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EMPLOYMENT LAW ALERT

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This alert is intended to call attention to recent NLRB actions affecting non-union employers. ***It is intended to be informational and does not constitute legal advice concerning any specific situation.***

NATIONAL LABOR RELATIONS BOARD & NON-UNION EMPLOYERS

Employers may not be fully aware that a new erosion of the Kansas employment at will doctrine has developed. In recent times, the National Labor Relations Board (NLRB) has undertaken to become more aggressive in the enforcement of the National Labor Relations Act (NLRA) against non-union employers.

The NLRA has always applied to non-union employers. Until most recently, NLRB focus has been on labor-management relations with unionized employers.

Now the NLRB is placing greater emphasis than in the past on enforcing employee "protected concerted activities" ("PCA") under the NLRA with non-union employers. If an employer is found to have interfered with employee protected concerted activity, such will be considered to be an unfair labor practice ("ULP"). Their investigators seem to be taking a highly aggressive anti-employer attitude.

Virtually all private employers engaged in any way "affecting" interstate commerce are subject to the NLRA. Most all employers will be considered to be engaged in interstate commerce, but the NLRB has a discretionary "de mimimus" standard which essentially states that if the amount of "affected" interstate business activity is less than $50,000 annually the employer will not be considered engaged in interstate commerce. The NLRB may not always apply that discretionary standard. Political subdivisions of the State are not subject to the Act.

Employees covered by the NLRA are generally all employees except agricultural laborers, supervisors, domestic services workers, persons employed by parents or a spouse, and employees of an employer subject to the Railway Labor Act.

Knowing and recognizing what may be considered by the NLRB to be a PCA can be very difficult. Taking disciplinary action or terminating an employee who has engaged in a protected concerted activity may bring NLRB action to nullify such employment action, recover damages for affected employees, obtain an injunction against the employer, and impose other compliance measures. Further, a complaint to the NLRB need not involve any employee disciplinary action, but merely be an allegation of some act affecting employees' PCA.

Protected concerted activity is activity engaged in for employees' mutual aid or protection, which includes employee efforts to improve working conditions and terms of employment. Generally, the activity must involve action by more than one employee, but the NLRB has held that actions by a single employee may be protected where there is indication of interest by a group of employees.

Anyone may file a written Charge alleging violation of the NLRA with the NLRB which will be first assigned to an investigator who may recommend dismissal of the Charge, seek settlement, or initiate formal action through a Complaint by the Regional Director. Formal action may lead to a trial before a Administrative Law Judge and subsequent appeals to the NLRB and to federal court.

The employer may prevail if a finding is made that the employee:

(1) did not engage in protected concerted activity; or

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(2) **the employer's action was not motivated** by the employee's engagement in protected concerted activity.

The NLRB has made a big effort to find certain employer Social Media policies and Employee Handbook provisions as interfering with employee rights under the NLRA. Employers might do well to obtain an update review of such policies and handbooks in light of recent NLRB holdings.

Just some examples of activities which have been held to be protected concerted activities are:

- An employer who fired two employees who composed a letter protesting a change in the method of compensation committed unfair labor practice.
- Discharging employees who gave affidavits to a sheriff stating that the employer's vice-president had embezzled funds from the employer was a violation of the NLRA. The employees were engaged in protected activity.
- An employee who objected at an employee meeting to the supervisor's lecture about the volume of radio headsets and received a written warning was engaged in protected activity; her discharge was an unfair labor practice.
- The employer committed an unfair labor practice when it discharged an employee after she and another employee told a third employee of their perception that the employer's refusal to hire that employee's daughter was unlawful race discrimination. The employee was engaged in protected concerted activity.
- Employee testified that she spoke with other employees to get their support and she wanted to go to management to see that the dress code was being fairly applied to everyone. She also presented evidence that the Employer's photography policy had never been enforced before and that employees routinely took pictures of each other at work, freely sharing them and posting them on company bulletin boards. The employer had committed an unfair labor practice.
- The provisions of the Employer's social media policy that prohibit the disclosure of personal information of co-workers and the use of company logos and photographs of company stores are unlawfully broad and were interpreted to restrain employees in the exercise of their protected concerted activity.
- The terminated employee posted his frustration on Facebook that another individual was promoted over him and that the promotions were not aligned with the performance. Responses to his post included suggestions that all the good employees should quit. These posts demonstrated "shared concerns about the terms and conditions of employment" and were therefore "protected concerted activity."
- The terminated employee posted on a co-worker's Facebook wall about his supervisor's bad attitude and poor management style, and the co-worker agreed responding that she wished she could work elsewhere. The employees had previously complained about the supervisor to a higher up. Protest of supervisory action is protected under the NLRA and the NLRB found that the discussion constituted "concerted activity for mutual aid and protection." The NLRB further found that the comments were not unprotected disparagement or defamation.

Review of NLRB decisions show that Employers can expect a high probability that NLRB will find some particular language in social media policies to "chill" protected concerted activity. Nonetheless, we don't recommend scrapping all social media policies, but perhaps consideration of some adjustments eliminating or modifying provisions which are most likely problematic. Applications of social media policy after careful consideration of the particular circumstances may pass without question, or withstand scrutiny.

Finally, the U.S. District Court in Washington, D.C. ruled on March 2, 2012, that the NLRB rule requiring employers, including private non-union employers, to post notice of employee rights through an NLRB designated poster is a lawful exercise of NLRB authority. **The poster now must be displayed by April 30, 2012.** (Originally, the display date was November 14, 2011, but was postponed to April 30, 2012, as the result of the litigation initiated by the National Federation of Independent Business.)