Duff on Hospitality Law

Are You a Non-Union Shop? Why You Should Care About the NLRB's Latest Report

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In this blog post, we discuss the NLRB's March 2015 report and the importance of reviewing and updating your employee handbook. Thank you! - Greg

The National Labor Relations Board (NLRB or the Board) oversees all things union under the National Labor Relations Act (NLRA). Congress enacted the NLRA in 1935 to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy. Even though the NLRB is focused on labor management practices with the unionized workplace, it also has jurisdiction over private sector employers who do not have a union. The Board just has not often exercised that authority - but that has increasingly changed that over the last ten years or so.

The NLRA gives employees the right to act together to try and improve pay and working conditions ("protected, concerted activity"), whether the employees are union or non-union. These rights are also commonly referred to as Section 7 rights because they are outlined in Section 7 of the NLRA. The NLRB has become more active in enforcing these rights. Generally, the Board looks to see if actions taken are of a concerted (more than one person) nature intended to address issues with respect to employees' terms and conditions of employment. Sometimes, though the issue is not the action taken, but the rules that govern the employees' behavior, such as those in your employee handbook.

On March 18, 2015 the General Counsel of the NLRB issued a report regarding what language in certain employer policies would be considered lawful, and what would not. When reviewing such rules, the NLRB looks at whether or not the language would act to chill employees from exercising their right to engage in a protected, concerted activity. In other words, they looked at each policy before them to determine if the average reasonable employee would likely read the policy to mean that the employee was not allowed to talk about the terms and conditions of their employment with others, whether that be outside people or other employees. If it could be read to mean that, the policy was unlawful.

So what sorts of things could be read to restrict employees from talking to each other? Just about anything from social media policies to confidential information policies to anti-harassment rules and anywhere in between. Above all, the context in which a phrase was used seemed to make a difference if a phrase was a close call. So it is important, as you review your handbook, to not just focus on the words themselves but also the context in which they are used. Additionally, it is important to remember that a simple disclaimer

such as, "Nothing in this policy is meant to prevent employees from engaging (or declining to engage) in discussions about their terms and conditions of employment" may be helpful, but they are not an automatic guarantee that an otherwise unlawful policy will now be lawful.

Some examples of phrases the NLRB found to be problematic *(and why)* are:

Confidentiality:

- Do not discuss customer or employee information outside of work, including phone numbers and addresses. *(Overbroad reference to "employee information" and the blanket ban on discussion may lead an employee to think they could not discuss the terms and conditions of employment, including the contact information of other employees so that they could all talk.)*
- Discuss work matters only with other Company employees who have a specific business reason to know or have access to such information. Do not discuss work matters in public places. *(Broad restrictions that do not clarify they are not meant to impinge on an employee's rights under the NLRA so an employee could reasonably understand it to encompass wages, benefits and other terms and conditions of employment.)*
- Confidential Information is: "All information in which its *(sic)* loss, undue use or unauthorized disclosure could adversely affect the Company's interests, image and reputation or compromise personal and private information of its members." *(Employees have a right to share information that supports their complaints about wages and terms and conditions of employment, and employees may believe they cannot disclose that kind of information because it might adversely affect the Company's interest, image or reputation.)*

Employee Conduct Toward Employer:

- Be respectful to the Company, other employees, customers, partners and competitors. *(Overbroad and employees could reasonably construe them to ban protected criticism or protests regarding their supervisors, management or the Company in general.)*
- No defamatory, libelous, slanderous or discriminatory comments about the Company, its customers, and/or competitors, its employees or management. *(Overbroad and employees could reasonably construe them to ban protected criticism or protests regarding their supervisors, management or the Company in general.)*
- It is important that employees practice caution and discretion when posting content on social media that could affect the Company's business operation or reputation. *(Overbroad because it could reasonably be read to require an employee to refrain from criticizing the employer in public.)*

Employee Conduct Toward Another Employee:

- Do not make insulting embarrassing, hurtful or abusive comments about other company employees online and avoid the use of offensive, derogatory or prejudicial comments. *(Overbroad because debate about unionization and other protected concerted activity is often contentious and controversial.*

Employees could reasonably read such a rule to mean they are limited in their ability to be honest in discussions regarding these subjects.)

There are many more examples of problematic employer rules on various topics in the report. You are encouraged to look again at your employee handbook and employer rules. If you have any questions, or for more information regarding this report, please feel free to contact me. We will be glad to help bring your employer rules back within the safety zone - at least until the next General Counsel report is issued.

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