NLRB Activity in 2016: Understanding Trends in Agency Action

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Introduction

- The NLRB has rapidly become one of the most active federal agencies focused on the reformation of traditional employment law.
- The current makeup of the board has implemented a number of changes to long-standing board precedent that impacts both union and non-union workforces.
- Likely a result of political gridlock and seen as an end-run on a Congress that does not support the objectives of the current Executive branch.

Introduction

- The National Labor Relations Act (NLRA) provides the right for all employees to band together and collectively bargain with their employers (unionizing) or to discuss the terms and conditions of their employment.

- We refer to these latter rights as “Section 7” or rights to engage in “concerted activity.”

Introduction

- Under broad policy interpretations of those rights, the NLRB has issued controversial decisions on a number of topics:
  - Joint Employment.
  - Employer Policies (at-will employment; civility; confidentiality)
  - Strike Protection.
  - And many, many more.

Introduction

- All employees have the right under Section 7 of the NLRA to engage in “concerted activity” about their terms and conditions of employment.
- It is clear that the NLRB is attempting to broaden its authority into non-unionized workplaces through an expanded interpretation of Section 7.
- Employers should be aware of the NLRB’s ongoing campaign against what previously have been considered lawful policies.

Social Media

- Beginning in about 2010, the NLRB began to show interest in social media posts by employees as potential exercise of Section 7 "concerted activity."

- Several cases made immediate headlines with surprising results – finding a number of questionable posts to be protected conduct.

- Recent trends in social media cases have resulted in some shocking expansion of those original goals.

Social Media

- Pier Sixty, LLC, 362 NLRB No. 59.
- New York-based catering company providing full-service event planning for private functions.
- During a pending organization campaign, an event resulted in conflict between a manager and an employee, as the manager attempted to direct a group of employees. The employee claimed the manager told them to “stop chit-chatting” and later used a “harsh tone of voice,” ordering them to “spread out” and “move!”

Social Media

- The employee takes his frustration to Facebook:

  "Bob is such a NASTY MOTHER F*CKER don't know how to talk to people!!!!!! F*ck his mother and his entire f*cking family!!!! What a LOSER!!!! Vote for the UNION!!!!!!"

Social Media

- Both the ALJ and NLRB found in favor of the employee.

- Both found that (1) The employee's Facebook post was a protected exercise of Section 7 "concerted activity" rights **and** (2) that his specific conduct was **not** sufficiently egregious, serious or violent to lose its protected character under previous NLRB precedent.

Social Media

- ALJ and NLRB concluded that **all four factors of the *Atlantic Steel*** supported the employee:
  - Not "public" – no risk of disruption to operations
  - Post was meant to communicate to other employees about a legitimate complaint against a manager
  - Offensive and obscene language not directed at the manager, did not involve insubordination, physical threats, or intimidation, and profanity was a regular occurrence at this employer
  - Failure to consent to union election and union demands showed animus and provocation

Employer Policies

- Recently, a series of NLRB cases has criticized employer policies in a variety of contexts.
- Even innocuous, conventional policies like anti-harassment policies are subject to attack by the current version of the NLRB.
- Consolidated Communications, Inc. v. NLRB, IBEW, Case No. 14-1135 (D.C. Cir. Sept. 13, 2016).

Employer Policies

- Company and IBEW entered into collective bargaining negotiations, which ultimately failed.
- IBEW called for a strike, which lasted four days.
- According to the employer, the picket line saw some of the quintessential behaviors that are typical of a strained labor relationship.
- Several striking employees were disciplined for violations of company policies prohibiting workplace violence and harassment for conduct directed at non-striking employees.

Employer Policies

- The union filed unfair labor practice charges, and the NLRB ultimately ruled in favor of each of the employees.
- The employer appealed, and the D.C. Circuit Court criticized the NLRB for its decisions.

Employer Policies

- Under the NLRA, an employer ordinarily must reinstate striking employees at the conclusion of a strike.
- However, “serious misconduct by strikers is not protected by the Act,” and an employer’s imposition of “reasonable discipline, including the refusal to reinstate employees for such misconduct, does not constitute an unfair labor practice.”

Employer Policies

- An employer's discipline of an employee for strike conduct constitutes an unfair labor practice if:
  - (i) "the discharged employee was at the time" of the alleged misconduct "engaged in a protected activity,"
  - (ii) the employer knew the employee was engaged in a protected activity,
  - (iii) the alleged misconduct during that protected activity provided the basis for discipline, and
  - (iv) the "employee was not, in fact, guilty of that misconduct."

Employer Policies

- Not all misconduct is sufficient to disqualify a striker from the Act's protection, however.
- Not every incident occurring on the picket line, though harmful to a totally innocent employer, justifies refusal to reemploy a picketing employee for acts that exceed the bounds of routine picketing.
- "Clearly some types of impulsive behavior must have been within the contemplation of Congress when it provided for the right to strike."

Employer Policies

- Striker misconduct justifies an employer's disciplinary action if, "under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act," including the right to refrain from striking.

Employer Policies

- One employee, Eric Williamson, picketed the employer's main office, and was accused of various threatening and intimidating behaviors toward non-striking employees.
- In one case, Williamson approached a female office employee and grabbed his crotch, and "lifted up as a mean, hateful gesture."
- The employee filed a complaint of sexual harassment, and the company investigated, ultimately suspending Williamson.

Employer Policies

- The NLRB held that Williamson's actions were not sufficiently egregious to warrant suspension.
- According to the NLRB, the striker-misconduct standard offers misbehaving employees greater protection from disciplinary action than they would enjoy in the normal course of employment.
- Thus, the employer's policy prohibiting offensive conduct of a sexual nature was effectively trumped by the employee's decision to strike.

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Employer Policies

- The justices of the D.C. Circuit were not so forgiving.
- The Court expressed “substantial concern with the too-often cavalier and enabling approach that the Board’s decisions have taken toward the sexually and racially demeaning misconduct of some employees during strikes. Those decisions have repeatedly given refuge to conduct that is not only intolerable by any standard of decency, but also illegal in every other corner of the workplace.”

Employer Policies

- Recent Board activity has also targeted garden variety at-will employment provisions in employee handbooks.
- In 2012, the acting General Counsel of the NLRB issued public memorandums indicating that the board should invalidate at-will employment policies if they had a “chilling effect” on employees’ exercise of concerted activity under the act.

Employer Policies

- The Acting General Counsel cited American Red Cross Arizona Blood Services Region, NLRB Case No. 28-CA-23443 (Feb. 1, 2012), in which an administrative law judge found an employer's at-will policy unlawful. In that case, employees were required to sign a form acknowledging their at-will employment status:
  - I further agree that the at-will employment relationship cannot be amended, modified or altered in any way.

Employer Policies

- The memos caused a significant amount of speculation about the Board's intent to pursue these types of claims.
- In 2016, that speculation came to fruition.
- In Minteq International, Inc., 364 NLRB No. 63, (July 29, 2016), the Board invalidated a company's confidentiality agreement because it contained a provision reminding the employees that they were at-will employees.

Employer Policies

- "Thus, the 'At-Will' rule has a reasonable tendency to discourage employees from engaging in conduct that would be protected by the CBA's "just cause" provision and by Section 7 of the Act, including the exercise of rights under the collective-bargaining agreement and other protected, concerted activity (such as, for example, communicating among themselves or with the Respondent's customers concerning their terms and conditions of employment), for fear that they could be discharged without the contractual 'just cause' protection."

Joint Employment

- In Browning-Ferris Industries of California, Inc., 362 NLRB No. 186 (Aug. 27, 2015), the NLRB announced its intention to wholly redefine the concept of "joint employment" under the Act.
- "Employers are joint employers of the same employees if they share or codetermine those matters governing the essential terms and conditions of employment," and the inquiry is whether an employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining.

Joint Employment

- "We will no longer require that a joint employer ... exercise that authority. Reserved authority to control terms and conditions of employment, even if not exercised, is clearly relevant to the joint-employment inquiry."
- "Nor will we require that ... a statutory employer's control must be exercised directly and immediately. If otherwise sufficient, control exercised indirectly–such as through an intermediary-may establish joint-employer status."

Joint Employment

- In Retro Environmental, Inc., 364 NLRB No. 70 (2016), the Board applied that standard for the first time.
- In Retro, the union filed a petition to represent demolition and asbestos workers jointly employed by Retro, the user employer, and Green JobWorks, a temporary staffing agency.
- The companies defended on a number of grounds, including the fact that the companies no longer worked together.

Joint Employment

- The Board found the future nature of that relationship to be “speculative” and ordered the temporary company to the bargaining table.
- “Even if the Employers’ relationships were altered on future projects, certain key aspects of their relationship will likely remain stable.”

Joint Employment

- Green JobWorks, as the supplier employer, will retain primary responsibility for hiring, assigning employees to project sites, and firing;
- Retro will continue to dictate the number of workers to be supplied by Green JobWorks, continue to impose conditions on Green JobWorks' hiring to ensure that the workers supplied are adequately trained and qualified, and continue to retain the right to request a replacement if it is unsatisfied with a Green JobWorks-supplied employee.

Joint Employment

- Therefore, given the distinct functions and areas of responsibility of each of the Employers, it is highly doubtful that the Employers' relationship on future projects could change in such a manner that would render them no longer joint employers of the employees in the petitioned-for unit.
- Thus, direction and control appears to now be irrelevant in determining the "joint employer" relationship, and staffing firms should now be concerned that they are always joint employers.

Other Expansive Decisions

- Graduate student assistants are employees.
- Management rights provisions may be too vague to be enforceable.
- Continued assaults on arbitration and class waivers.
- Prohibiting of recordings in the workplace is unlawful restraint of rights.
- Confidentiality agreements may be invalid.

Questions?