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D.C. Circuit Holds That Quicken Loans Workplace Policies Violate NLRA

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Over the past decade, the National Labor Relations Board ("NLRB") has increasingly and aggressively enforced Section 7 of the National Labor Relations Act ("NLRA") against private, non-union employers. Our blog has previously noted this trend and discussed the possible risks and consequences to employers accused of unlawfully restricting their workers' protected "concerted activities" (*e.g.*, here and here). However, as many recent Board decisions have shown, employers continue to run afoul of the NLRA by implementing well-intentioned work rules and policies that might inhibit employees from engaging in these protected activities.

As discussed below, this case serves as yet another example of why employers should pay close attention to NLRB decisions. If you have an employee handbook in place (and you should!), or if your employment agreements contain common provisions restricting competition, disparagement, and the dissemination of confidential information, it's important for you and your attorney to keep up with these legal developments and ensure that your company's contracts and policies are compliant with federal guidelines.

Last Friday (7/29/16), the D.C. Circuit Court of Appeals held that Quicken Loans, Inc. ("Quicken") violated the NLRA by maintaining a pair of policies which employees might reasonably view as coercive. In upholding the NLRB's ruling and granting the Board's petition for enforcement, the Court held that certain provisions of Quicken's standard employment agreement with its mortgage bankers illegally interfered with those employees' Section 7 rights (as a reminder, this Section of the NLRA protects workers' rights to discuss and object to the terms and conditions of their employment and to coordinate efforts to organize with fellow employees to promote their collective interests).

Quicken, the nation's second-largest retail mortgage lender, employs approximately 1,700 mortgage bankers who process loan applications, negotiate mortgage loans, and provide other financial services to Quicken's clients (both online and in branch offices located across the U.S.). As a condition of employment, each Quicken mortgage banker is required to sign a "Mortgage Banker Employment Agreement" that contains several mandatory rules and restrictions, including a Proprietary/Confidential Information Rule ("Confidentiality Rule") and a Non-Disparagement Rule. In essence, Quicken forbids its mortgage bankers to use or disclose "personnel information" without Quicken's prior written consent or to publicly criticize the company and its management.

After an ex-employee filed an unfair labor practice charge with the NLRB in 2012, the Board ruled that the sweeping prohibitions in both the confidentiality rule and the non-disparagement rule could reasonably be construed by Quicken employees as infringing upon their Section 7 rights. Accordingly, the Board instructed Quicken to remove portions of the Confidentiality Rule that generally barred employees from disclosing nonpublic information such as "rosters [and] personal information of co-workers" and "handbooks, personnel files . . . [and contact] information such as home phone numbers, cellphone numbers, addresses and email addresses." Quicken was also ordered to rescind the entire Non-Disparagement Rule, which barred employees from publicly criticizing, ridiculing, disparaging or defaming the company or its products, services and policies.

Quicken petitioned for judicial review of the NLRB ruling, pointing out that the company had never enforced the rule in a manner that restricted NLRA-protected activity, and arguing that Quicken's employees did not view the rule as limiting their Section 7 rights. However, as Judge Patricia Millett explained in the Court's memorandum opinion, "[t]he validity of a workplace rule turns not on subjective employee understandings or actual enforcement patterns, but on an objective inquiry into how a reasonable employee would understand the rule's disputed language." In other words, even if a workplace rule or contractual provision is facially unobjectionable, and even if the employer takes no action to enforce the rule in a way that might restrict concerted activities, the "mere maintenance" of a rule that might reasonably be interpreted by the average employee as discouraging NLRA-protected activity is a violation of the Act.

