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Overbroad Handbook Policies May Constitute Unfair Labor Practices

February 25, 2014

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At-will disclaimers in employee handbooks may provide protection from contract claims, but a recent decision by a National Labor Relations Board ("NLRB") Administrative Law Judge ("ALJ") serves to remind employers that the disclaimers do not provide insulation from claims of unfair labor practices ("ULPs"). In *Boch Imports, Inc. d.b.a. Boch Honda and International Ass'n of Machinists*, Case No. 1-CA-83551 (Jan. 13, 2014), the ALJ ruled that provisions in the employee handbook of a retail automobile dealership ("Boch" or "Company") constituted ULPs in violation of Section 8 (a)(1) of the National Labor Relations Act ("Act").

The introduction to the handbook welcomed employees and stated, "As an employee, you will want to know what you can expect from our Company and what we expect from you. This Handbook provides information regarding our Company's current benefits, practices, and policies as well as some of the Company's expectations regarding your performance."

The ULP charges filed against Boch targeted several of the Company's handbook policies. Prior to the hearing, Boch had revised all but one of the provisions to which the NLRB objected. The ALJ nevertheless entertained the ULP charges that had been filed regarding all the unrevised policies and found that the following provisions constituted ULPs:

- **Confidential and Proprietary Information.** This provision prohibited employees from disclosing or authorizing the disclosure or use of any "Confidential Information," which was defined as including "compensation structures and incentive programs."

  The ALJ found that the Confidential and Proprietary Information provision and, in particular, "the restriction on "'compensation structures' and 'incentive programs' could lead an employee to believe that his ability to discuss his terms and conditions of employment with fellow employees, the media or a union were limited by this provision" and, therefore, violated Section 8(a)(1) of the Act.

- **Discourtesy.** This provision included the following prohibition: "All employees are expected to be courteous, polite and friendly both to customers and to their fellow employees. The use of profanity or disrespect to a customer or co-worker or engaging in any activity which could harm the image of the Company is strictly prohibited . . . ."

  Although the ALJ found that the first part of the provision was satisfactory, he held that the prohibition against "engaging in any activity which could harm the image of the Company" was "clearly susceptible of being understood to limit employees in their right to engage in a strike, work stoppage or similar forms of concerted activities" and, as such, constituted a ULP.

- **Inquiries Concerning Employees.** This provision stated, in relevant part, "All inquiries from outside sources concerning employees should be directed to the Human Resources Department. An employee shall not provide personal information of any nature concerning another employee (including references) to any outside source unless approved by the Human Resources Department and authorized, in writing by the employee . . . ."

  The ALJ found that this provision clearly violated Section 8(a)(1) of the Act by preventing employees from discussing the employees' terms and conditions of employment with union representatives and from cooperating with the NLRB, the media, or governmental agencies that might be investigating the Company.

- **Social Media Policy.** This policy included provisions that:

  - prohibited employees from disclosing any information about the Company's employees or customers;

  - required employees to identify themselves when posting comments about the Company or comments related to the Company's business or a policy issue;

  - prohibited employees from referring to the Company in postings that would negatively impact the Company's reputation or brand;

  - prohibited employees from engaging in activities that could have a negative effect on the Company, even if it occurs off Company property or off the clock;

  - prohibited employees from using the Company's logos for any reason;

  - prohibited employees from posting videos or photos that are recorded in the workplace;

- required employees to contact the Company's Vice President of Operations before making statements to the media;

- required employees to provide the Company with access to any commentary posted by employees on social media sites; and

- required employees to write and post respectfully.

With little discussion, the ALJ found that the above provisions of the Social Media Policy constituted ULPs "as employees would reasonably construe these provisions as preventing them from discussing their conditions of employment with their fellow employees, radio and television stations, newspapers or unions or limiting the subjects that they could discuss."

- **Solicitation and Distribution.** This provision restricted persons who are not employed by the Company from soliciting and distributing literature or other materials at any time on property adjacent to the Company's premises.

  The ALJ characterized the prohibition of solicitation and distribution of materials on public property, i.e., "on property adjacent to the Company's premises" as a "clear violation" of Section 8(a)(1).

- **Dress Code and Personnel Hygiene.** This provision stated, in relevant part, "Employees who have contact with the public may not wear pins, insignias, or other message clothing which are not provided to them by the Company . . . ."

  The Company did not revise the Dress Code policy prior to the hearing.

Although not expressly stated by the ALJ, it appears that the Complaint was made on behalf of employees in Boch's service department, comprised of service technicians who perform repair and maintenance on the cars that are brought into the facility and service advisors who meet with customers to discuss the work that needs to be performed, write up the service orders, and check in the cars for service (e.g., checking the odometer and inspecting the exterior of the vehicle for damage). Boch requires service technicians to wear blue and grey Company-issued jackets and a Company hat. The technicians interact with customers on road tests and sometimes discuss work on a customer's car; in addition, customers can watch the service technicians at work through a large glass window in the waiting area. The ALJ noted that Boch uniformly prohibited the wearing of any kind of pin or button because of the potential for pins to cause accidental damage to vehicles (e.g., by falling into an engine or scratching a vehicle's interior or exterior). With respect to insignias, however, the ALJ noted that, after the Boston Marathon bombing, Boch conducted a fundraiser for Boston Strong and, on that day, permitted employees to wear Boston Bruins, Boston Red Sox, and similar shirts.

The ALJ agreed that Boch had a legitimate interest in a blanket prohibition against the wearing pins but held that the extension of the blanket prohibition to insignias on clothing constituted a ULP.

Citing to prior NLRB precedent, the ALJ noted:

> In determining whether an employer, in furtherance of its public image business objective, may lawfully prohibit uniformed employees from who have contact with the public from wearing union insignia, the Board considers the appearance and message of the insignia to determine whether it reasonably may be deemed to interfere with the employer's desired public image. [citation omitted]

The ALJ held, however, that "customer exposure to such insignia, alone, is not a special circumstance allowing the employer to prohibit the display." The ALJ stated, "There are numerous factors that need to be weighed to determine whether a displayed item constitutes special circumstances and should be permitted, including size and the message thereon." Because a blanket prohibition does not permit such a weighing process, the ALJ held that the Dress Code policy violated the Act.

The *Boch* decision addresses many, but not all, of the employer policies that the NLRB has been targeting recently. In December 2013, for example, an ALJ found that an employer's "No Gossip Policy" constituted a ULP. In *Laurus Technical Institute and Joslyn Henderson*, Case 10-CA-093934 (Dec. 11, 2013), the employer, a private, for-profit technical school, had fired an employee for violating the school's recently issued no-gossip policy, which defined "gossip" as including, among other things:

- talking about a person's professional life without his/her supervisor present;
- negative, or untrue, or disparaging comments or criticisms of another person or persons; and
- creating, sharing, or repeating a rumor about another person.

The ALJ in that case had no difficulty in finding that the no-gossip policy was overbroad and that Henderson's termination for violating the policy likewise violated the Act.

The *Boch* and *Laurus* decisions illustrate the increased scrutiny that the NLRB has been giving to employee handbooks over the past few years. These and other recent cases show that the NLRB is taking aim at employee handbooks and broadly interpreting whether an employer's policies and prohibitions would reasonably tend to chill employees in the exercise of their statutory rights under Section 7 of the Act.[1] As these

[1]Pursuant to Sec. 7 of the Act:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other

decisions demonstrate, a policy does not need to impose an explicit bar on Section 7 activity to run afoul of the law. It is sufficient if the NLRB finds that the policy (i) can be reasonably construed to prohibit Section 7 activity, (ii) was established in response to union activity, *or* (iii) has been applied to restrict the exercise of Section 7 rights.

What Employers Should Do Now

Accordingly, employers may wish to review their handbooks and policies with particular attention to the provisions aimed at governing employee conduct. Among other things, employers should do the following:

- Identify the legitimate business reasons for the policies, and tailor them to those purposes.

- Eliminate or modify policies that may impede employees' rights to discuss and challenge the terms and conditions of their employment—e.g., salary and benefits—and to share such information with others.

- Review blanket policies that may be overbroad, such as the Boch policy prohibiting the wearing of any insignia.

- Review policies that may target plainly protected conduct, such as the Boch policy barring employees from discussing compensation, because it fell within the Company's definition of "Confidential Information," or its policy against solicitation on property adjacent to, but not on, Company property.

- Review expansive and vague prohibitions, such as Laurus' policy against making any "[n]egative . . . or disparaging comments or criticisms of another person or persons."

- Review the Epstein Becker Green *Management Memo* blog post titled "NLRB Targets Non-Union Employers and At-Will Agreements," which discusses the NLRB's scrutiny of at-will disclaimers in employee handbooks, to confirm that the handbook's at-will disclaimer does not impinge on employees' Section 7 rights.

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concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

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