Morgan Lewis

The NLRB Wants to Review Your Employee Handbook – Should You Be Worried?

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NLRB Focus on Non-Union Workplaces

- For the last several years, the NLRB has taken more aggressive positions regarding policies applicable to nonunion workplaces.
- The NLRB's focus generally involves allegations that handbook policies are overbroad and "chill" protected speech.
- On June 18, the NLRB launched a webpage devoted to Protected Concerted Activity.

NLRB Wants to Review Your Employee Handbook

- Mandatory Arbitration Policies (*D.R. Horton*)
- Social Media
- Confidentiality
- At-Will Employment Disclaimers

Mandatory Arbitration – *D.R. Horton*

- The NLRB held that the NLRA prohibits employers from requiring employees to waive their rights to maintain class or collective actions in both judicial and arbitral forums. *D.R. Horton*, Inc., 357 NLRB No. 184 (2012).
  - *Class/collective action litigation is held to be a form of "concerted activity"*
  - *The arbitration agreement in D.R. Horton was required as a condition of employment.*
  - *The NLRB did not address class/collective action waiver agreements that are not a condition of employment.*
- The NLRB's decision is on appeal to the Fifth Circuit; briefing is underway.

Mandatory Arbitration – *D.R. Horton* (cont'd)

- Most courts have rejected *D.R. Horton*.
- Issue likely to be decided by Supreme Court at some point.
- Complaint in *24 Hour Fitness*
  - *Arbitration agreement was NOT a condition of employment.*
  - *Complaint seeks a remedy that would require the employer to notify each court where it has sought to enforce the arbitration policy that they employer will no longer seek arbitration and that it will no longer oppose collective/class action–type relief.*

Confidentiality of Arbitration Process

- ALJ decision in *Advanced Services, Inc.*, JD(ATL)-16-12 (July 2, 2012)
  - *ALJ held that provision requiring employees to maintain confidentiality of arbitration proceedings was unlawful because it "chilled" employees' rights to discuss terms and conditions of employment.*
  - *But such confidentiality provisions are enforceable under the FAA.*

The NLRB and Social Media

- Facebook, LinkedIn, and Twitter are treated as the 21st century water cooler.
  - *Employee appeals to outside parties concerning employment conditions are concerted if made in the context of employees acting on behalf of other employees or if made as part of a labor dispute.*
  - *Postings about employment conditions will generally be considered to be "protected" activity, although expressions of individual gripes are not protected.*
  - *Protection can be forfeited if a communication is "so disloyal, reckless, or maliciously untrue as to lose the [NLRA]'s protection."*
- Are social media more than just a water cooler?

The NLRB and Social Media

- A social media policy may be challenged under the NLRA, even if it does not explicitly restrict union activity, if:
  - *Employees would reasonably construe the policy to prohibit union activity;*
  - *The policy was promulgated in response to union activity; or*
  - *The policy is applied in a manner that restricts union activity.*

  See *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004); Advice Memo, *Sears Holdings*,18-CA-19081 (Dec. 4, 2009).

The NLRB and Social Media

- Acting General Counsel (AGC) reports on social media cases
  - *First report (August 2011) outlined cases where the AGC interprets both the language of social media policies and specific disciplinary situations*
  - *Second report (January 24, 2012) outlined additional cases involving challenges to both policies and specific disciplinary situations*
  - *Third report (May 30, 2012) analyzes policies and identifies a model policy (Wal-Mart)*

The NLRB and Social Media

- Costco Wholesale Corp., 358 NLRB No. 106 (Sept. 7, 2012)
  - *Several handbook provisions found to be unlawful:*
    - Prohibition on discussion of "private matters of members and other employees" such as "sick calls, leaves of absence, FMLA call-outs, ADA accommodations, workers' compensation injuries, personal health information, etc."
    - "Sensitive information such as membership, payroll, confidential financial, credit card numbers, social security number or employee personal health information may not be shared, transmitted, or stored for personal or public use without prior management approval."

The NLRB and Social Media

- Costco Wholesale Corp., 358 NLRB No. 106 (Sept. 7, 2012)
  - *Also found unlawful:*
    - Prohibition on sharing "confidential" information such as employees' names, addresses, telephone numbers, and email addresses.
    - Rule prohibiting employees from electronically posting statements that "damage the Company. . . or damage any person's reputation."
  - *But dismissed allegation as to rule requiring employees to use "appropriate business decorum" in communications.*

Internal Grievance Procedures and Social Media

- Complaint against Hyatt Hotels takes the position that requiring employees to report workplace concerns through internal grievance procedures violates NLRA
- ACG in third social media report says that a social media policy that encourages employees to use internal procedures rather than social media violates the NLRA

Employers Between a Rock and a Hard Place

- Employers can defend Title VII claims by showing they have a readily accessible and effective policy for resolving internal complaints and that an employee did not avail himself or herself of the internal policy – *Faragher and Ellerth* Supreme Court decisions.
- Can an employer craft a policy that contains internal reporting procedures that will allow the employer to avail itself of the defense and not run afoul of the NLRA?

Confidentiality of Investigations – *Banner Health*

- *Banner Health System*, 358 NLRB No. 93 (July 30, 2012)
  - *Held that asking employees to keep internal human resources or legal investigations confidential violates the NLRA.*
  - *Employer's human resources consultant routinely asked employees making workplace complaints not to discuss the matters with coworkers while the investigations were ongoing.*
  - *Burden is on the employer to determine whether, in any given investigation, confidentiality is needed.*

Confidentiality of Investigations – *Banner Health* (cont'd)

- As a result, employers can no longer have *blanket* confidentiality requirements for all internal investigations.
- Employers should be prepared to justify the need for confidentiality on a case-by-case basis.

Practical Advice

- For example, in a sexual harassment investigation confidentiality may be needed to protect the victim.
- In a theft investigation confidentiality may be needed to ensure that evidence is not destroyed or testimony fabricated.
- In a workplace violence investigation confidentiality is needed to protect against possible physical harm.

At Will Disclaimers

- ALJ decision in *American Red Cross Arizona,* JD(SF)-04-12 (Feb. 1, 2012)
  - *Found that an "at will" employment policy violates the NLRA if it could be read as a waiver of a right to change the policy through union organizing or collective bargaining.*
  - *Acknowledgement form provided that "I further agree that the at-will employment relationship cannot be amended, modified or altered in any way."*

At-Will Employment Policies

- *Hyatt Hotels* settlement
  - *At-will policy language said that "no oral or written statements or representation regarding your employment can alter your at will status, except for a written agreement signed by you and either our executive Vice President/Chief Operating Officer or President."*
  - *Theory of violation appeared to be that language did not allow for possibility that at-will status could be changed through collective bargaining agreement.*

Practical Advice

- Of course, nonunion employers need to continue to use at-will disclaimers.
- Recommend that policy state that it cannot be changed except “by written agreement.”
- Allows for possibility that at-will status could be changed by a written collective bargaining agreement.

Questions?

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