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NLRB Releases Advice Memoranda Providing Employers Guidance on Workplace Rules

The National Labor Relations Board (“NLRB”) recently released several advice memoranda through the NLRB’s Office of the General Counsel (“OGC”). Two of these memoranda provide specific insight into how the NLRB will determine whether an employer’s policies and rules are compliant with the National Labor Relations Act (“NLRA”).

This information is crucial for all employers, whether unionized or not, because Section 7 of the NLRA (“Section 7”) provides many of its protections universally to all employees. These rights include the right to self-organize and bargain through unions or otherwise for wages, benefits and other terms or conditions of employment. Section 7 also provides all employees with the right to engage in protected concerted activity and to discuss, comment or complain about wages, benefits and other terms or conditions of employment with or to other employees, third parties and the media, if the purpose is to improve working conditions for employees collectively. Furthermore, Section 8(a)(1) of the NLRA prohibits employers from interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7.

Background – *The Boeing Co. Case*

As more fully discussed in [Kutak Rock’s January 31, 2018 Client Alert](#), the NLRB recently shifted to what may be a more employer-friendly approach in analyzing whether an employer’s workplace rule, policy or handbook provision interfered with an employee’s rights under the NLRA. In *The Boeing Co.*, 365 NLRB No. 154 (2017), the NLRB stated it will designate a workplace policy into one of three categories:

- Category 1 – the policy is lawful, either because (i) it does not prohibit or interfere with the exercise of NLRA rights, or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule.
- Category 2 – the policy must be individually scrutinized as to any interference with NLRA rights and, if so, whether such impact is outweighed by legitimate justifications.
- Category 3 – the policy is unlawful to maintain because it would prohibit or limit NLRA-protected conduct and the impact is not outweighed by any legitimate justifications.

As demonstrated by the memoranda summarized below, the NLRB’s application of this new three-category standard provides clearer guidance as to what policy language is permissible, which will improve employers’ ability to protect their business interests.

ADT, LLC Advice Memorandum

In a memorandum dated July 31, 2018, the OGC issued advice regarding policies in ADT, LLC’s employee handbook, including those related to the dress code, personal cell phone usage, confidential information and media relations. All the employer’s rules were determined to be lawful Category 2 policies except for the rule relating to personal cell phones.

The employer's rule provided that personal cell phones could be used at work only for "work-related or critical, quality of life activities." Further, the policy provided that "[o]ther cellular functions, such as text messaging and digital photography, are not to be used during working hours." This rule was classified as Category 2 and required "individualized scrutiny" to determine whether it adversely affected employees' protected rights and whether the employer had justification to outweigh any adverse impact.

Although the OGC determined the employer could legitimately seek to prevent "distractions, lost time, and lost productivity," as set forth in the rule, "that interest is only relevant when employees are on work time." Thus, the productivity interest "does not outweigh the employees' Section 7 interest in communicating privately via their cell phones, during non-work time." The OGC found "employees will reasonably read the rule to prohibit Section 7 communications by cell phone even during non-work times." In other words, the rule prohibited employees from engaging in concerted activities for purposes of mutual aid or protection when outside of working hours, which directly conflicts with the rights afforded by the NLRA.

Nuance Transcription Services, Inc. Advice Memorandum

In a memorandum dated September 14, 2018, the OGC addressed the company's employee handbook policies, including a rule that the handbook itself is confidential, a prohibition against employees using their company email for non-business purposes, and a prohibition against employees disclosing "payroll" information. The OGC determined all of the rules were unlawful.

The employer's rule relating to its handbook stated: "[t]his handbook and the information in it should be treated as confidential. No portion of this handbook should be disclosed" except to those affiliated with the company. In its analysis, the OGC classified the rule as Category 3 because it prevented employees from conversing with unions or other third parties regarding pay, benefits, and working conditions. The OGC pointed out that the rule prohibits *any* portion of the handbook to be discussed with outside individuals and noted that the employer could have "tailor[ed] a rule to protect [confidential] information without trenching upon employees' Section 7 rights."

The OGC also considered Nuance's email policy, which provided that "[t]he email system . . . [is] Company property intended for business use" and that electronic communications systems "are for business purposes only." The OGC determined that because the rule was not limited in application to work time, it also violated the NLRA because employees generally have the right to use electronic systems to engage in protected activity during non-working time.

Lastly, the OGC addressed the employer's rule prohibiting the disclosure of "payroll" information, noting "[t]he [NLRB] has stated that rules prohibiting employees from discussing wages or benefits with each other fall in Category 3 [unlawful]." The OGC went on to state that even if the rule were classified under Category 2, it still would be unlawful as employees would reasonably construe the restriction on discussing "payroll" to include information in their paychecks regarding employee wages and benefits.

Recommendations

These advice memoranda demonstrate the importance of frequent employee handbook updates to ensure compliance with changing laws. Employers should particularly review policies related to confidentiality of handbooks or any specific information (especially related to pay or wages) and rules regarding email and employees' use of employer's electronic systems. It should be noted that the NLRB can process unfair labor practice charges relating to non-union employees in Section 7 cases.

If your organization has any questions regarding the advice memoranda addressed above or specific policies contained in your handbook, or would like to discuss a review or update to your handbook, please contact your Kutak Rock attorney or a member of our National Labor and Employment Practice.

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