

FEB. 2018 EMPLOYMENT LAW UPDATE

NEW NLRB TEST WILL AFFECT EMPLOYEE HANDBOOKS.

The National Labor Relations Act (the “Act”) is a Federal law that provides all employees with the right to engage in certain protected activities related to the terms and conditions of their employment. The National Labor Relations Board (“NLRB”), the administrative agency that enforces the Act, increasingly scrutinized employee handbooks during the past decade. Oftentimes, the NLRB found common and seemingly neutral policies were unlawful because those policies could be “reasonably construed” by employees to prohibit the exercise of the rights protected by the Act. Many employers responded by revising or removing such policies. The NLRB, however, recently adopted a new test that will likely allow employers more flexibility to maintain such policies.

Moving forward, the NLRB will evaluate two factors before determining whether a facially neutral policy unlawfully interferes with protected rights. First, the NLRB will analyze the nature and extent of the potential impact on employee rights. Second, the NLRB will assess the employer’s legitimate justifications for maintaining the workplace rule. An employer’s justification was never previously part of the NLRB’s analysis. Instead, the NLRB merely analyzed the content of the policy. After evaluating these two factors, the NLRB will conduct a balancing test to determine whether the policy is lawful. Based on this new standard, the NLRB anticipates workplace rules will fall into one of three categories.

Category One policies are lawful because either the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of rights under the Act or the potential adverse impact on protected rights is outweighed by justifications associated with the rule. An example is a workplace rule requiring employees to abide by basic standards of civility.

Category Two policies are rules that warrant individualized scrutiny to determine whether the rule would prohibit or interfere with rights, and if so, whether any adverse impact on protected conduct is outweighed by legitimate justifications. An example is a no-camera policy at a federal government contractor. The policy may potentially impact rights protected under the Act, but the justification for having the policy (in this case, national security) outweighs the potential impact.

Category Three policies are unlawful to maintain because they would prohibit or limit protected conduct, and the adverse impact on employee rights is not outweighed by justifications associated with the rule. An example would be a rule that prohibits employees from discussing wages or benefits with one another.

Employers should periodically review and update employee handbooks to ensure compliance with the law. The NLRB’s new test and the start of a new year provide an excellent opportunity to have your handbook reviewed and updated. If you have any questions related to this information or if you would like assistance reviewing and updating your handbook, please contact Jennifer S. Walther or Robert Finn Jensen of Mawicke & Goisman, S.C.

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