NLRB and SEC Impose Restrictions on Workplace Policies and Confidentiality Agreements

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During the last few years, the National Labor Relations Board ("NLRB") has been aggressively reviewing employers' confidentiality policies, as well as other work rules regarding, among other things, social media, use of the employer's computer, workplace civility, communications with the press and other third parties, conflicts of interest and the use of employer logos, copyrights and trademarks. It has determined that many of the provisions and policies it reviewed violate the National Labor Relations Act ("NLRA").

Under Section 7 of the NLRA ("Section 7"), employees have the right to form unions and to engage in concerted activity to improve their wages and other terms and conditions of their employment ("protected concerted activity"). Section 7 also makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees" in the exercise of the rights guaranteed under Section 7. Therefore, the NLRB has held that the language contained in various employer policies is unlawful, because it either prohibits or "chills" the exercise of the employees' right to engage in concerted activity. Recently, the NLRB also has recognized that electronic distribution is protected under employees' Section 7 right to solicit and distribute literature on non-work time. In addition, it recently overturned its own precedent by striking down policies prohibiting personal use of an employer's email system.

On March 18, 2015, the NLRB Office of the General Counsel ("OGC") issued a report outlining its recent decisions regarding employer rules, policies, and confidentiality agreements. A link to the OGC report is provided here. The report, which is divided into two parts, compares rules that the Board has found unlawful with rules it has found lawful, and explains the Board's reasoning behind each determination. The first part of the report focuses on the types of rules commonly found in employee handbooks and employment agreements, such as confidentiality rules, conflict of interest and professionalism rules, anti-harassment rules, trademark rules, photography and recording rules, restrictions against employees leaving work, non-solicitation and distribution polices and rules pertaining to media contacts. The second part of the report discusses particular rules that the OGC determined to be unlawful in an unfair labor practice case that it filed against Wendy's International, and provides the modifications to the rules

that were made as part of the settlement of that case.

The Board considers certain employment policies to be unlawful on their face because they explicitly restrict the employees' right to engage in protected concerted activity. However, the OGC instructs employers in this recent report that "context is everything." A policy or provision is also considered to be unlawful if employees could reasonably construe its language to prohibit Section 7 activity. The mere maintenance of a policy that violates the NLRA can give rise to an unfair labor practice charge, regardless of whether the policy is actually applied to discipline or terminate someone's employment. For example, confidentiality rules that broadly restrict disclosure of confidential employer information, which may be construed to bar disclosure of information regarding the employees' terms and conditions of employment, are considered to be unlawful, but policies that limit the restriction to confidential business information such as trade secrets are acceptable. Rules requiring employees to be respectful towards the company and coworkers are problematic, since they could restrict criticism or protests regarding supervisors or the company in general. Similarly, rules that prohibit "walking off the job" are considered unlawful, because they may discourage strikes and walkouts. However, a rule that prohibits "walking off shift" or "failing to report for a scheduled shift" may be lawful in the context of a healthcare employer with an interest in ensuring patient care. As these examples indicate, navigating what is lawful in context is a tricky task. Of course, rules that expressly restrict concerted activity, are imposed with the intention of discouraging protected activity, or are imposed in response to employees' concerted union activity are always unlawful.

The NLRB is not alone in its enforcement efforts against unsuspecting employers using confidentiality agreements. On April 1, 2015, the Securities and Exchange Commission ("the SEC") took action—for the first time—against a corporation for its use of confidentiality provisions. In part to preserve the attorney client privilege as to information it received in the course of its internal investigations, KBR, a large technology and engineering firm, required its employees to acknowledge that they were prohibited from discussing the particulars of their interviews without authorization from the Company's law department, under penalty of discipline, up to and including termination of their employment. The SEC found this requirement to be unlawful, as it could discourage employees from reporting securities violations. To settle the enforcement action, KBR agreed to pay a $130,000 penalty. It also agreed to revise its acknowledgement form to specifically state that employees are not required to seek authorization from the law department before communicating about potential violations of federal law or regulations to any governmental agency or entity, including, but not limited to, the Department of Justice, the SEC, the Congress, and any agency Inspector General. This enforcement action is a clear message to corporations subject to the SEC's jurisdiction that improperly worded confidentiality agreements will result in civil fines and possible criminal penalties.

This SEC enforcement action also comes in the wake of recent efforts by the Equal Employment Opportunity Commission ("the EEOC") to target confidentiality provisions under a similar theory that they may discourage protected whistleblowing. In 2014, the EEOC filed suit against CVS Pharmacy based on the nondisclosure and non-disparagement clauses contained in its severance agreements. The EEOC also claimed that these provisions had the effect of discouraging employees from filing charges of discrimination or otherwise participating in, or cooperating with, an EEOC investigation. Although a federal judge in Illinois granted summary judgment in favor of CVS, the EEOC has appealed

that ruling to the Seventh Circuit, and the appeal is pending.

For employers, these escalating enforcement efforts mean that employee handbooks and other workplace policies, as well as confidentiality agreements, will need to be carefully reviewed. The NLRA applies to non-union employers as well as those that currently have a union, so these recent federal enforcement efforts potentially affect most private employers. Workplace policies are especially vulnerable to challenge when an employee is terminated for violating one of them. Because so many once-standard policies have failed to survive recent NLRB scrutiny, it will be difficult to find any employer that currently maintains a handbook that fully complies with the Board's standards. Due to the NLRB's enforcement efforts and those of other federal agencies, employers should ensure that their policies and confidentiality agreements are reviewed and updated.

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