Insights, News & Events

THIRTEEN REASONS WHY NON-UNION WORKPLACES CAN'T IGNORE THE NLRB

Publication
May 2, 2016

There is little doubt that the National Labor Relations Board (NLRB) is making its impact felt – even if your company never sees a union. By expanding its concept of "concerted protected activity," the Board has staked out new territory for investigating union and non-union entities alike. And if the NLRB determines you have violated the law, they have ways of making your life miserable.

The Board can order non-complying employers to take steps such as posting an employee notice describing workers' rights, or perhaps rescinding handbook policies that run afoul of the law. Or, taking it one step further, it could force you to reinstate any employees you have discharged for violating policies it finds out of bounds.

Set forth below are just a few areas in which the agency can impact your business, along with some action items to help you steer clear of potential legal exposure:

- **Social Media Policies** – The NLRB will closely scrutinize policies which broadly restrict employee rights to air public grievances concerning wages and other working conditions on Facebook, Twitter, and elsewhere (read more here).
- **Off-Duty Access Restrictions** – Policies that give management the broad discretion to determine the circumstances in which employees may be disciplined for violating "no loitering" policies will likely be invalidated (read more here).
- **Class Action Waivers** – Despite multiple court decisions to the contrary, the agency continues to enforce its doctrine

Related People

Steven M. Bernstein

Regional Managing Partner and Labor Relations Group Co-Chair

813.769.7513

Service Focus

Labor Relations

prohibiting class action waivers contained in binding arbitration agreements, calling them an encroachment on concerted protected activity (read more here).

- **Restricting Discussion of Internal Investigations** – The NLRB has issued a line of decisions invalidating policies that impose blanket restrictions on an employee's right to discuss the status of complaints under internal investigation (read more here).
- **Solicitation and Distribution Policies** – The agency is carefully scrutinizing rules that ban solicitation for "commercial purposes," or otherwise extend beyond working areas and working time (read more here).
- **Electronic Communications** – Through recent decisions such as *Purple Communications*, the NLRB is now invalidating policies that purport to restrict the use of electronic communications over business-owned systems during non-working time (read more here).
- **At-Will Policy Statements** – Recent rulings suggest that the Board will now invalidate any at-will statements that state or imply that such status may not be modified by anyone under any circumstances (read more here).
- **Rules Requiring "Courteous" or "Respectful" Behavior** – Policies broadly requiring such conduct, or prohibiting "disparaging" or other conduct that "impedes harmonious relationships," are generally deemed unlawful (read more here).
- **Outright Bans on Workplace Photography or Recording** – Through a pair of recent Board rulings, you are generally precluded from imposing outright bans on such conduct except under extremely narrow circumstances (read more here).
- **Overly Broad Restrictions on Media Disclosures** – The NLRB has made clear that unless confined to situations in which the employee purports to address the media on the employer's behalf, such restrictions are overly broad (read more here).
- **Restrictions on Public Logo Displays** – Remarkably, the agency has gone so far as to suggest that you may not impose outright bans on displaying a company logo, absent compelling business reasons (read more here).

- **Overly Broad Confidentiality Rules** – Policies purporting to prohibit disclosure of employee salary information or related data pertaining to wages or benefits are increasingly being struck down as overly broad (read more here).

- **Mandatory Complaint Policies** – Similarly, policies compelling employees to direct their grievances through internal resolution mechanisms are also being invalidated under the concerted protected activity doctrine (read more here).

If you have not reviewed your policies and procedures in 2016, now is the time to do so. You should scrutinize them carefully for any language that broadly restricts group discussion or action, mandates advance management approval, or otherwise broadly proscribes "unprofessional" or "inappropriate" conduct.

Take steps to ensure that all general restrictions are accompanied by narrower terms defining the scope of improper conduct. Avoid ambiguity in favor of specific examples where possible, and consider adding a proper disclaimer.

For more information, contact the author at SBernstein@fisherphillips.com or 813.769.7513.