MORRISON | FOERSTER

Legal Updates & News

Bulletins

Employment Law Commentary -- March 2007

March 2007
by Samantha P. Goodman

Employer Personnel Policies May Constitute An Unfair Labor Practice

PDF Version

Last month, a federal Court of Appeals held that an employer committed an unfair labor practice under the National Labor Relations Act (NLRA) when it published a general confidentiality rule in its employee handbook. This ruling was just the latest in a line of cases in which seemingly innocuous personnel policies were found to violate the NLRA because they could reasonably be interpreted to interfere with the "Section 7" rights of employees under that Act [fn1] even though the policies were neither intended nor contemplated to have any such effect.

This trend has ramifications for all employers — including those with an entirely non-union workforce. An employer who implements a policy that is deemed to violate the NLRA could be required to rescind or revise the policy and post a remedial notice. In addition, an employee who is terminated for violating a policy prohibited by the NLRA could potentially file an unfair labor practice charge with the National Labor Relations Board even if he is not a union employee and was not engaged in any effort to organize a labor union. Therefore, all employers should be aware of this hazard and take steps to avoid any employment policies or work rules that could be interpreted to violate the NLRA.

Cintas Corporation v. NLRB

The most recent appellate opinion to address this issue is *Cintas Corporation v. NLRB*, 2007 U.S. App. LEXIS 6075 (D.C. Cir. Mar. 16, 2007), which was decided by the Court of Appeals for the District of Columbia Circuit on March 16, 2007.

In *Cintas*, the employer supplied workplace uniforms to various businesses. The employer published and distributed an employee handbook which contained the following discussion of how employees (referred to by the employer as "partners") are expected to treat confidential information:

> *We honor confidentiality*. We recognize and protect the confidentiality of any information concerning the company, its business plans, its partners, new business efforts, customers, accounting and financial matters.

The handbook also contained a discipline policy which warned employees that they may be sanctioned for "violating a confidence or [for the] unauthorized release of confidential information."

The union filed unfair labor practice charges with the National Labor Relations Board (NLRB), alleging that the quoted language from the handbook violated the provision of the NLRA which proscribes employer interference with employees' right to discuss the terms and conditions of their employment with others. The Administrative Law Judge agreed and concluded that the language prohibiting the disclosure of "any information concerning… partners" could be reasonably construed by employees as unlawfully restricting their right to discuss their wages and other terms and conditions of employment. On review, the NLRB unanimously affirmed the ALJ's decision.

On appeal to the United States Court of Appeals for the District of Columbia Circuit, the employer asserted that the NLRB's decision should be overturned because: (1) the confidentiality language in the handbook does not explicitly prohibit protected employee activity; (2) there is no evidence that employees interpreted the language to prohibit protected activity; and (3) the employer never interpreted or applied the language to prohibit protected activity. The Court found these facts, even if true, to be non-dispositive. The Court held that a company violates the NLRA if employees "would reasonably construe the language" to prohibit protected activity — even if the policy does not specifically prohibit protected activity and even if there is no evidence that the employees or employer ever actually interpreted or enforced it
that way.

The Court agreed with the NLRB that the language in the policy was sufficiently broad that employees could reasonably construe it to restrict discussion of wages and other terms and conditions of employment. The Court therefore upheld the NLRB's decision. In doing so, the Court noted that the employer made no effort in its rule to distinguish protected behavior from violations of company policy. As such, it was overbroad and violated
the NLRA.

Prior Cases

The *Cintas* opinion is not the first case in which a seemingly innocuous workplace policy has been found to be a violation of the NLRA even though it was not intended nor contemplated to restrict employee protected rights. As set forth in the seminal decision of *Lafayette Park Hotel*, 326 N.L.R.B. 824, 825 (1998), *enforced mem.*, No. 98-1625, 1999 WL 1215578, at *1 (D.C. Cir. Nov. 26, 1999),where work rules are "likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement." For example:

In *Guardsmark v. NLRB*, 475 F.3d 369 (D.C. Cir. Feb. 2, 2007), the Court found that the employer violated the NLRA by including three rules in its employee handbook: (1) a chain-of-command rule instructing employees "Do not register complaints with any representative of the client"; (2) a solicitation rule prohibiting solicitation and distribution of literature "at all times while on duty or in uniform"; and (3) a fraternization rule prohibiting employees from "fraterniz[ing] on duty or off duty" with other employees."

In *Longs Drug Stores California, Inc.*, 347 N.L.R.B. No. 45 (2006), the NLRB found that the employer violated the NLRA by maintaining confidentiality provisions in its employee handbooks which stated that "unauthorized disclosure of confidential information regarding customers, employees, or the business of the company" is conduct subject to discipline and elsewhere specified that "[y]our pay is confidential company information."

In *KSL Claremont Resort*, 2005 NLRB LEXIS 272 (2005), the NLRB found that the employer violated the NLRA by maintaining a rule that prohibited "negative conversations" about employees or managers.

In *Brockton Hospital v. NLRB*, 352 U.S. App. D.C. 302 (D.C. Cir. Jun. 28, 2002), the Court found that the employer violated the NLRA by maintaining a confidentiality policy that stated that information concerning employees "should not be discussed either inside or outside the hospital, except strictly in connection with hospital business."

In *Lafayette Park Hotel*, 326 N.L.R.B. 824 (1998), the NLRB found that the employer violated the NLRA by: (1) maintaining a standard of conduct that defined as unacceptable "[m]aking false, vicious, profane or malicious statements toward or concerning the [employer] or any of its employees"; and (2) implementing a scheduling and attendance rule that required employees to leave the employer's premises immediately after the completion of their shift and not to return until their next scheduled shift.

Pending Case

On March 27, 2007, the NLRB heard oral argument in the case *The Guard Publishing Company, d/b/a/ The Register-Guard* (Cases 36-CA-8743-1, et al.) to consider the question of whether employees have the right to use their company's e-mail system to communicate with each other about union matters. At issue is whether the employer's policy prohibiting the use of its e-mail system "to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations" violates the NLRA. Any decision by the NLRB in this case is likely to be appealed to the District of Columbia Circuit and potentially the United States Supreme Court.

Employer Hazards Of Maintaining Overbroad Employment Policies

Although employers with unionized workforces and employers which are the subject of organizing drives are the most likely to have their employment policies challenged and invalidated by the NLRB, any employers, even those with non-unionized workforces and with no union activity, can be charged with unfair labor practices simply for maintaining employment policies that are deemed to violate the NLRA. Employers found to have maintained policies that violate the NLRA can be required to rescind or revise those policies and to display a remedial notice at their worksites.

Another risk is that non-union employees may file unfair labor practice charges with the NLRB if an employer relies on a policy that violates the NLRA in order to discipline or terminate their employment — even if the employees' conduct was not related to any labor union or organizing activity. For example, an employer with an overbroad chain-of-command rule that violates the NLRA might terminate an at-will non-union employee who breaks that rule by complaining to a co-worker about his wages. [fn2] Even if the employee's complaint to the co-worker is not related to any labor union or union organizing effort, it is conceivable that the employee could file an unfair labor practice charge with the NLRB alleging that the enforcement of the rule with respect to his conduct (even though it has no collective bargaining purpose) violates the NLRA. If successful, such an employee could potentially obtain reinstatement and back pay as a remedy where he otherwise would not be entitled to bring any claim at all.

Therefore, it is important for all employers to avoid work rules that could violate the NLRA so that they will not be subject to the various forms of potential liability that could result.

How Can Employers Avoid Maintaining Employment Policies That Violate The NLRA?

The *Cintas* case and its predecessors serve as a reminder to all employers of the importance of carefully and specifically drafting employee handbook provisions and other employment policies and rules. As these cases make clear, even seemingly innocuous rules that are not intended or enforced to restrict protected employee rights may nonetheless be found to violate the NLRA.

Thus far, policies that address the following topics have been found to violate the NLRA:

(1)Confidentiality;

(2)Solicitation;

(3) Chain-of-command;

(4)Fraternization;

(5)Negative statements regarding the employer or other employees; and

(6)Off-duty access to work premises.

Obviously, not all employment policies that address one of these topics will necessarily constitute a violation of the NLRA. Rather, it is the scope of those (and other) policies and how specifically and clearly they are drafted that will determine whether they could reasonably be understood to restrict employee's protected rights. In those circumstances where a policy might be understood to restrict employee rights, for example, the policy could avoid violating the NLRA by specifically including an exception for protected employee conduct. Thus, careful drafting and review of employment policies will permit an employer to accomplish its business-related goals while avoiding the risk of a finding that any of its policies violate the NLRA.

Therefore, it is important that employers have their employee handbooks, employment policies and other rules reviewed by labor counsel or other knowledgeable persons in order to identify any potential violations of the NLRA and, if necessary, to revise the policies accordingly.

Footnotes

[1] Section 7 of the NLRA provides employees with the right to organize, bargain collectively, and engage in other concerted activities, or to refrain from doing so.

[2] For California employers, Labor Code §232 makes it illegal to discharge, discipline, or otherwise discriminate against an employee who discloses the amount of his or her wages.