



NLRB Releases Guidance on Workplace Policies

by Reg Belcher



Over the past few years, the National Labor Relations Board (“NLRB” or “Board”) has struck down various workplace policies that interfered with employees’ rights under the National Labor Relations Act, 29 U.S.C. §§ 151-159 (“NLRA” or “Act”).

The Board’s various rulings were not always intuitive and often required an in-depth analysis to determine whether an employer’s policies were lawful or unlawful. On March 18, 2015, the NLRB’s Office of the General Counsel released a Report “Concerning Employer Rules,” in an attempt to clarify the Board’s position on employer policies, including confidentiality, employee conduct, photography/recording, and use of company logos, copyrights, or trademarks.

Protected Concerted Activity

The NLRA gives all private-sector employees, whether union or nonunion, the right to engage in protected concerted activity, which occurs when two or more employees act together to discuss or improve any term or condition of employment. Protected concerted activity also can include a single individual’s action that is the “logical outgrowth” of other activities involving two or more employees.

Over the years, the Board broadly has recognized many types of protected concerted activity, including but not limited to:

- Discussing or complaining about working conditions, wages, hours, safety, discrimination, harassment, or a supervisor’s conduct;
- Supporting a co-worker’s complaints;
- Seeking to replace company management;
- Criticizing management; and
- Forming or attempting to form a union, discussing a union, or engaging in union-related activities.

Employers may violate the NLRA whenever they interfere with, restrain, or “chill” employees’ rights to engage in protected concerted activity.

Employees may file an unfair labor practice (“ULP”) charge with the Board whenever they believe that an employer has interfered with their right to engage in protected concerted activities. If the Board finds the charge meritorious, it can require the employer to cease and desist from such interference, rescind any disciplinary documents from the employee’s personnel file, pay back wages and interest, and reinstate the employee to his/her prior position to remedy wrongful suspensions or terminations.

Under the Board’s decision in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), the mere maintenance of a work rule may violate the Act if the rule has a chilling effect on employees’ rights to engage in protected concerted activity.

Overall, any workplace rule will violate the NLRA if: (1) employees would reasonably construe the rule’s language to prohibit their protected concerted activity; (2) the employer promulgated the rule in response to union-related activity; or (3) the employer applied the rule to restrict employees’ exercise of protected concerted activities.

Confidentiality

The NLRA gives employees the right to discuss wages, hours, and other terms and conditions of employment with fellow employees, as well as with nonemployees, such as union representatives.

According to the Board, an employer's confidentiality policy that specifically prohibits employee discussions of terms and conditions of employment—such as wages, hours, or safety—or that employees would reasonably understand to prohibit such discussions, violates the Act. Similarly, the Board also will construe a confidentiality rule that broadly encompasses “employee” or “personnel” information, without further clarification, to violate the NLRA.

For example, the Board found unlawful the following employer policies concerning confidentiality:

- Do not discuss “customer or employee information” outside of work, including “phone numbers [and] addresses.”
- “You must not disclose proprietary or confidential information about [the Employer, or] other associates (if the proprietary or confidential information relating to [the Employer’s] associates was obtained in violation of law or lawful Company policy).”
- “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].”

The Board reasoned that these policies interfered with employees’ protected concerted activities by too broadly restricting discussion and disclosure of information that could relate to terms or conditions of employment.

Employee Conduct

The NLRA gives employees the right to criticize or protest their employer’s labor policies or treatment of employees. Thus, the Board will strike, as unlawful, a rule that prohibits employees from engaging in “disrespectful,” “negative,” “inappropriate,” or “rude” conduct towards the employer or management, absent sufficient clarification or context. See *Casino San Pablo*, 361 NLRB No. 148 (Dec. 16, 2014).

Moreover, a policy or rule prohibiting false or defamatory statements is unlawful under the Act, unless it specifically prohibits only maliciously false statements. *Id.* at 4.

Conversely, a rule requiring employees to be respectful and professional to coworkers, clients, or competitors, **but not the employer or management**, generally are lawful because employers have a legitimate business interest in having employees act professionally and courteously in their dealings with coworkers, customers, employer business partners, and other third parties. Likewise, rules prohibiting insubordination generally are lawful. See *Copper River of Boiling Springs, LLC*, 360 NLRB No. 60 (Feb. 28, 2014).

Applying these standards, the Board has found the following employer rules unlawful:

- “Be respectful to the company, other employees, customers, partners, and competitors.”
- Do “not make fun of, denigrate, or defame your co-workers, customers, franchisees, suppliers, the Company, or our competitors.”
- “Be respectful of others and the Company.”
- No “[d]efamatory, libelous, slanderous or discriminatory comments about the Company, its customers and/or competitors, its employees or management.”

The NLRA gives employees the right to photograph and make recordings in furtherance of their protected concerted activity, including the right to use personal devices to take such pictures and recordings. Accordingly, rules placing a total ban on such photography or recordings, or banning the use or possession of personal cameras or recording devices, are unlawfully overbroad if they prohibit taking photos or recordings on non-work time.

Thus, the Board has found the following employer rules unlawful:

- “Taking unauthorized pictures or video on company property” is prohibited.
- “No employee shall use any recording device including but not limited to, audio, video, or digital for the purpose of recording any employee or [Employer] operation”
- A total ban on use or possession of personal electronic equipment on employer property.
- A prohibition on personal computers or data storage devices on employer property.

Company Logos, Copyrights, and Trademarks

Though the Board recognizes that copyright holders have a clear interest in protecting their intellectual property, handbook rules cannot prohibit employees' fair protected use of that property.

For example, the NLRB broadly permits employees to use an employer's name, logo, or other trademark to identify the employer in the course of employees' protected concerted activity, such as on picket signs, leaflets, billboards, Facebook, and other protest materials. Thus, a broad ban on such use, without any clarification, is overbroad and violates the Act.

The Board has found the following rules unlawful:

- Do "not use any Company logos, trademarks, graphics, or advertising materials" in social media.
- Do not use "other people's property," such as trademarks, without permission in social media.
- "Use of [the Employer's] name, address or other information in your personal profile [is banned]. ... In addition, it is prohibited to use [the Employer's] logos, trademarks or any other copyrighted material."
- "Company logos and trademarks may not be used without written consent."

The General Counsel's Report also provides guidance on rules affecting employee conduct towards and interactions with co-workers and third-parties, restrictions on leaving work, conflicts-of-interest, and social media (which the Board previously has addressed in similar reports).

The Board's rulings, as well as its summaries of those rulings, on protected concerted activity are fact intensive, complex, and require practitioners to engage in a detailed analysis when writing and reviewing work rules, policy manuals, and employee handbooks. The difference between a lawful and unlawful rule or policy sometimes might seem so slight that practitioners in those situations should review carefully the entirety of the General Counsel's Report on these issues and the underlying Board cases that address the particular topic.

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