Confidentiality and Non-Disparagement Rules Under NLRB Scrutiny

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SOCIAL NETWORKING IN THE WORKPLACE

What Follows are the Personal Thoughts and Opinions of Ambrose V. McCall Regarding Social Networking in the Workplace and does not constitute legal advice and does not represent the Opinions of Hinshaw & Culbertson LLP.

I. Confidentiality and Non-Disparagement Rules Under NLRB Scrutiny

Social media also allows for easy circulation by employees of disliked or misunderstood workplace policies. Furthermore, in light of the NLRB's express agenda that supports employee discussions that relate to the terms and conditions of employment, policies that may restrict speech about employment related topics receive greater agency scrutiny. For example, a policy that instructed employees to hold categories of data including "personnel lists, rosters, personal information of co-workers, managers, executives and officers; handbooks, personnel files," and contact data for personnel in the "strictest confidence" was found in violation of employee rights granted by the National Labor Relations Act. *Quicken Loans, Inc. v. NLRB,* 830 F.3d 542, 546-48 (D.C. Cir. 2016)("The Board properly determined that Quicken's Confidentiality Rule, as applied to personnel information, directly impinged upon employees' Section 7 rights. The very information that portion of the Rule explicitly forbids employees to share—personnel lists, employee rosters, and employee contact information—has long been recognized as information that employees must be permitted to gather and share among themselves and with union organizers in exercising their Section 7 rights.")("So too for

'handbooks' and other types of workplace information contained in 'personnel files.'").

The same challenging analysis applies to employer non-disparagement rules that direct employees to file internal complaints. In not unusual or typical fashion, Quicken Loans also had a non-disparagement policy that informed employees of internal complaint methods and that directed employees not to "publicly criticize, ridicule, disparage or damage" their employer or its "products, services, policies, directors, officers, shareholders, or employees" by using verbal, written or internet based communications. *Quicken Loans, Inc.,* 830 F.3d at 546. The Court found that the employer's non-disparagement policy also violated the Section 7 rights of its employees. *Id*. at 550-52 ("The Board quite reasonably found that such a sweeping gag order would significantly impede mortgage bankers' exercise of their Section 7 rights because it directly forbids them to express negative opinions about the company, its policies, and its leadership in almost any public forum.")("The Board appropriately determined that employees would reasonably construe the sweeping prohibitions in Quicken's Confidentiality and Non-Disparagement Rules as trenching upon their rights to discuss and object to employment terms and conditions, and to coordinate their efforts and organize to promote employee interests."). The Court found both rules in violation of Sections 7 and 8(a)(1) of the National Labor Relations Act. *Id.* at 552 citing 29 U.S.C. §§157, 158(a)(1).

Even in workplaces where peer review procedures are common, and risk-management programs are mandated by state law, the NLRB policy favoring open communication by employees of workplace terms and conditions can prevail. As a result, the NLRB prevailed over a

healthcare employer who cited and relied on hospital peer-review procedures mandated by state law. *Midwest Div.-MMC, LLC d/b/a Menorah Medical Center v. NLRB*, 867 F.3d 1288, 1302-03 (D.C. Cir. 2017)("Menorah does not suggest any legitimate and substantial justification for curtailing discussion of incidents that give rise to peer-review proceedings. Those events may also give rise to internal disciplinary processes, which of course can be the subject of grievances under the collective-bargaining agreement. (cites omitted). We therefore affirm the Board's conclusion that the present Confidentiality Rule is unduly broad in violation of employees' Section 7 rights."); see also *Banner Health System v. NLRB*, 851 F.3d 35, 42 (D.C. Cir. 2017)("Banner's Agreement expressly reached information about salaries and employee discipline. A reasonable employee could well understand Banner's rule to prohibit the very discussion of terms and conditions of employment that Section 7 prohibits."). In contrast, rules about confidential communications that make clear that they do not cover discussions about terms and conditions of the workplace are not found invalid by the NLRB or the federal courts reviewing the agency's actions. *Cmty. Hosps. Of Cent. California v. NLRB*, 355 F.3d 1079, 1088-89 (D.C. Cir. 2003). But confidentiality rules that can fairly be read as including, for example, wage data may result in a finding that a workplace rule is invalid. *Flex Frac Logistics, L.L.C. v. NLRB*, 746 F.3d 205, 209 (5th Cir. 2014)(invalidating part of policy on confidentiality regarding "personnel information" that the Board viewed as including wage data).

Another area of significance involves the ability of employees to post videos or photos as part of a social media post. Aware of such technology, some employers have created policies that seek to bar or limit with approval conditions the ability of personnel to create, post,

or use visual images of their workplaces. Some employers, for example, have instituted recording policies that seek to deter harassment and promote privacy interests. Such policies may prohibit employees from making such recordings or require approval from supervisory managers or the employer's legal department. *T-Mobile USA, Inc. v. NLRB*, 865 F.3d 265, 274, n. 15 (5th Cir. 2017). The NLRB, however, reads such broad policies as unduly weighing on the interest of employees to communicate about the terms and conditions of their employment. *Id*. at 274 ("The ban, by its plain language, encompasses any and all photography or recording on corporate premises at any time without permission from a supervisor. This ban is, by its own terms alone, stated so broadly that a reasonable employee, generally award of employee rights, would interpret it to discourage protected concerted activity; such as even an off-duty employee photographing a wage schedule posted on a corporate bulletin board.").

In contrast, a workplace conduct policy that requires employees to act in a professional manner, communicate in a courteous manner, and to contribute to a positive work environment, cannot be reasonably read as violating an employee's Section 7 rights. *T-Mobile USA, Inc.,* 865 F.3d at 272-73. The approved policy states as follow:

> [Employer] expects all employees to behave in a professional manner that promotes efficiency, productivity, and cooperation. Employees are expected to maintain a positive work environment by communicating in a manner that is conducive to effective working relationships with internal and external customers, clients, co-workers, and management.

T-Mobile USA, Inc., 865 F.3d at n. 10.

In the same case, the employer's following commitment-to-integrity policy was also upheld. *T-Mobile USA, Inc.,* 865 F.3d at 273-74. The policy stated the following:

> At [Employer], we expect all employees, officers and directors to exercise integrity, common sense, good judgment, and to act in a professional manner. We do not tolerate inconsistent conduct. While we cannot anticipate every situation that might arise or list all possible violations, the acts listed below are unacceptable…
>
> Arguing or fighting with co-workers, subordinates, or supervisors; failing to treat others with respect; or failing to demonstrate appropriate teamwork.

T-Mobile USA, Inc., 865 F.3d at n. 14.

Moreover, in the same case, the employer's acceptable use policy survived judicial review because a reasonable reading of the language did not support interpreting the policy as barring the use of wage or benefit data in protected activities or communications. T-Mobile USA, Inc., 865 F.3d at 275-76. That policy, at n. 18, stated:

> Users may not permit non-approved individuals access to information resources, or any information transmitted by, received from, printed from, or stored in these resources, without prior written approval from an authorized [Employer] representative.

The same acceptable use policy also contained the following provision limiting its scope:

> This policy applies to all non-public [Employer] information and any communication resource owned, leased, or operated by or for [Employer], and computers or devices, including those belonging to employees or contractors to the extent that these resources are used for [Employer] business purposes. All information created in connection with [Employer] business is the property of [Employer].

T-Mobile USA, Inc., 865 F.3d at n. 19. The reviewing court found that the portion of the policy specifying that it covered non-public data aided its validity by underscoring that its application and scope was restricted to non-public information so as to be reasonably understood by employees as not including wage and benefit information. *Id.*, 865 F.3d at 275-76 & n. 19.