THOMSON REUTERS
Westlaw®

Sneaky Section 7 traps for the unwary employer

By Chuck Mataya, Esq., *Bradley Arant Boult Cummings LLP**

MAY 22, 2018

With only about 6.5 percent of workers in the private sector being represented by unions, many private sector employers pay little, if any, attention to the requirements of the National Labor Relations Act (NLRA).

An employer may have heard something about "Section 7 rights," but the reference has little meaning unless an employer has become a target for organization or has received notice that an unfair labor practice (ULP) charge has been filed against it. Only then do some nonunion employers begin to appreciate the somewhat "sneaky" nature of some of the traps set up by this statute.

With that in mind, here are explanations of Section 7 and some of the traps that may help nonunionized employers avoid unintentionally violating Section 7.

SECTION 7

Section 7 of the NLRA guarantees covered employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[1]

These "rights" have been construed to include not only the right to discuss organizational issues, but also to discuss the terms and conditions[2] of an employee's employment, the right to criticize or complain about an employer, and the right to enlist the assistance of others in addressing employment matters. Thus, the concept of "concerted activity."

The concept is not self-explanatory; in fact, at times it is downright counter-intuitive, and some might even say, counterproductive.

THE 'YOUR PAY IS BETWEEN YOU AND ME' TRAP

Many employers in nonunion work environments attempt to pay employees based on individual merit. As such, some employees may be paid more than others for doing the same job, albeit perhaps not as productively or with the same quality. Publication of the differing compensation amounts, however, is thought to be counterproductive.

Thus, the following (or similar) admonition: "Please don't discuss your pay with others. Not everyone performs as well as you; so, not everyone is paid as much as you. Your pay is between you and me." The practice, logically, makes sense. However, the NLRB has construed such admonitions, especially if it is an enforced rule or practice, as violating Section 7.

Employees protected by Section 7, i.e., nonsupervisory employees, have a right to discuss their terms and conditions of employment with each other, especially their compensation. Even an implicit policy that restricts such discussion is considered to be invalid.[3]

THE 'ACTING OUT' EMPLOYEE TRAP

Similarly, many an HR professional has, at one time or another, told an employee something to the effect that, "Discipline is between you and your employer. You should not discuss it with others; it is none of their business." Employees caught complaining to others about their discipline have been disciplined for that conduct.

Employees protected by Section 7, i.e., nonsupervisory employees, have a right to discuss their terms and conditions of employment with each other, especially their compensation.

Unfortunately, similar to the compensation issue, an employee has the right to discuss disciplinary matters with other employees. So, maintaining a rule or practice forbidding such discussion is considered a Section 7 violation.

In Central States SE & SW Areas, Health & Welfare and Pension Funds, the NLRB held that an employer had committed an unfair labor practice when it ordered an employee to remove a laminated posting of a written disciplinary warning the employee had placed outside his work station.[4]

THE OVERLY BROAD CONFIDENTIALITY POLICY TRAP

Many employers have handbooks or ask employees to sign a nondisclosure agreement as a condition of their employment. In implementing such policies, many an employer has unintentionally impinged on its employees' Section 7 rights.

For example, in MCPc Inc., the Board held that an employee handbook stating that "dissemination of confidential information, such as personal or financial information, will subject the responsible employee to disciplinary action or possible termination" was overly

broad and unlawful because employees could construe the rule to prohibit the discussion of wages.[5]

Telling an employee that he may "[n]ever discuss details about your job, company business or work projects with anyone outside the company" was also held to be overly broad.

THE SOCIAL MEDIA POLICY TRAP

Many employers try to protect their name and reputation by forbidding certain activity by employees on social media sites.

The social media policies, however, according to the NLRB, have sometimes gone too far in limiting an employee's speech on social media. That is, the NLRB has construed many of the policies to be overly broad, thereby unlawfully restricting employees' right to concerted activity under Section 7.

An employer must be careful to make sure that the policy does not prohibit the kinds of activity protected by Section 7, such as the discussion of wages or working conditions among employees. For more on this complex subject, see the discussion on the NLRB's website.[6]

THE WORKPLACE INVESTIGATION TRAP

As strange as it may seem, the NLRB has also determined that a categorical prohibition on employee witnesses discussing a sexual harassment complaint while the investigation is pending is "on its face" an unfair labor practice.

A problematic determination, it seems, given the current environment when everyone's sensitivity to sexual harassment has been heightened by high-profile claims as seen in the media.

As every good human resources director knows, the best defense against a sexual harassment claim is an effective anti-harassment program — one that encourages employees to bring complaints, properly investigates such complaints, and takes prompt and effective remedial action when necessary. To make the process work, you need to be able to perform a thorough investigation.

Asking employees not to discuss the matter while the investigation is pending promotes integrity in the process. The intent of the "no discussion" instruction is pure, and it seems to make sense. Nonetheless, the NLRB apparently disagrees.

According to the Board's decision in Hyundai America Shipping Agency Inc., an employer cannot have a categorical prohibition on such discussion.[7] Rather, the Board places the burden on an employer to determine, on a "case-by-case" basis, that confidentiality is necessary "based on objectively reasonable grounds for believing that the integrity of the investigation will be compromised without confidentiality."

THE MESSAGE

Employers must be careful when implementing rules, policies or practices that in any way arguably restrict employee speech, at least to the extent the restriction may arguably be interpreted to restrict discussion as to the terms and conditions of employment.

While an employer can have reasonable rules restricting speech during work time, rules and policies should not be so broad as to arguably impinge on an employee's right to engage in concerted activity when not working.

When you need to have a rule restricting speech, be prepared to show that an individualized assessment of the need for such was made before implementing the rule, and avoid unnecessarily broad restrictions.

NOTES

1 https://bit.ly/1m0Cke5.

2 https://bit.ly/2wJpMlW.

3 https://bit.ly/2IqfwAd.

4 https://bit.ly/2GpfCGD.

5 https://bit.ly/2rL9fZs.

6 https://bit.ly/1HiHtnV.

7 https://bit.ly/2L7NgnB.

This article first appeared in the May 22, 2018, edition of Westlaw Journal Employment.

ABOUT THE AUTHOR

Chuck Mataya is a partner in the Nashville, Tennessee, office of **Bradley Arant Boult Cummings LLP**. He focuses his practice on litigation and counseling in various areas of labor and employment law, including the defense against class and collective individual actions in both state and federal courts. He can be reached at cmataya@bradley.com. This expert analysis was first published April 17 on the firm's website. Republished with permission.