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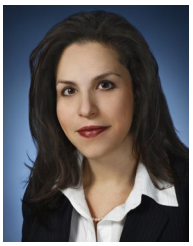

Retaliation under the National Labor Relations Act: The Next New Wave of Claims, for Both Union & Non-Union Employers?

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Until recently, non-union employers had little reason to consider the National Labor Relations Act (the "Act"), as they rarely faced liability under its provisions. They typically only took notice of the Act or the federal agency charged with enforcing it, the National Labor Relations Board (the "NLRB"), if their workers threatened unionization.

However, the NLRB has forced non-union employers to turn their attention to the Act with a slew of recent decisions holding that employer policies violate workers' rights to engage in "concerted and protected activities". This should interest the underwriting and broker communities as Employment Professional Liability Insurance ("EPLI") coverage can be triggered if workers allege that employers retaliated against them for violating such policies.

The Act preserves the right of all private-sector employees, whether union or non-union, to engage in protected concerted activity.[1] Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7" of the Act. In turn, Section 7 guarantees employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." "Concerted activities" occur when two or more employees act together to improve any term or condition of employment. According to the NLRB, concerted activity can occur in surprising ways, such as when a worker "likes" a co-worker's status or comment on Facebook, or retweets a co-worker's comments on Twitter.

This article describes the evolving role of the NLRB, the scope of employer (and carrier) liability for retaliation claims, how claims arise and proceed, the NLRB's views on specific employer policies, and how employers and carriers can minimize risk of liability.

The NLRB's Evolving Role and Focus

Created in 1935, the enforcement activities of the NLRB were historically associated with labor unions and collective bargaining. However, over time, traditional unionization activities have steadily declined.[2] As a result, the visibility, power, influence and necessity of the NLRB and the Act decreased. In recent years, the NLRB has reinvented itself and has undergone a generational renaissance to captivate a new economy of young, technologically savvy workers.

To appeal to a new generation of super-connected and mostly non-union workers, the NLRB released a mobile app, advertised as an "interactive wizard." The app teaches workers about their rights under the Act, and can connect them right to the NLRB to file a charge. The NLRB has also zeroed in on employer attempts to limit the social media activities of its workers. In 2011, the NLRB Acting General Counsel issued a report detailing 14 cases involving the social media policies of employers. In this report, the NLRB weighed in on "the protected and/or concerted nature of employees' Facebook and Twitter postings . . . and the lawfulness of employers' social media policies and rules."[3] The decisions held employer policies to be unlawful if they could be construed as prohibiting concerted activities on social media.

The NLRB then expanded its focus, and what followed was an avalanche of colorful and murky decisions opining on the lawfulness of all types of employer policies. This year, the NLRB's Office of the General Counsel released a report purporting to clarify its position on the lawfulness of policies (the "Memorandum").[4] Unfortunately, the Memorandum may have created more confusion than clarity, as it is difficult to understand the reasoning as to why certain seemingly benign policies are deemed unlawful and others lawful.

For employers, the NLRB's recent decisions holding that certain employee handbook provisions violate the Act have created a virtual minefield, the pitfalls of which remain increasingly difficult to map and avoid. The question

for insurance carriers becomes whether the NLRB's decisions foreshadow the need to reassess potential risk and exposure under current EPLI policies.

What is the Scope of Employer Liability & by Implication Carrier Liability?

Remedies available to an employee who establishes retaliation under the Act can include reinstatement, back pay and interest. In extreme cases, the NLRB has also awarded front pay and attorneys' fees.[5] The NLRB can also require the employer to rescind the policy and post a notice to employees. The notice advises employees of the role of the NLRB, and provides information about filing charges, potentially prompting the filing of additional charges and creating more liability.

Although most EPLI polices have exclusions that preclude coverage for claims for violations of the Act, many such exclusions provide a carve-back specifying that the exclusion does not apply to claims alleging retaliation under the Act. This carve-back could trigger coverage for a claim by an employee that he was terminated, harassed, discriminated against, or suffered other adverse action in retaliation for engaging in concerted activity. This type of claim might preserve coverage under an EPLI policy for an action pending before the NLRB which, in addition to covering an award of back-pay (and possibly front pay and attorneys' fees), would also cover defense costs associated with litigating before the NLRB, which can become very costly very quickly.

How do Claims Arise and Proceed?

Retaliation claims under the Act implicating handbook provisions may arise when an employer terminates an employee for violating a policy. The employee may file an unfair labor practices charge with his regional NLRB office, claiming that he was terminated in retaliation for engaging in protected and concerted activity—and that the employer policy was unlawful. The charge is investigated by regional office attorneys. If they believe that the Act has been violated, they also prosecute the claim, before an NLRB administrative law judge. Thus, the NLRB effectively acts as investigator, prosecutor and adjudicator.

Recent NLRB Pronouncements on Various Types of Employer Policies

In order to determine whether a policy violates the Act, the NLRB first considers whether it explicitly restricts activities protected by Section 7.[6] If so, the rule is unlawful. If it does not, the rule is still unlawful if employees could "reasonably construe the language to prohibit Section 7 activity," or it has actually been used to restrict exercise of that activity. While this guiding legal principle appears to provide a framework for anticipating how the NLRB would interpret employer policies, the NLRB has taken an increasingly broad and unpredictable view of how employees could "reasonably construe" a policy to infringe on their right to engage in concerted activity.

- ***Handbook Provisions Prohibiting Harassment and Discrimination***

Guided by United States Supreme Court precedent, employers regularly distribute policies prohibiting harassment and discrimination. However, according to the NLRB, these policies can violate the Act. For example, the Memorandum deemed unlawful a policy prohibiting "defamatory, libelous, slanderous or discriminatory comments about the company, its customers and/or competitors, its employees or management." However, the Memorandum considered lawful the following rule: "being insubordinate, threatening, intimidating, disrespectful or assaulting a manager/supervisor, coworker, customer or vendor will result in discipline." The Memorandum explained that employees might think the first rule bans criticism of their employer; however, the second rule was lawful because employees should understand that it only prohibits serious misconduct, like threats and assault.

Notably, the Memorandum deemed unlawful standard provisions in anti-harassment policies, including one prohibiting employees from sending "unwanted, offensive or inappropriate" e-mails, and another advising employees that: "Material that is fraudulent, harassing, embarrassing, sexually explicit, profane, obscene, intimidating, defamatory, or otherwise unlawful or inappropriate may not be sent by e-mail." The NLRB's rationale was that these rules were too vague and employees might believe they prohibited the sending of communications that were protected. Confusingly, the Memorandum approved a policy stating that any logos or graphics worn by employees "must not reflect any form of violent, discriminatory, abusive, offensive, demeaning, or otherwise unprofessional message." The distinction offered by the NLRB was that this policy merely required professionalism of employees, and did not mention management or the company.

- ***Policies Protecting Company Confidential Information***

Though maintaining the confidentiality of a company's proprietary information is a long recognized and judicially enforced employee obligation, the NLRB has recently deemed certain confidentiality policies unlawful under the Act. For example, in a recent decision regarding the employee policies of Macy's, the NLRB found the store's confidentiality policy overbroad and unlawful to the extent it required employees to maintain as confidential the "personal information" of employees, "including their names and home and office contacts."[7] The NLRB found that the provision "obviously restricts employees in their Section 7 rights to discuss their terms and conditions of employment with fellow employees, as well as their ability to notify a union of other employees of [Macy's] who might be interested in participating in the union movement."

As well, in the Memorandum, the NLRB said it was unlawful for an employer to advise employees: "Never publish or disclose the Employer's or another's confidential or property information." Yet, the Memorandum deemed lawful a policy prohibiting

"unauthorized disclosure of business secrets or other confidential information." The fine distinction, according to the Memorandum, was that the policy prohibiting disclosure of "another's" confidential information could be read to prohibit employees from disclosing the wage information of another worker.

- ***Policies Prohibiting Disparagement, Disrespect and Defamation***

Employers often prohibit employees from disparaging the company or acting disrespectfully towards management, on social media and elsewhere. The NLRB has found certain such policies unlawful, because they could be construed by employees to prohibit protected behavior. According to the NLRB, discussions among workers about supervisors or wages are "protected concerted activity," even if they are disparaging or disrespectful. Indeed, the NLRB has held that even defamatory statements by employees can be considered protected, unless they are "maliciously" false.[8]

While the NLRB has held that employers may require workers to act courteously and professionally towards customers, and can prohibit outright insubordination to management, it is difficult to flesh out where the NLRB thinks policies cross the line by prohibiting protected activity. For example, the NLRB approved an employer rule requiring employees "to work in a cooperative manner with management/supervision, coworkers, customers and vendors." Confusingly, a company policy mandating that employees "be respectful to the company, other employees, customers, partners, and competitors" was unlawful according to the NLRB. According to the NLRB, the first rule simply mandates cooperation while the second could be interpreted as banning criticism of the employer.

Employer and Carrier Take-Aways

Many employers attempt to avoid liability under the Act by including a "savings clause" in their handbooks, with wording such as: "nothing herein is intended to violate any employee rights protected by the National Labor Relations Act." However, in the recent Macy's case, the NLRB held that Macy's savings clause did not render the challenged policies lawful, because it did not specifically reference the policy provisions that were not intended to violate the Act. As well, Macy's did not distribute the savings clause until seven months after it distributed the policies. Accordingly, employers should include savings clauses in handbooks, but they should specifically cross reference the policies that could be interpreted as violating Section 8, and they should be distributed concurrently with handbooks.

In their confidentiality policies, employers should narrowly define what type of information is being protected, such as trade secrets and customer information. Employers should revise any policy that could be interpreted as restricting employees from disclosing information about wages, labor violations or terms and conditions of employment.

In policies that regulate employee behavior, employers can likely require civil and professional behavior towards coworkers and customers, and can prohibit outright insubordination. However, employers should use caution when limiting employees' rights to be critical of management.

Underwriters typically inquire as to whether an applicant for EPLI insurance has an employee handbook. In light of the NLRB's aggressive activities, however, underwriters might consider going a step further, and find out if the handbook has been recently reviewed and updated by employment counsel, and whether the applicant has trained its executives, management, and supervisors on the new legal issues under the Act.

Endnotes

1 All references to "employees" shall be to both union and non-union workers.

2 From 1935 to 1947, union membership in the United States quadrupled, from 3.5 million to nearly 15 million workers, and by the mid-1950's, more than a third of Americans belonged to a union. By 2014, only 11 percent of all American workers and seven percent of private-¬sector workers belonged to a union. See Kaufman, D. (2015). Scott Walker and the Fate of the Union. *The New York Times Magazine*, http://www.nytimes.com/2015/06/14/magazine/scott-walker-and-the-fate-of-the-union.html?

3 *See* Advice Memorandum From the NLRB Office of the Gen. Counsel to All Reg'l Dirs., Officers-In-Charge, and Resident Officers, Memorandum 11-74, Report of the Acting Gen. Counsel Concerning Social Media Cases (Aug. 18, 2011).

4 *See* Advice Memorandum From the NLRB Office of the Gen. Counsel to All Reg'l Dirs., Officers-in-Charge, and Resident Officers, Memorandum 15-04, Report of the Gen. Counsel Concerning Employer Rules (Mar. 18, 2015).

5 *See, e.g., See Camelot Terrace*, 357 NLRB No. 161 (Dec. 31, 2011); *HTH Corporation*, 361 NLRB No. 65 (Oct. 24, 2014).

6 *Lutheran Heritage Village – Livonia,* 343 NLRB 646 (Nov. 19, 2004).

7 *Macys, Inc. & United Food & Commercial Workers Union, Local 1445,* 1-CA-123640, 2015 WL 2235632 (May 12, 2015).

8 *Valley Hosp. Med. Ctr.,* 351 NLRB 1250, 1252 (Dec. 28, 2007).