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NLRB General Counsel Releases Memorandum on Unlawful Employer Policies

In our prior alert, we notified you of the National Labor Relations Board's (NLRB) decision to overturn an administrative law judge's (ALJ) ruling, finding that a confidentiality agreement had violated employee rights under the National Labor Relations Act (NLRA). On March 18, 2015, NLRB General Counsel Richard F. Griffin continued this trend by issuing a memorandum in which he summarized his office's position regarding where employer policies violate the NLRA. According to the NLRB General Counsel, many common employer policies might actually violate the NLRA.

The General Counsel's office is independent from the NLRB itself and is responsible for the investigation and prosecution of unfair labor practices and for the general supervision of the NLRB field offices. While his office is not able to make law in the way that the NLRB does, his office's view of the law sets the enforcement goals of the Board.

The General Counsel's position is rooted in his interpretation of Section 7 of the NLRA. Section 7 is one of the sections that apply to **both** unionized **and non-unionized** employers. It prohibits, among other things, restricting the right of employees to discuss wages, hours, and working conditions.

According to the General Counsel, no proof is needed for a violation to be shown of either the employer being anti-union or an actual employee having been chilled in the exercise of Section 7 rights. Indeed, in this memo, the General Counsel explains that an employer can violate Section 7 with even "well-intentioned" handbooks and policies. The General Counsel says a policy should be found unlawful if employees would reasonably construe its language to prohibit Section 7 activity.

The General Counsel reviewed a wide range of employer policies covering confidentiality, social media, and employee conduct rules—and found many such "well-intentioned" policies to be unlawful under the NLRA.

Examples of policies that the General Counsel believes **violate** Section 7, on their face, include the following:

- "Do not discuss customer or employee information outside of work, including phone numbers and addresses."
- "If something is not public information, you must not share it."
- "Be respectful to the company, other employees, customers, partners, and competitors."
- "Do not make fun of, denigrate, or defame your co-workers, customers, franchisees, suppliers, the Company, or our competitors."
- "No defamatory, libelous, slanderous, or discriminatory comments about the Company, its customers and/or competitors, its employees or management."
- "Don't pick fights online."

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- “Do not make insulting, embarrassing, hurtful or abusive comments about other company employees online, and avoid the use of offensive, derogatory, or prejudicial comments.”
- “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.”
- Prohibitions against “taking unauthorized pictures or video on company property.”
- “Employees may not engage in any action that is not in the best interest of the Employer.”
- Prohibitions against the disclosure of the Employer’s handbook to third parties.
- “Refrain from commenting on the company’s business, financial performance, strategies, clients, policies, employees or competitors in any social media, without the advance approval or your supervisor, Human Resources and Communications Departments.”
- “Soliciting, collecting funds, distributing literature on Company premises without proper approvals ... or during employees’ working time.”
- “Walking off the job without authorization.”
- Prohibitions against “threatening, intimidating, foul or inappropriate language.”
- “False accusations against the Company and/or against other employee or customer”

On the other hand, the NLRB General Counsel provided examples of lawful policies. While employers may not be able to have policies on the use of offensive language, the General Counsel believes it is lawful to prohibit “making inappropriate gestures, including visual staring.” The General Counsel’s memorandum does not explain the concept of “visual staring.”

Confused on how to follow these guidelines? You are not alone. Even non-unionized employers should carefully examine with legal counsel their current handbooks or other policies in light of the NLRB General Counsel’s memorandum.

This document is intended to provide you with general information regarding the recent memorandum issued by the NLRB’s General Counsel. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact the attorney listed or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.

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