EMPLOYMENT & IMMIGRATION LAW

A Revitalized NLRB Flexes Its Muscles

Actions affect social media use and union election rules

By ROBERT B. MITCHELL

Perhaps what is in many ways the most interesting, but seemingly least known, National Labor Relations Board development of 2011 came out of *Continental Group Inc.,* 357 N.L.R.B. No. 39 (Aug. 11, 2011). The facts involved a fairly simple story of an employee fired pursuant to an employer policy that forbids employees from being on the property unless on duty, picking up a paycheck or given managerial permission.

The Board used the case to expand on its *Double Eagle* doctrine; so named after an earlier case. The most interesting aspect of *Continental Group* was the board's clear statement that the National Labor Relations Act protection can extend to individual employees disciplined for protected activity under an overbroad employer workplace rule even though the employee was *not* engaged in activities that were either "concerted" or undertaken for "mutual aid and protection," the ordinary prerequisite for board action.

The NLRB concern with 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 (Aug. 18, 2011), describes the general counsel's views on 14 different cases. While each was unique, some NLRB policy concepts are presented and discussed that have a broad application to every workplace.

The General Counsel noted the *Lafayette Park Hotel* principle, 326 NLRB 824, 825(1998), enfd., 203 F.3d 52 (D.C. Cir. 1999), which states that an employer violates the NLRA by maintaining a work rule that would "reasonably tend to chill employees in the exercise of their Section 7 rights."

He then described the *Lutheran Heritage Village-Livonia,* 343 NLRB 646 (2004), a two-step inquiry used to determine if a particular work rule has a *Lafayette Park Hotel* effect. First, rules that explicitly restrict Section 7 activities are unlawful. Second, if a rule does not explicitly restrict protected activities, it is unlawful 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. When coupled with the *Continental Group* holding, the general counsel's social media report maps out a potential path for individual employees to bring their employers before the board without the need to demonstrate concerted activity. Whether a particular social media or other policy violates the National Labor Relations Act because of a "chilling effect" on protected activity is a point to be seriously considered by anyone drafting such rules, seeking to enforce them or trying to protect an employee who has run afoul of them.

Streamlining Elections

In its more traditional role of protecting employee rights to participate or refrain from participating in collective activities, the board also took some interesting steps in 2011.

First, it issued new proposed rules to streamline the union election process. Second, it promulgated a rule requiring employers to post a notice in the workplace to further employee awareness of their NLRA rights. Finally, the General Counsel's Office issued a controversial unfair labor practice complaint against the Boeing Co.

The new election rules would have two primary immediate effects. First, they would shorten the time between the filing of an election petition and the election date. It has been claimed that they would cause elections to be held within 10 to 21 days of the petition's filing. This would be approximately half the time that the average election takes under the current rules.

Second, they would substantially limit the opportunity for full board review of contested issues concerning the appropriate bargaining unit, voter eligibility and election misconduct. The proposed rules, for example, call for the use of a mandatory questionnaire, a proposed "Statement of Position Form," that would require an employer to state its position on bargaining unit appropriateness, any election bars, dates, times and location of the election and any other issues that it intended to raise at the pre-election hearing, which in turn is to be held seven days after the election petition and Statement of Position Form are served on the employer.

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The proposed rules would bar an employer from offering evidence or cross-examining witnesses as to any issue not raised either in its own statement or in response to another's statement, thus, giving the employer just those seven days to investigate, resolve and prepare to contest any of the issues that are customarily considered in a pre-election hearing.

Other portions of the proposed rules, such as their deferral of certain voter eligibility questions until after the election, would introduce substantial uncertainty into the campaign process. After receiving public comment and facing heated criticism from business, the proposed rules have been put into limbo, perhaps until after the 2012 elections.

Posting Notices

The NLRB has also issued rules requiring employers subject to its jurisdiction to post notices advising employees of their rights under the NLRA.

The notice outlines the NLRA's prohibitions against employer and union coercion or discrimination against employees who exercise their right to either participate or refrain from joining in protected activities. Some claim that the notice as formatted is too pro-union. There have been questions raised about the need for such a notice and even the Board's power to compel such postings. The notice rule is to take effect at the end of January 2012.

Finally, the general counsel's decision to issue a complaint against the Boeing Co. to prevent it from locating work on its new Dreamliner aircraft to a non-union plant has led to a storm of controversy. The complaint alleges that Boeing decided to build its airplane in the non-union plant to retaliate against its unionized employees for their strike history.

In that view, it seems akin to a "runaway shop" case. Board opponents note that Boeing is not moving any existing work, but simply declining to add a new production line to its unionized plants. In their view this is no "runaway shop" or retaliation situation, but a new venture that has incorporated sound business judgments unrelated to any protected employee rights. The complaint has resulted in passage of a house bill that some NLRB supporters say would "gut" the board's powers to correct labor law abuse.

These 2011 NLRB actions have brought a sometimes forgotten agency back to the employee relations forefront. The results were predictable — business community howls, adverse congressional reaction and congratulations from organized labor and some academics. What remains to be seen as we enter the 2012 political season is whether this year's NLRB activity will prove a prelude to continuing agency revitalization or turn out to be that proverbial flash in a pan. ■

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