

RECENT NATIONAL LABOR RELATIONS BOARD (NLRB) DECISIONS AND NON-UNION EMPLOYERS

**Calvasina, Gerald E.
Southern Utah University**

**Calvasina, Richard V.
University of West Florida**

**Calvasina, Eugene J.
Southern University**

ABSTRACT

In recent years the NLRB, through decisions issued by the board and initiatives instigated by the NLRB's General Council, has become increasingly focused on non-union employers. A wide range of employer policies and practices have come under NLRB scrutiny. Most recently, numerous efforts by the Board and the General Council have been directed at protecting what many consider the heart of the National Labor Relations Act, Section 7. Section 7 of the Act provides employees of employers engaged in interstate commerce the right to engage in protected concerted activities for the purpose of collective bargaining or other mutual aid or protection. The purpose of this paper is to identify and assess recent NLRB decisions and General Council initiatives directed primarily at non-union employers and how these employers might respond.

INTRODUCTION

In recent years the NLRB, through decisions issued by the board and initiatives instigated by the NLRB's General Council, has become increasingly focused on non-union employers. A wide range of employer policies and practices have come under NLRB scrutiny, and the NLRB's focus on non-union employers continues to take many of these employers by surprise especially small businesses (Thornton, 2010). The long running decline in union membership and organizing activity in the private sector are partially responsible for some of the surprise. Another is the ever increasing regulatory burden associated with the management of an organization's human resources that employers of all sizes have had to contend with in recent years.

While only 5% of the NLRB's case load has involved non-union concerted activity, current NLRB Chairman Mark Gaston Pearce believes that the right of non-union employees to engage in concerted activity is "one of the best kept secrets of the National Labor Relations Act" (NLRB, 2012 - A). The following quote from the NLRB's web site designed to inform employees in non-union environments of their rights underscores the current Board's approach to enforcing Section 7 of the NLRA.

The law we enforce gives employees the right to act together to try to improve their pay and working conditions or fix job-related problems, even if they aren't in a union. If employees are fired, suspended, or otherwise penalized for taking part in protected group activity, the National Labor Relations Board will fight to restore what was unlawfully taken away (NLRB, 2012 - A).

Chairman Pearce goes on to note that “a right only has value when people know it exists” to further emphasize the Board’s intent to reach out to employees in non-union environments. While this focus by the Board has been viewed by many as being more hostile toward non-union employers in recent years, employers should be reminded that congressional intent in enacting the NLRA in 1935 was to promote the use of collective bargaining as a means to help stabilize an American economy that was still trying to emerge from the great depression.

The purpose of this paper is to identify and assess recent NLRB decisions and General Council initiatives directed primarily at non-union employers and how these employers might respond.

POLICY AND PRACTICE ISSUES UNDER NLRB SCRUTINY

Policy and practices that have come under NLRB scrutiny in the last two years are noted in Table 1.

Table 1

<p>Notice Requirements – NLRB proposed rule (12/21/2010)</p> <p>Union Organizing Procedures – Proposed election rule changes (December 2011).</p> <p>Confidentiality of HR Investigations – Banner Estrella Medical Center case (7/30/2012).</p> <p>Off-duty access – Sodexo American LLC case (7/3/2012) & J.W. Marriott ((9/28/2012).</p> <p>Employee Handbook Language – Costco and Knauz BMW cases (September 2012).</p> <p>At-will employment provisions in handbooks – American Red Cross Arizona Blood Services Region case (2/1/2012).</p> <p>Mandatory Arbitration Clauses – D.R. Horton, Inc. case (1/3/2012) & Advanced Services Inc. (2012).</p> <p>Social Media and Concerted Activity – NLRB General Counsel Report (5/30/12).</p>
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NOTICE REQUIREMENTS AND UNION ORGANIZING PROCEDURES

The first two initiatives from the NLRB directed at non-union employers involved the development of new rules. The Employee rights notice posting rule was directed at most private sector employers and would require those employers to post a notice advising their employees of their rights under the National labor Relations Act. This requirement is similar to requirements associated with most federal laws that regulate employment decision making in the private sector. Under this rule, employers would also be required to publish a link to the notice on an internal or external website if other personnel policies or workplace notices are posted there. The rule was to become effective on April 30, 2012 but, on April 17, 2012 the DC Circuit Court of Appeals

temporarily enjoined the NLRB's rule and according to the NLRB the rule will not take effect until legal issues are resolved (NLRB, 2012 - B).

In December of 2011, the NLRB adopted a new rule amending its election case procedures. The new rule, often referred to as the "quickie election rule", was focused on procedures followed by the NLRB in cases in which parties could not agree on issues such as whether the employees covered by the election petition are an appropriate voting group. The NLRB contended that this rule would help reduce unnecessary litigation and delays and would only apply to a limited number of cases where the parties could not agree on the appropriate bargaining unit (NLRB, 2012 - C). A DC District Court decision on May 14, 2012 invalidated the rule and the NLRB suspended implementation of the rule pending an appeal (Lyman, 2012).

CONFIDENTIALITY OF HR INVESTIGATIONS

On July 30, 2012, in the Banner Health System and James A. Navarro NLRB decision, the board found that the employer's policy of routinely asking employees making a complaint not to discuss the matter with their co-workers while the investigation was underway violated the employees' rights to engage in protected concerted activity under Section 7 of the NLRA (Russ, 2012). In this decision, the NLRB concluded that Banner Health System violated Section 8(a)(1) of the NLRA by "maintaining and applying a rule prohibiting employees from discussing ongoing investigations of employee misconduct" (Banner Health System and Navarro, 2012). The NLRB found that a human resource consultant who routinely asked employees making a complaint not to discuss the matter with their coworkers while the employer's investigation was ongoing to be interference with the exercise of their Section 7 rights to engage in concerted activity. The NLRB further noted that the employer's generalized concern with protecting the integrity of its investigations was not sufficient to outweigh the employee's Section 7 rights. Additionally, the NLRB determined that the employer had the burden to first determine whether in any given investigation witnesses needed protection, evidence was in danger of being destroyed, testimony was in danger of being fabricated or there was a need to prevent a cover up in order to substantiate its claim of protecting the integrity of its investigations (Banner Health System and Navarro, 2012).

Shortly after the NLRB decision in the Banner Health System case, an Equal Employment Opportunity Commission (EEOC) office in Buffalo, New York issued a pre-determination letter to an employer also addressing confidential workplace investigations and their impact on an employee's right to "protected opposition" (Russ, 2012). This letter from the EEOC has been widely viewed as consistent with the NLRB's position regarding the confidentiality of workplace investigations. Numerous attorneys have been cited in the literature predicting a host of problems for employers attempting to conduct effective investigations in responding to employer complaints (Greenwald, 2012).

OFF-DUTY ACCESS RULES

In the Sodexo American LLC decision, the NLRB ruled that a rule that permits off-duty employees to enter the Hospital only if they are visiting patients, are patients themselves, or are conducting "hospital-related business" violates Section 8(a)(1) of the NLRA (Sodexo American LLC, 2012). The decision in the Sodexo American LLC case followed a 2011 NLRB decision in Saint John's Health Center where a similar rule regarding off-duty employee access to the facility was also found to be in violation of the NLRA (Saint John's Health Center, 2011). In both of these cases, the NLRB relied on its 1976 ruling in Tri-County Medical Center (Tri-County Medical Center, 1976). The NLRB in the Tri-County case developed a three-part test to determine the legality of an off-duty employee access policy:

the Board held that an employer's rule barring off-duty employee access to a facility is valid only if it limits access solely to the interior of the facility, is clearly disseminated to all employees, and applies to off duty access for all purposes, not just for union activity (Sodexo American LLC, 2012).

In the Sodexo case, the NLRB determined that similar to what the Board saw in the Saint John's case, that "it gives the employer unlimited discretion to decide when and why employees may access the facility" and that this violates Section 8(a)(1) of the NLRA because the policy "does not uniformly prohibit access to off-duty employees seeking entry to the property for any purpose" (Sodexo American LLC, (2012).

In the J.W. Marriott case, the Board found the hotel's rule regarding off-duty employee access to interior areas of the hotel or to hotel property without managerial approval to be unlawful. The Board concluded that requiring management permission for access "invites reasonable employees to believe that Section 7 activity is prohibited without prior management permission" (Marriott International, Inc. and Unite Here, 2012). The Board went on to note:

Indeed, because all access is prohibited without permission, it does more than merely invite that belief: it compels it. In turn, employees would reasonably conclude that they were required to disclose to management the nature of the activity for which they sought access—a compelled disclosure that would certainly tend to chill the exercise of Section 7 rights (Marriott International, Inc. and Unite Here, 2012).

Attorneys at Morgan, Lewis, & Bockius, an international law firm, believe that "failure to ban reentry for all purposes will open the door to challenge should an employee or union file an unfair labor practice (Broderdorf, Santucci, Fritts, Davis, & Cohen, 2012).

EMPLOYEE HANDBOOKS

The NLRB has addressed a number of provisions commonly found in non-union handbooks. In the Costco and Knauz cases, the NLRB addressed handbook provisions that dealt with the protection of confidential information and a rule requiring workplace courtesy. In Costco, the Board found that the company violated Section 8(a)(1) of the act by maintaining rules stating that:

(a) "unauthorized posting, distribution, removal or alteration of any material on Company property" is prohibited; (b) employees are prohibited from discussing "private matters of members and other employees . . . including topics such as, but not limited to, sick calls, leaves of absence, FMLA call-outs, ADA accommodations, workers' compensation injuries, personal health information, etc."; (c) "sensitive information such as membership, payroll, confidential financial, credit card numbers, social security number or employee personal health information may not be shared, transmitted, or stored for personal or public use without prior management approval"; and (d) employees are prohibited from sharing "confidential" information such as employees' names, addresses, telephone numbers, and email addresses (Costco, 2012).

The NLRB went on to find that Costco violated the NLRA by "maintaining a rule prohibiting employees from electronically posting statements that "damage the Company . . . or damage any person's reputation" (Costco, 2012).

In the Knauz case, the NLRB determined that Knauz BMW violated Section 8(a)(1) of the NLRA by maintaining a rule in its employee handbook stating the following:

(b) Courtesy: Courtesy is the responsibility of every employee. Everyone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership (Karl Knauz Motors, Inc., 2012).

The NLRB concluded that the “Courtesy” rule was unlawful because:

employees would reasonably construe its broad prohibition against “disrespectful” conduct and “language which injures the image or reputation of the Dealership” as encompassing Section 7 activity, such as employees’ protected statements—whether to coworkers, supervisors, managers, or third parties who deal with the Respondent—that object to their working conditions and seek the support of others in improving them (Karl Knauz Motors, Inc., 2012).

The Costco and Knauz decisions together with the three guidance memoranda from the Acting General Counsel have been viewed as a clear indication of the NLRB’s “aggressive” posture toward non-union employers (Davis, Fritts, Friedman, & Broderdorf, 2012).

AT-WILL EMPLOYMENT PROVISIONS

The issue of employers’ at-will disclaimers running afoul of the NLRA was addressed in two recent cases. In the American Red Cross of Arizona case, an NLRB Administrative Law Judge (ALJ) concluded that the Red Cross violated Section 8(a)(1) of the NLRA by maintaining an overly-broad and discriminatory provision in its “Agreement and Acknowledgement of Receipt of Employee Handbook” form. Specifically, the ALJ noted the following language as being unlawful under the NLRA: “I further agree that the at-will employment relationship cannot be amended, modified or altered in any way” (American Red Cross Arizona Blood Services Region and Lois Hampton, 2012).

In a second case, *NLRB v. Hyatt Hotel Corp.*, the NLRB’s acting General Counsel filed an unfair labor practice charge against Hyatt alleging that provisions in its at-will disclaimer violated the NLRA because it required employees to acknowledge that their at-will employment status could not be altered “except for a written statement signed by me and either Hyatt’s Executive Vice-President/Chief Operating Officer or Hyatt’s President” (Hyatt Hotels Corp and Unite Here International Union, 2012). Hyatt and the NLRB agreed to settle the complaint with Hyatt agreeing to revise its at-will provisions and requirements and to inform employees that the at-will language at issue would no longer be in effect (Perry, 2012).

MANDATORY ARBITRATION AGREEMENTS

In the D.R. Horton, Inc. and Michael Cuda case, the NLRB ruled that the employer’s “Mutual Arbitration Agreement” (MAA) contained provisions that violated Section 8(a)(1) and 8(a)(4) of the NLRA (D.R. Horton and Michael Cuda, 2012). D.R. Horton required employees to execute the MAA as a condition of employment. The relevant parts of the MAA that the NLRB examined included:

that all disputes and claims relating to the employee’s employment with Respondent (with exceptions not pertinent here) will be determined

exclusively by final and binding arbitration;

that the arbitrator “may hear only Employee’s individual claims,” “will not have the authority to consolidate the claims of other employees,” and “does not have authority to fashion a proceeding as a class or collective action or to award relief to a group or class of employees in one arbitration proceeding”; and

that the signatory employee waives “the right to file a lawsuit or other civil proceeding relating to Employee’s employment with the Company” and “the right to resolve employment-related disputes in a proceeding before a judge or jury”(D.R. Horton and Michael Cuda, 2012).

The NLRB concluded that the MAA required all employment-related disputes to be resolved through individual arbitration, and that the right to a judicial forum was waived. Further, the NLRB viewed the MAA as requiring employees to agree, as a condition of employment, that they would not pursue class or collective litigation of claims in any forum, arbitral or judicial (D.R. Horton and Michael Cuda, 2012). The Administrative Law Judge found, and the NLRB agreed, that D.R. Horton’s MAA would require employees, as a condition of employment, “to submit all employment related disputes and claims to arbitration..., thus interfering with employee access to the NLRB” (D.R. Horton and Michael Cuda, 2012). The ALJ and the Board also found that the language in the MAA would lead employees to reasonably believe that they were prohibited from filing unfair labor practice charges with the NLRB.

SUMMARY AND RECOMMENDATIONS

For many non-union employers, the last three years have been a very illuminating time with respect to the application of the NLRA to their workplaces. Many common human resource management policies and practices have come under scrutiny by a federal agency that many of these firms were, unfortunately, not prepared to deal with. Policies, practices, and rules dealing with off-duty access to facilities, confidentiality of workplace investigations, and common handbook disclaimer statements have come under scrutiny of the NLRB, and in many of those cases, the NLRB has concluded that these policies, practices, and rules interfere with the right of employees to engage in protected concerted activity. The right that eligible employees in covered organizations have to engage in concerted activity is one that NLRB Chairman Mark Gaston Pearce believes “is one of the best kept secrets of the National Labor Relations Act”, and that “a right only has value when people know it exists”(NLRB – A, 2012). Pearce’s statements were included in the NLRB Office of Public Affairs notice announcing the launching the NLRB’s web page describing protected concerted activity signaling the NLRB’s current leadership agenda to encourage employees to utilize the NLRB in what Pearce called “these difficult economic times” (NLRB – A, 2012). Pearce went on to state that the hope of the agency in launching the webpage was “that other workers will see themselves in the cases we’ve selected and understand that they do have strength in numbers” (NLRB – A, 2012).

As for advice to employers the common theme from the management side of the legal profession, is to employ resources to audit and adjust policies and rules to control employee behavior contained in handbooks and on their webpages. This is not new advice, but it is not unusual for these types of policies to go under the radar, especially with small non-union employers. Social media policies in general have been a lightning rod for NLRB scrutiny recently, and employers are advised to pay particular attention to the recent advice memos from the NLRB’s General Counsel Office on these policies. With respect to social media policy, employers are cautioned to “be specific” as possible and that overly broad terms like “appropriate” or “inappropriate

communications without the use of limiting language or examples of what would be considered inappropriate” are likely to not pass muster with the NLRB (Melick & Wall, 2012).

With respect to the confidentiality of investigations, the NLRB has held that employers cannot have “blanket” confidentiality rules with respect to workplace investigations. The NLRB held that “to justify a prohibition on employee discussion of ongoing investigations, an employer must show that it has a legitimate business justification that outweighs employees’ Section 7 rights (Banner Health System and Navarro, 2012). With respect to at-will disclaimers the notion of overly-broad language should also be avoided. In the American Red Cross case, the ALJ concluded that the “overly- broad and discriminatory provisions” in the receipt of employee handbook form restricted employees’ ability to exercise their Section 7 rights and thus violated the NLRA (American Red Cross Arizona Blood Services Region and Lois Hampton 2012).

CONCLUSION

At this point, non-union employers are still faced with a great deal of uncertainty. The NLRB notice requirements and “quickie election” rules are still undergoing judicial review. Some of the recent cases decided by ALJs and the Board may also come under judicial review. Additionally, the results of the presidential election may also impact the NLRB’s focus on non-union employers in the future.

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