PRESENTATION

Making Sense Out Of Recent NLRB Developments

Ben Bodzy

Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

211 Commerce Street, Suite 800
Nashville, TN 37201
Direct: 615.726.5640
Fax: 615.744.5640
E-mail: bbodzy@bakerdonelson.com

Top 10 NLRB Issues For 2014

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3. *Noel Canning* – Recess Appointments
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The Starting Point

- The National Labor Relations Act ("NLRA") applies to both union and nonunion employers.
- Section 7 of the NLRA allows employees to engage in "concerted activity" for "mutual aid or protection" or to refrain from doing so. These are called "Section 7 rights" a/k/a "protected concerted activity.
- Concerted activity is defined as activity "engaged in with or on the authority of other employees," and it includes activity intended to incite group action or speaking on behalf of other employees about terms and conditions of employment.
- Employers may not "interfere with, restrain, or coerce employees in the exercise of" their Section 7 rights.

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Northwestern Football Players Attempt to Unionize

- On January 28, 2014 Northwestern football players filed an election petition with the NLRB.
- The NLRB Regional Director issued on order on March 26, 2014 directing an election on April 25, 2014.
- The RD found that scholarship football players were employees.
- The NLRB issued an order on April 24, 2014, indicating that the football players could vote, but their ballots would be impounded until the NLRB decides if they are employees.
- On May 12, 2014, the NLRB invited briefs on whether football players are employees.

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Northwestern Football Players Attempt to Unionize

- Are football players employees?
  - Union argues
    - Players are compensated $76,000/year in tuition, fees, room, board, and books.
    - Players spend 50-60 hours per week in football related activities.
    - Coaches control living arrangements; outside employment; use of vehicles; travel off campus; what players post on the internet; whether players can speak to the media; use of drugs and alcohol, etc.
  - Northwestern argues
    - Relationship with players is primarily educational, not economic.
    - Scholarships are not compensation.
    - All students must follow rules; not just football players.

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Northwestern Football Players Attempt to Unionize

- If the Northwestern football players are found to be employees, then it raises a number of questions:
  - Subjects of bargaining
    - Compensation
    - Practice Times
    - Days off
    - Frequency of water breaks during practice
    - First class or coach travel to away games
  - Title VII liability
  - FLSA liability
  - Workers compensation liability

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UAW Attempts to Organize Volkswagen in Chattanooga

- Election conducted on February 12-14, 2014.
- Volkswagen entered into a neutrality agreement with the UAW.
- UAW lost 712-656. (52% to 48%)
- UAW objected to election based on “third party interference.”
- The UAW would have had to show that the statements by the government officials created "a general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizons Hotel*, 270 NLRB. 802 (1984).
- On April 21, 2014, at the NLRB hearing on the objections, the UAW withdrew its objections to the election.

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UAW Attempts to Organize Volkswagen in Chattanooga

- Reasons why UAW may have withdraw objections:
  - The UAW was on shaky legal ground.
  - A UAW loss would create precedent that was terrible for unions.
  - The UAW had already achieved its public relations objectives.
  - Even if successful, UAW objections would not have expedited a second election.
  - The UAW could cut a card check deal with Volkswagen.
  - Congress is investigating.
  - UAW is waiting Volkswagen's decision on SUV production.

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Noel Canning – Recess Appointments

- From January 2012 to July 2013, the NLRB was operating with three members. Two of those members were recess appointments by President Obama.
- Pro-forma Senate Sessions.
- Employers claimed that the recess appointments were invalid because they occurred when the Senate was not actually in recess.
- 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 US Supreme Court is deciding the issue right now.

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New Election Rules

- Draft rule in rulemaking process.
- Could shorten time between petition and election from current average of 42 days to as few as 10 days.
- Mandates a NLRB hearing within 7 days.
- Requires statement of issues prior to hearing.
- Eliminates ability to resolve eligibility issues prior to election.
- Requires turning over list of all unit employees' names, home addresses, telephone numbers, and personal e-mail addresses.

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Revisiting E-mail Solicitation

- In 2007, in *Register-Guard*, 351 NLRB 1110 (2007), the NLRB held that an employer "may lawfully bar employees' nonwork-related use of its e-mail system."
- On February 25, 2014, the NLRB's General Counsel issued a memorandum where he identified strategic priorities and initiatives.
  - Among these strategic priorities and initiatives, the memo identified "[c]ases that involve the issue of whether employees have a Section 7 right to use an employer's e-mail system."
  - This suggests that the NLRB's General Counsel intends to ask the Board to overturn *Register Guard*.

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Revisiting E-mail Solicitation

- On April 30, 2014, the NLRB requested briefing in *Purple Communications* on the following issues:
  - Should the Board reconsider its conclusion in *Register Guard* that employees do not have a statutory right to use their employer's email system (or other electronic communications systems) for Section 7 purposes?
  - If the Board overrules *Register Guard*, what standard(s) of employee access to the employer's electronic communications systems should be established? What restrictions, if any, may an employer place on such access, and what factors are relevant to such restrictions?

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Revisiting E-mail Solicitation

- In deciding the above questions, the Board intends to evaluate the following factors:
  - Whether employees have a protected right to communicate about unions using their employer's e-mail system?
  - The impact on the employer of employees using their e-mail systems for union activities.
  - The availability of alternative electronic means to communicate with employees. (i.e. personal e-mail addresses).
  - Technological changes since *Register Guard* was decided.

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Continued Focus On Policies

- In assessing an employer's policies, the NLRB analyzes whether the rule would "reasonably tend to chill employees in the exercise of their Section 7 rights."
- If the rule explicitly restricts protected concerted activity, it is unlawful.
- If the rule does not explicitly restrict protected concerted activity, it is unlawful if:
  - (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.

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Confidentiality Policies

- Employees have a protected right to communicate with each other regarding their own wages or their co-workers' wages.
- Confidentiality policies cannot prohibit discussion or communication of employee wages or terms and conditions of employment.
- The NLRB takes the position that confidentiality policies cannot be so broad that an employee would reasonably interpret the policy as prohibiting the discussion of wages or terms and conditions of employment.
- Employers often include "personnel information" or "financial information" in their definition of confidential information.
- Employers may prohibit employees from disseminating confidential information that the employee learns by virtue of the employee's job responsibilities. (Example: a payroll clerk could not share salary information that he learned in the course of processing payroll).

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Confidentiality Policies

- Recent NLRB Examples:
  - *Target Corp.*, 359 NLRB No. 103 (2013).
    - NLRB found Target's confidentiality policy unlawful because it prohibited the disclosure of "confidential information," which it defined as "any nonpublic information," including "personnel records."
  - *Flex Frac Logistics, LLC,* 358 NLRB No. 127 (2012).
    - NLRB found the employer's confidentiality policy unlawful because it prohibited the disclosure of "personnel information."

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Other Policies

- An employer may not prohibit “negative comments” or “negativity.”
  - *Hills and Dales General Hospital*, 360 NLRB No. 70 (2014).
- An employer may not require employees to “represent [the Company] in the community in a positive and professional manner.”
  - *Hills and Dales General Hospital*, 360 NLRB No. 70 (2014).
- An employer cannot prohibit employees from displaying “an inappropriate attitude or behavior to other employees.”
  - *First Transit Inc.,* 360 NLRB No. 72 (2014).

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Confidentiality of HR Investigations

- The NLRB has held that an employer cannot have a "blanket approach" or rule requiring employees to keep information relating to a human resources investigation confidential. *Banner Health Systems*, 358 NLRB No. 93 (2012).
- "To justify a prohibition on the discussion of ongoing investigations, an employer must show that it has a legitimate business justification that outweighs employees' Section 7 rights."
- The employer's "generalized concern with protecting the integrity of its investigations is insufficient to outweigh employees' Section 7 rights."

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Confidentiality of HR Investigations

- The NLRB held that the employer must assess on a case-by-case basis whether:
  - A particular witness needs protection.
  - Evidence is in danger of being destroyed.
  - Testimony is in danger of being fabricated.
  - The confidentiality instruction is necessary to prevent a cover-up.
- It is the employer’s burden to prove that one of these factors justifies a confidentiality instruction in a particular case.

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Confidentiality of HR Investigations

- The NLRB GC's Office has issued an Advice Memorandum containing an approved policy for confidentiality in the context of HR investigations:
  - The Company has a compelling interest in protecting the integrity of its investigations. In every investigation, the Company has a strong desire to protect witnesses from harassment, intimidation, and retaliation, to keep evidence from being destroyed, to ensure that testimony is not fabricated, and to prevent a cover-up. The Company may decide in some circumstances that in order to achieve these objectives, we must maintain the investigation and our role in it in strict confidence. If the Company reasonably imposes such a requirement and you do not maintain such confidentiality, you may be subject to disciplinary action up to and including immediate termination.

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Off-Duty Access to Premises

- Off-duty employees have a right to solicit and distribute literature in **exterior**, non-working, areas of the employer's premises. (ie. parking lot, sidewalks, driveway).
- This right applies to the facility where the employee works and any other facility of the employer.
- The NLRB allows employers to restrict access for "security needs," if the employer can prove a specific security concern, but there is a very high burden on the employer to prove why off duty employees in its parking lot pose a specific security threat.

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Off-Duty Employee Access to Premises

- An employer can have a policy limiting off-duty access by employees if:
  - The policy limits access solely to the interior of the facility.
  - The policy is clearly disseminated to all employees.
  - The policy applies to off-duty access to the interior of the facility for all purposes, not just for union activity.

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Off-Duty Employee Access to Premises

- In *Sodexo America, LLC*, 358 NLRB No. 79 (2012), the NLRB emphasized that the policy must restrict ***all*** off duty access to the interior of the facility.
  - An exception that allowed off duty employees to enter the facility for "company business," rendered the policy invalid.
  - The practical implication is that if you allow off-duty employees to come into the facility to pick up a paycheck, fill out HR forms, come to company sponsored events, etc., then you will have to allow them into the facility for organizing activity.
- When off-duty employees are permitted into the facility, you can restrict their access to nonworking areas.

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The NLRB Poster is Dead

- The NLRB issued a rule that required all employers subject to its jurisdiction to post a notice of rights under the NLRA.
- The poster requirement was scheduled to go into effect on April 30, 2012.
- On April 17, 2013, the U.S. Court of Appeals for the District of Columbia issued an injunction preventing the rule from going into effect.
- The D.C. Circuit later found that the NLRB could not require employers to post the notice because the notice was compelled speech that violated employers' First Amendment rights.
- On January 6, 2014, the NLRB announced that it would not appeal the D.C. Circuit's decision and it would not pursue the notice posting at this time.

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Investigatory Witnesses in Nonunion Workplaces

- Employees who are represented by a union are entitled to a witness in any investigative interview that could lead to disciplinary action.
- The NLRB has wavered back and forth on whether employees in non-unionized workplaces are entitled to witnesses at investigatory interviews.
- Since 2004, employees in non-unionized workplaces have not been entitled to witnesses at investigatory interviews.
- The NLRB General Counsel's February 25, 2014, memo outlining his strategic priorities and initiatives identifies the right to an investigatory witness in non-unionized workplaces as an issue under consideration.
- This suggests that the NLRB may be urged to re-extend the right to an investigatory witness in non-unionized workplaces in the coming year.

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Joint Employer Standards

- NLRB has invited briefs in *Browning-Ferris Industries of California Inc.*
- Teamsters petitioned to represent a subcontractor's employees working at a BFI landfill.
- NLRB Region dismissed the petition because the subcontractor hired, fired, controlled rates of pay, and supervised the subcontractor's employees.
- Union is arguing on appeal that since BFI dictated shift times, number of subcontractors employees on each shift, and sets productivity standards, it should be considered a joint employer.
- Current standard is whether the alleged employer exercises direct control over essential terms and conditions of employment.
- NLRB appears open to expanding the joint employer standard.

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Proactive Preventative Measures

- Identify a Rapid Reaction Team
- Update Your Employee Handbook
- Train Your Front-Line Supervision
- Conduct A Labor Relations Audit
- Solicit Feedback From Employees and Show Them That You Are Acting On It

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