Clarification needed

How recent labor board decisions may affect company policies **Interviewed by Roger Vozar**

Over the past year, the National Labor Relations Board (NLRB) has issued a number of directives with the potential to affect many employers across Ohio and the nation.

A common theme from the NLRB has been that employers need to clearly state that work rules do not restrict the legal rights of employees. Examples of NLRB actions include striking down a large retailer's social media use policy and a car dealership's rule about being courteous. In both cases, the NLRB ruled that employees could interpret the broad language of employer policies as prohibiting protected discussions about topics such as wages or working conditions.

"The board is emphasizing that an indirect violation can occur if, hypothetically, an employee who wants to exercise concerted rights with fellow employees might read a rule as preventing him or her from doing so. You'd have to be thinking of hypotheticals in order to be looking at that as a problem," says Stephen P. Bond, partner with Brouse McDowell, LPA.

Smart Business spoke with Bond about the NLRB and what companies should do in response to recent rulings.

Stephen P. Bond
Partner
Brouse McDowell, LPA

Are the recent NLRB actions just a concern for employers with unions in place?

No. Under federal law, the focus is on employees' rights to engage in concerted activities for the purpose of mutual aid or protection. This may exist whether there is a union or not, and the board has the authority to enforce those rights. In fact, the board issued a directive ordering all employers involved in interstate commerce to post a notice to employees informing them of their rights under federal law. But, at this stage, enforcement of that order has been postponed while the courts decide whether the board has the authority to enforce such a requirement.

Why is this happening now?

It is easy to understand that if an employer enforces a work rule that directly prevents an employee from doing something he or she has a right to do, the government would have a problem with that. But, recently, the board has emphasized an interpretation that if an employer adopts a rule that could reasonably be construed as prohibiting legal labor activities, then that also will be prohibited by the board, even if the employer had a legitimate reason for the rule. And the board holds that the ambiguous employer rules — rules that reasonably could be read to have a coercive meaning — are construed against the employer. So, there have been cases cited by the board under this standard where seemingly innocent rules have come under attack.

Can you provide some examples?

In the case of Costco Wholesale Corp., 358 NLRB No. 106 (Sept. 7, 2012), the board had problems with a number of Costco's employee rules. First, there were rules against unauthorized posting of any materials on company property; discussing private matters of employees, including issues about being off work for various reasons; disclosing sensitive information, including payroll, Social Security numbers and personal health information; and sharing confidential employee information such as addresses and email addresses. The board did not like these rules because they went too far and may have prevented employees from using information in connection with other employees for mutual benefit in ways that are protected.

The board further objected to a company rule prohibiting employees from electronically posting statements that damage the company or damage any person's reputation. And the board did not like a rule that prevented employees from leaving company premises during the workday without permission. In both respects, the board envisioned possible scenarios in which the employee could interpret these rules as preventing them from proceeding with rights they have under federal law in dealing with their employers.

In Karl Knauz Motors, 358 NLRB 164 (Sept. 28, 2012), the employer had this work rule: Courtesy is the responsibility of every employee. Everyone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language that injures the image or reputation of the dealership.

But the board held that an employee could take this to mean he or she could not criticize his or her employer or object to working conditions, even if talking to co-workers, conduct which is allowed under federal law.

What should employers do about this?

First, employers need to be aware of the potential of an employee making a claim that a work rule may be violating employee rights under federal law, even if there is no union.

Second, they should look at existing policies and handbooks with this issue in mind. Particularly, look to see if there are any obvious ways they are running afoul of any of these rulings.

It's not necessary to change all of your rules, but look at ways the rules can be interpreted and whether they can be clarified to make sure they're not in violation. The board talks about putting in language that says the intention is not to prevent employees from engaging in their lawful rights. You can use the company's existing language and put in a disclaimer that might save you from getting into one of these problems. <<

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