Maddin Hauser's Employment Law Symposium

LABOR LAW BLIND SPOTS THAT MAY SNARE YOUR ORGANIZATION

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Overview

- How the National Labor Relations Board (“NLRB”) is assessing work rules as violative of the NLRA.
- Severance Agreement terms that violate the NLRA.
- Shore up your Management Rights provisions in your Collective Bargaining Agreements.

OVERVIEW OF NATIONAL LABOR RELATIONS ACT

National Labor Relations Act ("NLRA") governs relations between union employees and their employers but also protects some nonunion employee actions.

Applies to ALL "employees" EXCEPT supervisors, managerial employees, agricultural workers, individuals who work for their parents or spouse, rail road employees. Management includes employees who act in a capacity for persons who determine or administer policy. *There is one minor exception to this rule.

Guarantees all employees 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 concerted activities for purposes of collective bargaining or other mutual aid or protection." (Section 7 rights)

MY COMPANY IS NON-UNION WHAT RELEVANCE IS THIS?

- The NLRA applies to both non-union employees and union employees.
- An employer can be in violation of the NLRA for the following:
  - Having certain work rules.
  - Terminating/disciplining/restricting certain communication by your employees, and
  - Having certain severance/noncompete terms.

IF THERE IS A NLRA VIOLATION, SO WHAT?

- A violation of the NLRA is considered an unfair labor practice ("ULP").
- ULP's usually arise from protected concerted activity.
- A ULP is filed with the Office of General Counsel.
  - The procedure varies if union v. nonunion. The underlying procedure of a ULP is not the subject of this presentation.

If there is a ULP violation, the employer will be ordered to pay back wages and post a six page written "mea copa" to employees.

WORK RULES AND VIOLATIONS OF THE NLRA

August 2, 2023 – NLRB issues *Stericyle Inc*. decision regarding unlawful work rules under Section 8(a)(1) of the NLRA.

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

Ask yourself: Does the work rule have a reasonable tendency to interfere with, refrain, coerce or restrict the employee who contemplates engaging in protected concerted activity?

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

BUT WAIT, THERE'S MORE!!!

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

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

- Improper work rules:
  - Prohibited use of employer's logo and tradename without permission from employer,
  - All company property "is to be used exclusively for Company business…"
  - Emails, memos, phones to be used, "exclusively for Company business..."
    - Chills employees from communicating about matters that are of common concern to employees.

OTHER WORK RULES THAT MAY VIOLATE THE NLRA

- Return of Company property and/or lists.
- Employee's use of recording media/photos.
  - Chills employees ability to document hazardous work conditions.
- Company office space to be used, "solely and exclusively for Company business purposes."
  - Employees have right to solicit other employees during nonworking time. This rule may chill that right.
- 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.
  - Prohibits employees from communicating with media concerning their terms and conditions of employment.

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

NON-DISPARAGEMENT CLAUSES

The NLRB does not like “non-disparagement clauses.”

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.”

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

FIX: Strike these provisions from your handbooks, rules and agreements.

SOCIAL MEDIA AND DISPARAGEMENT

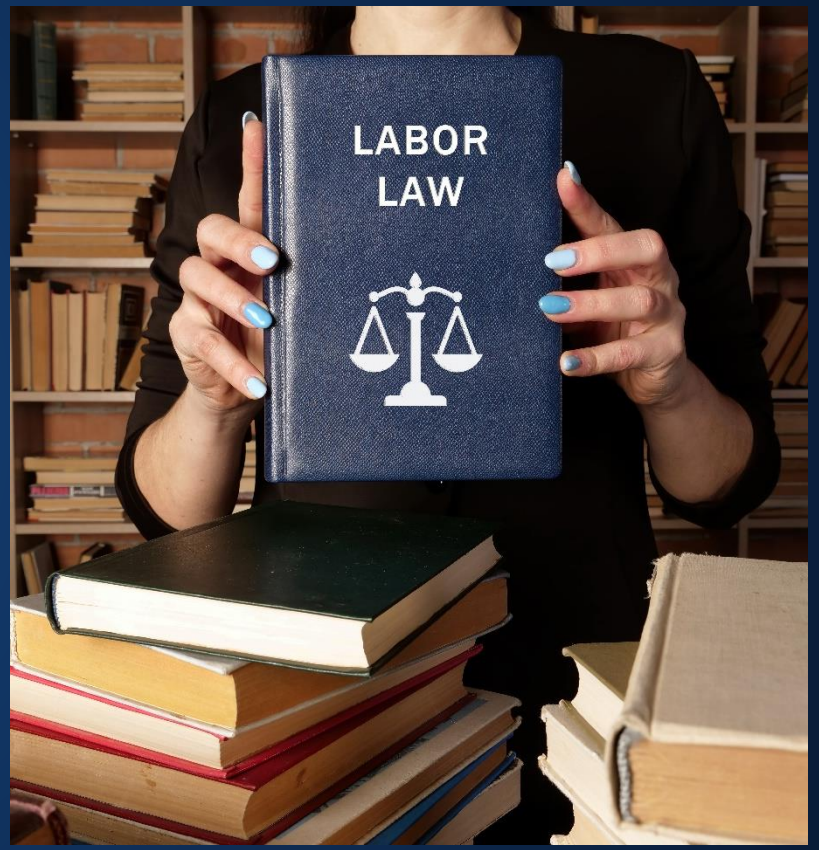
- Employers cannot prohibit employees from being disrespectful or using language that injures the reputation or image of the employer on social media.
- However, not all speech regarding the employer is protected.
- Be very wary about restricting your employees on social media, or making comments on social media to the employee. The NLRB is on social media too.

NLRB'S SEVERANCE AGREEMENT DECISION

- *McLaren Macomb*, 372 NLRB No 58, decision. Severance Agreements with broad restrictions may violate Section 8(a) of the NLRA.

  For Example:

  - Broad non-disparagement clauses
  - Confidentiality clauses



SEVERANCE AGREEMENTS ARE STILL OKAY BUT…..

NLRB determines violative where,

- “overbroad provisions” affecting rights of employees;
- Cannot restrict access to the NLRB, judicial/legislative forums, the media or various third parties; and
- While supervisors are generally not protected by the Act, Section 6 the Act does protect a supervisor who is retaliated against for refusing to act on their employer’s behalf in committing an unfair labor practice against employees.

REVIEW YOUR CONFIDENTIALITY CLAUSES

- Confidentiality Clauses can be in your work rules.
  - For example: do not prohibit employees from disclosing compensation, operational rules or terms and conditions of employment in severance agreements, work rules, employment agreements.

- Do not label an employee handbook as confidential.

RETROACTIVE APPLICATION

- NLRB decisions can be applied retroactively.
- To avoid retroactive application, advise your employees that overbroad provisions are no longer applicable

PREEMPLOYMENT COMMUNICATION

- Pre-employment offer letter language,
  - 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.”
    - Confidentiality clauses – considered to have a “chilling effect” by NLRB
    - DOES NOT INCLUDE – trade secret/proprietary information clauses

LOOKING FORWARD

- Office of General Counsel opined the following provisions in severance agreements as “problematic”;
  - “I believe that some other provisions that are included in some severance agreements might interfere with employees’ exercise of Section 7 rights, such as: non compete clauses; no solicitation clauses; no poaching clauses; 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; cooperation requirements involving any current or future investigation or proceeding involving the employer as that affects an employee’s right to refrain under Section 7, such as if the employee was asked to testify against co-workers that the employee assisted with filing a ULP charge.”

WHAT YOU WANT IN THE CBA

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

Recommended language:

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:

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

Determine and revise the number of employees to be employed;

Hire employees, and assign and direct their work;

Set and change employee wages and pay;

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

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

Train employees.

MANAGEMENT RIGHTS

Conduct performance reviews of employees;

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

Set and revise standards of work quality;

Set and revise the operational hours of the plant;

Establish and revise safety standards;

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

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

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;

Assure continuous performance of the unit's work; and

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

RIGHT TO WORK TERMINATION

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

- Need a release from the employee to take out dues.
- Need a 90 day provision and exclusion of temporary employees from becoming union dues paying.
- Go to Union about procedure and document all conversations with them about this.

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

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THANK YOU

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