LABOR LAW BLIND SPOTS THAT MAY SNARE YOUR ORGANIZATION

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I. OVERVIEW OF NATIONAL LABOR RELATIONS ACT ("NLRA")

A. NLRA governs relations between union employees and their employers.

II. MY COMPANY IS NON-UNION. WHAT RELEVANCE IS THIS?

A. NLRA applies to both non-union and union employees.

B. An employer can be in violation of the NLRA for the following:

1. Having certain work rules

2. Terminating/disciplining/restricting certain communication by your employees

3. Having certain severance/noncompete terms

C. If There Is A NLRA Violation, So What?

1. A violation of the NLRA is considered an unfair labor practice ("ULP")

2. ULPs usually arise from protected concerted activity

3. A ULP is filed with the Office of General Counsel

4. The procedure varies depending on whether the employee union versus non-union

5. If there is a ULP violation, employers may be ordered to pay back wages and/or post a "mea culpa" to employees

D. Work Rules and Violations of the NLRA

1. August 2, 2023 – National Labor Relations Board ("NLRB") issues *Stericyle Inc.* decision addressing unlawful work rules under Section 8(1) of the NLRA.

a. If the employee establishes that the work rule has the reasonable tendency to chill an employee from exercising their rights, the work rule is considered presumptively illegal.

2. Does the work rule have a reasonable tendency to interfere with, refrain, coerce or restrict the employee who contemplate engaging in protected concerted activity?

3. Employer must prove that the work rule advances a legitimate and substantial business interest AND employer cannot advance its interest with a more narrowly tailored rule.

III. BUT WAIT, THERE'S MORE!

A. January 11, 2024 – United Wholesale Mortgage LLC and Christopher Dennis.

1. Administrative Law Judge decision on a case out of Pontiac involving mortgage company.

B. Violation of Section 8(a)(1) of the NLRA for overbroad employment agreement, unlawful arbitration agreement and unlawful work rules.

C. Improper Work Rules:

1. Prohibited use of employer's logo and tradename without permission from employer

2. All company property "is to be used exclusively for Company business..."

3. E-mails, memos, phones to be used "exclusively for Company business..."

a. Chills employees from communicating about matters that are of common concern to employees.

IV. OTHER WORK RULES THAT MAY VIOLATE THE NLRA

A. Requirement to return of Company property and/or lists.

1. Employees may need access to contact information for customers or employees for a complaint about workplace conditions

B. Employee's use of recording media/photos.

1. Chills employee's ability to document hazardous work conditions.

C. Company office space to be used, "solely and exclusively for Company business purposes."

1. Employees have right to solicit other employees during nonworking time. This rule may chill that right.

D. Restrictions on Media and Press inquiries, "shall be directed to the Company's CEO..." Employee is not permitted to make any public statement on behalf of the Company.

1. Prohibits employees from communicating with media concerning their terms and conditions of employment.

E. Don't be too anxious about this yet – no NLRB board has gone this far in its decisions.

V. NON-DISPARAGEMENT CLAUSES

A. The NLRB does not like "non-disparagement clauses."

B. These clauses are typically found in handbooks or employee agreements.

1. Example: "Employee will not publicly criticize, ridicule, disparage or defame the Company or its products, services, policies, officers, owners or employees, through any written or oral statement or the image."

C. NLRB holds across the board that these clauses act to prohibit employees from expressing their concerns about their working conditions, which violates the NLRA.

D. How can you fix this? Consider striking these provisions from your handbooks, rules and agreements.

VI. SOCIAL MEDIA AND DISPARAGEMENT

A. Employers cannot prohibit employees from being disrespectful or using language that injures the reputation or image of the employer.

B. However, not all employee speech regarding their employer is protected.

1. For example: Employee posting pictures on Facebook of employer event and ridiculing event. This speech was not protected. Even though it was a car dealership event, employee made demeaning comments about set up of the event, that were defamatory.

C. Be very wary about restricting your employees on social media, or making comments on social media to the employee. The NLRB is on social media too.

VII. NLRB'S SEVERANCE AGREEMENT DECISION

A. *McLaren Macomb*, 372 NLRB No 58, decision held that severance agreements with broad restrictions may violate Section 8(a) of the NLRA by interfering or restraining exercise of an employee's rights under the NLRA. For example:

1. Broad non-disparagement and confidentiality clauses;

2. Employee prohibited from making statement that could "harm the image of the employer, officers, directors, employees ..."

3. Agreement only to be disclosed to, "spouse, professional advisor, unless compelled by law to ..." disclose terms to anyone else.

B. NLRB perceives that confidentiality clauses stop employees from reporting work conditions. Decides that, "rules prohibiting employees from disclosing personnel and procedure manuals are unlawful." (*Quicken Loans Inc.*, 361 NLRB 904 (2014)).

C. Severance Agreements are Still Okay But...

1. NLRB determines violative where:

a. "overbroad provisions" affecting rights of employees to engage with one another and to improve their lot as employees;

b. Cannot restrict access to the NLRB, judicial/legislative forums, the media or various third parties; and

c. While supervisors are generally not protected by the Act, under *Parker-Robb Chevrolet*, Section 6 the Act does protect a supervisor who is retaliated against, such as being fired, because they are refusing to act on their employer's behalf in committing an unfair labor practice against employees, in other words, they are refusing to violate the NLRA per their employer's directives

VIII. REVIEW YOUR CONFIDENTIALITY CLAUSES

A. Confidentiality Clauses should not be in your work rules.

1. For example: do not prohibit employees from disclosing compensation, operational rules or terms and conditions of employment in severance agreements, work rules, employment agreements.

B. Do not label an employee handbook as confidential.

1. Because handbooks contain the terms and conditions of employment and an employee's right to discuss the terms and conditions of employment is protected under the NLRA.

IX. RETROACTIVE APPLICATION

A. NLRB decisions can be applied retroactively.

B. According to the Office of the General Counsel,

1. "[W]hile an unlawful proffer of a severance agreement may be subject to the six-month statute of limitation language under Section 10(b), maintaining and/or enforcing a previously entered severance agreement with unlawful provisions that restrict the exercise of Section 7 rights continues to be a violation and a charge alleging such beyond the Section 10(b) period would not be time-barred."

C. To avoid retroactive application, advise your employees that overbroad provisions are no longer applicable.

1. "Relatedly, while it may not cure a technical violation of an unlawful proffer, employers should consider remedying such violations now by contacting employees subject to severance

agreements with overly broad provisions and advising them that the provisions are null and void and that they will not seek to enforce the agreements or pursue any penalties, monetary or otherwise, for breaches of those unlawful provisions. That conduct could form the basis for consideration of a merit dismissal if a meritorious charge solely alleging an unlawful proffer is filed."

X. PRE-EMPLOYMENT COMMUNICATION

A. Pre-Employment Offer Letter Language

1. These too can be subject of a violation if you have language that may, "restrain, interfere with or coerce an employee's exercise of Section 7 rights."

2. Confidentiality clauses – considered to have a "chilling effect" by NLRB

B. However, employers can still enforce confidentiality provisions to the extent they restrict trade secret/proprietary information

XI. LOOKING FORWARD

A. Office of General Counsel opined the following provisions in severance agreements as "problematic" because they interfere with an employee's exercise of Section 7 rights:

1. non-compete clauses;

2. non-solicitation clauses;

3. no poaching clauses;

4. broad liability releases and covenants not to sue that may go beyond the employer and/or may go beyond employment claims and matters as of the effective date of the agreement;

5. cooperation requirements involving any current or future investigation or proceeding involving the employer

a. These requirements affect an employee's right to refrain from work under Section 7

b. For example: if the employee was asked to testify against co-workers that the employee assisted with filing a ULP charge.

XII. WHAT YOU WANT IN THE CBA

A. Check your Management Rights provision, if it's not in the provision, you can't do it.

1. Recommended language:

a. Management Rights. Employer reserves the right to unilaterally change wages, hours of work, and other terms and conditions of employment. This includes but is not limited to the employer's unilateral ability to do the following:

i. Reprimand, discipline, suspend, or discharge employees for cause;

ii. Determine and revise the number of employees to be employed;

iii. Hire employees, and assign and direct their work;

iv. Set and change employee wages and pay;

v. Promote, demote, transfer, furlough, lay off, and recall to work employees;

vi. Schedule and reschedule work, jobs, shifts, and assignments;

vii. Train employees

XIII. MANAGEMENT RIGHTS

A. Conduct performance reviews of employees;

B. Determine and revise time off, sick pay, personal leave policies.

C. Set and revise standards of work quality;

D. Set and revise the operational hours of the plant;

E. Establish and revise safety standards;

F. Determine and change the staffing methods, means, and facilities by which operations are conducted;

G. Employ and/or assign work to non-unit personnel during pandemics, natural disasters, economic crashes, and other unforeseen emergency situations;

H. Implement and enforce sickness prevention policies that include but are not limited to the Employer's right to close the plant for sanitation, implement social distancing measures, require employees to wear masks and other personal protective equipment, take the temperature of employees before they enter the plant, require employees to get tested for illness, and require employees to get vaccinated;

I. Assure continuous performance of the unit's work; and

J. Determine the effects of taking any of the above-mentioned actions.

XIV. RIGHT TO WORK TERMINATION

A. Get the CBA amended to address the procedure (pre-right to work clauses) to secure dues taken out of wages.

1. Employers must have a release from the employee to take out dues.

2. Need a 90-day provision and exclusion of temporary employees from becoming union dues paying.

3. Go to Union about procedure and document all conversations with them about this.

B. Remember, you cannot take dues out of wages without a release from the employee.

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