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Labor and Employment Law

NLRB Continues Tightening Grip on Non-Union Employers

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Many non-union employers are becoming increasingly familiar with their obligations under the National Labor Relations Act (NLRA) as the National Labor Relations Board (NLRB) continues to widen the definition of permissible employee conduct under the Act. Ostensibly, behavior that most employers would have considered unacceptable several years ago is now routinely found by the NLRB to be proper in today's workplace.

Non-Disparagement

Companies historically had non-disparagement policies to prevent conflicts at work and maintain a level of decorum. Those days are gone, except where statements threaten violence or directly violate discrimination laws.

In one recent decision, the NLRB found that fast food workers who were engaged in union organizing were operating lawfully when they posted signs on community bulletin boards within the employer's establishment, and in public places close to such establishments, putting customers on notice that store employees do not get paid sick leave, and therefore, customers are taking a risk eating at the stores because sick workers may be preparing their food. When the employer fired those behind the posters, the NLRB found the firings to be violative of the NLRA and ordered reinstatement and back pay. *Miklin Enterprises*, 361 NLRB No. 27 (2014). The Board's decision was affirmed by the Eighth Circuit Court of Appeals, Miklin Enterprises, Inc., v. NLRB (2016).

In doing so, both the Board and Court found that the employees' conduct was part of an on-going labor dispute, and that the posters were not disloyal, reckless or maliciously untrue. In essence, the implication that customers will fall ill by eating at the restaurants was considered "exaggerated rhetoric which is common in labor disputes and protected under the Act," as opposed to disloyalty.

In a second case, the NLRB ruled it is also okay to post that your boss is a "nasty mother****er on Facebook, along with similar comments regarding the boss' family. *Pier 60*, 362 NLRB, No. 59 (2015). The post was in response to the boss telling several catering servers working an event to "spread out, and move" when they were standing around. The employer fired the worker who posted the comments, but the NLRB reinstated him because "the comments were directed at the manager's treatment of the servers, and were part of a sequence of events involving the employees' attempts to protest and ameliorate what they saw as rude and demeaning treatment by their managers."

Separation Agreements

The Board continues to focus on the contents of separation or settlement agreements containing provisions it believes chill section 7 rights to work collectively in addressing workplace concerns. In one recent case, an Administrative Law Judge found that the confidentiality, return of property, and non-solicitation of employees provisions in a severance agreement violated the NLRA. Quicken Loans, Case 28-CA-146517 (Mar. 17, 2016).

The confidentiality clause was found to be overbroad because it protected certain documents the employer did not take adequate steps to keep secret, and the non-disclosure requirements extended to workplace matters such as wages, work rules, and other terms of employment that employees have a right to publically communicate.

In addition, a requirement that employees return copies of the employee handbook was found unlawful as such materials are normally widely distributed within the workplace and therefore lose their protected status.

Further, a non-solicitation provision that prevented solicitation "for any reason" was found to be overbroad as it could be interpreted as preventing former employees from speaking with current employees about section 7 rights, which would violate the Act.

When writing policies or agreements, the devil is in the detail as the Board continues to dissect employer documents for any potential sign that the wording could be interpreted as restricting employee rights to ban together for their mutual aid and protection.

Workplace Recordings

Rules limiting workplace audio and video recordings have also been subjected to scrutiny. Unless an employer can show recordings will violate customer or patient privacy concerns, or reveal trade secrets, employees will often be permitted to record workplace interactions.

For instance, Whole Foods had a policy against workplace recordings, unless the consent of all participants was obtained. The Board found the rule violated the Act because employee section 7 rights outweighed the company's interest in promoting open and free discussions. It stated, "photography and audio or video recording in the workplace, as well as the posting of photographs and recordings on social media are protected by section 7 if employees are acting in concert for their mutual aid and protection and no overriding employer interest is present…." Protected employee conduct may include, for example, recording images of protected picketing, documenting unsafe workplace equipment or hazardous working conditions, documenting and publicizing discussions about terms and conditions of employment, documenting inconsistent

application of employer rules, or recording evidence to preserve it for later use in administrative or judicial forums in employment-related actions." Whole Foods Market Inc., 363 NLRB No. 87 (2015).

Clearly, the Board has taken a strong position that total recording bans are improper, and that any ban must be narrowly tailored to show its purpose is to protect trade secrets or other privacy rights.

Given these developments, employers should review their policies and handbooks to make sure they are compliant with the Board's ever more aggressive posture.

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