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Do Your Company Policies & Procedures Stand up against the NLRB?

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Many private businesses may be surprised to learn that the National Labor Relations Board (the "NLRB" or "Board") can and will regulate policies and procedures that impact employees' right to organize under Section 7 of the National Labor Relations Act ("the "NLRA"), regardless of whether there is any union activity. The NLRB has taken the position that its powers extend to all private companies, regardless of size, and has become increasingly more active as of late. Given the increased activity of the NLRB, employers need to stay apprised of the particular areas of inquiry and review and revise their policies to confirm compliance with the NLRA.

Background of NLRB

The Board is charged with investigating unfair labor practices that affect or may affect protected concerted activity. Concerted activity includes situations in which two or more employees act in concert to try to improve their employment conditions. One employee can also engage in protected concerted activity in which he or she is acting on behalf of other employees or attempting to engage group action.

The Board's increased involvement in non-union workplaces is a result of the decline [1] in union memberships. A company is subject to the jurisdiction of the NLRB if it has an annual volume of business greater than $500,000 or if it is involved in interstate commerce. The NLRA protects all employees other than supervisors.

The NLRB is "empowered to prevent any person from engaging in any unfair labor practice affecting commerce." 29 USCS § 160(a). To accomplish this goal, the NLRB can obtain injunctive relief in many forms, including, but not limited to, the following:

- Reinstatement of an employee to his/her former job;
- Payment of back pay and benefits to a former employee;
- Removal of any reference in employee's personnel file to unlawful discharge;
- Posting and distributing a Notice regarding the Board's Order; and
- Negotiation costs incurred if respondent is found to have engaged in aggravated misconduct.

Some specific areas the NLRB has focused on recently include the following:

Confidential Policies and Agreements Regarding Salary

Employer policies that require employees to keep salary information confidential are unlawful under the NLRA. The NLRB will look not only to a company's written policies but also to any other written documents or verbal communications that *might* chill an

employee's right to engage in protected activity. This includes language in non-compete and/or employment agreements that require employees to keep "financial information" or "personnel information" confidential.

Prohibiting Employees from Using Work Email for Non-Work Purposes

According to the NLRB, employees have the right to use work email to communicate with coworkers about protected concerted activity during non-working hours. In *Purple Communications*, the NLRB handed down a 3-2 decision finding a policy prohibiting employees from using work email except for work purposes unlawful. While the Board acknowledged the possibility of a complete ban being lawful in certain circumstances, employers should not take any comfort in this, as the Board further commented it would only be "the rare case where special circumstances justify a total ban on non-work email use by employees."

Non-Disparagement and Employee Conduct

While anti-harassment policies are lawful, any policy requiring employees to act "respectful" or "courteous" may be a NLRA violation. The NLRB's reasoning is activity that might be targeted at improving workplace conditions may not be interpreted by an employer as "respectful."

Social Media Policies

The Board has also scrutinized any social media policy that restricts what an employee can write online. Non-disparagement policies prohibiting negative comments about an employer violate the NLRA. The Board also takes issue with blanket restrictions that prohibit employees from discussing work matters publicly, that prohibit the use of the employer's name or that prohibit employees from becoming online friends with colleagues.

Employment At Will Language

The NLRB has ruled that language which implies an employee cannot act collectively to modify his or her at-will status is a violation of the NLRA. Specifically, requiring an employee to sign an agreement stating "I further agree that the at-will employment relationship cannot be amended, modified or altered in any way" is unlawful. The Board's recent decisions finding at-will language to be lawful shows the analysis must be done on a case-by-case basis and that the Board will not find the at-will language to be unlawful unless it forecloses the ability to later modify the employee's status.

Steps Employers Should Take in Light of the Increased Role of the NLRB

Employers should review and revise their employee policies to remove any policy or language that is an obvious violation of the NLRA, such as a prohibition of discussion of wages or working conditions, a ban on non-work emails, an extremely broad social media policy or any use of subjective terms such as "respectful" or "courteous." Employers should also consider adding a Section 7 disclaimer in their policies and procedures manuals to indicate that protected activity is not prohibited. Employers also need to be particularly careful when terminating an employee that the reason for the termination could not be interpreted as a violation of the NLRA. While the NLRA does not contain the same type of monetary penalties as other federal employment laws, it can create havoc in an office by requiring the reinstatement of a former employee.

[1] As of 2014, the percentage of US workers belonging to a union was only 11.1%, compared to 20.1% in 1983.

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