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Maybe All Employee Handbook Policies Aren't Illegal After All?

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In December 2015, the U.S. Chamber of Commerce released a publication that discussed numerous examples of the National Labor Relations Board's "increasing hostility to commonsense employee handbook policies." A main premise of that publication, titled *Theater of the Absurd: The NLRB Takes on the Employee Handbook*, was that the NLRB was "adopting a wildly expansive reading of the [National Labor Relations Act's] protections in order to undermine sensible and widespread workplace policies." The Chamber further offered that "[t]hrough a series of decisions and official guidance, the NLRB has undertaken a campaign to outlaw heretofore uncontroversial rules found in employee handbooks and in employers' social media policies—rules that employers maintain for a variety of legitimate business reasons."

If you've read *Theater of the Absurd* or have become familiar with any of the many NLRB decisions discussed therein, you'd probably agree that it's tough to argue with the Chamber's position. Additionally, if you've recently attempted to create or update employee handbook policies within your own organization, you may have been surprised at how difficult it had become to craft policies that are unlikely to draw the ire of the NLRB.

As noted by the Chamber, in its decisions the NLRB had found violations in employers' policies "dealing with confidentiality, respectful behavior, foul language, proprietary information, at-will employment, solicitation in the workplace, and dress codes" among others. The decisions centered on "the Board's reading of Section 7 of the NLRA, which says that employees have the right to engage in 'concerted activity' for 'mutual aid or protection.'" In addition to declaring that "an employer's policy or rule will be found unlawful if it bars otherwise protected activity," the NLRB also established a rule that "even if a rule does not expressly prohibit protected activity * * * it will be found unlawful under three scenarios: '(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to Section 7 activity; or (3) the rule has been applied to restrict Section 7 activity.'" The NLRB's expansive interpretation and application of the first test—how employees might "reasonably construe" policy language—became a focal point of several decisions that went against employers.

Just a few days ago, however, a decision came down from the NLRB that should give employers reason to hope that the "theater of the absurd" might be headed toward a final run. On August 14, 2017, the NLRB issued a decision that rejected a union's challenge to Macy's confidential information policy, to the extent it protected certain private information of Macy's

customers that Macy's maintained in its records. The union argued that some of that information, such as customer names and contact information, could be used by employees to appeal to Macy's customers regarding a labor dispute or the terms and conditions of employment. The NLRB rejected this argument, finding that the NLRA does not protect employees who divulge information that their employer lawfully may conceal, and that employees may be lawfully disciplined or discharged for using for organizing purposes information improperly obtained from their employer's private or confidential records.

It should be encouraging to employers that the NLRB, on this occasion, did not issue yet another decision in which it found a way to declare yet another employer confidentiality policy invalid. Pro-employer decisions such as this have been few and far between in recent years, but perhaps more are on the way. Notably, NLRB member Lauren McFerran, who was nominated during the Obama administration, was part of the majority that sided with the employer, Macy's, in this case.

Additionally, this pro-employer NLRB decision follows closely on the heels of another employer's successful federal court challenge of an adverse NLRB decision that had protected certain tactics used by employees as part of a union-organizing campaign. In July 2017, the federal Court of Appeals for the Eighth Circuit determined that employees of a Minnesota employer, which operated several Jimmy John's franchises, had not engaged in protected concerted activity when they used certain posters and press releases at the start of flu season in connection with their employer's sick leave policy. The Eighth Circuit found that the activity was not protected because the posters and releases were part of a "sharp, public, disparaging attack upon the quality of the company's products and its business policies" and were "materially false and misleading." Therefore, the Eighth Circuit went against the NLRB and held that the employees' third-party communications demonstrated "such detrimental disloyalty as to provide 'cause'" for the employer to discharge and discipline the employees responsible for the tactics. This is another encouraging development for employers in the context of the NLRB.

The new NLRB decision discussed above is *Macy's Inc. and United Food and Commercial Workers Union, Local 1445*, Case 01-CA-123640, Decision and Order, August 14, 2017. The Eighth Circuit decision is *MikLin, Inc. v. NLRB*, Nos. 14-3099 and 14-3211, issued July 3, 2017.

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