EMPLOYEE HANDOOKS

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Historically, handbooks were optional for employers. However, over time employment laws have increasingly crept-in, influenced and even mandated certain policies and practices. Over the past five years we have seen the number of agency mandates and reviews increase at noticeable rate. As most human resource professionals and labor attorneys know, the company handbook is invariably one of the first documents requested by plaintiff's counsel in almost any employment litigation. Consequently, anything the company has stated in its handbook can and will be used against it in a court of law (or at the agency level). In fact, policies will likely be blown up in front of the jury as exhibits in any employment matter. This is why consideration must be given to every word contained in a handbook to reduce the odds that it will come back to bite the employer in a later lawsuit. Review is warranted as to both legal and practical considerations. An employee handbook also sets forth the expectations of employee behavior and what employees can expect for the company. It must be specific on expectations and flexible for human resources and management to address the infinite number of issues that arise in the workplace.

This paper is not an exhaustive presentation of topics that may be covered in an employee handbook, but rather a collection of suggestions for handbook provisions that are intended to be useful in the workplace as well as in the courtroom. It is also written with federal and Texas law in mind, and does not take into consideration all of the nuances that may be applicable to a multi-state employer.

I. HOT ISSUES AND KEY CASES ON EMPLOYEE HANDBOOKS

A. NLRB's NEW GUIDANCE

For the past few years, handbook policies have drawn the ire of the NLRB. The NLRB has long held that rules or policies that may have a chilling effect on employees' Section 7 activity violates the NLRA. *See Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Even if a policy does not explicitly prohibit such activity, it may still be found unlawful if employees *could* reasonably construe the rule's language to prohibit Section 7 activity. *Id.* In the recent course-changing decision, *The Boeing Company,* 365 NLRB No. 154 (Dec. 14, 2017), the current Board strongly criticized the standard announced in *Lutheran Heritage* that prohibited any rule that ***could*** be interpreted as covering Section 7 activity to add a balancing test and significantly altered the previous jurisprudence on the NLRB's interpretation of its handbook rules when it approved the maintenance of rules promoting "harmonious interactions and relationships".

In the context of the *Boeing* decision, on June 6, 2018, the Office of the General Counsel for the NLRB published Memorandum GC 18-04 to provide guidance to its regional directors on Handbook Rules Post-*Boeing.*

The GC Guidance breaks workplace rules into categories.

1. CATEGORY 1: RULES THAT ARE GENERALLY LAWFUL TO MAINTAIN

These types of rules are generally lawful, "either because the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of rights guaranteed by the [NLRA], or because the potential adverse impact on protected rights is outweighed by the business justifications associated with the rule." Memorandum GC 18-04, p. 2. However, the Board rules that the application of a facially neutral rule against employees engaged in protected concerted activity is still unlawful.

The following types of rules have been placed in Category 1 by the Board.

a. Civility Rules.

Examples of such rules are as follows:

- "Conduct … that is inappropriate or detrimental to patient care of [sic] Hospital operation or that impedes harmonious interactions and relationships will not be tolerated."
- "Behavior that is rude, condescending or otherwise socially unacceptable" is prohibited.
- Employees may not make "negative or disparaging comments about the … professional capabilities of an employee or physician to employees, physicians, patients, or visitors."
- "Disparaging … the company's employees" is prohibited.
- Rude, discourteous or unbusinesslike behavior is forbidden.
- Disparaging, or offensive language is prohibited.
- Employees may not post any statements, photographs, video or audio that reasonably could be viewed as disparaging to employees.

According to the Board in *Boeing*, these types of rules, when reasonably interpreted, we not prohibit or interfere with Section 7 rights, but even if some rules of this type could potentially interfere, this is a slight possibility. Further, while protected concerted activity may involved criticism of fellow employees or supervisors, the requirement that the criticism be civil does not unduly burden that right, especially in light of the legitimate justifications that employers have a legal responsibility to maintain a workplace free from unlawful harassment, an interest in preventing violence and in avoiding a toxic work environment that impacts productivity.

b. No Photography Rules.

In the Whole Foods Market Inc., 363 NLRB No. 87, slip op. at 6-7 (Dec. 24, 2015), the rule that "[U]se of [camera-enabled devices] to capture images or video is prohibited…" was found by the Board as a rule that could violate Section 7 rights. The Board in *Boeing*, however, under the new standard, placed these types of rules in Category 1.

Other examples of such rules that will fall in Category 1 are as follows:

- Employees may not "record conversations, phone calls, images or company meetings with any recording device" without prior approval.
- Employees may not record telephone or other conversations they have with their coworkers, managers or third parties unless such recordings are approved in advance.

The Board in *Boeing* determined that these rules have little impact on NLRA-protected rights since photography is not central to concerted activity. Again, while such rules may occasionally chill rights, when balanced with the stronger business interests of encouraging open communication, protecting proprietary, confidential and customer information, and avoiding legal liability, these types of rules would be lawful.

c. Rules Against Insubordination, Non-Cooperation, or On-the-Job Conduct that Adversely Affects Operations.

On balance these types of rules would fall under Category 1 as employers have a legitimate business interest in preventing insubordination or non-cooperation at work.

d. Disruptive Behavior Rules.

These types of rules that prohibit "disruptive conduct" or "disorderly conduct" will generally fall into Category 1 as employees would likely not interpret such rules as applying to Section 7 activity, even though classic protected concerted activity such as walk-outs, protests, picketing, and strikes would be disruptive, the workplace rules seek to address unprotected roughhousing and dangerous conduct. Employers would not be able to discipline employees engaging in protected activity under these rules, but can now discipline employees engaging in unprotected and disorderly activities.

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