

Obama NLRB: Boldly Going Where No Board Has Gone Before

8/9/2011 Robert A. Dubault

All the major federal administrative agencies that regulate the workplace have been increasingly active during the past two and a half years. Budgets, staffing and enforcement activity have all increased. But of all the federal agencies, the National Labor Relations Board (NLRB or Board) has probably done more lately than any other to raise its public profile and attempt to reshape the law. The NLRB is charged with enforcing the National Labor Relations Act (NLRA), which regulates many aspects of the employer-union relationship and provides all employees with the right:

- to form, join or assist labor unions;
- to engage in other concerted activity for mutual aid and protection and;
- to refuse to engage in such activities.

In addition to the Board's widely-publicized pursuit of unfair labor practice charges against Boeing for its decision to locate certain production work in South Carolina instead of Washington, the NLRB has made other headlines in the past several months.

Posting Requirement

In December 2010, the Board proposed that all employers covered by the NLRA would be required to post a notice informing employees of their rights under the Act. According to the Board, the posting is needed because many employees are unaware of their legal rights. The notice requirement has not been finalized, but if the final notice looks at all like what has been suggested by the NLRB, it would:

- inform employees in detail of various actions that they can take;
- detail actions that employers are prohibited from taking and;
- provide NLRB contact information for filing a complaint if an employee believes his or her rights have been violated.

Social Media & Employee Discipline

As noted above, employees have the right under the NLRA to engage in concerted activity for mutual

aid and protection. This includes discussing working conditions, wages and benefits with coworkers. Employers are prohibited from interfering with this right by either promulgating overly-restrictive rules or disciplining employees who engage in such activities. Recently, the Board has taken up two cases involving employees who claimed that they were terminated because they discussed or sought to discuss with co-workers via the social media site Facebook some term or condition of employment. One case involved an emergency medical technician who claimed she was fired after she posted complaints about her supervisor on her Facebook page. That case was ultimately settled, but part of the settlement required the employer to modify its social media policy. The other case, which is still pending, involves a car salesman in Illinois who claims he was fired after criticizing the food his employer served during a promotional event because he believed it reflected poorly on the dealership and cost he and his co-workers sales (and commissions). He filed an unfair labor practice charge over his discharge and the regional office of the NLRB took the position that his discharge was unlawful because his comments/criticisms were protected activity under the Act.

Given the overwhelming popularity of social media sites and the growing number of people who use them on a regular basis, employers who plan to develop and even those who have established social media policies would be well advised to carefully consider whether the policy could raise issues under the NLRA. In addition, before taking employment action against an employee for statements he or she made on a social media site or a blog, the employer should carefully evaluate whether the statements or posts might be protected under the NLRA.

New Election Rules

Most recently, on June 21, 2011, the Board published proposed rules which would substantially overhaul the procedures by which it conducts elections to either certify or decertify a union as the representative of a group of employees. The present rules have been in place for decades and they either require or allow for a number of election-related issues to be resolved before an election is held. Some of these issues require a hearing, and the party who is unhappy with the outcome of that hearing may file an appeal to the NLRB before the election occurs. This can have the effect of delaying the scheduling or holding of an election, and critics complain that it allows a party (usually the employer) to slow the process down and buy time to communicate its position to its employees. Under the proposed rules, the pre-election process would be streamlined, and many of the procedural steps that currently exist would be delayed until after an election. Some steps, which are currently mandatory, would become totally discretionary. In addition, employers would be required to provide additional information about their employees much more quickly than under the present rules. At present, elections are typically held within about five or six weeks of when a petition is filed. Under the proposed rules, it has been predicted that elections could be held in as little as two or three weeks. This obviously would give the non-petitioning party much less time to communicate its message to the affected employees. Opponents of the proposed rules claim that this proposed expedited process is the Board's way of appeasing organized labor for the failure to pass the controversial Employee

Free Choice Act. They also criticize the fact that the Board has expedited the time period for public comment on its new election rules.

The Board's recent decisions and actions have not gone unnoticed in Congress and it's a safe bet that the Republican-controlled House of Representatives will continue to put pressure on the Board in a variety of different ways (including legislation or through the appropriations/budgeting process). Whether you agree or disagree with the Board's recent initiatives, one thing is clear: the Board has raised not only its public profile, but also awareness of the NLRA and the rights it protects. Thus, even if the proposed posting requirement or the changes to the election rules are never enacted (or if they are enacted in some modified form), the Board will still have succeeded in making many more people aware of the federal labor laws.