PRESENTATION

Top 5 Traditional Labor Topics Affecting Nonunion Employers

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1. The NLRB's continued focus on social media and employer handbooks;
2. The NLRB's rules regarding employees' use of company e-mail for protected concerted activity;
3. The NLRB's emphasis on joint employer status and its potential effect on franchise relationships;
4. The DOL's unconstitutional persuader rule requiring employers to disclose how much they are paying their labor lawyers; and
5. The NLRB's continued fight against class arbitration waivers despite court opinions to the contrary.

National Labor Relations Act

Section 7:

“Employees shall have the right to self-organization, to form, join, or assist labor organizations…and to engage in other concerted activities for the purpose of collective bargaining…and shall also have the right to refrain from any or all of such activities…”

Social Media and Employer Handbooks

- GC Memorandum 15-04
  - Gives examples of policies that pass muster and examples of policies that do not.
- Even if a rule does not explicitly prohibit Section 7 activity, however, it will still be found unlawful if:
  - 1) employees would reasonably construe the rule's language to prohibit Section 7 activity;
  - 2) the rule was promulgated in response to union or other Section 7 activity; or
  - 3) the rule was actually applied to restrict the exercise of Section 7 rights.

“Unlawful” Confidentiality Rules

- Do not discuss "customer or employee information" outside of work, including "phone numbers [and] addresses."
- "You must not disclose proprietary or confidential information about [the Employer, or] other associates (if the proprietary or confidential information relating to [the Employer's] associates was obtained in violation of law or lawful Company policy)."
- "Discuss work matters only with other [Employer] employees who have a specific business reason to know or have access to such information.... Do not discuss work matters in public places."
- Confidential Information is: "All information in which its loss, undue use or unauthorized disclosure could adversely affect the [Employer's] interests, image and reputation or compromise personal and private information of its members."

“Lawful” Confidentiality Rules

- No unauthorized disclosure of "business 'secrets' or other confidential information.”
- "Do not disclose confidential financial data, or other non-public proprietary company information. Do not share confidential information regarding business partners, vendors or customers.”
- Prohibition on disclosure of all "information acquired in the course of one's work.”

“Unlawful” Rules re Employee Conduct Toward Employer and Supervisors

- Employees also have the Section 7 right to criticize or protest their employer’s labor policies or treatment of employees.
- "Be respectful to the company, other employees, customers, partners, and competitors."
- Do "not make fun of, denigrate, or defame your co-workers, customers, franchisees, suppliers, the Company, or our competitors."
- "Chronic resistance to proper work-related orders or discipline, even though not overt insubordination" will result in discipline.
- "[I]t is important that employees practice caution and discretion when posting content [on social media] that could affect [the Employer's] business operation or reputation."

“Unlawful” Rules re Employee Conduct Toward Employer and Supervisors Cont.

- Do not make "[s]tatements that damage the company or the company's reputation or that disrupt or damage the company's business relationships.“
- A rule that prohibits employees from engaging in “disrespectful,” “negative,” “inappropriate,” or “rude” conduct towards the employer or management, absent sufficient clarification or context, will usually be found unlawful.
- A rule that bans false statements will be found unlawfully overbroad unless it specifies that only maliciously false statements are prohibited.

“Lawful” Rules re Employee Conduct Toward Employer

- No "rudeness or unprofessional behavior toward a customer, or anyone in contact with" the company.

- "Each employee is expected to work in a cooperative manner with management/supervision, coworkers, customers and vendors.”

- "Each employee is expected to abide by Company policies and to cooperate fully in any investigation that the Company may undertake.“ However, restricting the employee’s ability to discuss investigations, as for example, investigations into sexual harassment allegations may be unlawful.

“Lawful” Rules re Employee Conduct Toward Employer Cont.

- "Being insubordinate, threatening, intimidating, disrespectful or assaulting a manager/supervisor, coworker, customer or vendor will result in" discipline.

“Unlawful” Rules re Co-Workers

- "[D]on't pick fights" online.
- Do not make "insulting, embarrassing, hurtful or abusive comments about other company employees online," and "avoid the use of offensive, derogatory, or prejudicial comments.“
- "[S]how proper consideration for others' privacy and for topics that may be considered objectionable or inflammatory, such as politics and religion.”
- "Material that is fraudulent, harassing, embarrassing, sexually explicit, profane, obscene, intimidating, defamatory, or otherwise unlawful or inappropriate may not be sent by e-mail. ..."

“Lawful” Rules re Coworkers

- “Making inappropriate gestures, including visual staring.”
- Any logos or graphics worn by employees “must not reflect any form of violent, discriminatory, abusive, offensive, demeaning, or otherwise unprofessional message.”
- “[T]hreatening, intimidating, coercing, or otherwise interfering with the job performance of fellow employees or visitors.”
- No “harassment of employees, patients or facility visitors.”
- No “use of racial slurs, derogatory comments, or insults.”

“Unlawful” Rules re Third Party Communications

- Employees are not "authorized to speak to any representatives of the print and/or electronic media about company matters" unless designated to do so by HR, and must refer all media inquiries to the company media hotline.

- "If you are contacted by any government agency you should contact the Law Department immediately for assistance."

“Lawful” Rules re Third Party Communications

“Events may occur at our facilities that will draw immediate attention from the news media. It is imperative that one person speaks for the Company to deliver an appropriate message and to avoid giving misinformation in any media inquiry. While reporters may frequently tour our facility as potential clients, and may ask questions about a matter, good reporters identify themselves prior to asking questions. Every employee is expected to adhere to the following media policy: Answer all media/reporter questions like this: “I am not authorized to comment for [the Employer] (or I don't have the information you want). Let me have our Administrator contact you.”

“Unlawful” Rules re Logos, Copyrights and Trademarks

- Do "not use any Company logos, trademarks, graphics, or advertising materials" in social media.

- "Use of [the Employer's] name, address or other information in your personal profile [is banned]…. In addition, it is prohibited to use [the Employer's] logos, trademarks or any other copyrighted material."

“Lawful” Rules re Logos, Copyrights and Trademarks

"Respect all copyright and other intellectual property laws. For [the Employer's] protection as well as your own, it is critical that you show proper respect for the laws governing copyright, fair use of copyrighted material owned by others, trademarks and other intellectual property, including [the Employer's] own copyrights, trademarks and brands."

“Unlawful” Restrictions on Leaving Work

"Failure to report to your scheduled shift for more than three consecutive days without prior authorization or 'walking off the job' during a scheduled shift" is prohibited.

“Lawful” Restrictions on Leaving Work

"Walking off shift, failing to report for a scheduled shift and leaving early without supervisor permission are also grounds for immediate termination.”

Although this rule includes the term “walking off shift,” which usually would be considered an overbroad term that employees reasonably would understand to include strikes, we found this rule to be lawful in the context of the employees’ health care responsibilities. Where employees are directly responsible for patient care, a broad “no walkout without permission” rule is reasonably read as ensuring that patients are not left without adequate care, not as a complete ban on strikes.

“Unlawful” Conflict of Interest Rules

Employees may not engage in "any action" that is "not in the best interest of [the Employer]."

“Lawful” Conflict of Interest Rules

- Do not "give, offer or promise, directly or indirectly, anything of value to any representative of an Outside Business," where "Outside Business" is defined as "any person, firm, corporation, or government agency that sells or provides a service to, purchases from, or competes with [the Employer]." Examples of violations include "holding an ownership or financial interest in an Outside Business" and "accepting gifts, money, or services from an Outside Business."
- As an employee, "I will not engage in any activity that might create a conflict of interest for me or the company," where the conflict of interest policy devoted two pages to examples such as "avoid outside employment with an employer customer, supplier, or competitor, or having a significant financial interest with one of these entities."

Social Media and Employer Handbooks

- Whole Foods Market, Inc.
  - On December 24, 2015, the NLRB decided a case against Whole Foods, where they ruled that an employer violates the NLRA by banning photography and/or recording in the workplace.
  - The whole foods recording policy was a blanket prohibition.
  - The NLRB left open the question of whether the policy would be lawful if it prohibited recording in working areas during working times.
  - The NLRB acknowledged that “narrowly drawn restrictions” might be permissible if there is a legitimate business justification that supports them. It did not suggest, however, what restrictions pass muster.

E-Mail Solicitation

Purple Communications, 361 NLRB No. 125 (Dec. 2014)

"Employees' use of email for statutorily protected communications on non-work time must presumptively be permitted by employers who have chosen to give employees access to their email systems."

E-Mail Solicitation

- As a result of *Purple Communications*
  - Employer must allow an employee to e-mail protected concerted activity or union activity during nonworking time (before work, after work, during breaks, or any time employees would be allowed to send any other type of personal e-mail).
  - Employer cannot maintain a blanket prohibition on personal e-mail use.
  - Employer cannot prohibit use of e-mail on behalf of any organization (which is a line that many employers had previously drawn).

E-Mail Solicitation

- *Purple Communications* limitations
  - Only applies to nonsupervisory employees.
  - You can still monitor e-mail for impermissible use, so long as you are not looking for union activity or protected activity in e-mail.
  - Does not apply to other forms of electronic communication (yet).

Joint Employer/Franchise Relationships

- Browning-Ferris Industries of California, Inc., 362 NLRB No. 186 (Aug. 27, 2015)
- The test for joint employment under NLRB law has long been whether the alleged joint employers "share or codetermine those matters governing the essential terms and conditions of employment."
- Prior to BFI, in order to be a joint employer, you had to exercise "direct and immediate control" over the employee.

Joint Employer/Franchise Relationships

- BFI's new standard says that "direct and immediate control" is no longer required to establish a joint employer relationship.
- Under the new BFI test, the NLRB examines whether the alleged joint employer exercised ***indirect*** control through an intermediary or contractually reserved the right to do so.
- The NLRB found joint employer status based on factors such as BFI determining number of temp employees on a daily basis, setting broad hiring criteria for temp employees, setting safety standards, setting productivity standards, and setting a maximum pay rate for temp employees.

Joint Employer/Franchise Relationships

- The NLRB is currently considering a case *Miller & Anderson* where it will decide whether to allow "the inclusion of both solely and jointly employed employees in the same unit without the consent of the employers."

- This would allow temporary employees to be part of the bargaining unit in a union election, which they currently are not.

Joint Employer/Franchise Relationships

- The General Counsel of the NLRB has issued complaints against McDonalds, USA, LLC (McDonald's) and various of its franchisees in 43 cases for alleged violations of the National Labor Relations Act.
- The NLRB named McDonald's in these cases as a joint employer along with the franchisees of the restaurants where the complaints arose.
- If the complaints are pursued successfully to their conclusion with judicial determination of employer liability, McDonald's could be liable for the management decisions of the franchisees of these restaurants.
- The NLRB will apply the new BFI standard to analyze whether McDonald's exercises indirect control over its franchisees.

Joint Employer/Franchise Relationships

- The NLRB is arguing that McDonald's USA exercises a "very specific level of control" over its franchisees' employees, including control over wages, hours, training, terms of employment, and working conditions.
- Potential franchisees are subject to and must pass McDonald's USA's Hamburger University training program before being awarded a franchise.
- The NLRB trial attorney specifically targeted training materials and software, which allegedly impose exacting standards on restaurant operations.
- The NLRB also targeted training materials, which advise on staffing assignments, hiring practices, employee evaluations, and employee promotions.

Joint Employer/Franchise Relationships

- McDonald's and franchising industry representatives believe the NLRB's position is inconsistent with historical court decisions, which find that franchisees control the working relationships of their employees.
- McDonald's argues that its training materials and processes only offer advice and monitoring, and that McDonald's does not exercise control over the direct employer/employee relationship.
- McDonald's also argues that there was no evidence that it had any involvement in the conduct that was alleged to constitute unfair labor practices.

Persuader Rule

- The DOL announced in its Fall 2009 Regulatory Agenda its intention to propose rulemaking to narrow the scope of the LMRDA section 203(c) “advice exception.”
- LMRDA Section 203 requires employers and labor relations consultants to file reports disclosing agreements or arrangements to:
  - persuade employees about the exercise of their rights to organize and bargain collectively, or
  - supply an employer with information concerning the activities of employees or a labor organization in connection with a labor dispute involving the employer.

Persuader Rule

- Reporting is not required for agreements where the consultant engages **exclusively** in the following activities:
  - Giving the employer advice
  - Representing the employer before any court, administrative agency, or tribunal of arbitration, or
  - Engaging in collective bargaining on behalf of the employer or negotiating an agreement or any question arising under the agreement.

Persuader Rule

- Currently, persuader reporting is not required when the consultant has no direct contact with employees and limits activity to providing to the employer advice or materials for use in persuading employees, which the employer has the right to accept or reject.
- New rule going into effect July 1, 2016 eviscerates the advice exemption.
- Persuaders and employers who use them are required to file forms with the DOL including fact of persuasion and amount paid by employer to persuader.
- Lawsuits have been filed to attempt to stop the implementation of this rule.

Persuader Rule

- This rule change is being challenged because
  - It infringes on First Amendment Speech.
  - It invades the attorney-client privilege.
  - It is inconsistent with the express terms of the law.

Class Arbitration Waivers

- *D.R. Horton* (Validity of Class Action Waivers Under NLRA)
  - The NLRB held in *DR Horton* that class action waivers violate §7 of the NLRA.
  - The Fifth Circuit overturned the ruling in *DR Horton v. NLRB*. The Second, Ninth and Eighth Circuits have reached a similar conclusion.
- *Murphy Oil*
  - The NLRB again held that class action waivers violate §7 of the NLRA.
  - The Fifth Circuit again over turned the NLRB's decision.
  - The Fifth Circuit denied en banc review.
- The Supreme Court will ultimately decide, but the NLRB has not requested Supreme Court review, leaving employers in limbo.

On the Horizon

- Whether employees have a right, under *Purple Communications*, 361 NLRB No. 126 (2014), to not only use an employer's e-mail system for union-related communications but also other company electronic systems;
- Whether employers have engaged in unlawful surveillance of employee emails;
- The applicability of *Weingarten* rights in non-unionized settings; (*Weingarten* rights provide union employees the right to have a union representative present at meetings where the employee could receive discipline. The Board previously ruled that non-union employees are not entitled to have a union representative present during such meetings. *IBM Corp.*, 341 NLRB 1288 (2004).); and
- Whether the misclassification of employees as independent contractors violates Section 8(a)(1).

Take Away's

- Review and edit your policies if they could be construed as overbroad.
- Review your staffing agreements to determine if you are a joint employer under the BFI standard.
- Update expectations on e-mail usage to allow use on nonworking times.
- Decide whether NLRB exposure is outweighed by utility of class arbitration waiver.

Questions