April 2015


James Castagnera
Rider University

Follow this and additional works at: http://thekeep.eiu.edu/jcba

Part of the Collective Bargaining Commons, and the Higher Education Commons

Recommended Citation
Available at: http://thekeep.eiu.edu/jcba/vol0/iss10/56

This Proceedings Material is brought to you for free and open access by The Keep. It has been accepted for inclusion in Journal of Collective Bargaining in the Academy by an authorized editor of The Keep. For more information, please contact tabruns@eiu.edu.

By Jim Castagnera

In recent years, the NLRB has shaken up the corporate world with its decisions regarding the reach of the National Labor Relations Act Section 7, which seeks to secure employee protection for concerted activities... whether the activities involve unionism or not. Especially controversial have been Obama Board rulings to the effect that social-network interactions among employees may constitute “protected, concerted activity,” which cannot be forbidden by company policies.

General Counsel Memorandum GC 15-04 was issued on March 18th. GC Richard F. Griffin, Jr. opens his report with the observation, “During my term as General Counsel, I have endeavored to keep the labor-management bar fully aware of the activities of my Office. As part of this goal, I continue the practice of issuing periodic reports of cases raising significant legal or policy issues. This report presents recent case developments arising in the context of employee handbook rules. Although I believe that most employers do not draft their employee handbooks with the object of prohibiting or restricting conduct protected by the National Labor Relations Act, the law does not allow even well-intentioned rules that would inhibit employees from engaging in activities protected by the Act. Moreover, the Office of the General Counsel continues to receive meritorious charges alleging unlawful handbook rules. I am publishing this report to offer guidance on my views of this evolving area of labor law, with the hope that it will help employers to review their handbooks and other rules, and conform them, if necessary, to ensure that they are lawful.”
His report goes on to articulate the following unlawful “confidentiality” rules that the GC complains are commonly found in handbooks:

- **Do not discuss "customer or employee information" outside of work, including "phone numbers [and] addresses."**

  In the above rule, in addition to the overbroad reference to "employee information," the blanket ban on discussing employee contact information, without regard for how employees obtain that information, is also facially unlawful.

- **"You must not disclose proprietary or confidential information about [the Employer, or] other associates (if the proprietary or confidential information relating to [the Employer's] associates was obtained in violation of law or lawful Company policy)."**

  Although this rule's restriction on disclosing information about "other associates" is not a blanket ban, it is nonetheless unlawfully overbroad because a reasonable employee would not understand how the employer determines what constitutes a "lawful Company policy."

- **"Never publish or disclose [the Employer's] or another's confidential or other proprietary information. Never publish or report on conversations that are meant to be private or internal to [the Employer]."**

  While an employer may clearly ban disclosure of its own confidential information, a broad reference to "another's" information, without further clarification, as in the above rule, would reasonably be interpreted to include other employees' wages and other terms and conditions of employment.

  We determined that the following confidentiality rules were facially unlawful, even
though they did not explicitly reference terms and conditions of employment or employee information, because the rules contained broad restrictions and did not clarify, in express language or contextually, that they did not restrict Section 7 communications:

- Prohibiting employees from "[d]isclosing ... details about the [Employer]."
- "Sharing of [overheard conversations at the work site] with your co-workers, the public, or anyone outside of your immediate work group is strictly prohibited."
- "Discuss work matters only with other [Employer] employees who have a specific business reason to know or have access to such information... Do not discuss work matters in public places."
- "[I]f something is not public information, you must not share it."

Because the rule directly above bans discussion of all non-public information, we concluded that employees would reasonably understand it to encompass such non-public information as employee 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 [Employer's] interests, image and reputation or compromise personal and private information of its members."

Employees not only have a Section 7 right to protest their wages and working conditions, but also have a right to share information in support of those complaints. This rule would reasonably lead employees to believe that they cannot disclose that kind of information because it might adversely affect the employer's interest, image, or reputation.

**Rules that pass the GC’s muster.** The report also includes handbook policies that the NLRB considers acceptable under Section 7:

- No unauthorized disclosure of "business 'secrets' or other confidential
information."

- "Misuse or unauthorized disclosure of confidential information not otherwise available to persons or firms outside [Employer] is cause for disciplinary action, including termination."

- "Do not disclose confidential financial data, or other non-public proprietary company information. Do not share confidential information regarding business partners, vendors or customers."

Finally, even when a confidentiality policy contains overly broad language, the rule will be found lawful if, when viewed in context, employees would not reasonably understand the rule to prohibit Section 7-protected activity. The following confidentiality rule, which we found lawful based on a contextual analysis, well illustrates this principle:

- **Prohibition on disclosure of all "information acquired in the course of one's work."**

This rule uses expansive language that, when read in isolation, would reasonably be read to define employee wages and benefits as confidential information. However, in that case, the rule was nested among rules relating to conflicts of interest and compliance with SEC regulations and state and federal laws. Thus, we determined that employees would reasonably understand the information described as encompassing customer credit cards, contracts, and trade secrets, and not Section 7-protected activity.

[http://www.nlrb.gov/reports-guidance/general-counsel-memos]

The **Wendy’s International case.** The second half of the GC’s report pays special attention to the recent Board decision in which it found that the fast-food giant’s
handbook violated Section 7 by prohibiting reproduction of the tome and any discussion of the burger king on social media. Specifically, the Wendy’s handbook admonished its workers:

\textit{No part of this handbook may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or information storage and retrieval system or otherwise, for any purpose without the express written permission of Wendy's International, Inc. The information contained in this handbook is considered proprietary and confidential information of Wendy's and its intended use is strictly limited to Wendy's and its employees. The disclosure of this handbook to unauthorized parties is prohibited. Making an unauthorized disclosure of this handbook is a serious breach of Wendy's standards of conduct and ethics and shall expose the disclosing party to disciplinary action and other liabilities as permitted under law.}

And:

\textit{Refrain from commenting on the company's business, financial performance, strategies, clients, policies, employees or competitors in any social media, without the advance approval of your supervisor, Human Resources and Communications Departments. Anything you say or post may be construed as representing the Company's opinion or point of view (when it does not), or it may reflect negatively on the Company. If you wish to make a complaint or report a complaint or troubling behavior, please follow the complaint procedure in the applicable Company policy (e.g., Speak Out).}

Explains the GC regarding the first of these provisos, “We concluded that this provision was unlawful because it prohibited disclosure of the Wendy's handbook,
which contains employment policies, to third parties such as union representatives or
the Board. Because employees have a Section 7 right to discuss their wages and other
terms and conditions of employment with others, including co-workers, union
representatives, and government agencies, such as the Board, a rule that precludes
employees from sharing the employee handbook that contains many of their working
conditions violates Section 8(a)(1).”

With respect to the second, “Although employers have a legitimate interest in
ensuring that employee communications are not construed as misrepresenting the
employer's official position, we concluded that this rule did not merely prevent
employees from speaking on behalf of, or in the name of, Wendy's. Instead, it
generally prohibited an employee from commenting about the Company's business,
policies, or employees without authorization, particularly when it might reflect
negatively on the Company. Accordingly, we found that this part of the rule was
overly broad. We also concluded that the rule's instruction that employees should
follow the Company's internal complaint mechanism to "make a complaint or report a
complaint" chilled employees' Section 7 right to communicate employment-related
complaints to persons and entities other than Wendy's.”

The company’s admonishment to its associates to respect copyrights and
trademarks was overly broad in the Board’s opinion. That aspect of the rule could
cause employees to conclude they weren’t even allowed to make fair-use references
to company policies and other publications. No legitimate intellectual-property
interests were being protected by that part of the policy.

The portion of the policy proscribing posting on social media of any photos of
company events, absent the legal department’s blessing, could be construed to stop a
picketing employee from being depicted in the social media. Again: overly broad and
therefore illegal.
And the part of the policy prohibiting anonymous blog posts was a clear violation of Section 7 in effectively requiring protesting employees to self-identify… an “unwarranted burden” on Section 7 rights.

And there’s more. Rules restricting workers’ criticism of the company and its managers also elicited a list of “no-no’s” from the General Counsel’s pen:

We found the following rules unlawfully overbroad since employees reasonably would construe them to ban protected criticism or protests regarding their supervisors, management, or the employer in general.

• "[M]e respectful to the company, other employees, customers, partners, and competitors."

• Do "not make fun of, denigrate, or defame your co-workers, customers, franchisees, suppliers, the Company, or our competitors."

• "Be respectful of others and the Company."

• No "defamatory, libelous, slanderous or discriminatory comments about [the Company], its customers and/or competitors, its employees or management."

While the following two rules ban "insubordination," they also ban conduct that does not rise to the level of insubordination, which reasonably would be understood as including protected concerted activity. Accordingly, we found these rules to be unlawful.

• "Disrespectful conduct or insubordination, including, but not limited to, refusing to follow orders from a supervisor or a designated representative."

• "Chronic resistance to proper work-related orders or discipline, even though not overt insubordination" will result in discipline.

In addition, employees’ right to criticize an employer's labor policies and treatment of employees includes the right to do so in a public forum. See Quicken Loans, Inc., 361
NLRB No. 94, slip op. at 1 n.1 (Nov. 3, 2014). Accordingly, we determined that the following rules were unlawfully overbroad because they reasonably would be read to require employees to refrain from criticizing the employer in public.

- "Refrain from any action that would harm persons or property or cause damage to the Company's business or reputation."
- "It is important that employees practice caution and discretion when posting content [on social media] that could affect [the Employer's] business operation or reputation."
- Do not make "[s]tatements that damage the company or the company's reputation or that disrupt or damage the company's business relationships."
- "Never engage in behavior that would undermine the reputation of [the Employer], your peers or yourself."

With regard to these examples, we recognize that the Act does not protect employee conduct aimed at disparaging an employer's product, as opposed to conduct critical of an employer's labor policies or working conditions. These rules, however, contained insufficient context or examples to indicate that they were aimed only at unprotected conduct.


Reactions. Comments the law firm Bradley, Arant, Boult, Cummings, “Employers should read the General Counsel’s memo very carefully. Although the logic about what is restricted and what is not may appear inconsistent at times, the primary message is that
the NLRB is focused on employer handbook restrictions that they believe affect employees’ ability to discuss their working conditions and to criticize their employer. Additionally, employers should remember that just because you do not have a union does not mean these rules don’t apply to you.” [http://www.babc-employmentlawinsights.com/2015/03/if-you-cant-say-anything-nice-nlrb-general-counsel-releases-new-report-on-employee-handbook-rules/]

Adds Bond, Schoeneck & King, “Over the past few years, the NLRB and its General Counsel have aggressively scrutinized many frequently used employee handbook provisions. The basis for this scrutiny is the alleged infringement of the right of employees to engage in protected concerted activity under Section 7 of the National Labor Relations Act (NLRA). Section 7 activity includes the right to discuss, challenge, question, and advocate changes in wages, hours, and other terms and conditions of employment in both unionized and non-unionized work environments. Of course, it also includes the right to engage in union organizing. A majority of the current NLRB will deem an employee handbook provision to violate the NLRA if it specifically prohibits Section 7 activity or if ‘employees would reasonably construe’ the rule as prohibiting such activity. It is this ‘reasonably construe’ language that has resulted in many common employee handbook provisions being declared unlawful by the majority of the current NLRB.”

During the six-plus years of the Obama Administration, the NLRB has been an aggressive agency in search of an expanded mission. With less than 10 percent of the private-sector workforce represented by labor unions today, the Board has used Section 7 as its principal lever for prying its way into the non-union workplace. Its Chicago office
made headlines last year by declaring the Northwestern University football team to be employees eligible to vote for union representation. That decision, even more than the “social network” cases that stimulated the GC’s March report, exemplified the Board’s willingness to stretch the statutory envelope to the ripping point in its quest for relevance in an increasingly non-union America.