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No Union, No Problem?

By: Jennifer Brown Shaw and Geoffrey M. Hash

Employers that operate without a union probably do not devote much time or resources to compliance with the National Labor Relations Act (NLRA or Act). There are, after all, many other employment laws to worry about.

Unbeknownst to many non-union employers, though, the NLRA affects and applies regardless of whether a union has organized the workforce. Therefore, employers from time to time should consider the Act's influence in the non-union setting.

Two New NLRB Members

The NLRA applies to most private sector employers in most industries. There are special laws for public sector, agricultural and certain transportation businesses. The National Labor Relations Board (NLRB or Board) is the agency charged with administering the NLRA. The Board is supposed to be comprised of five members, each of whom serves a 10-year term. The president nominates Board members, resulting in ideological swings depending on the president's political leanings.

The Board issued many pro-employer decisions during President George W. Bush's administration. As Board members' terms expired, however, the Senate did not confirm President Bush's nominees. As a result, the Board operated with just two members for several months.

With three vacancies in the Board awaiting him, President Obama first appointed incumbent member Wilma Liebman to the Chairman position. On March 22, 2010, the president made two "recess" appointments: Craig Becker and Mark Pearce. Both are veteran labor lawyers who represented unions in private practice. Becker and Pearce will hold their positions until the current Senate term ends this Fall.

The President has not hurried to fill the fifth Board seat. As a result, the Board consists of Chairwoman Liebman, Becker, Pearce, and a lone Republican holdover, Peter Schaumber. Schaumber's term expires in August 2010. If tradition holds, the President will replace Schaumber with a Republican. That will still leave the vacant fifth seat--which traditionally is also a Republican.

Regardless of whether President Obama appoints a fifth member, it is certain the Board will be dominated by pro-union members. As a result, the Board will re-visit the prior Board's pro-employer decisions. These include cases extending the NLRA's reach into the non-union, private sector.

NLRA Rights for All, Including Non-Union Employees.

Section 7 of the NLRA provides all employees—union and nonunion alike—with with the right to "form, join, or assist labor organizations to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Section 8 delineates a series of unfair labor practices, which provide enforcement "teeth" to employees' Section 7 rights. Section 8(a)(1) is a broad provision that makes it a violation of the Act for an employer "to interfere with, restrain, or coerce employees in the exercise of rights guaranteed by section 7." Section 8(a)(3) prohibits discrimination or retaliation against employees who engage in activates protected under the NLRA.

The NLRB accepts administrative complaints—or charges—alleging "unfair labor practices." An administrative law judge may hold a hearing to decide whether the alleged wrongdoing violated the Act. Remedies may include posting notices, rescinding policies or practices, and even reinstatement and back pay for illegally discharged or disciplined employees.

Common Policies and Practices Often Expose Nonunion Employers to NLRA Violations

Section 7 rights are broad. The statute's language does not distinguish between union and non-union workforces. Many non-union employers do not realize certain of their policies and procedures may

violate Section 7. For example, to protect confidentiality or jealousy among co-workers, a non-union employer may prohibit employees from discussing their compensation with each other. However, because Section 7 covers the subject matter—wages—it is typically illegal to interfere with employees who disclose their compensation to co-workers.

The Board in Lutheran Heritage Village – Livonia, articulated a two-part test for determining whether a workplace policy violates the NLRA. First, the Board reviews whether the employer's rule or practice explicitly restricts employees' right to engage in NLRA-protected activities.

If the employer's policy does not violate the Act expressly, the Board then considers whether: (1) a reasonable employee would construe the rule to prohibit NLRA-protected activity; (2) an employer issued the rule in response to union activity in its workplace; and (3) the rule has been applied in a manner that effectively restricts employees' rights. If the answer to any of these three is "yes," the practice likely violates the Act.

Non-union employers' policies and practices come before the Board with some regularity. These include policies regarding solicitation at the workplace, restrictions on access to the worksite, electronic communications (e-mail, intranet use and blogging), confidential information, and non-disparagement.

Access and Solicitation

Employers often restrict third parties from soliciting employees. Employers typically may restrict employee solicitations during work time and in work areas, and may impose other restrictions, depending on the type of business. But employers may run afoul of the NLRA when they discriminate based on the type of solicitation, or by banning all employee solicitation in all parts of the workplace at all times (such as during unpaid meals). There also are limits on employers' right to restrict unions in areas open to the public, even on private property.

The newly constituted NLRB may revisit what is a lawful solicitation policy. Will employers have to ban all solicitation to preclude unions? Or will the Board uphold precedent allowing limited solicitation for charitable purposes, or for the employees' benefit, while permitting employers to ban commercial solicitation by third parties such as unions?

The NLRB also will continue to address how technological advances, such as email and the Internet, work with the NLRA. The Board has held that employers may ban commercial use of company email, as long as it does so consistently. A new Board may be persuaded to expand unions' rights to organize employees electronically.

Loyalty and Morale

Policies that prohibit or restrict employees' "gossip" and disparagement or criticism of employers may trap unwitting non-union employers. When such policies are too vague, the Board holds they impermissibly inhibit Section 7 rights. Union and non-union employees alike have a right to publish critical and even insulting statements regarding supervisors and employers, provided the statements relate to the terms and conditions of employment.

In Claremont Resort and Spa, the Board rejected a code of conduct that prohibited employees from having "negative conversations about associates and/or managers." In Ellison Media Co., the board found that an employer violated the Act where a supervisor instructed employees to "stop gossiping" when he learned they were e-mailing each other about sexual harassment allegations involving another supervisor.

The NLRB's Seesaw on Employee Investigations

The NLRB's jurisprudence regarding non-union employees' right to representation during employers' investigation illustrates effect of political winds on the Board's decisions. In 1975, the United States Supreme Court established, in NLRB v. J. Weingarten Inc., that a union employee may insist on having a union representative present during an investigatory meeting with management, if the employee "reasonably believes" that "the investigation will result in disciplinary action."

Since then, the Board has wrestled with application of these of these "Weingarten Rights" to non-union employees. In recent years, the Board has reversed course more than once. Most recently, the NLRB in IBM Corp. decided that Weingarten Rights protect only union-represented employees. The Board reversed a decision it issued just a couple of years earlier, in which non-union employers were required to extend Weingarten rights to non-union workers. When this issue comes before the new Board, the members may well change position again.

Protection Through Prevention

Non-union employers may take immediate steps to protect themselves from liability under the

Act. First, nonunion employers should review their policies and practices through the lens of NLRA compliance and with the assistance of labor counsel. Lawyers and consultants who review handbooks should ensure they consider the NLRA, particularly when reviewing policies covering electronic communications, confidentiality, workplace access, solicitation, and grounds for disciplinary action.

Non-union employers are more likely to remain that way when they improve and increase communication with employees. For example, employers should not hesitate to accurately remind employees of the competitive wages and various benefits they already enjoy (e.g., health care, vacation/paid time off, retirement, profit sharing, etc.). Employers should also state their position on unions in clear terms. Employers may use various avenues to communicate these messages, including orientation sessions, general meetings, memos, and policy reminders. Labor counsel can help craft an effective and lawful communications strategy.

Employers also should consider training their supervisors on NLRA matters before a union organizing campaign occurs. Effective training in this area will help supervisors recognize and appropriately respond to concerted protected activity.

The NLRA's applicability to non-union workplaces is one of employment law's best-kept secrets. Now that the secret is out, employers should begin planning now for the new Board's expansion of the Act to the non-union setting.

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