Legal Brief

The NLRB: Administrative Activism Has Implications for All Employers

Generally speaking, most non-union employers have had little exposure to the National Labor Relations Board ("NLRB"). However, due to the appointment of pro-union members to the NLRB by President Obama and four recent aggressive actions taken by the Board, the NLRB has new relevance for all employers.

The NLRB is a government agency that is charged with the obligation of enforcing the National Labor Relations Act ("Act"). The Act basically contains two major protections for employees. First, the Act protects employees who engage in a "protected activity," such as bringing complaints or grievances to the employer regarding terms and conditions of employment. Second, the Act gives employees the right to organize and bargain collectively with an employer through a designated representative. Most employers whose employees are not represented by a union have had little or no concern with regard to NLRB activities. However, the new NLRB has taken four significant steps that should cause all employers to pay close attention.

Social Media Postings and Unionization

First, in a series of decisions, the NLRB has taken a very aggressive stance toward social media regulation in the workplace. In addition to addressing the ability of employers to maintain social media policies in their places of business, the NLRB has regulated an employer's ability to take disciplinary action against employees for social media postings. These NLRB decisions have prompted employers to carefully scrutinize their social media policies and practices to avoid being subjected to an unfair labor practice charge.

Second, the NLRB has published proposed amendments to the rules and regulations governing how union elections are conducted. When the Obama administration and pro-union activists were unable to obtain expedited elections under the Employee Free Choice Act, the NLRB began efforts to streamline its own regulations to provide for expedited elections through the regulatory process.

The NLRB has proposed to shorten the election and hearing procedures so as to limit an employer's ability to raise legitimate objections about which employees properly belong in an appropriate bargaining unit and are eligible to vote. The NLRB's proposed rules also would require employers to provide names, home addresses, phone numbers, and e-mail addresses of eligible voters.

Third, the NLRB has issued a decision in *Specialty Healthcare and Rehabilitation Center of Mobile and United Steelworkers, District 9*, which permits smaller units of distinct groups of employees to unionize. Before the *Specialty Healthcare* decision, the appropriate bargaining unit for a manufacturing facility would typically consist of all production and maintenance employees. The *Specialty Healthcare* decision essentially allows smaller groups of employees, such as a job classification or department, to unionize. Allowing such small bargaining units makes it easier for a union to organize small segments of an employer's work force. The employer also could be forced to bargain with one or more small groups of employees.

Fourth, the NLRB has promulgated a rule requiring employers to post notice of an employee's rights to organize, engage in concerted activity, and bargain collectively under the National Labor Relations Act. The effective date of the posting requirement has been delayed until January 31, 2012.

For the Record

Taken together, these four actions by the NLRB demonstrate that the Obama administration and its appointees to the agency intend and hope to tip the scales in favor of unions to make union organizing easier. As a result, all employers need to gain a greater understanding of the implications of these actions and consider a strategy to respond to the NLRB's aggressive stance.

Fast Facts

- The Obama NLRB is taking extreme regulatory and judicial actions to make union-ization easier.
- Employers should design a strategy to respond to the NLRB's activism.

Should you have any questions concerning the contents of this article, contact Dan Miller at 814/870-7708, or any of the other members of the MacDonald Illig Labor and Employment Practice Group.

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