Recent NLRB General Counsel Report Means It's Time to Review and Update Those Employee Handbooks Again

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Many Minnesota employers just recently reviewed and updated their employee handbooks following the May 2014 enactment of the Minnesota Women's Economic Security Act (WESA). WESA was a sweeping law, imposing a number of new requirements on Minnesota employers and amending a variety of existing laws. Unfortunately, even if you just recently finished a WESA-driven handbook update, it's time to pull out those handbooks again. In late March 2015, the General Counsel of the National Labor Relations Board (NLRB) issued a Report Concerning Employer Rules that sets forth the NLRB's position on the types of handbook policies that run afoul of federal labor law. Because aspects of federal labor law apply to *all* workplaces - whether or not unionized - the NLRB General Counsel report is reason for every employer to revisit and, as appropriate, update its employee handbook yet again.

At issue in the NLRB General Counsel report are non-management employees' Section 7 rights under the federal National Labor Relations Act (NLRA). Under Section 7 of the NLRA, *all* non-management employees - whether or not in a union - have a legally protected right to engage in group activity aimed at improving their terms and conditions of employment. The NLRB takes a broad view of Section 7 rights and has significantly increased its enforcement of Section 7 rights. In recent years, the NLRB has brought numerous unfair labor practice charges against employers for disciplining or firing employees for exercising Section 7 rights or for maintaining employment policies that inappropriately "chill" Section 7 rights.

As part of the NLRB's ongoing enforcement efforts related to Section 7, the NLRB General Counsel report provides guidance on the types of policies that the NLRB is likely to find permissible or impermissible under Section 7 of the NLRA. Importantly, the NLRB prohibits policies that may "chill" Section 7 rights even when there is no evidence that the employer ever applied its policy to a particular employee or imposed discipline or termination for a policy violation. While not exhaustive, the following are a few of the types of policies that are on the NLRB's radar screen and which, according to the NLRB General Counsel report, may be lawful or unlawful depending on policy language and the impact on Section 7 rights:

- ***Confidentiality Rules*** - Under Section 7 of the NLRA, non-management employees have the right to discuss their terms and conditions of employment - such as wages, benefits, hours, or management practices - with others as part of aiming to improve those terms and conditions. As a result, policies that expressly or implicitly prohibit discussions of employment terms and conditions, such as wages, are considered unlawful by the NLRB. The NLRB also prohibits policies that expressly or implicitly prohibit "gossip" or the discussion of "employee" or "personnel information," because such policies might be read to discourage or prohibit protected communications. The NLRB General Counsel report indicates, however, that policies that broadly prohibit the disclosure of unspecified "confidential" information or other information obtained through work are lawful given that the policies do not appear, on their face, to attempt to prohibit discussions of terms of employment.

- ***Employee Conduct Toward Company and Supervisors*** - The NLRB also maintains that Section 7 broadly protects non-management employees' right to openly criticize or protest their employer's labor policies or employee treatment as part of trying to improve work conditions. This is true even when the communication is in a highly public forum, such as a social media post. Therefore, rules which require employees to be respectful of or not to disparage the company or management are prohibited by the NLRA. Employers may, however, institute policies which govern behavior toward third parties, such as customers or company visitors. In addition, requiring cooperation with supervisors, coworkers, customers, and vendors is lawful, as is requiring full cooperation in a company investigation.

- ***Employee Conduct With Colleagues*** - The NLRB also maintains that non-management employees have Section 7 rights to debate with each other and to discuss unionizing to try to improve work conditions. As such, the NRLA prohibits workplace rules that expressly or implicitly forbid online arguments, insults, or embarrassing or hurtful comments about company management or other employees. Additionally, rules that expressly or implicitly prohibit non-management employees with email access from using the company's email system for union organizing or other Section 7 activity typically run afoul of the NLRA. Such emails can, however, be limited to non-working time. In addition, the labor law does permit workplace policies that prohibit defamatory, coercive, intimidating, discriminatory, or harassing conduct**.**

- ***Employee Interaction with Third Parties*** - Employees have the right under Section 7 of the NLRA to communicate with the news media, government agencies, and other outside entities regarding the terms and conditions of their employment. As such, policies that ban such activity run afoul of the NLRA. An employer's policy may, however, forbid employees for speaking on behalf of the company without advance consent and may require any company response to a particular issue or situation be made by a designated spokesperson.

- ***Use of Company Logos, Copyrights, Trademarks*** - Under federal labor law, employers may take reasonable steps to protect their intellectual property, but their policies may not prohibit the "fair use" of that property. Employees may, therefore, use the company's name or logo on protest materials or in social media posts or other contexts. Employers may, however, lawfully require employees to respect copyright and trademark law.

- ***Photography and Recording Restrictions*** - Under the federal labor law, employees have a protected right to take photographs and make recordings in the workplace, if done so as part of trying to improve work terms and conditions. Therefore, the NLRB maintains that employer policies must not completely ban photography or recordings on the job site. Employers may, however, require pre-approval for news or media representatives to bring cameras on to a job site.

Because labor law is nuanced and often context-driven, employers are encouraged to work with their legal counsel in reviewing and updating their handbooks to be compliant with federal labor law. Our experienced team of labor and employment lawyers at Gray Plant Mooty would be happy to assist you in your efforts. Please contact a member of the firm's labor law team if you have any questions or would like assistance with a handbook review.