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Recent Anti-Employer Decisions By The National Labor Relations Board That Affect Non-Unionized Employers

The National Labor Relations Board currently has three Democrats and one Republican, with one vacancy. It has been both fashionable and accurate to characterize the current NLRB as "pro-union." That characterization, however, is incomplete. The NLRB now is not merely "pro-union"; it is also "anti-employer."

Non-unionized employers often perceive federal labor law and the NLRB as irrelevant to them because they do not have unions. That perception, unfortunately, is inaccurate.

Recent decisions affecting non-unionized employers confirm both the NLRB's "anti-employer" orientation and how its decisions can affect non-unionized employers. These decisions portend the direction that the NLRB will pursue during the next four years when there will continue to be a Democratic majority on the NLRB.

Social Media

The NLRB's Acting General Counsel has issued several reports on how employers' social media policies may violate the National Labor Relations Act by interfering with employees' Section 7 right to engage in "protected concerted activity."

The NLRB has also decided several cases involving discharges of employees for comments made on Facebook. The most recent decision is illustrative of the NLRA issues to which non-unionized employers may be exposed if they discipline or discharge employees for comments made on Facebook or other social media. *Hispanics United of Buffalo, Inc.*, 359 NLRB #37 (December 14, 2012).

In *Hispanics United of Buffalo*, a co-worker, Ms. Cruz-Moore, informed another co-worker, Ms. Cole-Rivera, that she "intended to discuss her concerns about" other employees' job performance with management. Ms. Cole-Rivera sent a text message to Ms. Cruz-Moore asking whether she really wanted management "'to know…how u feel we don't do our job…'" On her home computer, Ms. Cole-Rivera posted a message on her Facebook page: "'Lydia Cruz, a coworker, feels that we don't help our clients enough…I about had it! My fellow coworkers how do u feel?'" Four off-duty co-workers, using their personal computers, posted messages on Ms. Cole-Rivera's Facebook page and "generally objected to the assertion that their work performance was substandard." Ms. Cruz-Moore posted a demand on Facebook that Ms. Cole-Rivera must "'stop with ur lies about me.'" She complained to management about the Facebook comments, and, after reviewing a print-out of all the Facebook comments, the employer, on October 12, 2010, discharged Ms. Cole-Rivera and the other four employees because their Facebook comments about Ms. Cruz-Moore "constituted 'bullying and harassment' of a coworker and violated" the employer's "zero tolerance" policy prohibiting such conduct.

The NLRB, in a three to one decision, ruled that the employer violated the NLRA by discharging Ms. Cole-Rivera and the other four employees for their Facebook comments. According to the NLRB, the Facebook comments amounted to legally protected concerted activity for the "purpose of mutual aid or protection."

Member Hayes dissented, stating, in part, that "the group griping on Facebook was not protected concerted activity" because it was not for "mutual aid or protection."

The NLRB ordered the employer to reinstate the five employees and to pay them back pay, back benefits, and interest for a period of over two years.

Employee use of Facebook and other social media to complain about work or co-workers is evidently common. Whether an employer should even view such social media comments as potential violations of its work rules is a separate issue. But if an employer disciplines or discharges an employee for those kinds of complaints, it must assess whether the NLRB would view the discipline or discharge as illegal on the theory that the employees' Facebook comments amounted to legally protected activity under Section 7 of the NLRA.

Mandatory Grievance-Arbitration Program

Some non-unionized employers have procedures that an employee must use to resolve any employment-related legal claims that the employee may have against the employer. The current NLRB is hostile to those kinds of procedures and, in a recent case, ruled that a mandatory grievance-arbitration procedure was illegal under federal labor law.

A non-unionized employer had a mandatory grievance-arbitration program for its employees, which was called Total Solutions Management (TSM). There was a TSM Agreement stating that an employee agreed to use the TSM for "any claim of any kind" against the employer, including "claims relating to my application for employment, my employment, or the termination of my employment" and "claims under any federal, state, or local statute…" The Agreement identified "criminal matters, claims for workers' compensation, and claims for unemployment compensation benefits" as the "only" kinds of claims excluded from TSM.

A majority of the NLRB ruled that the employer violated Section 8(a)(1) of the NLRA by "instituting and maintaining" TSM. The reason for that conclusion was that "reasonable employees would understand the Agreement to mean that TSM applies to claims under the Act, and to inhibit their right to file Board charges or otherwise access Board processes, just as it explicitly limits employee rights to seek redress in similar forums."

Member Hayes dissented from the majority's ruling. He specifically noted that the "TSM program documents do not expressly restrict employees' rights to file charges with the Board" and that "employees would not reasonably be confused about whether the TSM program interferes with their Section 7 right of access to the Board, even in the absence of express reference to Section 7 or the Board in the TSM documents."

Member Hayes, in the course of criticizing the majority's decision, characterized the majority's position as follows: "in the nonunion setting, an individual mandatory arbitration agreement for the resolution of employment disputes will be deemed ambiguous and unlawful unless (a) it expressly exempts claims arising under the Act from its coverage, or, possibly, (b) it covers such claims but expressly states without qualification that employees may still pursue such claims and gain relief through the Board's processes." Non-unionized employers with internal dispute resolution procedures similar to TSM should heed Member Hayes's comments and review the language of their procedures.

More significantly, Member Hayes stated that the decision "signals the Board's continued reluctance to endorse any form of mandatory alternative dispute resolution encompassing statutory claims for individual workers in a nonunion setting." The majority's decision, according to Member Hayes, implies that "any private dispute resolution system for individual employees in a nonunion work force is unlawful unless" it is "nonmandatory."

The employer threatened employees with discharge if they did not sign and accept the TSM Agreement and discharged twenty employees who "refused to sign the policy." The NLRB majority ruled that both the threats and the discharges were unlawful. The employer was ordered to reinstate the twenty employees with back pay, back benefits, and interest. Because the discharges occurred in October 2010, the employer will owe over two years of back pay, back benefits, and interest to twenty employees. *Supply Technologies, LLC*, 359 NLRB #38 (December 14, 2012).

In addition, in another decision on December 18, 2012, the NLRB imposed further obligations on an employer when the NLRB orders an award of back pay. First, the employer will be required to submit documentation to the Social Security Administration so that "when the back pay is paid, it will be allocated to the appropriate calendar quarters." Second, the employer will be required to "reimburse" the affected employee "for any additional Federal and State income taxes" that the employee "may owe as a consequence of receiving a lump-sum back pay award covering more than 1 calendar year." *Latino Express, Inc.*, 359 NLRB #44 (December 18, 2012). These new obligations will apply, for example, to the two years of back pay to the twenty employees in the *Supply Technologies* case and the two years of back pay to the five employees in the *Hispanics United of Buffalo* case.

Over the next four years, the current anti-employer NLRB will continue to aggressively review the policies and disciplinary actions of non-unionized employers. These recent cases about social media discharges and a mandatory grievance-arbitration procedure are only examples of how the NLRB is applying the NLRA to non-unionized employers. Other employment policies that need to comply with the NLRA include no solicitation-no distribution, no access, bulletin board, and confidential information policies. Non-unionized employers should understand how the National Labor Relations Act may apply to work rules, employment policies, and disciplinary actions and should review their work rules and policies to ensure that they comply with the NLRA.

If you have any questions about the impact of NLRB decisions on non-unionized employers, please contact the author of this Client Alert, your Butzel Long attorney, or any member of the Labor and Employment Law Group.

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