice charge based upon its "chilling effect." *See, e.g., Whole Foods Market*, 363 NLRB No. 87 (2015).

If you have written work rules or other policies, including, in particular, policies dealing with comments made on social media, you may want to have such rules and policies reviewed to stay ahead of a possible challenge and avoid having to defend against an unfair labor practice charge.

While such challenges may be more likely in an already unionized setting, virtually every employer is a potential target of the NLRB's pro-union agenda.

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