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NLRB Activity Heats Up This Summer

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The acting general counsel for the National Labor Relations Board (NLRB), Lafe Solomon, has addressed a number of workplace topics, including social media policies, at-will employment statements and class action waivers in arbitration agreements. In addition, a new NLRB webpage describes the rights of employees, even if they are not in a union. Both of these activities demonstrate that the labor watchdogs are not taking a summer vacation – and neither should diligent employers.

Social Media Policies

On June 11, 2012, Solomon said approximately 100 social media-related unfair labor practice charges were pending at the NLRB. This should not be surprising news for anyone following the agency's activity over the past year. Since August 2011, the NLRB has issued three guidance memoranda on the issue. In these memoranda, the acting general counsel explains what social media actions are protected by the National Labor Relations Act (the Act) and what types of employer policies on social media violate the Act. Notably, Solomon pointed out that his most recent memorandum (issued May 30, 2012) contained the full text of an approved social media policy and provided guidance for employers struggling to develop guidelines that would withstand a challenge under the Act.

At-Will Employment Statements

Solomon also talked about employers' use of at-will disclaimers in employee handbooks. Specifically, he discussed a controversial complaint issued earlier this year by the NLRB in Phoenix, Ariz. The complaint alleged that a number of an employer's policies were unlawful, including an at-will statement similar to those used by employers nationwide. Solomon explained that he did not approve of this complaint before it was issued, but rather became aware of it later. He stated that, in his view, an employer would not violate the Act if the employer simply told its employees that they were employed at-will. He

suggested that it would also not be unlawful for an employer to tell its employees that the at-will nature of their employment cannot be changed by an oral statement alone. Solomon explained that this particular employer's at-will statement went too far because it implied that unionization would not change an employee's at-will status.

Many employers agree to "just cause" provisions in collective bargaining agreements with unions, which alter the at-will status of employment. For this reason, Solomon said, the employer at issue in the Arizona case was in potential violation of the Act. Solomon said the case had been settled, so the NLRB's theory would not be further tested at this point.

Class Action Waivers

Finally, Solomon addressed the recent conflict between the NLRB's decision in *D.R. Horton*, which held that an employer's arbitration agreement violates the Act when it requires employees to waive the right to arbitrate as a class, and the U.S. Supreme Court's decision in *AT&T Mobility v. Concepcion*, where the court held that the Federal Arbitration Act authorizes precisely such waivers. Solomon stated that he saw no conflict between the decisions because, in his view, the Act pre-empts the Federal Arbitration Act. He did acknowledge, however, that most federal courts considering the issue disagreed, holding instead that *Concepcion* overrode *D.R. Horton*.

NLRB's New Webpage Defines "Protected Activity"

On June 18, 2012, the NLRB launched a new page on its website that describes the rights of employees who act together, even if they are not in a union. The new page, at www.nlrb.gov/concerted-activity, defines the term "protected, concerted activity" as the term is used in the Act. On the webpage, the NLRB explains:

"The [National Labor Relations Act] 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. These rights were written into the original 1935 National Labor Relations Act and have been upheld in numerous decisions by appellate courts and by the U.S. Supreme Court."

The webpage then provides summaries of more than a dozen cases involving protected, concerted activity, which can be viewed by clicking on pins on a map of the United States. For instance, the pin atop St. Louis, Mo., represents a complaint filed by a customer service representative who was fired by her employer for discussing her wages with another employee. In this case, the employer discharged the employee for violating a company policy that forbade employees from sharing such

information. The NLRB found the company's policy unlawful because discussing wages with a co-worker is protected activity under federal law.

The webpage informs users that "[w]hether or not concerted activity is protected depends on the facts of the case," and it provides a phone number of an information officer who will advise the caller as to whether specific workplace conduct constitutes protected activity under federal law.

What This Means to You

Recent NLRB statements regarding employers' social media policies, at-will employment disclaimers and class action waivers should serve as a reminder to employers who have not updated their policies in recent years that such updates may now be warranted. At a minimum, employers are encouraged to review their social media policies and ensure that they are narrowly tailored to the employer's business needs and corporate culture. At-will statements must not be overly broad or imply that unionization would be futile for employees. Other policies should also be reviewed with an eye toward employees' rights under the Act. This way, employers may be able to avoid unfair labor practice charges alleging that the employer is impinging upon employee rights.

Through its new webpage, the NLRB is obviously seeking to make it easier for workers to find out whether they have been unlawfully disciplined by their employers for engaging in protected, concerted activity, and, if so, file a complaint against their employer with the NLRB. Employers should peruse the webpage and be aware of the information that the labor agency is providing to employees. Employers concerned about their policies should work with counsel to modify such policies rather than wait to react to an employee's complaint. In addition, employers with unionized workforces must also be aware that, in addition to filing grievances, their employees may file complaints with the NLRB. The agency's recent statements regarding unlawful employer policies – combined with its new webpage – demonstrate that the NLRB is clearly seeking to take a more active role in everyday workplace issues. Employers are encouraged to be aware of the NLRB's recent initiatives and be proactive in response.

Contact Info

Should you have questions, please contact your Husch Blackwell attorney.

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