



**BROAD COMPANY POLICIES CAN CREATE BIG PROBLEMS,
 WHETHER IN HANDBOOKS OR NOT**



Ashley R. Griffith.....

“Almost every employer has some type of harassment policy and/or leave policy, and even the use of broad language can open up legal issues...”

Several recent cases dramatically illustrate the need for careful company drafting of its employment policies, even though some are not related to employee handbooks. Almost every employer, for legal reasons or otherwise, has posted policies dealing with workplace harassment and leave policies under the Family and Medical Leave Act (FMLA).

In a recent case against Costco, the employer had a published employment policy dealing with harassment. The policy not only prohibited “unlawful” harassment but further provided that “appropriate corrective action will be taken, regardless of whether the inappropriate conduct rises to the level of any violation of law.” The policy went on to define harassment in a very broad manner. In this case, the plaintiff’s allegations of harassment were outside the statute of limitations, and the accusations within the statute of limitations were relatively minor. Despite the lack of “unlawful” harassment, the court found that the employer’s posted policy amounted to an express or implied contract between the employer and the employee, particularly since the policies did not contain any disclaimer language to the effect that its “super” anti-harassment provisions do not create legally enforceable protections beyond the protections of background law. *Marini v. Costco Wholesale Corp.*, 30 AD Cases 1876 (D. Conn. 2014).

In another case, an employer’s FMLA policy indicating that all full-time employees would be eligible for leave under the FMLA was sufficient grounds for the employee to claim FMLA coverage (under the doctrine of equitable estoppel). The employer argued that the employee was not actually eligible because the employer had not met the FMLA’s employee-threshold qualification under the law. The court rejected the employer’s argument, finding that the employee had reasonably relied on the policy statement addressing FMLA eligibility. *Tilley v. Kalamazoo County Road Commission*, 125 FEP Cases 1696 (C.A. 6, 2015). Thus, employers

should be cautious making broad statements that employees are covered under the FMLA when they are at work locations of less than 50 employees within a 75-mile radius, or otherwise have not met the statute’s hours-worked threshold.

In the final example, in December of last year, the Pennsylvania Supreme Court affirmed a \$151 million award to Wal-Mart employees who filed a class action claiming missed or interrupted meal breaks and rest periods. The employees argued that the employer would not allow them the breaks they were promised in published company policies and did not compensate them for the extra time worked. While neither federal nor state law required Wal-Mart to provide workers with the breaks that were involved in the lawsuit, the company policy stated that employees were eligible for specific meal and rest periods, and Wal-Mart was thus under a contractual obligation to provide them and to compensate employees for any missed or interrupted meal breaks or rest periods. *Braun v. Wal-Mart Stores, Inc.*, 106 A.3d 656 (Pa. Supreme Ct. 2015). Please note that Wal-Mart has filed an appeal to the United States Supreme Court.

Editor’s Note: The drafting of company personnel policies continues to create dilemmas for employers. The NLRB is claiming that overbroad company policies may infringe on protected employee activities such as unionism by “chilling” the rights of employees to engage in such activities. Without careful drafting, courts in some states are finding company policy language to be contractual and binding, even in those situations where no federal rights are involved. Almost every employer has some type of harassment policy and/or leave policy, and even the use of broad language can open up legal issues, as suggested by the foregoing cases. Unless the current legal environment changes, employers should have competent labor and employment law specialists review their policies, particularly those on sensitive subjects.

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EFFECT OF OBAMA VETO REGARDING ATTEMPTED CONGRESSIONAL OVERTURN OF QUICKIE ELECTION RULE



Howard B. Jackson

"Sen. Lamar Alexander ... [said that] the NLRB rule changes would 'allow a union to force an election before an employer has a chance to figure out what's going on.'"

During March, for only the second time in history, both Houses of Congress approved a resolution under the Congressional Review Act disapproving the controversial "quickie" or "ambush" union election rule. The Senate adopted the disapproval resolution of the NLRB action on March 4th by vote of 53-46, and the House passed an additional measure on March 19th by a vote of 232-186. On March 31st, President Obama vetoed the joint congressional resolution. The Senate vote is 14 votes shy of the total needed to override the President's veto. Therefore, the NLRB rule went into effect as scheduled on April 14th. While there are two lawsuits pending to challenge the legality of the new NLRB rule, in neither case has the court scheduled a hearing or made a ruling. In any event, blocking the rule through litigation is probably a long shot.

Regarding the Senate resolution, Sen. Lamar Alexander, Chairman of the Senate Labor Committee, said in a statement after the Senate's vote that the NLRB rule changes would "allow a union to force an election before an employer has a chance to figure out what's going on." On average, it currently takes about 38 days after a union petition is filed with the NLRB for a union election to take place. No one knows, not even the NLRB, how soon elections will be held in the future, but estimates vary between two and four weeks after the filing of the petition.

Implementation of the quickie election rule, together with the recent NLRB ruling in *Purple Communications, Inc.*, creates new issues for employers facing an election. The new election rules, among other things, require the employer to provide the union with employees' personal e-mail addresses, to the extent the employer has them. This will provide the union with a quicker and cheaper communication channel to the employee voters.

In *Purple Communications*, the NLRB adopted a presumption that employees who have been given access to the employer's e-mail system are entitled to use the system to engage in statutorily protected discussions about the terms and conditions of employment while on non-working time. This provides employees with a new form of protected communication during an organizing campaign (and at other times).

In short, the NLRB has made it easier for unions to communicate with employees - at least after an election petition has been filed - and has made it easier for employees to communicate with each other by using the employer's e-mail system.

Editor's Note: In light of the quickie election rules, employers should make a considered decision of whether to obtain and possess employees' personal e-mail addresses. In some organizations, there may be no strong business reason to have such information. If that is the case, there is now good reason not to possess it. In light of the Purple Communications decision, employers should review their e-mail policies and practices to ensure they are in order, and should do so in advance of any organizing activity to preclude any claim that the employer modified its rules and practices in response to such activity.



KNOW YOUR ATTORNEY KELLY A. CAMPBELL

KELLY A. CAMPBELL is the Regional Managing Member of the Morristown, Tennessee office of Wimberly Lawson Wright Daves & Jones, PLLC, which she joined in 1994. Her law practice includes an emphasis in workers' compensation, employment discrimination and wrongful discharge litigation (defense), as well as ADA and FMLA compliance for employers. She received her Bachelor of Science degree in General Business from the University of Tennessee at Knoxville in 1984 and her Doctor of Jurisprudence degree from the University of Tennessee College of Law in 1988. Ms. Campbell is a member of the Hamblen County Bar Association and Tennessee Bar Association. She has an AV Preeminent® Rating - which is the highest possible rating given by

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NLRB RESPONDS TO RIGHT-TO-WORK LEGISLATION



Howard B. Jackson.....

“... [T]he Labor Board is seeking input on a union fund-raising initiative that has long been deemed illegal under federal labor law.”
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In a little-noticed NLRB announcement during April, the Labor Board is seeking input on a union fund-raising initiative that has long been deemed illegal under federal labor law. The matter arose recently in *Buckeye Florida Corporation*, a subsidiary of *Buckeye Technologies, Inc.*, and *Georgia Pacific, LLC*, Case 12-CB-10954. In that case, the union charged a fee to process non-members’ grievances. In a March 24, 2014 decision, Administrative Law Judge William Nelson Cates (coincidentally a judge who was recommended for the position by Jim Wimberly), found that the union’s rule violated Section 8(b)(1)(A) of the National Labor Relations Act. That provision makes it unlawful for a union to restrain or coerce employees in the exercise of their protected rights.

In right-to-work States, employees may not be forced to join a union, or to pay union dues. Imposing charges on employees who have exercised their right not to join a union in connection with grievance processing has for years been considered a form of restraint or coercion of those employees. Accordingly, the initial decision in the *Buckeye Florida* case is not surprising.

However, the union appealed that decision to the National Labor Relations Board in Washington, D.C. The union argued that it should be allowed to charge non-members fees for handling grievances involving their employer, even though the union is already deemed to represent all bargaining unit employees under federal labor law, whether they are union members or not. If this contention is accepted it would effectively allow unions to create adverse consequences in the form of added cost for employees who exercise their statutory right not to join unions in right-to-work States.

On April 15, 2015, the NLRB invited the filing of briefs in order to allow other interested persons the opportunity to address the following questions: (1) “Should the Board reconsider its rule that, in the absence of a valid union-security clause, a union may not charge non-members a fee for processing grievances?” and (2) “If such fees were held lawful in principle, what factors should the Board consider to determine whether the amount of such a fee violates Section 8(b)(1)(A)?” and as a corollary, “What actions could a union lawfully take to ensure payment?” The due date for filing such briefs was recently extended to July 15th.

Unions of course argue that the right-to-work laws encourage “free riders” in States that have such laws. Nevertheless, the National Labor Relations Act grants States the right to enact such laws, and many States have done so. In view of those laws, are unions to be given the ability to effectively punish employees who have exercised their statutory rights by imposing charges in exchange for the union performing a duty generally considered a basic and routine function – i.e., processing a grievance on behalf of an employee it represents? It appears that the NLRB will answer that question, probably late this year.



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Catherine E. Shuck

“Adhering to these requirements is a ‘must’ for anyone managing payroll.”

TIME-KEEPING 101: THERE’S NO TIME LIKE THE CORRECTLY-RECORDED TIME

There are many ways to run afoul of the federal Fair Labor Standards Act (FLSA). One of the easiest pitfalls to avoid, however, is failure to follow the law’s time-keeping and record-keeping requirements. The FLSA sets relatively straightforward and easy-to-follow time-keeping and record-keeping requirements. Adhering to these requirements is a “must” for anyone managing payroll.

Time-Keeping. Employers are required to keep accurate records of *non-exempt* employees’ hours worked. For most non-exempt employees, daily records should show the time the employee arrived for work, the time the employee left for a lunch or other unpaid break; the time the employee returned from the lunch or break; the time the employee left for the day; and the total hours worked for the day.

No particular format or method of time-keeping is required. The U.S. Dept. of Labor, Wage and Hour Division, issued helpful instructions in Fact Sheet #21: *Recordkeeping Requirements under the Fair Labor Standards Act (FLSA)*. According to the Department of Labor (DOL), “[e]mployers may use any timekeeping method they choose.” The DOL suggests that employer may

“use a time clock, have a timekeeper keep track of employees’ work hours, or tell their workers to write their own times on the records.” The DOL’s list is not exhaustive; the DOL advises that “[a]ny timekeeping plan is acceptable as long as it is complete and accurate.”

Thus, depending on the employer’s situation and resources, an employer can choose the time-keeping method that makes the most sense. The important thing is that time be kept contemporaneously with the work being performed, to ensure the accuracy and integrity of the records. Automated time clocks or other electronic systems are nice (as long as they are accurate) but are not required. Having employees sign in and out on paper is also perfectly acceptable.

If an employer chooses to have non-exempt employees record their time by hand, the employer should instruct the employees to enter the exact time that they came and went. In other words, instead of just writing in at 8:00 and out at 5:00 every day, minus one hour for lunch, the employee should write the exact time, e.g. “in” at 7:58 and “out” at 5:04.

Note that if the employee is only supposed to work from 8:00 to 5:00, the employee does not have to be paid for time outside the scheduled work day, *as long as the employee does not actually perform any work outside the schedule*. So in the example above, if the employee is only supposed to work from 8:00 to 5:00, but she spends the first few minutes of her day getting coffee and the last few minutes checking her personal email, she can simply be paid from 8:00 to 5:00 (minus lunch). But it is important to record the actual time the employee arrived and left, again, to ensure that the records are accurate as required by the law.

The FLSA also permits employers to round employees’ time to the nearest quarter-hour. (Employers may round to a smaller increment, e.g. 6 minutes or 10 minutes, if they choose.) But it is important that the rounding practice be designed to “average out” over time. In other words, an employer cannot always round down. The employer should choose the midpoint of the rounding window and adopt a consistent practice of rounding down where the time recorded is below the midpoint and rounding up where the time is above it. In other words, if the employer adopts a 15-minute window, minutes 1-7 can be rounded down but minutes 8-15 must be rounded up.

Finally, note that employers *should not* require *exempt* employees to record their hours worked each day. One of the requirements to maintain exempt status is that the employee be paid on a fixed salary basis. Deductions from the salary may only be made in limited situations, and must almost always be made in full-day increments. Requiring exempt employees to record hours worked can call the exemption into question and can destroy it if employees are actually paid by the hour instead of on a salary basis.

Record-Keeping. The FLSA requires that employers keep records of hours worked, total earnings, total overtime, and additions to/deductions from wages for at least two years from the date of the last entry on the time record. Records may be kept in hard-copy or electronic form, as long as they are accessible within 72 hours of a request.

In addition to the time records, note that the FLSA also requires employers to maintain the following information for both non-exempt and exempt employees covered under the executive, administrative, and professional exemptions: full name; home address; date of birth if under age 19; sex; occupation in which employed; time of day and day of week in which workweek begins; regular hourly rate for non-exempt employees, and salary for exempt employees.

Conclusion. There is no time like the present to ensure that your time-keeping and record-keeping practices comply with the FLSA.