

Re: CLIENT ADVISORY 2015-03
Don't Tune Out the NLRB

HANDBOOKS AND THE NLRB

The fact that you aren't unionized doesn't mean that you can ignore the National Labor Relations Board which is policing handbooks to ensure they don't chill employees' Section 7 right to discuss wages, hours, and other terms and conditions of employment.

Do you have rules similar to these?

- Be respectful to the company, other employees, customers, partners, and competitors.
- Show proper consideration for others' privacy and for topics that may be considered objectionable or inflammatory, such as politics and religion.
- Failure to report to your scheduled shift for more than three consecutive days without prior authorization or walking off the job during a scheduled shift is prohibited.

Each was found unlawful by the NLRB according to its recently issued General Counsel Memorandum 15-04 (March 18, 2015).

The first was deemed overbroad since employees "reasonably would construe" it "to ban protected criticism or protest regarding...supervisors, management, or the employer in general." GC Memo at 7.

The second was determined unlawful because Section 7 protects communications about political matters, for example, proposed right to work legislation and because discussion of unionization would be chilled by such a rule as it can be an inflammatory topic. GC Memo at 11.

The third was pronounced unlawful because it contained a broad prohibition on walking off the job which reasonably could be read to include protected strikes and walkouts. GC Memo at 17.

As reflected by its memo, the NLRB has been pursuing charges alleging unlawful handbook rules. Is it time to review your handbook in light of the GC Memo focusing, in particular, upon confidentiality, employee conduct, conflict of interest, and social media rules?

EMAIL USE – FOR UNION ORGANIZING

Reversing the NLRB's 2007 decision that employees have no statutory right to use their employers' e-mail system for union organizing purposes, the NLRB on Dec. 11, 2014, held 3-2 that employees' use of e-mail for organizing purposes on non-working time must be permitted.

The NLRB stated, "We believe, as scholars have pointed out, that [our previous] analysis was clearly incorrect." "The consequences of that error are too serious to permit it to stand. By focusing too much on employers' property rights and too little on the importance of e-mail as a means of workplace communication, the board failed to adequately protect employees' rights under the act and abdicated its responsibility to adapt the act to the changing patterns of industrial life."

The NLRB explained that its ruling “applies only to employees who have already been granted access to the employer’s e-mail system and does not require employers to provide such access.”

NLRB QUICKIE ELECTION RULE IN PLACE

The new NLRB elections rule became effective April 14, 2015 and will impose new obligations on the employer such as filing, within one week of receipt of the election petition, a detailed written position including the employer’s legal position regarding the petition, the proposed bargaining unit, the employee classifications that are included or excluded, and all other legal issues regarding the petition and election.

If an employer fails to raise a legal issue in this filing, it will have waived its right to do so.

Some of these issues can be anticipated; should your company develop them now when you have the time?

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