

NLRB Update

What Non-Union Employers Need To Know about What the Board Is Doing

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The Obama Board

- The Recess Appointments
- Rulemaking: Notice Posting of NLRA Rights

Decisions of the Obama Board

Unfair Labor Practices in the Non Union
Workplace - Behavior

Protected Concerted Activity under the NLRA

- Section 7 of the NLRA provides that employees have the right “to engage in...concerted activities for the purpose of collective bargaining or other mutual aid or protection....”
29 U.S.C. § 157.

Bad Behavior

- The four-factor balancing test from *Atlantic Steel Co. v. Chastain* (1979) determines whether concerted action loses protection based on the fact that employee comment was egregious or flagrant, examining:
 1. the place of the discussion
 2. the subject of the discussion
 3. the nature of the employee's outburst
 4. whether the outburst was, in any way, provoked by the employer's unfair labor practice

Bad Behavior (cont.)

- *Fresenius USA Mfg. (2012)*
- *Stephens Media LLC d/b/a Hawaii Tribune-Herald v. NLRB (2012)*
- *NLRB v. Starbucks (2012)*
- *LaGuardia Associates, LLP d/b/a Crowne Plaza LaGuardia (2011)*

Pre-emptive Strike

- *Parexel Int'l LLC* (2011)

Decisions of the Obama Board

Unfair Labor Practices in the Non Union
Workplace – Workplace Policies

Company Policies

- Media policies
- Workplace photographs
- Ribbons and buttons
 - Buttons or ribbons critical of patient safety

No-Access Rules

- The traditional NLRA test: *Tri-County Medical Center* (1976). The Board applies a three-step test to no-access rules:
 1. The rule is limited solely to the interior of the plant and other working areas.
 2. The rule is clearly disseminated.
 3. The rule applies for any purpose, not just union activity.
- *Saint John's Health Ctr.* (2011)
- *Sodexo Am. LLC* (2012)
- *Mariott Int'l Inc.* (2012)

Company Policies (cont.)

- Employee handbooks – at-will disclaimers
- Employer policies regarding confidentiality of investigations
- General rules
- Restrictive covenants – non-solicitation agreements

The Obama NLRB

Social Media Issues

Social Media Issues

- Acting General Counsel's reports

Protected Concerted Activity: The Basics

- Concerted activity is “engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.” *Meyers Industries (Meyers I)* (1984), *rev’d sub nom Prill v. NLRB*, (1985), *cert denied* (1986), or remand *Meyers Industries (Meyers II)* (1986)
- Concerted activity also includes “circumstances where individual employees seek to initiate or to induce or to prepare for group action” and where individual employees bring “truly group complaints” to the attention of management. *Myers II*

Protected Concerted Activity: The Basics (cont.)

- Concerted activity otherwise protected under Section 7 can lose protection under the standard announced in *Atlantic Steel* (1979)
- And also under *N.L.R.B. v. Electrical Workers Local 1229 (Jefferson Standard)* (1953)

Social Media Cases

- Cases involving protected concerted activity in AGC's reports
- *Karl Knauz Motors, Inc.* (2012)
- Unresolved issues concerning social media postings

Social Media Policies and the NLRA

- The cases reflect an NLRA-centric focus, finding policies to be overbroad if they could reasonably be construed as limiting the exercise of Section 7 rights.
- *Lafayette Park Hotel* (1998), the Board considered whether workplace conduct rules (not dealing with the internet or social media) standing alone violated the Act by reasonably chilling the exercise of Section 7 rights.

Social Media Policies and the NLRA (cont.)

- To determine if an employer's policies or work rules chill the exercise of Section 7 rights, the Board uses a two-step inquiry first announced in *Lutheran Heritage Village Livonia* (2004), which provides that:
 - (i) a rule is clearly unlawful if it explicitly restricts Section 7 protected activities; (ii) if, however, the rule does not explicitly restrict protected activities, it will only violate Section 8 if: (a) employees would reasonably construe the language to prohibit Section 7 rights; (b) the rule was issued in response to union activity; or (c) the rule has been applied to restrict the exercise of Section 7 rights.

NLRB Decision

- *Costco Wholesale Corp.* (2012)

Social Media Cases - Employer Policies

- AGC Reports
 - Savings clauses
 - Confidential information
 - Accuracy or truth
 - Privacy
 - Online decorum
 - Official contacts with third parties
 - Permissible provisions

Surveillance

- “impression of surveillance”

Decisions of the Obama Board

Mandatory Arbitration of Employment Disputes

Mandatory Arbitration of Employment Disputes

- Supreme Court Decisions
- *D.R. Horton, Inc.* (2012)
 - Analytical problems?
 - Going up?
 - More recent NLRB developments
 - Federal courts address

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