January Early Bird Seminar

Presented by the Supplier/Service Provider Council

RECENT NLRB DEVELOPMENTS –

The Playing Field Still Isn't Level

This presentation will be addressing recent NLRB developments that relate to members in areas ranging from social media policies, employee handbook rules and arbitration issues through subcontracting rights and picketing.

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I. Purpose of this Presentation

- NLRB is dominated by Democratic appointees and is aggressively pushing a labor-friendly agenda

- Employers should be aware of this agenda, the Board's recent decisions, and their impact on the Company's policies and practices

II. Social Media Policies

A. BACKGROUND:

- NLRA (including Sections 7 and 8) applies to non-union employees as well as union employees;
- With new technologies come new applications of old rules: Facebook “walls” and Twitter “hashtags” are the new office water-cooler;
- Just as Employers may not lawfully prohibit employees from “protected concerted activity” – such as discussing the terms and conditions of their employment -- Employers may not restrict employees’ ability to discuss such topics on social media.
- Blanket bans on employees’ “gripes” or other “disrespectful” or “disparaging” comments are likely to be found illegal, since they may reasonably be construed as restrictions on Section 7 activity.

B. THE LAW

Test: does the restriction "reasonably tend to chill employees in the exercise of their Section 7 rights?" *See Lafayette Park Hotel, 326 NLRB 824, 825 (1998).*

Two part test thereunder: a policy is unlawful under the Act if it:

- explicitly restricts Section 7 protected activity; OR
- implicitly restricts such activity, in that:
  - Employees would reasonably construe the policy to prohibit Section 7 activity; or
  - The policy was promulgated in response to union activity; or
  - It has been used to restrict Section 7 rights.

C. PROTECTED CONCERTED ACTIVITY OR MERE GRIPES?

1. Unlawful restrictions of "protected concerted activity"

Costco Wholesale Corp., 358 NLRB 106, at *2 (NLRB Sept. 7, 2012) (workplace rule requiring "that statements posted electronically…that damage the Company…or violate the policies outlined in the Costco Employee Agreement, may be subject to discipline up to and including termination of employer" found unlawful since "employees would reasonably construe this rule as one that prohibits Section 7 activity.")

Design Technology Group LLC, 359 NLRB No. 96, at *1, *10 *et seq.* (NLRB April 19, 2013) (employees terminated after discussing their workplace complaints and their rights (and perceived violations of their rights by the Employer) on Facebook).

2. Lawful restrictions of "protected concerted activity"

NLRB GC found Tasker Healthcare Group's termination of an employee was lawful after that employee engaged in a conversation on Facebook. Although the conversation related to work, the terminated employee's messages involved an individual gripe and did not involve shared employee concerns over terms and conditions of employment.

The employee had posted:

> "They [the Employer] are full of shit… They seem to be staying away from me, you know I don't bite my [tongue] anymore, FUCK…FIRE ME…Make my day…"

No other current employees took part in that portion of the conversation. Accordingly, there was no "thread connecting the Charging Party's comments to those of any coworkers pertaining to shared concerns about working conditions." In re Tasker Healthcare Group, 2013 WL 2285967 (NLRBGC, May 8, 2013).

3. Restrictive Language May Cure Unlawful Policies

A general savings clause indicating that the Company's Social Media Policy will be administered in compliance with applicable laws and regulations (including Section 7 of the National Labor Relations Act) found **not** to cure an otherwise-overbroad policy. *See* NLRB General Counsel Memorandum OM 12-59, at p.9 (May 30, 2012).

A specific savings clause was found lawful in In re Cox Communications, Case No. 17-CA-087612 (NLRBGC, Oct. 19, 2012), partly because the otherwise-ambiguous policy was specific enough to ensure that employees would not reasonably interpret the policy in a way that would restrict Section 7 activity:

> "[n]othing in Cox's social media policy is designed to interfere with, restrain, or prevent employee communications regarding wages, hours, or other terms and conditions of employment."

4. Guidelines

1. Avoid broad language that could be construed to prohibit Section 7 protected conduct;

   a. Provide specific examples of prohibited conduct and unacceptable behavior;

   b. Carefully define the kinds of 'confidential' and/or 'proprietary' information that may not be revealed that do not implicate Section 7; and

2. Include a specific savings clause re protected concerted activity, and define such activity.

III. Other Handbook Policies

A. Workplace Investigations
B. Confidentiality of Information
C. Courteous No More

A. Confidentiality of Workplace Investigations

Banner Estrella Medical Center 358 NLRB No. 93, at *2 (NLRB July 30, 2012) (Employer's policy re confidentiality of workplace investigations found unlawful).

Employer's burden of showing, on a case-by-case basis, that there is a legitimate business need for confidentiality that outweighs employees' Section 7 rights.

Such proof could include:

1. Witnesses' needed protection;
2. Preservation of evidence;
3. Risk of fabricated testimony;
4. Need to prevent a 'cover up'.

Confidentiality of Workplace Investigations

See Verso Paper, NLRB Div. of Advice, No. 30-CA-89350 (January 29, 2013), finding Company's policy unlawful, but providing suggested revision which it would consider lawful:

> "[The employer] has a compelling interest in protecting the integrity of its investigations. In every investigation, [the employer] has a strong desire to protect witnesses from harassment, intimidation and retaliation, to keep evidence from being destroyed, to ensure that testimony is not fabricated, and to prevent a cover-up. [The employer] may decide in some circumstances that in order to achieve these objectives, we must maintain the investigation and our role in it in strict confidence. If [the employer] reasonably imposes such a requirement and we do not maintain such confidentiality, we may be subject to disciplinary action up to and including immediate termination."

Even recommending confidentiality may be found unlawful, if there is not a case-by-case determination and if there are no assurances to employees that they are free to disregard the recommendation.

B. General Confidentiality of Information

Design Technology Group LLC, 359 NLRB No. 96, at *1, *8-9 (NLRB April 19, 2013) (policy prohibiting employees from disclosing wages or compensation to any third party or other employee found to violate NLRA).

> Including employee personnel records as confidential information (which likely included wages, hours and other terms and conditions of employment) chilled employees' Section 7 rights.

Quicken Loans, Inc., 359 NLRB No 141 (June 21, 2013) (Employer violated the Act by maintaining an unlawful non-disparagement handbook rule, as well as an overly broad proprietary/confidential information rule).

GUIDELINES: Employers should review their policies and avoid broad, general prohibitions and undefined terms that could be read to prohibit the discussion of wages, hours and other working conditions.

C. Requiring Employees to be "Courteous" is Illegal

Mandatory employee "courtesy" is unlawful because it could be reasonably interpreted as including prohibition on Section 7 protected conduct. Karl Knauz Motors, Inc., 358 NLRB No164 (Sept. 28, 2012).

Arbitration – NLRB's Rejection of Waivers of Joint/Class Actions

D.R. Horton, 357 NLRB No 184 (NLRB Jan. 3, 2012) held that arbitration agreement waiving joint and class actions in any forum violated fed labor law in that it interfered with employees' Section 7 right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection."

--although DR Horton has been rejected by numerous courts, *see, for example*, D.R. Horton, Inc. v. NLRB, 737 F.3d 44 (5th Cir. Dec. 3, 2013) (rejecting Board's ruling that arbitration agreement violated federal labor law), the Board may still apply its ruling under its non-acquiescence policy. *See, for example*, Little River Band of Ottawa Indians, 359 NLRB No 84, *5 n8 (NLRB March 3, 2013) (recognizing the Board's non-acquiescence policy).

NLRB Permits Creative Hand-billing/ Picketing/"Secondary Activity

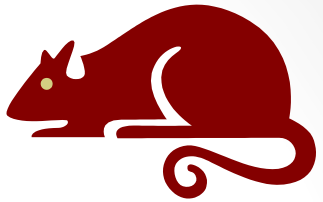
A. Section 8(b)(4)(ii)(B) makes it an unfair labor practice for a labor organization or its agents to "threaten, **coerce**, or restrain any [business]" where "an object" of such conduct is "**forcing or requiring any person to cease** using, selling, handling, transporting or otherwise **dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person**…"

Bannering

In Eliason & Knuth of Arizona, Inc., 355 NLRB No. 159 (NLRB 2010), the Board found that a Union did not violate the Act when it stationed several union agents within 100 feet of business, holding a very large banner saying "SHAME ON [secondary employer]" and urging the public not to patronize the business. The union's dispute was with a Company performing work for the secondary's parent company; the Union did not have a dispute with the secondary.

-The Board found that the display of the banner was not unlawful, as it did not create the type of "barrier" – actual or symbolic – that traditional "picketing" creates, despite its large size, strong words and presence of several union agents.

Rats!



In Brandon Regional Med. Ctr., 356 NLRB No. 162 (NLRB 2011), the Board found the Union did not violate the Act by displaying a large inflatable rat in front of a hospital with which it had no primary dispute, but which had hired certain contractors with which the Union had a dispute.

> The "rat balloon" measured about 16-feet tall and 12-feet wide, and had a sign captioned "WTS" (one of the primary employers) attached to the rat's abdomen. Nearby union members distributed handbills proclaiming "there's a 'rat' at Brandon Regional Hospital," identifying WTS as the "rat" or "rat employer."

Mandatory Posts

In Aug. 2011, NLRB implemented a rule requiring all employers subject to the NLRA be informed of their NLRA rights of self-organization, to form, join, or assist labor organizations, to bargain collectively, to engage in other concerted activities, and to refrain from such activities, and of the Board's role in protecting those statutory rights.

Failure to post the required notice would constitute an Unfair Labor Practice.

The posting rule was struck down by both the D.C. and Fourth Circuit Courts as beyond the Board's authority. *See* Nat'l Ass'n of Mfrs. v. NLRB, 717 F.3d 947 (D.C. Cir., 2013); *see also* Chamber of Commerce v. NLRB, 721 F.3d 152 (4th Cir. 2013).

Quickie election rule.

The rule would significantly shorten the time period between when a union requests an election and when that election is held; it would also reduce an employer's opportunity to challenge the election and effectively prevent employers from educating their employees about the negative effects of unions.

Was struck down by D.C. district court because the Board lacked a quorum to implement the rule. The Board may re-implement its quickie election rule (now that the Board has five members).

Can be used to convert an 8(f) contract to a 9(a) contract.

Micro Units

The term “Micro Units” refers to proposed bargaining units that include only a small number of employees. Generally, smaller bargaining units are favored by unions because they tend to be easier for unions to successfully organize. For example, most Employers would rather negotiate with a craft-wide bargaining unit instead of negotiating with a number of Micro Units within the same contract.

The Board has recently imposed a heavy burden on employers arguing that a Micro Unit should not be certified because additional employees should be included in the unit. This burden requires the employer to prove that the additional employees share an “overwhelming community-of-interest,” such that the proposed unit irrationally excludes the additional employees.

Conclusion / Q&A

- Employers who have not updated their employee handbooks should do so now.
- Prepare for potential union activities now, before they begin.