THE NLRB'S SHIFTING GUIDANCE ON EMPLOYEE CONDUCT POLICIES

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A major focus of the National Labor Relations Board ("NLRB") during the Obama Administration was on employer social media and general employee conduct policies. The NLRB found that a number of employers had unlawfully disciplined employees based on policies which, in the NLRB's view, were overbroad and illegal under Sections 7 and 8 of the National Labor Relations Act ("NLRA").

Section 7 of the NLRA guarantees employees the right to self-organize. But, it also grants employees, union *and* non-union alike, broad protection to engage in protected concerted activity – i.e., activity undertaken together by two or more employees, or one on behalf of others, "when they seek to improve terms and conditions of employment or otherwise improve their lot as employees…" Protected concerted activities would include, for example, two or more employees discussing work-related issues, or one employee speaking on behalf of his co-workers about improving working conditions. Section 8 makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees" in the exercise of their Section 7 rights.

An employer policy that explicitly restricts the exercise of employees' Section 7 rights is unlawful on its face. For example, a policy that banned union activity would be facially unlawful. Under the NLRB's decision in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), however, employer policies that "would reasonably tend to chill employees in the exercise of their Section 7 rights" are also unlawful. To prove its illegality, the government had to establish one of following: (1) employees reasonably would construe the rule to prohibit Section 7 activity; (2) the employer promulgated the rule in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

The Obama-era NLRB used the flexible "reasonably construe" standard to strike down a number of commonly used and seemingly harmless employer policies, that had previously been unchallenged. For example, in an unfair labor practice case settlement against Wendy's International, the NLRB concluded that several portions of Wendy's social media policy were overly broad, including its instruction to employees to "[**r]efrain from commenting on the company's business, financial performance, strategies, clients, policies, employees or competitors in any social media without the advance approval of [a] supervisor**…" *See Office of the General Counsel Memorandum GC15-04, Report of the General Counsel Concerning Employer Rules* (Released March 18, 2015). As part of the settlement, Wendy's revised its social media policy to say instead, "[d]o not comment on trade secrets and proprietary Company information (business, financial and marketing strategies) without the advance approval of your supervisor... Do not make negative comments about our customers in any social media."

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As another example, in *Hills and Dales General Hospital*, 360 NLRB 70, a former hospital employee who was discharged for throwing a yogurt cup at her boss posted about the incident on Facebook. A current employee commented on the post, "Holy shit rock on [S!] Way to talk about the douchebags you used to work with. I LOVE IT!!" The Hospital gave the employee a written warning for violating the following sections of its Values and Standards of Behavior policy:

> **Teamwork**
> **11. We will not make negative comments about our fellow team members and we will take every opportunity to speak well of each other.**
> **16. We will represent Hills & Dales in the community in a positive and professional manner in every opportunity.**
> **Attitude**
> **21. We will not engage in or listen to negativity or gossip. We will recognize that listening without acting to stop it is the same as participating.**

The disciplined employee filed an unfair labor practice complaint with the NLRB against the hospital. The NLRB found that the hospital's proscription against "negative comments" and "negativity" was unlawfully overbroad, because it could be read to prohibit protected discussions about working conditions. The NLRB ordered the Hospital to revise or rescind its policy.

Other rules found by the Obama-era NLRB to be overbroad because employees would reasonably construe them to ban protected concerted activity include:

- **"Be respectful to the company, other employees, customers, partners, and competitors."**
- **Do "not make fun of, denigrate, or defame your co-workers, customers, franchisees, suppliers, the Company, or our competitors."**
- **No "[d]efamatory, libelous, slanderous or discriminatory comments about [the Company], its customers and/or competitors, its employees or management."**
- **"Disrespectful conduct or insubordination, including, but not limited to, refusing to follow orders from a supervisor or a designated representative."**
- **"Refrain from any action that would harm persons or property or cause damage to the Company's business or reputation."**
- **"[D]on't pick fights" online.**
- **Employees may not engage in "any action" that is "not in the best interest of [the Employer]."**
- **"Taking unauthorized pictures or video on company property" is prohibited.**
- **Do not discuss "customer or employee information" outside of work, including "phone numbers [and] addresses."**

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Under the Trump Administration, however, the NLRB has reversed course. In December 2017, the NLRB overruled the *Lutheran Heritage* "reasonably construe" standard in a 3-2 decision. Instead, in *Boeing v. NLRB*, the Board established a new test: when evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule.

Applying the new test, the Trump-era NLRB concluded that Boeing lawfully maintained a no-camera rule that prohibited employees from using camera-enabled devices to capture images or video in the workplace without a valid business need and an approved camera permit. The Board majority reasoned that the rule potentially affected the exercise of NLRA rights, but that the impact was relatively slight and outweighed by important justifications such as national security concerns.

In another pro-employer move, on January 16, 2018, an NLRB attorney issued a non-binding, internal advice memo that defended Google's firing of James Damore over a memo he wrote criticizing Google's diversity policies. In his memo, Damore claimed that the gender gap in tech and leadership at the company was due to biological differences between the sexes. Google fired him for advancing "offensive gender stereotypes" in violation of its policies against harassment and discrimination. In finding Google's actions acceptable, the NLRB attorney reasoned that employers should be given "**particular deference**" in trying to enforce anti-discrimination and anti-harassment policies, and "**must be permitted to 'nip in the bud' the kinds of employee conduct that could lead to a hostile workplace**."

This appears to be just the beginning of a move by the Trump-era NLRB away from the previous expansion of workers' rights. It remains to be seen how, exactly, the NLRB's new balancing test will be applied to the sorts of social media, conduct, non-disparagement, and other types of employer policies that were previously struck down. And, of course, the NLRB could always reverse course, again, with the next administration. But, all indications are that the NLRB is moving – at least for now – in a more common-sense direction when evaluating standard employee policies that advance a legitimate business concern.

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