

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: April 19, 2002

TO : Cornele A. Overstreet, Regional Director
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Region 28

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Wal-Mart Stores, Inc. 512-5006-0100
Case 28-CA-17141 512-0150-5000
512-5036-8329

This case was submitted for advice on whether language in the Employer's employee benefits booklet excluding "certain other union represented" employees from coverage violates Section 8(a)(1).

FACTS

Wal-Mart Stores, Inc. (the Employer) produced and distributed a new booklet to employees, entitled "Associate Benefits Book" or "Summary Plan Description." The booklet described employee benefits that were effective January 1, 2001. Under the heading, "Eligibility Requirements," the booklet contains the following language:

If you are a leased employee, non-resident alien, independent contractor or consultant or are not treated as an employee of Wal-Mart Stores, Inc. and its participating subsidiaries, you are not eligible for coverage regardless of whether you are later determined by a court or any governmental agency to be, or to have been common law employee of Wal-Mart Stores, Inc. or any participating subsidiary. Contractually excluded and certain other union represented associates are not eligible for coverage.

(Emphasis added.)

The above language replaces a provision in the Employer's year 2000 handbook that merely stated: "Independent Contractors or other individuals who are not treated as employees of Wal-Mart and its participating subsidiaries are not eligible for coverage."¹

¹ This language is not alleged as unlawful.

The Employer apparently distributed the booklet nationwide. The booklet's cover lists the Employer's corporate Arkansas address, not the address of individual stores. The booklet also provides contact telephone numbers for employees with benefit inquiries; those numbers appear to be the telephone numbers of the Employer's Arkansas headquarters. And, a district manager informed a Kingman, Arizona employee that the Employer used the same handbook nationwide, with local variations in the benefits provided.

ACTION

We agree with the Region that the 2001 handbook language unlawfully interferes with Section 7 rights and that absent settlement, a Section 8(a)(1) complaint should issue.

An employer's announced restriction of benefits to nonunion employees or maintenance of a provision limiting eligibility for benefits to nonunion employees effectively denies benefits to employees who choose union representation or who are covered by a collective bargaining agreement, and violates Section 8(a)(1) of the Act.² Any language that "suggests that coverage of employees will automatically be withdrawn as soon as they become represented by a union or that continued coverage under the plan will not be subject to bargaining" is coercive.³ Such restrictions "constitute threats to

² See Niagara Wires, Inc., 240 NLRB 1326, 1328 (1979); Toffenetti Restaurant Co., 136 NLRB 1156, 1170, 1173 (1962), enf'd 311 F.2d 219 (2d Cir. 1962), cert. denied 372 U.S. 977 (1963).

³ Lynn-Edwards Corp., 290 NLRB 202, 205, 208-209 (1987) (unlawful for profit sharing plan to restrict eligibility to all full time employees "except those covered by collective-bargaining agreements") (1987). See also VOCA Corp., 329 NLRB No. 60, slip op. at 1 (Sept. 30, 1999) (unlawful to restrict eligibility to any employee who is "not a member of a collective bargaining unit," and unlawful to deny benefits to any employee who "changes to a bargaining unit job"); Alaska Pulp, 300 NLRB 232, 243-44 (1990), enf'd mem. 972 F.2d 1341 (9th Cir. 1992) (unlawful for disability policy to restrict eligibility to "active, full-time hourly non-union employee[s]"); Channel Master Corp., 148 NLRB 1343, 1345, 1349 (1964) (unlawful to deny

discontinue the benefits or refuse to bargain over continuation of the benefits."⁴ Such restrictions therefore interfere with and restrain employees' exercise of Section 7 rights without regard to the employer's motivation or whether the employer has applied the restriction.⁵

As an exception to the above principle, an employer lawfully may announce or include in plan documents language that excludes union-represented employees from eligibility if the language makes clear that the union-represented employees' benefits are subject to the collective-bargaining process. If an employer includes explanatory language that informs employees that benefits are subject to bargaining or that benefits will continue during bargaining, along with language that states that union-represented employees are not eligible for a particular plan, no interference with employee rights occurs.⁶ Thus,

eligibility to any employee whose terms and "conditions of employment are determined by collective bargaining with a recognized bargaining agent").

⁴ Handleman Co., 283 NLRB 451, 452 (1987).

⁵ Niagara Wires, 240 NLRB at 1327-28 (language limiting benefit plan to nonunion employees has a coercive impact on employees even without unlawful motivation, "regardless of whether the employer adds to misconduct by implementing the restriction or exploiting it during an organizing campaign"). See also Hill Park Health Care Center, 334 NLRB No. 55, slip op. at 4 n.2, 12 (June 20, 2001) (employer's posting of document entitled "Benefits for Non-Union Employees," which listed employee benefits, violates Section 8(a)(1) because its restriction of eligibility to nonunion employees "has the inherent effect of interfering with the employees' Section 7 rights").

⁶ For example, in KEZI, Inc., 300 NLRB 594, 595 (1990), the Board found lawful language that excluded "employees who are members of a collective bargaining unit with whom retirement benefits were the subject of good-faith bargaining" because it showed that the Employer would not exclude those employees except through good-faith bargaining and that collective bargaining would determine coverage. Similarly, in Handleman, above, the Board found lawful the provision in an employee stock ownership plan allowing coverage for any employee who "Is not covered by a collective-bargaining agreement entered into by the

in Lynn-Edwards Corp., 290 NLRB 202, 205, 208-209 (1987), language in an employee handbook and summary plan document was unlawful because it stated that all employees covered by a collective-bargaining agreement were excluded from a retirement plan. By contrast, the retirement plan itself in that case was lawful because it excluded from coverage only employees covered by a collective-bargaining agreement that provided coverage by another retirement plan.

If the Employer had stated only that it would not extend benefits to those employees who are "[c]ontractually excluded," the Board might find that language lawful as falling within the exception. Thus, employees might reasonably understand that phrase alone to mean that they would not receive benefits if a union negotiated a collective-bargaining agreement that excluded them from that plan, but provided them with other coverage. Thus, the phrase "contractually excluded," standing alone, would not necessarily convey to employees that they would not receive benefits merely because they are covered by a collective-bargaining agreement.

The Employer, however, rendered the provision coercive by also including in the exclusionary language the phrase "and certain other union represented associates."⁷ The Employer thus has conveyed to employees that either (1) specific employees i.e., union-represented, will be ineligible for benefits; or (2) a particular number of those union-represented employees will be ineligible for benefits. The first meaning is clearly unlawful as

Employer, unless such agreement, by specific reference to the Plan, provides for coverage under the Plan." Because the language there "contemplate[d] the continuation of the benefits" during bargaining, it was lawful. 283 NLRB at 452. Cf. A.H. Belo Corp., 285 NLRB 807, 808 (1987) (the employer's sick pay plan excluding employee participation if covered by collective-bargaining agreements was not unlawful because the employer merely put in writing benefits that had existed for nonunion employees, and because the union and employer were negotiating a benefit plan for union employees).

⁷ "Certain" may mean "exact, precise" as in "a certain percentage of the profit." "Certain" may also mean "particular" to distinguish something, as in "certain people would like him to speak." Webster's Third New International Dictionary (Unabridged 1971).

automatically excluding all union represented employees.⁸ The second meaning is also unlawful because it does not convey to employees, in a manner that the Board has found to be sufficiently clear, that union-represented employees' benefits will be subject to good-faith negotiations or that the Employer's plan will not cover them because collective bargaining has provided them with other benefit programs.⁹ Without explicit language reassuring employees that mere union-representation will not result in ineligibility, the Board has consistently found violations.¹⁰

[FOIA Exemption 5

⁸ Niagara Wire, 240 NLRB at 1328 (although employer argued that it did not intend to discourage unionization, and that it intended only to restrict coverage to those covered by a collectively-bargaining plan, with its language denying eligibility to those "subject to the terms of a collective-bargaining agreement," plan documents were still overbroad as they conveyed the "impression that employees would ultimately lose the benefits under the pension plan if they chose to become members of a bargaining unit").

⁹ See KEZI, Inc., 300 NLRB at 595; Lynn-Edwards Corp., 290 NLRB 202 at 208-209; Handleman Co., 283 NLRB at 452.

¹⁰ See cases cited at n.3. The Employer's counsel's position paper justifies this language arguing that "...not all unionized associates are ineligible... only those whose collective bargaining agreements provide distinct, separate, and different benefit programs for them..." The additional exclusionary language, however, belies this explanation. In effect, the Employer claims that the exclusionary language was intended to mean only union employees whose contracts provide different plans. The Employer's subjective intent is not relevant. See Niagara Wire, supra. The plain language of the booklet is not susceptible to that interpretation.

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In sum, complaint should issue, absent settlement, alleging that the language of the booklet violates Section 8(a)(1). [FOIA Exemption 5

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B.J.K.

¹¹ See Kinder-Care Learning Centers, 299 NLRB 1171, 1171 & n.1, 1176 (1990); La Quinta Motor Inns, 293 NLRB 57, 57, 62 (1989). See also Raley's Inc., 311 NLRB 1244, 1244 n.2, 1252 (1993).