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Labor and Employment Law

NLRB Continues Scrutiny of Non-Union Employer Practices*

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The National Labor Relations Board (NLRB or Board) continues to scrutinize non-union employer practices for compliance with the National Labor Relations Act (NLRA or Act). Under Section 7 of the Act, employees have the right to engage in concerted activities for their mutual aid or protection. Section 8(a)(1) of the Act makes it unlawful for an employer through statements, conduct, or adverse employment actions to interfere with, restrain, or coerce employees in the rights guaranteed by Section 7. The test for evaluating whether an employer's conduct or statements violate Section 8(a)(1) is whether the statements or conduct have a reasonable tendency to interfere with, restrain, or coerce union or protected activities. If the work rule expressly restricts Section 7 activity, it is unlawful. However, even if the rule does not explicitly restrict Section 7 activity, it is unlawful if employees would reasonably construe the language of the rule to prohibit Section 7 activity.

While the NLRA's first significant attempts to involve itself more deeply in the non-union workplace manifested itself in the review of company social media policies a couple of years ago, it has now expanded its reach into almost every employment policy and practice area. These include non-disparagement clauses, confidentiality restrictions, misconduct investigations, at-will provisions, dress codes, off-duty access, and even the use of profanity. Some recent decisions impacting these areas are discussed below.

Social Media Policies

In Lily Transportation Corp., CA-108618 (2014) the employer's social media policy stated the following:

"Employees would be well advised to refrain from posting information or comments about the company, the company's clients, the company's employees, or employees' work that have not been approved by the company on the Internet . . . . The company will use every means available under the law to hold persons accountable for disparaging, negative, false or misleading information or comments involving the company or the company's employees and associates on the Internet . . . ."

In Durham School Services, 369 NLRB No. 85 (2014), an employer who operates a fleet of school buses maintained a social networking policy that urged employees who use social media to "limit contact with parents or school officials, and keep all contact appropriate." It also required employees to keep "communication with coworkers. . . professional and respectful, even outside of work hours." The policy also threatened discipline for "[e]mployees who publicly share unfavorable written, audio or video information related to the company, or any of its employees or customers."

The NLRB found these two policies violated the NLRA because they were overbroad. In particular, they:

Failed to adequately specify the types of information employees were prohibited from posting;

Failed to adequately distinguish between information employees could not post and protected speech; and/or

Failed to provide examples of social media content the employer would consider "appropriate," "professional," respectful," or "unfavorable."

These decisions demonstrate that employers cannot ban all negative comments about their organization, or establish subjective standards that give employers complete discretion to decide which negative comments will result in discipline. Instead, employers must draft narrowly tailored policies that employees could reasonably read as permitting social media discussions about wages, hours, and others terms and conditions of employment, regardless of how negative the posted comments are.

Non-Disparagement Clauses

In a similar vein, employers must carefully construct handbook policies that govern behavior beyond the sphere of social media. In Hills and Dales General Hospital, 360 NLRB No. 70 (2014), the NLRB found the hospital's workplace policies banning "negativity" and "negative comments" to be unlawful. The specific language the Board found offensive included:

11) We will not make negative comments about our fellow team members and we will take every opportunity to speak well of each other;

16) We will represent Hills & Dales in the community in a positive and professional manner in every opportunity; and

21) We will not engage in or listen to negativity or gossip. We will recognize that listening without acting to stop it is the same as participating.

The Board found all three statements to be unlawful because employees could reasonably view the policies as preventing them from engaging in concerted, protected activity with co-workers by prohibiting negative statements about their employer, its managers, or any other concerns regarding terms and conditions of employment.

In Quicken Loans Inc., 359 NLRB No. 141 (2013), the Board held a non-disparagement provision in an employment agreement was unlawful because employees would reasonably construe its provisions as restricting Section 7 activity. The provision stated:
"You agree that you will not (nor will you cause or cooperate with others to) publicly criticize, ridicule, disparage or defame the company or its products, services, policies, directors, officers, shareholders, or employees, with or through any written or oral statement or image (including, but not limited to, any statements made via websites, blogs, postings to the internet, or emails and whether or not they are made anonymously or through the use of a pseudonym). You agree to provide full cooperation and assistance in assisting the company to investigate such statements if the company reasonably believes that you are the source of the statements. The foregoing does not apply to statutorily privileged statements made to governmental or law enforcement agencies."

The Board found that an employee reading this policy could reasonably construe it as restricting their right to engage in protected concerted activities, including the right to criticize their employer and its products, or to appeal for public or co-worker support regarding their concerns.

In Karl Knauz Motors Inc., 358 NLRB No. 164 (2012), a handbook provision that stated: "Courtesy is the responsibility of every employee. Everyone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language which injures the image or reputation of the dealership." The language was found to be unlawful because it could reasonably be construed as prohibiting employee statements about objectionable working conditions, or seeking the support of others in improving them.

Confidentiality Provisions

In Design Technology Group LLC d/b/a Bettie Page Clothing, 359 NLRB No. 96 (2013), the Board held that an employer violated the NLRA by maintaining a rule in its handbook prohibiting the disclosure of wages or compensation to any third party or other employee. The rule stated: "Compensation programs are confidential between the employee and the company. Disclosure of wages or compensation to any third party or other employee is prohibited and could be grounds for termination."

The Board found that Section 7 of the Act protects the right of employees to discuss wages and other benefits with each other and with non-employees, and an employer may not prohibit employees from doing so.

Likewise, in MCPc Inc., 360 NLRB No. 39 (2014), the Board held that an employer violated Section 8(a)(1) of the Act by maintaining the following language in a confidentiality rule in its employee handbook: "Dissemination of confidential information within the company, such as personal or financial information, etc. will subject the responsible employee to disciplinary action or possible termination."

The NLRB found that employees would reasonably construe this language to prohibit discussion of wages or other terms and conditions of employment with their coworkers.

Further, in Quicken Loans, in addition to striking down the non-disparagement provision, the Board found it was unlawful to prohibit employees from disclosing: (1) non-public information relating to personnel; and (2) personnel information including personnel lists, rosters, personal information of co-workers, handbooks, personnel files, home phone numbers, cell phone numbers, addresses, and email addresses.

The Board found these restrictions would substantially hinder employees in exercising their Section 7 rights because employees could not discuss with others, including fellow employees or union representatives, the wages and benefits they receive, or the names, wages, benefits, addresses or telephone numbers of other employees.

Investigations

In addition, the Board has held that companies may not require employees to keep information provided in an internal investigation confidential, unless they can prove some legitimate business justification. Such justification may include concerns over the destruction of specific evidence, or the protection of specific witnesses. A generalized concern with protecting the integrity of the investigation is not enough. As such, employers should express any special need for confidentiality, and state its needs at the commencement of the investigation. Adding more complexity is the EEOC's position that any investigation of matters within its jurisdiction should be conducted as confidentially as possible.

At-Will Provisions

About two years ago the Board began questioning standard at-will provisions found in virtually every non-union offer letter and handbook in the United States. In particular, the NLRB found that language stating the at-will relationship cannot be amended, modified or altered under any circumstances was unlawful because employees could reasonably think it would be useless to form a union and bargain a change to the at-will relationship. The Board has since clarified that language clarifying that an at-will policy can be amended through the agreement of particular officials will overcome its earlier concerns.

Dress Codes

In World Color (USA) Corp., Subsidiary of Quad Graphics Inc., 360 NLRB No. 37 (2014), the NLRB held that an employer's policy of prohibiting employees from wearing any baseball caps other than company caps violated Section 8(a)(1) of the Act. The Board stated that the policy prohibited employees from engaging in the protected activity of wearing caps bearing union insignia. The board has long held that in the absence of "special circumstances," employees have a Section 7 right to wear insignia referring to unions, or other matters pertaining to working conditions, for the purpose of mutual aid and protection. Restrictions are only permissible when the employer can prove substantial evidence of "special circumstances" that would outweigh the employees' Section 7 rights. Examples of "special circumstances" include a threat of violence, interference with training or production, disparagement of the employer's products or services, safety concerns, and interference with the image the employer desires for its employees to project to its customers or suppliers. Employers have the duty to prove "special circumstances," and the exception has been interpreted narrowly.

Likewise, in Target Corp., 359 NLRB No. 103 (2013), the board affirmed an ALJ's finding that a retail store violated the Act by maintaining a dress code policy, which stated: "Don't wear any buttons or logos on your clothing (unless approved by your team leader)." The employer argued that because its established brand was "red and khaki," the code permitted an employee to be identified as a team member, and any button or logo that detracted from that identification interfered with its carefully crafted public image and business plan. However, the ALJ stated that the employer failed to meet the "special circumstances" test.

Off-Duty Access Policies

In American Baptist Homes of the West d/b/a Piedmont Gardens, 360 NLRB No. 100 (2014), the Board held that a nursing home violated Section 8(a)(1) of the NLRA by maintaining a policy prohibiting employees from remaining on its premises after their shift "unless previously authorized by" their supervisor. While the Board has said that a rule restricting off-duty access is valid if (1) it limits access solely to the interior of the facility and other work areas, (2)is clearly disseminated to all employees, and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity. Here, the third prong was not met because it gave management unlimited discretion to decide when and why employees may re-enter the facility. The NLRB disregarded the employer's actual practice of allowing off-duty access only in three limited circumstances: when an off-duty employee picked up her paycheck; attended a scheduled meeting with human resources; or arrived early for the night shift.

Prior Board decisions have also struck down rules that barred access except for employer sponsored events, or access without prior approval. Given this history, employers should consider either having a broad rule prohibiting all access, or not have any access rule.

Restrictions on Profanity

In Plaza Auto Center Inc., 360 NLRB No. 117 (2014), the employee worked as a car salesman. While employed, he discussed the employer's policies on breaks, restroom facilities, and compensation practices with other employees. After the employee complained to a sales manager about the employer's calculation of sales commissions, the owner called him into a meeting in the sales manager's office. During this meeting, the employee was told that he needed to follow the employer's policies and procedures, that he should not be complaining

about his pay, and that he did not need to work for the employer if he did not trust them. The employee then lost his temper, yelling at the owner and calling him a "f**king mother f**ker," a "f**king crook," and an "a**hole." He also told the owner he "was stupid, nobody liked him, and everyone talked about him behind his back." The employee also stood in the small office, pushed his chair aside, and warned the owner that if the owner fired him, the owner would regret it. The business owner did not intend to fire the employee at this meeting, but he did so following the employee's outburst.

The Board initially concluded the employee's conduct was not egregious enough to lose protection of the Act. In reaching that decision, the Board considered the following factors from Atlantic Steel Co., 245 NLRB 814 (1979): (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by the employer's unfair labor practices. The Board concluded that all four Atlantic Steel factors weighed in favor of protection, and therefore, the employer violated the Act by firing the employee.

On appeal, the Ninth Circuit agreed with the Board on three of the Atlantic Steel factors, but remanded the case because it found that the Board erred in its assessment that the nature of the outburst weighed in favor of protection. On remand, the Board agreed with the Ninth Circuit's finding that the nature-of-the-outburst factor weighed against protection. Even so, the Board concluded that the other three Atlantic Steel factors weighed in the employee's favor, because: (1) the outburst occurred in a closed-door meeting in a manager's office away from the workplace; (2) the discussion concerned the employee's protected conduct; and (3) the outburst was provoked because it would not have occurred but for the employer's unfair labor practice of inviting the employee to quit if he did not like the employer's policies.

Additionally, despite the employee's outrageous conduct, the Board concluded that the employee did not engage in menacing, physically aggressive, or belligerent conduct, because he made no specific threats of physical harm, had no history of committing or threatening violent acts, and did not hit, touch, or attempt to hit or touch the owner. In doing so, the Board applied an objective standard and disregarded the owner's testimony that he feared for his personal safety, and for the safety of other employees. Instead, the Board concluded that the employee's "you will regret it" statement was a threat of legal consequences and not of physical harm.

The dissenting opinion noted that under the standard articulated by the Board, employees "will be permitted to curse, denigrate, and defy their managers with impunity during the course of otherwise protected activity, provided they do so in front of a relatively small audience, can point to some provocation, and do not make overt physical threats." Employers, both union and non-union, should proceed with caution when disciplining employees who might be engaged in concerted activity, as the Board's decision comes close to issuing employees a *carte blanche* in such circumstances.

Take-Aways

Because the law in this area remains very fluid employers should be cautious when developing policies, or taking disciplinary action that may be protected by the NLRA. Policies should objectively define permissible and impermissible conduct as clearly as possible in a manner easily understood by employees. When analyzing policy provisions for compliance with the NLRA, employers should consider whether employees would reasonably understand that the policy does not prohibit them from discussing wages, performance evaluations, workplace safety, discipline, or other legally protected terms and conditions of employment with their co-workers, or outsiders. Also, when a policy statement in a handbook is an abbreviated version of

a longer policy found elsewhere, the more formal policy should be cited. Most importantly, employers must realize that behavior that historically triggered discipline or discharge may now be protected under the NLRA.

***This article borrows heavily from, and is based on the work of several labor and employment attorneys at Littler Mendelson, P.C. In particular credit should be given to Jason R. Stanevich, Esq. and his article "NLRB Continues Focus on Employee Handbooks," which appeared in the *Connecticut Law Tribune's Employment and Immigration Law Section* on June 16, 2014; "Five Recent NLRB Cases Provide Further Insight on Structuring Employers' Social Media Policies" posted on July 24, 2014 by Philip Gordon, Esq. and Lauren Woon, Esq.; and "The New Normal: Employee's Profane, Insubordinate Outburst Is Protected Activity According to the NLRB" posted on June 19, 2014 by Kyllan B. Kershaw, Esq.**

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