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SPECIAL FEATURE

NLRB campaign to educate non-unionized employees

By William E. Hannum III

The National Labor Relations Board recently announced that it will begin an educational campaign to teach non-unionized employees that they have the same rights as unionized employees to engage in "concerted activity" protected by the National Labor Relations Act.

This article summarizes the major components of the NLRB's educational campaign, describes the underlying statutory rights about which the NLRB is seeking to educate non-union employees (which may be new to some non-union employers, as well), describes recent enforcement efforts by the NLRB directed at non-union employers, and outlines actions that non-union employers should consider taking in response to these recent changes at the NLRB.


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By way of background, the NLRB's announcement about its educational campaign coincides with the other activity at the NLRB, a coincidence that suggests that there is a general intent to promote union organizing activity.

For example, April 30 was the effective date of the NLRB's new "quickie election" rules, which put union-representation elections on a fast track, leaving little time for employers to present their case against unionization to their employees after a representation petition has been filed with the NLRB.

April 30 was also to be the deadline for employers to post an NLRB-prescribed notice detailing employees' rights under the NLRA. However, that deadline was recently suspended, when the U.S. Court of Appeals for the District of Columbia Circuit enjoined the NLRB from enforcing the regulation that would require employers to post that notice in workplaces informing employees of their rights under the NLRA.

That injunction is temporary, preserving the status quo "pending appeal" while the court resolves whether the NLRB has the right to require employers to post the notice.

Thus, the NLRB announced, "Regional offices will not implement the rule pending the resolution of the issues before the court."

In light of these developments at the NLRB, all employers — both unionized and non-unionized — need to be aware of the heightened risk that any interference with employees' rights to take action for their "mutual aid or protection" will result in an unfair labor practice charge.

NLRB's 2012 educational campaign

Initial reports about the NLRB's planned educational efforts indicate that the agency will:

- publish a web page dedicated to explaining the concept of protected concerted activity (described further below) and citing examples of unlawful employer responses to protected concerted activity;
- produce pamphlets in English and Spanish describing concerted-activity

rights for distribution by employee advocacy groups and other federal agencies; and

- follow up with a media campaign that will include speeches and media appearances by NLRB personnel to discuss non-unionized employees' rights under the NLRA.

Employers — particularly non-unionized employers — can also expect additional enforcement efforts from the NLRB in the coming months.

'Protected concerted activity' under the NLRA

Under Section 7 of the NLRA, most non-supervisory employees in the private sector have the right to organize or join a labor union, bargain collectively, and "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

The NLRA's protection of such concerted activities covers unionized and non-unionized employees alike. However, many non-unionized employees (and their employers) are not aware of the existence or full scope of this right. The NLRB's new campaign is intended to increase such awareness among non-union workers.

Generally, when employees act together to try to improve the terms and conditions of their employment (e.g., wages, hours, benefits or working conditions), such actions constitute protected concerted activity.

In addition, actions taken by a *single* employee may nonetheless be deemed protected, if the employee undertakes such actions with the object of initiating or preparing for group activity.

Examples of specific employee actions that may constitute protected concerted activity include:

- requests that other employees sign a petition asking management to change a personnel policy;
- discussions among employees of their pay rates or other terms and conditions of employment;
- communications with outside parties (such as labor unions, government agencies or media outlets) about workplace issues; and
- requests to meet with management to discuss workplace safety concerns.

In a number of decisions within the past year (often referred to as the "Facebook firing" cases), the NLRB has concluded that social media postings by employees about workplace issues qualified as protected concerted activity, and that employers therefore violated the NLRA by terminating or disciplining employees in response to such postings.

While the cases are fact-specific, as a general matter, when an employee posts about an issue of mutual concern to employees, or invites co-workers to post comments in response, the NLRB may well find such online activity to be protected under the NLRA.

Based on these so-called "Facebook firing" cases, and on the agency's recent publication of special reports summarizing them, it is clear that social media activities have become a matter of particular focus for the NLRB.

In addition, the NLRB has emphasized that employers may violate the NLRA merely by maintaining personnel policies that employees could reasonably interpret as prohibiting protected concerted activities, even if no employee is actually disciplined for violating those policies.

For instance, in one recent case, the NLRB concluded that an employer's rule prohibiting "[m]aking disparaging comments about the company through any media, including online blogs, other electronic media or through the media" unlawfully restricted employees' Section 7 rights, as the rule could be construed as prohibiting protected complaints about workplace issues, in violation of the NLRA.

Recommendations for employers

While many non-union employers have had little or no experience with NLRA issues, this could quickly change for those non-union employers that do not take appropriate steps to ensure that they do not violate employees' rights under the statute.

Thus, employers would be well-advised to:

- ensure that all executives, managers and supervisors are fully educated as to the nature and scope of employees' rights under the NLRA to engage in concerted activities;
- consult labor counsel before disciplining or terminating an employee for violating a social media policy or for any other infraction that might involve protected concerted activity;
- work with counsel to revise current policies to comply with the NLRB's recent pronouncements on social media and similar communications among employees; and
- monitor developments related to the suspended requirement to post the NLRB's new employee-rights poster. (The notice and updates on the status of the cases challenging the poster are available, at no cost, through the NLRB's website at http://www.nlrb.gov/poster.)

In light of the NLRB's educational initiative, its mandatory employee-rights poster and the recent "Facebook firing" cases, it is clear that the agency is focusing on non-union employers.

Thus, these employers should work with labor counsel to be certain that they understand the nature and scope of employees' rights to engage in protected concerted activities, and take appropriate action to minimize the risks posed by the NLRB's educational initiative. NEIH