Your company employee handbook
Why is the NLRB suddenly interested in it?

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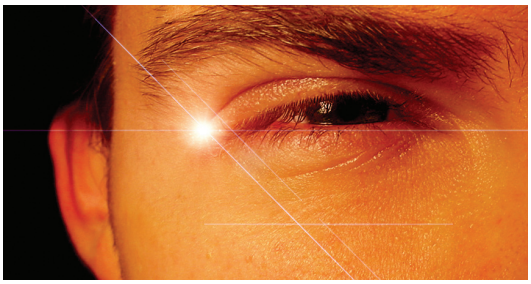

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As the unionized workforce in the private sector continues to decline, the National Labor Relations Board (NLRB) under the current administration has increasingly turned its attention to other issues. Those issues include a non-union company's social media and mandatory arbitration policies and typical workplace rules and regulations (some commentators contend that this is NLRB's way to maintain relevancy – and funding).

Over the past few years there has been an onslaught of NLRB decisions which upend traditionally held views on the validity of common employer workplace and handbook policies such as employment at-will disclaimers, confidentiality, civility and codes of conduct. The NLRB's stated concern is that these standard handbook policies are overbroad and chill protected speech.

The NLRB contends that an employer covered by the National Labor Relations Act (NLRA) violates it by maintaining work rules or policies that prohibit NLRA-protected union or concerted activity, such as joining a union or **discussing terms and conditions of employment with coworkers.**

The NLRB says: even if not explicit, a workplace rule can be unlawful if employees would reasonably construe the language to prohibit protected Section 7 activity.

Basically, Section 7 of the Act provides that all employees of covered employers — not just employees in labor unions — may engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." Because restrictions on Section 7 rights are rarely "explicit," the NLRB generally looks at whether:

1) employees would reasonably construe the company's handbook language to prohibit Section 7 activity,
2) the rule was promulgated in response to union activity or
3) the rule has been applied to restrict the exercise of Section 7 rights.

It is prudent for non-union Georgia Green Industry members to review their employee handbooks before the NLRB asks for a copy; after a disgruntled employee has reached out to the NLRB for help when he or she is disciplined for violation of company policy. If the NLRB gets involved it may require the adverse employment decision be overturned (including payment of back wages and reinstatement) and mandate that the company post notices advising its workforce that it will not enforce its offending company policies and that it will change those policies. Even though there may not be a fine imposed, most companies do not need this distraction and bad publicity not to mention the significant time impact and expense spent dealing with the issue.

Workplace policies

Here are some common workplace policies recently noted by commentators as attracting NLRB attention:

Employment at Will Disclaimers

At-will clauses are common policies that allow employers to terminate workers for any reason as long as it's not unlawful. However, an NLRB Administrative Law Judge recently held in a 2012 case that an American Red Cross local unit breached the NLRA by maintaining a handbook provision that required the employee to agree

that "the at-will employment relationship cannot be amended, modified or altered in any way."

Employer Take-Away:
The NLRB's general counsel has provided guidance to companies with at-will disclaimers suggesting that the disclaimer should note that management could enter into a written agreement to change employees' at-will status. The NLRB Acting General Counsel's Advice Memo upheld the following handbook language, so add a similar paragraph to your at-will disclaimer:

No manager, supervisor, or employee of [name of company] has any authority to enter into an agreement for employment for any specified period of time or to make an agreement for employment other than at-will. Only the president of the Company has the authority to make any such agreement and then only in writing.

Gossip, Civility, Values and Standards, and Code of Conduct Policies

In April, 2014 the NLRB issued an opinion involving non-unionized Hills and Dales General Hospital in Cass City, MI. The Hospital issued an employee, Danielle Corliss, a written warning for a Facebook comment she posted in response to a Facebook rant by a former employee who had been fired for "playfully throwing a yogurt cup at her boss" (the fired employee's description of the incident).

> *Corliss wrote:*
> **Holy s–t rock on [fired employee]! Way to talk about the douchebags you used to work with. I LOVE IT!!!**

The Hospital's disciplinary warning to Corliss sparked a complaint; the NLRB got involved and reviewed three paragraphs of the Hospital's *Values and Standards Behavior policy*. Hospital officials testified the civility policy had been adopted in 2006 in response to "a poor work environment," because ... hospital departments were not cooperating with each other, and employee relationships were suffering due to 'back-biting and back stabbing" resulting in low employee satisfaction, departing employees and loss of patients.

Despite the seemingly valid and innocuous reason for the policy (which had been drafted with employee input) the NLRB rejected three segments of the Hospital's *Values and Standards Behavior Policy*:

- Provision 11: We will not make negative comments about our fellow team members and we will take every opportunity to speak well of each other.
- Provision 16: We will represent Hills & Dales in the community in a positive and professional manner in every opportunity.
- Provision 21: We will not engage in or listen to negativity or gossip. We will recognize that listening without acting to stop it is the same as participating.

The Hospital argued that Provisions 11 and 21 could only be unlawful if they were linked to employees' engagement in Section 7 activities. The NLRB disagreed, ruling that Provisions 11 and 21 were "unlawfully overbroad and ambiguous" by their own terms.

The majority of the Board also overruled a prior decision in the case and found Provision 16 overbroad because the requirement that employees "represent [the hospital] in the community in a positive and professional manner" is just as overbroad and ambiguous as the proscription of "negative comments" and "negativity" because, which viewed in the context of the other provisions employees would reasonably view the language as proscribing them from engaging in any public activity or making any public comments that are not perceived as positive towards [the hospital] on work related matters.

In *First Transit Inc. and Amalgamated Transit Union Local #1433 AFL-CIO*, the Board questioned a number of First Transit's employee handbook provisions. There, the NLRB upheld at least one policy. It looked at a prohibition on profane or abusive language that is uncivil, insulting, contemptuous, vicious or malicious. Looking at the language in its context, the NLRB found that reasonable employees would construe this prohibition as merely requiring that they act in accordance with "general notions of civility and decorum." The NLRB determined that this language was not so patently ambiguous as to render it unlawfully overbroad.

Employer Take-Away:
If your company has handbook language or workplace rules that use broad generic language about teamwork, positive communication, negativity, courtesy or unprofessionalism, consider revising and narrowing the language and adding a specific savings clause which clearly states that the rule or policy is not intended to interfere with any employee's exercise of any Section 7 or other legal rights. If carefully drafted prohibitions on "gossip" may be upheld. Consider using phrases that require your employees to "represent the company in a positive and ethical manner" as this phrasing (if used in the proper context) has been approved by the NLRB.

Confidentiality

Many employee handbooks also contain provisions instructing employees to keep company information confidential. The NLRB has issued several recent opinions addressing this type of provision.

Recently, the Fifth Circuit Court of Appeals (covering federal courts in Texas, Louisiana and Mississippi) in *Flex Frac Logistics, LLC v. NLRB* upheld the NLRB's rejection of a nonunion trucking company's confidentiality policy. The confidentiality policy prohibited employees from discussing confidential company financial information (including costs, prices, current and future business plans, and computer and software systems and processes) as well as personnel information and documents, company logos and artwork. The policy also warned employees that they would be disciplined and potentially terminated for disclosing such confidential information.

An unfair labor practice charge was filed by a company employee who was terminated for discussing confidential information.

The NLRB found that although the confidentiality policy did not explicitly prohibit the discussion of wages or terms and conditions of employment, the confidentiality policy was unlawful on its face because it was overly broad.

In its March, 2014 decision the 5th Circuit upheld the NLRB's determination, concluding that by specifically including "personnel information" as a prohibited category of confidential information a reasonable person could interpret the confidentiality policy to prohibit employees from discussing wage information with co-workers and non-employees.

Employer Take-Away:
Georgia's green industry employers should evaluate whether their confidentiality policies are overly broad in light of the NLRB's increased scrutiny. **Bottom line: employers cannot successfully maintain policies that restrict their employees' ability to talk about how much they earn.** However your confidentiality policy can limit discussion of trade secrets and other confidential, proprietary information, including employee-specific information such as social security numbers, medical records, background criminal checks, drug tests, and other similar information; but precluding discussion of wages and other terms and conditions of employment is off limits per the NLRB.

Further, **don't fire or discipline an employee for talking to co-workers about wages or working conditions** because it could be viewed as resulting from protected activity under the NLRA. You may be inviting the NLRB to peruse your handbook.

Open Door Policies and Confidentiality during Workplace Investigations

Many employee handbooks contain open-door and dispute-resolution policies directing employees to first take their concerns to the human resources or other company departments. The NLRB is closely inspecting these seemingly innocuous policies.

The NLRB contends that if a company handbook suggests that employees first have to take a complaint through an open-door policy or are not allowed to complain to third parties (such as unions, other workers, or agencies such as the NLRB or the EEOC), that open door/dispute resolution policy violates the NLRA because employees have a right to discuss problems in the workplace amongst themselves and also to appeal to the public about their wages, hours or working conditions.

However the NLRB also acknowledges that it can be legal, under some circumstances, to require confidentiality during an investigation, depending on:

- the severity of the allegation
- whether a person needs protection against retaliation
- whether protection against destruction of evidence is required
- whether any testimony is in danger of being fabricated
- whether there is a realistic need to prevent a cover up, and
- whether to particularize the instruction.

Employer Take-Away:
If your employee handbook contains open-door policy language, consider adding a savings clause which clearly states that the rule or policy is not intended to interfere with any employee's exercise of any legal rights, particularly Section 7 rights. In particular review your confidentiality during investigation clause to narrow the focus to require confidentiality only when it is truly needed and consider adding a savings clause.

This article is a short overview of some aspects of workplace law and does not provide legal advice. Every situation is fact dependent and business owners may wish to consult with counsel experienced in this area for legal counsel and assistance.

About the author

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