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National Labor Relations Board (NLRB) Reads Employee Code of Conduct Broadly in Determining Employer Engaged in an Unfair Labor Practice

Section 8(a)(1) of the National Labor Relations Act makes it an unfair labor practice “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by Section 7” of the Act. Those Section 7 rights are broadly inclusive and include actions not only related to union organizing but also to other activities such as discussion of compensation or the terms and conditions of work. An employer policy or work rule that explicitly restricts Section 7 rights is on its face unlawful. In cases where a policy is not explicitly restrictive, the NLRB utilizes a three step analysis by asking: (1) would employees reasonably construe the language of the policy or work rule to prohibit Section 7 activity?; (2) was the rule promulgated in response to union activity?; and (3) has the rule been applied to restrict Section 7 rights? An affirmative answer to any one of the three questions makes maintenance of the policy or rule an unfair labor practice. The following July 31, 2014, decision of the NLRB indicates how easy it can be for an employer to run afoul of the first of these questions whereby an employee can reasonably construe the meaning of a policy or rule to restrict Section 7 rights.

Fresh & Easy Neighborhood Market operates a chain of grocery stores. It provides its employees with a written “Code of Conduct” which employees are required to follow on topics like protection of company and customer resources; equal employment opportunity; ethical considerations in business; abusive and other unacceptable employee conduct. The section on protecting company resources has a sub-section on “Confidentiality and Data Protection” containing the affirmative requirement that employees “Keep customer and employee information secure. Information must be used fairly, lawfully and only for the purpose for which it was obtained.”

The union representing the Fresh & Easy employees filed a complaint with the NLRB, which was joined by the NLRB’s General Counsel, alleging that the above language above “would reasonably tend to chill employees in the exercise of their Section 7 rights” specifically that employees would interpret the language to prohibit disclosure of employee wages and other terms and conditions of employment “to other employees or individuals including union representatives.”

The Administrative Law Judge who heard the complaint dismissed it in its entirety noting that the charged language “does not appear in isolation” and a reading of the entire section would support an understanding that what is protected is “collected information” from employees or customers. Such collected information would include

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social security information, medical information, and other information customarily held in employees' personnel files, but would not include wage and working conditions information. In addition the ALJ noted that the "Code of Conduct" was not a typical employee handbook addressing working conditions.

The union and the General Counsel filed exceptions which were heard by a three member panel of the NLRB. That panel, with one dissenting member, delivered a decision and order finding the language of the code to be violative of Section 7 rights. The majority wrote:

"Contrary to the judge and our dissenting colleague, we find that the challenged rule is unlawful. We agree with the General Counsel that employees would reasonably construe the admonition to keep employee information secure to prohibit discussion and disclosure of information about other employees, such as wages and terms and conditions of employment. The Board has repeatedly found rules with similarly overbroad phrasing to be unlawful...In addition, the instruction to use information 'only for the purpose for which it was obtained' reinforces the impression that the rule prohibits Section 7 activity, as the Respondent's business purpose clearly does not include protected discussion of wages or working conditions with fellow employees, union representatives, or Board agents."

The Board's order required Fresh & Easy to rescind the section containing the violating language within fourteen days of the Board's order and to post a copy of the order in conspicuous places where notices to employees are customarily posted, and to distribute the order by electronic means such as email or posting on an internet site.

The case is **Fresh & Easy Neighborhood Market and United Food and Commercial Workers International Union**; Cases 31-CA-077074 and 31-CA-080734. The decision and order are available on the NLRB's website.

Applications Being Accepted for Greater Minnesota Business Expansion Sales Tax Refunds

The Minnesota Department of Employment and Economic Development is accepting applications from businesses located outside the seven county Twin Cities Metro Area for refund of state sales tax on qualifying purchases.

The program requires a business to be certified by the Minnesota Department of Employment and Economic Development. A business may qualify if:

- It has been operating at least one year in a Greater Minnesota City or, for an agricultural processing facility, at least one year in a Greater Minnesota county.

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- It pays employees at least 120 percent of the federal poverty level for a family of four (for 2014 that amount is \$28,620 per year or \$13.76 per hour) and meets prevailing wage guidelines for construction projects.
- It agrees to expand employment within three years by a minimum of two employees or 10 percent of the number of employees at the facility which ever is greater.
- It is not primarily engaged in retail sales, lobbying, gambling, entertainment, professional sports, political consulting, leisure, hospitality, professional services or operate as a public utility.

The refund is available for:

- Purchase and use of goods and services at the business' facility in Greater Minnesota.
- Purchase and use of construction materials and supplies for real property improvements at the business' facility in Greater Minnesota.

In addition:

- The business will receive sales tax refunds for seven years following the date of certification.
- Only purchases made after certification qualify.
- The business may be eligible for up to \$2 million in sales tax refunds per year and up to \$10 million over the seven year certification period.
- The business must submit an application for certification, must participate in a Business Subsidy public hearing if the amount of the refund is \$500,000 or more, and must enter into a Business Subsidy Agreement with the Minnesota Department of Employment and Economic Development. **See additional details at <http://mn.gov/deed>.**

Past issues of Small Business Notes are available on the Department of Employment and Economic Development website at <http://mn.gov/deed/>

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