JUNE 13, 2013

MORE EMPLOYER POLICIES CHALLENGED: WHERE EXACTLY IS THE LINE?

The National Labor Relations Board has, for at least the past two years, been focusing on private employer policies that interfere with employee rights to engage in protected concerted activity for their mutual aid and protection. Employer policies that prohibit talking about wages, hours and working conditions while at or away from work have been struck down as being over-broad and unlawful. Likewise, rules and policies that require employees to be "courteous" or to maintain "confidentiality" have been challenged as well. It's difficult for employers to know just where the line is between a lawful and an unlawful policy. What's an employer to do?

SOME HELP IN FINDING THE LINE?

The NLRB has attempted to define the line in case decisions and in official advice memos. In general, an employer's policy or rule would be unlawful if:

1. Employees would reasonably construe the language to prohibit activity protected by the NLRA;
2. The rule or policy was established in response to union activity; or
3. The rule or policy has been applied to restrict the exercise of protected rights.

The policy or rule must be read in context and be given a reasonable reading. Nevertheless, the line is still very fuzzy.

POLICIES OF THE AMERICAN RED CROSS FOUND TO BE OVER-BROAD AND UNLAWFUL

A recent decision by an NLRB Administrative Law Judge ("ALJ") took a look at several policies of the American Red Cross and found them to be unlawful. The language found to be unlawful is not that unusual. Although the ALJ's decision has not yet been officially adopted by the NLRB, it does provide additional guidance in determining if particular policies will survive NLRB scrutiny. Here is the specific language from the Red Cross policies and agreements that the ALJ found to be over-broad and unlawful:

CONFIDENTIAL INFORMATION AND INTELLECTUAL PROPERTY AGREEMENT

- Confidential information shall include but not be limited to: information relating to Red Cross' . . . (i) personnel . . . (ii) employees ... [and] (v) all information not generally known outside of Red Cross regarding Red Cross and its business, regardless of whether such information is written, oral, electronic, digital or other form and regardless of whether the information originates from Red Cross or Red Cross' agents.
- I will not during or after my Red Cross affiliation disclose to persons outside of the Red Cross information that the Red Cross considers confidential . . . including, but not limited to (i) information relating to Red Cross ... benefits, compensation, equal employment opportunity matters, or (ii) information relating to Red Cross . . . employees . . . unless authorized by the President of the Red Cross or his/her designee.

EMPLOYEE HANDBOOK AND CODE OF CONDUCT

- Prohibited: Disclos[ure of] any confidential American Red Cross information that is available solely as a result of an employee's . . . affiliation with the American Red Cross to any person not authorized to receive such information, or use to the disadvantage of the American Red Cross any such confidential information, without the express authorization of the American Red Cross.
- Prohibited uses of Western Lake Erie Region communication systems include, but are not limited to: Distributing . . . confidential . . . information of the Western Lake Erie Region and/or the Red Cross without appropriate authorization.
- Prohibited: The release of confidential employee information without authorization.
- Prohibited: Unauthorized placement or posting of information in break rooms, or in common areas.
- Prohibited: Participating in a work stoppage is prohibited.

THIS IS AN ADVERTISEMENT
© 2002-2024. Hall, Render, Killian, Heath & Lyman, P.C. All Rights Reserved.

CONFIDENTIALITY AGREEMENT

- All information obtained by virtue of employment with the American Red Cross is to be held in the strictest confidence. This includes all information in . . . personnel and financial records. The following are some examples of confidential information: All information on litigation; all documents marked "confidential"; and all Financial Information.

The ALJ also held that the "Savings Clause" included in the policies was not effective in making an otherwise over-broad and unlawful policy lawful. The Savings Clause in this case provided: *"This Agreement does not deny any rights provided under the National Labor Relations Act to engage in concerted activity, including collective bargaining."* The ALJ said that employees aren't knowledgeable enough to know their rights, and so a general Savings Clause statement would not be effective unless a more detailed statement of the protected rights was included in it.

We have, for the past two years, followed the NLRB's challenges in our **HR Insights Blog**. You can find six separate articles here, here, here, here, here and here that discuss other holdings that tend to define the line between lawful and unlawful restrictions on employee activity.

WHAT TO DO?

Private employers should consider reviewing exiting rules and policies that contain similar broad language that might be construed by employees to limit their right to discuss wages, hours and working conditions or to engage in concerted activity – whether or not a union is involved.

Reference: *American Red Cross Blood Services Western lake Erie Region and UFCWU, Local 75, JD-38-13, June 4, 2013.*

Please contact Steve Lyman at slyman@hallrender.com or your regular Hall Render attorney if you have questions.

THIS IS AN ADVERTISEMENT
© 2002-2024. Hall, Render, Killian, Heath & Lyman, P.C. All Rights Reserved.