Recent NLRB Decisions May Require Changes to Employee Handbooks

By Josh Ulman and Christi Layman

It does not get closer to home, or specifically campus, for higher education HR professionals than an institution’s employee handbook. The handbook is the framework for implementing HR policy on campus. It is a document that has been toiled over; a document that has had every word scrutinized and approved by legal counsel. Edits are not made on a whim, and when they are made, it’s often a long and laborious process. Yet one federal agency — the National Labor Relations Board (NLRB or Board) — is taking an interest in and demanding changes to employee handbooks.

The NLRB is charged with enforcing and interpreting the National Labor Relations Act (NLRA), the statute that governs relations between unions and most private businesses, including private colleges and universities. Section 7 of the NLRA establishes the right of employees working at private employers to act collectively, with or without a union, to improve pay and working conditions. The Board recently created a webpage (www.nlrb.gov/rights-we-protect/protected-concerted-activity) to outline Section 7 rights and highlight significant cases and enforcement actions. The NLRB’s recent interest in scrutinizing private employers’ employee handbooks stems from its concern that certain provisions in handbooks negatively affect, or “chill,” employees’ rights to engage in protected concerted activity. Since employees have a right to engage in such activity with or without a union, the NLRB may require changes to your employee handbook, even if your institution is not unionized.

The Cases
The NLRB has taken action on, and continues to act on, a number of cases in recent years that provide guidance on which handbook provisions may run afoul of the NLRA.
Hills and Dales General Hospital

In Hills and Dales General Hospital and Danielle Corlis (Case No. 7-CA-53556), a complaint was filed with the Board against the hospital employer after it issued a written warning to a current employee about a Facebook post she wrote. Specifically, the employee posted the following comment in response to another post by a former employee, who had been terminated for throwing a yogurt cup at her boss: “Holy [expletive], rock on … Way to talk about the [expletive] you used to work with. I LOVE IT.” The employer issued the warning on the grounds that the post violated paragraph 16 of its Values and Standards of Behavior Policy, which stated that employees “will represent Hills and Dales in the community in a positive and professional manner in every opportunity.”

The NLRB examined the entire Values and Standards of Behavior Policy and ruled that paragraph 16 as well as paragraphs 11 and 21 violated Section 7 because they could make employees think twice about engaging in protected concerted activities. Paragraph 11 states in the relevant part that employees will not make “negative comments about … fellow team members,” and paragraph 21 states that employees “will not engage in or listen to negativity or gossip.” The Board found that employer policies prohibiting negative conversations about coworkers or managers are unlawful on their face. It found paragraph 16 unlawful because the requirement that employees must represent Hills and Dales in the community in a positive and professional manner “is just as overbroad and ambiguous as the proscription of ‘negative comments’ and ‘negativity.’”

First Transit Inc.

In First Transit Inc. and Amalgamated Transit Union Local #1433 AFL-CIO (Case No. 28-CA-023017), the Board again found several provisions in an employee handbook to be unlawful. Among them were those that prohibited:

1. Discourteous or inappropriate attitude or behavior toward other employees;
2. “Disclosure of any company information,” including wage and benefit information;
3. Employees from making statements about work-related accidents “to anyone except the police or company officials;”
4. Employees from making false statements about the company;
5. Employees from participating in “outside activities that are detrimental to the company’s image or reputation, or when a conflict of interest exists;” and
6. Employees from conducting themselves “during non-working hours in such a manner that the conduct would be detrimental to the interest or reputation of the company.”

The NLRB decided that there was enough ambiguity in these prohibitions that employees could reasonably construe them as limiting their communications and therefore violating their right to protected concerted activity.

Walmart

One positive case for employers, Walmart (Case No. 11-CA-067171), considered in a NLRB regional office, provides assistance to employers in the increasingly murky area of social media policies. In this case, the regional NLRB office submitted the case to the office of general counsel for advice on whether Walmart’s social media policy was unlawfully overbroad, and whether Walmart violated Section 8(a)(1) of the NLRA by discharging the charging party because of comments he posted on his Facebook page. During the proceedings of the case, Walmart revised the policy, and the office of the general counsel concluded that the revised social media policy was lawful and that the discharge was not unlawful because the charging party’s comments did not implicate Section 7 concerns.

In 2011 and 2012, Acting General Counsel Lafe Solomon issued a series of three guidance memos detailing a number of cases and the opinions of the office of the general counsel on each case. Each memo documented instances of lawful policies and unlawful policies. It was in the third memo where he provided guidance on a social media policy that was acceptable in its entirety with the Walmart case. It is important to note that the general counsel’s opinions and advice memos are not binding on the NLRB or any
court, but they do give employers an approved social media policy to look to when creating such policies for their own organizations.

**Impact of the Supreme Court Ruling in *Noel Canning***

We expect to see additional cases in this area. However, the latest wrinkle has been the U.S. Supreme Court’s June 26 ruling in *National Labor Relations Board v. Noel Canning*. Noel Canning, a canning and bottling company, sued the NLRB, claiming the Board did not have authority to rule against the company in an unfair labor practice charge because the agency lacked a full quorum.

A three-member panel of the full Board, including the unconstitutional recess appointees, found that an employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights. Now with the Supreme Court’s ruling in *Noel Canning*, this case will be revisited by the new Board; however, we expect the new Board to issue a similar ruling.

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as two of the members on the decision were invalidly appointed to the Board. President Obama had made recess appointments to the Board while the Senate was holding pro forma sessions. The Court unanimously decided President Obama’s appointments to the Board were unconstitutional because he lacked the authority to make recess appointments at the time, determining the Senate’s pro forma sessions were valid sessions and the Senate was not in recess. The NLRB now has to find a way to review all of the cases decided during the recess appointees’ time on the Board from January 2012 through July 2013, which is estimated to be in the hundreds.

Some of the important decisions on employee handbooks were made by the now invalid recess appointees, so some of these cases will likely see some changes as the new Senate-approved Board provides new rulings. One such case is *Karl Knauz Motors, Inc. d/b/a Knauz BMW and Robert Becker* (Case No. 13-CA-046452). In this case, the Board upheld a decision by an administrative law judge that the respondent, which owned and operated a BMW dealership, violated Section 8(a)(1) of the NLRA by maintaining a “courtesy” rule in its employee handbook on courtesy being a responsibility of every employee.

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**What’s Ahead?**

We expect the NLRB to continue to scrutinize employee handbook policies, even for non-union workplaces. Challenges will likely continue to be brought for at-will employment statements, policies prohibiting certain employee communications or behavior, confidentiality policies, social media policies, and access to employer property. The context for these policies, how broadly they are written, and if savings clauses are included that stipulate that the rules do not prohibit any rights protected by Section 7 of the NLRA will be key in the Board’s considerations.

In light of the NLRB’s recent actions, you may want to take a fresh look at your employee handbook and consult with counsel to see if changes should be made.

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