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NLRB Is Showing More Interest In Nonunion Employers

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Law360, New York (January 16, 2015, 7:36 AM ET) -- It wasn't too long ago that the National Labor Relations Board rarely concerned itself with the policies and practices of nonunionized employers, particularly when union activity, such as organizing activity, otherwise was not present in the workplace. Lately, though, the NLRB is applying what were often regarded as virtually dormant legal concepts to the nonunionized workplace.

Section 7 of the National Labor Relations Act, which provides that employees have a legal right to engage in "concerted activities for the purpose of ... mutual aid or protection," is the wellhead from which the NLRB's heightened interest in nonunionized workplaces springs. "Concerted activities" is a much broader concept than "union activities." Consequently, the NLRB deems virtually any activity as "concerted" and "protected" if the activity at issue is aimed at affecting employee interests. Employers who "interfere with, restrain or coerce" employees exercise of their Section 7 rights commit an unfair fair labor practice as proscribed by Section 8(a)(1) of the NLRA.

Applying these principles, the NLRB is now more frequently and aggressively scrutinizing nonunionized employer policies and invalidating those that, in its view, could "chill" employees from engaging in concerted activities. Intent or motivation is rarely considered, nor is an employer's failure to enforce and offending policy considered a defense.[1] A policy which appears neutral on its face is deemed "chilling" if: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights."[2]

Thus, nonunionized employers are now, more than ever before, being found to have engaged in unfair labor practices. Policies that have either passed muster with or been disregarded by the NLRB for decades are now suddenly deemed illegal. Employers therefore must review their policies through a new lens and determine if they could be construed by the NLRB as inhibiting employees from engaging in legally protected concerted activities.

Among the policies the NLRB appears to be most suspicious of, whether in a union or a nonunion context, are the following.

Class Action Waivers in Arbitration Agreements

Many nonunion employers have elaborate arbitration agreements with their employees, and many of those agreements have provisions barring employees from participating in class or collective actions against the employer. As a result, discrimination and overtime claims that may otherwise be brought on a class basis may only be brought on an individual basis. In its landmark D.R. Horton decision,[3] the NLRB held that class actions are quintessential concerted activities and therefore class action waivers are contrary to the NLRA's Section 7 rights. The NLRB was also concerned because, in its view, employees could construe such provisions as precluding them from filing group charges with the NLRB.

Virtually every court that has been asked to apply the NLRB's D.R. Horton holding has refused, primarily because of the superseding congressional endorsement of arbitration vis-a-vis the Federal Arbitration Act, and the U.S. Supreme Court's line of cases enforcing the terms of arbitration agreements, including those with class waivers. Recently, the Fifth Circuit specifically rejected the D.R. Horton decision, although it agreed that such waivers may not imply that the filing of group unfair labor practice charges is prohibited.[4]

Nonetheless, the NLRB is continuing its stance that such waivers violate the NLRA and is attempting to resurrect the D.R. Horton holding through its more recent Murphy Oil USA decision[5] in which it claims to address and overcome the concerns of the Fifth Circuit. In other words, the NLRB is being particularly tenacious in its attempt to forbid employers from using class waivers in arbitration agreements even though waivers in commercial arbitration agreements have been resoundingly upheld by the federal courts, including the Supreme Court.

Social Media Policies and Practices

Since Facebook and other social media sites have become commonplace, employers have strived to develop policies to protect their employees and businesses from being disparaged in public by their employees' use of such sites. Doing so while not running afoul of the NLRA's Section 7 rights, however, has become particularly challenging. Indeed, many policies that were viewed as formal manifestations of common sense have been held to be illegal. Similarly, the NLRB more often than not has found that employees who have been disciplined for social media postings were in varying degrees engaging in concerted activities by their postings, and therefore their disciplines were deemed to violate the NLRA. Even postings that disparage management have been regarded by the NLRB as protected concerted activity when they result in comments by other employees or "likes."

Realizing that the line separating legal from illegal social media policies is difficult to recognize, the NLRB's general counsel has published three detailed memoranda summarizing the case law in this area and how it may apply to specific scenarios.[6] The common threads through these memos and related cases suggest that postings that are mere personal gripes are not concerted, but postings that appear to express the thoughts of a group or seek support from others are concerted and are therefore protected. General rules requiring "respect" or "courtesy," or that prohibit statements that could harm an employee's or the employer's reputation are too broad, but rules directed at conduct aimed at customers and products are given more leeway. Furthermore, "safe harbor" statements that expressly tolerate activity protected by the NLRA do not validate otherwise questionable policies, according to the NLRB. Safe harbor policies along with examples of prohibited and/or acceptable communications, though, may help to bring the policy into conformity with the NLRA.

Email Use

For years, employers and the NLRB have struggled to determine the extent to which employers could restrict employees from using the company email systems for union-

related activity, including union organizing. Employers contended that their email systems were akin to bulletin boards, and the extent to which employers could control what employees posted on bulletin boards applied to email systems. The NLRB had mixed views on the issue for years, trying to reconcile the bulletin board doctrine with this new technology. In its 2007 decision in Register Guard,[7] the NLRB gave some bright-line guidance by holding that employers owned their email systems and therefore, based on their property interests, had significant ability to control how it is used. Therefore, the employer could forbid employees from using their systems from being used for nonbusiness purposes, including the promotion of outside groups, such as unions, so long as all outside groups were treated equally.

This past December, though, in its Purple Communications decision,[8] the NLRB reversed itself and held, "Consistent with the purposes and policies of the [NLRA] and our obligation to accommodate the competing rights of employers and employees, we decide today that employee use of email for statutorily protected communications on nonworking time must presumptively be permitted by employers who have chosen to give employees access to their email systems." Email, according to the NLRB, is an important means of employee communications, and by failing to appreciate this reality, it concluded that the Register Guard board failed to "adapt the [NLRA] to the changing patterns of industrial life."

Thus, once an employer allows employees to use its email system in the course of their work, it cannot prohibit employees from using the email system during nonwork time, even if that usage relates to union or other nonwork matters. An employer may, however, completely ban nonwork use of its email system, but only "by demonstrating that special circumstances make the ban necessary to maintain production or discipline." The NLRB also stated that, if there is not a total ban, an employer may still "apply uniform and consistently enforced controls over its email system to the extent such controls are necessary to maintain production and discipline."

Confidentiality Policies

Confidentiality policies and practices in both unionized and nonunionized settings also are suspect, according to the NLRB. Consequently, in Guardsmark LLC v. NLRB,[9] the court of appeals upheld the NLRB's decision to strike down a no-fraternizing policy that could be interpreted by employees as extending beyond dating, and thereby could interfere with the employees' right to discuss terms and conditions of employment. In essence, the court held, employees cannot engage in concerted activity with engaging in some level of fraternizing. Soon thereafter, in Cintas Corporation v. NLRB,[10] the same court struck down a handbook provision which read: "We honor confidentiality. We recognize and protect the confidentiality of any information concerning the company, its business plans, its [employees], new business efforts, customers, accounting and financial matters." Again, the court agreed with the NLRB that the mere potential of employees construing the policy to prohibit protected activity was sufficient to find the policy to be illegal.

Last year, in Philips Electronics North America Corp.[11] the NLRB found that practice of prohibiting employees from discussing their disciplinary records is a violation of the NLRA, even if there was no written policy encompassing that practice. "An employer violates [the NLRA] when it prohibits employees from speaking with co-workers about discipline and other terms and conditions of employment absent a legitimate and substantial business justification for the prohibition," the NLRB held. Soon thereafter in Tiffany and Co.,[12] an administrative law judge held that even if a policy broadly defining confidential information has a statement to the effect that it does not extend to protected activities, the savings clause does not cure the policy's defect. The savings clause in Tiffany read: "This Policy does not apply to employees who speak, write or communicate with fellow employees or others about their wages, benefits or other terms of employment in the exercise of their statutory rights to organize or to act for their individual or mutual benefit under the National Labor Relations Act or other laws." The administrative law judge held that the

savings clause was deficient because it only related to discussions among employees and did not clearly extend to third parties, such as unions or the NLRB.

Confidentiality of Investigations

Employers often advise employees to keep investigations of misconduct confidential. In Banner Health System,[13] the NLRB held that blanket rules or practices imposing confidentiality expectations unduly chill employees from engaging in concerted activities regarding the substance of the investigations. The NLRB provided employers some flexibility, though, if the employer makes a determination as to whether confidentiality is needed on a case-by-case basis, and thereby establishing that there is a legitimate business interest that outweighs the employees' Section 7 rights. Merely protecting the integrity of an investigation is not enough, according to the NLRB. Instead, in any particular case, the employer must establish that confidentiality is needed for reasons such as protecting witnesses, protecting evidence from being destroyed, protecting against the fabrication of testimony or preventing a cover up.

At-Will Policies

In early 2012, in a case involving the American Red Cross, the NLRB took aim at at-will acknowledgements commonly found in handbooks. In this case, the administrative law judge held that the following rather typical handbook provision ran afoul of Section 7 of the NLRA: "I further agree that the at-will employment relationship cannot be amended, modified or altered in any way." Since unionizing could change an employee's at-will status, the administrative law judge viewed the provision as barring union organizing activities.

Later that year, the NLRB brought charges against Hyatt Hotels claiming that the following statements crossed the permissible line since they could be interpreted as bans on union organizing:

- I understand that my employment is "at-will."
- I acknowledge that no oral or written statements or representations regarding my employment can alter my at-will employment status, except for a written statement signed by me and either Hyatt's executive vice president/COO or president.
- The sole exception to [Hyatt's ability to modify or delete policies] is the at-will status of my employment, which can only be changed in a writing signed by me and either Hyatt's executive vice president/COO or president.

The American Red Cross and Hyatt settled the charges against them by amending their handbooks. The NLRB's claims, though, greatly concerned the employer community. The conventional wisdom was that these concerns could be cured by the provisions also acknowledging the employees' right to organize. Many employers were still reluctant to take that measure.

On Oct. 31, 2012, the NLRB's General Counsel Office appeared to tone down the board's apparent hostility to at-will clauses with two memos describing at-will clauses that pass muster under the NLRA. The key is how the clause states how the at-will relationship may be altered. The memos found the following clauses to be permissible:

- No representative of the company has authority to enter into any agreement contrary to the foregoing "employment at-will" relationship. Nothing contained in this handbook creates an express or implied contract of employment.

- Nothing in this handbook or in any document or statement shall limit the right to terminate employment at-will. No manager, supervisor or employee of [the company] has any authority to enter into an agreement for employment for any specified period of time or to make an agreement for employment other than at-will. Only the president of the company has the authority to make any such agreement and then only in writing.

Unlike the clauses that the NLRB viewed as "crossing the line" in American Red Cross and Hyatt, the board's general counsel determined that since these provisions lacked the use of the word "I," they did not cause employees to waive their ability to unionize and alter their employment status. The key appears to be that a clear statement that the at-will relationship may be altered in some way must be included.

Conclusion

In sum, the trend at the NLRB is clear and the above only highlights the direction the board is heading in. No employer — unionized or not — is immune from the NLRB's effort to enforce employees' rights to engage in concerted activities. Policies and practices the NLRB believes may be construed by employees as interfering with the exercise of their Section 7 rights will be challenged.

NLRB investigations of discrete charges also will be broadened to see if there are problematic policies or practices unrelated to those in the initial charge, provided the board can articulate some basis for the expansion other than being on a "fishing expedition."[14] Some of the issues discussed above, such as the class action waivers, will be subject to heated litigation before the dust settles with a firm rule. Others have not triggered substantial litigation since the cost of changing a policy is often much less than the cost of litigation.

In any event, employers should closely review their policies and practices and determine if they could be construed as chilling employees in their ability to engage in protected concerted activity. The NLRB likely will be exploring more areas where employers will be deemed vulnerable in this regard, as this is an fast-evolving enforcement initiative by this agency.

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[1] Lafayette Port Hotel, 326 NLRB 824, 825 (1988).

[2] Lutheran Heritage Village-Livonia, 343 NLRB 646, 647 (2004).

[3] 357 NLRB No. 184 (2012).

[4] D.R. Horton v. NLRB, 737 F.3d 344 (5th Cir. 2013).

[5] 361 NLRB No. 72 (2014) (3-2 decision).

[6] See http://www.nlrb.gov/news-outreach/fact-sheets/nlrb-and-social-media.

[7] 351 NLRB 1110 (2007), enf'd. in relevant part sub nom. Guard Publishing v. NLRB, 571 F.3d 53 (D.C. Cir. 2009).

[8] 361 NLRB No. 126 (2014).

[9] 475 F.3d 369 (D.C. Cir. 2007).

[10] 482 F.3d 463 (D.C. Cir. 2007).

[11] 2014 NLRB 16 (2014).

[12] NLRB Case No. 01-CA-111287 (August 5, 2014).

[13] 358 NLRB No. 93 (2012).

[14] Allied Waste Servs. of Mass. LLC, NLRB Case No. 1-CA-123082, order 12/31/14 (subpoena enforced).