

What Employers Need to Know about the New NLRB



NATIONAL LABOR
RELATIONS BOARD

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Majority of Board Members are Pro-Union

- NLRB case decisions will favor unions
- Policy initiatives will favor unions
- Anticipated new “procedural” rules will favor unions (e.g., ambush election)



PCA Violations Allow Labor Board to be Relevant

- Employee Section 7 right to engage in “protected, concerted activity” (PCA) as to terms & conditions of employment
- Policies that would inhibit employees from exercising their PCA rights deemed unlawful
- Special focus on employer restriction of employee “social media” communications

Several Standard Handbook Policies are at Risk

- Confidentiality/Non-disclosure
- No discussion of pay or wages
- Non-disparagement

Overbroad Handbook Policies

- Courtesy/respect
- No boisterous activity
- Communications to media

Facebook Profanity Protected



- Consider NLRB August 2014 ruling in Triple Play
- Employees upset about tax miscommunications
- Series of Facebook criticisms of owners by employees (including ID owners by names)
- One employee referred to owner as “asshole”
- Another employee “liked” the comments
- NLRB ruled that employees conduct was lawful PCA and that terminations were unlawful

So What Can Employers Do?

- Essential that employers review their social media and other policies we have discussed with eye toward PCA
- Be specific as to type of conduct employer seeks to protect and reason
- Consider adding examples
- Avoid general, subjective terms
(e.g., “inappropriate,” “improper,”
“company information”)

Joint Employer Doctrine

NLRB Action in the McDonald's Case



Joint Employer Doctrine - The Facts

- Since November 2012, NLRB has received 181 cases alleging McDonald's has engaged in unfair labor practices.
- Upon review, GC has found at least 43 cases have merit and will be pursued (60+ cases have no merit, while others are still under review.)
- McDonald's USA, LLC will be named as a joint employer respondent.

Joint Employer Doctrine - The Dynamics

- NLRB taking position that McDonald's exercises control through corporate policy and its franchise agreements.
- McDonald's takes the position that it does not direct or co-determine the hiring, termination, wages, hours or any other terms and conditions of employment of the franchisees.

Joint Employer Doctrine - The Implications

- NLRB General Counsel advocating for a new “Industrial Realities” standard.
- Changing away from the “direct control” standard could be game-changing for a number of industries, particularly construction and businesses that use temporary staffing agencies.

Will Employees Be Able to Send Broadcast Emails or Texts about Unions?

- 2007 Board decision in Register Guard—prohibit employees from using company email/computer system to advocate for union or PCA conduct
- Board now revisiting email restriction in Purple Communications case
- Board invited briefing on topic in June 2014
- Board will likely issue decision that permits employees to use company email/computer system

NLRB Endorses Smaller Units for Elections

- NLRB will permit smaller units (so-called micro units) to organize. Specialty Healthcare case
- Macy's (July 2014)—NLRB permits election of cosmetics dept. employees in Macy's store
- Much harder for Employer to challenge Union's proposed unit of employees eligible to vote

NLRB Majority Has Reintroduced the Proposed June 2011 Election Rules

- By a 3-2 vote, on Feb. 6, 2014, the NLRB announced its proposed new election rules. Board held public hearings in April 2014.
- Likely that Board will issue final election rules later this year. (Will also be Court challenge.)



Why Should Virginia Employers Care?

- Time for election would likely decrease from average of 42 days to 20 days or less
- Less time to educate employees will result in more union victories
- Other union-friendly rules as well (e.g., employer less time to raise procedural questions)

NLRB Reform



Need for Reform

- NLRB is increasingly perceived as an outright advocate for unions.
- U.S. Dist. Court Judge Schwab criticized NLRB as “serving as litigation arm of the union and a co-participant in the ongoing organization effort of the union.”
- McDonald’s case set off alarm bells across business world.

The Reform Proposal

- Enlarge NLRB to make it neutral
 - 6 member board with 3 Republicans and 3 Democrats.
 - 4 board members required for any action.
 - Following same model as Federal Election Commission.
- Limiting Power of General Counsel
 - Parties would have right to review in U.S. District Court of any complaint.
 - Increased discovery rights for respondents.

The Reform Proposal (cont'd)

- More Timely Decision-Making
 - If NLRB fails to decide case within 1 year, either party may apply to a Federal Court of Appeals for de novo review.
 - Funding for entire NLRB would be reduced 20 percent if it fails to decide 90 percent of its cases within one year. (Over first 2 year post-reform period.)

Recap of the Landscape

- NLRB invalidating common handbook policies—protecting employee speech/conduct
- NLRB endorses smaller units (micro units)
- NLRB likely to allow employee broadcast emails
- NLRB likely to adopt new “ambush” election rules

Result: Playing Field tilted heavily in favor of Union organizing

Recommendations

Would you be prepared if learned a Union was seeking to organize a group of employees at your company?

- Employers must be proactive – know your employees
- Give employees a voice – communication is key
- Supervisors need people skills as well
- Consider cross training (depts. not so rigid)
- Training for executives/supervisors

Questions?

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