What’s in Your Employee Handbook?
Some Provisions May Be Harmful Rather Than Helpful Under the National Labor Relations Act

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Employers often invest a great deal of resources — both financial and human — in creating, reviewing, and maintaining employee handbooks. If these handbooks are carefully prepared, and if the policies they embody are consistently followed, these policies help to minimize the burgeoning risks associated with employment-related litigation. If the policies are poorly drafted, violate laws, or if an employer fails to adhere to the policies on a consistent and uniform basis, these documents can actually increase an employer's exposure to litigation and potential liability.

This article explores several practical and legal concerns under the National Labor Relations Act ("NLRA" or "Act") that employers and their counsel should consider when creating, reviewing, and maintaining employee handbooks. This article does not exhaust all potential legal pitfalls in drafting employee handbooks, but is an attempt to highlight some areas in which errors can be made that may trigger liability under the Act.

I. Practical Considerations
   A. General Advantages

   While there is generally no legal requirement to have an employee handbook, such a document can provide several advantages to employers. First, handbooks help to explain employers' policies, procedures, and philosophies and can introduce employees to employers' environments and cultures. Second, handbooks are useful tools for communicating employer expectations. Third, when consistently followed by management, handbooks can foster uniformity and consistency in policy interpretation, administration, and enforcement. Finally, handbooks can provide useful defenses against wrongful discharge litigation.

   B. Some Disadvantages

   Handbook language may be interpreted to create contractual obligations that require employers to follow certain procedures when terminating employees, or interpreted to restrict employers' ability to discharge employees on an “at will basis.” Inconsistent interpretation or adherence to handbook policies can also greatly increase an employer's exposure to potential liability. Further, as noted in this article, handbook provisions can be found to be violative of the NLRA. On balance, though, these risks can be managed, and they rarely outweigh the benefits associated with handbooks.

II. Legal Considerations
   A. Confidentiality Provisions

   Many employers include in their employee handbooks language that precludes employees from disclosing the employer's confidential information. Generally, such information is not readily available to the general

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public and may be information of a proprietary nature to the employer’s business. Employers should beware, however, that under the NLRA, employees cannot be prohibited from discussing with other individuals information about wages, benefits, and other terms and conditions of employment. Indeed, a number of National Labor Relations Board ("NLRB" or "Board") decisions prohibit employers from enforcing overly broad policies in this area.

Section 7 of the NLRA grants employees the right to form, join or assist unions, to engage in other concerted activity, or to refrain from doing so. 29 U.S.C. § 157. Section 8 of the Act, further protects this entitlement, making it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" under Section 7. Id. at § 158(a)(1). "In determining whether the mere maintenance of rules such as those at issue here violates Section 8(a)(1), the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights." Lafayette Park Hotel, 326 NLRB 824, 825 (1998), enforced sub nom, Lafayette Park Hotel v. N.L.R.B., 203 F.3d 52 (D.C. Cir. 1999).

The NLRB has routinely stated that employers may violate Section 8(a)(1) if their employment handbook provisions inhibit employees' ability to exercise their Section 7 right to openly discuss wages and working conditions. See, Aroostook Cty. Reg'l Ophthalmology Ctr., 317 NLRB 218, 224 (1995), enforced in relevant part sub nom, Aroostook Cty. Reg'l Ophthalmology Ctr. v. N.L.R.B., 81 F.3d 209 (D.C. Cir. 1996) (policy entitled "Confidentiality" and stating that "no office business is a matter of discussion with spouses, families or friends" was unlawful); Pontiac Osteopathic Hosp., 284 NLRB 442, 466 (1987) (rule forbidding employees from discussing "hospital affairs" and "employee problems" was unlawful).

The following cases are illustrative of where the Board found that the employer committed an unfair labor practice by maintaining confidentiality policies that restricted employees from discussing wages and compensation. In Double Eagle Hotel & Casino, 341 NLRB No. 17 (2004), a Board panel held that the casino's Confidential Information policy violated 8(a)(1). The policy stated in part:

\[Pursuant to Company policy . . . you may be required to deal with many types of information that are extremely confidential and with the utmost discretion must be observed. It is essential that no information of this kind is allowed to leave the department, other than by activity/job requirements, either by documents or verbally. A list, which is not all-inclusive, of the types of information considered confidential is shown below . . . . [List omitted.]\]

\[Information should be provided to employees outside the department or to those outside the Company only when a valid need to know can be shown to exist. Check with Management if you have any doubt or questions.\]

\[Unless there is a need for it in the normal course of business, personal information concerning individual employees should not be discussed with members of your own group. . . .\]

The majority concluded that this rule violated 8(a)(1) because it expressly prohibited the discussion of wages and other terms and conditions of employment.

Likewise, in Community Hospital of Central California, 335 NLRB 1318 (2001), enforced in part, review granted in part, sub nom, Community Hospital of Central California v. N.L.R.B., 335 F.3d 1079 (2003), the Board found the employer violated the NLRA, where its handbook forbade the "release or disclosure of confidential information concerning patients or employees." In rejecting the rule, the Board noted that it "is unlawfully broad because it could be construed by employees to prohibit them from discussing information concerning terms and conditions of employment, including wages, which they might reasonably perceive to be within the scope of the broadly-stated category of 'confidential information' about employees." Id. at 1322.
Of course, not all confidentiality provisions are found to be unlawful under the Act. In In re Safeway, Inc., 338 NLRB No. 63 (Nov. 20, 2002), a Board majority held that the following confidentiality rule, included in the employer's general working rules and regulations, was not a basis for setting aside a successful decertification election:

Confidential, restricted or sensitive information must be kept safe and never given to an unauthorized person or organization. Such information includes (but is not limited to) computer-access passwords, procedures used in producing computer or data processing records, personnel and medical records, and payroll data.

Each employee is responsible for preserving the confidentiality of a variety of information that, if released, may lose its value or hurt the Company's competitive position. That includes business and financial information, customer account information, new project and marketing plans, cost data, salary information, personnel information and ad information.

Further, the Board has not objected to the imposition of more specific and business-centered confidentiality policies. In K-Mart, 330 NLRB 263 (1999), the employer included the following confidentiality provision in its handbook: "Company business and documents are confidential. Disclosure of such information is prohibited." Because the provision focused on the company's operational information, the Board held that the policy "would be reasonably understood by employees not as restricting discussion of terms and conditions of employment but, rather, as intended to protect solely the legitimate confidentiality of the [employer's] private business information, as it was meant to do." Id. at 263-264. The Board concluded that the provision would have no "chilling" effect and dismissed the complaint. Id.

Thus, employers should take care to ensure that employee handbook provisions relating to confidentiality are specific and business oriented. Employers should not include provisions which specifically preclude employees from discussing wages or terms and conditions of employment, as such policies would be facially violative of the Act.

B. Union Free Environment Statements and Handbook Receipt/Acknowledgement

Statements against employee organizational rights under the NLRA are problematic, but if carefully drafted, should be found to be lawful under the Act. For example, in In re Hancock, 337 NLRB 1223 (2002), enforced sub nom, John W. Hancock, Jr., Inc. v. N.L.R.B., 73 Fed. Appx. 617 (4th Cir. 2003), the NLRB held that the following statement in an employee handbook was protected free speech under § 8(c) of the Act:

John Hancock, Jr., Inc. is a union-free company. It always has been, and we desire that it will always remain so. We prefer to deal directly with our employees instead of through a third party, and we believe that sound leadership and concern for our employees is the best way of ensuring the propriety of our company and the welfare of our employees.

Nonetheless, the NLRB has repeatedly held, in certain unfair labor practice proceedings against employers, that such anti-union statements may be used as evidence of an employer's general union animus, thus making it easier to establish unfair labor practices based on other conduct.

When distributing handbooks or handbook revisions, employers should obtain (and retain) signed statements from employees acknowledging receipt. Receipt forms that include at-will disclaimers can be helpful to employers in defending against wrongful discharge claims. Further, such forms can be of assistance to employers in defending against employment discrimination and wrongful discharge lawsuits where an issue in such litigation may be the employee’s knowledge of, and adherence to, particular employer policies such as attendance, tardiness and related policy matters. Nonetheless, employers who
have policy statements in their handbooks regarding unionization must be cautious in their wording of handbook receipt forms. If the receipt states that the employee may be terminated for failing to abide by the employer's "rules" or otherwise states that the employee agrees with, agrees to be bound by, or accepts the statements in the handbook, the employer may be found guilty of an unfair labor practice charge based on the theory that requiring an employee to agree to such a statement is violative of the employee’s Section 7 rights under the NLRA. See, e.g., Matheson Fast Freight, Inc., 297 NLRB 63 (1989); Heck's Inc., 293 NLRB 1111 (1989); La Quinta Motor Inns, 293 NLRB 57 (1989).

C. Miscellaneous Handbook Provisions that May Violate Employees' Section 7 Rights under the Act.


Because health care employers need to maintain a tranquil atmosphere for patients, they may ban solicitation and distribution, at all times, in any area necessary to avoid disruption to patient care. The burden is on the employer, however, to prove the necessity of the employer’s work rule. See, e.g., Cooper Health Sys., 327 NLRB 1159, 1163 (1999) (burden is on the hospital to demonstrate that non-work time solicitation in non-patient care areas “would either disrupt care or disturb patients”). Both the NLRB and the courts recognize, though, that employers are presumptively permitted to prohibit all solicitation and distribution in “immediate patient care” areas. See, e.g., N.L.R.B. v. Baptist Hosp., 442 U.S. 773, 778 (1979); Beth Israel Hosp. v. N.L.R.B., 437 U.S. 483 (1978). Consistency of enforcement is key. See, e.g., Mercy General Hospital, NLRB 100, 106 (2001), vacated on other grounds by, Mercy General Hospital, 336 NLRB 1047 (2001) (holding that where employer permitted “employees [to] discuss[] other subject matters without limitation in the same [patient care] area of the hospital . . . the employer’s discriminatory prohibition against union talk was objectionable”).

The NLRB has, however, defined the term “immediate patient care area” restrictively. Generally, the term includes areas “such as patient rooms, operating rooms, and places where patients receive treatment, such as x-ray and therapy areas.” St. John’s Hosp., 222 NLRB 1150, 1151 (1976), enforcement denied in relevant part, sub nom, St. John’s Hosp. & Sch. of Nursing v. N.L.R.B., 557 F.2d 1368 (10th Cir. 1977). The NLRB has also indicated that halls and corridors adjacent to patient care areas may be extensions of such areas. The Board has rejected, however, the contention that patient care areas include all hallways used to transport patients. See, e.g., Brockton Hosp., 333 NLRB No. 165 (D.C. Cir. June 28, 2002), enforced in part sub nom, Brockton Hosp. v. N.L.R.B., 294 F.3d 100 (2002), cert. denied, 537 U.S. 1105 (2003). Similarly, the Board has held that many other areas of a hospital that may be frequented by patients are not necessarily “patient care areas.” See, e.g., N.L.R.B. v. Harper-Grace Hosp., Inc., 737 F.2d 576, 579 (6th Cir. 1984) (front entrance); Eastern Maine Med Ctr., 253 NLRB 224, 225-226 (1980) (lobby area), enforced sub nom, Eastern Main Med. Ctr. v. N.L.R.B., 658 F.2d (1st Cir. 1981), Albert Einstein Med Ctr., 245 NLRB 140, 143 (1979) (vestibule in front of cafeteria).

Finally, all employers that maintain non-solicitation/distribution policies should take measures to ensure that such policies are carefully and narrowly tailored. Additionally, such policies should be enforced in a non-discriminatory manner against union activity and non-union activity alike.

2. "Business use only" internet/e-mail policies.

The NLRB's General Counsel, under President Clinton, took the position that "business use only" e-mail policies facially violate the Act, although no NLRB case has specifically adopted this position. The Board, however, has held that "business only" policies are unlawful if disparately enforced. As a practical matter, most employers who have such policies, nonetheless, allow their internet and e-mail resources to be accessed by employees for a variety of personal uses. Web-based fantasy football, Girl Scout cookie announcements, and e-mails announcing "tickets for sale" are just a few examples. An employer that allows these uses of its internet and e-mail resources for a variety of personal employee matters, but then cracks down on union-related uses by employees of these resources, may have to answer to unfair labor practice charges before the NLRB. See, e.g., E.I. du Pont de Nemours & Co., 311 NLRB 893, 919 (1993).
3. Employee Conduct.

Employers should also be wary of employee handbook provisions which lump together and prevent certain acts of misconduct. For example, in Community Hospitals of Central California., 335 NLRB No. 1318 (2001), enforced in part sub nom, Community Hospitals of Central California v. N.L.R.B., 335 F.3d 1079 (D.C. Cir. 2003), the Board struck down as facially invalid under the NLRA policies that prohibited "[i]nsubordination [and] refusing to follow directions, obey legitimate requests or orders, or other disrespectful conduct towards a service integrator, service coordinator, or other individual" as well as "release or disclosure of confidential information concerning patients or employees."

4. After Hours or Off-Duty Employee Access.

Another area of concern for employers, in maintaining employee handbooks deals with provisions relating to employee access to the employer's premises for off-duty employees and after normal scheduled work hours. Generally speaking, an off-duty employee is permitted to access any areas of the employer's business that is open to the general public, such as waiting rooms and cafeterias, and also to access such non work areas as employee parking lots and break rooms. See, Tri-County Medical Center, Inc. 222 NLRB 1089 (1976).

Although access to other areas is not necessarily permitted, employers should be cautious in limiting employee access and should be even-handed in the enforcement of these policies. See, In re Mediaone of Greater Florida, Inc., 340 NLRB No. 39 (Sept. 19, 2003)(the Board found that a handbook provision prohibiting employees from "entering company property after hours without authorization" violated Section 8(a)(1)); In re El Mirador, 340 NLRB No. 84 (Sept. 30, 2003)(a Board panel held that an HR director for an organization that served developmentally disabled adults in various group homes violated Section 8(a)(1) by giving a disciplinary memo to an employee who went to other homes while off-duty to circulate a letter of complaint about working conditions, and by discharging the employee for circulating the letter); In re United Servs. Auto Ass’n., 340 NLRB No. 90 (Sept. 30, 2003), enforced sub nom, United Servs. Auto Ass’n. v. N.L.R.B., 387 F.3d 908 (D.C. Cir. 2004)(A Board panel held that an employer violated Section 8(a)(1) by interrogating and terminating an off-duty employee who had visited the employer's office after hours to distribute flyers protesting a layoff as a result of a reorganization. The panel found that the employer did not have a valid no-access policy for off-duty employees)

On balance, employee handbooks are beneficial to employers. Care should be undertaken, however, in drafting these documents and they should be reviewed by counsel. Finally, all levels of management should be familiar with the contents of employee handbooks, should ensure the provisions in the handbook are accurate and current, and finally, should implement steps to ensure the provisions in such handbooks are consistently and uniformly enforced.