

General Counsel Column

Employee Handbooks: A Checklist for Labor Law Compliance

By Kathryn M. Hindman and Jennifer Sabovik

Kathy is a shareholder with Bullard Law and has spent the last 23 years assisting employers with litigation prevention and training. She specializes in public and private sector wage and hour compliance, workplace harassment and discrimination, and managing family medical leave, the interactive process and reasonable accommodation.

Employers often seek legal review of their handbooks and policies to ensure compliance with federal and state employment laws, but neglect to seek review for compliance with federal and state labor laws. Even employers whose employees are *not* represented by a union should ensure that their policies comply with the federal National Labor Relations Act (NLRA), since (in most cases) they are still subject to the jurisdiction of the National Labor Relations Board (NLRB) – the federal agency tasked with enforcing the NLRA. The NLRA guarantees employees the right to act “in concert,” i.e., to communicate with coworkers about their wages, hours and terms and conditions of employment. Often, broad employer policies will be found to be unlawful because they interface with or infringe on those rights. As a result, a unionized employer might face an overturned election, and even if not unionized, can be liable for back pay and/or reinstatement for violating the NLRA.

Following is a checklist of some of the provisions in employee handbooks or employer policy manuals that are often found to be unlawful under the NLRA.

1. Prohibitions Against Discussing Wages

Broad rules prohibiting employees from criticizing the company’s wages are often found in “confidentiality” policies. Under the NLRA, however, employees have a right to discuss their wages and terms and conditions of employment with one another and with third parties. The better practice is to narrowly tailor a confidentiality provision to protect confidential business information, such as budgetary and sales information, trade secrets and customer lists. Policies should specify that “wages,” “wage rates” and “other terms and conditions of employment” are not included.

2. Prohibitions Against Solicitation and Distribution

Employers often attempt to prohibit employees and third parties from distributing literature and from soliciting for organizations on the Employer’s property, but nevertheless make the exception for several “favorites” (i.e., Girl Scouts, school drives, humane society, etc.). The labor rules regarding such prohibitions are somewhat complex. Prohibitions against solicitation are not in and of themselves unlawful as long as they prohibit solicitation by employees during working time and are uniformly and consistently enforced. Distribution of union materials by employees may be prohibited at any time, as long the policy prohibits the distribution of *any* materials by employees. Union material cannot be singled out.

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3. *Policies Governing the Use of Employer Email*

No-solicitation rules also come into play when addressing an employer's e-mail policies. The NLRB has held that an employer may prohibit employees from using its email systems to solicit for the union so long as it is pursuant to a uniformly enforced policy that prohibits any non-business related solicitations. The NLRB has approved an employer's electronic policy that states: "Communications systems are not to be used to solicit or proselytize for commercial ventures, religions or political causes, outside organizations, or other non-job-related solicitations. Nothing in this rule is intended to prevent communications concerning wages, hours and working conditions and is not intended to prohibit any communications allowed by law." This holding, however, is highly unpopular with unions and is likely to be reversed by the new Obama NLRB.

4. *Bulletin Board Policies*

Employer policies governing employee use of company bulletin boards may infringe on the rights of employees to unionize. Often, employers provide a bulletin board specifically for employee use, and allow them to post advertisements about items for sale, such as school wrapping paper, used cars, or puppies. If employers allow such postings, they must allow employees to post items regarding union activity. If the policy contains a requirement that any items must be approved by management before they are posted on the bulletin board, that policy must be uniformly and consistently enforced; it can't be used to single out union related materials. Nor can it be instituted in response to union organizing activity in the workplace. It is okay to have a bulletin board policy that prohibits any postings by employees. As long as that policy is consistently and uniformly enforced, it can be used to prohibit the posting of union related material.

5. *Prohibitions Against Wearing Stickers or Pins*

Since, employees have a right to wear union paraphernalia in the workplace (subject to some limitations), most employer policies that attempt to restrict pins or stickers are invalid on their face. Employers may prohibit the wearing of such paraphernalia under limited circumstances for example, pursuant to uniformly enforced safety rules, or dress code policies for employees who have significant contact with customers. These exceptions are generally limited to specific areas, such as the sales floor or check stands in retail settings, or in "immediate patient care areas" in a hospitals and nursing homes.

6. *Prohibitions Against "Fraternizing On Or Off Duty"*

This type of rule is subject to an over-broad interpretation which could restrict employees from engaging in concerted activity. If the intent of the rule is to prohibit romantic relationships and/or nepotism, the language should be sharpened to specify what is actually prohibited.

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7. *Prohibitions Against Disruptions or Abusive Language*

Employer policies that generally prohibit employee disruptions, insubordination, and abusive language in the workplace should be tailored to specific workplace conduct rules, like workplace violence or anti-harassment policies. The NLRB often finds that such policies are too broad because they could be interpreted to prohibit legitimate concerted activity, such as employees walking off the job or distributing union literature that is critical of management.

8. *No-Access Rules*

Such rules prohibit employees from entering or remaining on company property outside their normal working hours without authorization. Such rules are not unlawful if they: (1) are distributed to all employees; (2) limit access only to non-working areas; and (3) apply to off-duty employees entering the property for any reason whatsoever (and are uniformly and consistently applied as such).

9. *Rules Requiring Employees to Follow Complaint Procedures*

Many employers have policies that outline a procedure by which employees can file complaints. There is nothing wrong with such a policy, as long as it does not specify that employees must present complaints using that procedure and are disciplined if they bypass that procedure. Employees have the right under Section 7 of the NLRA to complain to each other or to outsiders, such as union organizers and in some cases customers and the media.

10. *Anti-Fraternization Policies*

Rules prohibiting employees from fraternizing with one another in and outside the workplace are generally aimed at preventing workplace romances or nepotism. They are often found to be unlawful as written because they could be interpreted to prevent employees from gathering together to engage in protected concerted activity.

11. *"Anti-Union" Position Statements Coupled with a Requirement That Employees Comply With All Company Policies*

A policy informing employees that the company strives to keep its workplace enjoyable, "so it hopes" employees will not feel "the need" to elect a third-party (i.e., a union) to interface with the direct communications between the employees and the employer is often referred to as an "anti-union" statement. Believe it or not, the NLRB does not believe this statement, on its own, is unlawful. Notably, however, if your handbook also has a statement requiring all employees to abide by all the policies in your handbook, the Board has found such a combination to be unlawful.

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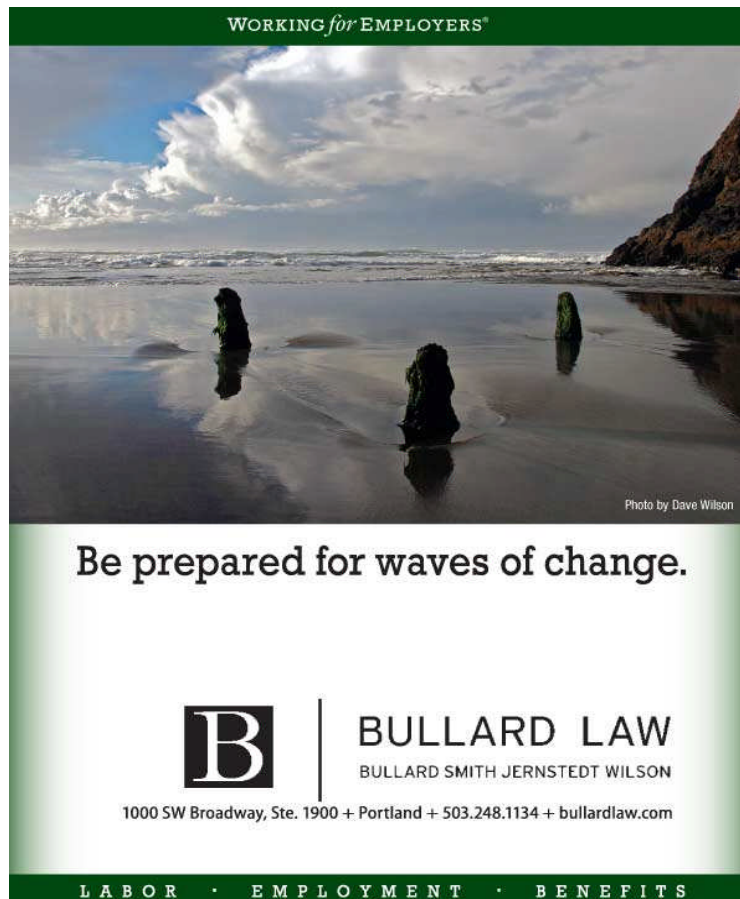
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The NLRB thinks employees could interpret the combination to mean they must comply with the "anti-union" position statement and refrain from exercising their rights to engage in union activity.

12. Social Media Policies

Finally, the NLRB has recently taken the position that social media policies which broadly prohibit employees from discussing or disparaging their employers and coworkers in social media (i.e., Facebook, My Space, etc.), even when off duty and while using personal computers, violate the NLRA because such policies can "chill" protected speech. Until this is sorted out by the NLRB, and ultimately through the courts, employers should be cautious with broad policies that prohibit employees from bad-mouthing or talking about the employer and coworkers through social media.

Whether you work with a unionized workforce or not, consistency is key when it comes to employer policies. You may have a policy in the books that would help you respond to union activity when it occurs in your workplace, but if you have not been enforcing that policy uniformly, you will not be able to enforce it when it comes to union activity. And if you have not carefully reviewed your policies, you may find that you cannot enforce them because they are unlawful under the NLRA. One approach to help avoid such result is to include a disclaimer in all your handbooks and manuals stating that "nothing in these policies is intended or will be applied in a manner that prevents or interferes with communications regarding employee wages, other terms and conditions of employment, or with employee activity protected by law."



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