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# Briefly

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# NLRB COMMENTS ON RULES VIEWED AS UNLAWFUL, AND HOW THEY CAN BE MADE LAWFUL

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"The GC's report … illustrates is that it is simply not always easy to predict what rule the NLRB may accept, and what similar version(s) of the same type of rule may be found to be unlawful."

On March 18, 2015, the NLRB'S General Counsel (GC), Richard Griffin, issued a thirty-page report that attempts to reduce some of the mass confusion over the NLRB's policies concerning employer policies. The GC acknowledges most employers do not draft their policies with the object of restricting conduct protected by the labor law, but states that the law does not allow even well-intentioned rules that would inhibit employees from engaging in "protected activities."

A rule is certainly unlawful if it facially prohibits protected activity. And a rule banning union activity would be such a rule. The GC's report notes that most violations are not of that sort, but are instead rules that an employee might reasonably interpret as prohibiting protected activity.

If there is an overarching principle to be gleaned from the report, it is that rules written with specificity, and which make clear that the conduct prohibited is not protected under the NLRA will be found lawful. Conversely, vague and broad wording that does refer, or at could refer, to protected activity will be found unlawful.

The report is too long to summarize in this article. The GC's comments on certain specific topics are summarized below to illustrate the GC's approach.

Confidentiality. Employees have the right to discuss wages, hours and working conditions. Accordingly, a rule "prohibiting employees from disclosing details about the employer" was found unlawful because such details could include, for example, pay. But a rule that prohibits the disclosure of trade secrets or other business secrets would be lawful, as this rule specifically focuses on information that the employer has legitimate reasons to protect.

Employee conduct toward the Company and Management. Employees have the right to criticize the organization and its management regarding wages, hours and working conditions. Accordingly, a rule stating "be respectful of others and the Company" is unlawful, as some of the permissible criticisms might be viewed as disrespectful. On the other hand, a rule stating "each employee is expected to work in a cooperative manner with management/supervision, co-workers, customers and vendors" would be lawful. Frankly, the distinction made by the GS between the phrasing of these rules is very subtle, and it would have been difficult for anyone to predict that "respectful" verbiage is unlawful whereas the "cooperative" verbiage is lawful.

Conduct toward fellow employees. Employees are allowed to argue and debate with each other over wages, hours and working conditions. In view of that right, the GC commented that a rule saying "do not send unwanted, offensive, or inappropriate emails" was unlawful, apparently on the theory that it could discourage employees from engaging in the debate for fear of being disciplined if a co-worker said the message was "unwanted" or "inappropriate." On the other hand, a rule prohibiting employees from "threatening, intimidating, coercing, or otherwise interfering with the job performance of fellow employees or visitors" was lawful.

Employee interaction with third parties. Employees have the right to communicate with third parties regarding their concerns over wages, hours and working conditions. Accordingly, a rule stating "employees are not authorized to speak to any representative of the media about Company matters unless designated to do so by HR" was unlawful. A rule

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restricting who may speak on the employer's behalf can be lawful (assuming it is not worded so broadly as to prohibit employees from speaking in a protected manner).

Use of Company logos and trademarks. Intellectual property has certain protections. But employees may use logos and the like for non-commercial purposes, such as on leaflets or picket signs. Therefore, a rule providing "do not use any company logos, trademarks, graphics, or advertising materials in social media" was unlawful. An employer can, however, prohibit the commercial use of its intellectual property by employees.

Photography and recording devices. Employees have a right to take pictures and recordings in furtherance of protected activity. Accordingly, a rule prohibiting "use or possession of personal electronic equipment on employer property" was unlawful. But where an employer has a reason to ban the use of such equipment that is particular to its business the employer may promulgate an appropriately tailored rule. For example, concerns for patient privacy in the health care setting would justify a rule banning the use of pictures and recordings in a manner that jeopardize patient privacy.

Rules that restrict leaving work. The right to strike is a fundamental right under the NLRA. The GC finds that some fairly typical employer rules are overly broad because they could be read as prohibiting lawful strike activity. For example, the GC commented that a rule stating "walking off the job is prohibited" was unlawful because it reasonably could be read to include protected strikes and walkouts. The author respectfully suggests that most employees understand that such a rule would simply mean that they may not leave their post at will, with no consequences. Nevertheless, this is another illustration of how the GC meticulously reviews employer rules with an eye toward determining whether they may be taken to prohibit protected activity.

The GC's report is appreciated and is somewhat helpful. But one point it illustrates is that it is simply not always easy to predict what rule the NLRB may accept, and what similar version(s) of the same type of rule may be found to be unlawful.

*Editor's Note: The current NLRB and GC will continue to scrutinize employer policies that come to their attention. Employers generally, and in particular an employer that believes that it may be the target of organizing activity, should review their handbook and other policy language to ensure that proper and defensible policies are in place.*

## KNOW YOUR ATTORNEY

### MARY DEE ALLEN

MARY DEE ALLEN is a Member in the Cookeville, Tennessee office of Wimberly Lawson Wright Daves & Jones, PLLC, which she joined in 2003. Mary Dee is a practicing trial attorney since 1992, handling primarily workers' compensation defense and employment discrimination defense, in state and federal Courts and administrative agencies. She obtained an Associates Degree in Nursing from Union University in 1988, a Bachelor's Degree in History from Union University in 1989, and a Doctor of Jurisprudence Degree from the University of Memphis in 1992. Mary Dee has an AV Preeminent® Rating - which is the highest possible rating given by Martindale-Hubbell, the leading independent attorney rating entity. She is a member of the Putnam County Bar Association, the Tennessee Lawyers Association for Women, and Kiwanis. Mary Dee is Legislative and Governmental Affairs Chair of the Tennessee Society for Human Resource Management and Co-Chair of the Upper Cumberland Society for Human Resource Management.

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**Edward H. Trent**

"Employers and recruiters are turning more frequently to social media for additional background screening information."

# GETTING TO KNOW YOU – BACKGROUND CHECKS AND PRE-EMPLOYMENT TESTING

Hiring new employees can be an expensive, time consuming task. An employer can be prepared with standard forms and interview questions, but still not have enough information to truly evaluate someone who may be a member of the workplace "family" for years to come. Employers would be wise to spend a little more time in obtaining relevant background information. The law, however, sets some important ground rules on how to gather such information, and knowing them is critical when attempting to learn more than what is presented on a resume.

The best place to start with background screening is with the employment application itself. In addition to the basics (work history, education, qualifications), an employer should consider requesting job and personal references, as well as permission to conduct one or more background checks. Towards that end, the job application should include a *separate form signed by the applicant, specifically authorizing the employer* to verify the application information, contact references, and conduct background checks.

A background check is the most common type of screening information requested by employers today, and it can include criminal history, credit check, and/or other personal information. Most employers use third-party providers to gather such information, in which case, the rules under the Fair Credit Reporting Act ("FCRA") apply. Before requesting a third party to conduct a criminal background check, the employer must provide notice to the applicant and obtain a signed authorization. Employers who conduct public records searches themselves, or call to verify job history or to speak with references are not bound by the FCRA requirements.

A background check should not be requested unless it is job-related. The employer should be able to articulate, in objective terms, why it may be relevant to an employment decision. For example, a credit check would be suitable for employees responsible for handling cash, or who are subject to a bonding requirement, but not for someone working as a construction worker, for example.

Some states and towns (but not Tennessee) have limited when criminal background checks can be performed, and prohibited employers from asking applicants about any criminal convictions on their employment applications, under a recent wave of so-called "ban the box" laws. However, regardless of when criminal background checks are performed, not everything in someone's history is always relevant. Accordingly, employers should be careful how they use the information. In 2012, the EEOC updated its guidance in this area, to the cheers of some and the derision of others, requiring employers to conduct an "individualized assessment" before making a hiring decision on the basis of criminal history. Thus, an employer should gather additional facts about any particular incident of concern, and determine if it is truly related to the necessary job qualifications, before deciding to reject an applicant on that basis.

For example, if a 30-year-old candidate (who was otherwise qualified) was arrested when he was 18-years-old for vandalizing his high school as part of a senior prank, but had no other blemishes on his record, rejecting him for the incident would most likely not be job-related and therefore run afoul of the EEOC's guidance. Furthermore, it might also be viewed as a pretext for some unlawful reason why he was not hired, such as discrimination on the basis of race or national origin.

Employers and recruiters are turning more frequently to social media for additional background screening information. Jobvite's *2014 Social Recruiting Survey* reports that approximately 94% of recruiters will use LinkedIn to solicit candidates or gather background information on applicants. This far exceeds the number of recruiters who use Facebook (32%) or Twitter (18%) for getting background information on candidates.

Social media can productively be used to investigate professional experience, specific skills, examples of work product, and other relevant work-related information. This explains why LinkedIn is the top choice of social media sites used by recruiters. However, employers may find Facebook and/or Twitter to be more relevant for other helpful information, such as identified in the Jobvite study: e.g., profanity, spelling and grammar errors, illegal drug references, and sexual posts. These issues can legitimately be considered by the employer, so long as they do not encroach on a protected class such as religion, sex, disability, race or national origin. On the positive side, employers may learn about volunteer work and donations to charity. Accordingly, open social media sources may provide valuable information if used correctly.

Use of social media is not without risks, however. Many states, including Tennessee, prohibit employers from requiring an applicant to give access to "private" areas of social media. Additionally, information on social media may reveal that the candidate (or someone affiliated with them) has health issues or a disability, or is otherwise a member of a protected group, and such factors cannot legally influence a hiring decision. Additionally, personal medical information and family medical history (e.g., a relative recovering from cancer) are matters that if considered in hiring will likely violate the Americans with Disabilities

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Act ("ADA") and/or the Genetic Information Non-Discrimination Act.

To avoid a claim that information sourced on social media was wrongfully used to make a hiring decision, the employer should designate a single individual to search social media and only gather (and print) information relevant to the hiring decision. Then, only relevant information should be shared with the hiring manager.

The other area for background screening – and one often forgotten by employers - is to verify each applicant's education, job history, and reference checks pursuant to their signed authorization as mentioned above. It can be helpful, for example, in confirming whether an applicant actually graduated from a college or university, or just took classes. It can also be helpful in obtaining more information from another employer than just the dates of employment, last position held, and wage rates. Although employers are free to provide truthful information about a former employee, they may be hesitant to do so due to fear of litigation if the employee is not hired for the new job, and a signed authorization can make all the difference. Keeping good notes of who the employer spoke with and the information provided is critical if a hiring decision is made based on the background check.

Of course, all screening must be done uniformly and consistently for all relevant applicants. It can be done after a conditional job offer, or after an initial round of screening for minimal qualifications, or after the employer has narrowed the field to a final list of candidates. The information-gathering can also be spread over time, with some information gathered before an interview and other information gathered before a final hiring decision is made. Regardless, *the same processes and the same timing should be used for all applicants for the same job and/or comparable positions, with criterion and results applied equally*. Selectively doing background screening for only certain applicants will open the employer to claims of discrimination.

In addition to background screening, employers can do a variety of pre-employment testing. The most common is pre-employment drug testing. These tests should only be used after a conditional job offer has been made and the person should not start work before the results are in. The employer should have procedures in place 1) to inform the employee of the requirement for a drug screen and the process to be followed, and 2) to obtain the prospective employee's prior written consent. The employer should only use a reputable drug testing facility, and positive test results should always be verified before notifying the employer.

While more states have started authorizing the use of medical marijuana and some have legalized recreational marijuana, that does not mean (at least in most of these locales) that employers must allow employees to come to work under the influence of marijuana or to use marijuana at work. Active drug use is not protected under the ADA, but drug dependence and the need for drug treatment may be. Accordingly, employers should have a policy in place on the consequences of a positive test and apply that policy consistently to avoid claims of discriminatory treatment.

Lastly, some employers like to use aptitude tests, personality tests, physical ability tests, or specific skills tests. Just as with other types of employment screening, these should be job-related and applied equally across the board. Tests should be based on sound scientific validation standards and the employer must be very careful to monitor the results for possible disparate impact on protected groups (e.g., race, sex, age), and not to wittingly or unwittingly disproportionately exclude certain classifications of individuals. These same concerns are applicable to tests given to a pool of candidates for promotion. The disparate impact analysis is important to protect the employer and justify the use of the test(s) in question.

Hiring a new employee is a big decision, and can affect everyone in the workplace "family" for a long time. Accordingly, taking the time to learn about the applicant and consider all relevant information before hiring can go a long way to assisting an employer in making the right hiring decision.