The NLRB's New Focus: Non-Union Employers

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The figures on union membership have been crunched for decades now, yet the percentages have never been lower than they are right now. At 6.6% of the private sector workforce, organized labor is in the midst of its greatest down-turn since the passage of the National Labor Relations Act (NLRA) in 1935. Any number of factors have contributed to this decline, and additional membership losses are projected over the coming years.

To an agency tasked with overseeing representation elections and investigating unfair labor practices that typically flow from organizing campaigns, these figures paint a sobering picture for the National Labor Relations Board (NLRB or the Board). Confronting a world in which unions wield diminishing influence, the Board is facing a decline in labor activity that threatens to drain its dockets — and ultimately its enforcement budgets.

Within this changing landscape, the Board has revisited an age-old doctrine to define a new role for itself that will ensure continued viability outside the context of organized labor. That doctrine has long been referred to as "concerted protected activity," a term that emanates from Section 7 of the NLRA. Encroachment upon an employee's Section 7 rights constituted an independent violation of Section 8(a) (1) of the NLRA. To drive home the point, the Board recently launched a website in an effort to openly promote the doctrine. The vehicle employed by the Board to revive this doctrine — the employee handbook — is as common to the workplace as employees themselves.

Put simply, the doctrine of concerted protected activity extends protection to all employees (union or non-union) who band together "for mutual aid or protection," typically by expressing shared concerns over common employment terms and conditions. To illustrate this concept, the Board has long relied upon the image of employees gathered around the proverbial water cooler to engage in discourse over matters pertaining to wages or benefits.

Granted, Congress could never have fathomed the advent of social media outlets such as Facebook at the time of Section 7's enactment. By approaching social media as "the water cooler of the 21st century," the Board has managed to breathe new life into old doctrine, reaffirming its own relevance in the process. Because virtually every employee handbook purports to restrict employee use of social media on (as well as off) duty, the Board has a ready vehicle at its disposal to scrutinize policy for the possibility of impermissible encroachment on this doctrine. encroachment on this doctrine.

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Social media offers just one (albeit high-profile) example of the Board's attempt at self-renewal. Other handbook policies under increased agency scrutiny include confidentiality provisions, at-will disclaimers, and access rules.

Regardless of the Board's current status, increased focus on the nonunion workplace looks like it's here to stay. In an increasingly complex regulatory environment, corporate counsel are advised to get ahead of the curve when it comes to this burgeoning trend, and to take a proactive stance when it comes to auditing policies and procedures that currently present a substantial risk for union and non-union businesses alike.

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