Schulte Roth&Zabel

Alert

NLRB's Office of the General Counsel Addresses Employee Handbook Policies

May 12, 2015

Following the National Labor Relations Board's (the "NLRB's") recent increased focus on employment policies and employees' rights under Section 7 of the National Labor Relations Act (the "NLRA"), the NLRB's Office of the General Counsel (the "OGC") on March 18, 2015 released a report addressing recent case developments relating to employee handbook rules as guidance for employers when creating or updating their handbooks and policies. Section 7 of the NLRA applies to *both* unionized and non-unionized employees, and it protects employees' rights to engage in protected concerted activities, including those in which employees seek mutual aid or protection; seek to initiate, induce or prepare for group action; bring group complaints to management's attention regarding the terms and conditions of their employment; or address workplace issues that are of concern to employees.

All employers with broad employee prohibitions in their employee handbooks must be aware of recent developments on potential liability for unfair labor practices. The policies that have been the focus of the NLRB and the OGC's concern include those relating to confidentiality, employee conduct, employee interaction with third parties, the use of company logos and trademarks, use of photography and recording devices, conflicts of interest, and use of social media platforms.

Confidentiality Rules

The NLRB has interpreted Section 7 of the NLRA to provide that employees have a protected right to discuss their wages, hours and other terms and conditions of employment with fellow employees and third parties. Therefore, the OGC views a confidentiality provision that in some way restricts that right as not compliant with the NLRA. Any policy or rule that includes "employee" or "personnel" information as part of its definition of "confidential information" is in danger of violating Section 7. For example, the OGC deems the following to be overly broad:

> "Discuss work matters only with other [Employer] employees who have a specific business reason to know or have access to such information … . Do not discuss work matters in public places."

The OGC opines that because an employee could reasonably understand the above to apply to information such as wages, benefits and other terms and conditions of employment, it is therefore unlawful. On the other hand, the OGC has approved the following because it does not reference information that could be interpreted to include an employee's terms and conditions of employment:

> "Do not disclose confidential financial data, or other non-public proprietary company information. Do not share confidential information regarding business partners, vendors or customers."

Use of Company Logos and Trademarks

The OGC advises that employers cannot prohibit an employee's fair use of the company's logo, copyrights or trademarks. Employees have a right to use their employer's trademarks and logos on picket signs, leaflets and other protest materials. The OGC noted the following broad bans could be understood to ban fair use of the company's intellectual property by employees:

> "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."

On the other hand, the OGC approved the following as not in violation of the NLRA because the provision does not broadly ban the use of copyrighted materials and only asks that copyright laws be respected:

> "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."

Rules Restricting Photography and Recording

The OGC notes that employees have the right to use their own mobile devices to photograph and make recordings on non-work time for the purposes of protected concerted activity. A total ban on personal devices could be interpreted by employees to prohibit the taking of photographs on non-work time. The OGC found the following rule overbroad because an employee could read the rule to prohibit the taking of photographs to document health and safety violations of the employer:

> "Taking unauthorized pictures or video on company property is prohibited."

The OGC stresses that a contextual analysis is necessary when determining whether a ban on personal devices violates an employee's Section 7 rights. For example, if the employer bans the use of recording devices to protect patient rights, an employee would not reasonably understand the ban to prohibit photographs used to further protected concerted activity.

Social Media and Email Policies

Another focus of recent litigation and of the OGC are employees' postings to social media sites that discuss the terms and conditions of employment with, or seek advice from, other employees. Based on developments in this area, when employees discuss job performance, supervisory actions, or concerns about workplace responsibilities or policies, employers should be wary of disciplining the employees or terminating their employment, even if their postings contain insulting or offensive language. The OGC even found a policy that instructs employees not to "pick fights online" to be unlawful because it could

be construed to prohibit a heated conversation about unionization or the employer's treatment of employees.

The OGC references the following policies as overbroad and/or ambiguous:

> "[S]how proper consideration for others' privacy and for topics that may be considered objectionable or inflammatory, such as politics and religion."
>
> Do not send "unwanted, offensive, or inappropriate" e-mails.
>
> "Material that is fraudulent, harassing, embarrassing, sexually explicit, profane, obscene, intimidating, defamatory, or otherwise unlawful or inappropriate may not be sent by e-mail … ."

The OGC further advises that employers should be careful when instructing employees to not make false or misleading representations about credentials or work because it is only "maliciously false" statements that lose protection. Notably, the OGC approved the following social media policy:

> "Be thoughtful in all your communications and dealings with others, including email and social media. Never harass (as defined by our anti-harassment policy), threaten, libel or defame fellow professionals, employees, clients, competitors or anyone else. In general, it is always wise to remember that what you say in social media can often be seen by anyone. Accordingly, harassing comments, obscenities or similar conduct that would violate Company policies is discouraged in general and is never allowed while using [Employer's] equipment or during your working time."

Savings Clauses

Some employers have added a "savings clause" to their policies to avoid running afoul of the NLRA. However, the NLRB advises that a savings clause does not cure otherwise unlawful provisions of a policy because employees may not understand from the disclaimer that protected activities are permitted. For example, according to a May 30, 2012 guidance from the OGC, the NLRB found the following savings clause did not cure an otherwise unlawful provision:

> "National Labor Relations Act. This policy will not be construed or applied in a manner that improperly interferes with employees' rights under the National Labor Relations Act."

However, if language is added at the end of a specific policy and is unambiguous about the types of activities that are permitted, the NLRB may not object. For example, the following policies (the first regarding a confidentiality provision and the second a no-camera provision) were approved by the OGC:

> "Nothing in this section prohibits employees from discussing terms and conditions of employment."
>
> "An exception to the rule concerning pictures and recordings of work areas would be to engage in activity protected by the National Labor Relations Act including, for example, taking pictures of health, safety and/or working condition concerns or of strike, protest and work-related issues and/or other protected concerted activities."

Conclusion

The crux of the OGC's position is that policies that are overbroad are unlawful. Overly broad policies are those that may be reasonably interpreted as restricting an employee's Section 7 rights. For example, policies that prohibit employees from discussing the company, its management or its employees; prohibit employees from posting pictures depicting the employer; or prohibit employees from making any disparaging remarks or engaging in any inappropriate discussions, without defining what is inappropriate, may be unlawful. The OGC also opined that policies that prohibit employees from making disparaging remarks when discussing the company or the employees' superiors, co-workers, or competitors are unlawful if the policies do not contain limiting language to inform employees that the prohibition does not apply to Section 7 activity.

Employers should review their rules and policies to ensure compliance with the NLRB's emerging interpretations regarding employee handbook policies.

Authored by Mark E. Brossman, Ronald E. Richman, Holly H. Weiss, Scott A. Gold and Joseph Gallagher.

If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

Schulte Roth&Zabel
New York | Washington DC | London
www.srz.com