

THE NATIONAL LABOR RELATIONS BOARD

Assaulting the Non-Union Workplace and Making It Easier for Unions to Organize

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NLRB JURISDICTION

- **Jurisdiction when interstate commerce exceeds minimal level.**
- **Broad jurisdiction over most private sector employers.**



A WORD ON NOEL CANNING

- **President Obama's recess appointments to the NLRB declared invalid by the U.S. Supreme Court.**
- **As a result of the invalid appointments, more than 100 cases decided during the period will be reviewed.**



CLASS ACTION WAIVERS

- **Important cases:**
 - AT&T Mobility, LLC v. Concepcion, 131 Supreme Court 1740 (2011);
 - D.R. Horton, Inc., 357 NLRB No. 184 (2012).
- **Varying opinions by District and Circuit Courts.**



EMPLOYEE HANDBOOKS AND SOCIAL MEDIA

- **NLRB review of handbooks**
 - NLRB has determined certain policies to be overly broad and a potential unfair labor practice;
 - Potentially interfere with concerted, protected activity guaranteed in Sections 7 and 8(a)(1) of the NLRA.



EMPLOYEE HANDBOOKS AND SOCIAL MEDIA

- **NLRB review of social media policies**
 - Posting disparaging comments about coworkers and managers on social media;
 - Disclosure of confidential (internal and external) information;
 - Off duty “no access” policy rejected (employees prohibited from entering the premises except for legitimate business reasons”);
 - “Inappropriate contact” with coworkers, parents, and school officials not adequately defined;
 - Employee fired for participating in a Facebook discussion regarding supervisor.



THE GENERAL COUNSEL'S MEMORANDA FINDINGS

- **Scrutiny as to overly broad definitions in activities including, but not limited to:**
 - No Defamation/Non-Disparagement;
 - Confidentiality;
 - Logos/Trademarks;
 - Discussion of work-related concerns;
 - Communications with the media;
 - “Unprofessional” content;
 - Employee’s Self-Identification.



E-MAIL USE

- **Register Guard, 357 NLRB No. 27 (2011)**
 - Employer determined to have the right to protect property, and employees have no legal right to use the employer's e-mail for Section 7 purposes.
 - Likely that the NLRB will reverse Register Guard.



AT-WILL EMPLOYMENT

- **Employee handbook acknowledgment**
 - If not worded properly, may be potentially construed as infringing on employee rights to engage in concerted activity.



ACCESS RULES

- **“No Access” policies restricting off duty employees from entering certain areas of the employer’s premises violate the NLRA.**
- **Restrictive “No Access” rules must meet Tri-County Medical Center standard.**



CONFIDENTIALITY

- **Unlawful provisions regarding “confidentiality”**
 - Personnel information
 - ❖ Personnel lists;
 - ❖ Rosters; and
 - ❖ Personal information of coworkers.
 - Handbooks;
 - Personnel files; and
 - Home and cell phone numbers, addresses, and e-mails.



WORKPLACE INVESTIGATIONS

- **Blanket policy regarding confidentiality as it relates to workplace investigations violates Section 7 of the NLRA.**



NLRB MAKES IT EASIER FOR UNIONS TO ORGANIZE

- **Long-standing precedent changing in an effort to enable unions to organize.**
 - Northwestern University football players found to be “employees”;
 - Hospital residents, interns, chief residents, and fellows found to be “employees.”



UNION DUES DEDUCTIONS AND WITNESS & UNION-FREE STATEMENTS

- Long-standing precedent — over 50 years—changing, thereby mandating employers continue honoring union dues checkoff provisions after a collective bargaining agreement has expired.
- 30-year precedent overturned:
 - Employers no longer “shielded” from providing witness statements and employee disciplinary action information to unions.
 - The NLRB vacated the unqualified exemption put into place in 1978.
- **Bargaining Units**
 - “Mini” bargaining units endorsed.
- **Union-Free Statements**
 - Potential Violation of Section 7 of the NLRA.



WHAT SHOULD YOU DO?

- **Examine your organization's potential vulnerability.**
- **Make concerted effort to review:**
 - Handbooks;
 - Policies and procedures;
 - Rules including, but not limited to:
 - ❖ Social media;
 - ❖ E-mail;
 - ❖ Confidentiality;
 - ❖ Investigations;
 - ❖ Alternative dispute resolution;
 - ❖ Access rules; and
 - ❖ Confidentiality.



“GET READY”

In the words of The Temptations (circa 1966),

“Get ready, ‘cuz here
[the Board] comes.”

