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This month's newsletter includes articles by Peg Sheahan concerning Connecticut's new paid sick leave legislation, and by Bob Mitchell on the NLRB's new posting requirements being imposed on non-union employers.

We would also like to announce that Bob and Peg have been appointed to the Executive Committee of the Labor & Employment section of the Connecticut Bar Association.

As always, thank you for reading. If you have any suggestions for future articles or have any questions about the articles included in this month's newsletter, feel free to contact us.

THE NATIONAL LABOR RELATIONS BOARD NOW APPEARING IN YOUR NON-UNION SHOP?

BY ROBERT B. MITCHELL

Many non-union employers still believe that the National Labor Relations Act ("NLRA") and its enforcing agency the National Labor Relations Board ("Board") are of no concern to them. On August 30th, the NLRB acted to put that notion to rest forever. On that date, new regulations became effective that require all employers subject to the Board's jurisdiction[1] to post a public notice explaining their employees' rights under the NLRA. The rules will become effective 75 days after their official adoption, or about November 14, 2011. After that date most private employers in retail businesses doing at least $500,000 of business a year through sales, purchases or a combination of the two will be required to post the Board's notice. Employers in other businesses who do $50,000 of business yearly will also be required to comply, although the Board has said that it," has chosen not to assert its jurisdiction over very small employers whose annual volume of business is not large enough to have more than a slight effect on interstate commerce". National Labor Relations Board, Operations - Management Memo, No. 11-77, Attachment 1 (August 31, 2011). Unfortunately, the Board has not defined what businesses might fall into this *de minimis* category.

The Rule provides that failing to post the Notice may be an unfair labor practice in violation of Section 8(a)(1) of the NLRA and may also, in appropriate circumstances, be grounds for tolling the six month statute of limitations that ordinarily applies to unfair labor practice claims under the Act. The notice is required to be posted in English and in a second language if 20% or more of a workforce is not

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English proficient and speaks a common language. The rules prescribe the wording, size and posting location of the notice. (The required wording immediately follows this article.) The Notice is oriented toward informing employees about their right to unionize and the federal protections from employer's impeding or punishing any efforts they make to do so. Only a very small paragraph almost at the end of the Notice mentions the fact that it is equally illegal for a union to try and coerce membership or support. (The Notice generally describes what are known as "Section 7 rights.")

The notice requirement is an effort by the current administration to "get the word out" about unions; a favorable word. It follows closely on President Obama's January 30, 2009 Executive Order 13496, requiring Federal contractors and subcontractors to include in their Government contracts specific provisions for posting notices of employee NLRA rights (E.O. 13496 was given effect on May 20, 2010 when the Department of Labor issued a final implementing rule that became on effective June 21, 2010. 75 FR 28368, 29 CFR part 471). Indeed, this new notice requirement, E.O. 13496 and the Board's recently proposed revised union election regulations, taken together, appear to be an effort to give effect to at least a portion of the Employee Free Choice Act that the unions' legislative allies unsuccessfully submitted to Congress several years ago. It remains to be seen whether these regulatory efforts can reverse the decline of organized labor within America's private sector workforce. I do not think so, because they are aimed at the wrong target. It is not hostile management but organized labor's own long-term systemic failings and refusal to adapt to the needs of a changing workforce that have caused the unions' private sector decline.
On another topic, the NLRB's recent, strong interest in, and thinking about, social media issues should be of interest to union and non-union employers alike. A Report of the Acting General Counsel Concerning Social Media Cases, Operations - Management Memo, No. 11-74 (August 18, 2011) ("Report") describes the General Counsel's views on fourteen different cases. While each was unique, some NLRB policy concepts are presented and discussed that have a broad, if unclear, application in every workplace.

Before reaching the policy issues, the Report outlines the tests for determining if a complaint raises questions concerning "protected concerted activity"; a term that defines the limit of the NLRB's statutory jurisdiction over the workplace. The Report repeats the NLRB's long-standing definition of "concerted" activity as being activity undertaken, "with or on the authority of other employees, and not solely by and on behalf of the employee himself," and restates the principle that "protected" activities are simply those that relate to the terms and conditions of employment.

The most interesting parts of the Report for employers concern the Board's view of work rules respecting social media. In broad terms the Acting General Counsel writes that an employer violates the Act by maintaining a work rule that would "reasonably tend to chill employees in the exercise of their Section 7 rights." The Board uses a two-step inquiry to determine if a work rule would have such an effect. First, a rule is unlawful if it explicitly restricts Section 7 activities. Second, if the rule does not explicitly restrict protected activities, it is unlawful only upon a showing that: (1) employees would reasonably construe the language to prohibit protected concerted activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of protected rights." In the cases discussed in the Report, the issue was generally whether the rule in question could be reasonably construed to restrain protected activity.

In one case an internet/blogging policy that, in part, forbade "inappropriate discussions" about the company, management and/or coworkers was held to be illegal. Indeed, a lawyer's letter to an offending employee, threatening a defamation suit for comments made on the internet, was itself held to violate the Act.

In another case, the General Counsel's Office found that a hospital's social media policies were overly broad where one rule prohibited employees from using any social media that might violate, compromise, or disregard the rights and reasonable expectations as to privacy or confidentiality of any person or entity; another prohibited any communication or posts that embarrassed, harassed or defamed the hospital or any hospital employee, officer, board member, representative, or staff member; and a third prohibited statements that lacked truthfulness or that might damage the reputation or goodwill of the hospital, its staff, or employees. Again, the General Counsel's Office concluded that the policy provisions were illegal because; "employees could reasonably construe them to prohibit protected conduct".

Another policy that the General Counsel felt could be "reasonably construed" to prohibit protected activity, also included in an employer's handbook,prohibited employees on their own time from using micro-blogging features to talk about company business on their personal accounts, from posting anything that they would not want their manager or supervisor to see or that would put their job in jeopardy, from disclosing inappropriate or sensitive information about the Employer, and from posting any pictures or comments involving the company or its employees that could be construed as inappropriate. It also cautioned that one inappropriate picture or comment taken out of context could fall into the wrong hands and cost an employee his or her job.

A final example was a policy that: (1) precluded employees from revealing, including through photographs, personal information about coworkers, company clients, partners, or customers without their consent; and (2) forbade the use of the Employer's logos and photographs of the Employer's store, brand, or product, without written authorization. Again, the issue was overbreadth; the General Counsel's conclusion was that these policies, again, could reasonably be read to prohibit protected activity.

The lesson to employers from the Report is that internet policies must be very narrowly drawn. Unfortunately, there is no clear overall guidance from the Board as to what types of policies will pass muster, just the Report's case-by-examples of what has and has not been accepted to date.

The Board's new notice posting regulations and the Acting General Counsel's comments about social media rules both indicate a more aggressive NLRB than we have seen for several years. These may be signs of the NLRB's determination to take a more active role in an increasingly non-union workplace, as well as a determination more strongly to encourage employee workplace organization.

If you have any questions about the new NLRB posting rule, Report on social media issues or their potential impacts on your workforce, please feel free to give us a call to discuss your concerns.

FORM OF BOARD POSTING NOTICE

EMPLOYEE RIGHTS UNDER
THE NATIONAL LABOR RELATIONS ACT

The National Labor Relations Act (NLRA) guarantees the right of employees to organize and bargain collectively with their employers, and to engage in other protected concerted activity or to refrain from engaging in any of the above activity. Employees covered by the NLRA* are protected from certain types of employer and union misconduct. This Notice gives you general information about your rights, and about the obligations of employers and unions under the NLRA. Contact the National Labor Relations Board (NLRB), the Federal agency that investigates and resolves complaints under the NLRA, using the contact information supplied below, if you have any questions about specific rights that may apply in your particular workplace.

Under the NLRA, you have the right to:

Organize a union to negotiate with your employer concerning your wages, hours, and other terms and conditions of employment.

Form, join or assist a union.

Bargain collectively through representatives of employees' own choosing for a contract with your employer setting your wages, benefits, hours, and other working conditions.

Discuss your wages and benefits and other terms and conditions of employment or union organizing with your co-workers or a union.

?

Take action with one or more co-workers to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government agency, and seeking help from a union.

?

Strike and picket, depending on the purpose or means of the strike or the picketing.

?

Choose not to do any of these activities, including joining or remaining a member of a union.

Under the NLRA, it is illegal for your employer to:

Prohibit you from talking about or soliciting for a union during non-work time, such as before or after work or during break times; or from distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms.

Question you about your union support or activities in a manner that discourages you from engaging in that activity.

Fire, demote, or transfer you, or reduce your hours or change your shift, or otherwise take adverse action against you, or threaten to take any of these actions, because you join or support a union, or because you engage in concerted activity for mutual aid and protection, or because you choose not to

engage in any such activity.

Threaten to close your workplace if workers choose a union to represent them.

Promise or grant promotions, pay raises, or other benefits to discourage or encourage union support.

Prohibit you from wearing union hats, buttons, t-shirts, and pins in the workplace except under special circumstances.

Spy on or videotape peaceful union activities and gatherings or pretend to do so.

Under the NLRA, it is illegal for a union or for the union that represents you in bargaining with your employer to:

Threaten or coerce you in order to gain your support for the union.

Refuse to process a grievance because you have criticized union officials or because you are not a member of the union.

Use or maintain discriminatory standards or procedures in making job referrals from a hiring hall.

Cause or attempt to cause an employer to discriminate against you because of your union-related activity.

Take adverse action against you because you have not joined or do not support the union.

If you and your co-workers select a union to act as your collective bargaining representative, your employer and the union are required to bargain in good faith in a genuine effort to reach a written, binding agreement setting your terms and conditions of employment. The union is required to fairly represent you in bargaining and enforcing the agreement.

Illegal conduct will not be permitted. If you believe your rights or the rights of others have been violated, you should contact the NLRB promptly to protect your rights, generally within six months of the unlawful activity. You may inquire about possible violations without your employer or anyone else being informed of the inquiry. Charges may be filed by any person and need not be filed by the employee directly affected by the violation. The NLRB may order an employer to rehire a worker fired in violation of the law and to pay lost wages and benefits, and may order an employer or union to cease violating the law. Employees should seek assistance from the nearest regional NLRB office, which can be found on the Agency's Web site: http://www.nlrb.gov.

You can also contact the NLRB by calling toll-free: 1-866-667-NLRB (6572) or

(TTY) 1-866-315-NLRB (1-866-315-6572) for hearing impaired.
If you do not speak or understand English well, you may obtain a translation of this notice from the NLRB's Web site or by calling the toll-free numbers listed above.

The National Labor Relations Act covers most private-sector employers. Excluded from coverage under the NLRA are public-sector employees, agricultural and domestic workers, independent contractors, workers employed by a parent or spouse, employees of air and rail carriers covered by the Railway Labor Act, and supervisors (although supervisors that have been discriminated against for refusing to violate the NLRA may be covered).

This is an official Government Notice and must not be defaced by anyone.

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[1] Public sector employers, transportation companies subject to the Railway Labor Act and certain others are outside the NLRA's reach.

OURS IS THE FIRST STATE IN THE UNION TO MANDATE PAID SICK LEAVE!

BY MARGARET M. SHEAHAN

As of January 1, 2012, some Connecticut workers will be entitled by law to paid sick leave. After a hard-fought battle spanning many legislative sessions, the statute is a creature of compromise and, like the camel produced by a committee setting out to design a horse, it's weird!

For example, a 50 employee threshold test is applied every January 1st and an "employer" is a person or organization that employed 50 individuals in any quarter of the previous calendar year, according to the business's Unemployment Compensation wage reports to the CT Department of Labor . Is it a 50 employee count maintained throughout a quarter? reached any time during a quarter? averaged throughout a quarter? The statute does not say. The statute defines "employee" to include "individual[s] engaged in service to an employer in the business of the employer." Note the confusion of circularly defining "employee" with reference to "employer" which is defined by a count of individuals "employed." Also, "employee" under this definition could well include workers that businesses treat as contractors.
There are two express categories of enterprises excluded from coverage under this new sick leave statute. First are businesses in three specifically referenced sectors in the North American Industrial System; that translates into manufacturers. Second is a mystery group of IRS-qualifying non-profits offering recreation and child care and education. This statutory language, popularly nicknamed the "YMCA exception," also requires such organizations to be "nationally chartered," a term with no definition in state or federal law. Whether this language effectively excludes the Y is even questionable; that it offers no protection to purely local non-profits, however, is perfectly

clear.

The statute does not provide paid leave rights to all employees of covered employers, but only to "service workers." The term is defined as hourly paid or non-exempt (from federal minimum wage and overtime laws) workers performing any of 68 listed occupations recognized by the U. S. Bureau of Labor Statistics. "Service workers" include all kinds of workers in health and child care, food preparation and service, hospitality and transportation, retail, which one might expect, but also a wide array of office workers, including not only Receptionists, but Secretaries/Administrative Assistants, and Computer Operators.
"Service workers" do not include "day or temporary workers" who "perform work on a per diem, occasional or irregular basis for only the time required to complete such work," whether paid by the work's recipient or a temporary or employment agency." This appears to provide a de facto exception for professional employer organizations (PEOs) that coordinate various short term and temporary assignments for a group of employees maintained on the PEO's payroll but farmed out to various customers purchasing limited blocks of labor. Furthermore, the practice of frequent and somewhat predictable use of per diem workers that some organizations adopt may spark dispute under this definition over what "occasional" and "irregular" standards should be.

Covered employers must start accruing paid sick leave for service workers as of January 1, 2012 or the service worker's later date of hire. The rate of accrual is one hour at a time (not partial hours) of paid sick leave after completion of 40 hours worked, up to a maximum of 40 hours of sick leave per calendar year. The service worker may carry over into the following calendar year a maximum of 40 hours of accrued sick leave but need not be permitted to use more than 40 hours of paid sick leave in any calendar year.[1]

For a service worker to use statutory paid sick leave, three things must be true. First, the service worker must have worked 680 hours since January 1, 2012 or a later date of hire, or the employer must agree to its use prior to this benchmark being reached. It appears that this 680 hour standard is a one-time, rather than an annual, threshold for each service worker's employment with a covered employer. Second, the service worker must have worked an average of at least 10 hours per week in the most recently ended calendar quarter. Third, there must be a qualifying reason for the leave. Qualifying reasons are of two different kinds: medical issues and family violence/sexual assault issues. Medical reasons are illness, injury or health condition; medical diagnosis, care or treatment of mental or physical illness, injury or health condition; or preventative medical care. The medical issue can involve the service worker or his/her spouse or child. The service worker's child can be biological, adopted, step, foster, legal ward or one to whom the service worker stands "in loco parentis" and must be under 18 or incapable of self care because of mental or physical disability. Service workers who are victims of family violence or sexual assault may use statutory paid sick leave to get victim services, medical care or counseling; to relocate; or to participate in legal proceedings. Predictable leave may be subjected to an up to 7 day advance notice requirement and unforeseeable leave to a notice as soon as practicable rule. The statute does not authorize employers to require advance management approval of scheduling leave use or require that service workers attempt to schedule qualifying activities outside of working hours. Documentation of the qualifying reason may be required by the employer for leaves of three or more consecutive days.

Pay for statutory sick leave is the employee's regular rate or the State

minimum wage, whichever is higher.[2] If a service worker receives different pay rates for different kinds of work, the sick pay rate is the average rate paid in the week before the use of the statutory sick leave. The employer and service worker can agree to allow the employee to make up sick time in the same pay period in which the leave is taken or the preceding pay period, in which case no accrued leave is utilized.

An employer will be in compliance if in some other manner, such as a PTO policy, a vacation plan and/or the grant of paid personal days, the employer offers paid time off available for use for the statute's qualifying reasons and "accru[ing] in total at a rate equal to or greater than the rate described in" two subsections of the statute. [3]This is not so simple as determining whether there are employees who get a week off each year with pay. Many businesses would quickly answer "yes" to that question but often the 40-hour week off with pay that full timers enjoy is pro-rated for part-timers working under 40 hours per week. Also commonly, a certain minimum of regularly scheduled hours is required to qualify for any paid time off. It is not unusual for this cutoff to be 20 hours per week; but under the statutory standards, service workers scheduled for as little as 14 hours per week are entitled to accrue and use mandatory paid sick leave. Furthermore, a typical rule requiring completion of six months of employment prior to use of any paid time off would not pass muster for a 40-hour-per-week service worker, who would complete the statutory 680 hours 9 weeks before then.

This new statute also includes a very broad anti-retaliation provision, prohibiting employers from taking any adverse employment action against an employee (not just a service worker) for using or requesting paid sick leave under the statute or the employer's policy or for filing a complaint with the Labor Commissioner. As of January 1, 2012, employers must provide service workers with notice of their rights under this statute at the time of hire. This obligation can be satisfied by posting a notice the Labor Department has been charged with developing.

Coordinating this new requirement with existing systems and, if applicable, with the recordkeeping and calculations necessary to comply with federal and State FMLA rules may prove quite challenging. We recommend analyzing your organization's workforce and existing practices before the January 1 effective date.

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[1] I wonder what happens if a business's employee count drops below 50 in one or more quarters of the year in which a service worker is accruing paid sick leave that he or she attempts to carry over into the following calendar year? In that case, would the business not be a covered employer in the subsequent year and thus have no obligation to provide paid sick leave despite the employee's accrual?

[2] Some minor workers in certain jobs can lawfully be paid 85% of minimum wage.
[3] By my lights, only the first cited subsection describes an accrual rate, but the specific statutory reference to both subsections leads me to question what features a covered employer's existing paid time off system really needs to provide a compliance "safe harbor."

Community Corner

The Women's Business Development Council ("WBDC") will hold its

annual breakfast at the Trumbull Marriott on November 3rd, featuring speaker David Gergen, a well known political analyst. Please visit their website for more information www.ctwbdc.org

Thank you for reading!

Sincerely,

Mitchell & Sheahan, P.C.

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