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Another Reason to Have Your Employee Handbook Reviewed

ejwong · Friday, May 6th, 2011

In *Jurys Boston Hotel*, 356 NLRB No. 114 (2011), the National Labor Relations Board (“the Board”) set aside a representation election that sought to remove UNITE-HERE (“the union”) as the collective bargaining representative for a unit of the hotel’s employees (a “decertification election”) because of overbroad provisions in the hotel’s Employee Handbook. Specifically, the Board determined that three provisions in the hotel’s Employee Handbook were overbroad despite the fact that no evidence existed that these provisions had ever been enforced, cited, or referred to during the thirty days preceding the election (the “critical period”), let alone that this language affected the outcome of the election. In fact, the union did not file unfair labor practice charges or otherwise complain about the Employee Handbook provisions until after a petition was filed with the Board requesting a decertification election.

The overbroad provisions at issue in the Employee Handbook were those that: (1) Prohibited solicitation and distribution on hotel property; (2) subjected employees to discipline (up to and including discharge) for being in an unauthorized area and/or loitering inside or around the hotel without permission and for using guest facilities for personal use, including but not limited to guest phones, ATM machines, and restrooms; and (3) prohibited employees from wearing emblems, badges, or buttons containing messages of any kind other than the issued nametags or other official types of pins that form an approved part of their uniforms.

The union lost the election and filed objections seeking to set aside the election based on this overbroad language. The Board set aside the election on the grounds that the mere maintenance of overbroad rules can affect election results because employees could reasonably construe these rules as directives from their employer to refrain from engaging in Section 7 activities. The Board found it immaterial that the provisions were neither enforced nor that there was no evidence that the employees were deterred from voting for the union.

Given the Board’s aggressive defense of unions, it is likely the Board will continue to set aside elections based simply on employers maintaining overbroad rules irrespective of whether the rules are enforced or whether there is any evidence the overbroad rules interfere with Section 7 rights or the election.

Consequently, all employers, and particularly all hospitality industry employers, should contact labor counsel to review their Employee Handbooks to ensure that the Handbooks contain no language that could be construed as overbroad with respect to solicitation, distribution, employee access to the employer's premises, and/or the wearing of buttons or other insignia. It is important to do so before a union begins organizing employers' employees or before a decertification election is requested so that any negative effects of the overbroad language can be repudiated. Employers can rest assured that unions will closely scrutinize Employee Handbooks in preparation for any election campaign in an effort to ensure that if they lose a representation election, they can simply set it aside and obtain another election.

This entry was posted on Friday, May 6th, 2011 at 10:08 am and is filed under [Labor, National Labor Relations Board, News & Alerts, Unions](#). You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. Both comments and pings are currently closed.