COLLAZO FLORENTINO & KEIL LLP Client Advisory

For Clients And Friends Of The Firm

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NLRB General Counsel Offers Guidance On Employer Policies

On March 18, 2015, the General Counsel for the National Labor Relations Board ("NLRB") issued a report addressing lawful and unlawful employer handbook rules ("General Counsel Memo" or the "report"). This thirty-page report is divided into two parts: Part 1 discusses handbook rules that are lawful and unlawful with an explanation of the reasoning behind the distinctions; Part 2 discusses Wendy's International LLC's changes to its employee handbook in connection with the company's settlement of an unfair labor practice charge. This Client Advisory discusses some highlights from the General Counsel Memo. The Office of the General Counsel prosecutes alleged unfair labor practices before the National Labor Relations Board; these comments are important guidance for all employers in avoiding administrative proceedings, as the NLRB has jurisdiction over protected concerted activity regardless of whether it occurs in a unionized environment.

According to the report, many handbook violations arise because employees would "reasonably construe" a policy's language to prohibit lawful Section 7 activity. In determining whether a rule can be so construed, the Office of the General Counsel looks to both the specific words used and the context surrounding the applicable language. The report provides guidance on how the General Counsel believes employees would reasonably construe certain rules regarding confidentiality; conduct toward the company and supervisors; conduct toward fellow employees; employee interactions with third parties; use of company logos, copyrights, and trademarks; photography and recording; rules restricting leaving work; and conflicts of interest.

A. Confidentiality

The report asserts that when examining confidentiality policies, the General Counsel primarily considers whether an employee would reasonably understand a rule to prohibit discussions on wages, hours, or workplace complaints. Therefore, confidentiality rules that broadly prohibit discussions about "employee information" or "personnel information", without clarification, will generally be deemed unlawful. For example, the report notes that a rule prohibiting discussion of "'customer or employee

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information' outside of work, including 'phone numbers [and] addresses'" was invalid, due to the broad reference to "employee information" and blanket ban on discussing employee contact information, regardless of how employees obtained said information. (General Counsel Memo at 4). The General Counsel also pointed to other improperly broad restrictions that failed to clarify, either by language or context, that they did not restrict protected communications. For example, the rule that "[I]f something is not public information, you must not share it" could be reasonably understood to encompass such non-public information as wages, benefits, and other terms and conditions of employment, and was therefore unlawful. (General Counsel Memo at 5). Conversely, statements which do not define "confidential" in an overbroad manner may be lawful; for example, "Do not disclose confidential financial data, or other non-public proprietary company information. Do not share confidential information regarding business partners, vendors or customers." (General Counsel Memo at 6).

Notably, in the settlement with Wendy's, a handbook provision stating that the handbook itself was "proprietary and confidential information" not to be shown to "unauthorized parties," was considered unlawful because such a rule barred employees from sharing a written description of many of their working conditions with union representatives and government agencies in violation of Section 8(a)(1). (General Counsel Memo at 20). The amended policy, approved by the General Counsel, "strictly limited" use of the handbook to Wendy's and its employees and prohibited the disclosure of the handbook to competitors. (General Counsel Memo at 26). Finally, the General Counsel emphasized that the context of a challenged rule is relevant to its interpretation and may compensate for overly broad language. For example, a rule prohibiting disclosure of all "information acquired in the course of one's work", when read in isolation, would be considered overbroad and unlawful; however, when read in the context of rules about conflicts of interest and compliance with SEC regulations and state and federal laws, the rule was reasonably understood to encompass customer credit cards, contracts, and trade secrets, not activity protected under the NLRA. (General Counsel Memo at 6).

B. Conduct Toward The Company And Supervisors

In examining policies regulating conduct toward management, the General Counsel observed that employees are able to exercise their Section 7 rights to "criticize or protest their employer's labor policies or treatment of employees", including doing so in a public forum. (General Counsel Memo at 7-8). Many

employers are already aware that sweeping prohibitions against "disrespectful", "negative", "inappropriate" or "rude" conduct toward the company or management are usually unlawful, absent clarification, as are prohibitions on comments that could "damage the company or the company's reputation". The General Counsel Memo further asserts that rules prohibiting false or defamatory statements are only permissible if limited to "maliciously false" statements. Rules requiring employees to be respectful only to fellow employees, competitors, and clients are generally lawful, but tend to become unlawful if the company or management is added to that list. Employers may lawfully prohibit conduct that amounts to insubordination; however, employers must be careful that those rules do not also prohibit assertive or confrontational behavior that does not rise to the level of insubordination. For example, the General Counsel Memo opined that the following rule was unlawful: "Disrespectful conduct or insubordination, including, but not limited to, refusing to follow orders from a supervisor or a designated representative." (General Counsel Memo at 7-8). The General Counsel did, however, consider the following rule lawful, which the report said reflected the employer's legitimate expectation that employees work together in an atmosphere of civility: "Each employee is expected to work in a cooperative manner with management/supervision, coworkers, customers and vendors." (General Counsel Memo at 9).

C. Conduct Toward Fellow Employees

When considering rules governing conduct toward fellow employees, the General Counsel primarily attends to employees' ability to argue and debate one another about unions, management, and the terms and conditions of their employment. The Supreme Court has noted that these discussions do not lose their protection even if the discussions include "'intemperate, abusive and inaccurate statements.'" (General Counsel Memo at 10, quoting *Linn v. United Plant Guards*, 383 U.S. 53 (1966)). Therefore, rules that broadly prohibit "negative" or "inappropriate" discussions among employees, without additional clarification, will generally be read to prohibit Section 7 activity. For example, the General Counsel considered the following rule overbroad: "Do not make 'insulting, embarrassing, hurtful or abusive comments about other company employees online,' and 'avoid the use of offensive, derogatory, or prejudicial comments.'" Among other issues, the General Counsel Memo opined that employees would reasonably read the rule's prohibitions on offensive, derogatory, insulting, or embarrassing comments to limit their ability to honestly discuss protected concerted activity. (General Counsel Memo at 10). Conversely, a rule simply prohibiting "threatening, intimidating, coercing, or otherwise

interfering with the job performance of fellow employees or visitors" was found to be lawful.

D. Employee Interactions With Third Parties

Employees have the right under Section 7 of the NLRA to communicate with government agencies and the news media regarding their wages, benefits, and terms and conditions of employment. The report notes that the General Counsel frequently takes issue with media policies that the office believes reasonably can be read to prohibit protected communications with the media. For example, a rule stating that employees were not "authorized" to speak to the media about "company matters" was considered unlawful because "company matters" could be reasonably construed to encompass employment concerns and labor relations. (General Counsel Memo at 12). Rules regarding blogging are subject to similar scrutiny. For example, the following provisions of the Wendy's handbook were considered unlawful: a prohibition on e-mailing, posting, commenting, or blogging anonymously and a prohibition on creating "a blog or online group related to your job without the advance approval of Legal and Communications." The report asserts that "[r]equiring employees to publicly self-identify in order to participate in protected activity imposes an unwarranted burden on Section 7 rights". The report also asserts that employees are entitled to discuss their terms and conditions of employment in blogs and online groups, and that requiring prior authorization by the employer chills Section 7 activity. (General Counsel Memo at 22). Instead, the revised handbook required company pre-approval for blogs or groups related to Wendy's, *except* for blogs or discussions involving "wages, benefits, or other terms and conditions of employment, or protected concerted activity". (General Counsel Memo at 27).

E. Use of Company Logos, Copyrights, and Trademarks

Employees may engage in protected fair use of certain of an employer's intellectual property; specifically, employees have the right to use a company's name and logo on picket signs and other protest material. Therefore, rules requiring employees to receive permission before utilizing "other people's property" or "Company logos and trademarks" in social media are generally overbroad and unlawful. (General Counsel Memo at 14-15). However, rules requiring employees to respect intellectual property laws, but permitting fair use are lawful, such as the following: "DO respect the laws regarding copyrights, trademarks, rights of publicity and other third-party rights. To minimize the risk of a copyright violation, you should

provide references to the source(s) of information you use and accurately cite copyrighted works you identify in your online communications. Do not infringe on [Employer] logos, brand names, taglines, slogans, or other trademarks." (General Counsel Memo at 15).

F. Photography and Recording

The General Counsel has expressed concern about limitations on employees' rights to use personal cameras or recording devices to take pictures or recordings on non-work time to document health and safety violations or other protected concerted activity. Therefore, complete bans on the use or possession of personal electronic equipment on company property or blanket prohibitions on the "taking [of] unauthorized picture or video on company property" are generally overbroad and unlawful. (General Counsel Memo at 16). However, where the employer has a strong, well-understood privacy interest (such as prohibiting all photography in response to a breach of patient privacy), the Board has found that employees would not reasonably understand such a rule to limit pictures for protected concerted purposes.

G. Rules Restricting Leaving Work

According to the General Counsel memo, "[o]ne of the most fundamental rights employees have under Section 7 of the [National Labor Relations] Act is the right to go on strike." Therefore, rules that discuss when employees can leave work will generally be unlawful if they can reasonably be read to forbid protected strikes and walkouts. Rules normally will be found to violate the NLRA when they use words such as "walkouts" or "disruptions" (e.g. "'Walking off the job . . .' is prohibited."). (General Counsel Memo at 17). Absent such terms, rules prohibiting employees from leaving company property during work time without permission will not be reasonably read to encompass strikes.

H. Conflicts of Interest

The General Counsel Memo notes that employees may engage in protected concerted activity, even if that activity conflicts with the employer's interests. As a result, an employer's conflict-of-interest policy will be found unlawful if it can be reasonably read to prohibit activities like boycotts, picketing, and soliciting support for a union during non-work time. For example, the Wendy's policy stated that "Because

you are now working in one of Wendy's restaurants, it is important to realize that you have an up close and personal look at our business every day. With this in mind, you should recognize your responsibility to avoid any conflict between your personal interests and those of the Company. A conflict of interest occurs when our personal interests interfere—or appear to interfere—with our ability to make sound business decisions on behalf of Wendy's." The General Counsel concluded that the portion of the policy requiring employees to avoid "any conflict between your personal interests and those of the Company" could reasonably be read to encompass Section 7 activity such as demanding higher wages or engaging in public demonstrations. (General Counsel Memo at 23-24). Instead, the revised handbook rules, approved as a term of settlement, explained what constituted a conflict of interest, discussing "gifts and business or financial dealings or investments". (General Counsel Memo at 28).

We encourage you to review your handbooks and other policies in consultation with counsel to ensure compliance with the guidance from the NLRB General Counsel. Please contact Kristina Grimshaw at (212) 758-7792, or any other attorney at the Firm, if you would like more information on the General Counsel's report or other assistance.