Strategies

The Employee Handbook: A Pandora’s Box of Unfair Labor Practices

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Employers thrive on efficiency, stability and consistency. In this fast-paced, constantly changing business climate, the employer that can adapt to every situation by applying a set procedure is the employer that usually comes out ahead. In the realm of human resources and employee administration, employers typically achieve that stability and consistency through an employee handbook. It is the employer’s scripture, its set of Golden Rules, its creed and doctrine, its ultimate authority. And now, that employee handbook could force employers to spend substantial money, time and effort fighting unfair labor practice charges.

For several years now, the National Labor Relations Board (“Board”) has expanded the scope of its application of the National Labor Relations Act (“Act”). Now more than ever, the Board examines every employer, even those whose employees are not affiliated with a union, to ensure compliance with federal labor law. Recently, the Board’s General Counsel issued a 30-page report summarizing the various ways that employers violate the Act simply by maintaining certain work rules—even if those rules never have been applied in an illegal fashion. The potential impact on employers is staggering. Every employer, whether unionized or not, potentially is at risk of being brought up on unfair labor practice charges before the Board, based solely on the language in the employee handbook.

By engaging counsel early, employers can relieve themselves of the headaches of future costly litigation, and the employee handbook once again can become a set of Golden Rules that provides stability and consistency, rather than a Pandora’s Box.

By way of example, the following nuances in the language of employee handbook provisions caused the Board to determine the following work rules are unlawful, even if they have never been applied:

- A rule prohibiting employees from discussing “customer or employee information” outside of work or disclosing “confidential or proprietary information” is unlawful, but prohibiting disclosure of “business secrets or other confidential information” is lawful;

- Requiring employees to “be respectful” to the company, employees and customers is unlawful, but preventing “rudeness or unprofessional behavior” toward a customer is lawful;

- Prohibiting employees from making “defamatory, libelous, slanderous or discriminatory comments” about the company, employees or management, or taking any action that would “harm the company’s business or reputation” is unlawful,

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Under Board law, simply maintaining a work rule can violate the Act if the rule has a “chilling effect” on employees’ federally-guaranteed rights to act together with other employees for mutual aid or protection. Stated more plainly, if an employee would reasonably construe an employer’s work rule to prevent employees from engaging in activities they are allowed to do by law (such as discussing wages, hours or other terms or conditions of employment), the employer will have committed an unfair labor practice even if that work rule never has been applied. Therefore, in order to avoid costly litigation, employers will need to carefully review and modify many areas commonly addressed in employee handbooks – rules regarding confidentiality, professionalism, anti-harassment, trademark, photography/recording and media contact, just to name a few.

The devil truly is in the details. When analyzing whether the maintenance of a work rule violates federal labor law, the Board scrutinized specific word choices or phrasing, often focusing on one or two words in the rule to determine if the rule was unlawful. The Board also dissected how multiple policies operate in conjunction with one another. Even if one work rule standing alone would not violate the Act, its interaction with another work rule might cause employees to reasonably construe the rules to “chill” their rights under the Act, thus causing the employer to commit an unfair labor practice and violate federal labor law.

By way of example, the following nuances in the language of employee handbook provisions caused the Board to determine the following work rules are unlawful, even if they have never been applied:
but requiring employees to be courteous and respectful to a customer or any member of the public while in the course and scope of the company’s business is lawful;

- A rule stating employees cannot “pick fights,” make insulting, embarrassing or abusive comments about other employees online, or send “unwanted, offensive, or inappropriate” e-mails is unlawful; but preventing threats, intimidation, coercion, harassment or interference with job performance is lawful;

- Forcing employees to refer all media or government agency inquiries to a specified company official is unlawful; but stating that only one person speaks for the company is lawful;

- Preventing employees from using company logos or trademarks in social media is unlawful; but telling employees to respect copyright and trademark rights is lawful;

- Stating that employees cannot take photographs or make recordings on company property or while “on duty” is unlawful; but preventing such photography or recordings during working time is lawful;

- Prohibiting employees from “walking off the job” is unlawful, but allowing for termination if an employee “walks off a shift” is lawful.

Obviously, the differences in these variations are slight, and it is not readily apparent at first glance why certain language is unlawful and others lawful. The General Counsel’s report attempts to explain the rationale used by the Board, but in this regard, the old proverb that “an ounce of prevention is worth a pound of cure” rings particularly true. The most prudent course employers can take is having legal counsel carefully review and update the phrasing in an employee handbook to ensure that each rule (and the interaction between rules) complies with the Board’s rationale. By engaging counsel early, employers can relieve themselves of the headaches of future costly litigation, and the employee handbook once again can become a set of Golden Rules that provides stability and consistency, rather than a Pandora’s Box that could unleash chaos and turmoil if the Board opens it and looks inside.

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