National Labor Relations Act Obligations for Non-Union and Union Employers
Complying with NLRA Mandates and Preparing for Heightened NLRB Enforcement

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1pm Eastern    |    12pm Central    |    11am Mountain    |    10am Pacific

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Does Your Company’s Social Media Policy Violate the National Labor Relations Act?

NLRB Challenges Employee’s Termination For Facebook Posts

A recent unfair labor practice complaint filed by the Hartford office of the National Labor Relations Board (NLRB) challenging an employee’s termination for posting negative remarks about her supervisor on her Facebook page demonstrates that non-union employers should use caution when developing and implementing social media policies. The NLRB’s complaint and national press release signal that the General Counsel is not shy about limiting the reach of employer policies relating to employee expression. Both union and non-union employers should carefully review their policies and handbooks in this area to avoid potential pitfalls under the National Labor Relations Act.

The November 2, 2010 complaint alleges that American Medical Response (AMR) unlawfully terminated an employee based on comments she posted on her Facebook page which falsely described her supervisor as having a psychiatric illness. The initial post prompted some of the employee’s co-workers to post responses, leading the employee to make additional negative comments about the supervisor. AMR terminated the employee for violating its policy prohibiting employees from making disparaging remarks when discussing the company or its supervisors. The policy also prohibits employees from describing the company in any way on the internet without its permission.

In the complaint, the General Counsel alleges that the termination was illegal because the employee’s comments constituted “protected concerted activity” under Section 7 of the National Labor Relations Act. The General Counsel also alleges that AMR’s social networking policy itself is overbroad and therefore violates employees’ Section 7 rights.

The General Counsel’s position retreats from current Board law regarding when handbook policies interfere with employees’ rights to organize, discuss their work environment with other employees, and engage in discussions concerning unionization. In 2009, the NLRB General Counsel’s Division of Advice issued an advisory memorandum concluding that a social media policy virtually identical to AMR’s did not run afoul of employees’ Section 7 rights to comment on their work environment. In that case, the employer’s social media policy prohibited “[d]isparagement of company’s or competitors’ products, services, executive leadership, employees, strategy, and business products.”

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The NLRB found that the employer’s policy was legal because it was written in the context of prohibiting clearly improper conduct, such as discussing a company’s proprietary information, making explicit sexual or other inappropriate references, obscenity, profanity, or references to illegal drug use. The policy also specifically stated that it was tailored to protect employer and employee interests and not to “restrict the flow of useful and appropriate information.” Under these circumstances, the Division of Advice concluded that the policy did not tend to chill employees’ rights under Section 7.

While AMR’s policy is similar to the policy upheld in the 2009 memorandum, there is at least one difference. AMR’s policy prohibits employees from depicting the company in any way without first obtaining approval from the company. This section may result in a finding that the policy is overbroad (even though it was not the basis for AMR’s decision to terminate the employee).

Complaint Reflects NLRB’s Expanding Definition of Protected Concerted Activity

The AMR complaint also reflects a recent trend in NLRB decisions toward expanding the definition of protected concerted activity under Section 7 and a corresponding reduction in the leeway afforded to employers in developing social networking policies. For example, in Plaza Auto Center, a case decided this summer, the NLRB held that an employer unlawfully terminated an employee for engaging in protected communications, notwithstanding the employee’s use of obscenities and threats.

In Plaza Auto, an employee objected to the employer’s policies regarding breaks, bathroom facilities and compensation. In response, a supervisor advised the employee that if he did not like those policies he could quit. The employee called the supervisor obscene names, stood up and pushed his chair aside and said that if he was fired the company would regret it. At the administrative hearing, an Administrative Law Judge (“ALJ”) found that the employee’s conduct, obscenities and actions were physically threatening, if not downright menacing, and therefore not protected by the statute. The NLRB reversed the ALJ, holding instead that the conduct was protected because it was not so violent or of such a serious character as to render the employee unfit for further service.

Likewise, in a case decided two weeks later – Kiewit Power Constructors Company – the NLRB held that an employer unlawfully terminated two employees notwithstanding their threats that if they were terminated “it was going to get ugly” and that the supervisor “better bring his boxing gloves.”

With the AMR complaint, the General Counsel has made clear that it is his intent to expand the definition of “protected concerted activity.” Particularly in the case of online social networking, this expansion will affect all employers – both unionized and non-unionized. In discussing the complaint, NLRB officials have stated that employee social media complaints or other statements relating to a supervisor or working conditions almost always will constitute protected concerted activity if other employees have access to view the postings. A hearing in the case is scheduled for early next year before an ALJ.
Practical Implications

Employers should carefully review policies regarding the use of social media and the Internet to ensure specific prohibitions are limited to comments that reveal proprietary information, violate the law, or otherwise are unrelated to protected employee comments concerning the workplace, unionization, or company policies. The consequences of an overbroad rule can be severe -- all discipline issued under the rule is unlawful, even if the conduct being punished would otherwise violate a lawful rule. Accordingly, an overbroad social media policy may result in an order reinstating an employee who otherwise could have been lawfully terminated. Unionized and non-unionized employers also should tread carefully when disciplining or terminating an employee based on an employee’s use of social media.
Client Alert  
January 2011

NLRB Issues Proposed Rule to Require Posting of NLRA Rights

On December 22, 2010, the National Labor Relations Board (NLRB) published a Notice of Proposed Rulemaking for a rule that would require most private sector employers to post a notice advising employees of their rights under the National Labor Relations Act (NLRA). The NLRB believes that “many employees protected by the NLRA are unaware of their rights under this statute,” and that the posting would “increase knowledge of the NLRA among employees, to better enable the exercise of rights under the statute.”

More specifically, the proposed rule would require employers to notify employees of their right to organize a union, to join or assist labor organizations, to bargain collectively, to take action with one or more co-workers to improve their working conditions, and to engage in other concerted activity, including strikes and picketing. The proposed notice also informs employees that they have the right to refrain from such activities and provides information on the NLRB’s role in protecting statutory rights. Finally, the proposed notice lists conduct prohibited by employers and unions (unfair labor practices).

Private sector employers (excluding agricultural, railroad and airline employers) whose workplaces fall under the NLRA would be required to post the employee rights notice in “conspicuous places” where other workplace notices are “customarily” posted. If an employer “customarily” communicates with its employees by email or other electronic means, the proposed rule requires the notice to be permanently posted electronically as well. In addition, employers that have significant numbers of employees who are not proficient in English would be required to post notices of employee rights in the language or languages spoken by significant numbers of those employees.

The Board proposes the following sanctions for failure or refusal to post the required employee notices: (1) finding the failure to post the required notices to be an unfair labor practice; (2) tolling the statute of limitations for filing unfair labor practice charges against employers that fail to post the notices; and (3) considering the knowing failure to post the notices as evidence of unlawful motive in unfair labor practice cases.

Public comment is invited on the proposed rule and must be submitted to the NLRB by February 20, 2011. Comments can be submitted either electronically to www.regulations.gov or in writing to the Executive Secretary of the NLRB in Washington D.C.
Implications for Employers

Employers should take note that no posting has to occur at this point. The Proposed Rule will not be finalized until sometime after February 20, 2011, and potential legal challenges and other procedural matters may delay the effective date beyond that date.

Employers interested in submitting comments should do so during the public comment period. In particular, the proposed rule raises several questions, including:

- Whether the NLRB has the statutory authority to promulgate a rule which requires a private employer, not involved in an NLRB matter, to post NLRB information on private property.

- Whether the NLRB has the statutory authority to consider the failure to post an advisory notice an unfair labor practice or to impose additional remedies on such employer who is not otherwise violating any applicable labor law.

- Whether the notice is adequate to notify union represented employees of their rights under the NLRA, since it does not address an employee’s right to pay dues in a right to work state in order to keep their job; the right not to join a union under a union shop clause as long as dues are tendered to the union; the right to pay less dues under a union shop clause that the normal union dues (Beck rights); the right to file a deauthorization election at any time to void the union security provision so no dues need to be paid under any circumstance; the right to decertify the union at the end of a contract and the proper time to file such a petition; and the employees’ rights to sue a union for “unfair representation.”

- Whether the notice is adequate to notify unrepresented employees of their rights under the NLRA, since the notice does not address an employee’s right to refuse to sign an authorization card, the right to discuss the advantages and disadvantages of union representation with his/her employer, the right to insist on a secret ballot election, and the right to receive information from his/her employer.

- Whether the rule is too vague as to when there is a “significant” number of employees not proficient in English so as to require translated versions of the notice.

- Whether the rule is too vague as to when an employer “customarily” communicates with its employees electronically to the degree that it has to also distribute the notice electronically.

Board Member Brian Hayes raised some of the same concerns in his dissent from the proposed rule. Hayes argued that the posting requirement is beyond the scope of the NLRB’s power to issue “such rules and regulations as may be necessary to carry out the provisions” of the NLRA. The three Democratic members of the NLRB voted to propose this rule over Member Hayes’ dissent.
Finally, the proposed rule is another indicator that the NLRB intends to exercise its rulemaking authority to reshape and expand labor law in ways favorable to unions. But there may be unintended consequences of requiring employers to notify employees of only a portion of their rights under federal labor laws. Employers may do more than just post the notice. For example, many employers may spend significant time notifying employees of the full panoply of rights under the NLRA, including the right to file decertification and deauthorization petitions. The proposed NLRB rule also appears to be at odds with President Obama’s Executive Order 13496 issued on January 30, 2009. In that Executive Order, President Obama revoked the Executive Order requiring federal contractors and subcontractors to post a notice (known as a “Beck” notice) which notified employees that they did not have to pay the portion of their dues used by unions for political purposes.

We will continue to monitor the progress of the proposed rule. Baker & McKenzie also intends to file comments. Please send us any of your suggestions, concerns, questions, etc. if you would like to include them. If you would like to discuss how the proposed notice of posting may impact your company, please contact your Baker & McKenzie lawyer or any of the lawyers in our Labor and Employee Relations practice.
Client Alert
October 2010

The Changing Labor Landscape: What Every Employer Should Know About The NLRB’s August Decisions

While labor law legislation such as the Employee Free Choice Act has stalled in Congress, unions continue to push for labor law reform through the NLRB. In this forum, they may have found a receptive audience. The NLRB has a three-vote majority of former union lawyers and a former NLRB attorney in the role of Acting General Counsel. Moreover, after announcing that it would reconsider nearly 100 decisions pending in the appeals court in the wake of the U.S. Supreme Court’s decision in New Process Steel, the NLRB has begun to decide cases raising significant labor policy issues. In August alone, the Board issued 118 decisions. While employers should continue to monitor legislative developments, more rapid change is likely to take place at the NLRB in the form of new decisions and rulemaking favorable to unions. Employers will need to revisit their labor strategies and policies in light of these decisions, which impact both union and non-union employers.

Composition of the NLRB

The composition of the National Labor Relations Board (NLRB) can dramatically impact the labor landscape for employers. Traditionally, the NLRB is comprised of five members -- three members from the President’s political party and two from the opposing party. However, from December 2007 to March 2010, only two of the five seats were occupied – one by Chairman Wilma Liebman (D), and the other by Member Peter Schaumber (R). The empty seats were due to expired terms and political wrangling that made it impossible for either party to confirm new candidates. Since the NLRB could only act if both members agreed, most of the cases involving significant labor policy questions were deferred. By practice and tradition, the NLRB generally does not establish new law or reverse prior precedent without three affirmative votes and typically does so only when there is a Board of four or five members.

Over the next several months, the NLRB returned to its full complement of five members. In March 2010, President Obama exercised his power to make recess appointments by appointing Democrats Craig Becker and Mark Pearce to the NLRB. The Senate subsequently confirmed Member Pearce and, in June, a Republican, Brian Hayes. In the meantime, the U.S. Supreme Court invalidated all of the decisions issued by the two-member NLRB, finding that a quorum of at least three members is required for NLRB decisions. The five-member NLRB then had to decide how to handle the several hundred cases potentially affected by New Process Steel and make a final push to issue decisions before Member Schaumber’s term expired in August – which would require the NLRB to reassign all cases involving Member Schaumber to a new three-member panel. As a

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result, the NLRB issued 118 decisions during the month of August. These decisions have expanded labor law in ways favorable to unions, particularly when it comes to union organizing and election conduct. Some of the most significant decisions are discussed below.

The NLRB’s Decisions of August

Union Organizing and Election Conduct

The NLRB’s recent decisions reflect increased scrutiny of employer conduct during union organizing campaigns. In several cases, the NLRB overturned the results of the election based on the union’s objections and ordered a rerun election. For example, in Mandalay Corp. d/b/a Mandalay Bay Resort & Casino, 355 NLRB No. 92 (August 17, 2010), the NLRB held that the employer unlawfully solicited grievances with the express or implied promise to remedy the grievances when it held a series of “focus meetings” with security officers shortly after the union filed a petition to represent the officers. During these meetings, the employer discussed the union campaign and asked officers about work-related concerns. The employer also reinstated overtime opportunities for full-time officers after the officers raised concerns to the CEO during one meeting. While the record was unclear whether this occurred prior to the election, the NLRB determined that the employer’s conduct violated the Act and directed a new election. The NLRB further found that there was no evidence that the employer had a past practice of soliciting grievances as it had done before the union election. In doing so, the NLRB dismissed evidence that the employer had an established practice of holding regular shift meetings during which employees raised employment concerns with management.

Practical Tip: Holding periodic meetings with employees for the stated purpose of discussing work-related concerns can help employers maintain open lines of communication with employees and possibly avoid union organizing campaigns. Moreover, if a campaign is initiated, employers with a past practice of discussing work-related concerns with employees can continue to meet with employees and address their concerns in a legal manner.

The NLRB similarly directed a second election in Stabilus, Inc., 355 NLRB No. 161 (August 27, 2010), based in part on its finding that the company unlawfully prohibited employees from wearing pro-union T-shirts during an election campaign. While the employer had a pre-existing uniform policy, the NLRB determined that the company selectively enforced its policy against union supporters and applied it in a disparate manner to Section 7 activity relative to comparable, non-Section 7 activity because the employer had permitted isolated exceptions (i.e., allowing employees to wear Carolina Panthers T-shirts before the Super Bowl, costumes during the Halloween period).

Employer Property Rights

The NLRB also ordered a rerun election in Research Foundation of the State University of New York at Buffalo, 355 NLRB No. 170 (August 27, 2010), based on its holding that a SUNY official acted unlawfully when he insisted that a union representative meeting with an associate in that associate’s office leave the building or he would call the police. According to the NLRB, SUNY’s conduct, which occurred on state property and was witnessed by a potentially
determinative voter, reasonably tended to interfere with employee free choice in the election for union representation.

Practical Tip: Employers generally have the right to control access to property which they occupy; however, it is important for employers, particularly government contractors, to ensure they possess a property interest in the workspace before excluding a union representative.

Employee Discipline and Misconduct

The NLRB’s August decisions also reflect an increased scrutiny of employer discipline of employees during union organizing campaigns as well as a more expansive view of protected activity. In Altercare of Wadsworth Center for Rehabilitation & Nursing Care, Inc., 355 NLRB No. 96 (August 19, 2010), the NLRB held that the employer’s verbal warnings to employees that they must refrain from discussing union matters during work hours were unlawful because verbal warnings were the first step in the employer’s progressive disciplinary system. It did not matter that the employer did not take adverse action or memorialize the verbal warnings in the employees’ personnel files. See also Faurecia Exhaust Systems, Inc. 355 NLRB No. 124 (August 26, 2010) (employee’s suspension for asking for unit employees’ contact information in violation of employer’s personnel privacy policies was unlawful because the employee only asked for the information – he did not actually receive it).

Practical Tip: Significantly, in Altercare, the NLRB held that the employer’s verbal directions to employees to remove pro-union buttons were not unlawful because the directions were not part of the progressive disciplinary system and did not lay a foundation for future disciplinary action against the employee. The parties’ collective bargaining agreement specifically provided that “verbal counseling and coaching shall not count for purposes of progressive discipline.” While a well-defined policy can help employers defend against NLRB charges, employers should proceed cautiously when directing or disciplining employees during an organizing campaign.

In Plaza Auto Center, Inc., 355 NLRB No. 85 (August 16, 2010), the NLRB held that the employer unlawfully terminated an employee for communications in the course of protected activity notwithstanding the employee’s use of obscenities and threatening language. In Plaza Auto, an employee began questioning his employer’s policies concerning breaks, restroom facilities, and compensation. In response, his supervisor told him that he did not need to work at Plaza if he did not like the policies. The employee then began calling the supervisor obscene names, stood up and pushed his chair aside, and said that, if he was fired, the employer would regret it. Following this outburst, Plaza Auto terminated the employee for misconduct. While the administrative law judge determined that the employee’s conduct and profanity were physically threatening, if not menacing, and thus not protected by the NLRA, the NLRB dismissed this finding. According to the NLRB, the employee’s conduct was not “so violent or of such serious character as to render the employee unfit for further service.” See also Kiewit Power Constructors Co., 355 NLRB No. 150 (August 27, 2010) (employer unlawfully terminated two employees for misconduct; threats that “it was going to get ugly” if they were terminated and that the supervisor “better bring his boxing gloves” were protected).
Union Conduct During An Organizing Campaign

The NLRB’s recent decisions also suggest that it is less eager to sustain unfair labor practice charges against unions or to overturn union election victories based on the employer’s objections. In *Affiliated Computer Services, Inc.*, 355 NLRB No. 163 (August 27, 2010), the NLRB held that pro-union letters sent from a U.S. Congressman and a New York State Senator to the employer’s employees did not improperly interfere with the election. The NLRB dismissed the employer’s argument that the letters could have improperly led employees to believe that the government supported the union’s bid for election.

Court Actions Challenging Employee Conduct

In *DHL Express, Inc.*, 355 NLRB No. 144 (August 27, 2010), the NLRB held that both DHL and its consultant unlawfully threatened to sue an employee in court for defamation based on an article in the Union’s newsletter. Notwithstanding the lack of a factual basis for the employee’s claim that a partner consultant had admitted to “misrepresenting union members and lying to them about ‘stealing’ their money,” the Board found that the statement was protected. It further noted that while the consultant discussed the matter with more than one attorney, no lawsuit was ever filed.

Bargaining and Unilateral Changes

An employer’s bargaining obligations frequently are the subject of litigation. In *E.I. DuPont de Nemours and Company*, 355 NLRB No. 177 (August 27, 2010), the NLRB found that the employer’s unilateral changes to employee benefit plans after the expiration of the collective bargaining agreement were unlawful because the employer had failed to negotiate with the union to impasse. According to the Board, while the employer had established a past practice of making unilateral changes, it had not done so during the hiatus periods between labor contracts.

In *Stella D’oro Biscuit Company, Inc.*, 355 NLRB No. 158 (August 27, 2010), the NLRB found an employer’s offer to allow a union to view an audited financial statement was not a valid accommodation of a union’s lawful information request. Instead, when an employer claims an inability to pay, the employer must provide an actual copy of the financial statement to the union (particularly if the union agrees to keep the information confidential).

Union Conduct Against Third Parties

In *United Brotherhood of Carpenters and Joiners of America, Local Union No. 1506 (Eliason & Knuth of Arizona, Inc.)*, 355 NLRB No. 159 (Aug. 27, 2010), the NLRB found that the Union’s display of large stationary banners did not violate the Act, which makes it an unfair labor practice for unions or their agents “to threaten, coerce, or restrain” persons or industries engaged in commerce with an object of “forcing or requiring any person to . . . cease doing business with any other person.” While the banners announced a “labor dispute” and sought to elicit “shame on” the employer or persuade customers not to patronize the employer, the NLRB found that the display did not constitute picketing or coercive nonpicketing.
Overruling Prior Precedent

Some of the most controversial cases have yet to be decided. This past August, the NLRB granted review and requested public comment through the filing of amicus curiae (“friend of the court”) briefs on whether the NLRB should modify or overrule its decisions in two key cases that address the issue of when a labor union’s support among employees can be challenged. In *Rite Aid Store #6473 and Lamons Gasket Co.*, the Board will reconsider its 2007 decision in *Dana Corp.*, 351 NLRB 434, holding that when a union is voluntarily recognized, whether or not a card-check or neutrality agreement existed, no election bar will be imposed after a card-based recognition unless (1) employees in the bargaining unit receive notice of the recognition and of their right, within 45 days of the notice, to file a decertification petition or to support the filing of a petition by a rival union, and (2) 45 days pass from the date of notice without the filing of a valid petition.

In *UGL-UNICCO Service Company and Grocery Haulers, Inc.*, the Board will review its 2002 decision in *MV Transportation*, 337 NLRB 770, concerning the duties of a successor employer to an incumbent union. Before *MV Transportation*, under the successor bar doctrine, if a successor employed a majority of predecessor employees represented by a union, then the union’s majority status could not be challenged for a reasonable period to allow the new company and union a period to negotiate. *MV Transportation* overruled the successor bar doctrine and instead made the presumption of majority status rebuttable and open to challenge by the employer, employees, or a rival union.

As the above summaries demonstrate, the NLRB is taking an active role in reshaping labor law and issuing decisions that reverse prior precedent and expand labor law in ways favorable to unions. Both union and non-union employers should carefully monitor NLRB developments. Those who don’t risk NLRB charges and the threat of a re-run election in those cases where employees rejected union representation.
Reconstituted NLRB Moving Quickly To Enact Reform Agenda

by Harold P. Coxson, Jr., and Eric C. Stuart

The November 2010 election results appear to have stalled attempts to reform national labor policy through federal legislation. The focus of the reform effort has quickly shifted from legislative action – seeking passage of the Employee Free Choice Act (EFCA) and other amendments to the National Labor Relations Act (NLRA) – to equally significant administrative and regulatory changes enacted directly by the National Labor Relations Board (NLRB).

The changes implemented (and under consideration) by the NLRB involve enhanced enforcement initiatives, modifications to agency policies and procedures, and additional regulatory requirements imposed on employers. Recent developments strongly suggest the NLRB is poised to deliver sweeping changes in 2011 making union organizing easier and compliance potentially more onerous and costly for employers.

Posting Rule Proposed

The proverbial “tip of the iceberg” is the NLRB’s recently issued Notice of Proposed Rulemaking, which, if adopted, requires employers to post in the workplace notices describing for employees their right to organize a union, engage in collective bargaining, and conduct other forms of concerted activity (such as strikes and work stoppages). The NLRB’s proposed rule is “similar to one recently finalized by the U.S. Department of Labor for federal contractors.” Controversial NLRB member Craig Becker helped draft the Executive Order authorizing the DOL’s final rule while serving on the Obama transition team and still employed by the Service Employees International Union.

The stated purpose of the NLRB’s proposed rule is to inform employees of their right to act together to attempt to improve wages and working conditions, to form a union, to join a union, to bargain collectively or to choose not to do any of these things. The proposed rule also provides examples of unlawful employer conduct, but very little in the way of prohibited union conduct. There is also no mention of an employee’s right to withhold a portion of union dues used for non-collective bargaining purposes (such as political contributions) under the U.S. Supreme Court’s Beck decision.
The Notice of Proposed Rulemaking was published in the *Federal Register* on December 22, 2010. Interested members of the public can submit comments to the NLRB on the proposal until February 22, 2011. Ogletree Deakins is analyzing the proposal and assisting clients in drafting and submitting comments on the proposed rule.

Under the NLRB’s proposed rule, all private employers covered by the NLRA would be required to physically post the notice in a conspicuous place “including all places where notices to employees are customarily posted.” Employers that typically communicate with employees electronically are additionally required to distribute the notice by email or by prominently posting the notice on a company’s intranet or website. If a significant number of workers are not proficient in English, the employer must provide the notice in the language its employees speak.

Employers that fail to post the notice would be subject to sanctions including: (1) finding the failure to be an unfair labor practice; (2) tolling the statute of limitations for filing unfair labor practice charges; and (3) considering the failure to post as evidence of unlawful motive in subsequent unfair labor practice cases.

Although similar notices are required by other federal workplace laws, (e.g., ADEA, ADA, FLSA and FMLA) this is the first time in the 75-year history of the NLRA that the Board has proposed such a requirement. The proposed NLRA notice differs from other required workplace notices by containing not only a summary of the law, but actual examples of employer conduct which might constitute an unfair labor practice.

Board Member Hayes dissented from the issuance of the proposed rule and strongly questioned whether the Board has the statutory authority to promulgate or enforce the notice posting proposal. This proposal is just one of a host of NLRB initiatives that will radically impact the labor relations landscape for all employers in 2011 and beyond.

**Increase in 10(j) Federal Court Injunctions**

Labor unions frequently contend that employers utilize unlawful tactics during union organizing campaigns and that the NLRA does not provide prompt, effective redress of such violations. Critics assert that discharges of union supporters, solicitation of grievances, promises or grants of benefits, unlawful interrogations and surveillance during campaigns significantly inhibit employees from engaging in union organizing activity. Alleged unfair labor practices committed during union organizing campaigns have been identified by the NLRB as “nip-in-the-bud” cases.

Acting General Counsel Lafe Solomon has directed Regional Directors of the NLRB to seek a federal court injunction under Section 10(j) of the NLRA in all unfair labor practice cases involving a discharge occurring during a union organizing drive. Solomon also has directed Regional Directors to seek “additional remedies to remove the impact of the discharges as well as the other Section 8(a)(1) violations.” In other words, in addition to injunctive relief for charges involving terminations under Section 8(a)(3) of the NLRA, Solomon has seemingly instructed Regional Directors also to seek injunctive relief in garden variety 8(a)(1) cases arising during a union organizing campaign.

An aggressive timeline for processing nip-in-the-bud cases has been established as well. In addition to increased use of 10(j) proceedings, the NLRB will now fast track the processing of these unfair labor practice (ULP) charges. This includes prompt identification of cases purportedly appropriate for injunctive relief, short time frames for receipt of the employer’s evidence and Board authorization for litigation including expedited trial of the merits before an administrative law judge. Regional Directors are now required to make a determination on the merits of nip-in-the-bud ULP charges within 49 calendar days from the filing of the charge. If a decision is made to issue a complaint, the decision regarding whether to pursue injunctive relief under Section 10(j) will be made at the same time.
NLRB Regional Directors also have been directed to seek additional remedies in nip-in-the-bud cases, such as: (1) requiring a “responsible management official” to read remedial notices to assembled groups of employees; (2) union access to the employer’s bulletin boards; (3) providing names and addresses of employees to unions; (4) granting union access to non-work areas during employees’ non-working time; (5) affording unions equal time and facilities to respond to any address made by the employer regarding the issues of unions and unionization; and (5) allowing unions the right to deliver speeches to employees prior to any Board election.

**Practical Impact:** With the expected increase in Section 10(j) injunctions during union organizing campaigns, employers should carefully evaluate existing training initiatives to ensure supervisors are up to date on NLRA compliance. Training should empower supervisors to communicate lawfully with employees regarding unions and unionization. This is critically important given that even isolated alleged violations of Section 8(a)(1) very well may trigger requests for injunctive relief. Relatedly, a trend is beginning to emerge in which the Board is increasingly overturning union election losses based on extremely technical or questionable alleged violations.

**Default Language in Settlement Agreements**

On January 12, 2011, Acting General Counsel Solomon ordered all Regional Directors to use “default language” in informal settlement agreements and compliance settlement agreements (GC Memorandum 11-04). If the charged party/respondent defaults on the settlement agreement, the new mandatory “default language” in the agreement would waive the right of the defaulting party to challenge allegations of the complaint or compliance specification.

Under the new default language, the violations set forth in a complaint/compliance specification is deemed admitted and the defaulting party’s answer would be considered withdrawn. The Board may then, without the necessity of trial or any other proceeding, find all allegations of fact and conclusions of law to be adverse to the charging party/respondent on all issues, and may issue an order providing a full remedy. The default language also binds the parties to allow the U.S. Courts of Appeal to enter a judgment against the charged party/respondent enforcing the Board order ex parte.

As a practical matter, the new “default language” raises a host of issues in that it may bind employers not only in the case settled, but also for subsequent conduct arising under the terms of the settlement agreement. For example, where an employer settles a Section 8(a)(5) refusal to bargain charge, would a subsequent charge arising from the same negotiations (such as premature impasse) force default judgment of the settled charge? Would default language in a settled case involving a termination subsequently preclude the employer from disciplining or terminating the employee without risking default judgment and full back pay, with no right to appeal?

In the General Counsel’s Summary of Operations Report FY 2010, Acting General Counsel Solomon stated, just as his predecessors did in past reports, that “the Agency’s effectiveness and efficiency in administering the Act is greatly enhanced by its ability to obtain voluntary resolution of unfair labor practice cases.” He continued: “Over the years, the Agency has achieved an excellent settlement record due to the efforts of Agency staff and the cooperation of the Bar. In FY 2010, the Regions obtained 7,246 settlements of unfair labor practice cases, representing a rate of 95.8% of total merit cases . . . Over the last 10 years the settlement rate has ranged from between 91.5% and 99.5%.”

The new “default language” clearly increases the risk associated with settling cases and may affect an employer’s willingness to voluntarily enter into such agreements. What would a reduction of even 5-10% of settled cases mean for the Board’s operations and budget if it had to litigate those matters? With the current Board’s reversals of precedent, expanded interpretations of what constitutes “protected concerted activity,” and tougher enforcement policies, it would seem that the Board’s caseload...
will increase. In sum, the new “default language” may discourage voluntary settlements of even “routine” unfair labor practice cases.

**Practice Tips:** First, try to negotiate out the “default language” before agreeing to an informal settlement agreement or compliance settlement. Some Regional Directors may be anxious to avoid the expenditure of government resources and the time delays in achieving remedial relief through an administrative law judge trial, and will be encouraged to settle even without the default language.

Second, if the Regional Director insists on the “default language” (as most will), at least try to limit the potential default to conduct arising out of the facts of the initial charge, such as failure to honor back pay as agreed or reinstatement of the employee in accordance with the terms of the settlement agreement. Finally, try to preclude future conduct unrelated to the charge in the settlement agreement from triggering the default language.
Legal Alert
November 2010

Facebook Posts May Be “Concerted Activity”

Section 7 of the National Labor Relations Act (NLRA) bars employers from interfering with employees’ efforts to work together to improve the terms and conditions of their workplace. The National Labor Relations Board (NLRB) regularly has held that an employer violates Section 7 if its actions would “reasonably tend to chill employees” in the exercise of their rights under the NLRA.

Recently, the NLRB announced its plans to prosecute a complaint issued by its Hartford, Connecticut regional office regarding the termination of an employee who posted negative remarks about her supervisor on her personal Facebook page. The complaint alleges that the company, American Medical Response of Connecticut, Inc. (an ambulance service), also denied union representation to the employee during the investigation of the incident.

The dispute began when Dawnmarie Souza was asked to prepare a report related to a customer’s complaint about her work. Souza requested representation by Teamsters Local 443 regarding the complaint. According to Souza, she was denied representation and was threatened with discipline because of her request.

After leaving work, Souza posted a negative comment about her supervisor on her Facebook page from her home computer. The comment elicited supportive responses from co-workers, and led to additional negative comments from Souza. When the company learned of the comments, it fired Souza stating that the postings violated the company’s Internet policies.

The NLRB investigated the situation and determined that the Facebook postings constituted “protected concerted activity” and that the employer’s Internet policy was overly restrictive to the extent that it precluded employees from making disparaging remarks when discussing the company or its supervisors. A complaint was filed, alleging both that the company’s actions violated Section 7 and that its Internet policy was unlawful.

Both union and non-union employers should pay attention to further developments in this area, particularly because the NLRB’s allegation regarding the company’s Internet policy is one that could be brought against virtually any employer on the basis of a written policy, and even in the absence of a
specific factual instance of violation of such policy. Under the NLRA, employees have the right to engage in protected concerted activity, which can include discussions, meetings, or even conduct by a single employee who is attempting to initiate group action. While employees do not have unlimited discretion in choosing their method of activity – they cannot, for example, be “unduly and disproportionately disruptive” – employment policies should be drafted to avoid precluding employees’ ability to act in concert, or to act to effect positive change in the terms and conditions of the workplace. According to the NLRB, protected activity might even include an online discussion about the personal character of a particular supervisor.
NLRAB Proposes Rule Requiring Employers to Post Employee Rights

If you follow closely the potential for labor law reform you know that the focus of that effort has now shifted from legislative action—passage of the Employee Free Choice Act (EFCA)—to the enforcement/rulemaking arena involving the National Labor Relations Board (NLRA). In an effort to make amends for their failure to pass EFCA, the Obama Administration has instead given organized labor a decidedly pro-labor NLRA, now with an acting General Counsel—Lafe Solomon—who appears willing to aggressively promote the reform agenda. Developments this week suggest that the NLRA is poised to deliver substantive change, which will make union organizing easier.

In one of the most significant actions to date, today the NLRAB issued a Notice of Proposed Rulemaking pursuant to which employers covered by the National Labor Relations Act (NLRA) would be required to post in their workplace educational notices describing for employees their rights to organize a union. It comes as no surprise that the notice proposed by the NLRA is “similar to one recently finalized by the U.S. Department of Labor for federal contractors,” since controversial NLRAB Member Craig Becker helped draft the DOL notice when serving on the Obama transition team. Below is a brief summary of the proposed rule.

The Proposed Posting Requirements

The NLRA’s proposed notice would inform employees of their right to act together to improve wages/working conditions, to form a union, to join a union, to bargain collectively or to choose not to do any of these things. The proposed notice also apparently provides examples of potentially unlawful conduct.

Under the proposal, all covered employers would be required to post the notice physically in a conspicuous place “including all places where notices to employees are customarily posted.” Employers that customarily communicate with employees electronically, additionally are required to distribute the notice by email or by prominently posting the notice on a company’s intranet or website. Employers with a significant number of workers who are not proficient in English must provide the notice in the language their employees speak.
The Board proposed the posting requirement reasoning that many American workers are ignorant of their NLRA rights. According to the Board, this “knowledge gap” is attributable to the fact that the “overwhelming majority or private sector employees are not represented by unions” and that immigrants, constituting an “increasing proportion of the nation’s work force, are unlikely to be familiar with their workplace rights.” Moreover, the Board noted that the workplace “is the most appropriate place” to communicate with employees about their statutory rights and that the burden of compliance with the new requirement on employers would be minimal.

In the event that an employer fails to post the notice, the Board proposes several sanctions including: (1) finding the failure to be an unfair labor practice; (2) tolling the statute of limitations for filing unfair labor practice charges against employers that fail to post the notices; and (3) considering the knowing failure to post as evidence of unlawful motive in unfair labor practice cases.

While the Board downplays the significance of this proposed development by pointing out that similar notices are required by other workplace laws (e.g., wage/hour and EEO), it fails to note that this is the first time in the 75-year history of the Act that the NLRB has proposed such a requirement.

The Notice of Proposed Rulemaking will be published in the Federal Register on December 22, 2010. Members of the public can submit comments on the proposal for 60 days, until February 22, 2011.

Memorandum on Remedies

While this development is significant in isolation, that it comes on the heels of another directive issued by the General Counsel yesterday, suggests that the pace of change at the NLRB is picking up and that employers need to be on alert. In Memorandum GC 11-01, the General Counsel announced an initiative to systematically seek appropriate remedies in response to serious unfair labor practices committed by employers during the course of an initial union organizing campaign.

In short, the General Counsel is requiring NLRB regional offices to use more frequently the right they have long had to seek injunctive relief from federal district courts to remedy alleged unfair labor practices pending final resolution of those claims as part of the Board litigation process. The memo authorizes regional offices to include remedies—such as a public reading of the Board’s remedial notice, allowing unions access to bulletin boards, and requiring employers to provide unions a list of employee names and addresses—in complaints and petitions seeking temporary injunctions from federal courts.

We have for some time been predicting change from the NLRB. While the pace has until now been measured, it appears things are about to pick up. All of this change is likely to make union organizing easier and to make it more difficult for employers to exercise the right of free speech that exists under the Act.

Additional Information

We will keep you informed of developments as they occur. In that regard, be aware that we are now in the 60-day comment period regarding the proposed rule, which would require posting of the NLRA rights notice. If you would like to discuss options for opposing that proposed rule, please contact the Ogletree Deakins lawyer with whom you normally work, Ogletree Governmental Affairs, or the Client Services Department at 866-287-2576 or via email at clientservices@ogletreedeadkins.com.