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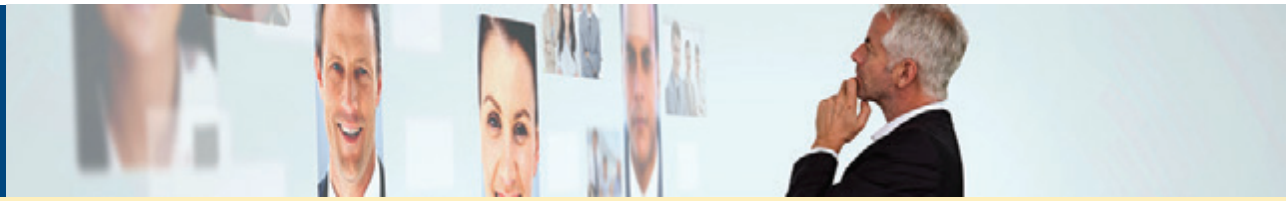

The Job Description

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In This Issue

Leadership Note

From the Chair

By Sidney R. Steinberg

The current issue of *The Job Description* features a terrific article from Reggie Belcher (Chair of our Committee's Labor Law subcommittee) and Catherine Cunningham about changes at the National Labor Relations Board that will impact *all* employers as they write or revise their employee handbooks. The article also highlights how labor law and decisions of the NLRB impact even non-unionized employees.

The second article is one that we can all relate to—Chris McCarty identifies the various deposition witnesses that we confront all too often

Chris also compiled the articles and edited this edition of *The Job Description*. His time and expertise benefits us all and I know is tremendously appreciated.

And speaking of "community," DRI's Annual Seminar is just weeks in San Francisco, October 17–20. On Wednesday afternoon our committee will have a CLE on the state of sexual harassment law in the era of #MeToo. We will also have plenty of opportunities to renew friendships at a group dinner on Wednesday night as well as more informal dinners throughout the week. San Francisco is always one of the best Seminar venues and our Annual Meeting Chair Marie Holvick and Vice Chair Brendan Benson have done a terrific job laying the groundwork for a successful week.

The Annual Meeting will also mark the closing of my tenure as Chair of the Committee. The best part of my time has been working closely my talented, passionate and caring colleagues in helping to guide and grow the Committee. Thanks to each and every member of both the Steering Committee and the Committee at large for your time, your energy, insight and support.

Sidney R. Steinberg is a principal and chair of the Post & Schell PC's Labor and Employment & Employee Relations Practice Groups. Mr. Steinberg's practice involves virtually all aspects of labor and employment law, including substantial litigation experience defending employers against employment discrimination and wage and hour disputes in federal and state courts. He also has experience in representing employers before federal, state and local administrative agencies, including the EEOC, the Department of Labor and the National Labor Relations Board, as well as in arbitration proceedings. Mr. Steinberg is the monthly employment law columnist for The Legal Intelligencer in Philadelphia.

Feature Articles

Work Rules and Handbooks Just Got Easier

By Reggie Belcher and Catherine Cunningham

Writing work rules and employee handbooks is easier now for private-sector employers than it has been for many years thanks to a recent National Labor Relations Board ("NLRB" or "Board") case and a Memorandum from the NLRB's Office of General Counsel ("OGC").

Protected Concerted Activity

The National Labor Relations Act, 29 U.S.C. §§151-159 ("NLRA" or "Act") gives all private-sector employees, whether union or nonunion, the right to engage in protected concerted activity, which occurs when two or more employees act together to discuss or improve any term or condition of employment (commonly referred to as Section 7 rights).

Over the years, the NLRB has broadly recognized many types of protected concerted activity, including but not limited to:

- Discussing or complaining about working conditions, wages, hours, safety, discrimination, harassment, or a supervisor's conduct;
- Supporting a co-worker's complaints;

- Seeking to replace company management;
- Criticizing management; and
- Forming or attempting to form a union, discussing a union, or engaging in union-related activities.

Employers may violate the NLRA whenever they interfere with, restrain, or "chill" employees' rights to engage in protected concerted activity.

Under the Board's decision in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), the mere maintenance of a work rule may violate the Act if the rule has a "chilling effect" on employees' rights to engage in protected concerted activity.

Per *Lutheran Heritage*, any workplace rule would have violated the NLRA if: (1) employees reasonably interpreted the rule's language to prohibit their protected concerted activity; (2) the employer promulgated the rule in response to union-related activity; or (3) the employer applied the rule to restrict employees' exercise of protected concerted activities.

The Obama Board

During President Obama's Administration, the NLRB increasingly expanded the scope of *Lutheran Heritage* through various cases and struck down numerous workplace rules that interfered with employees' rights.

The Obama Board's rulings were not always intuitive and often required an in-depth analysis to determine whether an employer's policies were lawful or unlawful. In March 2015, the OGC released a Report, entitled "Concerning Employer Rules," clarifying the Obama Board's position on employer policies including confidentiality, employee conduct, photography/recording, and use of company logos, copyrights, or trademarks.

Employers were surprised and often frustrated to learn that the Board considered many seemingly mundane policies and prohibitions unlawful, including the following examples:

- "Never publish or disclose [the Employer's] or another's confidential or other proprietary information. Never publish or report on conversations that are meant to be private or internal to [the Employer]."
- "Be respectful to the company, other employees, customers,
- partners, and competitors."
- Do "not make fun of, denigrate, or defame your co-workers, customers, franchisees, suppliers, the Company, or our competitors."
- "No employee shall use any recording device including but not limited to, audio, video, or digital for the purpose of recording any employee or [Employer] operation"
- Do "not use any Company logos, trademarks, graphics, or advertising materials" in social media.
- "Company logos and trademarks may not be used without written consent."

The May 2015 OGC Report also provided guidance on rules affecting employee conduct towards and interactions with co-workers and third-parties, restrictions on leaving work, conflicts-of-interest, and social media (which the Obama Board's OGC previously addressed in similar reports).

The Obama Board's rulings, as well as the OGC's summary of those rulings, were fact intensive, complex, and required practitioners to engage in a detailed analysis when writing and reviewing work rules, policy manuals, and employee handbooks.

The Trump Board

In December 2017, President Trump's NLRB began to retreat from the Obama Board's aggressive expansion of *Lutheran Heritage*, with the Trump Board's ruling in *The Boeing Company*, 365 NLRB No. 154 (Dec. 14, 2017). In *Boeing*, the Trump Board overturned the first prong of *Lutheran Heritage* and established a new standard focusing on the balance between a facially neutral rule's negative impact on employees' ability to exercise their Section 7 rights and the rule's connection to employers' rights to maintain discipline and productivity in their workplace.

Boeing also criticized *Lutheran Heritage* and its progeny for prohibiting any rule that employees *could* interpret as covering Section 7 activity, as opposed to only prohibiting rules that employees *would* so construe.

Boeing further specifically noted that the decision only applied to the mere maintenance of facially neutral rules. Rules that specifically ban protected concerted activity or rules that employers promulgate directly in response to union organizing or other protected concerted activity, remain unlawful. Similarly, *Boeing* held that the *application* of a facially neutral rule against employees engaged in protected concerted activity remains unlawful.

Latest OGC Report

In June 2018, the Trump Board's OGC issued a report, entitled "Guidance on Handbook Rules Post-*Boeing*" (Memorandum GC 18-04), clarifying and explaining *Boeing's* impact on work rules. The OGC analyzed work rules in three categories.

Category 1: Rules That Are Generally Lawful

Work rules in this category are generally lawful, either because the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of rights guaranteed by the Act, or because the potential adverse impact on protected rights is outweighed by the business justifications associated with the rule.

Such rules include the following topics or issues:

- Civility;
- Photography and recording;
- Insubordination, non-cooperation, on-the-job conduct that adversely affects operations;
- Disruptive behavior;
- Confidential, proprietary, and customer information;
- Defamation and misrepresentation;
- Employer logos and intellectual property;
- Authority to speak for the company; and
- Disloyalty, nepotism, and self-enrichment.

Simply because a rule falls in Category 1 does not mean an employer may lawfully use the rule to prohibit protected concerted activity or discipline employees merely because they engaged in protected concerted activity.

Category 2: Rules Warranting Individualized Scrutiny

Rules in this category are not obviously lawful or unlawful, and must be evaluated on a case-by-case basis to determine whether the rule would interfere with Section 7 rights and, if so, whether legitimate business justifications outweigh any adverse impact on those rights.

The legality of such work rules often will depend on their context, viewed as they would by employees who interpret work rules as they apply to the "everydayness of their job."

Other contextual factors include the placement of the rule among other rules, the kinds of examples provided, and the type and character of the workplace. Moreover, *Boeing* noted that evidence that a rule has actually caused employees to refrain from Section 7 activity is a useful interpretive tool indicating that the rule likely is unlawful.

Possible examples of Category 2 rules include:

- Broad conflict-of-interest rules that do not specifically target fraud and self-enrichment and do not restrict membership in, or voting for, a union;
- Confidentiality rules broadly encompassing "employer business" or "employee information;"
- Rules regarding disparagement or criticism of the *employer* (as opposed to civility rules regarding disparagement of employees);
- Rules regulating use of the employer's name (as opposed to rules regulating use of the employer's logo/trademark);
- Rules generally restricting speaking to the media or third parties (as opposed to rules restricting speaking to the media *on the employer's behalf*);
- Rules banning off-duty conduct that might harm the employer (as opposed to rules banning insubordinate or disruptive conduct at work or rules specifically banning participation in outside organizations); and
- Rules against making false or inaccurate statements (as opposed to rules against making defamatory statements).

Category 3: Rules that are Unlawful to Maintain

Rules in this category are generally unlawful because they would prohibit or limit NLRA-protected conduct, and the adverse impact on the rights guaranteed by the NLRA outweighs any business justifications associated with the rule.

Such unlawful rules include confidentiality rules prohibiting employees from discussing wages, benefits, or working conditions and rules prohibiting employees from joining outside organizations or voting on matters concerning the employer.

Final Thoughts

The Trump Board has starting chipping away at some of the Obama Board's key labor rulings. Review *Boeing* and the latest OGC report before writing or revising a private-sector work rule or handbook, as employers have considerably more latitude now than they previously enjoyed.

Reggie Belcher is a shareholder with Turner Padget in Columbia, South Carolina, and he is longtime DRI member and a Certified Specialist in Labor and Employment Law.

Catherine Cunningham is an Associate on Turner Padget's labor and employment team. You can reach them at rbelcher@turnerpadget.com or ccunningham@turnerpadget.com.

The Five Plaintiffs We Dread

By Chris W. McCarty

Andy Warhol once said, "Isn't life a series of images that change as they repeat themselves?" As an employment lawyer, particularly a defense lawyer, I would modify that thought only slightly: "Isn't life a series of the same plaintiffs whose faces change as they repeat themselves?"

The longer I have done this job, the more I have experienced the same (type of) plaintiffs. And these are the five who consistently annoy me the most:

Ms. Failure to Mitigate

Def. Atty: Have you worked at all since being laid off by my client?

Plaintiff: Define "worked."

Def. Atty: To perform a task for which you get paid.

Plaintiff: Sure.

Def. Atty: Okay, who have you worked for?

Plaintiff: When?

Def. Atty: Since you got laid off by my client.

Plaintiff: And gotten paid?

Def. Atty: Yes, that's how it typically works.

Plaintiff: Oh, well no one then.

Def. Atty: So, since you were laid off by my client, two years ago, you have not worked?

Plaintiff: I've worked.

Def. Atty: You've held a job?

Plaintiff: Define "job."

This particular plaintiff infuriates as much as she dances. There is no clear question, and there is no plain timeline. She "may" have looked for jobs, but she can't recall when, or how, or using what. She is an extremely hard worker, always has been, yet keeping a job remains difficult due to a run of bad luck.

2. Mr. Perfect

Def. Atty: Would you agree that you sometimes struggled arriving at work on time?

Plaintiff: Absolutely not.

Def. Atty: So, you were consistently on time?

Plaintiff: Always.

Def. Atty: I have your timecards, and once or twice every week you were at least 20 minutes late, right?

Plaintiff: Look, I was there to work. Every day. All day. Usually early. A lot of time I would just start working and forget to clock-in.

Def. Atty: Sir, can we agree you were a mall security guard who was supposed to arrive by 9:00 a.m.?

Plaintiff: Every… Day.

Def. Atty: Can we also agree the mall didn't open until 10:00 a.m.?

Paul Blart here is not unlike a lot of employment plaintiffs. They do not make mistakes. They do not have weaknesses. And they have no hesitation when (vehemently) expressing their importance to the company (or to mankind in general).

3. Ms. I Didn't Sign That

Def. Atty: Ma'am, I am passing you what has been marked as Exhibit No. 13. Do you recognize this document?

Plaintiff: No, never seen it before.

Def. Atty: Please look again, as I believe you'll see your signature at the bottom of the page.

Plaintiff: Not my signature.

Def. Atty: Let's look back at Exhibit No. 2, which is your driver's license. I'll hand it back to you.

Plaintiff: Okay.

Def. Atty: Do you see your signature there on that driver's license?

Plaintiff: I see "a" signature.

Def. Atty: Are you saying the signature on your driver's license is fake?

Plaintiff: I'm not saying anything other than I didn't sign it.

Def. Atty: Any theory as to who signed for you?

Plaintiff: The Tooth Fairy for all I know.

At this point in my career, I have no idea how many times plaintiffs have refused to identify their own signatures. On discipline notices. On change of status forms. Even on notarized documents. I really never had a clue how many people live in a world in which vast amounts of forgers line the streets and cause chaos with their pens.

4. Mr. They Fired Me

Def. Atty: Tell me about your last day with my client.

Plaintiff: You mean the day they fired me?

Def. Atty: Why do you believe that you were fired?

Plaintiff: Because I got there with a job, and I left without a job.

Def. Atty: Help me understand that.

Plaintiff: Okay. They called me into a meeting. Started lying. Wouldn't stop lying. So, I left.

Def. Atty: You were called into a meeting about getting into a fist fight with another employee?

Plaintiff: A disagreement.

Def. Atty: And your supervisors wanted to discuss that disagreement with you?

Plaintiff: No, they wanted to start lying about me punching Jimmy.

Def. Atty: Didn't you punch him?

Plaintiff: Not in the face.

Def. Atty: Okay, but when were you actually fired during that meeting?

Plaintiff: You think I was just gonna keep working there after that mess?

Def. Atty: Let me rephrase… Did anyone ever say, "You're fired?"

Plaintiff: With their eyes.

It is honestly astounding how many words are apparently synonyms for "fired." Laid off means fired. Suspended means fired. Disciplined means fired. I once had a plaintiff tell me she had been "fired" because a supervisor raised his voice after the plaintiff lost over $200 from her cash register.

5. Ms. I Never Knew That

Def. Atty: You had an opportunity to review the Employee Handbook during the break, correct?

Plaintiff: Yes, I read through it.

Def. Atty: Do you recall being provided with a copy of the same Handbook during employee orientation?

Plaintiff: Nope.

Def. Atty: But you saw your signature on the last page of the Handbook?

Plaintiff: I saw it.

Def. Atty: Yet you don't recall ever seeing this Handbook before today?

Plaintiff: I've seen a lot of things, even signed some of them. But I never read this.

Def. Atty: Do you have a habit of signing documents you have not actually read?

Plaintiff: I also have a habit of biting my nails. Drives my husband crazy.

I am more surprised now during depositions if employees have read their handbooks. Truth be told, I often wonder how many jurors would say the same. I went to school to become a lawyer, and even I scroll through that iTunes user agreement before reading the word "the."

Conclusion

If you happen to run across any of these plaintiff types, do what I do: fantasize about having attended dental school rather than law school. In all seriousness though, you have seen these plaintiffs, and you will see them many times again in the future. Take a deep breath, stare at your deposition outline for a few seconds, and get back to work. It could be worse. You really could be a dentist.

Chris W. McCarty, a shareholder in the Knoxville office of Lewis, Thomason, King, Krieg & Waldrop, P.C., where he practices in the areas of employment law, education law and civil litigation.