BURR ALERT

DO EMPLOYERS NEED POLICY REVIEWS FOLLOWING THE ELECTION?

By John J. Coleman, III December 2012

The election is over, so now what? Elections have consequences, and the consequence of this election for employers' employment policies is breathtaking. Have an arbitration policy? It is likely unenforceable. Rules protecting trade secrets? Likely unlawful. Work rules concerning technology use and even workplace violence? Possibly unenforceable. Want to know more?

The great majority of employers have no unions, and little familiarity with the National Labor Relations Act and its enforcers. That is going to change and it impacts union-free employers in all of the ways discussed above. In the past, the extent of most union-free employers' interaction with the National Labor Relations Act has been confined to having the right rules concerning solicitation, wearing buttons, and using company email. No more. The current National Labor Relations Board and Acting General Counsel Lafe Solomon have recently issued a number of opinions directed at making the union-free employer's life more difficult.

Many union-free employers find it useful to have an arbitration policy requiring employees to arbitrate disputes as a condition of employment. After all, the U.S. Supreme Court has said that is all right as long as the same remedies are available, and even that it is all right to have a policy that prevents employees from bringing class actions. The President's NLRB enforcers have other ideas, calling such policies unlawful unfair labor practices. Will your policy survive?

Every wise employer has specific policies protecting confidential information and trade secrets. These forbid employees from talking about confidential information outside of those with a need to know within the company, and from using company logos in a manner the company may consider inappropriate. The President's NLRB enforcers have other ideas. A general prohibition against discussing confidential information or forbidding all unauthorized use of company logos is an unlawful unfair labor practice. Is your definition of "confidential information" appropriate in their view, or is it unlawful? Will rules about the use of employer logos now suddenly cost you attorney's fees?

Every smart union-free employer has a disclaimer at the front of any set of policies to ensure that no employee can argue he or she is anything other than an employee-at-will. That has been the norm for decades. The President's NLRA enforcers, however, think this should change. They narrow considerably any policy that limits the people who can modify an individual's at-will status by what they say. Will your "employment-at-will" statement survive?

Finally, any business requires rules--rules to protect the products, rules to protect the employees, and rules to ensure production flows smoothly. In a union-free environment, employers make the rules. Can even innocuous rules, such as rules against rude behavior or workplace violence policies, result in unwanted scrutiny by the President's NLRA enforcers? You bet. They say many such rules are unlawful unfair labor practices. Will your rules pass muster?

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