IRI Intelligence Briefing

News and Developments Affecting the Workplace

Vol. 7 – No. 1 April, 2015

NLRB General Counsel Changes Regulation of Employer Policies

The National Labor Relations Board (NLRB) and its General Counsel continue to pursue their activist agenda, this time regarding employee and union challenges to workplace policies.

In recent weeks, the NLRB has been particularly active in finding violations by employers of Section 8(a)(1) of the National Labor Relations Act (NLRA) in this area. In reaching these decisions, the current Board has expansively applied the holding in Lutheran Heritage Village-Livonia-343 NLRB 646 (2004).

In that decision, the Board held that employer rules and policies will be found to violate the NLRA if: (1) employees would reasonably construe the language of such policies to prohibit protected activity; or (2) the policies were promulgated in response to union or other protected activity; or (3) the policies were actually applied to restrict protected employee rights under the NLRA. Most of the litigation in this area has involved interpretation of prong one of the Lutheran Heritage holding – whether employees would reasonably construe employer rules to prohibit protected activity.

In March, Richard Griffin, the Board's General Counsel, issued a Memorandum that discussed virtually all of the NLRB's recent decisions and opinions issued by its Division of Advice in this area. It provides guidance regarding frequently litigated issues in this area such as confidentiality rules, professionalism rules, anti-harassment rules, trademark rules, photography/recording rules and media contact rules. The Memorandum also discusses handbook rules from a recently settled unfair labor practice charge against Wendy's International, LLC. The Memorandum reviews Wendy's rules that were initially found unlawful and the company's modified rules, which thereafter, were approved in an informal settlement agreement between Wendy's and the Board's Office of General Counsel.

Unequivocally, employers will disagree with both Board decisions and its General Counsel's rationale in this area. However, we recommend that employers closely review the Memorandum because it does provide helpful guidance including specific policy language that the Board's Office of General Counsel found to be acceptable. For example, it said that an employer could not prohibit employees who were on non-work time from electronically distributing literature to employees who were in work areas. The Memorandum stated "unlike distribution of paper literature [in work areas] which can create a production hazard even when it occurs on non-working time, electronic distribution does not produce litter and only infringes on the employer's management interest if it occurs on working time." The law has been for many years that employers may restrict distribution of literature in work areas at all times. It will be interesting to see if the

Board adopts the Office of the General Counsel's position on this issue in the future.

It is highly recommended that employers work with their legal counsel to review this Memorandum and examine how it may impact various employment-related policies to ensure, to the extent possible, compliance with the NLRA. Employers should be careful not to use overly broad and vague language in their policies, be sensitive to the context and location of where language occurs in their policies, and, whenever possible, provide examples as to how the policy in question is to be applied.

The larger issue is for employers to maintain the consistent application of policies to avoid challenges by labor unions. Employers will need to be realistic when drafting these policies to ensure management fully understands how to apply policies. One way this can be accomplished is by providing interpretative training and real life examples of how to enforce them consistently.

The Memorandum can be found at http://op.bna.com/dlrcases.nsf/id/ldue-9urq25/$File/GC%20Memo%2015-04.pdf.

GET IT BY EMAIL

The IRI Intelligence Briefing is published periodically for the benefit of IRI's clients and industry associates. If you would like to receive the IRI Intelligence Briefing by e-mail, please send your e-mail address to newsletter@iriconsultants.com, and put Intelligence Briefing in the subject line. Your privacy is assured and your e-mail information will be not used for any other purpose. For more information, please contact Jim Trivisonno at 313.965.0350, extension 422.