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Renewed scrutiny: Focus on 'concerted activity' increases litigation against nonunionized employers

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In his convention speech on the occasion of his second nomination, President Barack Obama — reprising FDR's New Deal populism — proclaimed that his administration would engage in "bold, persistent experimentation" in government.

The National Labor Relations Board has aggressively taken this principle to heart.

Importantly, the Obama Board has focused its efforts on unprecedented outreach efforts to ensure that the full range of its remedial authority is known and available to workers who are not already organized as union-represented union members.

The National Labor Relations Act, administered and interpreted by the Board, is known primarily to govern employer-union relations and bargaining. Separately, however, Section 7 of the Act also guarantees the right of *all* covered workers, unionized or not, to engage in "concerted activities" for "other mutual aid or protection."

The scope of this protection, particularly to counsel who do not focus on the arcanities of the Act, is less than obvious.

'Chilling effect'

Nowhere has the Board been more aggressive than in its scrutiny of employer rules and practices that arguably have a "chilling effect" on Section 7 rights, and its expansion of this doctrine.

Whether a rule has a proscribed effect depends on whether:

(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.

Work policies that may (according to the Board) be "reasonably construed" by workers to interfere with Section 7 rights are subject to particular scrutiny.

In *Supply Technologies LLC*, the nonunion employer adopted a dispute resolution policy requiring employees to arbitrate "any claim of any kind against Supply Technologies, Inc. … includ[ing] … claims under any federal state or local statute."

The Board held the policy invalid, concluding that "reasonable employees … would understand it to restrict their right to file unfair labor practices charges or otherwise access the Board's processes."

In other cases, the Board has invalidated ADR policies prohibiting workers from pursuing "class action" claims.

Garden-variety "employment at-will" disclaimers similarly have received fresh attention. While in two "Advice" memoranda the Board has "clarified" its position, those memoranda suggest that employers maintaining at-will policies (the great majority of private employers, virtually all of whose employees are *not* represented by unions) might do well to examine the specific language used.

Specifically, in its *Mimi's Café* Memorandum, the Board reviewed a policy stating that "[n]o representative of the Company has authority to [alter its] 'employment at will' relationship." The Board found no violation, reasoning that "there is no indication that the Employer promulgated its policy in response to union … activity."

The Board distinguished, but did not reject, a much-criticized ALJ decision (*American Red Cross*) ruling the following similar policy unlawful: "I further agree that the at-will employment relationship cannot be amended, modified, or altered in any way."

The Board in the Advice Memorandum concluded that "the provision in *American Red Cross* more clearly involved an employee's waiver of his Section 7 rights than the handbook provision" in *Mimi's Café*.

Social media

Employer policies regarding social media have received much attention. Many nonunion employers, however, will remain unaware of the reach of Board regulation, particularly in regard to enterprise reputation or "trade dress" concerns.

For example, in *Costco Wholesale Corp.*, the Board invalidated a rule prohibiting nonunion employees from electronically posting statements on social media sites that "damage the Company or damage any person's reputation."

The Board held that although the rule did "not explicitly reference Section 7 activity," it "clearly encompasses concerted communications protesting [Costco's] treatment of its employees.

"… In these circumstances," the Board held, "employees would reasonably conclude that the rule requires them to refrain from engaging in protected communications (i.e. those that are critical of [Costco] or its agents)."

'Collective Activity'

An element of the Section 7 rubric requires proof that activity was "collective." While a common understanding of the word includes participation by more than one employee, recent Board decisional authority suggests not.

In *Wyndham Resort Dev. Co.*, an employee questioned his supervisor about a newly-adopted dress code. He was not a member of a union. He did not consult with other workers before the incident.

The employee, known as the "Tommy Bahama shirt king," was specifically concerned that pursuant to the rumored new policy the resort was going to require male employees to tuck in their shirts.

Told that shirt-tucking might be expected of him, the worker stated to the supervisor in front of other employees, "I didn't sign up for this crap," and, "I don't need the money." A warning was issued, no other penalty was imposed.

The Board concluded that this outburst constituted protected "collective" activity. The Board inferred the worker's intent to speak on behalf of other employees (even though the discussion initially involved only the worker and his supervisor), because he "knew his fellow sales representatives' penchant for wearing Tommy Bahama shirts untucked, and thus he would reasonably suspect that his coworkers would disagree with the rule change even [though] he was [in fact] unaware of their actual discontent."

Unprecedented 'outreach'

As the past NLRB chairman states, "a right only has value when people know it exists." The Board has addressed this issue.

In 2012, the Board promulgated a requirement (subsequently enjoined) that all employers, unionized and not, post prescribed notices affirmatively advising workers of their right to engage in protected collective activity.

Not dissuaded, the Board in June of 2012 posted its own interactive website informing workers of their rights and NLRB enforcement activity, complete with a map displaying and describing successful prosecutions of violations of the Act.

No labor commentator expects this trend to be reversed in the remaining years of the Obama Board. Employers, organized or not, beware.

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