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Alert

Labor and Employment Client Service Group

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NLRB Guidance Suggests Standard Or Common Personnel Policies May Violate Federal Labor Law

Developments within the National Labor Relations Board ("NLRB") in recent months demonstrate that the agency may be determined to rid the workplace of very common employer policies.

At the urging of the NLRB's Acting General Counsel earlier this year, an Administrative Law Judge held that an employer's requirement that employees sign an at-will acknowledgment stating that the employee's at-will status could not "be amended, modified or altered in any way" violated the National Labor Relations Act ("Act") because "[c]learly such a clause would reasonably chill employees who were interested in exercising their Section 7 rights." *Am. Red Cross Arizona Blood Servs. Region & Lois Hampton, an Individual*, 28-CA-23443, 2012 WL 311334 (Feb. 1, 2012).

Then, on May 30th, the NLRB's Acting General Counsel issued the latest in a series of three memoranda addressing the impact of the Act on employers' social media policies. The latest memorandum, however, demonstrates that the Acting General Counsel has taken aim at much more than just social media policies and is using the Act to invalidate personnel policies that are commonplace for many employers. Relying heavily on the concept that personnel policies are unlawful if employees could "reasonably" interpret them to infringe on rights protected by the Act, the Acting General Counsel reports that his office has, in recent months, declared unlawful numerous policies governing social media, confidentiality, privacy, protection of employer information, intellectual property, and contact with the media and government agencies because "they would reasonably be construed to chill the exercise of Section 7 rights."

For example, the following policy provisions have recently been deemed unlawful under the Act:

Online Behavior

- Prohibiting the posting on the Internet "confidential guest, team member, or company information";
- Instructing employees that "[o]ffensive, demeaning, abusive or inappropriate remarks are as out of place online as they are offline";

- Instructing employees to "[t]hink carefully about 'friending' co-workers";
- Requiring employees to "[r]eport any unusual or inappropriate internal social media activity";
- Prohibiting employees from posting on the Internet photos, music, videos, and the quotes and personal information of others without obtaining the owner's permission and ensuring that the content can be legally shared; and
- Requiring employees to "[g]et permission before reusing others' content or images" in Internet postings.

Behavior Impacting the Company's Image

- Prohibiting employees from using the Employer's logos and trademarks;
- Warning employees to "avoid harming the image and integrity of the company";
- Encouraging employees to "resolve concerns about work by speaking with co-workers supervisors, or managers" instead of airing grievances online.

Disclosures of Confidential Information

- Informing employees that they could be discharged or criminally prosecuted for "failing to report unauthorized access to or misuse of confidential information";
- Requiring that employees report to management "any unsolicited or inappropriate electronic communications";
- Prohibiting employees from "sharing confidential information with coworkers unless they need the information to do their job, and not to have discussions regarding confidential information in the breakroom, at home, or in open areas and public places";
- Threatening "employees with discharge or criminal prosecution for failing to report unauthorized access to or misuse of confidential information";
- Requiring employees to make sure their Internet postings are "completely accurate and not misleading and that they do not reveal non-public information on any public site";
- Requiring employees not to "reveal non- public company information on any public site" and then explains that nonpublic information encompasses "[a]ny topic related to the financial performance of the company"; "[i]nformation that has not already been disclosed by authorized persons in a public forum"; and "[p]ersonal information about another [Employer] employee, such as . . . performance, compensation or status in the company";
- Cautioning employees that "[w]hen in doubt about whether the information you are considering sharing falls into one of the [prohibited] categories, DO NOT POST. Check with [Employer] Communications or [Employer] Legal to see if it's a good idea";
- Requiring employees to refrain from "comment[ing] on any legal matters, including pending litigation or disputes"; and

- Prohibiting employees from posting information regarding the Employer that could be deemed "material non-public information" or "confidential or proprietary."

Notably, the Acting General Counsel also asserts that prohibiting employees from discussing topics such as "company performance, cost increases, and customer wins or losses" is unlawful because such information "has potential relevance in collective-bargaining negotiations regarding employees' wages and other benefits."

To be lawful, according to the NLRB, policies must "clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such that they could not reasonably be construed to cover protected activity." Nevertheless, the Acting General Counsel's recent publication indicates that even an express disclaimer within a policy that the policy will be administered in compliance with Section 7 of the Act may be insufficient to salvage an otherwise "overbroad" personnel policy.

The Acting General Counsel's scrutiny on common personnel policies is particularly troubling in light of the NLRB's recent and repeated invalidation of union election results favoring employers based in part on the presence of unlawful employer policies (even though no evidence linked the election results to the policies that the Board considered unlawful). In light of these developments, employers should consider seeking review of policy manuals to determine whether revisions are necessary to comply with federal labor law.

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