National Labor Relations Board Member to Address Regulation of the Non-Union Workforce

Key Developments and Q&A with Board Member Harry I. Johnson, III

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moderated by

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Board Member Harry Johnson's thoughts on "Regulation of the Non-Union Workforce" for


NOTICE
THANK YOU
FOR NOTICING THIS
NEW NOTICE
YOUR NOTICING IT HAS BEEN NOTED
AND WILL BE REPORTED TO THE AUTHORITIES

Regulation of the Non-Union Workforce

- Protected Concerted Activity: Recent NLRB Legal Rules & Cases
  - Work Rules/Policies, including…
  - Confidentiality; and
  - Arbitration
- Access Rules
- Independent Contractors vs. Employees
- Today's NLRB

Focus on
Protected Concerted Activity

Section 7 – Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and …*to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection*, and shall also have the right to refrain from any or all of such activities.

Protected Concerted Activity

- Two Parts:
  - "Why?"
    - Must be engaged in for the purpose of "mutual aid or protection"
  - "How?"
    - Must be collective in spirit – that is, "done in concert with others" or "group-minded"

Policy Review – *The Standard to Apply*

- Test set forth in *Lutheran Heritage*:

- First ask whether rule or policy *explicitly* restricts Section 7 activities. If so, it will be found unlawful.
  - What is a "rule" or "policy" here?

- If not explicitly restrictive, then ask if:

  (1) employees would reasonably construe the language to prohibit Section 7 activity;

  (2) the rule was created in response to Section 7 activity; or

  (3) the rule has been applied to restrict the exercise of Section 7 rights

The Biggest Social Media / Protected Concerted Activity Case To Date

- ***Triple Play Sports Bar and Grille*, 361 NLRB No. 31 (2014)**
  - Employer violated the Act by terminating employees for participation in profane, disparaging Facebook discussion about "owing" due to employer error in tax withholding. 3-0
  - Employer also maintained unlawful Internet/Blogging policy re: "inappropriateness" according to Board majority. 2-1

Triple Play

- Employer Interest: "The Board has long recognized that an employer has a legitimate interest in preventing the disparagement of its products or services and, relatedly, in protecting its reputation (and the reputations of its agents as to matters within the scope of their agency) from defamation."

Triple Play

- "First, the Facebook discussion here **clearly disclosed the existence of an ongoing labor dispute** concerning the Respondent's tax withholding practices."
- " Second, the evidence does not establish that the discussion in general, or [the employees'] participation in particular, was directed to the general public. The comments at issue were posted on **an individual's personal page** rather than, for example, a company page providing information about its products or services. Although the record does not establish the privacy settings of LaFrance's page, or of individuals other than Sanzone who commented in the discussion at issue, **we find that such discussions are clearly more comparable to a conversation that could potentially be overheard by a patron or other third party** than the communications at issue in *Jefferson Standard,* which were clearly directed at the public."

Triple Play

- "The comments at issue **did not even mention** the Respondent's products or services, much less disparage them. Where, as here, the purpose of employee communications is… not to disparage its product or services or undermine its reputation, the communications are protected."

Triple Play – defamation = actual malice

- "The comments at issue likewise were not defamatory. ….Respondent has the burden to establish that the comments were maliciously untrue, i.e., were made with knowledge of their falsity or with reckless disregard for their truth or falsity."
- "[N]o basis for finding that the employees' claims that [1] their withholding was insufficient to cover their tax liability, or that [2] this shortfall was due to an error on the Respondent's part, were maliciously untrue."

Triple Play: Social Media Rule Issue

- The Company supports the free exchange of information and supports camaraderie among its employees. However, when internet blogging, chat room discussions, e-mail, text messages, or other forms of communication extend to employees revealing confidential and proprietary information about the Company, or engaging in inappropriate discussions about the company, management, and/or co-workers, the employee may be violating the law and is subject to disciplinary action, up to and including termination of employment. Please keep in mind that if you communicate regarding any aspect of the Company, you must include a disclaimer that the views you share are yours, and not necessarily the views of the Company. In the event state or federal law precludes this policy, then it is of no force or effect.

Savings Clauses

- ***First Transit*, 360 NLRB No. 72 (2014)**
  - An effective savings clause should adequately address the broad panoply of rights protected by Section 7.
  - Placement should be "prominent" and "proximate" to the rules it purports to inform.
  - There should be no ongoing actual violations of Section 7 rights.
- ***Triple Play***: Ineffective: "In the event state or federal law precludes this policy, then it is of no force or effect."

Recent Protected Concerted Activity Cases and Policy Cases

- ***Plaza Auto Center, Inc.*, 360 NLRB No. 117 (2014)**
  - On remand from Ninth Circuit, Board majority held for the second time that employer violated the Act by terminating employee who engaged in profane outburst
  - Dissent disagreed, finding employee lost protection of the Act

Recent Protected Concerted Activity Cases and Policy Cases

- ***MikLin Enterprises, Inc.*, 361 NLRB No. 27 (2014)**
  - Board held franchisee violated the Act when it disciplined employees for distributing posters which implied the franchisee's sick leave policy would lead to customers getting sick from the franchisee's food. 2-1
  - Board also found that supervisors violated the Act when they encouraged employees, supervisors, and managers to harass union supporters via social media. 3-0

Recent Protected Concerted Activity Cases and Policy Cases

- ***Fresh and Easy Neighborhood Market II*, 361 NLRB No. 12 (2014)**
  - Board majority found employee was engaged in "concerted activity" when she sought assistance from her co-workers in raising sexual harassment complaint to employer. 3-1-1.
  - Dissent and concurrence both disagreed with majority's view that communications concerning individual employment lawsuits are generally PCA

Recent Protected Concerted Activity Cases and Policy Cases

- ***Hills and Dales General Hospital*, 360 NLRB No. 70 (2014)**
  - Board found prohibitions against "negative comments" and "negativity" to be unlawful (3-0), as well as policies requiring employees to behave in a "positive and professional manner" 2-1

Example: "Disruptive" Conduct Rules

- ***Purple Comm'ns***, 361 NLRB No. 43 (2014) (unlawful: "[c]ausing, creating, or participating in a disruption of any kind during working hours on Company property.") 3-0
- ***Copper River Grill***, 360 NLRB No. 60 (2014) (lawful: "displaying a negative attitude *that is disruptive to other staff or has a negative impact on guests"* (emphasis added)) 2-1

Other Notable Cases

- ***Philips Electronics North America Corp.,*** 361 NLRB No. 16 (2014)
  - Unwritten "policy" found unlawful. 2-1
- ***Flex Frac Logistics II,*** 360 NLRB No. 120 (2014)
  - Unlawful policy can still be basis for lawful termination. 3-0
- ***Richmond District Neighborhood Center,*** 361 NLRB No. 74 (2014)
  - Prospective insubordination on social media not protected. 3-0

Confidentiality Rules

- "Keep customer and employee information secure. Information must be used fairly, lawfully and only for the purpose for which it was obtained."

- Held unlawful (2-1): ***Fresh & Easy Neighborhood Market I***, 361 NLRB No. 8 (2014)

- "Confidential Information includes, but is not limited to, information that is related to: our customers, suppliers, distributors;[our] organization management and marketing processes, plans and ideas, processes and plans; our financial information, including costs, prices; current and future business plans, our computer and software systems and processes; *personnel information and documents*, and our logos, and art work."

- Held unlawful (2-1): ***Flex Frac Logistics I***, 358 NLRB No. 127 (2012), enfd. 746 F.3d 205 (5th Cir. 2014).

Rule Compliance/Litigation Issues

- The reason for the rule is not in the rule itself;
- The reason for the rule was never told to employees; rather….
- The reason for the rule comes through later testimony/argument that the employees never heard…
- Issue: *LHL* model is entirely premised on *understanding of an employee*.

Employment Arbitration – ***Murphy Oil***, 361 NLRB No. 72 (2014)

- What Are Class Action Waivers And Why Should You Care?
- Why The NLRB Continues To Follow *D.R. Horton* And Hold Them Unlawful
- What Are The Remedies?

Independent Contactors - ***Fed Ex Home Delivery*****,** 361 NLRB No. 55 (2014)

- "Refined" independent contractor test
- Dealt with how "entrepreneurial opportunity" would by treated under that test
- Actual entrepreneurial opportunity" counts; theoretical does not
- Holding: No "actual entrepreneurial opportunity" existed and vast majority of factors gauged against the employer

Fed Ex: Contractor v. Employer Factors

[32] This section provides, in pertinent part:

(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right of control.

(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

(a) The extent of control which, by the agreement, the master may exercise over the details of the work.

(b) Whether or not the one employed is engaged in a distinct occupation or business.

(c) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision.

(d) The skill required in the particular occupation.

(e) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work.

(f) The length of time for which the person is employed.

(g) The method of payment, whether by the time or by the job.

(h) Whether or not the work is part of the regular business of the employer.

(i) Whether or not the parties believe they are creating the relation of master and servant.

(j) Whether the principal is or is not in the business.

- New subfactor of new factor "(k)": "Today, we make clear that entrepreneurial opportunity represents one aspect of a relevant factor that asks whether the evidence tends to show that the putative contractor is, in fact, *rendering services as part of an independent business."*

- *Other subfactors: (1)* ability to work for other companies, (2) can hire their own employees, (3) and have a proprietary interest in their work

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BIG PICTURE:

- AEO is now subfactor to "factor (k)"
- There is no "actual" entrepreneurial opportunity in a relationship between large corporate customer and individual service supplier, where relationship is (1) effectively sole-customer, (2) contractually malleable, (3) extensively monitored, (4) seamlessly branded, (5) vertically integrated.

Access Rules

- *Tri-County Medical Center,* 222 NLRB 1089, 1089 (1976) -- a rule restricting off-duty employee access is valid only if it:
- (1) limits access solely with respect to the interior of the facility and other working areas
- (2) is clearly disseminated to all employees,
- and (3) applies to off-duty employees seeking access to the plant for any purpose **and not just to those employees engaging in union activity.**

Access - ***American Baptist Homes of the West***, 360 NLRB No. 100 (2014)

- Rule 33: "Employees may not clock in for duty before their shift begins, nor are they to remain on the grounds after the end of their shift, unless previously authorized by their supervisor. Employees must have prior supervisor authorization before working/incurring overtime."
- Memo reaffirming: "No employees are allowed inside the building when not scheduled to work unless they have prior approval of their supervisor/manager, Human Resources, or the Executive Director."
- But employer forbade union-realted meeting while it "permitted off-duty employees to access the facility" for [1] meetings with human resources. [2] to pick up their paychecks at the security desk at entrance, or [3] arriving early for their shift.

Access - ***American Baptist Homes of the West***, 360 NLRB No. 100 (2014)

- HR witness "did not testify (and the record otherwise fails to establish) that those were the *only circumstances* under which supervisors and managers had granted access in the past or had discretion to grant access. In any event, *neither Rule 33 nor the supplemental memorandum informs employees that supervisors and managers may grant access to off duty employees only under the three circumstances* identified by witness."
- Also, employer obviously discriminated versus employees holding union meetings.

Today's NLRB

Not Just Talking About The NLRB App

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