

## **Changes at The New NLRB May Affect Your Business**

Since 2009, the National Labor Relations Board (“NLRB”) and the NLRB’s General Counsel’s Office have both been controlled by Democratic appointees for the first time in over a decade. In the past year, the newly-reformed Board has taken unprecedented steps to regulate the national workforce in new ways, and reversed major Board precedent in ways that may have a significant impact on any company whether it is non union or union. This article will examine just a few of the notable changes at the NLRB in the past year.

### **Workplace Posters and Rulemaking**

In December, 2010, the NLRB caused a stir by announcing a proposed rule that would require all employers under its jurisdiction – union and non-union – to hang a poster notifying employees of their rights under the NLRA. The proposed poster would inform employees that they have the right to do any of the following:

- Collectively negotiate wages, hours, and other terms and conditions of Employment.
- Form, join, or assist a union.
- Discuss terms and conditions of employment with other employees.
- Take action with one or more co-workers to improve working conditions by, among other means, raising work-related complaints, seeking help from a union; and Strike and picket.

The Board’s notice further advises that it is illegal for an employer to retaliate against employees for engaging in union activities, to prohibit employees from soliciting for a union during non-work time and in non-work areas, and to question employees about union activities in a manner that discourages such activity. The poster would contain the Board’s web address and a toll-free number for workers to call if they believe their labor rights were being violated. Under the rule, an employer’s failure to post the notice would be considered an unfair labor practice.

The announcement of the proposed rule was not only surprising because of its scope (creating a requirement for nearly all U.S. employers), but because the Board was

proposing a rule at all. While the Board has the authority to promulgate regulatory rules, it has done so only once before in its 75-year history. The previous rule, created in 1988, governed a very specific issue – unit determination in acute healthcare facilities – and the rulemaking process involved four hearings in strategic cross-national locations, resulting in over 1,000 pages of testimony on the issue. This time, no one outside of the NLRB knew about the proposed rule until it was announced. Public comments were accepted for the statutorily-required period, but no hearings were held on the rule, and no other input from interested parties was sought.

The time frame for the public to submit comments about the rule ended on February 22, 2011. The NLRB has not provided any additional information about what changes may be made to the rule as a result of the comment period, or when a final rule is expected.

### **Facebook, Handbooks and Wrongful Termination at the NLRB?**

In October, 2010, the Board announced (via press release) that it had filed a complaint against a Connecticut corporation for retaliating against an employee engaged in concerted action under the NLRA. The employee's supposed protected activity? She was terminated for posting disparaging comments about a supervisor on Facebook. See Complaint and Notice of Hearing, American Medical Response of Connecticut, Inc., Case No. 34-CA-12576 (NLRB Region 34, October 27, 2010).

Following a customer complaint about her performance, the employee was asked to participate in an investigative review and requested representation from her union. *Id.* at 1-2. After her request was denied, she posted a negative remark about her supervisor on Facebook, which drew additional comments on her “wall” from some of her coworkers. *Id.* While the complaint included allegations regarding the denial of union representation, the NLRB's focus was on the company's employee handbook, which contained a

“Blogging and Internet Policy” that read, in part:

Employees are prohibited from making disparaging, discriminatory or defamatory comments when discussing the Company or the employee's superiors, co-workers and/or competitors.

*Id.* at 2. The NLRB alleged in its complaint that the employee “engaged in concerted activities with other employees by criticizing [her] supervisor...on her Facebook page.”

*Id.* at 3. The allegation of concerted activity was not connected in any way to the employee's union affiliation.

While the *American Medical Response (AMR)* matter settled before a hearing was conducted, the case shows that the NLRB is making restrictions in employers' social media and internet policies a priority. Indeed, this complaint marks a complete reversal of the interpretation of a nearly-identical social media policy by the previous General Counsel only a year prior. While the previous General Counsel saw no detriment to a social media policy restricting disparaging remarks, the *AMR* settlement required an agreement from the employer to scrap the blogging and internet policy at issue, and an acknowledgement that the policy interfered with employee's rights to discuss wages and other conditions of employment.

The Board's focus on social media policies means employers will have to be very cautious of how they control or manage what is said by their employees online. While employers absolutely must protect its public image, especially in this tenuous economic environment, over-reaching control may be considered an unfair labor practice by the Board, regardless of whether unions are involved.

### **Opening Up Objections to Failed Union Elections**

In two recent cases, *Austal USA, LLC*, 356 NLRB No. 65 (2010), and *Community Medical Center*, 355 NLRB No. 128 (2010), the Board reversed prior precedent, ruling that unfair labor practice allegations can be considered for setting aside a union election, even where those practices were not objected to in the official election objections. This ruling “effectively overruled” a previous case, *Super Operating Corp.*, 133 NLRB 241 (1961), which the new Board called an “anomaly”.

In *Super Operating Corp*, the Board ruled that union allegations of unfair labor practices that it claims interfered with the results of an election cannot be considered unless the union also raised those practices as official objections to the election. In *Austal USA*, an employee was discharged, allegedly for participating in a union organizing drive. Even though the unfair labor practice was not raised as an objection, the Board, relying on similar language in *Community Medical Center*, supra, held that “the interests of employee free choice require that the unfair labor practice allegations be considered as grounds for setting aside the election even though not specified in the election objections.” *Austal USA*, 356 NLRB No. 65. The Board then ruled that the union organizer’s discharge affected the election results, and approved of the decision to set aside the election.

### **Pro-Union Clothing Can Replace Uniforms**

Finally, in *Stabilus, Inc.*, 355 NLRB No. 61 (2010), the Board ruled that an employee’s right to wear pro-union garb extends even to the extent that the pro-union clothing replaces or supplants a required uniform. In *Stabilus*, an employee was prohibited from wearing a union t-shirt during a certification election, because the company had a handbook policy requiring all employees to wear shirts bearing the company name. The Board found that the policy in and of itself was overbroad, and was applied to the employees in a discriminatory manner. *Id.* In support of its radical rebalancing of the rights of management and employees, the Board noted that *Stabilus* had relaxed the policy in special circumstances in the past, such as the days following the terror attacks of September 11, 2001. *Id.*

### **What These Changes Mean for Your Business**

Through its actions, the Obama Administration’s NLRB has made clear that it intends to expand its traditional role. These changes in longstanding Board precedent are clearly geared toward giving unions a much more visible presence in work facilities, through notice posters, and relaxing of management prerogatives over issues like uniform or workwear rules. These shifts also mean that unions will have a much easier time

convincing the Board to set aside lost election results, and to carry a much more visible presence during organizing campaigns and elections through worker clothing and “concerted action” such as social media posts. Additionally, the *AMR* and *Stabilus* cases show a clear push by the Board to examine companies’ handbooks and other policies at an unprecedented level.

These are major shifts in Board policy that may have a serious impact on both union and nonunion employers. In particular, union membership for manufacturing employees has declined in the past two years, while productivity and overall output have increased. Given the focus on manufacturing’s involvement in the economic recovery, and the decline in membership, unions will likely use the new leeway granted by the Board to try and regain ground industry-wide. The Board’s very public willingness to prosecute issues for non-union employees could also embolden union supporters to bring charges long before a formal labor campaign has begun.

Additionally, as companies continue to improve their lean and other efficiency designs, care must be taken to ensure that changes in workforce policy or structure, including workwear rules, leave policies, etc., do not violate the NLRA’s protections. Employers (even non union employers) must also understand that, with the Board’s current stance on internet and communication policies, any employee commentary regarding changes in quotas, takt time, or other productivity expectations, whether at the water cooler or on a Facebook wall, may be protected “concerted activity” under the Act. If you believe an employee’s complaints about work changes warrant discipline, contact with an attorney knowledgeable about Board precedent is imperative.

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