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THE NLRA AT 80: IS THE STATUTE ADAPTING TO THE MODERN WORKPLACE?

DEVELOPMENTS AT THE BOARD:

MEMORANDUM GC 15-04: REPORT OF THE GENERAL COUNSEL CONCERNING EMPLOYER RULES

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I. INTRODUCTION

- A. Recently, the Board has paid careful attention to employer work rules, handbooks, and social media policies to ensure that these rules do not expressly or implicitly limit employees' right to engage in concerted protected activity guaranteed by Section 7 of the NLRA.
- B. Under the Board's decision in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), merely maintaining a work rule may violate Section 8(a)(1) of the Act if the rule has "a chilling effect" on employees' Section 7 activity.
- C. A rule explicitly restricting protected concerted activity would obviously violate the Act, but an employer's rules may still be unlawful even if they do not expressly limit Section 7 rights. For example, a work rule can still be found unlawful if (1) employees would reasonably construe the rule's language to prohibit Section 7 activity; (2) the rule was promulgated in response to union or other Section 7 activity; or (3) the rule was actually applied to restrict the exercise of Section 7 activity.
- D. Importantly, even well intentioned handbook rules that *could*, as written or as applied, limit Section 7 activity are unlawful.
- E. The General Counsel's Report Concerning Employer Rules presents recent case developments and guidance in this evolving area of federal labor law. Below is a summary of the General Counsel's Report along with some discussion of related cases.

II. EMPLOYER WORK RULES REGARDING CONFIDENTIALITY

- A. Section 7 of the NLRA affords employees the right to discuss wages, hours and other terms and conditions of employment with fellow employees, as well as with nonemployees, such as union representatives, without fear of reprisal. Thus, the mere maintenance of a confidentiality policy that expressly prohibits employee discussions of terms and conditions of employment, such as wages, hours, or working conditions, violates the Act. Additionally, a confidentiality policy that could be reasonably understood to prohibit such discussions, such as a generalized restriction on disclosing "employee" or "personnel information" will, without further clarification and context, violate the Act.
 - 1. For example, in *Flamingo-Hilton Laughlin*, 330 NLRB 287 (1999), the Board found that a Hotel's maintenance of a rule prohibiting employees from revealing "confidential information regarding our customers, fellow employees, or Hotel

business” could reasonably be read to restrict protected discussion of terms and conditions of employment amongst the Hotel’s employees and was therefore unlawful. *See also Pontiac Osteopathic Hospital*, 284 NLRB 442 (1987) (employer confidentiality rule prohibiting employees from discussing “[h]ospital affairs, patient information, and employee problems” is unlawful).

- B. The Board has recognized, however, that Employers have a substantial and legitimate interest in maintaining the privacy of certain business information. Employers retain authority under the NLRA to maintain and enforce work rules which restrict the disclosure of “confidential information” so long as the rule cannot be reasonably read to limit employee dialogue regarding terms and conditions of employment.
1. As explained above, a confidentiality rule referencing “employees,” “personnel,” or employee terms and conditions of employment is facially unlawful. Lawful confidentiality policies, such as a restriction on “unauthorized disclosure of ‘business secrets’ or other confidential information,” cannot expressly or impliedly be read to restrict discussion of protected employment matters.
 2. Moreover, lawful confidentiality rules offer context and guidance to help employees understand the scope of the rule governing prohibited disclosures. A general restriction on the disclosure of “confidential” information is unlawful unless the term “confidential” is given particularized meaning through context.
 - a. For instance, the General Counsel identified a broad rule preventing employees from “disclosing . . . details about [the Employer]” as unlawful because the rule contained a broad restriction on disclosing “details” without offering any clarification as to the meaning or scope of “details”. Although the rule does not expressly condemn the disclosure of terms and conditions of employment or employee information, a reasonable employee could interpret “details” to include wages, working conditions, or other statutorily protected topics. *See also Fresh & Easy Neighborhood Market*, 361 NLRB No. 8 (2014) (invalidating a confidentiality rule requiring that employees keep information “secure” and use it “fairly, lawfully and only for the purpose for which it was obtained.”).
 - b. On the other hand, where an employer confidentiality policy offers context or specifically defines the scope of the prohibited disclosures as not including employee information or terms of employment, such a rule is enforceable and can provide a basis for lawful employee discipline.

III. EMPLOYER WORK RULES REGARDING EMPLOYEE CONDUCT TOWARD THE COMPANY AND SUPERVISORS

A. Section 7 includes the right of employees to criticize or protest their employer's labor policies or treatment of fellow employees. Employee criticism of his or her employer does not lose protection under the Act simply because the criticism is false or defamatory. Additionally, recent Board law is clear that an employee's right to criticize an employer's labor policies and treatment of employees includes the right to do so in a public forum. Employers commonly promulgate and enforce three distinct types of work rules that contravene an employee's rights to criticize management under the NLRA.

1. First, an employer "Code of Conduct" policy or workplace civility rule is unlawful where it expressly requires, or could be reasonably read to require, an employee to be refrain from being "disrespectful," "uncooperative," "negative," "inappropriate," or "rude" in his or her dealings with management.

a. For example, in *Casino San Pablo*, 361 NLRB No. 148 (Dec. 16, 2014) The Board found unlawful a handbook rule stating that employees would be subject to discipline for "[i]nsubordination or other disrespectful conduct (including failure to cooperate fully with Security, supervisors and managers." Members Pearce and Schiffer reasoned that this provision lacked clarity and could reasonably be read to preclude protected concerted objections to working conditions or discipline imposed by a supervisor.

b. See also *Claremont Resort & Spa*, 344 NLRB 832 (2005) (striking down a work rule prohibiting negative conversations about associates and/or managers); *Southern Markland Hospital*, 293 NLRB 1209 (1989), *enf'd in relevant part*, 916 F.2d 932 (4th Cir. 1990) (invalidating a work rule prohibiting derogatory attacks on hotel representatives).

c. For similar reasons, the General Counsel identified the maintenance of the following workplace civility rules as unlawful under Section 8(a)(1):

i. "[B]e respectful to the company, other employees, customers, partners, and competitors."

ii. "Do 'not make fun of, denigrate, or defame your co-workers, customers, franchisees, suppliers, the Company, or our competitors.'"

iii. "Be respectful of others and the Company."

2. Second, a rule prohibiting false or defamatory statements by employees is unlawfully overbroad unless it specifies that only maliciously false or defamatory statements are prohibited.
 - a. In *Casino San Pablo*, a unanimous panel invalidated the employer's rule prohibiting employees from making "false, fraudulent, or malicious statements," reasoning that such a broad prohibition would chill protected activity. 361 NLRB No. 148 (Dec. 16, 2014); *see also Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), *enf'd mem.*, 203 F.3d 52 (D.C. Cir. 1999) (invalidating a work prohibiting employees from "[m]aking false, vicious, profane or malicious statements toward or concerning the [hotel] or any of its employees.>").
 - b. *See also Costco Wholesale Corp.*, 358 NLRB No. 106 (2012) (invalidating an employer social media policy stating that "statements posted electronically . . . that damage the company, defame any individual or damage any person's reputation . . . may be subject to discipline."); *Beverly Health & Rehabilitation Servs.*, 332 NLRB 347 (2000), *enf'd* 297 F.3d 468 (6th Cir. 2002) (invalidating a company rule prohibiting employees from making "false or misleading work-related statements about a company, facility, or fellow associates.>").
 - c. Drawing from these decisions, the General Counsel has similarly identified the following anti-defamatory conduct policy as an unlawful restraint on an employee's right to criticize management:
 - i. "No '[d]efamatory, libelous, slanderous or discriminatory comments about [the Company], its customers and/or competitors, its employees or management. '"
3. Third, handbook rules restricting an employee's right to criticize his or her employer's reputation are unlawfully overbroad because they may reasonably be read to require that employees refrain from voicing criticism openly and publically.
 - a. In *Quicken Loans, Inc.*, 361 NLRB No. 94, slip op. at 1 n. 1 (Nov. 3, 2014), the Board upheld an administrative law judge's ruling that the Company's non-disparagement policy, which generally barred employees from publically criticizing, ridiculing, or defaming the Company and its policies, was unlawfully overbroad.

IV. EMPLOYER WORK RULES REGULATING CONDUCT TOWARDS FELLOW EMPLOYEES

- A. The NLRA affords employees the right to engage in argument and debate with fellow employees about unions, management, and their terms and conditions of employment. As one might expect, these conversations can grow to be contentious, but the Supreme Court had held that protected concerted speech will not lose its protected status because it includes “intemperate, abusive, and inaccurate statements.” *Linn v. United Plant Guards*, 383 U.S. 53 (1966). Thus, although management has a legitimate and substantial interest in preventing harassment and promoting harmonious employee relations at work, anti-harassment rules must permit vigorous and contentious debate between employees over terms and conditions of employment.
1. Employers must be careful not to merely prohibit “negative” or “inappropriate” discussions or interactions because without further clarification, employees would reasonably read such rules as preventing protected heated discussions regarding unionization, labor policies, or the employer’s treatment of its employees.
 - a. For instance, the General Counsel has indicated that an employer rule stating: “[D]on’t pick fights online” is unlawfully overbroad and ambiguous because there is no limitation to the type of “fights” employees are and not allowed to pick with one another.
 - b. Additionally, the General Counsel’s memo notes that rules prohibiting employees from making “insulting, embarrassing, hurtful, or abusive comments about other company employees online” or requiring that employees “avoid the use of offensive, derogatory, or prejudicial comments” are unlawful restrictions on protected speech.
 2. Further illustrating the Board’s approach to coworker rules, the Board in *Hills and Dales General Hospital*, 360 NLRB No. 70 (2014) struck down an employer “Values and Standards of Behavior Policy” which prohibited “negative comments about fellow employees.” Although the rule did not explicitly restrict Section 7 activity, the rule could reasonably be construed to prohibit argument and debate amongst employees on protected topics. *See also 2 Sisters Food Group*, 357 NLRB No. 168, slip op. at 2 (2011) (invalidating a rule subjecting employees to discipline for an “inability or unwillingness to work harmoniously with other employees”).
- B. Where, however, an employer’s professionalism or civility rules merely require that employees be respectful to customers or competitors, and does not mention the

company or its management, employees would not reasonably read such rules as prohibiting protected debate or confrontations over Section 7 subjects.

1. Accordingly, the General Counsel found the following co-employee conduct rules lawful:
 - a. “Threatening, intimidating, coercing, or otherwise interfering with the job performance of fellow employees or visitors is impermissible.”
 - b. “No harassment of employees, patients, or facility visitors.”
 - c. “No use of racial slurs, derogatory comments, or insults.”
 - i. Despite the fact that a blanket ban on making derogatory comments, by itself, would be unlawful, the above rule was included in a section of the employer handbook dealing exclusively with unlawful harassment and discrimination and therefore has sufficient context to be read only to prohibit those types of unprotected criticism towards coworkers.

V. EMPLOYER WORK RULES REGARDING INTERACTION WITH THIRD PARTIES

- A. Employees also have the right to communicate with the news media, government agencies, and other third parties about wages, benefits, and other terms and conditions of employment. Work rules that would reasonably be read to restrict employee interaction with the media are unlawfully overbroad.
 1. In *Trump Marina Associates*, the Board invalidated employer policies which provided for discipline in the event that an employee “releas[ed] a statement to the news media without prior authorization” and which limited the right to speak with the media to certain executive employees. 354 NLRB 1027, 1027 n.2 (2009), *incorporated by reference*, 355 NLRB 585 (2010), *enf’d mem.*, 435 F. App’x 1 (D.C. Cir. 2011). Invalidating Trump’s Public Speaking/Media Requests policy under Section 8(a)(1), the Board held that a rule which reasonably lends itself to prohibiting all employee communications with the media regarding a labor dispute is unlawful under the NLRA. *See also Crowne Plaza Hotel*, 352 NLRB 382 (2008); *Valley Hospital Medical Center*, 351 NLRB 1250 (2007); *St. Luke’s Episcopal-Presbyterian Hospitals*, 331 NLRB 761, 762 (2000); *Hacienda de Salud Espanola*, 317 NLRB 962 (1995).
 - a. Under this approach, the General Counsel considers unlawful employer media policies requiring that “all inquiries . . . be referred to the Director of Operations in the corporate office” because it could reasonably be read to

apply to all communications with any media outlet, not only inquiries seeking the employer's official statement of position.

- b. Similarly, the General Counsel considers unlawful employer media policies preventing employees from "answering questions from the news media" generally, or policies requiring that employees, when approached for information by a third party immediately "refer the person to [the Employer's] Media Relations Department.
2. In addition to company media policies, work rules which limit protected communications between employees and government agencies are unlawful.
 - a. For example, the General Counsel considered unlawful an employer rule stating that "[i]f you are contacted by any government agency you should contact the Law Department immediately for assistance." This is because an employee could reasonably believe that they may not contact or respond to a government agency without management approval under any circumstances, including participating in a Board investigation. The Board has recognized an employer's right to present its own formal position in response to a government inquiry, but the restriction included in this rule was overly broad.
- B. The Board has recognized an employer's legitimate interest in controlling who makes official company statements and responses to media inquiries, but a rule regarding the company spokesperson must be narrowly tailored such that an employee could not reasonably read the rule as preventing him from speaking to the media or other third parties on his own behalf.
 1. Lawful rules regarding interaction with third parties will clearly indicate that employees should not speak on behalf of or for the company. For example, the General Counsel approved the following rule because it specifically banned employee media contact regarding non-protected activity, such as crisis management, and was not a categorical ban on employee media interaction: "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."

VI. EMPLOYER WORK RULES LIMITING OR RESTRICTING THE USE OF COMPANY LOGOS, COPYRIGHTS, AND TRADEMARKS

A. The Board has also paid careful attention to employer rules restricting employee use of company logos, copyrights, and trademarks for consistency with the fair use doctrine. Despite the fact that copyright holders have a clear, identifiable interest in protecting the proprietary nature of their intellectual property, employer handbook rules cannot limit an employee's fair, non-commercial protected use of that property. *Pepsi-Cola Bottling Co.*, 301 NLRB 1008, 1019-20 (1991), *enfd mem.*, 953 F.2d 638 (4th Cir. 1992). Employees retain the right to use the employer's name and logo "on picket signs, leaflets, and other protect material . . . [and an] [e]mployer's proprietary interests are not implicated by the employees' non-commercial use of a name, logo, or other trademark to identify the employer in the court or Section 7 activity."

1. Rules expressly prohibiting the use of company logos, copyrights, and trademarks in the course of Section 7 activity are facially unlawful and infrequently found in handbooks.
2. Broad prohibitions on such use, however, are common and may reasonably be interpreted to ban fair use of the employer's intellectual property in the course of protected activity. The General Counsel has identified the following handbook rules, which categorically restrict non-proprietary use, as unlawfully overbroad:
 - a. "Do 'not use any Company logos, trademarks, graphics, or advertising materials' in social media."
 - b. "Use of [the Employer's] name, address, or other information in your personal profile [is banned] . . . In addition, it is prohibited to use [the Employer's] logos, trademarks or any other copyrighted material."

B. Crafting a lawful intellectual property work rule for purposes of the NLRA is simple; Employers need only identify and request that employees respect applicable fair use laws.

1. For example, the General Counsel identified as lawful a rule requiring employees "[r]espect all copyright and other intellectual property laws" by "show[ing] proper respect for the laws governing copyright, fair use of copyrighted material owned by others, trademarks, and other intellectual property"

VII. EMPLOYER WORK RULES LIMITING OR RESTRICTING PHOTOGRAPHY AND RECORDING

A. The NLRA also confers upon employees the right to photograph and make recordings in furtherance of their protected concerted activities. This right includes the ability to use

personal electronic devices to take pictures and recordings. Two important rules for purposes of evaluating the legality of workplace policies stem from this principles.

1. First, rules categorically banning the *use* of personal equipment for purposes of taking photographs or making recordings are unlawful because they can reasonably be read to limit an employee's ability to do so in furtherance of protected Section 7 activity.
 - a. For example, the Board held in *Hawaii Tribune-Herald*, 356 NLRB No. 63, slip op. at 1 (Feb. 14, 2011), *enf'd sub. nom., Stephens Median, LLC v. NLRB*, 677 F.3d 1241 (D.C. Cir. 2012) that maintenance of an overly broad work rule prohibiting employees from making secret audio recordings violated the Act.
 - b. The General Counsel has identified the following anti-recording handbook rules as unlawful:
 - i. "Taking unauthorized pictures or video on company property is prohibited."
 - ii. "No employee shall use any recording device including but not limited to, audio, video, or digital for the purpose of recording any [Employer] employee or [Employer] operation"
 2. Second, broad rules preventing employees from *possessing or carrying* personal recording equipment, without further limitation, may run afoul of the Act.
 - a. Additionally, the General Counsel indicated that a rule prohibiting employees "from wearing cell phones, making personal calls or viewing or sending texts while on duty" was unlawful despite the fact that the "on duty" limitation. This is because an employee could reasonably read the term "on duty" to include breaks and meals during their shifts in which he or she may lawfully engage in concerted activity, including the use of personal recording devices.
- B. Lawful rules regulating photography and recording equipment are appropriately limited in scope. See *Flagstaff Medical Center*, 357 NLRB No. 65, slip op. at 5 (Aug. 26, 2011), *enf'd in rel. part*, 715 F.3d 928 (D.C. Cir. 2013).

VIII. EMPLOYER WORK RULES RESTRICTING EMPLOYEES FROM LEAVING WORK

- A. The right to strike is a fundamental Section 7 right. Accordingly, broad prohibitions against walking off the job, which could reasonably be interpreted to include protected strikes and walkouts, are also unlawful under the NLRA. *Purple Communications, Inc.*, 361 NLRB No. 43, slip op. at 2 (Sept. 24, 2014).

1. The General Counsel has identified several rules, each of which expressly prohibits “walking off the job,” as inconsistent with the Act. For example, the following employer work rules have been determined to be unlawful.
 - a. “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.”
 - b. “Walking off the job . . . is prohibited.”
- B. To lawfully restrict an employee’s ability to leave work, an employer need only avoid using terms indicative of a strike, such as “work stoppage” or “walking off the job,” or must provide sufficient context so such terminology, if included, cannot reasonably be read to prevent striking.
 1. The General Counsel determined that a rule stating that “[e]ntering or leaving Company property without permission may result in discharge” was lawful because a general rule forbidding an employee from leaving the employer’s property during working hours without permission will not be read to encompass protected work stoppages.