

RECENT CASES IMPACT COMMON WORKPLACE POLICIES

Under recent case law, policies about common workplace issues such as confidentiality, complaints, solicitation, and fraternization may violate employee rights protected by the National Labor Relations Act (NLRA) – regardless of whether the employees belong to a union.

According to the U.S. Court of Appeals for the District of Columbia Circuit, certain handbook policies were too broad and infringed employees' NLRA rights even though: (1) the policies did not explicitly prohibit protected activity under the Act; (2) there was no evidence that any employee interpreted the policies as prohibiting such protected activity; and (3) there was no evidence that the employers ever applied or enforced the policies to prohibit protected activity. See *Cintas Corp. v. NLRB*, 482 F.3d 463 (D.C. Cir. 2007); *Guardsmark v. NLRB*, 475 F.3d 369 (D.C. Cir. 2007).

Additionally, though not addressing employee rights under the NLRA, a recent decision from the U.S. District Court for the District of South Carolina serves as a reminder to employers about the risk involved with using mandatory policy language and not using a disclaimer. See *Wessinger v. Westinghouse Electric Company, Inc.*, 2007 WL 1128887 (D.S.C. 2007).

Confidentiality Policy

The *Cintas* case involved a confidentiality policy stating that employees should “recognize and protect the confidentiality of any information concerning the company, its business plan, its [employees], new business efforts, customers, accounting and financial matters.” Employees could be sanctioned for “violating a confidence or [for the] unauthorized release of confidential information.”

The court found that an employee “could reasonably construe” the policy to prohibit employees from discussing their terms and conditions of employment with other employees or a union. The court acknowledged, however, that “a more narrowly tailored rule that does not interfere with protected activity would be sufficient to accomplish the Company’s presumed interest in protecting confidential information.”

Complaint Policy

In the *Guardsmark* case, the court found that the employer violated the NLRA by including the following rules in an employee handbook:

- A complaint procedure instructing employees “not [to] register complaints with any representative of the client”;
- A solicitation policy prohibiting the distribution of literature “at all times while on duty or in uniform”; and
- A fraternization policy prohibiting employees from “fraterniz[ing] on duty or off duty.”

As in *Cintas*, the court found that *Guardsmark*’s policies were overbroad and violated the NLRA.

Guardsmark's complaint procedure instituted a "chain-of-command" rule that required employees to bring complaints about workplace issues directly to their supervisors and prohibited them from registering complaints with a client representative. Guardsmark argued that the policy was to implement an internal complaint procedure and insulate its customers and clients from hearing such complaints. The court disagreed and found that the rule interfered with the statutorily protected right of employees to solicit sympathy and support from the general public and customers regarding their terms and conditions of employment.

Solicitation Policy

As for Guardsmark's solicitation policy, the court found that the company had a legitimate business objective of disassociating itself from an employee's unofficial activities. However, the company "may not accomplish that goal through a rule that restricts its employees' right to engage in union solicitation while off duty." Consequently, the court found the policy to be overbroad and unlawful.

Fraternization Policy

The court held that while Guardsmark's fraternization policy may have been aimed at addressing legitimate business interests, it was nevertheless overly broad and unlawful. Guardsmark's goal was to provide safeguards so that security would not be compromised by interpersonal or romantic relationships – not to prevent employees from discussing terms and conditions of employment. The court, however, found that to "fraternize" could also mean to "associate or mingle as brothers or on fraternal terms" and to "associate, cooperate, join, or unite." Using this definition, the court concluded that employees would reasonably interpret the fraternization rule to prevent them from discussing their terms and conditions of employment.

Furthermore, the court found that even if Guardsmark had a legitimate interest in a 24-hour ban of employee dating, the company did not demonstrate its inability to achieve such a goal with a more narrowly tailored rule that would not interfere with protected activity. For example, Guardsmark could have specifically stated that it encompassed romantic relationships only or made an exception for protected activity. In the absence of such evidence, the court found Guardsmark's fraternization policy to be unlawful.

Handbook Disclaimer

In several states, including South Carolina, policies in an employee handbook or personnel manual can constitute an implied employment contract. The presence of mandatory terms, vague promises of "fairness," and the absence of a conspicuous disclaimer is a recipe that could turn an ordinary termination of an otherwise at-will employee into a potential lawsuit for wrongful discharge.

That lesson was recently emphasized by a federal court in the *Wessinger* case. The handbook in that case contained well-intentioned phrases such as an explanation that the progressive disciplinary policy was intended to assure "the fair administration of disciplinary action" and that "managers are responsible for the fair and consistent administration of corrective action." Significantly, the handbook did not contain a conspicuous disclaimer. Accordingly, the court refused to dismiss the Plaintiff's breach of contract claims.

One of the best precautions against a handbook creating a contract is using conspicuous disclaimers. South Carolina law clearly specifies that a disclaimer must appear on the first page of the document in underlined, capital letters. Moreover, for handbooks or personnel manuals, the employee must sign the disclaimer.

Conclusion

In light of these decisions, employers should review their personnel policies and handbooks and consider whether they should be revised. The following are examples of policies to review:

- Employment-at-will policy
- At-will disclaimers
- Confidentiality policy
- Complaint process
- Customer relations policy
- Solicitation policy
- Literature distribution policy
- Fraternalization policy
- Dating policy
- Uniform policy

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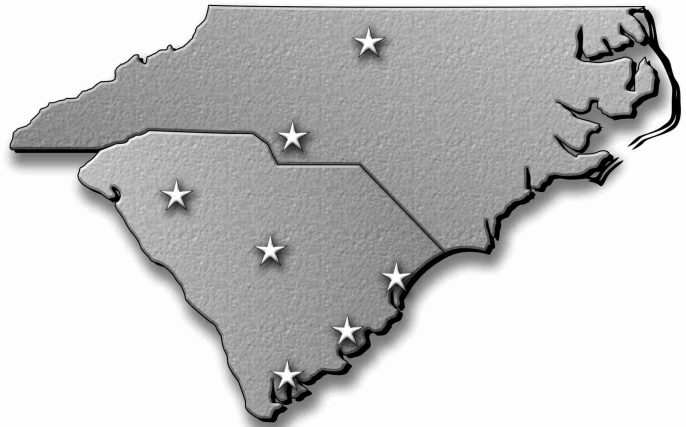
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