Monday, October 28
2:30 PM - 4:00 PM

306: Just When You Thought You Were Safe: The NLRB's Foray Into Non-Union Employers

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Session 306

Natalie Abbott
Natalie S. Abbott is associate general counsel for North America at Saint-Gobain Corporation. Ms. Abbott is a seasoned employment law advisor, who provides strategic advice to the Saint-Gobain family of businesses on a wide range of labor and employment-related matters such as terminations, hiring, investigations, compensation, employment agreements, and personnel policies. Her counseling and litigation experience cover a wide variety of employment law matters, including laws dealing with employment discrimination, wage and hour requirements, employee raiding, unfair competition, trade secrets, disability accommodation, leaves of absence, and workforce reductions.

In addition, Ms. Abbott provides employment training and compliance review services. At Saint-Gobain, Ms. Abbott serves on the Human Resources Executive Committee, the Diversity Committee, the Green Commuter Task Force and is co-chair of the Women's Leadership Committee.

Prior to joining Saint-Gobain, Ms. Abbott was senior vice president human resources and employment counsel for TNS North America, Inc., the global leader in custom market research services. She began her practice in the Labor and Employment Group of Pepper Hamilton, LLP where she advocated for management in employment-related claims before state and federal courts, administrative agencies, and in alternative dispute resolution settings. She also assisted clients in responding to union organizing campaigns, advised management regarding collective bargaining issues, and represented companies in unfair labor practice proceedings and arbitrations.

Ms. Abbott received a BA from The Ohio State University and her JD from the University of Pennsylvania School of Law.

Terin Barbas Cremer
Terin Barbas Cremer is associate general counsel at Bankers Financial Corporation in St. Petersburg, FL. She manages a wide variety of legal issues including litigation, transactional, employment, compliance and regulatory matters.

Before joining Bankers, Ms. Cremer was an associate at a boutique labor and employment law firm. Additionally, she served as a Gubernatorial Fellow and an attorney for the Florida Agency for Persons with Disabilities, with a litigation-focused practice dealing with legislative implementation and executive-branch policymaking. She has litigated before state and federal courts, as well as state agencies in the administrative decision making process.

Ms. Cremer serves on the Board of Directors for PetNet (part of the Tampa Humane Society), and is a 2013 graduate of Leadership Florida's Connect Florida. She also serves
as a mayoral appointee to the City of Tampa Civil Service Board, presiding on an administrative panel reviewing all city employment grievances against the city. In addition to her position as an attorney, Ms. Cremer founded Life Realized Coaching. As a life coach, she helps clients reach their career goals—from guiding high school students through the college application process to helping professionals get out of a rut.

Ms. Cremer graduated from the University of Notre Dame with a BBA in Marketing, cum laude, where she was captain of the Cheerleading Squad. She received her J.D. and M.B.A. cum laude from Florida State University, where she was a member of Law Review.

**Jennifer Deitloff**  
Jennifer Deitloff is senior counsel for ConAgra Foods, Inc., where she advises the company on labor, employment and immigration related matters including litigation management, administrative proceedings, employment, labor and immigration compliance, health and safety and day to day legal advice.

Prior to joining ConAgra, Ms. Deitloff worked as an attorney at McGrath North Mullin & Kratz, PC LLO in the firm's Labor and Employment Group. She represented management interests with respect to labor and employment and immigration matters including litigating matters in state and federal courts and handling arbitrations.

She is a member of the Association of Corporate Counsel, the Minority Corporate Counsel Association, the American Immigration Lawyers Association, and the Nebraska Bar Association.

Ms. Deitloff received a Bachelor's degree in Communication Studies from the University of Nebraska and a JD from the University Of Nebraska College Of Law.

**Chad Richter**  
Chad P. Richter is a partner in the Omaha office of Jackson Lewis, LLP. Mr. Richter's practice includes representing employers before the National Labor Relations Board, assisting employers involved in union organizing drives, and advocating on behalf of management in arbitration cases.

Mr. Richter is also a frequent speaker to business groups throughout the country and previous faculty member for the ACC. Mr. Richter routinely advises employers on all aspects of traditional labor and employment law matters.

Mr. Richter provides significant volunteer work on an annual basis to Susan G. Komen Nebraska and to the Nebraska State Bar Association through the volunteer help desk.

Mr. Richter is on the board of directors for the Midwest Chapter of the American Teleservices Association; national chairman of the Labor Relations Forum of the American Teleservices Association; past co-chair for the Human Resources Association.
Mr. Richter is a member of the Human Resource Association of the Midlands, Legislative Committee; The Society of Human Resources Management; the ABA's Labor and Employment Law Section; and the Omaha Chamber of Commerce, Young Professional Council.

Mr. Richter was appointed to serve on the Nebraska Advisory Board of the U.S. Commission on Civil Rights for 2010 through 2013. He was also selected to serve on the Employee Relations Expertise Panel for the Society of Human Resources Management for 2010, 2011, and 2012.

Mr. Richter earned his B.B.A. from the University of Nebraska-Omaha in business marketing. He received his J.D., cum laude, in 2000 from the Creighton University School of Law.
JUST WHEN YOU THOUGHT YOU WERE SAFE: THE NLRB’S FORAY INTO NON-UNION EMPLOYERS

Presented By:

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New Developments at the Labor Board: How They Affect Every Employer

Organized Labor’s Continued Decline
Union Membership Percentage In The Private Sector

-- Union Membership Rates

1935
1955 (33%)
1960s
2012 (6.6%)

Source: US DOL Report, January 2012
THE NATIONAL LABOR RELATIONS BOARD

• WHAT IS IT?
• WHAT DOES IT DO?

The National Labor Relations Act:

• Regulates employer-union relations
• Regulates unionized and union-free employer policies and practices that impact employee rights
National Labor Relations Board

FIVE MEMBERS

– Mark Pearce (D) – Chairman, expires August 27, 2018
– Nancy Schiffer (D) Board Member, expires December 16, 2014
– Kent Hirozawa (D) Board Member, expires August 27, 2016
– Harry Johnson III (R) Board Member, expires August 27, 2015
– Phillip Miscimarra (R) Board Member, expires December 16, 2017

Acting General Counsel: Lafe Solomon
Nominated: Richard Griffin

The Coming Labor Agenda

• Manipulation of Bargaining Units
• Ambush Election Regulation
• Non-Employee Union Access
• Restricting Management’s Ability to Enforce Workplace Policies
• Rubber-stamping Anti-Employer Decisions
LIKELY RESULTS?

• Increased NLRB “protected concerted activity” charges in non-union setting
• Increase in organizing, NLRB petitions and union election victories

NLRB ADJUDICATION:
Expansion of Existing Initiatives

• Micro Bargaining Units – Specialty Healthcare.
• Must prove “overwhelming community of interest” to expand voter/bargaining unit.
• Effectively enables the union to choose any unit, no matter how small – an employer’s ability to successfully oppose is very limited.
• 6th Circuit denied the company’s Petition for Review and granted the Board’s Petition for enforcement (8/15/13)
NLRB ACCELERATED ELECTION RULE

- Substantially shortens time between the petition and the actual election
- Streamlines the pre-election process
  - Limits hearing issues
  - No appeal prior to election
- Eliminates most pre-election supervisor determinations
- All about speeding up the election process
- Faster elections favor unions

NLRB ACCELERATED ELECTION RULE

STATUS

- First ruling: Federal District Court in Washington D.C.
  - NLRB did not have a quorum at the time the vote was held.
- Second ruling: Federal District Court in Washington D.C.
  - NLRB’s Motion to Alter or Amend Judgment denied.
- Appeal: Court of Appeals for the D.C. Circuit.
  - Currently before the D.C. Circuit.
  - Appellate Court cancels hearing and is holding appeal in abeyance based on Noel Canning
The NLRB’s Section 7 Initiative

- In June 2012, the NLRB launched a new “Protected Concerted Activity” webpage, which describes “the rights of employees to act together for their mutual aid and protection, even if they are not in a union.”
- http://www.nlrb.gov/concerted-activity

Section 7 of the NLRA provides:

“Employees shall have the right to self-organization, 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.” (emphasis added)
PROTECTED CONCERTED ACTIVITY

In determining whether employee activity is entitled to the protections of Section 7, the Board looks at the following:

- whether the activity is “concerted”;
- whether the activity is “for mutual aid or protection”; and
- whether the activity has lost the protection of Section 7 by reasons of (1) its means or (2) its objectives.

WHAT IS PROTECTED?

EXAMPLES

- Jointly complaining with others about working conditions
- Class-action lawsuits related to working conditions
- Speaking with residents/family members/news media about your employer
WHAT IS NOT PROTECTED?
EXAMPLES

- Intermittent Strikes and work slowdowns
- Comments to Third Parties Critical of an Employer that are Maliciously False
- Comments to Third Parties Critical of an Employer that Make No Reference to a Labor Controversy
- Concerns about the “happiness” of customers or quality of product
- Social issues that have no more than a tangential relationship to work

Knowing the Context Is Critical

- Conduct which appears inappropriate and would seem a proper basis for discipline may, in fact, be protected.
- Employees are permitted some leeway for impulsive behavior when engaging in protected activity.
- Protections can extend to individual employees, e.g., when an employee speaks individually to his or her employer on his or her own behalf and on behalf of one or more co-workers about improving working conditions as a prelude to bringing some kind of group action in opposition to working conditions or directed at working conditions.
What Violates the National Labor Relations Act?

- A work rule that reasonably tends to chill employees from exercising their right to engage in protected concerted activity even if not enforced
- Promulgation of work rule in response to union activity or
- Application of rule to restrict the exercise of Section 7 rights
- Retaliation for discussing or complaining about terms and conditions of employment

EXAMPLES OF LAWFUL AND UNLAWFUL EMPLOYER RULES AND POL ICES
What Violates the National Labor Relations Act?

Policies being scrutinized by the Labor Board include:

• Confidentiality
• Fraternization
• Statements of conduct
• Apparel and appearance
• Off duty access

What Violates the National Labor Relations Act?

Policies being scrutinized by the Labor Board include:

• Disloyalty
• Civility
• Media contact
• Social media
• Employment-at-will
Confidentiality Rules

• “Employees may not discuss wages with co-workers.”

• “Office business is not a matter of discussion with spouses, families or friends.”

• “Employees may not discuss confidential proprietary information with competitors.”

Confidentiality Rules

• During the investigation of a workplace issue a third party investigator asked employees “not to discuss the investigation with co-workers.”

Four Exceptions:

• Protect a witness
• Prevent fabrication of testimony
• Prevent a cover-up
• Prevent destruction of evidence
Confidentiality Rules

• What if: Employer assures employee of confidentiality?

Confidentiality Rules

• Company employees must refrain from discussing private matters involving other employees such as sick leave or FMLA leave.
Anti-Fraternization Rules

• “Employees are prohibited from “fraternizing on duty or off duty, dating or becoming overly friendly with a client’s employees or with the co-employees.”

Rules Regarding Conduct

• Making false, or profane statements concerning the Company or any of its employees is prohibited.
Rules Regarding Conduct

• Courtesy is the responsibility of every employee. Everyone is expected to be courteous, polite and friendly to our customers, vendors and fellow employees. No one should be disrespectful or use profanity.

Rules Regarding Conduct

• Employees are not allowed on company property when not on duty without approval of their manager.
Rules Regarding Conduct

- Participating in any disruption or interference with work is grounds for discharge.

Apparel and Personal Appearance Rules

- Employees may not wear unauthorized pins and/or decals.

- Personal bulletin board postings need the approval of the Director of Human Resources.
Acknowledgment

I have received this booklet entitled The Company Employee Handbook, and I agree to abide by the policies and the procedures contained herein. I understand that the continuance of my employment is contingent on my so abiding by these rules.

_________________________________  _________________________
Signature of Employee               Date

Disparagement and Disloyalty

• Employees are prohibited from making disparaging comments and/or remarks about the Company, its officers and its Board members in the media, including through online blogs.
Non-Harassment and Civility

• “Employees are expected to conduct themselves professionally at all times and avoid inappropriate or offensive remarks, threatening or uncivil behaviors toward other employees or any actions that might be viewed as harassment.”

• Employees are encouraged to resolve concerns about work by speaking with co-workers, supervisors and managers before bringing their issues outside the company.

Solicitation and Distribution

• “Employees are prohibited from soliciting at any time when either they or those they are soliciting are working. Solicitation is permitted during free time in work areas but distribution of literature is not.”
Employment At-Will Statements

• You may resign at any time with or without notice. We may terminate your employment at any time with or without reasons. This at will employment relationship cannot be amended, modified or altered in any way.

Employment At-Will Statements

• You may resign at any time with or without notice. We may terminate your employment at any time with or without reasons. This at will employment relationship cannot be amended, modified or altered in any way except in writing by the Vice President of Human Resources or another company executive.
Social Media & Concerted Activity

• Employees are talking about their employers online – like it or not
  • Including, for example, social media sites, blogs and text messages
  • 47% of online adults use social networking sites

Social Media & Concerted Activity

Fired Because of Facebook®: Social Media Policies and the NLRB

• NLRB extends concerted activity to social media
• Board reviewing well over 100 cases involving Twitter, Facebook, YouTube and other forms of social media and electronic communication
Two Issues Arise From These Cases:

- **Discipline**
  When may an employer discipline an employee based on the employee’s online activities?
- **Policies**
  Do the employer’s social medial policies prohibit the kinds of activities protected by federal labor law?
- **Worker-to-worker communication and appeals to a third party?** The NLRB’s Acting General Counsel may consider factors under both

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**Summary**

- Employees have broad latitude in what they can say about work and supervisors in online postings
  - “Time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee’s time to use as he wishes without reasonable restraint....” *U.S. Supreme Court*
  - But there are limits – flagrant, violent, or extreme remarks
  - Still, one has to wonder what the limits are!??!
Potential Consequences In This Area

- Reinstatement and back pay with interest if an employee is terminated for a policy violation
- Having an NLRB Election your company wins set aside
- An NLRB order to rescind the applicable policy
- Posting a notice (physically and perhaps electronically) stating that your company is rescinding your policy and will not violate the NLRA again
- Possible debarment if your company is a federal contractor

5 Ways to Avoid Violations of the National Labor Relations Act

1. Review and revise your current policies and handbook provisions (including ones you do not enforce) to make them compliant.
2. Do not discipline employees without considering whether their conduct constitutes protected concerted activity.
5 Ways to Avoid Violations of the Labor Act

3. Train supervisors, managers and other decision makers on the issue of protected concerted activity.

4. Add lawful policies and handbook provisions to help manage employee conduct.

5. Adopt a lawful disclaimer that specifically addresses protected concerted activity.

Recommendation

- Would a reasonable employee construe your rule or policy as limiting his/her ability to engage lawfully in protected concerted activity?
- Context is important to any analysis of whether section 7 rights are violated
- Generally avoid using words like “negative” or “disparaging.” Use words like “maliciously false” and use examples whenever possible
- Verbal statements and discipline without a written policy can also be a violation
Recommendation

Disclaimer or Savings Clause in Employer’s Social Media Policy approved by the Advice Division of the NLRB in 2012

- Nothing in our company’s social media policy is designed to interfere with, restrain, or prevent employee communications regarding wages, hours, or other terms and conditions of employment. Employees have the right to engage in or refrain from such activities.

Recommendation

Lawful Social Media Policy

Wal-Mart's social media policy was approved by the Advice Division of the NLRB in 2012
QUESTIONS?
An employer violates Section 8(a)(1) of the National Labor Relations Act through the maintenance of a work rule if that work rule would reasonably tend to chill employees in the exercise of their Section 7 rights. The National Labor Relations Board uses a two-step inquiry to determine if a work rule would have this effect. First, a rule is unlawful if it explicitly restricts Section 7 protected activities. If the rule does not explicitly restrict protected activities, it still will violate Section 8(a)(1) upon a showing that: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

The Acting General Counsel of the National Labor Relations Board issued three Memoranda on the subject of social media policies and attendant issues. The Division of Advice also recently released an opinion analyzing an organization’s code of conduct policy. The following are general “do’s” and “don’ts” as you draft and revise your code of conduct and social media policies:

**DO:**

- Avoid broad restrictive language that could arguably chill the exercise of employees’ Section 7 activity.
- Clarify and explain policy language, with great specificity. The more explanation surrounding the policy language the greater the likelihood the policy will withstand NLRB scrutiny (i.e. policy guidelines, frequently asked questions interpreting the policy, situational examples, and the like).
- Review the Acting General Counsel’s Reports Concerning Social Media dated August 18, 2011, January 24, 2012, and May 30, 2012. These reports address numerous policy issues such as confidentiality and non-disparagement which are not specific to Social Media policies.
- Adopt language advising employees, in laymen terms, that the policy language does not restrict employees’ Section 7 activities. A recent Advice Opinion suggested such a disclaimer provides value despite decisions to the contrary.

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1 The information provided is not exhaustive and is intended only to provide recommendations which employers may consider adopting or implementing. The information may be accepted, rejected or modified for use. The content is informational and educational in nature and is not legal advice. All readers of this content are cautioned to consult with counsel before implementing.
• Review the Memorandum from the Office of the General Counsel Division of Advice dated February 28, 2013, regarding The Boeing Company’s Code of Conduct policy. In deciding the company’s code of conduct policy did not violate the Act, the Division of Advice held the company sufficiently clarified the terms of the policy.

• When describing conduct that violates company policy, be cautious regarding the adjectives used to describe the conduct. For example, in regard to describing prohibited conduct, the Acting GC has held that “maliciously false” is lawful where as “false” or “offensive” could infringe on Section 7 activity.

• Incorporate language that limits communication by employees on behalf of the company as the Company generally has the ability to regulate such communications.

• Distinguish between prohibited conduct on Company time, on behalf of the Company or on Company systems vs. on personal time. In general, greater employee rights only exist vis-à-vis postings on personal time.

• Request employees to use a disclaimer such as “the postings on this site are my own and do not necessarily reflect the views of [Employer]” in any situation where the poster’s employment can be imputed and the post could pose an actual or potential conflict of interest.

• Cross-reference your harassment and discrimination policies in describing prohibited conduct as the references to such policies demonstrate the policy is not intended to restrict Section 7 activities.

**DON’T:**

• Prohibit employees from posting “material non-public information or confidential information” without clarifying the type of information or cross-referencing to a confidentiality policy that does not limit employees’ Section 7 rights to discuss wages or other terms and conditions of employment. For example, language that prohibits employees releasing “confidential guest, team member or company information” was held unlawful as this could be interpreted as prohibiting employees from discussing employees’ conditions of employment.

• Use the following language in your code of conduct or social media policy, unless able to sufficiently clarify the meaning to avoid a violation of the Act:
  - inappropriate conversations;
  - disparaging comments;
  - disrespectful conduct;
  - unprofessional communication;
  - negative conversations;
  - offensive communication;
  - demeaning behavior;
o abusive language;
  o statements that damage the company;
  o objectionable comments;
  o inflammatory communication.

- Prohibit all use of the company’s name or logo outside the course of business without prior approval of a company representative.
- Incorporate language that requires the employee to check with their employer before they post content on personal blogs, etc. The Board has held that any rule requiring employees to secure permission from an employer as a precondition to engaging in Section 7 activity violates the Act.
- Adopt language prohibiting employees from posting photos, music, videos, and quotes and personal information of others without obtaining the owner’s permission.
- Restrict employees from “friending” one another.
- Provide policy instructions that employees “report any unusual or inappropriate internal social media activity.” An employer violates the Act by encouraging employees to report to management the union activities of other employees.
- Prohibit disclosure of personal information about the employer’s employees.
- Adopt language restricting employees’ commenting on any legal matters.
- Use language warning employees to “avoid harming the image and integrity of the company” in the absence of clarifying language. Employees could construe the language to prohibit protected criticism of the employer’s labor policies or treatment of employees.

For additional information, please contact:

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