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5 Points Of Clarity On Evolving NLRB Doctrines

By **Alan Berkowitz, J. Ian Downes and Rhiannon DiClemente** (April 4, 2019, 12:06 PM EDT)

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Last month, the Office of the General Counsel of the National Labor Relations Board released five advice memoranda concerning various topics, including the application of the board's recent Boeing test for evaluating the lawfulness of work rules, the protection of social media postings by employees, and a union's duty of candor to members concerning changes in job conditions.

These memoranda provide valuable insight concerning the process by which the OGC analyzes unfair labor practice allegations under the National Labor Relations Act, and should assist employers seeking clarification concerning evolving board doctrines.

J. Ian Downes

Guidance on the Application of Boeing to Work Rules Concerning Confidentiality, Email Use and Other Subjects

One of the earliest, and most notable, actions taken by the board following the election of President Donald Trump was the abandonment of the Bush-era test for evaluating the validity of employer work rules. In The Boeing Company,[1] the board rejected its prior standard established in Lutheran Heritage Village-Livonia,[2] finding that it inappropriately involved a "single-minded consideration of NLRA-protected rights," without taking into account employers' legitimate justifications for adopting work rules and policies.

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Under Boeing, rather than asking only if an employer's work rule "reasonably tends to chill employees in the exercise of their Section 7 rights," the board must "evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule" in order to "strike the proper balance between ... asserted business justifications and the invasion of employee rights in light of the Act and its policy."

Application of this new test, the board stated, will result in the creation of three categories of work rules: (1) those that are "lawful to maintain" because they either do not interfere with protected rights or the "potential adverse impact" is outweighed by an employer's justifications; (2) those that "warrant individual scrutiny;" and (3) those that are unlawful to maintain because they prohibit or limit protected conduct.

In two memoranda released on March 14, 2019, the OGC provided insight into the board's view of how its Boeing standard should be applied to various employer rules. In the first memorandum, dated July 31, 2018, the OGC addressed allegations that ADT LLC maintained unlawful rules concerning employee dress, information security, media relations and personal cell phone use.[3] Noting that each of the rules fell into "Category 2," the OGC wrote that while the first three rules were permissible given their limited impact on protected employee rights and the employer's valid interests, the prohibition on cell phone use other than for "work-related or critical quality of life activities" was unlawful.

While "the employer has a legitimate interest in preventing distractions, lost time, and lost productivity," the OGC stated, this interest applies only while employees are on working time. Since the policy applied to nonworking time, the employer's interest "does not outweigh the employees' Section 7 interest in communicating privately via their cell phones, during nonwork time, about their terms and conditions of employment."

The second memorandum, dated Nov. 14, 2018, addressed policies issued by Nuance Transcription Services that: (1) required employees to cooperate in internal investigations; (2) required the employer's employee handbook to be kept confidential; (3) prohibited nonbusiness use of employer email; and (4) restricted disclosure of payroll data and "other nonpublic information." The OGC concluded that while the cooperation policy was permissible, the other policies were not.

With respect to the cooperation policy, while employees cannot be required to participate in an investigation concerning an unfair labor practice charge, the memorandum stated, a general rule requiring cooperation in internal investigations would likely only be interpreted by employees to apply to investigations concerning general workplace misconduct, not unfair labor practice allegations.

The remaining policies, however, were found to be unlawful. With respect to the policies concerning the confidentiality of the employer's employee handbook and payroll information, the OGC noted that while the rules were likely "Category 3" rules that were presumptively unlawful, even if they fell within Category 2, the employer's proffered justification — preventing sensitive information from falling into a competitor's hands — did not outweigh employees' rights to discuss compensation and other terms and conditions of employment.

With regard to the prohibition on nonbusiness use of email, the OGC noted that since the employer provides employees with email access as part of their work, the "ban on personal use of its email system, which extends to non-working time, violates Section 8(a)(1) under extant Board law."[4] The OGC also considered a separate policy that allowed "incidental personal use" provided that such use does not consist of "counterproductive messages that tie up system resources and are not considered in support of Nuance objectives."

This policy was found to be impermissible because it does not focus on "genuine business conflicts of interest" and would be interpreted to prohibit protected activities that "might not be in support of [employer] objectives, e.g., communications concerning strikes, protests, or public expressions of workplace dissatisfaction." Finally, the OGC concluded that the policy's ban on "solicitation for any non-Company business or activities" ran afoul of Purple Communications because it was not limited to working time.

Interestingly, the OGC addressed the permissibility of Nuance's email policies in the event that, as many commentators predict, the board rejects Purple Communications in favor of a return to the prior rule of Register Guard.[5] According to the memorandum, Nuance's nonsolicitation policy would be valid in

such a case, as Register Guard held that employees have no Section 7 right to use an employer's email system provided that the employer does not "discriminate along Section 7 lines." The prohibition on uses that do not "support Nuance objectives," however, is unlawful under either test, the OGC wrote. This is because the rule is an "overbroad restriction [that] is content based" and constitutes "disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status."

In conclusion, the primary insight provided by the memoranda relates to the process by which the board will analyze work rules post-Boeing. That is, although it is not clear that the ultimate resolution of each charge is different under Boeing than it would have been under Lutheran Heritage Village-Livonia, the memoranda demonstrate that, as predicted by Boeing, most employer rules are likely to fall in "Category 2" and require an explicit balancing of employee rights and employer interests.

Protections for Facebook Posts

Also included in the memorandum released by the OGC was an Obama-era memo that addressed whether an employee's Facebook posts discussing workplace safety concerns constituted protected concerted activity under the NLRA. At issue in the memorandum was a posting by a David Svoboda, an employee of the North West Rural Electric Cooperative, on a Facebook page called "Linejunk" on which electrical workers regularly post about employment-related concerns.

In response to a question asking why accidents in the lineman trade were so prevalent, Svoboda posted comments in which he was heavily critical of North West's management and his crew mates' level of experience and discipline. A week later, North West fired the employee for supposedly violating two company policies: the "Attitude, Spirit and Cooperation Policy," and the "Personal Conduct Policy."

The OGC found that the employee's Facebook posts were protected concerted activity because (a) they involved mutual aid or protection and (b) he was engaged in concerted activity with other statutory employees. Applying the board's traditional discriminatory discharge analysis,[6] the OGC concluded that North West violated Section 8(a)(1) of the NLRA by terminating the employee because he engaged in protected concerted activity. The OGC found that the employee's Facebook posts fell within the "broad definition of mutual aid or protection under the [NLRA]" because they addressed workplace health and safety concerns, "which plainly involve attempts to improve terms and conditions of employment."

Moreover, the OGC found the employee's participation in the Facebook discussion constituted "concerted activity" under the NLRA not only because his co-workers were known members of Linejunk, but also because the group involved other electrical workers. The OGC noted that the board has held that statutory employees employed by different employers may also join together to engage in concerted activity.[7] Notably, the OGC found that North West's policies were also unlawfully overbroad, and that the employee's discharge even on these grounds was in violation of Section 8(a)(1).

OGC Knocks Out MMA Fighter's Labor Complaint, Ducks Independent Contractor Issue

In an advice memorandum dated Sept. 13, 2018, the OGC provided advice as to (1) whether Ultimate Fighting Championship fighter Leslie Smith and other MMA fighters under contract with UFC were statutory employees within the meaning of the NLRA; and (2) whether UFC unlawfully discriminated against Smith by failing to renew her fight contract in retaliation for her union organizing efforts and participation in protected concerted activities.

While the initial hurdle to Smith's unfair labor practice charge was whether UFC fighters are employees or independent contractors, the OGC did not address that issue because it found that UFC did not engage in unlawful behavior. According to Smith, the termination of her contract was in retaliation for her efforts to unionize UFC fighters, in which she was instrumental in launching Project Spearhead, a "fighter-led" organization promoting "the process of moving toward unionizing all professional mixed martial artists.

The OGC, however, concluded that, under Wright Line, there was insufficient evidence to establish a prima facie case of unlawful discrimination. The OGC noted that while failure to renew an employment contract can be an adverse employment action akin to discharge, in this case the parties' contract expired by its terms, and UFC and Smith failed to reach an understanding on a new agreement.

The OGC stated that "the [NLRA] does not require any party to enter into a contractual agreement or to offer any specific terms in a contract or renewal of a contract." Further, the OGC stated that it was not its proper role "in the absence of evidence pointing to animus or pretext, to second-guess UFC's business decision not to continue to negotiate or renew [Smith's] contract in response to these kinds of demands."

Union's Duty of Fair Representation Requires Candor Concerning Changes to Terms and Conditions of Employment

The fifth and final Memorandum addressed whether the Service Employees International Union, Local 1199 breached its duty of fair representation by willfully misleading employees about their future employment terms and by waiving employees' rights to file a grievance regarding their transfer of employment and receipt of severance pay.[8] The employees in question worked for South Oaks Hospital in a campus-wide bargaining unit that included a nursing home/rehabilitation center known as Broadlawn Manor.

The employees were assigned to work in different buildings rather than at a specific location. In early 2017, South Oaks informed the union that it was selling Broadlawn to the Kennedy Group/Massapequa Center, and had agreed to provide Massapequa with as many housekeepers and dietary workers as it needed. Since there was not a specific group of employees assigned to Broadlawn, the union agreed to give employees the opportunity to transfer voluntarily to Massapequa with any remaining vacancies to be filled by the least-senior employees.

The union and Massapequa thereafter entered into a memorandum of agreement, or MOA, in which Massapequa recognized the union and adopted the majority of the collective bargaining agreement in existence between the union and South Oaks. However, the MOA provided less sick leave and vacation time than existed under the South Oaks agreement. Despite this, a union official repeatedly assured the transferring employees that they wouldn't lose any benefits following their transfer to Massapequa. The union and South Oaks also reached an agreement that included a waiver of the transferring employees' rights to file a grievance and that the employees would not be paid severance pay by South Oaks under a clause that existed in the South Oaks collective bargaining agreement.

On these facts, the OGC concluded that the union had breached its duty of fair representation by "willfully misleading employees" regarding the benefits they would receive at Massapequa. The duty of fair representation requires that a union represent the interest of employees "fairly, impartially, and in good faith," and is akin to a duty owed by fiduciaries to their beneficiaries. Despite this breach, however, the OGC concluded the employees' charge should be dismissed because the misrepresentation had no

impact because by the time the misleading statements were made, the transferring employees had already volunteered or been selected for transfer.

Regarding the grievance and severance pay waivers, the OGC concluded that there was no breach of the duty of fair representation at all. The duty of fair representation does not impose limitations on the substance of a union's bargaining proposals, other than to ensure that it is not acting with discriminatory intent or in an arbitrary manner. Here, the union's primary objective was to ensure continued employment for its members and the waiver of the right to file a grievance or receive severance pay were valid compromises to achieve that goal.

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[1] 365 NLRB No. 154 (Dec. 14, 2017).

[2] 343 NLRB 646 (2004).

[3] ADT, LLC, Case 21-CA-209339.

[4] See Purple Communications, Inc., 361 NLRB 1050 (2016).

[5] 351 NLRB 1110 (2007), enforced in part and remanded sub nom. Guard Publishing v. NLRB, 571 F.3d 53 (D.C. Cir. 2009).

[6] See Wright Line, 251 NLRB 1083, 1089 (1980), enforced on other grounds, 662 F.2d 899 (1st Cir. 1981).

[7] E.g., Etiwanda, LLC, 357 NLRB No. 172, slip op. at 3 (Dec. 30, 2011).

[8] Local 1199 SEIU (South Oaks Hospital-Northwell Health), Case 29-CB-215856.