

Change We Can Be Afraid Of – Recent Developments In Labor And Employment



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What's New In 2011?



NLRB

- I. Social Media Cases
- II. Posting Requirements
- III. Quickie Election Rules
- IV. The “Gag” Rule
- V. New Bargaining Unit Definition



I. Social Media



You Be The Judge: Lawful to fire?

1. Customer Complaint about employee;
2. Supervisor asks employee to prepare investigative report;
3. Employee on Facebook (from home) refers to supervisor as:
 1. Psychiatric patient
 2. *@*!bag
 3. A Richard
4. Employee received supportive comments from co-workers on Facebook
5. Handbook policy prohibiting disparaging remarks when discussing company or supervisors and from depicting the Company in any media



Section 7 NLRA



Section 7 Rights:

Or engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.





October 14, 2011



Welcome to the World of Obnoxious Protected Concerted Activity



Ambulance Service Case

1. NLRB: termination unlawful

- Protest of supervisory actions is protected conduct under Section 7
- Supportive comments from co-workers
- No verbal/physical threat



Double Whammy!




Company Policy Was Also Unlawful

- Similar to “disrespectful conduct” rule
- No limiting language to inform employees that it did not apply to Sec. 7 activity
- Media Rule: could be read to prohibit posting pictures on picket signs or wear a t-shirt with company logo protesting terms & conditions of employment




Hispanics United of Buffalo (ALJ Case)



1. Five employees used a worker's Facebook page to post angry and defensive responses to co-worker's criticism of their work



Hispanics United of Buffalo (ALJ Case)



2. Five co-workers terminated for bullying and harassing of the employee-zero tolerance was company policy



Hispanics United of Buffalo (ALJ Case)



3. Terminations unlawful



Hispanics United of Buffalo (ALJ Case)



4. “Around the water cooler” type statement –
protected by Section 7



Today's Lesson



Review Handbook policies

Beware of the papal “we”

Look before you leap



NLRB Posting Requirements



1. Effective January 31, 2012 (previously date was November 14, 2011)
2. Text in Materials
3. Covers most private employers



II. Posting Requirements



1. Where? All places where notices to employees concerning personnel rules are customarily posted
2. Language Requirements:
 - “significant numbers” not proficient in English = 20%
 - Must post physically and electronically
3. Electronic Posting
 - ❖ Can use link to NLRB website



II. Posting Requirements



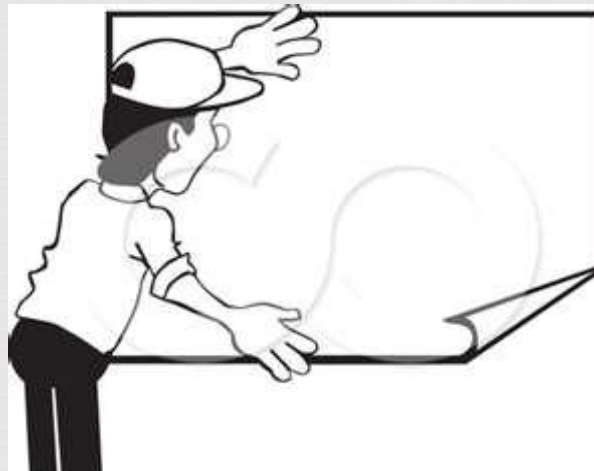
4. Failure to post
 - ULP
 - Tolling statute of limitations
 - Evidence of unlawful motive in ULP case if “knowingly and willfully”
5. Court challenge by Chamber



Poster Lessons



1. Posting is mandatory
2. Consider posting your own “Anti” poster



III. Quickie Elections



New Representation Case Rules

1. Electronic processing of election petitions, election notices and voter lists
2. Pre-election hearing within 7 days of service of Notice of Hearing
3. Positions must be stated at start of hearing before evidence is accepted
4. Litigation of eligibility issues involving less than 20% of unit will be deferred to after the election



III. Quickie Elections



5. Production of preliminary voter list (names, work location, shift & classification) by the opening of the pre-election hearing
6. Pre-election appeals to Regional Director – not full NLRB
7. Post election appeals – Board could deny review of objections and challenges
8. Excelsior List (Final Voter List): Name, Address, phone numbers and email address – within two work days (now 7 “days”)



IV. The “Gag” Rule



1. DOL Reinterpretation under LMRDA of “persuader activities”
1. For 50 years: Advice exception trumped reportable activity

Test: Whether law firm directly communicates with employees (reportable) or whether it provides recommendations which the employer is free to accept, modify or reject (not reportable)



DOL reinterpretation: Attorney “indirect communications” to employees about union rights triggers reporting requirements



Reporting Burden



- a) Client required to file form LM-10
- b) Attorney required to file form LM-20 and LM-21
- c) LM-21:
 - report total receipts from all clients
 - List names of clients and amount paid
 - List disbursements to officers and employees
- d) President and Treasurer: Civil and Criminal sanctions and personal liability attaching to form signers



Indirect Communications About Union Rights



- ❧ Help develop personnel policies or practices
- ❧ Union avoidance seminars/training for managers
- ❧ Helping draft or reviewing company presentations on union issues
- ❧ Drafting or reviewing communications on contract negotiations or strike situations
- ❧ Disclosing any info about a union



Lessons Learned



- 1) Do not have your son or daughter become a management labor lawyer
- 2) If in a law firm, resign as President or Treasurer
- 3) Hope for a change at the DOL
- 4) Expect legal challenges: ABA has already weighed in on the issue



V. New Bargaining Unit Rule



Specialty Healthcare

- Overall larger unit of non-professionals is no longer the appropriate unit in non-acute healthcare facilities
- Petitioned-for unit of CNA's is appropriate



Specialty Healthcare Rationale



1. “Readily identifiable group”; all employees in same job classification
2. Share community of interest
3. If employer contends larger grouping would be appropriate, employer must demonstrate that employees in larger unit share overwhelming community of interest



“What Me Worry”

Alfred E. Newman



1. Not Restricted to healthcare
 2. Organizing by job classifications
 3. Smaller units are easier to organize
 4. Balkanization of work place
 5. Production and maintenance?
 - Plant Clericals
 - QC Employees
 - Drivers
1. Ralph's Rule of Inverse Proportionality
 - Small bargaining units more expensive and time consuming than larger units

