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NLRB Slams Hospital for Maintaining Work Rules Prohibiting Employees from Engaging in "Improper Conduct" [Ober|Kaler]

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Over the past several years, employers have been bombarded with news about the National Labor Relations Board (NLRB) and its ever expanding control over employers' internal workplace policies. In fact, just a few years ago, the NLRB and its General Counsel announced quite clearly their intent to police employee handbooks for unlawful workplace policies.

Since that time, the NLRB has made that intention a reality, and has paid a great deal of focus on hospitals and other employers in the health care industry in doing so. The NLRB's decision in *William Beaumont Hospital*, 363 N.L.R.B. No. 162, released just last month, is the lengthiest explanation to date of how the agency evaluates workplace rules and expects employers to comply.

First, while most people associate the National Labor Relations Act (the Act) with union workplaces only, in reality the Act protects employee rights in *all* workplaces. Along those same lines, the decisions of the NLRB, the government agency tasked with implementing and enforcing the Act, affect both union and non-union workplaces. With that said, the Act is designed to protect the rights of union and non-union employees to engage in concerted activities for their mutual aid or protection, which includes employees' rights to talk about the terms and conditions of employment.

Now, to provide a bit of context for the decision in *William Beaumont Hospital*, it is important to understand the standard the NLRB applies when reviewing employer rules. In its seminal decision, *Lutheran Heritage Village-Livonia*, the NLRB explained that an employer's rule violates the Act if it would "reasonably tend to chill" an employee from engaging in protected activity. This prohibition applies to rules that are specifically intended to prevent the exercise of a right (i.e., a rule that explicitly prohibits union organizing), or a facially neutral rule that is applied in a manner that interferes with protected rights (i.e., applying an otherwise lawful non-solicitation policy only to prohibit union-related solicitation). Moreover, under *Lutheran Heritage*, even a rule that on its face does not directly implicate protected rights and that is not applied to restrict protected rights may nevertheless violate the Act if an employee could "reasonably construe" the rule to restrict the employee's ability to engage in activities that are protected under the Act.

Which brings us to the NLRB's recent decision in *William Beaumont Hospital*. In that case, two nurses were discharged by the hospital for violating anti-bullying and patient and employee relations rules. The NLRB upheld the discharges as lawful, but moved on to analyzing the hospital's "rulebook." The NLRB focused on the hospital's "Code of Conduct for Surgical Services and Perianesthesia" in particular, which read in relevant part:

Conduct on the part of a Beaumont employee or physician that is inappropriate or detrimental to patient care of [sic] Hospital operation or that impedes harmonious interactions and relationships will not be tolerated. Transgressors shall be subject to appropriate remedial or corrective action.

Improper conduct or inappropriate behavior…includes but not limited [sic] to…[n]egative or disparaging comments about the moral character or professional capabilities of an employee or physician made to employees, physicians, patients, or visitors.

In upholding the standard set in *Lutheran Heritage*, the NLRB ruled that the hospital violated the Act by maintaining rules that would "reasonably be construed to prohibit expressions of concerns over working conditions."

Although this finding is noteworthy in itself, it is even more significant because of the partial dissent. Board Member Philip Miscimarra wrote that the decision "defies common sense to find that a hospital violates Federal law merely by stating that physicians and nurses must promote 'harmonious interactions and relationships.'" Miscimarra went on to urge that the "reasonably construe" rule in *Lutheran Heritage* be overruled in favor of a more evenhanded approach to evaluating employment policies, work rules, and handbook provisions. Specifically, Miscimarra suggested that the NLRB has a duty to strike a balance between the potential adverse impact of a workplace rule on protected activity, and the legitimate justifications an employer may have for maintaining the rule. Under such a balancing test, a facially neutral policy would be unlawful if the business justifications are outweighed by the adverse impact on activity protected under the Act.

Of course, the majority scoffed at the idea of implementing a new standard. That means employers must take note of the NLRB's decisions on this matter, if they have not done so already, and review their policies for compliance with the Act. If any rule or policy could be read to prohibit an employee from engaging in protected activity, an employer would be wise to revise it now, before the NLRB comes knocking.