ASAP™ A Littler Mendelson **Time Sensitive** Newsletter

in this issue:

MARCH 2007

A recent federal court of appeals decision underscores the risk for employers that seemingly innocuous work rules, including anti-fraternization rules aimed at curbing workplace dating, may be deemed to violate the NLRA.

Labor Management | A Littler Mendelson Newsletter

The Dangers of Overbroad Work Rules: Union-Free and Unionized Employers Beware

By Alan I. Model and Shannon Huygens Paliotta

Most employers across the United States have a compilation of work rules – some more detailed than others - to guide their employees' workplace conduct. However well-intentioned and necessary to establish workplace norms, without careful drafting and review, work rules can be framed in ways that can cause them to be overbroad and lead to legal exposure under the National Labor Relations Act, the federal law that gives employees the right to engage in concerted activity (e.g., join a union).

Recently, the D.C. Circuit Court of Appeals in *Guardsmark LLC v. NLRB*, No. 05-1216 (D.C. Cir. Feb. 2, 2007) took aim at employer policies prohibiting coworker fraternization. At issue before the court in *Guardsmark* was a work rule that directed employees not to "fraternize on duty or off duty, date or become overly friendly with the client's employees or with co-employees." The court held that Guardsmark employees would reasonably believe that the work rule prohibited employees from discussing their terms and conditions of employment. The court reasoned that the primary dictionary definition of "fraternize" is to participate in fraternal relationships and, therefore, the work rule unlawfully prohibited the discussion of terms and conditions of employment among employees in violation of Section 7 of the NLRA.

In short, the court said that employees would think that a rule prohibiting "fraternization" prevents more than dating one's coworker, which is the common usage of such a rule among employers.

A Continuing Trend

Over the past ten years, there have been numerous decisions by the National Labor Relations Board and reviewing courts that an employer's mere maintenance of an overbroad work rule violates the law.

In the seminal decision of *Lafayette Park Hotel*, 326 NLRB No. 69 (1998), the NLRB set forth the principles for interpreting work rules under the NLRA and held that "the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights." Under this standard, the hotel's rule against "making false, vicious, profane or malicious statements" toward or concerning the hotel was deemed unlawful because it did not clearly define permissible conduct. In addition, requiring employees to leave the hotel's premises immediately following a shift change had the effect of denying off-duty workers access to nonworking areas, such as the parking lot, to engage in concerted activity. Finally, the NLRB discussed the hotel's policy prohibiting fraternization between employees and guests on hotel property. Despite the fact that "fraternize" was undefined, the NLRB did not believe that employees would read the rule as prohibiting their speaking with customers about terms and conditions of employment.

In *Martin Luther Memorial Home d/b/a Lutheran Heritage Village-Livonia*, 343 NLRB No. 75 (2004), the NLRB clarified the analysis as to whether the mere maintenance of a work rule is unlawful.

> In determining whether a challenged rule is unlawful, the Board must, however, give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights. (citation omitted.) Consistent with the foregoing, our inquiry into whether the maintenance of a challenged rule

> is unlawful begins with the issue of whether the rule explicitly restricts activities protected by Section 7. If it does, we will find the rule unlawful. If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

In *Lutheran*, the NLRB held that the mere maintenance of work rules prohibiting "abusive and profane language," "verbal, mental and physical abuse," and "harassment … in any way" were not unlawful because these rules could not reasonably be understood as interfering with employees' rights.

Since *Lafayette Park Hotel* and *Lutheran*, the NLRB has heard numerous other cases challenging handbook policies and work rules. *See e.g., Claremont Resort and Spa*, 344 NLRB No. 105 (2005) (employees would reasonably read employer's rule prohibiting "negative conversations" about their managers as an unlawful prohibition on voicing complaints); *Longs Drug Stores California, Inc.*, 347 NLRB No. 45 (2006) (work rules against disclosure of confidential information deemed unlawful because employees would reasonably believe such work rules prohibit disclosure of employee wage rates).

The *Guardsmark* Decision

In *Guardsmark*, the NLRB found that two work rules violated the NLRA. The employer's "chain-of-command" rule required employees to bring complaints about workplace issues directly to their supervisors and also stated that employees were prohibited from registering complaints with any representative of the employer's clients. Thus, what appeared to be an employer's innocent attempt to implement an internal complaint procedure and insulate its clients/customers from hearing such internal complaints was interpreted by the NLRB as interfering with employees' rights to discuss complaints with the employer's clients or customers. The NLRB also found that the company's rule prohibiting "solicitation and distribution of literature … at all times while on duty or in uniform" was unlawful because it restricted off-work solicitation. The NLRB also looked at Guardsmark's fraternization rule, but found that it was lawful because fraternization referred only to romantic relationships. The NLRB concluded that "employees would reasonably understand the rule to prohibit only personal entanglements rather than activity protected by the Act."

On review before the D.C. Circuit Court of Appeals, the fraternization rule was deemed to violate Section 7 of the NLRA. The court's decision rested on the fact that "fraternize" had a primary definition that was different from its common usage for personal romantic relationships. Fraternize can also mean "to associate or mingle as brothers or on fraternal terms," and to "associate, cooperate, join, or unite." When viewed in light of these dictionary definitions, the court concluded that employees would reasonably interpret the fraternization rule to prevent them from discussing their terms and conditions of employment.

What is problematic about this decision is that many employers have anti-fraternization policies aimed at prohibiting workplace dating. Following the *Guardsmark* decision it is imperative for all employers to review their work rules, regardless of how seemingly innocuous the work rules may appear or how infrequently they are enforced.

Potential Ramifications and Practical Recommendations for Employers

Both union and non-union employers alike that do not perform annual reviews of their employee manual and/or work rules may face serious legal consequences. The mere existence of an overbroad policy can lead to an employer's affirmative obligation to post a notice at all of its facilities informing employees that their employer violated the law and that employees have the protected right to unionize.

We suggest that employers consider the following practical recommendations.

- Perform an annual review of your work rules to ensure legal compliance with all federal and state laws. A proactive, careful review of a company's policies *before* a challenge is lodged may eliminate the expense and time involved with defending a legal challenge to an overbroad work rule.
- Include in the beginning of a company's handbook that nothing in the handbook should be construed as intending to chill an employee's statutory rights under the National Labor Relations Act or other applicable laws. Employers that consider this recommendation need to weigh the pros and cons. The clear benefit of this recommendation is to help defend against unfair labor practice charges under the NLRA and the downside is that it introduces employees to the NLRA which runs counter to a union avoidance program.
- Insert the statement "This rule is not intended to prohibit employees from speaking with others about their terms and conditions of employment" at the end of any work rule that arguably chills employee speech. Examples of work rules that should have such "disclaimer" language include rules addressing confidentiality, media inquiries, no-fraternization, no-solicitation, employee loyalty, use of e-mail and computer systems, and internal complaint procedures.
- Use plain language for your work rules. As evident from *Guardsmark*, a policy against dating should be called what it is -- a "Policy Against Dating" and not a fraternization policy. If your employees might misinterpret a word in your policy, don't use it. In addition to using plain language, it is recommended that work rules be translated into the languages spoken by large portions of the workforce. Translating work rules into multiple languages will result in better compliance and boost employee morale due to the efforts to communicate with employees in their native languages.

Alan I. Model is a Shareholder in Littler Mendelson's Newark office and Shannon Huygens Paliotta is an Associate in Littler Mendelson's Pittsburgh office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Mr. Model at amodel@littler.com, or Ms. Paliotta at spaliotta@littler.com.