

How Recent Decisions of the National Labor Board Affect Non-Union Employers

Steve Goodwin

Baker Donelson

Memphis, Tennessee

901.577.2141

sgoodwin@bakerdonelson.com

2013 NLRB Update

- The Status of the NLRB
- NLRB Intrusion Into Nonunion Workplaces
- What's Next?



The Status of The NLRB

- *Noel Canning*
- From January 2012 to July 2013, the NLRB was operating with three members. Two of those members were recess appointments by President Obama.
- Employers claimed that the recess appointments were invalid because they occurred when the Senate was not actually in recess.



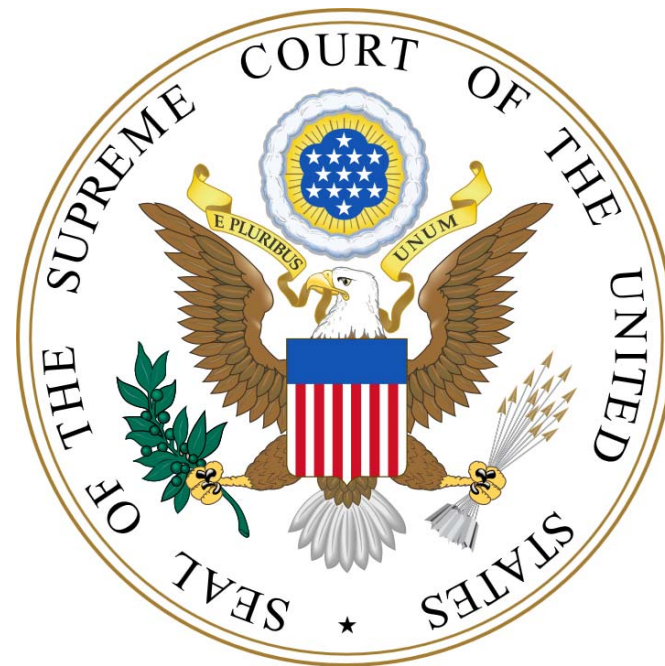
The Status of The NLRB

- The D.C. Circuit ruled that the recess appointments were invalid in January 2013.
- Two other courts of appeals (Third and Fourth) have agreed with the D.C. Circuit that the recess appointments were invalid.



The Status of The NLRB

- The NLRB has appealed the D.C. Circuit's decision to the U.S. Supreme court. The Supreme Court is expected to rule on the validity of the recess appointments in the first half of 2014.
- If the Supreme Court rules that the recess appointments were invalid, then many of the cases decided by the unconstitutional Board would have to be re-decided.



The Status of The NLRB

- In July 2013, the NLRB was reconstituted with five Senate confirmed appointees.
- The new appointments restore the legitimacy of the Board going forward, but the cases decided by the recess appointments, many of which were controversial, are still being litigated.



NLRB Intrusion into Nonunion Workplaces

- Confidentiality Instructions in HR Investigations
- Off Duty Access
- Expansion of Protected Concerted Activity
- At-will employment
- Class Arbitration Waivers
- Social Media Cases
- E-mail organization



Confidentiality Instructions in HR Investigations

- Employees have a protected right to mutually discuss workplace discipline
- NLRB requires employer to have specific objective facts that would warrant a confidentiality instruction
- Specific facts must relate to intimidation, harassment, retaliation, cover up, destruction or fabrication of evidence



Off-Duty Access

- NLRB has three requirements for off-duty access policy: (1) limited to interior of building; (2) clearly disseminated policy; (3) applies to all off duty access.
- The Board came out with a recent case that said that there cannot be a “company business” exception.
- If off-duty employees can enter facility to get paychecks or fill out company paperwork, then employees can enter the facility to organize for the union.



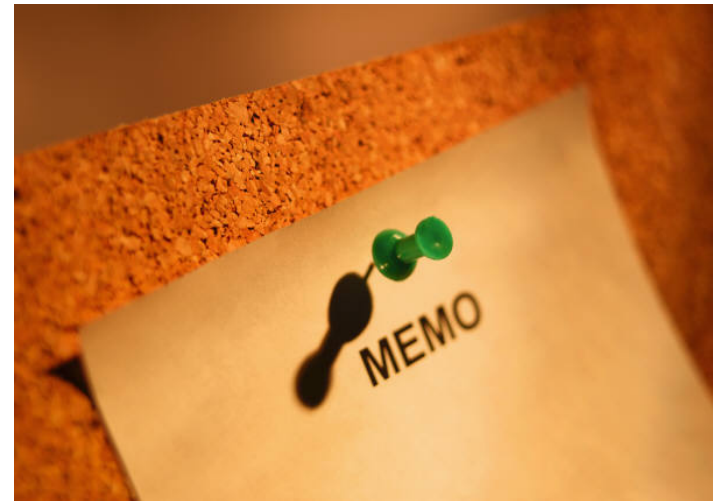
Expansion of Protected Activities

- In a recent case, Grand Canyon Education, Inc., the NLRB held that an employer unlawfully interrogated an employee by asking about a manager's leadership abilities, as well the employee's assessment of team morale.



At-Will Clauses

- The NLRB initially opined that at-will clauses can be unlawful if they imply at-will status cannot be changed.
- NLRB's theory was that telling employees that their at-will status cannot be changed is akin to telling them that unionization would be futile.
- In February 2013, the NLRB's general counsel issued an Advice Memorandum backing away from this attack on at-will clauses.



Class Action Waivers

- The NLRB held that employees are engaging in protected concerted activity when they file a class or collective action lawsuit.
- The NLRB held that an employer commits an unfair labor practice when it requires employees to forfeit their protected right to pursue class claims through arbitration.
- Courts have largely ignored the NLRB reasoning and enforced class arbitration waivers.



Social Media

- The NLRB has been focused on protected concerted activity online in social media.
- The NLRB's general counsel has issued three reports regarding social medial policies and cases.



NLRA – Examples of Protected Postings

Not Safe for Work?

Examples of Facebook postings that were deemed protected by labor law by NLRB lawyers, and others that weren't.



'Scumbag'

A paramedic was fired after calling her supervisor a 'scumbag' on Facebook from her home computer.

NLRB'S POSITION:

Employee was wrongfully fired

OUTCOME:

Case settled just before trial



'Setting it off'

A Frito-Lay warehouse employee was fired after writing on Facebook he was 'a hair away from setting it off in that b—,' apparently referring to the warehouse.

NLRB'S POSITION:

Employee was not wrongfully fired

OUTCOME:

Employee's lawyer has appealed



'Rednecks'

A bartender was fired for communications on Facebook with a relative in which he called customers 'rednecks' and said he hoped they choked on glass.

NLRB'S POSITION:

Employee was not wrongfully fired

OUTCOME:

NLRB didn't file a complaint



Source: National Labor Relations Board

May 30, 2012 NLRB Acting General Counsel Report

- Reiterates that work rules violate NLRA if they “would reasonably tend to chill employees in the exercise of their Section 7 rights.”
- BUT, the third time was a charm, and for the first time the Acting GC approved of a policy in its entirety. This gives employers an actual roadmap for what should survive NLRB scrutiny.



May 30, 2012 NLRB Acting General Counsel Report

- “. . . rules that clarify and restrict their scope by including examples of clearly illegal and unprotected conduct, such that they could not reasonably be construed to cover protected activity, are not unlawful.”
 - GC did not say or mean such policies are lawful, just that they are not per se unlawful.
 - Importantly, approved policy prohibits “inappropriate postings that may include discriminatory remarks, harassment and threats of violence or similar inappropriate or unlawful conduct.”



May 30, 2012 NLRB Acting General Counsel Report

Continued

- Other approved provisions include:
 - Confidentiality: limited to trade secrets and proprietary information – provided examples.
 - “Be Respectful,” “Fair and Courteous”: questioned this, but approved because specific, detailed definitions of prohibited conduct were provided.
 - Provisions approved without comment include:
 - “Carefully read these guidelines [and other applicable codes and policies] and ensure your postings are consistent”
 - “Make sure you are honest and accurate. . . Never post any information or rumor that you know to be false about [Employer, customers or co-employees].”
 - “Never represent yourself as a spokesperson. . . make it clear that your views do not represent those of [Employer].”

What's Next

- The NLRB will likely revisit the Rule that would expedite elections.
- Could compress timeline from current average of 7 weeks to 10 days.
- Employers may have to provide e-mail addresses for employees to union.



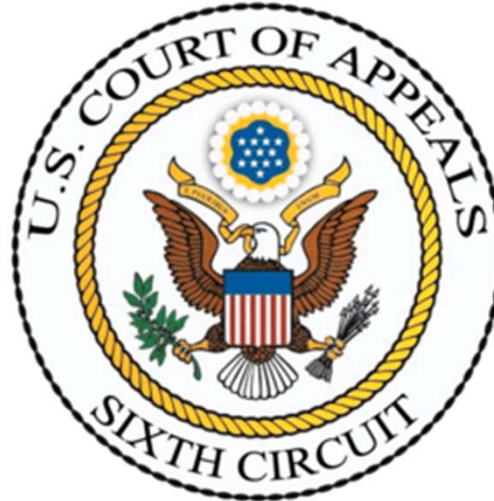
What's Next

- The poster rule is likely dead.
- The D.C. Circuit ruled that the NLRB did not have authority to require the poster.
- The D.C. Circuit denied the NLRB's request for a rehearing by the full D.C. Circuit, so the rule is dead unless the Supreme Court takes the case and reverses the D.C. Circuit.



What's Next

- Reducing barriers to organization
 - E-mail – Unions want to revisit *Register Guard*
 - Lowering community of interest thresholds (microunits)
 - *Specialty Healthcare* was just upheld by the 6th Circuit



QUESTIONS?

