Board Takes Aim at Employers' Rules That Violate National Labor Relations Act

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Since President Joe Biden took office in 2021, the National Labor Relations Board (NLRB or the board) has shifted in a pro-labor direction. In addition to aligning board appointments back to a Democrat-controlled majority, Biden's appointment of Jennifer Abruzzo as the NLRB's general counsel has resulted in numerous policy initiatives by the board. Whether a direct result of the administration's labor-friendly initiatives or an independent coincidence, the board recently reported a substantial increase in the number of union representation petitions filed at the NLRB.

Most nonunion employers tend to overlook and discount the NLRB's potential reach into their operations, believing that the board's jurisdiction only extends to employee issues in union shops. That type of thinking may be dangerously naive. This is particularly true when it comes to employees' conversations about their wages. According to the NLRB, employer policies that specifically prohibit discussions of wages among employees are unlawful.

Section 7 of the National Labor Relations Act (NLRA) provides that "employees shall have 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 other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities." Specifically, Section 7 of the NLRA has been interpreted to protect employees' rights to discuss, debate, and communicate with each other about the terms and conditions of their employment, including compensation and wages.

At a time when employers are struggling to retain competent employees, negotiations may involve paying certain employees more than other employees who might be doing the exact same job. When an employer's conversation about an increase in an employee's wages also includes the instructions to "keep this between us" or "if others find out what we are paying you it may make things uncomfortable for the company," those instructions, if enforced as rule or practice by a private employer, can be viewed as a violation of the employee's Section 7 rights. Couple this with a possible adverse action by the employer, such as a decision to fire an employee if the employer later finds out that the employee bragged to his co-workers about how much more money he was making, there is even more potential that the NLRB will jump to take action against the employer if the employee decides to report the employer's actions. In fact, the NLRB has consistently held that an employer prohibiting employees from discussing wages is unlawful. *See*, e.g., *Parexel International*, 356 NLRB 516, 518 (2011) (citing *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995), enfd. in part 81 F.3d 209 (D.C. Cir. 1996)); *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 205 (2007), enfd. 519 F.3d 373 (7th Cir. 2008) ("It is axiomatic that discussing terms and conditions of employment with coworkers lies at the heart of protected Section 7 activity.").

Employers may face similar issues if handbook policies with respect to required confidentiality and the definition of "confidential company information" are viewed to be so broad as to prohibit employees from discussing their wages or salary information. Such policies are particularly objectionable if they state that any employee found to have disseminated such "confidential company information" will be subject to disciplinary action, including possible termination.

Should a nonunion employer be served with a charge by the NLRB, the employer will be assigned a board agent who will investigate the matter to determine whether the charge has merit. The investigation will apply the relevant facts and law to the matter in an effort to make recommendations to the regional director as to the proper disposition of the case. This might entail taking and preparing affidavits, interviewing witnesses, obtaining confidential witness questionnaires, requiring the "charged party" employer to submit a written statement of position, or the issuance of subpoenas by the NLRB to obtain relevant and necessary evidence. Ultimately, at the conclusion of an investigation, cases are presented to the regional director who has the final authority and responsibility to make all case handling decisions within the NLRB regional office.

It is the policy of the board and the general counsel, however, to actively encourage the parties to reach a mutually satisfactory resolution/settlement of charge issues at the earliest possible stage, if of interest to the parties. Settlement, including an informal board settlement, can be considered before a merit determination is made. Factors that might be considered in determining the appropriateness of a pre-merit determination informal settlement include whether the charging party/employee has presented sufficient evidence to establish arguable merit to the charges; whether compliance can be expected to be achieved quickly and easily; the nature and scope of the violations; the history of prior violations by the charged party/employer; the nature of the underlying evidence, including whether the evidence can be preserved if compliance becomes an issue and further investigation becomes necessary; and the position of all the parties, including the charging party/employee.

Unlike settlement agreements related to claims brought through the Equal Employment Opportunity Commission (EEOC), all NLRB settlement agreements must be approved by the applicable regional director or by the board itself. See memorandum from Richard A. Siegel, associate general counsel, "Nonboard Settlements" (Dec. 27, 2006) (on file with NLRB). An NLRB complaint cannot simply be withdrawn by the charging party/employee—the withdrawal must be approved. In addition, the NLRB general counsel, the board, and regional directors are empowered to revoke an approved settlement agreement and withdrawal of the charge where the employer fails to comply with its obligations under the agreement or the employer is found to have committed a subsequent violation of the NLRA. 29 CFR Section 101.9 (e); *see also Wallace v. National Labor Relations Board*, 323 U.S. 248, 254 (1944).

Employers should also understand that certain standard settlement agreement clauses are prohibited by the NLRB, including overly broad confidentiality and non-disparagement clauses. *See Alpine Site Services*, 49 N.L.R.B. AMR 35 (2021). For instance, employers may not limit an employee's ability to discuss the terms of the settlement agreement or the allegations related to their claims, except the specific settlement amount. In addition, a settlement agreement may only prohibit a charging party/employee from engaging in defamatory speech against an employer.

Recent policy changes have also affected the NLRB's pursuit of remedies against employers. In her Sept. 15, 2021, memorandum, NLRB general counsel Jennifer Abruzzo encouraged regional directors to seek "new and alternative remedies … to ensure that board orders provide full relief to those harmed." See memorandum from Jennifer Abruzzo, general counsel, NLRB, "Full Remedies in Settlement Agreements," Mem. GC 21-07 (Sept. 15, 2021) (on file with NLRB).

Abruzzo identified several types of remedies that regional directors can and should seek in settlement agreements, including "an award of consequential damages to make employees whole for economic losses (apart from the loss of pay or benefits) suffered as a direct and foreseeable result of an employer's unfair labor practice." Economic losses may include "interest or late fees on credit cards incurred by an unlawfully fired employee to cover living expenses; penalties incurred by an unlawfully fired employee from having to prematurely withdraw money from a Retirement account to cover living expenses;" or "damages caused to an employee's credit rating following an unlawful firing."

Beyond economic damages, Abruzzo also identified several new types of remedies that regional directors should seek from employers, including letters of apology, admissions clauses for repeat violators, and notices to employees. See memorandum from Jennifer Abruzzo, general counsel, NLRB, "Update on Efforts to Secure Full Remedies in Settlements," Mem. GC 22-06 (June 23, 2022) (on file with NLRB.). There is support to suggest that regional directors have already succeeded in implementing these types of remedies across the NLRB's regions throughout the country.

In the current climate, employers must be mindful when developing, implementing, or enforcing rules or policies that might arguably restrict employees' speech, particularly when it comes to discussions regarding the terms and conditions of employment and employees' compensation and wages. Employers who fail to pay attention to these types of prohibitions might, reluctantly, find themselves among those targeted for action by the NLRB. Given the increased breadth of the board's and general counsel's remedies and awards in such cases, employers should thoughtfully tailor employee rules and policies to avoid unintended consequences and battles with the NLRB. ■

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