

You CAN Ask Your Employees To Be Happy! Federal Appeals Court Reins In National Labor Relations Board (NLRB)

Labor & Employment Law Update

By Beverly Alfons on August 17, 2017

Much has been written and discussed about the National Labor Relations Board's (NLRB) attack on handbook policies over the past several years. The NLRB has found what many consider to be run-of-the-mill, standard policies that have, for many years, raised no issues or controversy, to be violative of the National Labor Relations Act (NLRA).

Last year, the NLRB struck down various policies in a handbook issued by T-Mobile, including one that encouraged employees to be professional and maintain a "positive work environment" in *T-Mobile USA, Inc. v. NLRB*, No. 16-60284 (5th Cir. 2017). In its decision, the Board reasoned: "[w]e find that employees would reasonably construe the rule to restrict potentially controversial or contentious communications and discussions, including those protected by Section 7 of the [NLRA], out of fear that the [employer] would deem them to be inconsistent with a 'positive work environment.'" T-Mobile appealed the NLRB's decision to the U.S. Court of Appeals for the Fifth Circuit.

Specifically, T-Mobile challenged the Board's determination that the following provisions from its employee handbook violated the NLRA because they discouraged unionizing or other concerted activity protected by the Act. Provision (1) encouraged employees to "maintain a positive work environment"; (2) prohibited "[a]rguing or fighting," "failing to treat others with respect," and "failing to demonstrate appropriate teamwork"; (3) prohibited all photography and audio or video recording in the workplace; and (4) prohibited access to electronic information by non-approved individuals.

On July 25, the Fifth Circuit held that the Board erred in finding that a reasonable employee would construe policies (1), (2), and (4) to prohibit protected activity. The Court reasoned:

In this case, where the record does not suggest that the rules have been applied in the context of union or collective activity, the 'reasonable employee' is a T-Mobile employee aware of his legal rights but who also interprets work rules as they apply to the everydayness of his job. The reasonable employee does not view every employer

policy through the prism of the NLRA. Indeed, [the Board] must not presume improper interference with employee rights.'

The Court did agree with the Board's finding that a reasonable employee would construe policy (3) to prohibit protected activity. It reasoned that unlike the other policies such as the "workplace conduct" policy and "commitment -to-integrity" policy, the recording policy blanketedly forbids certain forms of clearly protected activity. For instance, it would prohibit an off-duty employee from taking a picture of a wage schedule. Notably, last month, the U.S. Court of Appeals for the Second Circuit upheld a similar NLRB decision on workplace recordings.

Bottom line: This federal appeals court decision in *T-Mobile USA Inc. v. NLRB* gives employers and their counsel additional basis for defending legitimate personnel policies in the face of numerous NLRB decisions issued over the past several years that have been viewed as an attempt to diminish management's right to set basic employee standards in the workplace. However, it seems that blanket policies prohibiting workplace recordings continue to require careful wording and business justification.

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