How the NLRB Targets Non-Unionized Employers

Pittsburgh Employment Law Conference

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MY WORKFORCE IS NOT UNIONIZED. WHY SHOULD I CARE ABOUT 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
- Federal and state governmental offices, employers subject to the Railway Labor Act, municipalities, and religious organizations are excluded
- NLRB rules and decisions apply to both unionized and non-union employers
  - Union organizing activity of non-union employees
  - Other concerted activity of non-union employees
  - Non-union employers' policies and actions that interfere with employees' Section 7 rights

HOW CAN THE NLRB ISSUE RULES AND DECISIONS AFFECTING NON-UNION EMPLOYERS?

- The NLRB is a political body
- Appointed by the President with approval of Senate
- Current NLRB majority (Democratic Party appointees) is intent on expanding employees' rights
- Decline in private-sector unionism has the NLRB looking for ways to maintain its relevance
  - How can the NLRB increase the number of unionized employers, and thereby increase the prevalence of collective bargaining?
  - How can the NLRB interject itself into the employment relationship between non-union employers and their employees?

NLRB ACTIONS TO INTERJECT ITSELF IN NON-UNION WORK ENVIRONMENTS

- Challenge non-union employer policies and directives on basis that policies and directives interfere with Section 7 rights
- Find that non-union employers' discipline and discharge of employees interfere with employees' Section 7 rights
- Establish rules facilitating organizing of non-union employers

EXPANDING RIGHTS

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UNDERSTANDING EMPLOYEE RIGHTS UNDER THE NATIONAL LABOR RELATIONS ACT

- Section 7 – "Employees shall have the right to self-organization, to form, join or assist labor organizations, 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." (Emphasis Added)

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" or
  - "Where individual employees seek to initiate or to induce or to prepare for group action"

COMMON WAYS TO VIOLATE AN EMPLOYEE'S SECTION 7 RIGHTS

- Interfering with an employee's right to organize a union or join a union
- Retaliating against employees for engaging in protected concerted activity
- Disciplining employees for engaging in protected concerted activity

WHAT ACTIVITY IS 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 to have a union representative assist her in preparing an incident report
- The NLRB also found unlawful an employer rule that required employees to be courteous, and that stated, "No one should be disrespectful or use profanity…"

THE NLRB AND EMPLOYEE HANDBOOK RULES

- A workplace rule violates the NLRA when it reasonably tends to chill employees in the exercise of their Section 7 rights

- A rule is unlawful if: (a) employees would reasonably construe the language to prohibit Section 7 activity; (b) the rule was promulgated in response to union activity; or (c) the rule has been applied to restrict employees in the exercise of Section 7 rights

  — The vast majority of rules are unlawful under the first prong

OVERLY BROAD COURTESY POLICY

- "Be respectful to the company, other employees, customers, partners, and competitors"
- Do "not make fun of, denigrate, or defame your co-workers, customers, franchisees, suppliers, the Company, or our competitors"
- "Be respectful of others and the Company"
- No "[d]efamatory, libelous, slanderous or discriminatory comments about [the Company], its customers and/or competitors, its employees or management"

LAWFUL COURTESY POLICY

- When a rule simply requires employees to be respectful to customers, competitors, and the like, but does not mention the employer or its management, employees are not likely to reasonably believe that such rule prohibits Section 7 activity
  - Ex. No "rudeness or unprofessional behavior toward a customer, or anyone in contact" with the company"
- Rules requiring employees to cooperate with each other and the employer in the performance of their work are similarly lawful
  - Ex. "Each employee is expected to work in a cooperative manner with management/supervision, coworkers, customers, and vendors"

OVERLY BROAD CONFIDENTIALITY POLICY

- Do not discuss "customer or employee information" outside of work, including "phone numbers [and] addresses"
- "[I]f something is not public information, you must not share it"
- "Discuss work matters only with other [Company] employees who have a specific business reason to know or have access to such information . . . Do not discuss work matters in public places"

LAWFUL CONFIDENTIALITY POLICY

- Policies that do not reference information about employees or terms and conditions of employment are generally lawful
- Policies that do not define the term “confidential” in an overly broad manner are generally lawful
  - Ex. No unauthorized disclosure of “business ‘secrets’ or other confidential information”
  - Ex. “Do no disclose confidential financial data, or other non-public proprietary company information. Do not share confidential information regarding business partners, vendors or customers”

KEEPING INVESTIGATIONS CONFIDENTIAL

- Employers should exercise care during an investigation when requesting that employees do not speak to other employees about the investigation
- An employer's general concern with maintaining the integrity of the investigation is insufficient to justify a restriction on employees' Section 7 rights
- Instead, the employer must demonstrate that maintaining the confidentiality of the investigation is necessary for one of the following reasons
  - Witnesses need protection
  - Evidence is in danger of being destroyed
  - Testimony is in danger of being fabricated
  - There is a need to prevent a cover up

THE NLRB'S POSITION ON 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
  - *Lily Transportation Corp*., Case No. 01-CA-108618 (ALJ Apr. 22, 2014). The company's social media policy provided that "Employees would be well advised to refrain from posting information or comments about Lily, Lily's clients, Lily's employees or employees' work that have not been approved by Lily on the internet, including but not limited to blogs, message boards, and websites. Lily will use every means available under the law to hold persons accountable for disparaging, negative, false, or misleading information or comments involving Lily or Lily's employees and associates on the internet and may take corrective action up to and including discharge of offending employees"

THE NLRB'S POSITION ON SOCIAL MEDIA

- ALJ holding: The policy was overly broad, because advising employees to refrain from posting comments about Lily or its employees, and holding persons accountable for disparaging or negative information, interfered with employees' Section 7 rights

- It is unlawful to terminate an employee for exercising Section 7 rights

  — In the case of *Hispanic United of Buffalo and Carlos Ortiz*, Case No. 03-CA-027872 (Dec. 14, 2012), an employee posted the following on her Facebook Page: "Lydia Cruz, a coworker feels that we don't help our clients enough at [Employer]. I about had it! My fellow coworkers how do u feel?"

  — Four other employees commented on the Facebook post and generally objected to the assertion that their work performance was sub-par

  — The employee who posted on Facebook and the four other employees who commented on the post were discharged for violating the employer's "zero tolerance" policy prohibiting bullying and harassment

THE NLRB'S POSITION ON SOCIAL MEDIA

- The Board found that the employees engaged in concerted protected activity because they took group action against the accusations they believed the co-worker was going to make to management about their poor work performance

- The Board may find unlawful any policy that even "touches" on Section 7 rights

THE NLRB AND E-MAIL

Purple Communications, Inc.

- On December 11, 2014, the NLRB held that if employers give employees access to company-owned email, employees must be allowed to use company-owned email for protected Section 7 activities

THE NLRB AND E-MAIL

- What should employers do after *Purple*?
  - If employees are given access to company-owned email, they must be allowed to use the email to engage in protected Section 7 communications during non-working time
  - Only rarely "where special circumstances" exist will a total ban on non-work email use be lawful
    - A total ban must be necessary to maintain production or discipline

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

EXAMPLES

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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 emails of a personal nature. The company permits limited personal use of the company's e-mail system. A union files a representation petition. Several employees send uninvited e-mails to co-workers urging the employees to vote for the union. They also send e-mails informing employees of the time and place of union meetings. May the company lawfully stop this practice since it violates the company policy?

1. Yes

2. No

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

EMPLOYEE'S TRANSLATOR

Employer has several employees who spoke only Spanish. Garcia, a production worker, often acts as a translator between supervisors and the Spanish-speaking employees. While translating a supervisor's instructions to a Spanish-speaking employee, the supervisor becomes angry when the employee fails to follow orders. The employee tells Garcia to ask the supervisor why the supervisor is mad. The supervisor responds angrily that the employee doesn't have a choice but to follow his orders. Garcia then asks the supervisor why he is mad at the employee and treating her badly. The supervisor does not answer, aggressively stares at Garcia and walks away. Later, the supervisor tells Garcia that he can no longer act as a translator. Is this an unfair labor practice?

1. Yes

2. No

COURTESY POLICY

The company has a policy which requires employees to treat others with respect, patience and courtesy; never engage in abusive or disruptive behavior; and not threaten them. 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

“DON’T DISCUSS YOUR WAGES”

Employer has a policy which states that employees should not discuss the employer’s confidential 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

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 BMW's serving this type of food. Bob and the other salespersons are concerned that the type of food will affect BMW's image and that their commissions will suffer as a result. Bob takes several pictures of customers and employees eating hot dogs and posts the pictures with snide comments on his Facebook page. Bob's family and friends comment on his post. Several days later, at the employer's Range Rover dealership 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. Several Range Rover employees comment on the post. Can the employer discharge Bob?

1. Yes for pictures/comments of the car but not for pictures of customers and employees eating hot dogs.
2. No for either the pictures of the car or the pictures of customers and employees eating hot dogs.
3. No for either the pictures of the car or the pictures of customers and employees eating hot dogs.

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**

MAJOR CHANGE NO. 1 – TIMING OF ELECTIONS

- Prior Rule
  - Minimum of 25 days between petition and election
  - Median: 38 days
  - More than 90% within 56 days
- Revised Rule
  - 25 day minimum time period eliminated
  - No mandatory time frame for elections
  - Expected to reduce period to 10-21 days, due to streamlined representation procedures

EFFECTS OF MAJOR CHANGE NO. 1 – TIMING OF ELECTIONS

- Less time for employer to campaign
- Less time for employees to be educated about the process and the pros and cons of unionization
- Greater likelihood that unions will prevail in elections

MAJOR CHANGE NO. 2 – INFORMATION GIVEN TO UNION

- Prior Rule
  - Excelsior List of names and home addresses
  - Seven days after approval of election agreement or direction of election. More than 90% within 56 days
  - To NLRB
  - Fax, mail, or electronically
- Revised Rule
  - List of names, home addresses, personal telephone numbers, and personal email addresses
  - Employees' work location, shift, and classification
  - Within two days after direction of election
  - To union
  - Electronically

EFFECTS OF MAJOR CHANGE NO. 2 – INFORMATION GIVEN TO UNION

- Increases unions' access to employees
- Shortens amount of time it takes for unions to contact employees
- Allows for mass electronic mailings by unions
- Decreases costs, to unions, of communicating with employees
- Allows unions to focus, in communications, on issues specific to work locations, shifts, or classifications

MAJOR CHANGE NO. 3 – RESTRICTIONS ON PRE-ELECTION HEARINGS

- Prior Rule
  - Pre-election hearing held, absent a stipulated election agreement
  - Typically held within seven-to-ten days of filing of election petition
  - Issues typically litigated are voter eligibility and/or inclusion of classifications in the unit
- Revised Rule
  - Hearing on the eighth day
  - Most issues of voter eligibility and inclusion of classifications in the unit are deferred until after the election

EFFECTS OF MAJOR CHANGE NO. 3 – RESTRICTIONS ON PRE-ELECTION HEARINGS

- Reduces time period between petition and election
- Prevents employer from ascertaining whether particular classifications are appropriately within unit
- Undermines employees' ability to make an informed decision
- Puts employer at risk of ULP that could result in setting aside of election

MAJOR CHANGE NO. 4 – LIMITATIONS ON LITIGATION PROCEDURES

- Prior Rule
  - Right to submit briefs after representation hearing
  - Right to appeal, to NLRB, Regional Director's decision to direct election
  - Automatic stay of election, if appeal filed
  - Right to review of post-election objections
- Revised Rule
  - Hearings will conclude with oral argument, absent permission to file briefs
  - Right to appeal Regional Director's decision to direct election only for "compelling reasons"
  - No automatic stay if appeal filed
  - Right to review of post-election objections "if necessary"

EFFECTS OF MAJOR CHANGE NO. 4 – LIMITATIONS ON LITIGATION PROCEDURES

- Helps ensure quick election
- Gives regional director and hearing officers a greater amount of unreviewable discretion
- Limits parties' (primarily employers') right to challenge issues

CHALLENGES TO IMPLEMENTATION OF REVISED RULES

- U.S. Chamber of Commerce, SHRM, NAM, and others filed lawsuit in the D. D.C. on January 5, 2015
- Associated Builders & Contractors of Texas filed lawsuit in the W.D. Tex. on January 13, 2015
- Congressional disapproval legislation introduced in Congress in early February 2015

ON-LINE ORGANIZING

- General Counsel for NLRB instructed Region to accept electronic signatures as the basis for a showing of interest
  - Issued September 1, 2015

ON-LINE ORGANIZING

- Absent evidence impugning validity of signatures, a Region will now administratively process any petition supported by electronic signatures

MICRO UNITS

- Board Adopted an "overwhelming community of interest" standard
  - If "readily identifiable as a group who shares an overwhelming community of interest" a micro-unit may be established, even if the unit could fit within another larger unit
  - "Unit within a unit"
- *Specialty Healthcare and Rehabilitation Center*, 357 NLRB 83 (2011)

MICRO UNITS

- Unions are now permitted to establish "micro-units," going after one job classification or department
  - Allows unions to target smaller groups of disgruntled employees
  - Establishes a union presence
  - Creates bargaining headaches…

ACTIONS THAT EMPLOYERS SHOULD TAKE

- Adopt and maintain a “union-free” employment policy
- Adopt and consistently enforce lawful no-solicitation, no-distribution, and no-access rules
- Implement policies that promote union-free status
- Maintain strong employee communications
- Educate employees on the employer’s position regarding unionization

ACTIONS THAT EMPLOYERS SHOULD TAKE

- Educate managers and supervisors on signs of union activity
- Conduct vulnerability studies
- Identify a management response team
- Develop campaign materials in advance
- Identify labor counsel and labor consultants

MORE TO DO'S

- One thing is for certain
  - Waiting until the petition for election is filed will not provide you 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

PERSUADER RULE PROPOSED CHANGES

- 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 communications which would directly or indirectly persuade employees concerning their rights to organize or bargain
  - Regardless of whether there was any actual contact with employees

QUESTIONS?

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THANK YOU

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