SEBRIS BUSTO JAMES Employment Law Note December 2014

Happy Holidays from the National Labor Relations Board

NLRB Takes Exceptional Year-End Steps to Encourage & Support Union Organizing

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With the 2014 Holiday Season upon us, the National Labor Relations Board has just taken exceptional year-end steps to give the gift that keeps on giving. . . . for unions. In a sweeping NLRB decision related to company email systems and employee union organizing access, and newly issued regulations that stand decades of NLRB representation election procedures on their head with new "quickie" union election protocols, the NLRB has opened the door to massive union organizing in 2015 and beyond. These are extraordinary steps by the Board for all employers. In our private sector the decisions of the NLRB related to the National Labor Relations Act control, and in our state public labor relations system for our Public Employment Relations Commission in Washington they provide guidance.

Labor will undoubtedly be mobilizing in 2015 to move ahead with major union organizing initiatives. Now is the time to prepare with revised policies and training programs to help you reduce risk to your organization.

Introduction. Two extraordinary actions were taken by the NLRB last week to undercut employer rights and strengthen union rights for organizing. First, the NLRB overruled prior case law and held that employees have a presumptive right to use employer e-mail systems for protected concerted activity during non-work time, including union organizing. Next, the agency issued final rules—the so-called "quickie election" rules—that will greatly shorten the time frame within which an employer can respond to a union organizing drive after the union files a petition for a representation election. These developments require management to immediately review their e-mail policies and to assess their preventive union avoidance measures. Management training needs to go hand-in-hand with new policies.

Employees' Right to Use Company E-Mail

In Purple Communications, a divided NLRB overturned its 2007 decision in Register-Guard and ruled that employers must allow employees on non-work time to use the employer's e-mail system for protected concerted activity, including union organizing. The Board rejected claims that the employer's property interest in its e-mail systems outweighed the right of employees to communicate via company e-mail. The modern workplace, according to the Board, relies upon e-mail as the most efficient means of workplace communications, and to deprive employees of the ability to use company e-mail to communicate with co-workers on union matters and matters of common concern (i.e. , "concerted" activity") unnecessarily deprives employees of their statutory rights to communicate effectively. The Board stated that employers may still choose not to allow employees access to its e-mail systems, but employers who allow employee access to e-mail for business purposes will need to prove "special circumstances" to justify a ban on employee use of e-mail for union or related purposes. This right of access applies only to employees; unions and other third parties do not have a similar right to use an employer's e-mail system. In two vigorous dissenting opinions, Board members Miscimarra and Johnson argued that employees did not need to use company e-mails for co-worker communications because they could avail themselves of reasonable alternate means of communications, such as social media, private email, websites and in-person communications. The majority rejected these arguments, stating that employees had a presumptive right to use company e-mail without regard to other communication platforms. The majority also dismissed concerns that employers who monitor e-mail usage may be susceptible to charges of unlawful surveillance, and to concerns that its new rule is ambiguous and lacks clarity for employers, employees and unions.

Employers should review their e-mail and electronic communications policies to ensure compliance with this new ruling. This includes access understandings, as well as restriction safeguards where it is appropriate under the new case. Unions will seek to have employees use your systems. They will also use poorly written employer policies and practices to file unfair labor practice charges and overturn any unfavorable union election results.

Quickie Elect ion Rules: Taking Effect in Mid-April

One day after the NLRB issued its e-mail decision, the agency issued its long-awaited final rules that change dramatically the processing of union election petitions. In particular, the rule: (1) postpones most litigation over union eligibility issues until after a representation election (requiring employers to identify any issues or concerns within a shortened timeframe); (2) shortens the time between the filing of the election petition request and the election itself (cutting short the time an employer has to conduct a campaign); and (3) requires employers to furnish to union organizers all available personal e-mail addresses and phone numbers of employees who are eligible to vote in a union election. The Board will also expressly allow unions to submit electronic signatures of employees in order to sustain a showing of interest for the purpose of moving to an election. These are extremely powerful changes to the NLRB election process and dramatically undermine the rights of employers. They are very similar to the rules that were issued three years ago but which were thrown out by courts because they were issued without a Board quorum. Employers will have very little time after a petition is filed to campaign effectively against unionization; it is expected that these new rules may cut the time to hold an election from roughly 42 days after a petition is filed, to as little as 14 days. This provides almost no time for an employer to provide adequate information about employee rights in a union organizing situation once a NLRB representation petition is filed. Consequently, employers should consider taking preventive measures now, such as employee opinion surveys, supervisory training and union avoidance audits, to reduce the chances that employees will look to unions for assistance with workplace issues in the first place. It may be too late to respond to union organizing after the petition is filed.

The new rules go into effect April 14, 2015. It is expected that unions may hold off on filing new election petitions until the new, union-friendly, rules go into effect. But expect underground campaigns to ramp up well before that. Employers should take this opportunity to review their policies and practices, and to consider other preventive measures. Training is essential for your managers and supervisors to protect your employer rights.
