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Client Alert Employment & Labor

Recent Developments Illustrate the Need to Regularly Review Employee Handbooks

A recent report from the General Counsel of National Labor Relations Board (“NLRB”) as well as decisions from the New Jersey Appellate Division and the United States Supreme Court illustrate why employers – both unionized and union-free – should review their employee handbooks and personnel policies regularly to ensure their continued compliance with federal and state laws.

Policies that seem innocuous to many employers may actually violate the National Labor Relations Act. Further, failing to include certain handbook language can alter “at-will” employment status, and maintaining a facially neutral policy may nonetheless support an employee’s pregnancy discrimination claim.

Report of the NLRB’s General Counsel

The General Counsel’s report dated March 18, 2015 discusses cases in which the NLRB addressed the legality of a litany of employee handbook policies, including rules regarding social media, e-mail, and other online activity; policies pertaining to confidentiality and conflicts-of-interest as well as the use of company logos, copyrights, and trademarks; and rules regarding employee conduct.

Generally speaking, a work rule or policy will violate the National Labor Relations Act (“NLRA”) if it has a “chilling effect” on employees’ rights to engage in “protected concerted activity.” The NLRB has made clear that even rules that employees would reasonably

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understand to prohibit such activity can violate the NLRA, even if, on their face, they do not.

The difference between a lawful and unlawful policy is often very subtle. For example, the NLRB recently determined that Wendy's International, LLC's social media policy violated the NLRA. A portion of that policy stated:

> Refrain from commenting on the company's business, financial performance, strategies, clients, policies, employees or competitors in any social media, without the advance approval of your supervisor, Human Resources and Communications Departments.

Pursuant to a settlement agreement with the NLRB, Wendy's was required to revise its social media policy so that it read:

- Do not comment on trade secrets and propriety Company information (business, financial and marketing strategies) without the advance approval of your supervisor, Human Resources and Communications Department;
- Do not make negative comments about our customers in any social media; [and]
- Use of social media on Company equipment during working time is permitted, if your use is for legitimate, preapproved Company business. Please discuss the nature of your anticipated business use and the content of your message with your supervisor and Human Resources. Obtain their approval prior to such use.

Though the differences between Wendy's before and after policies appear minimal, it is these drafting differences that ultimately determine whether a policy is lawful under the NLRA. Union-free employers must remember that they, too, are prohibited from restricting and interfering with their employees' rights to engage in protected concerted activity.

Lee v. South Jersey Healthcare

In *Lee v. South Jersey Healthcare*, a disciplinary policy "reserve[d] to [the employer's] sole discretion the use of progressive discipline" and, as the Appellate Division noted, "roughly outlined the disciplinary procedures that the employer 'may' apply." The employer's policy did not contain a clear and prominent disclaimer explaining that the policy did not create an employment contract or that employees were "at-will."

The employer terminated an "at-will" employee in accordance with the policy's progressive discipline procedures. The employee sued, claiming that the employer's policy created an implied contract that prevented the employer from terminating the employee without cause. The Appellate Division, in affirming the trial court's dismissal of the employee's suit, explained that it was immaterial whether the employer's policy created a contract that protected the employee from termination without cause, because the employer complied with its disciplinary policy when it terminated the employee.

Although the court did not decide whether the employer's policy created an implied contract, the court stated that, given the policy's lack of "clear and prominent disclaimer" and "at-will" language, it "sets forth a loose structure for employee discipline, and thus presents a weak but cognizable basis for finding that the policy created an implied contract."

This decision emphasizes that employers that fail to include such disclaimer language in an employee handbook run the risk that they will unwittingly limit their ability to terminate otherwise "at-will" employees.

Young v. United Parcel Service Inc.

In *Young v. United Parcel Service Inc.* ("UPS"), the United States Supreme Court recently held that a pregnant employee can establish a *prima facie* case of discrimination by alleging that her employer denied her request for an accommodation and her employer accommodated others "similar in their ability or inability to work." In doing so, the Court made clear that even an employer's facially neutral policy can support a claim that an employer *intentionally* discriminated against a pregnant employee.

Young, a part-time delivery driver, held a position requiring her to lift heavy packages. After she became pregnant, her doctor recommended that she lift no more than 20 pounds. When Young asked UPS to accommodate her by placing her on light duty, UPS refused the request. Young claimed that UPS violated Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended by the Pregnancy Discrimination Act ("PDA"), because UPS had accommodated other drivers who were "similar in their . . . inability to work" by providing those drivers with light duty work.

UPS contended that it did not unlawfully discriminate against Young because UPS treated her the same way that it treated other non-pregnant employees under its facially neutral policy. UPS's policy provided light duty work only to employees who suffered on-the-job injuries, lost their Department of Transportation certifications, or were covered by the Americans with Disabilities Act ("ADA"). Young, at the time of her

pregnancy did not fall into any of those categories; thus, UPS argued, she was properly denied light duty work pursuant to its policy.

The Court held that the pregnant employee only needed to provide "sufficient evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's 'legitimate, non-discriminatory' reasons are not sufficiently strong to justify the burden, but rather . . . give rise to an inference of intentional discrimination." The Court further explained that the employee can support her claim that the employer's policy imposes a significant burden on pregnant workers "by providing evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers."

The Court's decision suggests that the PDA requires employers to reasonably accommodate pregnancy-related work restrictions under certain circumstances. Employers must also be mindful of potential obligations owed to pregnant employees arising under the ADA and state anti-discrimination laws – issues which the Court did not address.

Employer Tips

As a matter of good human resources practice, all employers should conduct an annual or bi-annual review and revision of their handbooks to address nuanced changes in the law or interpretations of the law that could have significant impact on liability.

Your employment attorneys can assist you in interpreting new decisions, laws and commentary impacting handbook policies, conducting a review of those policies, and recommending appropriate language revisions.

If you have any questions regarding information in this alert, or if you need more information, please contact one of the following Sills Cummis & Gross attorneys:

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