BURR ALERT

"WTF", Under the NLRB, Employers Should "Cut the Crap?"

The NLRB on Employer Rules, Handbooks, and Increased Employee Protections

As you have likely seen by now, on March 18, 2015, the National Labor Relations Board Office of the General Counsel ("GC") issued an extensive memorandum offering guidance on employer rules and handbooks. This memorandum focuses on employees' rights under Section 8(a)(1) of the National Labor Relations Act (NLRA) which prohibits employers from interfering with employees' rights to organize and engage in concerted activities for the purpose of mutual aid and protection.

So, what distinguishes lawful and unlawful employer policies? Unfortunately, the answer is not entirely clear. However, employers should consider how their existing rules and handbook policies may be impacted: employers can now expect employees to file a wave of new unfair labor practice charges challenging employers' existing policies. When crafting your rules and handbook policies, it is critical to keep these changes in mind.

Main Points of the GC's Memorandum:

The memorandum is divided into two parts. The first addresses a wide spectrum of rules and handbook policies that are commonly litigated, such as confidentiality rules, anti-harassment rules, professionalism rules, trademark rules, photography/recording rules, and media contact rules. Using the well-known chain Wendy's as an example, the second part compares specific Wendy's handbook policies that the NLRB determined to be unlawful and contrasts them with the modified rules Wendy's subsequently adopted. Here is a condensed overview of the General Counsel's guidance for five common employer policies:

1) **Confidentiality Policies**: Employees have the right to discuss wages, hours, and other terms and conditions of employment with coworkers and nonemployees. Thus, employer confidentiality policies that explicitly forbid employee discussions of terms and conditions of employment, or that could be construed to prohibit such discussions, violate the Act. In the alternative, more broadly phrased prohibition on disclosing "confidential" information are lawful as long as there is no reference to terms or conditions of employment. Additionally, when placed in context, a confidentiality rule will be lawful if employees would not reasonably understand the rule to prohibit Section 7 activity.

2) **Employee Criticisms**: Employees have the right to protest and criticize their employer's labor policies and treatment of employees. Accordingly, any rule or policy that can be reasonably understood to prohibit "disrespectful," "rude," or "inappropriate conduct" toward an employer, without the appropriate context or clarification, will typically be considered unlawfully overbroad. In contrast, rules requiring employees to be respectful to co-workers, competitors, and customers, without mentioning the company or management, are generally considered to be lawful.

For example on June 02, 2014, in *Pacific Bell Telephone Company and Nevada Bell Telephone Company d/b/a AT&T and Communication Workers of America*, the NLRB ruled that two companies violated the NLRA when they attempted to block employees from wearing buttons/stickers at work containing vulgar language. The buttons and stickers read "WTF Where's the Fairness," "FTW Fight to Win" and "Cut the Crap! Not My Healthcare." The board majority found the language not to be so profane as to lose protection of the Act, particularly where the "WTF" and "FTW" buttons and stickers "provided a nonprofane, nonoffensive interpretation on their face" and "[t]he color used on the word 'Crap' is orange and I am unable to tell if the word 'Crap' represents feces, cheese or Cheetos," Judge John J. McCarrick noted in his April 2014 ruling.

3) **Employee to Employee Conduct**: Employees also have a right to debate and argue with each other over management, unions, and the terms and conditions of their employment. Although these discussions may become contentious, they remain protected in most cases even if they include intemperate, abusive and inaccurate statements.

4) **Employee Interaction Outside the Workplace**: Employees have the right to communicate with the news media, government agencies, and other third parties about benefits, wages, and other terms and conditions of employment. Therefore, any handbook rules that reasonably would be read to prohibit such communications are considered unlawfully overbroad.

5) **Policies Restricting Photography**: Employees have the right to photograph and make recordings in the furtherance of protected concerted activity. Therefore, handbook rules that totally prohibit/forbid such photography or recordings without an appropriate limitation are unlawfully overbroad where they would reasonably be read to prohibit the taking of recordings or pictures on non-work time.

This is just a small peppering of the policies covered in the GC's memo, and *Pacific Bell Telephone* is just one of many in a series of cases indicating that employee speech is largely protected in the context of concerted activity. Employers who are considering disciplining or terminating employees for violations of policies must act carefully in light of this GC memo and recent Board decisions.

For more information, or to examine the NLRB's examples, see Memorandum from Richard F. Griffin, Jr., General Counsel for the National Labor Relations Board, to All Regional Directors, Officers-in-Charge, and Resident Officers (Mar. 18, 2015).

For more information contact:

Meryl Cowan in Birmingham at (205) 458-5261 or mcowan@burr.com
or your Burr & Forman attorney with whom you regularly work.