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Hold On To Your Employer Handbooks: Part 1

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Over the last 18 months, federal agencies including the U.S. Securities and Exchange Commission, National Labor Relations Board and U.S. Equal Employment Opportunity Commission have initiated challenges to a wide variety of employer policies. Notably, in many cases, these challenges have been to the employers' mere "maintenance" of the policies, without any evidence that they have been implemented in specific cases to interfere with employee rights. This article discusses several of these challenges.

Part one of this article series focuses on agency challenges to policies dealing with workplace communications and conduct, such as confidentiality, employee conduct and social media policies. Part two addresses recent developments concerning regulation of restroom and background check policies by the EEOC and U.S. Occupational Safety and Health Administration. Part three concludes by examining restrictions and requirements imposed on employer policies regarding wellness programs, pregnancy discrimination and employee dress codes.

Introduction

Among the critical policies that nearly every employer implements are policies governing communications between employees and management, co-workers and third parties. These policies have been subject to increasing scrutiny and attack in recent months. Part one discusses how various federal agencies have been challenging such policies, and how employers can balance the need to control their workplaces with the proliferation of agency restrictions.

I. Confidentiality Policies Face Scrutiny From Multiple Agencies

Perhaps the most robust attacks on employer policies have come in the form of challenges to employer confidentiality and nondisclosure policies. The SEC, NLRB and EEOC have all gotten in on the act, with each bringing or threatening litigation over employer policies that they perceive to unduly restrict employees in exercising their statutorily protected rights.

A. SEC

SEC Rule 21F-17, enacted pursuant to the Dodd-Frank Act, states that "no person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement ... with respect to such communications." 17 C.F.R. § 240.21F-17.[1]

In April 2015, the SEC announced that it had commenced a first enforcement action KRB Inc., the agency's first under Rule 21F-17. According to the SEC, KBR required witnesses in internal investigations to sign confidentiality agreements that threatened discipline for disclosure concerning the matters at issue without approval from KBR's legal department. The SEC concluded that the agreements violated Rule 21F-17 because the agreements "potentially discouraged employees from reporting securities violations." *See* SEC Release 2015-54 (April 1, 2015). More generally, the SEC noted that "SEC rules prohibit employers from taking measures through confidentiality, employment, severance, or other type of agreements that may silence potential whistleblowers before they can reach out to the SEC." Significantly, the SEC's challenge was to KBR's agreements generally, as the SEC stated that it was "unaware of any instances in which (i) a KBR employee was in fact prevented from communicating directly with Commission Staff about potential securities law violations, or (ii) KBR took action to enforce the form confidentiality agreement or otherwise prevent such communications." *In re: KBR Inc.*, SEC File No. 3-16466, Order dated April 1, 2015, Release No. 74619.In response to the SEC's action, KBR agreed to pay a $130,000 penalty and revise its agreements.

The SEC's action against KBR does not appear to be an isolated case. In September 2015, Barnes & Noble Inc. announced in a quarterly report that the SEC was investigating Barnes & Nobles' use of employee confidentiality agreements in violation of Rule 21F-17. *See* Barnes & Noble Inc. Form 10-Q dated Sept. 10, 2015. In light of these developments, employers subject to the jurisdiction of the SEC must carefully examine their policies and agreements to ensure compliance with Rule 21F-17. As the SEC warned in disclosing its action and the settlement with KBR, "employers should similarly review and amend existing and historical agreements that in word or effect stop their employees from reporting potential violations to the SEC." SEC Release 2015-54.

B. NLRB

For the past several years, the NLRB has issued dozens of decisions invalidating employer confidentiality policies on the basis that they unlawfully interfere with employees' exercise of their rights under Section 7 of the National Labor Relations Act. Section 7 of the NLRA guarantees employees the right to engage in "concerned activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Particularly in recent years, the NLRB has construed the phrases "concerted activities" and "mutual aid or protection" extremely broadly to invalidate a myriad of employer policies. Many of these decisions have involved nonunion employers, and there is no indication that the NLRB's restrictions are loosening.

In *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), the NLRB determined that the "maintenance" of a work rule will violate the NLRA if it "reasonably tends to chill employees in the

exercise of their Section 7 rights." "If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the 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." *Id.* at 647. The vast majority of the NLRB's decisions invalidating employer policies have relied on the first prong of this analysis.

In March 2015, the NLRB's general counsel issued a report concerning the board's handling of cases involving challenges to employer rules, particularly confidentiality and social media policies. *See* GC Memorandum 15-04 (March 18, 2015). With regard to confidentiality policies, the general counsel wrote that, in general, "broad prohibitions on disclosing 'confidential' information are lawful so long as they do not reference information regarding employees or anything that would reasonably be considered a term or condition or employment, because employers have a substantial and legitimate interest in maintaining the privacy of certain business information." The general counsel went on to provide examples of employer confidentiality policies that do and do not pass muster under the NLRA. For example, the general counsel noted that the following policies had been found by the NLRB or its administrative law judges to be unlawfully overbroad:

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

- "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)."

- "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]."

- "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."

The general counsel went on to conclude that the following policies, in contrast, were permissible because they did not restrict employees' discussions of the terms and conditions of their employment:

- 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."

The general counsel's interpretations of the NLRA have generally aligned with those of the NLRB itself and the board's administrative law judges. For instance, in *Macy's Inc.*, No. 1-CA-123640 (NLRB Div. of Judges May 12, 2015), an administrative law judge of the NLRB invalidated several of Macy's company policies, including rules barring the disclosure of "the personal information of the Company's employees" and "personal data of its present and former associates." This rule, the administrative law judge ruled, "[O]bviously restricts employees in their Section 7 rights to discuss their terms and conditions of employment with fellow employees, as well as their ability to notify a union of other employees ... who might be interested in participating in the union movement." The judge also rejected Macy's defense of its policy based on the policy's "savings clause," which stated that nothing in the policy "is intended or will be applied, to prohibit employees from exercising their rights protected under federal labor law, including concerted discussion of wages, hours or other terms and conditions of employment."[2] According to the judge, this clause was "too generic." The remedy ordered by the judge was significant as well — he required that Macy's rescind the policy and notify employees nationwide of the change.

In addition to invalidating policies prohibiting discussions of wages and personnel information, the NLRB also typically holds that policies requiring that internal investigations be kept confidential are unlawful absent a specific showing of a compelling need for such a policy. For instance, in *Boeing Co.*, 362 NLRB No. 195 (Aug. 27, 2015), the NLRB held in a 2-1 decision that Boeing maintained an overbroad work rule prohibiting employees from discussing issues being investigated by the company's human resources department. The NLRB also invalidated a revised rule issued by Boeing that only "recommended" that employees refrain from discussing an investigation with co-workers. Noting that "mandatory phrasing" is not necessary for a rule to be deemed overbroad, the majority concluded that the revised rule tended to inhibit employee Section 7 rights because "recommending" that employees not discuss ongoing investigations was equivalent to "requesting" confidentiality, which the NLRB typically holds to be unlawful. A similar policy was also invalidated by an administrative law judge in *T-Mobile USA Inc.*, Cases 01-CA-142030 10-CA-133833 (NLRB Div. of Judges Aug. 3, 2015) (policy mandating that employees "maintain the confidentiality" of names of individuals involved in internal investigations and "keep confidential" communications between themselves and investigators was unlawful).

C. EEOC

In 2014, the EEOC filed a pattern or practice case against CVS, claiming that several of the provisions of CVS' separation agreement interfered with workers' rights under Title VII of the 1964 Civil Rights Act to lodge discrimination claims with agencies and cooperate in enforcement of claims. *EEOC v. CVS Pharmacy Inc.*, No. 1:14-CV-0863 (U.S.D.C, N.D. Ill.). The EEOC had dismissed an individual discrimination charge in the case, but decided that several provisions in the agreement, including a confidentiality clause and standard provisions requiring employees to notify the company if the employee received an inquiry from an investigator, a nondisparagement clause and a no-pending-actions clause, violated Title VII. Although CVS prevailed in the case at the summary judgment stage, the court did not address the merits of the EEOC's challenge to CVS' agreement. The EEOC has appealed to the Seventh Circuit. In the meantime, the EEOC may continue to challenge employer agreements and policies that they contend

interfere with workers' rights under Title VII to bring claims and cooperate with the EEOC.

II. Employee Conduct Rules

In addition to its campaign against confidentiality policies, the NLRB has issued numerous decisions invalidating employer work rules governing employee conduct. As stated in the general counsel's March 2015 memorandum, the NLRB has ruled that "employees ... have the Section 7 right to criticize or protest their employer's labor policies or treatment of employees." This includes the right to engage in Section 7 conduct even if it involves "intemperate, abusive and inaccurate statements." *Linn v. United Plant Guards*, 383 U.S. 53 (1966). Thus, the NLRB has struck down work rules restricting employee conduct toward the employer itself — such as prohibitions on "disrespectful," "negative," "inappropriate" or "rude" conduct directed toward the employer — that it believes could be interpreted to prohibit protected activity. These decisions stand in contrast to the NLRB's position that requirements that employees be respectful and professional toward co-workers (as opposed to the employer or management), which have been ruled to be permissible.

One recent example of the NLRB's approach to employee communications concerning management is *Pacific Bell Telephone Co.*, 362 NLRB No. 105 (June 2, 2015). There, the NLRB held that the employer violated the NLRA by barring employees from wearing Communications Workers of America buttons and stickers bearing the phrases "WTF Where's the Fairness," "FTW Fight to Win" and "Cut the Crap! Not My Healthcare." According to the NLRB, the buttons were not "so vulgar and offensive as to cause employees wearing them to lose the protection of the Act." The NLRB further noted that "we find that the possible suggestion of profanity, or 'double entendre,' as the Respondents characterize it, is not sufficient to render the buttons and stickers unprotected here, where an alternative, nonprofane, inoffensive interpretation is plainly visible and where, further, the buttons and stickers were not inherently inflammatory and did not impugn the Respondents' business practices or product."

III. Social Media Policies and Use of Company Logos

One of the most noteworthy and contentious issues currently before the NLRB is the issue of an employers' right to monitor and issue discipline based on employees' use of social media. The NLRB has afforded employees broad rights to use social media to engage in concerted protected activity. Indeed, the general counsel has issued several reports addressing employers' regulation of employees' use of social media. *See* general counsel reports dated Aug. 18, 2011, Jan. 25, 2012, and May 30, 2012.

Additionally, the NLRB has issued numerous recent decisions concerning the scope of employees' rights with respect to social media.

- In *Pier Sixty LLC,* 362 NLRB No. 59 (March 31, 2015), the NLRB held that an employee's profanity-laced Facebook post arising from criticism he received from his supervisor was protected by the NLRA. According to the majority, while the employee's post was "distasteful," his "impulsive reaction ... reflected his exasperated frustration and stress after months of concertedly protesting disrespectful treatment by managers — activity protected by the Act."

- In *Boch Imports Inc.,* 362 NLRB No. 83 (April 30, 2015), a majority of the NLRB invalidated an employer's social media policy requiring that employees identify themselves when discussing the company's business or policy issues.

- In *Tinley Park Hotel & Convention Ctr. LLC,* No. 13-CA-141609 (ALJ June 16, 2015), an administrative law judge concluded that an employer acted unlawfully by disciplining an employee for social media comments that placed the employer in an "unfavorable light," in violation of the employer's policy prohibiting "disloyalty, including disparaging or denigrating [the employer] by making or publishing false or malicious statements." The administrative law judge concluded that the employer's policy was overbroad because it could be read as barring employees from discussing their complaints about supervisors.

Due to the multimedia nature of social media, an issue that has been frequently confronted by the NLRB is the permissibility of employer policies prohibiting the use of company logos and copywritten and trademarked materials. The NLRB has held that while employers have a legitimate interest in protecting their intellectual property, employees must be allowed "fair protected use" of that property. Accordingly, work rules broadly prohibiting use of "any company logos, trademarks, graphics, or advertising materials in social media" are unlawful. *See* General Counsel Memorandum 15-04. On the other hand, policies that simply warn employees to respect copyright and other intellectual property laws, without flatly barring use of company logos, etc., are generally permitted.

IV. Arbitration Policies

In a number of highly publicized decisions, the U.S. Supreme Court has reaffirmed the breadth and preemptive power of the Federal Arbitration Act. *See AT&T Mobility LLCv. Concepcion,* 131 S. Ct. 1740 (2011); *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013). Despite these rulings, the NLRB has held that an employer violates the NLRA "when it requires employees covered by the Act, as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours, or other working conditions against their employer in any forum, arbitral or judicial." *D.R. Horton Inc.*, 357 NLRB No. 184 (2012); *see also Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014).

In 2013, the Fifth Circuit refused to enforce the decision in *D.R. Horton*, holding that the NLRB's decision was inconsistent with the Federal Arbitration Act. 737 F.3d 344. Nevertheless, the NLRB has continued to adhere to *D.R. Horton* outside of the Fifth Circuit. In *On Assignment Staffing Services*, 362 NLRB No. 189 (Aug. 27, 2015), a 2-1 majority of the NLRB held that an employer interfered with Section 7 rights by requiring employees, "as a condition of employment, to be bound to an agreement that limits resolution of all employment-related claims to individual arbitration, unless employees follow a procedure to opt out of the agreement before it takes effect 10 days after receiving it." According to the majority, the employer's policy was unlawful because it required employees "to prospectively waive their Section 7 rights to engage in concerted activity," notwithstanding the opt-out right in the policy.

In addition to the issues presented by the NLRB, federal whistleblower laws also impose limitations on employers' ability to compel the use of mandatory arbitration. Dodd-Frank prohibits the use of pre-dispute arbitration agreements with respect to claims arising under the Sarbanes-Oxley Act. 18 U.S.C. § 1514A(e)(2) ("No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section."). Interestingly, however, the prohibition on arbitration agreements doesn't specifically apply to claims under Dodd-Frank itself. *Murray v. UBS Securities, LLC* (S.D.N.Y. Jan. 27, 2014).

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[1] The rule contains an exception to this prohibition for communications subject to the attorney-client privilege. 17 C.F.R. § 249.21F-17.

[2] In general, the NRLB's position on savings clauses is that, to be valid, such clauses: (1) must be sufficiently broad to cover all Section 7 rights; (2) must be placed prominently in an employer's handbook; and (3) must not be accompanied by unfair labor practices by the employer that contradict the clause's purpose. *First Transit Inc.*, 360 NLRB No. 72 (April 2, 2014); *see also* General Counsel Advice Memo re: *Cox Communications Inc.*, No. 17-CA-087612 (Oct. 19, 2012).