

NLRB Continues To Eviscerate Workplace Civility Policies In New Handbook Decision

In *T-Mobile U.S.A., Inc.*, 363 NLRB No. 171 (2016), the National Labor Relations Board continued its trend in aggressively policing Employee Handbooks. It has issued a decision that finds a series of workplace rules in T-Mobile's and MetroPCS' Employee Handbooks unlawful, including provisions requiring positive workplace behavior and prohibiting workplace recordings. The Board concluded that those workplace rules would reasonably tend to chill employees in the exercise of their NLRA Section 7 rights, which give employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Background

The Board's intrusion into workplace policies is the result of its decision in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Under the standard set in *Lutheran Heritage*, a work rule is unlawful if the rule explicitly restricts activities protected by Section 7. If the work rule does not explicitly restrict protected activities, it nonetheless will violate the NLRA if: "(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."

The Board's Decision

In *T-Mobile*, the Board acknowledged that the rules at issue did not explicitly restrict protected activities and were not promulgated in response to or applied to restrict Section 7 activities. Nonetheless, the Board found the following rules unlawful because employees would reasonably construe them to prohibit their Section 7 rights:

- A policy that stated the employer's expectation that all employees "behave in a professional manner that promotes efficiency, productivity, and cooperation" and "maintain a positive work environment by communicating in a manner that is conducive to effective working relationships with internal and external customers, clients, co-workers, and management";
- A policy that prohibited employees from recording people or

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confidential information using cameras, camera phones/devices, or recording devices in order “to prevent harassment, maintain individual privacy, encourage open communication, and protect confidential information”;

- A provision that the handbook is a confidential and proprietary document that must not be disclosed to or used by any third party without the employer’s written consent;
- A rule that requires employees to maintain the confidentiality of the names of employees involved in internal investigations as complainants, subjects, or witnesses;
- A rule that requires employees to contact a manager, an HR business partner, or the integrity line if they feel they have not been paid all wages or pay owed to them, believe that an improper deduction was made from their salary, or feel they have been required to miss meal or rest periods;
- A rule that requires employees to refer all media inquiries to the employer without comment;
- A rule that prohibits employees from using its information or communications resources in ways that could be considered disruptive, offensive, or harmful to morale;
- A rule that prohibits employees from using the company’s information or communications resources to advocate, disparage, or solicit for political causes or non-company-related outside organizations;
- A rule that requires employees to sign a restrictive covenant and confidentiality agreement that classifies employee wage and salary information as confidential and proprietary information not subject to disclosure;
- A rule that prohibits employees from disclosing employee information that is defined to include employee addresses, telephone numbers, and contact information and prohibits employees from accessing such information without a business need to do so and without the employer’s prior authorization or the consent of employees;
- A rule that prohibits employees from disclosing employee information, such as employee addresses and other contact information, except in the proper performance of their duties, and suggests that employees may be disciplined or subject to legal action for violating the rule;
- A rule that prohibits employees from making detrimental comments about the employer or its customers, products, services, or employees.

Employer Take Away

This decision serves as a reminder for employers to carefully review their Employee Handbooks as the NLRB continues to scrutinize workplace policies and expand the language that it believes employees “would reasonably construe” as prohibiting protected concerted activity. It is now clear under this standard, Employee Handbooks that prohibit employees from criticizing their employer, discussing or disclosing wage or benefit information, or that admonish employees to protect the names and other contact information of employees, or to behave professionally or collegially in the workplace will not survive NLRB scrutiny.

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