

RYBICKI & ASSOCIATES, P.C.

LABOR AND EMPLOYMENT ATTORNEYS

2023 Annual HR Conference

Crafting Handbooks and Employer Policies for Non-Union Workplaces

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INTRODUCTION

Introduction

- Labor & Employment Attorney
- Two types of law we often do:
 - “Employment Law”: EEO, wage-and-hour, workplace safety, civil litigation, policy preparation, etc.
 - “Traditional Labor”: State and federal labor/management law

What We Will Cover

- Basic NLRA Issues
- Potential Impact on Employers
- Recent Changes to NLRB Rules
- Specific and General types of Policies
- Strategy and Conclusion

Presentation and Links

- This presentation can also be viewed on our website blog:

www.rybickiassociates.com/blog

- Blog version can be viewed, downloaded, and the links contained in the PowerPoint are active.
- (Can also follow on phone/iPad/etc. when easier!)

NATIONAL LABOR RELATIONS ACT

Basic NLRA Issues

- The National Labor Relations Act (“NLRA”)
 - Passed in 1935 as part of the New Deal.
 - Intended to prevent violence and unrest that had plagued the country for decades.
 - Applies to most private employers except in certain industries such as agriculture.

What is Protected

- NLRA goes much farther than protecting unions or guaranteeing union rights.
- Main protection: employee “concerted activity.”
 - Employees working together, or speaking on behalf of others, *whether or not a union is involved!*

What is Protected?

- Discussion at: <https://www.nlrb.gov/about-nlrb/rights-we-protect/our-enforcement-activity/protected-concerted-activity>
- The National Labor Relations Board (NLRB) gives several good examples of this type of activity on an interactive map format showing various recent cases:

Examples of Concerted Activity

- A long-time employee at a vegetable packing plant was fired after raising safety concerns on behalf of other workers with company management and a government agency.
- A supervisor at a dental association was fired after she refused to divulge the names of employees who had anonymously signed a petition protesting top management.

Examples of Concerted Activity

- Construction contractor fired five employees after several of them appeared in a YouTube video complaining of hazardous working conditions.
- Employees at an Oakland based internet software company were discharged through a layoff soon after they raised group concerns about changes to their working conditions.

Examples of Concerted Activity

- Employer's social media policy contained several unlawful sections which restricted employees' ability to discuss their terms and conditions of employment.
- The NLRB filed complaints and recovered money **in every one of these cases!**

War Story: Non-Union Client

- Recent client: received a class-action complaint covering all non-exempt employees.
- We found that the plaintiff had signed an arbitration agreement and moved to dismiss the class claims.
- Turns out: NLRB had filed a charge over the agreement, the employer had withdrawn it and never implemented a new one!

Major Emphasis of the NLRA

- The NLRB now aggressively reviews non-union employer policies along with unionized workplaces.
- Its focus will be on whether policy language interferes with *any* employee rights under the NLRA, whether to **organize with a union, complain as a group**, or just to **share information about their workplace** to others.

Procedure

- The NLRB may conduct an investigation of workplace rules or respond to complaints by employees (or potential union representatives).
- “Unfair Labor Practice” charges may be filed in the local Regional Office (such as Oakland and San Francisco).
- Charges prosecuted by the NLRB General Counsel, a (theoretically) independent entity.

Potential Impact on Employers

- General Counsel can request an order forcing changes to a policy in addition to:
 - Notice posted or sent to all employees;
 - Backpay and any losses suffered by employees impacted by a policy;
 - Potential expanded money damages for other costs;
 - Other remedies – such as a “bargaining order” requiring that a union be recognized **without an election**.

RECENT CHANGES

In the recent past ...

- NLRB scrutiny started during the Clinton Administration but was revised between 2017 and 2019.
- Over the past several years, the Board considered whether a neutral policy was lawful by examining:
 - (i) the nature and extent of the **potential impact** on NLRA rights, and
 - (ii) **legitimate justifications** associated with the rule.

In the recent past ...

- This standard first looked at whether a reasonable interpretation from an ordinary person's perspective (not someone focused solely on NLRA issues) would interfere with protected rights, and
- Then looked at whether any potential restrictions would be justified by the employer's legitimate needs.
- Allowed many common policies such as confidentiality and trade secret restrictions.

New Law

- The current NLRB reverted to its prior standard in **August, 2023**:
 - *Stericycle, Inc. and Teamsters Local 628*
 - A policy is unlawful if it has a “**reasonable tendency**” to dissuade workers from engaging in organizing activity (such as discussions with outsiders or other workers).
 - Flips the standard from an **objective** reasonableness test to an unforgiving **subjective** standard.

New Law

- The new rule views a policy:
 - “from the perspective of an employee who is subject to the rule and economically dependent on the employer” and
 - “who also contemplates engaging in protected concerted activity.”
- If employee “could reasonably interpret the rule” as limiting protected conduct it is *presumptively* unlawful.

New Law

- Relevant Board comments:
 - Employees are economically dependent on work so do not want to violate rules even if they are ambiguous.
 - A reasonable employee “interprets rules as a layperson, not as a lawyer.”
 - So – if an employee “could reasonably interpret a rule to restrict or prohibit” protected activity, then it is assumed to be unlawful.

Employer Burden

- An employer must then show that the rule:
 - “advances a **legitimate and substantial business interest**,” and that
 - “the employer is **unable to advance that interest** with a more narrowly tailored rule.”

Impact

- There is no need to show that a policy *had* or *is likely to have* any impact on employee decision-making.
- The test is purely analytic; it is not tied to any particular situation.
- It is easily applied even when there is no evidence that employees knew about a policy in the first place (!).

TYPES OF POLICIES

Policies Affected

- (1) Does not apply to *explicit* policies that directly mention protected activity (such as “do not make statements to outside parties about union activity in the workplace”).
- (2) Applies to policies that *appear* to be neutral.
- (3) Some are “hot topics” while other are inherently dangerous.

Electronic Monitoring

Hot Topic: Electronic Monitoring

- General Counsel has issued a memorandum addressing “Electronic Monitoring and Algorithmic Management of Employees.” ([link](#))
- Believes that “the potential for omnipresent surveillance and other algorithmic-management tools” to interfere with employee rights is a risk to employee confidentiality.

Hot Topic: Electronic Monitoring

- wearable devices
- security cameras
- radio-frequency identification badges
- GPS tracking devices
- in-vehicle cameras
- PC /workstation monitoring
- keyloggers
- software that takes screenshots
- webcam or audio recordings
- AI and algorithm-based collection and analysis of data

Hot Topic: Electronic Monitoring

- GC will encourage the NLRB to scrutinize these issues under existing and new Board law.
- Employers should consider the types of policies that may touch on these areas: electronic timekeeping, productivity or activity monitors, GPS and location services, AI review of email and voice mail,
- Always consider what the 'legitimate business need' is underlying each policy and whether there are alternatives.

Restrictive Covenants

Hot Topic: Restrictive Covenants

- GC's most recent memo addresses “Non-Compete” policies. ([link](#))
- Full non-compete agreements are almost always unlawful in California employment relationships.
- But other types of “restrictive” agreements are common.

Hot Topic: Restrictive Covenants

- Many California employers have policies that prohibit solicitation of other current employees for a period of time.
- State Labor Code creates a “Duty of Loyalty” that may prevent current employees from encouraging other employees to leave and go to another employer.

Hot Topic: Restrictive Covenants

- These ‘legal’ policies violate two rights identified by the GC in her memo:
 - “They chill employees from soliciting their co-workers to go work for a local competitor as part of a broader course of protected concerted activity.”
 - “They chill employees from seeking employment ... to specifically engage in protected activity with other workers at an employer’s workplace [and] limit employees from the kind of mobility required to be able to engage in some particular forms of this activity, such as union organizing, which may involve obtaining work with multiple employers in a specific trade and geographic region.”

Confidentiality Rules

Confidentiality Rules

- Even under less strict rules, prior General Counsel focused on “confidentiality” requirements that could easily confuse or limit employees.
- Risk: ambiguous, broad policy terms such as “any sensitive information” or “any information about our business.”
- Specific policies identified by prior GC:

Confidentiality Rules

- Do not discuss “customer or employee information” outside of work, including “phone numbers and addresses.”
- Do not disclose proprietary or confidential information about [the employer, or] other associates (if the proprietary or confidential information relating to [the employer’s] associates was obtained in violation of law or lawful company policy).
- Never publish or disclose [the employer’s or] another’s confidential or other proprietary information. *Never publish or report on conversations that are meant to be private or internal to the employer.

Confidentiality Rules

- Issues these types of policies create:
 - Overbroad references such as “employee information” that provide little guidance to an employee.
 - Reference to *other parties*’ information without definitions.
 - Any vague terms that could be interpreted to include an employee’s own or other employees’ wages and other terms and conditions of employment.

Confidentiality Rules

- Strategies:
 - Develop tight, well-defined confidential information and trade-secret disclosure policies.
 - Enter NDAs and other agreements with third parties protecting business information without spilling over to terms and conditions.

Conduct Rules

Conduct Rules

- Conduct rules are particularly difficult as GC and the Board recognize that debate over concerted activity can be “vexing” and “contentious.”
- Hard to predict what will be allowed and not allowed – but policies should be carefully tailored to clarify the business-oriented basis of any rules.

Conduct Rules

- Found unlawful: Do not make "insulting, embarrassing, hurtful or abusive comments about other company employees online," and "avoid the use of offensive, derogatory, or prejudicial comments."
- Found unlawful: "[S]how proper consideration for others' privacy and for topics that may be considered objectionable or inflammatory, such as politics and religion."
- Also: Do not send "unwanted, offensive, or inappropriate" e-mails.

Conduct Rules

- Found lawful: Any logos or graphics worn by employees "must not reflect any form of violent, discriminatory, abusive, offensive, demeaning, or otherwise unprofessional message."
- "[T]hreatening, intimidating, coercing, or otherwise interfering with the job performance of fellow employees or visitors."
- No "harassment of employees, patients or facility visitors."

Conduct Rules

- Some guidance:
 - Place conduct restrictions in relevant parts of a handbook – such as unlawful harassment and bullying policies – to provide *context* to a reader.
 - Tie to general professionalism and businesslike behavior without specifically mentioning management or “the company.”

Outside Communications

Communications

- Policies regulating communication with outside parties, the media, and government agencies.
- These have been another hot topic as discussed by prior GC.
- Basic rule seems to carefully limit rules to statements made on behalf of the employer.

Communications

- Unlawful: Employees are not "authorized to speak to any representatives of the print and/or electronic media about company matters" unless designated to do so by HR, and must refer all media inquiries to the company media hotline.
- Unlawful: "[A]ll inquiries from the media must be referred to the Director of Operations in the corporate office, no exceptions."
- Unlawful: "If you are contacted by any government agency you should contact the Law Department immediately for assistance."

Communications

- Lawful: "The company strives to anticipate and manage crisis situations in order to reduce disruption to our employees and to maintain our reputation as a high quality company. To best serve these objectives, the company will respond to the news media in a timely and professional manner only through the designated spokespersons."

Communications

- Lawful: "Events may occur at our stores that will draw immediate attention from the news media. It is imperative that one person speaks for the Company to deliver an appropriate message and to avoid giving misinformation in any media inquiry. While reporters frequently shop as customers and may ask questions about a matter, good reporters identify themselves prior to asking questions. Every . . . employee is expected to adhere to the following media policy: . . . Answer all media/reporter questions like this: 'I am not authorized to comment for [the Employer] (or I don't have the information you want). Let me have our public affairs office contact you.'"

Communications

- GC explained that the lawful language would be reasonably interpreted as an attempt to control the company's message, rather than to restrict employee communications to the media.
- Policies should focus on this distinction.

Other Common Policies

Other Policies

- Use of Company name and logo
- Social Media policies
- Restrictions on leaving work
- Conflicts of Interest
- Email use (likely)
- Pictures and Recording

Additional Points

- These rules do not apply to a policy that *expressly* mentions protected activity (e.g., communications about union activity).
- The test does not provide a “safe harbor” for rules adopted *in response to* concerted activity (e.g., confidentiality rules adopted after an employer learns of union organizing activity).

Guidance

- Prior guidance (Obama, Trump era) have been removed by successor administrations.
- They are *very* helpful, though, in (unofficially) assessing the hot topics and some useful strategies
- Obama-era GC report accessible at: ([link](#))
- (Outdated) Trump-era GC memo accessible at: ([link](#))

STRATEGIES

Strategies for Compliance

- First: new standard makes policies presumptively unlawful if any employee *actively planning* to engage in protected activity *and afraid to lose their job* could *reasonably interpret* a policy as prohibiting the conduct.
- Second: even when a policy may be interpreted that way, the employer may still establish that it is justified by *business necessity* and has *no reasonable alternative*.

Strategies for Compliance

- Employers should consider:
 - Stating the **reason for the policy** in each relevant portion.
 - Explaining in hot-topic areas that the policy **does not prohibit** protected conduct, with examples.
 - Whether there **actually are alternatives** to broad language.

Strategies for Compliance

- Employers should consider:
 - Avoiding a single standalone “NLRB” or “Protected Activity” policy that may not be read with a separate policy.
 - Playing devil’s advocate when considering business necessity and potential alternatives.

Strategies for Compliance

- Employers should consider:
 - Keep a close eye on industry associations and human resource organizations (PASCO, HR California, SHRM, etc.) for developments and recommendations.
 - Revise handbook frequently to accommodate changes in the law and evolution of the employer's workplace.

QUESTIONS?

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