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Restrictions on Employee Communication Could Lead to Unfair Labor Practice Charges

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Employer Takeaway: *Employment handbook provisions restricting the content or method of employees' communications with co-workers about their employment may constitute an unfair labor practice. Employers should review these policies to ensure that they cannot be interpreted as restricting the ability of employees to discuss the terms and conditions of employment. Any restrictive provisions should be connected to a business justification and be tailored to address that justification.*

Although the National Labor Relations Act ("NLRA") is commonly viewed as regulating unionized workforces, the NLRA's "concerted activity" provision is increasingly being enforced against employers of non-union employees. The NLRA protects the right of even non-union employees to act together to improve the terms and conditions of their employment and it is an unfair labor practice under the NLRA for employers to interfere with the exercise of that right.

When an employee brings an unfair labor charge to the National Labor Relations Board ("NLRB"), the NLRB can bring a complaint against the employer not just on the employee's charge, but also on other subjects that raise similar issues as the charge. In recent years, the NLRB has used this authority to attack employment handbook provisions that place limitations on the method and content of employees' communications with co-workers. If the handbook provision could reasonably be interpreted by an employee to restrict the ability to communicate with co-workers about the terms and conditions of employment, then it may run afoul of the NLRA and constitute an unfair labor practice.

Some relatively common handbook provisions that have been successfully attacked by the NLRB in recent cases include:

Restrictions on discussing workplace investigations: In a recent case, *Hyundai America Shipping Agency, Inc. v. National Labor Relations Board*, the U.S. Court of Appeals for the District of Columbia Circuit explained that a prohibition on revealing information about matters under investigation by the employer clearly limits the NLRA right of employees to discuss their employment. The court credited the employer's explanation that antidiscrimination laws frequently require or encourage that investigations be kept confidential, but found that this explanation did not justify a blanket ban on discussing any investigation. Therefore, the employer's blanket ban provision constituted an unfair labor practice.

Takeaway: *Rather than using a uniform, blanket investigation confidentiality policy, employers should impose confidentiality requirements on a case-by-case basis where justified or, if a general policy is used, limit that policy to specific types of investigations (such as discrimination or sexual harassment) where confidentiality can be justified.*

Restrictions on using the employer's e-mail system: Also under attack are policies prohibiting employees from non-business related use of the employer's e-mail system. In a late 2014 decision, In re Purple Communications, Inc., the NLRB ruled that such a restriction is an unfair labor practice because it prohibits employees from engaging in union activity or discussing the terms and conditions of employment. While not directly addressed, the reasoning of the decision could also apply to the use of employer-owned smartphones, tablets, computers, and other equipment.

Takeaway: *Unless the employer has a very strong business justification, prohibitions on non-business use of employer e-mail accounts or devices should be removed or amended to explicitly permit employees to engage in concerted activity using the accounts or devices. Employers may still prohibit non-business use during working time (but not during breaks) and may still apply technical restrictions on non-business e-mail use if the restrictions are uniformly applied.*

Policies regarding the reporting of complaints: Similarly to the investigative confidentiality policy described above, some handbooks contain provisions requiring employees to report complaints to their supervisors and forbidding them from discussing the complaint with co-workers. If these policies are set forth in mandatory language with possible penalties for non-compliance, then it is very likely that the NLRB would find that the policies restrict employees' concerted activity rights by restraining the employees from taking joint action to address the complaints.

Takeaway: *Such provisions should encourage, not require, complaints to be reported to supervisors and should not forbid employees from discussing the complaint with their co-workers.*

