HOW THE NLRB TARGETS NON-UNIONIZED EMPLOYERS

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MY WORKFORCE IS NOT UNIONIZED, WHY SHOULD I CARE WHAT THE NLRB HAS TO SAY?

- Whether your workforce is represented by a union or not, most private employers are covered by the National Labor Relations Act (Act)
- The majority of the current National Labor Relations Board (Board) is intent on expanding employees' rights under the Act
- The majority of the current Board wants to make it easier for employees to organize
- Unions need to organize or they will become irrelevant
- Excluded entities: Federal or State governmental offices, the Federal Reserve Bank, employers subject to the Railway Labor Act, municipalities and religious organizations

HOW DOES THE NLRB DO IT?

- The answer: Section 7 of the National Labor Relations Act. It guarantees employees:

  "the right to self-organization, the right to join, form or assist labor organizations, the right to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as well as the right "to refrain from any or all such activities"

- Section 8(a)(1) of the NLRA also helps. It makes it an unfair labor practice for an employer "to interfere with, restrain or coerce employees in the exercise of rights guaranteed in Section 7" of the Act

- Through a broad and sweeping interpretation of the Section 7 rights of workers, the new NLRB has expanded its reach into non-unionized work forces

CONDUCT MUST BE BOTH PROTECTED AND CONCERTED

- Conduct must be protected by the NLRA
  - Right to organize
  - Statements or activity regarding an employee's wages, working conditions or other terms of employment
- Conduct must involve concerted activity
  - Concerted activity occurs when "the employee is engaged with or on the authority of other employees, and not solely on behalf of the employee himself"
  - "Where individual employees seek to initiate or to induce or to prepare for group action"

SOCIAL MEDIA – THE NEW WATERCOOLER

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THE NLRB AND SOCIAL MEDIA

- The Board is broadly interpreting protected/concerted activity
- The Board has extended an employee's Section 7 rights to a broad range of social media activity
- Blanket social media policies that prohibit the exercise of Section 7 rights are unlawful
- Employee terminations that prohibit the exercise of an employee's Section 7 rights are unlawful
- The Board may find unlawful any policy that even "touches" on Section 7 rights

FACEBOOK INSUBORDINATION

Several months ago, two employees made work-related complaints at a staff meeting. Yesterday, the two employees posted lengthy comments on Facebook advocating insubordination, disregarding rules, undermining leadership, neglecting their duties, and jeopardizing projects. Can the company discipline or discharge the employees?

1. Yes
2. No

MAKING FUN OF THE EMPLOYER ON FACEBOOK

The employer operates several car dealerships. When the employer's BMW dealership introduces the redesigned BMW 5, the employer serves customers hot dogs, Doritos, cookies and water. Bob, a salesman at the employer's BMW dealership, along with several other salespersons, complains about the food. Bob takes several pictures of customers and employees eating hot dogs and posts the pictures with snide comments on his Facebook page. Several days later, at the employer's Range Rover dealership, which is across the street from the BMW dealership, a 13 year old boy drives a Range Rover into a pond located next to the dealership. Bob takes a photo of the car in the pond and posts it on his Facebook page along with more snide comments about the employer. Can the employer discharge Bob?

1. Yes
2. No

WHAT ACTIVITY IS PROTECTED?

The NLRB has found the following to be protected:

- Facebook postings by employees containing obscenities and sarcastic remarks about a supervisor and the employer
- Facebook postings including two employees' concerns about working late in unsafe neighborhoods
- An employee's Facebook posting that her supervisor was a scumbag for not allowing her a union representative to prepare an incident report
- The NLRB also found unlawful an employer rule requiring courtesy of every employee and stating "No one should be disrespectful or use profanity…"

DISCIPLINE/TERMINATION CONSIDERATIONS

- Carefully review any discipline that arises out of social media postings
- Consider the following:
  - Is the employee's social media posting suggestive of collective action by employees?
  - Does the posting reference a prior discussion among employees?
  - Did other employees respond to the posting?
  - Did the response reference working conditions?
  - Is the employee's gripe personal?
- Train supervisors on improper social media postings and proper steps in disciplining employees

THE NLRB AND E-MAIL

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E-MAIL USE

The company's technology policy prohibits employees from engaging in activities on behalf of organizations or persons with no professional or business affiliation with the company and sending uninvited email of a personal nature. The company permits limited personal use of the company e-mail by employees. A union files a representation petition. Several employees send uninvited e-mails to co-workers arguing that the employees should vote for the union. They also send e-mails informing employees of the time and place of union meetings. Can the company stop this practice since it violates the company policy?

1. Yes
2. No

PURPLE COMMUNICATIONS, INC.

- On December 11, 2014, the NLRB gave unions an early Christmas present, holding that employees must be allowed access to company-owned email systems for protected Section 7 activities

- For years, the Board had consistently held there was "no statutory right…to use an employer's equipment or media," as long as any restrictions were non-discriminatory

PURPLE COMMUNICATIONS, INC. (CONT.)

- In 2007 in *Register-Guard*, the Board, by a 3-2 decision, upheld the employer's communications system policy under which a union president was disciplined for using the email system to send union related emails

- The dissent blasted the majority's "archaic chattel-based analysis" as "absurd" in light of email's unique characteristics, claiming email was akin to the proverbial "water cooler" as the hub for employee communications

PURPLE COMMUNICATIONS, INC. (CONT.)

- Instead of viewing the issue as whether employees had the right to use company equipment, the Board in *Purple Communications* analyzed the issue as one involving "access" to an employer's premises and the right of employees to engage in Section 7 activities, on non-working time, while on the employer's premises

- Now, a company email system is part of a "virtual workplace" where protected communications are transmitted electronically, rather than in person

WHAT TO DO AFTER *PURPLE*?

- If your employees have been granted access to company email systems, they **must** be allowed to use them to engage in protected Section 7 communications during non-work time

- Uniform and consistently enforced controls over email systems may still be applied “to the extent that those controls are necessary to maintain production and discipline”

- Only rarely “where special circumstance” exist will a total ban on non-work email be lawful

POST-*PURPLE* ISSUES FOR EMPLOYERS

- *Employee Access*: How defined? Once granted, is it revocable? What if job duties change? Or, the email is used for harassment? Can "access" be withdrawn?

- *Storage Capacity:* Must employers buy capacity to store employee emails? Can they be freely purged? What if spam filters block a union email?

- *Monitoring Employee Emails*: Will this be unlawful surveillance in a union campaign? Privacy concerns?

THE NLRB & HANDBOOK RULES

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COURTESY POLICY

The company has a policy which requires employees to treat others and the company with respect, patience and courtesy; to never engage in abusive, threatening or disruptive behavior; and to never make defamatory, libelous, slanderous or discriminatory comments about the company, its customers and/or competitors, its employees or management. When John is hired, he is told at the orientation meeting by the union steward that all employees must join the union to remain employed. John rudely tells the steward that this statement is incorrect. Several union officials complain that John is rude and the company discharges him. Does the policy violate the Act?

1. Yes
2. No

CONFIDENTIAL INFORMATION POLICY

Employer has a policy which states that employees should not discuss the employer's confidential customer or employee information. A supervisor overhears several engineers discussing their salaries. He informs the engineering department's supervisor who fires several of the employees for violation of the company's confidentiality policy. Has the company violated the Act?

1. Yes
2. No

KEEP INVESTIGATION CONFIDENTIAL

Sue complains that Bob sexually harassed her. Tim, the Human Resource Director, interviews Sue and Bob. Sue tells Tim that Mary saw the whole thing and can corroborate Sue's complaint. Tim interviews Mary who tells him a slightly different version of the events and tells Tim that Tom, Dan and Paul can corroborate her version. Tim ends each interview by telling the witness that the company policy requires the witness to keep the interview confidential and not to talk about it with anyone. Does this violate the Act?

1. Yes
2. No

FRESH & EASY NEIGHBORHOOD MARKET (JULY 31, 2014)

- NLRB continued its strict enforcement of employer work rules
- NLRB found following confidentiality rule to unlawfully prohibit Section 7 activity:
  - "Keep customer and employee information secure. Information must be used fairly, lawfully and only for the purpose for which it was obtained."

HOLLIS PRESS, INC. (AUGUST 21, 2014)

- NLRB held an employee engaged in protected concerted activity when she solicited co-workers to be witnesses for a sexual harassment complaint
- Section 7 protections arise when an employee raises concerns directly to employer or an outside entity
- Section 7 rights implicated because employee invoked protection of statute benefiting employees

HOLLIS PRESS, INC. (AUGUST 21, 2014) (CONT.)

Aftermath:

- Gives employee "two bites at the apple" – anti-retaliation protections under state/federal law (OSHA, EEO) and possible ULP under NLRA. This is a growing trend!
- Employers should exercise care during investigation to ensure that any limitation on an employee's ability to speak with other employees is based on maintaining the integrity of the investigation. Need to have legitimate business justification:
  - An investigation witness needs protection
  - Evidence is in danger of being destroyed
  - Testimony is in danger of being fabricated
  - There was a need to prevent a cover up

UNION ORGANIZING

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NLRB SPEEDY ELECTION RULE

- On December 12, 2014, by a 3-2 vote, the Board adopted a final rule amending its representation case procedures to modernize and streamline the process for resolving representation disputes
- The rule took effect on **April 14, 2015**. It applies to all petitions from that date on
- Purpose is to cut the time it takes to hold a union representation election:
  - Limits pre-election hearings
  - Limits post-hearing briefs
  - Limits right to appeal Regional Director's decision to the full Board
  - Makes Board review of post election objections discretionary
  - Discontinues Board 25-day election rule

IMPACT OF NLRB'S NEW ELECTION RULE

- Under the new rules, representation hearings may take place within eight days of the filing of the election petition
- An election may occur in as little as 14 days after the filing of the petition
- An employer may be required to provide a statement of its position by noon the day before the representation hearing **and** an alphabetized list of the full names, work locations, shift and job classifications
- If a Notice of Election is issued, an "Excelsior" list is required within two days. The Excelsior must contain a list of the full names, work locations, shift, job classification, home addresses, home and cell phone numbers, and personal email addresses if available of eligible voters
- 30% or more of eligible employees must still sign union authorization cards. However, the new rules severely limit challenges that an employer can make about voter eligibility and other representation issues, and postpone those challenges to a post-election process

OPPOSITION TO NLRB ELECTION RULE

- Two different business groups filed suits in separate federal courts challenging the right of the NLRB to make these rule changes
- One suit, led by a group of contractors and business organizations in Texas was filed in federal district court in Texas
- The other suit was filed by the U.S. Chamber of Commerce and other business groups in the federal district court in Washington, D.C.
- The lawsuits rely heavily on the lengthy dissenting opinions of the two Republican members of the NLRB who questioned the changes to the election rules

WHAT DOES THIS MEAN TO YOU

Employers must be prepared for union organizational efforts:

- Train all supervisors and managers on the benefits of remaining union free, warning signs of union organizational activity, and how supervisors and managers are to respond to potential activity
- Develop a corporate strategy on how to remain union free
- Train all supervisors and managers on managing in a union free environment including fair applications of policies, communication and issue resolution

MORE TO DO'S:

- Review of all policies and procedures to make sure they are compliant with the NLRB's new rulings on social media and courtesy policies
- Communicate the company's union free message to all employees
- Proactively review your union free strategy and consult with a labor relations expert if necessary
- **One thing is for certain:** waiting until the petition for election is filed will not provide your company sufficient time to prepare for an election

PERSUADER RULE PROPOSED CHANGES

- Any person who, under any agreement or arrangement with an employer, directly or indirectly attempts to persuade employees to exercise or not exercise their right to organize and bargain collectively or who supplies an employer with information concerning the activities of employees or labor organizations in connection with a labor dispute is a persuader
- On June 22, 2011, the Department of Labor proposed revisions to the interpretation of the Persuader Rule:
  - Proposal would interpret “advice” as plain meaning
  - Advice would include any oral or written communication or recommendation regarding a decision or a course of conduct
  - Persuasion would include actions and communication which would directly or indirectly persuade employees concerning their rights to organize or bargain
  - Regardless of whether there was any actual contact with employees
  - New Rule may go into effect in July, 2015

EMPLOYER'S ACTIONS

- Review company policies regarding solicitation, access to the workplace after the employee's shift, e-mail policies, or other technology policies to ensure they comply with the NLRA
- Identify supervisors (The 12 supervisory functions are: (1) Hire, (2) Transfer, (3) Suspend, (4) Lay off, (5) Recall, (6) Promote, (7) Discharge, (8) Assign, (9) Reward, (10) Discipline other employees, (11) Responsibly to direct employees, and (12) Adjust their grievances
- Train supervisors to spot union activity and how to deal with it
- Tell supervisors to report any suspicious activity to human resources
- Train supervisors in TIPS and TOIL
- Supervisors must enforce company rules

QUESTIONS?

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Thank You

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