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ROSENTHAL<sub>LLP</sub>

2024 Employee Handbook Updates

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# Agenda

- The NLRB – New rules on policies and unionization
- New policies under federal and state law – lactation accommodations, pregnancy accommodations, drug testing, leave, discrimination
- Other developments – DEIA, generative AI

## Fundamentals

- The National Labor Relations Act (NLRA) applies to virtually all private-sector employers and employees
- Most changes come through adjudication before the National Labor Relations Board (NLRB)
- The NLRB General Counsel and a majority of the Board are from political party of the sitting president
- Consequently, there has been a back-and-forth on the most controversial issues every 4-8 years as political winds shift

## Fundamentals

- Protected Concerted Activity (PCA) – Employees (both union and non-union) have the legal right to engage in concerted activity regarding the terms and conditions of their employment
- Unfair Labor Practice (ULP) - Employers (both unionized and non-union) who interfere with or restrain PCA commit a ULP

## *Cemex Construction Decision*

A union can become bargaining representative in one of two ways without the union ever winning a secret-ballot election OR the employer extending voluntary recognition:

1. The employer fails to recognize the union or file a RM petition within two weeks of the demand for recognition; or
2. The employer commits unfair labor practices requiring the election to be set aside – even if the employer won the election
  - Commission of an unfair labor practice will result in a bargaining order unless it is “so minimal or isolated that it is virtually impossible to conclude that the misconduct...affected the election results.”

## *Stericycle* Decision

- Board’s decision in *Stericycle* applies to “facially neutral” rules that do not expressly prohibit protected activity
- NLRB GC must show an employee could reasonably interpret rule to be coercive
  - Even if a contrary, non-coercive interpretation is reasonable
  - Now viewed from perspective of employee who wants to engage in protected activity
- If established, an employer must prove both:
  - Rule advances legitimate and substantial business interest
  - Narrowest possible rule to advance that interest

## Handbooks and Work Rules

- Immediately assess facially neutral work rules to determine if they could be construed as interfering with protected activity
- Even if rule advances legitimate business interest, can rule be more narrowly tailored?
- Harbinger for a host of customary work rules to be found unlawful by NLRB
- Simply having an unlawful rule could result in a *Cemex* order



## NLRB-Targeted Work Rules

- **Confidential Information** – must define scope of term in detail, no prohibitions on sharing information regarding wages and other terms and conditions of employment, do not include “any non-public information,” which may be construed as wage information
- **Social Media** – same, no prohibitions on “negative” or “disparaging” comments about the Company or managers – stick to prohibiting defamatory speech
- **Confidentiality During Investigations** – no categorical prohibitions on discussion of investigation during the investigation

## NLRB-Targeted Work Rules

- **Workplace Recordings** – Across-the-board prohibition likely unlawful; focus on no recording of confidential processes, trade secrets, etc., or interference with the safety of employees
- **Work stoppage** – no prohibition on interfering with co-workers, restricting work output, or encouraging others to do the same
- **Dress code** – no limitations on union pins and other insignia, no statement that “only official/approved uniforms may be worn”

## NLRB-Targeted Work Rules

- **Workplace Civility** – NLRB believes employees do not have obligation to act civilly when engaged in protected activity
- **Conflict of Interest** – Should be tailored so cannot be construed as restricting protected conduct; be careful with “no moonlighting” rules
- **Leaving Work Without Permission/Walkouts** – Walkouts are generally permitted (e.g., strikes); can provide carveout for activities not protected by the NLRA [NOTE: These rules may be lawful in some industries, such as the healthcare industry.]

# Lactation Accommodations Policy

## **PUMP for Nursing Mothers Act** – For one year following birth:

- Reasonable break time
  - Need not be paid unless using general paid break time
  - Any additional time may be unpaid, as long as relieved from work
- Private place to express milk
  - Shielded from view, free from intrusion, available when needed, not a bathroom
  - Functional – seating, raised surface for pump, ideally electricity/sink, storage
- But remember state law protections and requirements!!!

# Pregnancy Accommodations

**Pregnant Workers Fairness Act** – Employers must provide reasonable accommodations for a worker’s known limitations related to pregnancy, childbirth or related conditions, absent undue hardship

- “Reasonable accommodation” includes modification or adjustment to the application process, the work environment or manner/circumstances of performance, or to enable the individual to enjoy equal benefits and privileges of employment

## Pregnancy Accommodations

- **Examples:** making facilities accessible, job restructuring, modified work schedules, reassignment, breaks, equipment, modification of policies, light duty, telework, temporary suspension of essential function, reserved parking, leave
- **“Virtually always reasonable accommodations”:** allowing the individual to carry water and drink as needed; additional restroom breaks; seating or standing as needed; breaks for eating/drinking

# Pregnancy Accommodations Policy

- Policy provisions:
  - how to request,
  - interactive process,
  - when reasonable medical certification required,
  - examples of accommodations,
  - undue hardship
- But remember state law protections and requirements!!!

# Drug Testing Policies - Marijuana

- Does your state prohibit testing for marijuana, or disciplining based on positive test?
- Are there exceptions?
  - Federal contracts, legal compliance, safety-sensitive and/or direct care positions
- Modifications to policy
  - Permit off-duty use v. zero tolerance – if permitted under state law
  - Testing for marijuana?
  - Impairment provisions – take disciplinary action based on symptoms and behaviors, not tests!
- But remember state law protections and requirements!!!



## Leave Policies

Remember state law protections and requirements!

- General leave – new
- Sick leave – new and amended
- Other forms of leave: voting, bereavement, organ/bone marrow donation, crime/domestic victims

# Leave Policies

## Policy provisions:

- eligibility,
- amount,
- paid/unpaid,
- how accrued,
- rollover,
- separation from employment,
- permitted uses,
- notice to Company,
- verification,
- fraud

## Paid Family and Medical Leave

Remember state law protections and requirements!

- Policy provisions:
  - eligibility,
  - amount,
  - permitted uses,
  - application process,
  - interaction with Company-provided paid leave,
  - notice to Company

# Discrimination Policies

- CROWN Acts
- Gender identity and sexual orientation
- Other? Height and weight, disability, marital status...
- Policy revisions – if list protected characteristics under state law, will want to include

## DEIA Policies

*Students for Fair Admissions, Inc. v. President and Fellows of Harvard College and SFFA v. University of North Carolina*

- Supreme Court rejected use of affirmative action for college admissions
- Different standards apply in employment!
  - Employment decisions cannot be based on legally protected personal characteristics – even in mandatory or voluntary affirmative action plans/programs!

## DEIA Policies

- Accessibility?
- Review stated goals and strategies
  - No quotas or set-asides
  - No rewards to management for achieving certain diversity numbers
  - No favoring of protected characteristics (race and gender)
  - No exclusive employee resource groups
  - No exclusive programs/initiatives
- Focus on achieving overall diversity and inclusion
- Prohibit discrimination, harassment and retaliation

# Generative AI Policies

## Policy provisions:

- Explanation of how AI is being used by the Company
- Permitted/forbidden use of AI by employees
- Procedures for receiving approval for the use of AI
- Limitations on what data may be input into general AI tools
- Independent verification of information or output from the AI tool
- Ensure that the use of the AI tool does not result in discrimination, harassment, or defamation
- Compliance with applicable regulatory requirements
- Clarification of intellectual property rights

## Generative AI – Other Policies

- Confidential and proprietary information
- Codes of conduct
- Computer systems use
- Intellectual property



# Questions

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