Labor Board Seems Certain to Soon Change Handbook Standards – What Should Employers Do?

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Lurking in the recesses of your memory may be a recollection that not too long ago, federal labor relations officials scrutinized the employee handbooks of non-union employers and found legal violations with commonplace policies and practices. It wasn't a dream, it actually happened – and it appears all but certain that is about to happen again. Now that the White House is under new leadership, non-unionized employers can expect to soon see seismic shifts in the way that federal officials view your handbook policies. What do you need to know about this impending swing of the pendulum, and what can you do about it?

What Happened?

It is a fact of life that when the party in the White House changes, the National Labor Relations Board changes composition to reflect the party in power. The new Labor Board takes some time to get constituted after a new president takes office, and in the case of the Biden administration, that shift was just formalized last month. Once a new Board is established, it may overrule, narrow, or expand decisions of the prior Labor Board. Non-union employee handbooks, policies, and work rules are an area in which we can expect this to happen.

A New Day Dawned Under A Previous Administration

It has been established Board law for some years that an employer could not have a work rule or policy that employees would reasonably construe as prohibiting them from doing something they had the right to do under the National Labor Relations Act (NLRA). But for decades, cases in which a non-union employer's work rule or policy was subject to attack was rare. And when such cases did arise, they generally focused on issues that could have an immediate impact on employee rights during union organizing, like an overly broad solicitation/distribution policy, or a rule against employees discussing their wages.

But under the Obama administration, the Labor Board began to apply this standard vigorously to strike down non-union employers' handbook policies and work rules in cases that ostensibly had nothing to do with union organizing. Critics said the Board was unrealistic in its view of how an employee would "reasonably construe" a rule and therefore reached the wrong result in many cases.

While the Trump Labor Board changed the standard in 2017, deciding that the better approach was to balance the interests of the employees and the interests of the employer, employers shouldn't rely on this standard being in place much longer. That Labor Board said the critical factors were the impact the rule or policy would really have on NLRA-protected rights and the employer's legitimate justification for needing such a rule or policy. The Labor Board determined that some rules would be facially valid because they would have little or no impact on protected rights when reasonably applied and the justification for such a rule was obvious. Other rules would be facially invalid where they would clearly have a negative impact on protected rights and the justification for such a rule was weak. Policies and rules falling in between those two groups would be individually scrutinized.

Change is Coming

This balancing approach has given employers a respite for the past four years. But all signs point to the fact that things are soon going to change. There are now strong indications that the current Labor Board will modify or overrule the decisions we saw the last several years relating to the standard to be applied in evaluating work rules and policies. And of course, these are the work rules and policies of non-union employers, most of whom do not spend much time thinking about the National Labor Relations Act. They are likely to be caught off guard.

Looking back at cases decided by the Obama-era Board will offer some clue as to what we can expect:

- *"Do not discuss customer or employee information outside of work, including phone numbers and addresses"* was found to be unlawful because of the ban on discussing employee contact information.
- *"Be respectful to the company, other employees, customers, partners, and competitors"* was found to be unlawful because employees have the right to criticize supervisors and other managers and to protest their actions.
- *"Refrain from any action that would harm persons or property or cause damage to the Company's business or reputation"* was found to be unlawful because employees have the right to criticize their employer in public forums.
- *"Don't make insulting, embarrassing, hurtful or abusive comments about other company employees online and avoid the use of offensive, derogatory, or prejudicial comments"* was found to be unlawful because debate about unionization and other protected activity can be contentious and employees would understand this rule to limit their ability to honestly discuss such subjects.
- *"Do not make personal calls or send or receive texts while on duty"* was found to be unlawful because the Board decided that employees would interpret the phrase *"on duty"* to include breaks and meal periods.

If these results seem a bit counter-intuitive, they should. The Board was expansive in its view of how an employee would reasonably understand these rules. Would an employee really understand the

phrase "*on duty*" to include lunch? It seems doubtful. But that was the world we lived in back then and to quote the Carpenters, "It's yesterday once more."

What Should You Expect – and What Should You Do?

How long do we have before the Labor Board formally changes its approach to the handbooks and work rules of non-union employers? That is hard to predict with any precision. The previous was able to issue its balancing test less than a year after the White House changed hands. The current Board may not move as quickly, so we probably have about year before it has a chance to modify or overturn the current balancing approach.

What is an employer to do? First, remember these changes are all but certain to arrive – but are not yet here. You still have a right to promulgate and enforce rules in compliance with the balancing test instituted by the previous Board until you hear otherwise.

Second, it's important to recognize that we don't know precisely how the new Labor Board will deal with current standards, and the future may not precisely parallel the past. It is hard to discern exactly what will change and in what manner, so it may be imprudent to make any wholesale changes in anticipation of the coming changes.

That being said, if you are in the process of updating your handbook, you may want to write it to meet the previous standards – unless you want to run the risk of facing an unfair labor practice charge and be the test case that serves to overrule current standards. However, if you have recently updated your handbook, you may choose to wait until the Board issues a decision on the matter before making any sweeping policy changes.

Conclusion

Fisher Phillips will continue to monitor any further developments in this area as they occur, so you should ensure you are subscribed to Fisher Phillips' Insight system to gather the most up-to-date information. For guidance and support in preparing for these developments, we would encourage you to contact your Fisher Phillips attorney, the author of this Insight, or any member of our Labor Relations Practice Group.

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