

Employer Handbook Policies Violate the National Labor Relations Act



FOLEY & LARDNER LLP

Article By

[Jeffrey S. Kopp](#)

[Foley & Lardner LLP](#)

[Labor and Employment Law Perspectives](#)

- [Labor & Employment](#)
- [Federal Circuit / U.S. Court of Spec. Jurisdiction](#)

Tuesday, August 30, 2016

As [we recently noted](#), the National Labor Relations Board (NLRB) is laser-like focused on scrutinizing employer personnel policies. In yet another example of this ongoing campaign, a recent administrative law judge (ALJ) decision highlights how some common employer's handbook policies can be found to be unlawful.

Here are just a few of the policies the ALJ considered and found illegal:

Conducting Personal Business

- According to the company handbook, *"You are expected to use BCD's property only for business purposes. Personal use is generally prohibited of BCD's supplies or equipment, such as telephones, fax machines, computers, or repair equipment and supplies. ... As part of this policy, Team Members are reminded they should only be on BCD's property when conducting BCD's business. ... Team Members are to conduct only BCD business while at work. Team Members may not conduct personal business or business for another employer during their scheduled working hours."*

The ALJ found that this rule was poorly written and violated Section 7 of the National Labor Relations Act (NLRA) in several ways. First, the prohibition against conducting "personal business" on company property and "while at work" was overly restrictive. The judge also found that restricting "personal business" could include

communications about unions or complaints about working conditions and was therefore too broad. Also, restricting employees from conducting only company business “while at work” was illegal because it prevented employees from engaging in protective activity on lunch and breaks. Finally, the rule was ruled to be illegal because it could be reasonably read to deny off-duty employees the right to engage in protected activity in non-work areas of the employer’s property.

Solicitation and Distribution

- The company handbook states, *“Any and all solicitations or distributions must cease immediately if the intended recipient expresses any discomfort or unreceptiveness whatsoever.”*

The ALJ found this rule violated the NLRA because the Act generally protects employees’ rights to solicit and distribute literature during non-work time and in non-work areas, even if it is annoying or disturbs the employees being solicited.

Social Media

- Related to social media, the company handbook includes, *“BCD recognizes the importance and prevalence of electronic media in our work and personal lives. To assist in addressing employment related concerns the following Social Media Policy guides your actions. . . . If you publish content to any blog or website and it has to do with work, use a disclaimer, such as ‘The postings on this site are my own and do not represent my employer’s positions’. . . . If you do publish content regarding BCD, always identify yourself – State your name and (when relevant) your position at BCD. . . . Don’t cite or reference guests, vendors, clients, or Team Members without their approval. . . . When posting photos, always obtain approval and never use photos gathered throughout the course of your career at BCD. Photos taken or obtained at BCD are the sole property of the company and are not permitted to be used for personal use. Don’t provide confidential, proprietary information and/or trade secrets.”*

As with the other rules, the ALJ found this rule to be illegal under the NLRA. Specifically, the ALJ held that requiring employees to identify themselves and refrain from mentioning guests, vendors, clients, or other employees without their approval restricts the free exercise of their rights to comment about work-related concerns. The ALJ noted that, as written, this rule is broad enough to restrict emails between employees complaining about work conditions. The ALJ also held that the rule violated other provisions of the NLRA because it restricted the use of videos, photos, and audio recordings which could be used to engage in protected rights.

As this recent decision again makes clear, common handbook policies like those above are squarely in the crosshairs of the NLRB’s enforcement actions. If you have not recently reviewed your handbook and other policies, and especially if you have policies like those above, we strongly suggest that you do so to ensure they pass muster and can withstand challenges by the NLRB.

Source URL: <https://www.natlawreview.com/article/employer-handbook-policies-violate-national-labor-relations-act>