

NLRB flexes its muscles

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While state legislators across the nation make headlines curtailing the clout of public-sector unions, of greater concern to private-sector employers are less publicized efforts by the National Labor Relations Board to push its markedly pro-union agenda.

Under long-standing federal law, if two or more employees complain to management about working conditions, NLRB jurisdiction can be invoked to contest subsequent discipline or termination even if there is no union or union organizing efforts at the workplace. Currently, such non-union "protected-activity" cases are rarely filed. This is likely to change, thanks to the rejuvenated "Obama board."

Last fall, the NLRB announced that it will aggressively prosecute companies that interfere with union-organizing campaigns by fast-tracking such cases and increasing the use of court injunctions to counter retaliatory company actions. The NLRB recently proposed a new rule requiring the posting of notices in private-sector workplaces to inform employees of their rights to form unions and file charges at the NLRB. Observers expect the notice regulation to be finalized soon, with failure to comply constituting a violation of the law and extending the time period for filing cases against employers.

Highly publicized "Facebook firing"

cases continue to be brought by the NLRB against both unionized and non-unionized employers. Typically, in these cases, employees accuse their employers of unlawfully disciplining them for making disparaging remarks about management on social networking sites.

Since the first Facebook firing case was filed in October 2010 against an ambulance company in Connecticut, the NLRB continues to broaden its rulings, limiting employers' rights to police what their workers say about the company online.

In a very recent San Francisco Facebook case, the employer settled before trial, agreeing to pay back wages and post a notice informing employees of their right to discuss working conditions online. Similar cases involving complaints and disparaging remarks about supervisors and company tax-withholding practices, critiques of company-sponsored events, and even cartoon videos about workplace feuds have been brought against for-profit and nonprofit entities, including luxury car dealerships, home-improvement stores, resort hotels and charitable organizations.

The NLRB asserts such online commentaries are "protected concerted activity" under federal labor law. Section 7 of the NLRA protects employees who complain about work terms and conditions, whether or not those complaints are connected to union activity.

To enforce this provision, the board issues unfair labor practice complaints against employers whose actions "chill" protected activity. There is no filing fee for such complaints, and the federal government prosecutes these cases on behalf of employees. Employers who lose can be ordered to reinstate the employee with back pay, rescind improper discipline and/or company policies and post NLRB notices detailing the violations and penalties.

While the law does not protect an employee's public criticism of company products or services, breach of lawful poli-

cies or disruptive or vulgar comments, the NLRB has shown high tolerance for offensive behavior and profanity. This makes it difficult for managers to distinguish protected from unprotected conduct.

Although the law itself has not changed, the recent NLRB rulings make clear that the scope of protected activity will continue to expand under the Obama board. The NLRB currently allows employers to prohibit the use of company email for union organizing, but that could change. The Obama board is increasingly scrutinizing other workplace policies, including confidentiality, chain-of-command, anti-fraternization and social media rules, striking them down when they might chill protected concerted activity.

The board may give non-unionized employees the right to bring a co-worker to disciplinary meetings with management, narrow who qualifies as a "supervisor," require union access to company premises for organizing, and loosen restrictions on wearing union insignia to work.

Employers should review their policies and practices now to ensure compliance, and to facilitate effective response to possible union organizing by:

- Reviewing workplace policies affecting protected activity
- Training managers on union issues
- Developing a communications strategy to use if unionization starts
- Paying attention to nearby, "on-the-ground" union activity
- Holding regular meetings with staff to discuss working conditions
- Reviewing manager job descriptions and duties to protect their NLRA supervisory status. **NHR**

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