



THE NLRB: TRYING TO MAKE ITSELF RELEVANT IN THIS E-WORLD

APRIL 23, 2015

Agenda

- What is the NLRB and what does it do
- This is not your grandfather's NLRB
- Activities the NLRB considers to be a *Per Se* violation
- What is hot



NATIONAL LABOR
RELATIONS BOARD

What Is The NLRB And What Does It Do

The NLRB

- Enforces the National Labor Relations Act (“NLRA”)
 - Conduct Elections
 - Investigate Charges
 - Facilitate Settlements
 - Decide Cases
 - Enforce Orders
- Created in the late 1930s
- Trying to make itself relevant in this electronic age
- 2014 - 11.1 percent, down 0.2 % from 2013, 14.6MM
- Peak of 22.2 MM workers in 1975, peak % was 35% in mid-1950s



The NLRB: The Board

- 5 Sitting Board members
 - Primarily acts as a quasi-judicial body in deciding cases on the basis of formal records in administrative proceedings.
 - Appointed by the President to 5-year terms, with Senate consent, the term of one Member expiring each year
 - Typically the party in power has three members
 - **Mark Gaston Pearce, Chairman (D)**
 - **Kent Y. Hirozawa (D)**
 - **Philip A. Miscimarra (R)**
 - **Harry I. Johnson, III (R)**
 - **Lauren McFerran (D)**
 - Unlike courts, Board does not always follows the concept of stare decisis and routinely revisits decisions by earlier Boards

The NLRB: The General Counsel

- Independent from the Board, but like the Board is a political appointee of the President
- 4 year term
- **Richard F. Griffin, Jr.** was sworn in on November 4, 2013. Prior to becoming General Counsel, Mr. Griffin served on the Board for about 18 months. Prior to that he served as attorney for the International Union of Operating Engineers (IUOE) for virtually his entire professional career. Also served on the board of directors for the AFL-CIO Lawyers Coordinating Committee
- Division of Advice
- Division of Enforcement Litigation
- Generally supervises NLRB field offices in the process of cases

The NLRB: Division of Judges

- Decides ULP cases throughout country in the first instance, similar to a trial judge
- 40 Administrative Law Judges (ALJs) organized through four offices: Washington, New York, Atlanta and San Francisco
- Typically have worked for Board or other federal agency as an attorney
- Issues a written decision that is appealed to the Board

The NLRB: The Regional Offices

- 26 regional offices and is headquartered in Washington
- Conducts elections
- Responsibilities are similar to those of EEOC Regional Office
 - Investigates charges
 - Issues complaints for alleged violations of the NLRA
 - Seeks informal resolution, if possible

The National Labor Relations Act

- NLRA protects rights of employees in the private sector to engage in protected concerted activity.
 - Key word is “concerted”
 - Section 7 of the NLRA (29 U.S.C. § 157): “Employees shall have the right to self-organization . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection”
- Protected concerted activities include forming labor unions, negotiating a collective bargaining agreement (CBA or union contract), taking part in strikes or merely discussing wages over the water cooler or other workplace concerns, such as a bad boss, with coworkers on Twitter
- Commonly referred to as “Section 7 rights”

The NLRA Applied

- ACME Supplies issues an employee handbook that discusses its policy that wages are confidential. Joe is terminated by Acme when he complained on Facebook that he just found out that Frank makes \$1.00 more an hour.
- Issues?

Why This Matters!

- From a sample EPL policy found on the internet:
 - **Retaliation** means any actual or alleged **Wrongful Termination** or other adverse employment action against a Claimant or Outside Claimant on account of such **Claimant's** or **Outside Claimant's** exercise or attempted exercise of rights protected by law, refusal to violate any law, disclosure or threat to disclose to a superior or to any governmental agency alleged violations of the law, or on account of the **Claimant** or **Outside Claimant** having assisted or testified in or cooperated with a proceeding or investigation regarding alleged violations of law.
 - The Company will not be liable for Loss for any Claim for any violation of responsibilities, duties or obligations under any law concerning Social Security, unemployment insurance, workers' compensation, disability insurance, or any similar or related federal, state or local law or regulation; or for any actual or alleged violation of the Worker Adjustment and Retraining Notification Act (WARN), Occupational Safety and Health Act (OSHA), Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), National Labor Relations Act (NLRA) or amendments thereto or regulations promulgated thereunder, or any similar or related federal, state or local law or regulation; provided that this exclusion will not apply to **Claims for Retaliation**.

The NLRA (cont.)

- The Act does NOT protect (among others):
 - Supervisors
 - Public employees.
 - Independent contractors.
 - Persons covered by the Railway Labor Act (which covers airlines as well)
- But, the Act DOES apply to:
 - All employees, whether or not they are members of a union.
 - All employees, regardless whether the employer is a union or non-union firm

Unfair Labor Practices: An Overview

- *The NLRA generally makes it unlawful for an employer to:*
 - Interfere with employees acting in concert to protect rights provided for in the Act, or **retaliate** based on such actions.
 - No requirement for a union to be present
 - Key is activity must be concerted, i.e., involve more than one person
 - Dominate or interfere with the formation or administration of a labor organization.
 - Discriminate against employees for engaging in concerted or union activities or refraining from them or to **retaliate** on the same basis.
 - Discriminate or **retaliate** against an employee for filing charges with the NLRB or taking part in any NLRB proceedings.
 - Refuse to bargain with the union that is the lawful representative of its employees.

Unfair Labor Practices: Procedure

- ULPs are filed with the Regional Director.
- An investigation is conducted by an investigator.
 - Typically seeks sworn statements
- The Regional Director then determines whether formal action should be taken
- If a Complaint and Notice of Hearing issue:
 - Employer must file an Answer within 10 days
 - Matter will be tried before Administrative Law Judge
- Remedies include reinstatement, back pay and posting
 - Front pay?
 - Punitive damages?

Litigating ULPs

- If no timely exceptions are filed to the ALJ's decision, the findings of the ALJ automatically become the Decision and Order of the Board.
- If timely exception, Board can affirm or remands case to the ALJ for further action.
- Appeals from the Board are to U.S. Circuit Courts of Appeals
 - Appeal can be filed anywhere employer has an office

THIS IS NOT YOUR
GRANDFATHER'S NLRB (or
welcome to the 21st Century)

New Areas of Application For An Old Law

- Areas of NLRB focus that potentially may impact insurers and claims:
 - Social media policies.
 - Confidential workplace investigation policies.
 - Off-duty access policies.
 - Employment “at-will” provisions.
 - Mandatory arbitration policies.
 - Company email
 - Joint employment
 - Assertion of jurisdiction over religious institutions
- The Board has been primarily concerned with rooting out *protected concerted activity* and whether employers are **retaliating** against employees for engaging in PCA.

Social Media Policies

- The NLRB's General Counsel has issued Reports (*i.e.* his opinion) addressing social media. *See* Memorandum OM 11-74 August 18, 2011, Memorandum 12-59 May 30, 2012.
- Review of numerous policies has resulted in charges, hearings, and/or settlements with the NLRB. *But see Landry's Inc.*, Case No. 32-CA-118213 (June 26, 2014) (win for the good guys)



Social Media Policies (cont.)

- These cases typically involve either an employee who was disciplined or discharged because of social media activity, or review of an employer's policy on the subject.
- The Board has made clear that many employers' social media policies are unlawful under the NLRA.



Social Media Policies: The *Costco* Case



- September 7, 2012 – *Costco v. United Food and Commercial Workers*.
- Affirms the test: *“If the rule does not explicitly restrict protected activities, it will only violate Section 8(a)(1) upon a showing that: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.”*

Social Media Policies: Landry's Inc.

- General Counsel argued employees would reasonably construe the following language to prohibit activity protected by the Act:
 - While your free time is generally not subject to any restriction by the Company, the Company urges all employees not to post information regarding the Company, their jobs, or other employees which could lead to morale issues in the workplace or detrimentally affect the Company's business. This can be accomplished by always thinking before you post, being civil to others and their opinions, and not posting personal information about others unless you have received their permission
- The ALJ rejected this argument



Other Developments Since *Costco* - Examples of Invalid Social Media Policies

- *Kroger Co. of Michigan* (April 2014) – The ALJ invalidated, as overbroad, several provisions of Kroger’s employee handbook:
 - **A “disclaimer” policy** – “If you identify yourself as an associate of the Company and publish any work-related information online, you must use this disclaimer: ‘The postings on this site are my own and don't necessarily represent the positions, strategies or opinions of The Kroger Co. family of stores.’”
 - **Intellectual property** – “You must comply with copyright, fair use and financial disclosure laws, and you must not use without permission or compromise in any way the Company’s intellectual property assets (like copyrights, trademarks, patents or trade secrets – including, for example, Kroger or [sic] banner logos, or trade names of products, or non-public information about the Company’s business processes, customers or vendors).”



Kroger (cont.)

- The ALJ also found these policies to be overbroad and in violation of employees' Section 7 rights:
 - **Confidential information** - "Confidential and proprietary information should not be discussed in any public forum unless it has been publicly reported by the Company. Confidential and proprietary information includes but is not limited to: financial results, new store designs, current or future merchandising initiatives, and planned technology uses or applications. Do not comment on rumors or speculation related to the Company's business plans."
 - **Anti-disparagement policy** – "When online, do not engage in behavior that would be inappropriate at work—including, but not limited to, disparagement of the Company's (or competitors') products, services, executive leadership, employees, strategy and business prospects."
- NOT an independent violation:
 - **Threat of discipline for violations** – "As with all Company policies, violations of the terms of this policy can result in disciplinary action up to and including termination of employment."

Confidential Workplace Investigations

- *Banner Health System*, 358 NLRB No. 93 (July 30, 2012)
 - Hospital illegally interfered with employees' Section 7 rights by asking employees to refrain from conversing with co-workers about internal investigations.
 - The Board held that the hospital's "generalized concern" about the integrity of its investigations did not outweigh the right of employees to engage in concerted activities that are protected by the NLRA.
- Set aside by the DC Circuit on the basis of *NLRB v. Noel Canning*, 134 S. Ct. 2550, 189 L. Ed. 2d 538 (2014)



Verso Paper – What is “Overbroad”

- January 29, 2013 - Advice Memorandum of General Counsel Division of Advice following a settlement reached in *Verso Paper*, Case 30-CA-089350 (January 29, 2013)
- This policy would be “overbroad” according to the Board:

“Verso has a compelling interest in protecting the integrity of its investigations. In every investigation, Verso has a strong desire to protect witnesses from harassment, intimidation and retaliation, to keep evidence from being destroyed, to ensure that testimony is not fabricated, and to prevent a cover-up. To assist Verso in achieving these objectives, we must maintain the investigation and our role in it in strict confidence. If we do not maintain such confidentiality, we may be subject to disciplinary action up to and including immediate termination.”

Verso Paper – What is “Lawful”

- This policy would be lawful per the General Counsel’s guidance:

“Verso may decide in some circumstances that in order to achieve these objectives, we must maintain the investigation and our role in it in strict confidence. If Verso reasonably imposes such a requirement and we do not maintain such confidentiality, we may be subject to disciplinary action up to and including immediate termination.”

PER SE POLICY VIOLATIONS

Employer Policies

- Broad non-defamation/disparagement policies
- Confidentiality policies
- “At-will” language.
- Off-duty access polices.
- Illegal if it would impinge on employees’ ability to discuss wages and working conditions with others inside or outside the organization
- March 18, 2015 the NLRB General Counsel issued Memorandum GC 15-04 giving guidance on what he believes is lawful and unlawful with respect to confidentiality

Employer Policies – Unlawful Non-disparagement

- “[B]e respectful to the company, other employees, customers, partners, and competitors.”
- Do "not make fun of, denigrate, or defame your co-workers, customers, franchisees, suppliers, the Company, or our competitors."
- “Be respectful of others and the Company.”
- No "[d]efamatory, libelous, slanderous or discriminatory comments about [the Company], its customers and/or competitors, its employees or management.
- "Disrespectful conduct or insubordination, including, but not limited to, refusing to follow orders from a supervisor or a designated representative.“
- "[D]on't pick fights" online.”

Employer Policies – Lawful Non-disparagement

- No "rudeness or unprofessional behavior toward a customer, or anyone in contact with" the company.
- "Employees will not be discourteous or disrespectful to a customer or any member of the public while in the course and scope of [company] business."
- "Each employee is expected to work in a cooperative manner with management/supervision, coworkers, customers and vendors."
- Each employee is expected to abide by Company policies and to cooperate fully in any investigation that the Company may undertake."

Employer Policies – Unlawful Confidentiality Policies

- Do not discuss "customer or employee information" outside of work, including "phone numbers [and] addresses."
- "You must not disclose proprietary or confidential information about [the Employer, or] other associates (if the proprietary or confidential information relating to [the Employer's] associates was obtained in violation of law or lawful Company policy)."
- "Never publish or disclose [the Employer's] or another's confidential or other proprietary information. Never publish or report on conversations that are meant to be private or internal to [the Employer]."

Employer Policies – Unlawful Confidentiality Policies

- Prohibiting employees from "[d]isclosing ... details about the [Employer]."
- "Sharing of [overheard conversations at the work site] with your coworkers, the public, or anyone outside of your immediate work group is strictly prohibited."
- "Discuss work matters only with other [Employer] employees who have a specific business reason to know or have access to such information.. .. Do not discuss work matters in public places."
- "[I]f something is not public information, you must not share it."

Employer Policies – Lawful Confidentiality Policies

- No unauthorized disclosure of "business 'secrets' or other confidential information."
- "Misuse or unauthorized disclosure of confidential information not otherwise available to persons or firms outside [Employer] is cause for disciplinary action, including termination."
- "Do not disclose confidential financial data, or other non public proprietary company information. Do not share confidential information regarding business partners, vendors or customers"
- Context matters!

Employer Policies – “At-Will” Language

- June 11, 2012 – Lafe Solomon (former NLRB Acting General Counsel) identified “at-will” statements within employer handbooks as the next enforcement area for the Board.
- February 1, 2012 – *Red Cross & Hyatt Hotels Cases*. ALJ found the following language unlawful:

“I further agree that the at-will employment relationship cannot be amended, modified, or altered in any way.”

Lawful “At-Will” Language

- Advice memoranda from the NLRB’s Division of Advice:
- “Nothing in this [Handbook] changes this at-will relationship, guarantees you a benefit, creates a contract of continued employment or employment for a specified term, or any contractual obligation that conflicts with the [Employer’s] policy that the employment relationship with its employees is at-will.”
- “No representative of the [Employer] other than a[n Employer] executive has the authority to enter into any agreement for employment for a specified duration or to make any agreement for employment other than at-will. Any such agreement that changes your at-will employment status must be explicit, in writing, and signed by both a[n Employer] executive and you.”
- “I further understand that the foregoing provision regarding my status as an at-will employee may only be changed by a written agreement signed by a[n Employer] executive and me that refers specifically to this provision.”

Employer Policies – Off-Duty Access

- *Sodexo America, LLC*, 358 NLRB No. 79 (2012)
 - The Board ruled that hospital's off-duty access policy violated employees' Section 7 Rights:
 - The policy prohibited off-duty employees from entering the hospital unless they were visiting a patient, receiving medical treatment, or conducting "hospital-related business."
 - Hospital defined "hospital-related business" as "the pursuit of the employee's normal duties or duties as specifically directed by management."
 - The Board was concerned with the "specifically directed by management" clause.

Sodexo America, LLC Case (cont.)

- The Board further found that the policy provided the hospital with “unlimited discretion to decide when and why employees may access the facility.”
- The Board reasoned that:
 - The rule, on its face, prohibited employees access for the purpose of engaging in PCA, while permitting access for other reasons as specified by management.
 - Such a policy lacked uniformity in that it did not prohibit off-duty access entirely, only when it was not specifically directed by management.
 - Gave employer unlimited right to establish the terms of off-duty access.

What Is Hot!

Employee's Right To Use Company Email To Engage In PCA

- *Purple Communications, Inc.*, 361 NLRB No. 126 (2014)
 - NLRB held that employees are presumptively permitted to use their employer's email systems during non-work time for Section 7 activities if employers give employees access to their email systems.
 - Overrules 2007 decision in *Register Guard* "to the extent it holds that employees can have no statutory right to use their employer's email systems for Section 7 purposes."

Arbitration of Class-Wide Claims

- *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011)
 - Supreme Court upheld the waiver of class claims under the Federal Arbitration Act
- *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012)
 - Board in a 2-0 decision ruled NLRA bans employers from including class action waivers in their employment arbitration agreements.
 - Fifth Circuit overturned and refused to rehear it on banc
- *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014).. Board ruled stood by its decision in the *D.R. Horton*, and again stated that class-action lawsuits are protected under the NLRA. The decision rebuffs the findings of the Fifth Circuit, as well as similar ruling made at the Second and Eight Circuits

NLRB Appointments: *Noel Canning*

- *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014)
- Court unanimously affirmed Circuit Court's decision and sets aside the NLRB's order in *Noel Canning*
 - As can be seen from *Banner Health*, the decision has the potential to set aside a number of cases, in fact, order setting aside *Banner Health* set aside a number of other Board decision

Pacific Lutheran Univ., 361 NLRB No. 157 (2014)

- Decided in December 2014 and addressed religious exemption
 - NLRB said that a religious college would need to show that "it holds out the petitioned-for faculty members as performing a religious function. This requires a showing by the college or university that it holds out those faculty as performing a specific role in creating or maintaining the university's religious educational environment."