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National Labor Relations Board Decisions Impacting Non-Union Private Employers

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I. Introduction

The National Labor Relations Board ("NLRB" or "Board") enforces the **National Labor Relations Act ("NLRA" or "Act")** which provides non-supervisory employees with the right to engage in "concerted activities for the purpose of collective bargaining *or other mutual aid or protection* (emphasis added)." 29 U.S.C. s. 157. In so doing, the Act covers all private sector employers "whose activity in interstate commerce exceeds a minimal level." *Jurisdictional Standards*, National Labor Relations Board. In this regard, while NLRB cases historically have arisen in the context of unionized employers and union organizing activity, now that only 6.9% of private sector employees in the United States are unionized, Board decisions during the current administration have delved significantly into the affairs of employers devoid of union activity. As a result, non-union private employers should consider the Board's impact in the following areas to avoid exposure to unfair

labor practice litigation and liability.

II. Class and Collective Action Arbitration Waivers

Early this year, the NLRB ruled that an employer violates the Act when it conditions employment on the signing of "an agreement that precludes [employees] from filing joint, class, or collective claims addressing their wages, hours or other working conditions" either through arbitration or litigation. *D.R. Horton, Inc.*, 2012 NLRB Lexis 11, *1 (Jan. 3, 2012). Thus, employers who want to maintain "superior bargaining power" by requiring non-supervisory employees to arbitrate individually can no longer do so without violating the NLRA. *Id*. at *20 (quoting *J.H. Stone & Sons*, 33 NLRB 1014, 1023 (1941). In making this determination, the Board asserted that deeming this form of agreement unlawful under the NLRA does not contradict the Federal Arbitration Act ("FAA"). While the Board's decision facilitates employees joining together against their employers, class and collective actions are more difficult, and more costly, for employers to defend.

However, the Supreme Court of the United States previously held that the FAA preempted a state rule deeming class-action waivers unconscionable in *AT&T Mobility LLC v. Concepcion*. 131 S. Ct. 1740 (U.S. 2011). The Supreme Court declared that the FAA exists "to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings," and that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration." *Id*. at 1748. Thus, in *D.R. Horton*, the Board placed itself in direct opposition to the Supreme Court's decision in *AT&T Mobility*.

Consequently, and fortunately for employers, courts have not responded well to the *D.R. Horton* decision, as numerous district courts "have declined to adopt its rationale altogether in the face of conflicting Supreme Court precedent, statutory schemes, and questions over its precedential value." *Tenet Healthsystem Phila., Inc. v. Rooney*, 2012 U.S. Dist. Lexis 116280, *10 (E.D. Pa. Aug. 14, 2012). In fact, *D.R. Horton* is currently on appeal to the United States Court of Appeals for the Fifth Circuit. *Carey v. 24 Hour Fitness USA, Inc.*, 2012 U.S. Dist. Lexis 143879, *3 (S.D. Tex. Oct. 4, 2012).

Regardless of the outcome of the D.R. Horton appeal, the result will undoubtedly impact the ability for private employers, union and non-union, to enforce arbitration agreements against their non-supervisory employees.

III. Social Media and Electronic Communication Policies

In September, the NLRB issued two decisions relating to employers' electronic communications policies and the actions taken in response to employees' internet activity. First, the Board ruled that portions of Costco Wholesale Corporation's Electronic Communications and Technology Policy violated the NLRA. *Costco Wholesale Corp.*, 2012 NLRB Lexis 534 (Sept. 7, 2012). The policy at issue stated, "[e]mployees should be aware that statements posted electronically [...] that damage the Company, defame any individual or damage any person's reputation, or violate the policies outlined in the [Employee Agreement], may be subject to discipline, up to an including termination of employment." *Id*. at *4-*5. The Board

reasoned that this violated the NLRA because employees could interpret the communications policy as prohibiting protected union activities.

Next, the NLRB tackled its first case concerning the termination of an employee for posting photos and comments on Facebook. *Karl Knauz Motors, Inc.*, 2012 NLRB Lexis 679 (Sept. 28, 2012). Although the Board ultimately ruled that the employee termination was lawful, it held that the employer's "courtesy rule" violated the NLRA. *Id*. at *3. The rule stated, "[c]ourtesy is the responsibility of every employee [...] No one should be disrespectful or use profanity or any other language which injures the image or reputation of the [employer]." *Id*. at *2. Again, the Board asserted that this language is overbroad and could chill employees right to engage in protected concerted activities.

With the prevalence of electronic messaging and social media in companies today, non-union employers should reevaluate their communications policies to ensure that they are not violating the NLRA with an overbroad policy. Even where no union is present, employers can commit unfair labor practices by maintaining electronic communications policies that could inhibit potential union activity.[1]

IV. Confidentiality Agreements

Employers also need to be conscious of overbroad confidentiality directives and agreements. The NLRB held that "an employer must show that it has a legitimate business justification that outweighs employees' Section 7 rights" to prohibit employee discussion. *Banner Estrella Med. Ctr.*, 2012 NLRB LEXIS 466, *7 (July 30, 2012). In *Banner*, when an employee submitted a complaint to human resources, he or she was asked "not to discuss the matter with their co-workers while the investigation [wa]s ongoing." *Id*. at *22. In addition, all employees signed a confidentiality agreement upon hire that listed "[p]rivate employee information (such as salaries, disciplinary action, etc.) that is not shared by the employee" as confidential information. *Id*.

The Board found that the employer violated the NLRA when human resources asked each employee who submitted a complaint not to speak about the investigation. The Board explained that a "blanket approach" to confidentiality is inappropriate and that an employer must evaluate situations on a case-by-case basis to determine that a legitimate business justification exists for prohibiting employee discussion. *Id*. at *8. Additionally, the NLRB upheld the finding of an Administrative Law Judge ("ALJ") that the employer's confidentiality agreement prohibiting employees from discussing salaries violated the Act.

As a result, employers should review confidentiality agreements and investigations procedures to make certain that employers are only forbidding employee discussion that is necessary to protect the business. Otherwise, employers may be violating the Act by requiring employees to sign or adhere to overbroad confidentiality agreements.

V. Limited Modification of the At-Will Relationship

Another type of employment agreement where employers need to be cautious is

employee acknowledgements of the at-will relationship that purport to prohibit, or substantially restrict, the ability to modify the at-will relationship. Specifically, an ALJ held that an employer's "Agreement and Acknowledgement of Receipt of Employee Handbook" violated the NLRA. *American Red Cross Ariz. Blood Servs. Region*, 2012 NLRB Lexis 43 (Feb. 1, 2012). In *American Red Cross*, the Agreement and Acknowledgment stated that the employee "agree[s] that the at-will employment relationship cannot be amended, modified or altered in any way." *Id*. at *63. The ALJ concluded that employees could construe this clause as prohibiting protected union activity by agreeing "not to enter into any contract, to make any efforts, or to engage in conduct that could result in union representation and in a collective-bargaining agreement, which would amend, modify, or alter the at-will relationship." *Id*. at *66. Thus, the employer violated the Act due to its "overly-broad and discriminatory" language. *Id*. at *74.

While a general prohibition on modifying the at-will employment relationship violates the NLRA, an employer's attempt to limit the method in which the at-will relationship can be altered may also violate the Act. In *NLRB v. Hyatt Hotel Corp.*, the Board filed an unfair labor practice complaint against Hyatt Hotels in Phoenix, Arizona declaring its at-will provision overbroad. The provision at issue contained an employee acknowledgement, stating that "no oral or written statements or representations regarding my employment can alter my at-will employment status, except for a written statement signed by me and either Hyatt's Executive Vice-President/Chief Operating Officer or Hyatt's President." However, before reaching a hearing, the parties settled.

Accordingly, employers should be cognizant of the provisions employees sign upon hire, as well as any revisions to those provisions. Although an employer may favor a broadly written agreement, it could subject the employer to exposure to unfair labor practice liability.[2]

VI. Potential Notice Posting Requirement

Finally, the NLRB has tried to implement a notice-posting rule entitled "Notification of Employee Rights under the National Labor Relations Act" since August 30, 2011. *National Ass'n of Mfrs. v. NLRB*, 846 F. Supp. 2d 34, *39 (D. D.C. March 2, 2012). This rule would require employers, including non-union employers, to post an eleven-by-seventeen inch poster in a prominent place to inform employees of their rights under the NLRA. The rule would also require employers who use the internet for employee materials to place a copy of the notice on employers' intranet or website. And, the notice-posting rule would deem an employer's failure to post the notice an unfair labor practice under Section 8(a)(1) of the NLRA.

However, contrary to the current Board's intent, implementation of this rule is on hold. In *National Association of Manufacturers*, plaintiffs challenged the Board's promulgation of the notice-posting rule, alleging that it violated the Administrative Procedure Act. While the United States District Court of the District of Columbia held that the Board's requirement for employers to post the notice was lawful, the court also held the NLRB's declaration that a failure to do so constituted an unfair labor practice was not.

The United States District Court for the District of South Carolina went a step farther and declared the entire NLRB notice-posting rule unlawful, reasoning that the Board lacked authority to execute the rule under the Administrative Procedure Act in the first place. *Chamber of Commerce v. NLRB*, 2012 U.S. Dist. Lexis 52419, *52 (D. S.C. April 13, 2012). And, although the *National Association of Manufacturers* case ruled the notice-posting requirement lawful, the United States Court of Appeals for the District of Columbia granted an emergency motion to enjoin the NLRB's implementation of the rule until the "court resolves all of the issues on the merits." *National Ass'n of Mfrs. v. NLRB*, 2012 U.S. App. Lexis 10768, *4 (D.C. Cir. April 17, 2012). The court heard oral argument on September 11.

Regardless of the outcome of this appeal, the result will undoubtedly affect private employers, both union and non-union.[3] Therefore, companies should be aware of a potential decision requiring another obligation on the part of the employer even where no union is present or active.

VII. Conclusion

Not only do the recent NLRA decisions (and upcoming appeals) affect unionized employers, but they also affect non-union employers by generating additional areas where unfair labor practices may arise. In response, all private employers, union and non-union alike, would be wise to reevaluate company policies and procedures to insure that they comply with the NLRA.

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1 The Associate General Counsel for the National Labor Relations Board, in an advice memorandum dated October 19, 2012, concluded that an employer's social medial policy was lawful. Specifically, the Associate General Counsel noted that a savings clause ensured that employees would not interpret the social media policy as prohibiting protected concerted activities.

2 On October 31, 2012, the Acting General Counsel for the National Labor Relations Board issued two advice memoranda upholding employers' at-will employment policies. The Acting General Counsel distinguished the two policies from the policy at issue in American Red Cross because the at-will provision worded in the first person in American Red Crossconstituted a waiver of employee rights.

3 Despite the United States Court of Appeals' order staying implementation of the notice-posting requirement, the poster is already included in some "all-in-one" labor law posters sold to employers. Thus, employers may be displaying a notice they are not legally obligated to post.