EXECUTIVE LABOR SUMMARY

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JULY / AUGUST 2016

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NEWS & ANALYSIS

The NLRB continues its assault on workplace civility and efficiency – **As we reported more than two years ago**, Mark Gaston Pearce, Chairman of the National Labor Relations Board, and NLRB General Counsel Robert Griffin unambiguously put all private sector employers on notice that the Board will aggressively scrutinize employer handbooks and policies for "**any**" language that might chill employees' exercise of the right to engage in "protected concerted activity" under Section 7 of the National Labor Relations Act. The NLRB is continuing to interpret expansively what constitutes unlawful "interference" with Section 7 rights. Many employer policies are deemed unlawful by the Board because an employee "might" read policy language and reasonably think that some "merely possible" form of protected concerted activity "might" be restricted. The NLRB construes any ambiguities against the employer, regardless of whether there is evidence that the policy language, in fact, restricted any employee's actions.

Recent decisions of the Board and its administrative law judges continue to demonstrate that the NLRB is, in fact, "parsing every provision of an employer's handbook," putting an emphasis on what General Counsel Griffin asserts are "some of the 'black letter' principles that clearly define violations of the NLRA but are not understood or followed by many employers." Many employers are understandably confused by what they see as the Board's one-sided interpretation of the law and arguably strained, and often out-of-context, "non-real-world" interpretation of employee handbook and policy language. The confusion is disruptive for employers and employees. From almost any perspective, the NLRB is still "ratcheting up" scrutiny of employer policies and it is not turning back, and it generally does not matter whether a workforce is union or non-union.

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THE TIME IS STILL NOW (OR YESTERDAY) TO GET THOSE EMPLOYEE HANDOOKS AND POLICIES OUT AND HAVE THEM REVIEWED FOR NLRA COMPLIANCE.

Some of the types of employer rules and policies that have been in the NLRB's target zone are discussed briefly below.

Confidentiality policies and agreements

In the view of the Board, employees have the right to talk among themselves about almost any employment-related issue and to communicate about such issues with third parties and the general public. Thus, the Board is likely to find that policies and individual confidentiality agreements violate the law if they label as "confidential" personnel information and other information about wages, benefits, or terms and conditions of employment; or prohibit disparagement of the employer, other employees, or management. Likewise, blanket confidentiality policies applicable to internal corporate investigations are likely to be ruled unlawful employer interference. Here, though, there is a "Board-created" exception that allows some employer "interference" on a case-by-case basis, when confidentiality of an investigation is reasonably necessary given the circumstances of the investigation.

Recent example: ***Quicken Loans, Inc.*, July 29** – The U.S. Court of Appeals for the District of Columbia Circuit enforced an NLRB decision that a rule barring disclosure of non-public information was unlawful because the definition of confidential information covered "personnel information including, but not limited to, all personnel lists, rosters, and personal information of co-workers . . . handbooks, personnel files, personnel information such as home phone numbers, cellphone numbers, addresses, and email addresses."

Recent example: ***Cy-Fair Volunteer Fire Department*, July 15** – The NLRB found unlawful rules prohibiting disclosure of employees' personal information.

Employee behavior and conduct policies

Many employers have policies that require employees to show respect to customers, co-workers, and managers, and to be courteous in their dealings with co-workers, people in the workplace, and third parties when the employees are actually or appear to be representing the employer, and to act appropriately on social media and elsewhere whenever the employer's reputation may be affected. Although there is some point at which employee bad behavior is so egregious that it crosses a line even in the view of the NLRB, the line is unclear, and the Board is likely to find as "protected" even concerted activity that is "loud, profane, disrespectful, and outrageous," **as a Board panel majority did recently**. Thus, any employer policy or rule intended to track or get close to that line probably will be, at best, questionable from a labor law standpoint, and the Board is likely to find that such a rule is overbroad and constitutes unlawful interference. In the NLRB's view, activity is usually protected even if it might be considered inappropriate, discourteous, disrespectful, offensive or intimidating – thus, in the NLRB view, any restriction, condition, or limitation on that type of activity might restrain employees in the exercise of their Section 7 rights. The Board comes down squarely on the side of protecting some bullying, harassment, and otherwise uncivil workplace behavior.

Recent example: ***Casino Pauma*, July 18** – A Board ALJ found unlawful a casino's handbook rule that employees had to "immediately cease any solicitation or distribution that caused the intended recipient to "experience discomfort or nonreceptiveness *[sic]* whatsoever." The ALJ also found unlawful the casino's social media policy rule, which prohibited employees from posting anything about work without employer approval, posting references to co-workers without their prior approval, and posting photographs in connection with work without prior casino approval.

Non-disparagement and intellectual property policies

Policies and agreements targeted by the NLRB include those that prohibit (1) disparaging the employer, management, co-workers, company products, and sometimes others, and (2) misuse of the employer entity name and logo or

trademarks. In the NLRB's estimation, such policies are overbroad and likely to be deemed to be a form of unlawful interference. Although the Board might allow an employer to prohibit disparagement of its *product* and commercial use of company intellectual property, including logos and trademarks, the lines are unclear, and any ambiguity in employer policies will be probably be construed against the employer.

Recent example: ***Minteq International, Inc.*, July 29** – The NLRB found that a non-compete and confidentiality agreement provision prohibiting employees from interfering with the employer's business relationships was unlawful.

Recent example: ***Quicken Loans, Inc.*, July 29** – In addition to enforcing the part of the NLRB ruling dealing with confidential personnel information described above, the D.C. Circuit also enforced part of the Board decision invalidating a rule which barred employees from "publically *[sic]* criticizing, ridiculing, disparaging, or defaming Quicken Loans or its products, services, or its policies."

Recent example: ***Cy-Fair Volunteer Fire Department*, July 15** – In addition to invalidating the fire department's policy prohibiting disclosure of personal employee information (described above), the ALJ found unlawful a rule prohibiting social media posting of embarrassing or damaging information about the fire department and any social media activity that could harm its goodwill and reputation. The ALJ also found unlawful a rule prohibiting use of the fire department's trademarks and logo without its consent.

No-solicitation/no-distribution rules and access policies

Rules that prohibit employees from distributing literature in non-working areas or from soliciting during non-working time are regularly found to be unlawful. Likewise, policies that prohibit employees from staying on or coming back to the workplace premises during non-working time are sometimes viewed by the Board as overbroad and unlawful. In the NLRB's view, employees generally have the right under Section 7 to linger in employer parking lots and external, non-working areas. Moreover, if the employer lets employees come into the facility for some non-work-related purposes, it generally must allow access to any employee who wants to engage in protected concerted activity of any sort.

Recent example: ***Casino Pauma*, July 18** – In addition to invalidating the casino's "nonreceptiveness" rule described above, the ALJ found unlawful a handbook rule that provided, "Team members are to conduct only Casino Pauma business while at work. Team members may not conduct personal business or business for another employee during their scheduled work hours." The ALJ also found unlawful a rule that required the casino's advance approval for any solicitation of co-workers.

Employment-at-will disclaimers

"Employment-at-will" statements generally provide clearly that there is no contract of employment for a definite term, and that the employment relationship may be terminated by employer or employee at any time and for any lawful reason. To prevent the chaos that can result from actual or alleged "side agreements" between employees and company representatives, the policies often provide that the "at-will" provision may not be changed. There has never been any indication that such a statement was intended to deter union activity or ever deterred an employee from pursuing Section 7 activity. However, the NLRB in several cases has taken the position that such policies are unlawful because employees might think that union representation (and, ultimately, a collective bargaining agreement with termination only for "just cause") would be futile.

Recent example: ***Minteq International, Inc.*, July 29** – In addition to finding that a prohibition on "interference with business relationships" was unlawful (described above), the NLRB invalidated a non-compete and confidentiality agreement provision specifying that employment was at will. According to the Board, the provision was unlawful because it conflicted with a "just cause" provision in a collective bargaining agreement.

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May / June 2016

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The Takeaways

- **NOW MEANS NOW.** Before the NLRB comes calling, employers should review their handbooks, policy manuals, social media policies, work rules, plant rules, and individual employee agreements – including confidentiality and non-disclosure agreements – to determine whether the language could be interpreted as interfering with Section 7 activity.

- Employers should consider revising their policies to avoid unfair labor practice charges and union election objections while, if they choose to do so, still protecting their rights as much as possible. Any revisions should be made *before* the employer has knowledge of any union organizing activity. (Once organizing starts or an unfair labor practice charge is filed, changes to policies should not be made unless labor counsel approves.)

There is little doubt that the Board will continue to scrutinize employer rules and policies for interference. Many non-union employers, who consider themselves outside the scope of NLRB concern, are increasingly finding themselves subject to unfair labor practice proceedings before the agency and their defenses compromised due to reliance on or presence of rules and policies that are unlawful in the opinion of the Board and its General Counsel.

Recent Ninth Circuit decision demonstrates widening split over whether class action waivers in arbitration agreements violate the NLRA - On August 23, the U.S. Court of Appeals for the **Ninth Circuit** in found in ***Morris v. Ernst and Young, LLP***, that an arbitration agreement requiring employees to bring "separate proceedings"—thus barring collective, class, or group arbitration – violated the employees' right to engage in protected concerted activity under Section 7 of the National Labor Relations Act. The NLRB has taken the same position since its 2012 decision in ***D.R. Horton, Inc***. The *Morris* decision appears to mark the second time that a U.S. court of appeals has agreed with the NLRB. The Seventh Circuit **recently agreed with the Board**. On the other hand, the **Second, Fifth, and Eighth** circuits have rejected the Board's position. The Ninth and Seventh circuits say that the Board's position does not conflict with the Federal Arbitration Act, because that law has a provision stating that arbitration agreements are "enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*" (Emphasis added.) Thus, these courts reason, because the requirement to proceed separately violates the NLRA, the FAA does not require that it be enforced. These courts also say that the right of employees to proceed collectively is a substantive – not procedural – right that cannot be waived in an arbitration agreement. The current and growing split among the federal circuits (as well as some state appeals courts, **including the California Supreme Court**) on this issue of importance to employers, employees, and the current NLRB majority arguably makes the issue ripe for review by the U.S. Supreme Court.

NLRB allows student teaching and research assistants to organize as "employees"- On August 23, the NLRB found in a **3-1 decision** that graduate and undergraduate student teaching and research assistants at private colleges and schools are "employees" under the NLRA. The Board's decision in *Columbia University* overrules its 2004 decision in ***Brown University***. The *Columbia* majority proclaimed that the *Brown* decision "deprived an entire category of workers of the protections of the Act without a convincing justification." One might ask – convincing to whom – especially when the students perhaps find themselves no longer "student assistants" but merely "students" again without pay and tuition waivers, as colleges and universities realize that the "employee" status perhaps presents more trouble for the institutions' educational missions than it is worth.

THE GOOD, THE BAD AND THE UGLY

U.S. Department of Labor agrees to pay $7 million to settle overtime grievance – against itself – Overtime violations by the U.S. Department of Labor? They've got to be willful! The DOL, which enforces the overtime requirements of the Fair Labor Standards Act, recently agreed to pay thousands of its current and former employees $7 million to resolve a grievance brought on the employees' behalf by the American Federation of Government Employees. The grievance arose in 2006 and took a life of its own through three Secretaries of Labor. **According to a union press release**, employees allegedly were not paid for hours that the employees were "permitted or suffered to work." So here it is -- the government is paying $7 million in government money to government employees who enforce the law

on behalf of the government.

Contractors who staff U.S. Senate cafeteria agree to pay $1 million for wage violations – Not to be distracted by its own wage and hour problems, the DOL in late July announced its **finding** in an investigation of contractors whose employees work in the U.S. Senate cafeteria. The DOL investigation started after prodding by 46 Democratic senators, who accused the contractors (covered by the Service Contract Act) of violating prevailing wage law and failing to pay overtime. The workers' labor union, supported by the senators, alleged that after negotiating a new collective bargaining agreement, the contractors began reclassifying employees, with no change in job duties, in an effort to reduce the employees' pay. The union also alleged that employees were not paid for work that was required before their paid shifts began, and thus that required health and welfare, and overtime, were not paid. After the DOL findings were announced, one contractor's representative was quoted in *Law360* as saying that "the misclassifications were largely attributable to administrative technicalities related to our associates' evolving day to day work responsibilities, which in some cases crossed multiple lines." This case illustrates a problem with government contract work. Even when the enforcement agencies themselves are unable to comply with all facets of the complicated legal matrix now confronting employers, government contractors are often expected to comply with the rules, strictly applied.

NLRB finds that Michigan state employee union violated NLRA – *in dealing with its employees' union* – Yes, that's right: A union was found to have dealt unlawfully with the union that represented its employees. According to the NLRB, the Michigan State Employees Association unlawfully (1) discriminated against its own employees, represented by the Central Office Staff Association union, for engaging in union activity, (2) made unilateral changes, (3) refused to bargain over the removal of bargaining unit work, (4) refused to supply information to the employees' union, and (5) directed an employee to keep an investigation questionnaire confidential. The Board ordered reinstatement of several employees with back pay and benefits. **According to the *Detroit Free Press***, the MSEA, through counsel, has indicated that it will appeal to the U.S. Court of Appeals for the **Sixth Circuit**. One wonders whether the COSA has employees too, and whether those employees have a union. And does that union have union employees? This could go on forever.

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