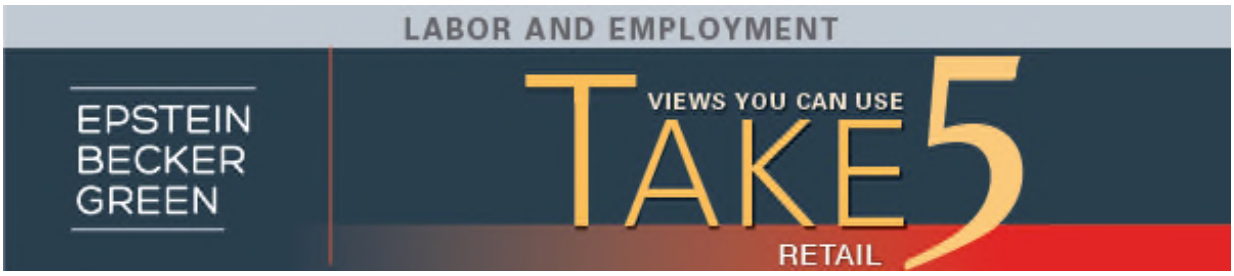

May 29, 2015

Five Employment, Labor, and Workforce Management Concerns Impacting Retailers

For the latest employment, labor, and workforce management news and insights concerning the retail industry, please visit and subscribe to *Epstein Becker Green's Retail Labor and Employment Law blog*.

Retailers will be busy this summer attempting to conform their policies and procedures to various local, state, and federal laws, such as the spate of state and city sick leave laws, and analyzing proposed amendments by the Equal Employment Opportunity Commission ("EEOC") that would significantly affect Affordable Care Act ("ACA")-compliant wellness programs. On the union organizing side, the "ambush election rules" issued by the National Labor Relations Board ("NLRB" or "Board") will, among other things, stimulate retailers to become more proactive in their labor relations and create an environment in which an organizing campaign cannot take root. And while reviewing their policies and procedures, retailers will likely wish to revise many of their standard handbook policies, since the NLRB recently called such policies into question because they may chill employees' rights to collectively discuss the terms and conditions of their employment. Finally, if complying with these changes is not challenging enough, the threat of a data breach, including cyber-attacks and accompanying lawsuits, feels almost inevitable. This edition of *Take 5* will help retailers navigate these issues and become informed about the recommended changes to their policies, procedures, and practices:

1. **Sick Leaves Laws Are Sweeping the Nation**
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1. **Sick Leaves Laws Are Sweeping the Nation**
   By Nancy L. Gunzenhauser

The paid sick leave trend is gaining traction. In his 2015 State of the Union address, President Obama called for national legislation guaranteeing paid sick leave for workers. While Congress has not yet taken any action, three local jurisdictions enacted paid sick leave laws affecting private employers in 2015 so far.

Three states, California, Connecticut, and Massachusetts, and nearly 20 cities have passed paid sick day legislation. These cities include Oakland and San Francisco, California; Bloomfield, East Orange, Irvington, Jersey City, Montclair, Newark, Passaic, Paterson, and Trenton, New Jersey; New York City; Eugene and Portland, Oregon; Philadelphia; Seattle and Tacoma, Washington; and Washington, D.C. Some of these laws, such as those in California and Massachusetts, will become effective in 2015, while others are already in effect. Understanding what is required by these laws has never been more important.

Generally, paid sick leave laws allow employees to take paid time off to diagnose, care for, or treat their own, or a family member's, illness, injury, or health condition, or to obtain preventative medical care. Some states and cities—such as California, Connecticut, Eugene, Portland, Seattle, and Washington D.C.—allow employees who are victims of domestic violence, sexual assault, or stalking to take paid time off as well. In addition, New York City, Portland, Seattle, Tacoma, and certain cities in New Jersey allow paid leave in connection with the closure of an employee's place of business due to a public health emergency or an employee's need to care for a child whose school or place of care has been closed due to a public health emergency.

While some of the laws cover all employers, regardless of the number of employees, paid sick leave laws in Connecticut, Jersey City, New York City, Philadelphia, and Seattle do not apply to employers that employ less than a specified number of employees. Similarly, the laws in Jersey City, Massachusetts, New York City, and Portland provide that, even when a smaller employer is not required to provide *paid* sick days, those employers must still allow employees to take unpaid time off.

The threshold for employees' eligibility to accrue sick time differs by location, but most laws require that employees (including part-time and temporary employees) work a certain number of hours in a year in order to be eligible. For example, the ordinances enacted in New Jersey require that employees work more than 80 hours in a year in order to qualify for paid sick leave, while Philadelphia requires an employee to work at least 40 hours in a year.

While the accrual of sick time generally begins immediately upon hire, most sick leave laws provide that employees become eligible to actually *use* sick time after their 90th or 120th day of employment. Many of these laws dictate that employees accrue one hour of sick leave for every 30 hours worked (or 40 hours worked in Connecticut and Philadelphia). However, in places such as Seattle and Washington, D.C., accrual is based on the number of employees the business employs, so that employers with fewer employees accrue hours at a slower rate than those employers that employ greater numbers of employees.

Another major difference among various sick leave laws is the incremental use of sick time. In Washington, D.C., for example, employers must allow employees to use sick time in one-hour increments. In California, employees can use sick time in two-hour increments, while in New York City, employers can require that employees use a minimum of four hours of sick time at a time.

Essentially all the paid sick time laws require employers to either provide notice to employees of their rights under the law upon hire or display a poster containing the requisite information in their business establishment. Most of the laws require employers to maintain and retain adequate records of their compliance with the laws as well. Some of the laws even go so far as to require employers to track remaining sick time on employees' pay stubs.

The concern with the hodgepodge of sick leave laws popping up across the country is, of course, remaining in compliance, particularly for companies that operate in multiple locations. Many employers are opting to create a single sick leave policy that complies with all of the laws applicable to their various locations, while others have created separate policies for each location.

In any event, employers should keep an eye out for new sick leave laws in every jurisdiction in which they do business.

2. The NLRB's New "Expedited" Election Rules Became Effective April 14, 2015—Expect a Major Uptick in Union Activity in Retail
By Steven M. Swirsky

The NLRB issued a 733-page final rule ("Final Rules") this past December, which became effective on April 14, 2015, that amended the Board's rules and procedures for union representation elections and are commonly referred to by employers and others as "the ambush election rules." The Final Rules involve the most significant changes to the Board's procedures in representation cases in more than 50 years and, together with the Board's 2013 *Specialty Healthcare* decision, allow unions to petition for elections in so-called micro-units, consisting of small groups, sometimes smaller than a single department in a retail operation, and is expected to bring a major increase in union organizing in retail workplaces.

Because the Final Rules are designed to cut the period between the filing of a representation petition and the vote down to 21 days from the typical 40-45 days under the procedures that they replaced, retail and other employers will need to adjust their labor relations and human resources practices and strategies if they are to successfully maintain non-union status.

The Final Rules significantly change the Board's long-standing union election procedures and eliminates many of the steps that employers have relied on to protect their rights and the rights of employees who may not want a union. Cumulatively, the Final Rules tilt the scales in labor's favor by expediting the election process and cutting employer rights. Among the most important changes contained in the Final Rules are the following:

- Representation hearings will generally take place within eight days of the filing of the petition.

- Employers will have to provide the NLRB and any union that files a petition with a list of their employees' names, job classifications, shifts, and work locations before the hearing. Under the old rules, employers did not have to provide employees' names and addresses until after an election was agreed to by the parties or directed by the NLRB Regional Director after a hearing.

- If an employer does not agree that the proposed bargaining unit named by the union in its petition is an appropriate one, the employer must also provide the petitioning union and the NLRB with the names, job titles, work locations, and shift information for all other

employees whom it believes should be included in the unit. This information will allow the union to contact and begin its campaign among all of those employees as well.

- One of the most significant requirements of the Final Rules is that an employer must submit a detailed Statement of Position ("SOP") by noon the day before the before the hearing identifying any and all issues that it believes exist with respect to the petition—this will include issues concerning eligibility, inclusion or exclusion from the unit, supervisory and managerial status, and whether the unit that the union seeks is appropriate. If an issue is not raised in the SOP, the employer will be deemed to have waived all of its legal arguments that it did not raise. This means that it is critical that an employer carefully assess all of the facts and issues without delay.

- Under the Final Rules, employers no longer have the legal right to a hearing and to present evidence on issues such as supervisory status, unit composition, and other issues. The Board's Regional Office will generally deny employers the right to have important questions concerning eligibility and supervisory status resolved before an election.

- Instead, an employer will need to be prepared to make an "offer of proof" at the hearing, describing in detail who its witnesses and what its documentary evidence would have been had it been allowed to call witnesses.

- Employers no longer have the right to file post-hearing briefs on issues that are litigated at a representation hearing; instead, parties will be limited to arguing their positions in closing statements unless the Regional Director decides that briefs are necessary.

- Under the old rules, parties generally had not less than eight days from the close of the hearing to submit a written brief applying the facts and the law and presenting their arguments verbally. Generally, when an employer ordered the transcript of the hearing and requested an extension, its time to submit a post-hearing brief would be extended by an additional two weeks.

- Employers will no longer have the right to appeal a Regional Director's decision to the Board in Washington before an election is conducted. Under the old rules, this appeal period typically meant that the election could not take place until at least 25 days after the Regional Director issued a Decision and Direction of Election.

- The Final Rules expand the information that employers must provide about their employees to the union and the NLRB before the election. While the old rule required employers to supply employees' names and home addresses, the Final Rules dictate that employers also provide unions with employees' home telephone numbers and their personal email addresses. The list will now be due in two days rather than seven days and must be in a Word document.

- The Board's review of a Regional Director's legal findings and conclusions is severely curtailed.

- Perhaps most important, there will no longer be a minimum time period for the pre-election campaign because the Final Rules eliminate the minimum 25-day waiting period between a Direction of Election and the election. Rather, the Regional Director "shall

schedule the election for the earliest date practicable"—which could be as early as 14 days after the petition is filed.

By and large, the Final Rules run roughshod over an employer's right to dispute the propriety of the proposed bargaining unit before the election occurs and saddle the employer with new pre-election obligations. In effect, the NLRB has endeavored to speed up the election process so that an employer is unable to investigate and present a campaign against the union or fully consider the applicable legal questions. While the NLRB argues that the amendments "remove unnecessary barriers" to a union election, in reality, what was removed were those checks and balances preventing a union ambush and ensuring that an employer's right under the National Labor Relations Act ('NLRA" or "Act") to express and communicate its position under Section 9(c), the "employer free speech" provision, has meaning. To put it bluntly, organized labor and the Board hope for, and the rest of us should expect, more union elections, in a shorter period of time, and more victories by unions trying to organize.

While the NLRB characterizes the amendments as necessary to "modernize the representation case process," there is little in the Final Rules that merits such a claim. The amendments seem little more than window dressing to obscure the Board's intended goal of helping unions win elections.

Expect Additional and Faster Elections and More Union Organizing

Until now, the NLRB's goal has been to ensure that elections take place within 45 days of the filing of a representation petition. The Board's goal in amending its rules is to shorten that period as much as possible without amendments to the Act, which would require Congressional action.

When measuring their likely impact, the changes in the election rules should not be viewed in isolation. Rather, they need to be looked at in light of the Board's ruling in *Specialty Healthcare* and subsequent cases. In that line of cases, the Board made clear that it will find smaller, easier-to-organize units sought by unions to be appropriate and will direct elections accordingly, even though, under prior Board decisions, many such units would have been found to be inappropriate under the rule that units are not to be based on the extent of organizing.

The Final Rules should also be viewed in the context of the Board's recent *Purple Communications* decision, which held that, if employees are allowed to use their employer's email system for any non-work-related purpose, they will be presumptively allowed to use their employer's email system for union organizing and other matters relating to terms and conditions of employment.

3. EEOC Proposes Wellness Program Amendments to ADA Regulations: The Impact on Retail Employers
By August Emil Huelle

When the ACA increased wellness program incentives to encourage a healthier workforce, many employers in the retail industry embraced the potential long-term cost savings by amending their wellness programs to implement the maximum incentives allowed. A newly proposed wellness program rule issued by the EEOC may force employers to reduce their ACA-compliant wellness incentives and, at the very least, to update their existing wellness program designs to comply with the EEOC's proposed rule.

On April 20, 2015, the EEOC issued proposed amendments to regulations under the Americans with Disabilities Act ("ADA"), which attempt to clarify when wellness program incentives render a health plan involuntary and, therefore, discriminatory under the ADA. Title I of the ADA explicitly restricts employers from obtaining medical information from employees by generally prohibiting them from making disability-related inquiries or requiring medical examinations. The statute, however, provides an exception to this rule for employers that "conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site." Employee health programs include workplace wellness programs.

Previous EEOC guidance explained that a "wellness program is voluntary as long as an employer neither requires participation nor penalizes employees who do not participate," but until the recently released proposed rule, the EEOC was silent on whether and to what extent, if any, wellness program incentives sanctioned by the ACA violate the ADA.

The Proposed Rule

The proposed rule states that an employer may offer limited incentives up to a maximum of 30 percent of the total cost of employee-only coverage, whether in the form of a reward or penalty, to promote an employee's participation in a wellness program that includes disability-related inquiries or medical examinations as long as participation is voluntary. Under the proposed rule, "voluntary" means that an ADA covered entity does not: (1) require employees to participate, (2) deny coverage under any of its group health plans or limit the extent of such coverage to an employee who refuses to participate in a wellness program, and (3) take any adverse employment action or retaliate against, interfere with, coerce, intimidate, or threaten employees who do not participate.

Further, to ensure that participation in a group-health-plan wellness program that includes disability-related inquiries or medical examinations is truly voluntary, an employer must provide an employee with a notice indicating: (1) what medical information will be obtained, (2) who will receive the medical information, (3) how the medical information will be used, (4) the restrictions on such information's disclosure, and (5) the methods that the covered entity will employ to prevent improper disclosure.

Confidentiality of medical information also is addressed in the proposed rule. The EEOC made no changes to the current ADA confidentiality rules, but it did propose to add a new subsection that generally requires that the medical information collected though a wellness program be provided to the ADA covered entity only in aggregate terms that do not disclose, or are not reasonably likely to disclose, the identity of specific individuals, except as needed to administer the plan. The proposed rule confirms that a wellness program associated with a covered entity under the Health Insurance Portability and Accountability Act ("HIPAA") likely should comply with the new ADA confidentiality obligation by complying with the HIPAA Privacy Rule.

The proposed rule does not address whether the EEOC's interpretation of the term "voluntary" and its interplay with wellness program incentives under the ADA cross over to similar provisions under the Genetic Information Nondiscrimination Act ("GINA"). Rather, the proposed rule states that further rulemaking on GINA and wellness programs will be forthcoming.

The Big Departure from ACA Guidance

The proposed rule's biggest departure from current ACA wellness program guidance arguably is the 30 percent incentive limit placed on all participatory *and* health-contingent wellness programs that include disability-related inquiries or medical examinations, including those designed to reduce or eliminate tobacco use. The ACA does not impose limits on rewards for participatory wellness programs. Unlike health-contingent wellness programs, participatory wellness programs do not include any condition for obtaining a reward-based incentive that turns on an individual satisfying a standard related to health.

By excluding participatory incentives over 30 percent and the additional 20 percent health-contingent incentive allowed for tobacco cessation, employees lose the opportunity to lower their premiums by these additional amounts. Even more troubling is that, depending on the employee, a refusal to permit the full tobacco cessation incentive might tip an employee over the ACA's 9.5 percent threshold for "affordability," possibly resulting in assessable payments under the shared employer responsibility provisions.

Potentially compounding this problem is that the proposed rule requests comments on whether the EEOC should deem a wellness program with disability-related inquiries or medical exams coercive and involuntary if the incentives exceed the ACA's 9.5 percent affordability rate. Significantly, the EEOC takes the position in the proposed rule that the measure of affordability and the impact of a 30-percent reward or penalty are based on self-only coverage.

4. Security Considerations for the Retail Employer
By Adam C. Solander and Brandon C. Ge

In today's connected data-centric world, the reality is that, at some point, a retailer will likely experience a data breach. Despite this inevitability, consumers, employees, and business partners view such incidents with a critical eye and will want to understand what steps the business took to prevent the breach and mitigate the incident.

In the past year, there has been an explosion in the number of cyber-attacks targeting retail employee and consumer data. There has also been a corresponding increase in the number of lawsuits and government investigations challenging a retailer's practices that led to the data disclosure. Unfortunately, these challenges have the benefit of hindsight and, thus, retailers must take reasonable steps to protect their data and be ready to effectively respond when an incident happens.

While not all breaches are preventable, there are several critical steps that retailers can take to manage risk with regard to security incidents and protect against a foreseeable incident.

a. Risk Assessment

Conducting a risk assessment is perhaps the most important step in managing data breach risk. While there are a number of different frameworks for conducting a risk assessment, the assessment should at a minimum:

- identify all systems and processes that contain sensitive information,
- document potential threats and vulnerabilities to those systems and processes,

- identify additional security measures to mitigate risks to an acceptable level, and
- monitor the progress of mitigation.

If an organization has conducted a risk assessment and put in place measures to mitigate risk, it is in a good position to refute arguments that the organization did not take reasonable steps to protect its data.

b. Training

Nearly all of the major breaches reported this year have had some element of social engineering associated with them. In general, social engineering involves an outsider manipulating employees into performing actions or divulging confidential information. The most common forms involve phishing emails and phone calls designed to trick employees into divulging their credentials to access company systems. While it is important for employers to have systems in place to filter emails from likely sources of social engineering attacks, no system is perfect and these messages will get through. Thus, employers cannot rely on technical safeguards and should develop training programs to educate employees on social engineering attacks and cyber security more generally. This training should be an ongoing process designed to keep employees up to date on the types of attacks happening and things to be on the lookout for.

c. Information Security Frameworks

In a data breach dispute, the argument usually boils down to whether the controls that the business had in place to protect information were reasonable. The reality for employers is that there are an incalculable number of ways in which data can be lost or their systems can be compromised. Consequently, it is impossible for businesses to prepare for every contingency. It is therefore recommended that businesses adopt an industry accepted framework for information security management. There are a number of frameworks available (e.g., HITRUST, ISO, and NIST) and, if such a framework is adopted and followed, it becomes difficult for plaintiffs to argue that the controls put in place were not reasonable to protect information.

d. Vendor Management

Retailers rely on a host of vendors that may have access to their sensitive data or systems. Many of the largest and most damaging data breaches have occurred not because of an organization's actions but rather because of its business partners. As a result of this threat, retailers should be cognizant of whom they do business with and put in place a process to thoroughly examine the IT security practices of their business partners before giving them access to information systems or data. At a minimum, retailers should request and review all compliance documentation such as risk assessments, evidence of training, and policies and procedures. In addition, retailers should push out questionnaires to test the IT practices of potential business partners as part of the request-for-proposal process.

e. Encryption

Sophisticated system intrusions from skilled hackers are difficult for most businesses to prevent. The majority of data breaches are caused by employees losing company-owned assets containing sensitive information. To prevent these types of breaches, retailers should ensure that all company-owned laptops, desktops, and storage devices are encrypted. Under both state

and federal law, if information is encrypted using a certified methodology, it is considered unreadable and not subject to breach notification laws.

f. Data Destruction

Retailers can minimize the impact of a breach by instituting data destruction policies to purge data from company systems when no longer needed for a business purpose. Limiting the amount of data in a business environment reduces the risk profile of the organization. Additionally, because sensitive data is often stored in unintended locations, the business should routinely scan its environment to determine whether data is being stored inappropriately. If hidden repositories are found, the data should be moved to the appropriate location and business processes should be updated to ensure that data remains secure.

g. Patching and Penetration Testing

Given the litigious environment around data breaches, organizations can no longer take a passive approach to information security. Software and systems become outdated quickly and organizations must take active steps to identify vulnerabilities and update systems as soon as possible. Organizations should run regular vulnerability scans to determine whether their systems require patching to bring them up to date. Additionally, at least on an annual basis, organizations should invest in a comprehensive penetration test to determine if their systems are vulnerable to outside attack. Engaging in such practices allows the employers to show that they took steps to actively manage their environment if their practices become challenged following a security incident.

h. Incident Response Plan

When a breach occurs, employers should be prepared to address the breach quickly and effectively. In order to effectively respond to a breach, an employer should have an incident response plan in place that is fully documented, regularly tested for operational effectiveness, and regularly updated. This plan should identify any reporting obligations and those who need to be involved as soon as a breach is identified. This team should include the internal breach response team as well as any vendors that the employer would use to mitigate the incident. Because contracts take time to negotiate, it is a best practice to identify breach vendors and enter into contracts before a breach occurs. The breach response team should have a defined hierarchy of who makes decisions on behalf of the organization and who is authorized to speak for the organization.

5. NLRB Issues Critical Guidance on Employee Handbooks, Rules, and Policies, Including "Approved" Language

By Steven M. Swirsky

As the NLRB continues to assert itself in the realm of non-union workplaces, one critical aspect of the Board's initiatives, and those of the NLRB's General Counsel, has been in the area of employer policies and workplace rules, including, but not limited to, those maintained in employee handbooks. The Board and the General Counsel have emphasized the fact that the NLRA does not only protect employees' rights with respect to union membership and representation, but the fact that the Act ensures the right of employees to engage in "concerted activity" with respect to a broad array of terms and conditions of employment.

On March 18, 2015, NLRB General Counsel Richard F. Griffin, Jr., issued General Counsel Memorandum GC 15-04 ("Memorandum") containing extensive guidance as to the General Counsel's views on what types of employer polices and rules, in handbooks and otherwise, will be considered by the NLRB's investigators and regional offices to be lawful and which are likely to be found to unlawfully interfere with employees' rights under the Act. The Memorandum is highly relevant to employers throughout retail, regardless of whether they have union-represented employees.

As explained in the Memorandum, the Board's legal standard for deciding whether an employer policy unlawfully interferes with employees' rights under the Act is generally whether "employees would reasonably construe the rules to prohibit Section 7 activity"—that is an action of a concerted nature intended to address issues with respect to employees' terms and conditions of employment. As we have noted previously, this General Counsel and Board have consistently given these terms broad interpretations and have found that many employer policies and procedures, in handbooks and elsewhere, that appear neutral and appropriate on their face, violate the Act and interfere with employee rights. Many of these cases have involved non-union workplaces where there is not a union present and there is no union activity in progress.

The Memorandum offers a recap of NLRB decisions concerning the following eight broad categories of policies, with summaries of the Board's holdings and examples of policy language that the NLRB found to unlawfully interfere with employees' Section 7 rights and policy language that the Board found did not unlawfully interfere with employees' rights:

- **Employer Handbooks Rules Regarding Confidentiality** – The Memorandum reviews the Board's precedents holding that "[e]mployees have a Section 7 right to discuss wages, hours, and other terms and conditions of employment with fellow employees, as well as with nonemployees such as union representatives." Interestingly, the Memorandum also states that "broad prohibitions on disclosing 'confidential' information are lawful so long as they do not reference information regarding employees or anything that would reasonably be considered a term or condition of employment, because employers have a substantial and legitimate interest in maintaining the privacy of certain business information." The Memorandum further "clarifies" by advising that "an otherwise unlawful confidentiality rule will be found lawful if, when viewed in context, employees would not reasonably understand the rule to prohibit Section 7 protected activity."

- **Employer Handbooks Rules Regarding Employee Conduct Toward the Company and Supervisors** – As explained in the Memorandum, "Employees also have the Section 7 right to criticize or protest their employer's labor policies or treatment of employees." The Memorandum offers an overview of decisional law, with particular attention to cases involving rules that prohibit "employees from engaging in 'disrespectful,' 'negative,' 'inappropriate,' or 'rude' conduct towards the employer or management, absent sufficient clarification or context . . . ." As further noted, employee criticism of the employer "will not lose the Act's protection simply because the criticism is false or defamatory."

- **Employer Handbooks Rules Regulating Conduct Towards Fellow Employees** – This section of the Memorandum focuses on language and policies that, according to the Board, interfere with the Section 7 right that employees have "to argue and debate with each other about unions, management, and their terms and conditions of employment," which as the General Counsel explains, the Board has held that protected concerted speech will not lose its protection under the Act, "even if it includes 'intemperate, abusive and inaccurate statements." Of particular interest in this portion of the Memorandum is the examination of

policies concerning harassment. The Memorandum notes that "although employers have a legitimate and substantial interest in maintaining a harassment-free workplace, anti-harassment rules cannot be so broad that employees would reasonably read them as prohibiting vigorous debate or intemperate comments regarding Section 7 protected subjects."

- **Employer Handbooks Rules Regarding Employee Interaction with Third Parties** – This section of the Memorandum focuses on employer policies and provisions that seek to regulate and restrict employees' contact with, and communications to, the media relating to their employment. The General Counsel notes that "[a]nother right employees have under Section 7 is the right to communicate with the news media, government agencies, and other third parties about wages, benefits, and other terms and conditions of employment," and that rules "that reasonably would be read to restrict such communications are unlawful." The General Counsel acknowledges, however, that "employers may lawfully control who makes official statements for the company," but any such rules must be drafted so as "to ensure that their rules would not reasonably be read to ban employees from speaking to the media or third parties on their own (or other employees') behalf."

- **Employer Handbooks Rules Restricting Use of Company Logos, Copyrights, and Trademarks** – The Board has found many employer policies, whether contained in employee handbooks or elsewhere, that broadly prohibit employees from using logos, copyrights, and trademarks to unlawfully interfere with employees' Section 7 rights. While the General Counsel acknowledges that "copyright holders have a clear interest in protecting their intellectual property," the Board has found, with the approval of such courts as the U.S. Court of Appeals for the Fourth Circuit, that "handbook rules cannot prohibit employees' fair protected use of that property." In this regard, the General Counsel states in the Memorandum that it is his office's position that "employees have a right to use the name and logo on picket signs' leaflets, and other protected materials," and that "[e]mployers' proprietary interests are not implicated by employees' non-commercial use of a name, logo, or other trademark to identify the employer in the course of Section 7 activity."

- **Employer Handbooks Rules Restricting Photography and Recording** – While many handbooks and policies prohibit or seek to restrict employees from taking photographs or making recordings in the workplace and on employer policy, the Memorandum states, "Employees have Section 7 right to photograph and make recordings in furtherance of their protected concerted activity, including the right to use personal devices to take such pictures make recordings." The Memorandum further notes that such policies will be found to be overbroad "where they would reasonably be read to prohibit the taking of pictures or recordings on non-work time."

- **Employer Handbooks Rules Restricting Employees from Leaving Work** – With respect to handbook or other policies that restrict employees from leaving the workplace or from failing to report when scheduled, the Memorandum notes that "one of the most fundamental rights employees have under Section 7 of the Act is the right to go on strike," and therefore "rules that regulate when an employee can leave work are unlawful if employees reasonably would read them to forbid protected strike actions and walkouts." Not all rules concerning absences and leaving the workstations are unlawful. A rule would be lawful if "such a rule makes no mention of 'strikes,' 'walkouts,' 'disruptions' or the like" since employees should "reasonably understand the rule to pertain to employees leaving their posts for reasons unrelated to protected concerted activity."

- **Employer Conflict-of-Interest Rules** – The Memorandum states that, under Section 7 of the Act, employees have the right to engage in concerted activity to improve their terms and conditions of employment, even if that activity is in conflict with the employer's interests. The Memorandum cites as examples of such activities that could arguably be in violation of broad conflict of interest policies as protests outside the employer's business, organizing a boycott of the employer's products and services, and solicitation of support for a union while on non-work time. Also, the Memorandum notes that when a conflict-of-interest policy "includes examples of otherwise clarifies that it limited to legitimate business interests [as such term is defined by the General Counsel and the Board] employees will reasonably understand the rule to prohibit only unprotected activity."

While the Memorandum arguably does not contain "new" information or changes in policy or case law, it should be useful for employers and practitioners (and employees) in that it provides a concise summary of the General Counsel's views on this wide range of matters and examples of language that is likely to be found lawful in future proceedings. Of course, it is important to note that each charge is decided on its own facts, and the actions and statements of employers and their supervisors in connection with the application and enforcement of the particular provision will almost always be relevant to the determination of whether the Board will issue a complaint on a particular unfair labor practice charge.

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