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Do You Know What the National Labor Relations Board Considers Unlawful These Days? Take This Pop Quiz

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Consider the following scenarios. Then answer whether you think the employer conduct involved is lawful or not lawful:

1. After an unsuccessful union campaign at a fast-food franchisee's stores, some employees dissatisfied with the employer's sick leave policy run a “contaminated sandwich” poster campaign at the stores. The posters show photos of two identical sandwiches, one purportedly made by a "healthy" employee and the other by a "sick" one. The posters implore patrons to “help [the] workers win sick days.” The employer fires six of the employees involved. Lawful?

2. A newly hired salesperson at a car dealership immediately begins questioning the employer’s policies regarding breaks, restroom facilities and compensation. Eventually, the owner has a meeting with the employee. The owner has no intention of disciplining the employee, but simply tells him to stop all the negativity. The employee then states he does not trust the dealership in calculating his commission, and the owner tells him he could work elsewhere if he did not trust the dealership. The employee loses his temper, raises his voice, curses the owner out and tells him that he is stupid and no one likes him. Finally, he warns that if the owner fires him he would regret it. The owner fires him. Lawful?

3. Technicians who conduct service calls at customers’ homes wear buttons and display bumper stickers that read “WTF, Where’s The Fairness,” “FTW Fight To Win” and “CUT the CRAP! Not My Healthcare.” The employer, viewing the acronyms as more familiarly being texting lingo for vulgarisms, sends some employees home and asks other employees to remove the buttons. Lawful?

4. A restaurant has a work rule providing that “[i]nsubordination to a manager or lack of respect and cooperation with fellow employees or guests” might result in discipline up to and including immediate termination. Lawful?

The Answers, and Why

In each instance, the answer is "not lawful."

The foregoing fact situations are taken from actual recent National Labor Relations Board (NLRB) cases. On what basis did the NLRB find the employers' conduct unlawful?

In each case, the answer purportedly derives from Section 7 of the National Labor Relations Act (the Act). Section 7 protects the rights of employees "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." The NLRB found the employer to have violated the bolded italicized language in the foregoing scenarios.

In scenario 1, the NLRB panel majority found that the "contaminated sandwich" poster campaign was concerted activity because it related to an ongoing labor dispute. It found the activity was "protected" because the panel majority did not feel that the conduct was "so disloyal, reckless or maliciously untrue" as to lose the Act's protection.

In scenario 2, the NLRB admitted that the outburst "involved obscene and denigrating remarks that constituted insubordination," but did not believe it constituted "menacing, physically aggressive, or belligerent conduct" to cause the conduct to lose its protection. It found the discharge unlawful even though the owner did not intend to fire the employee until the outburst occurred.

In scenario 3, an NLRB administrative law judge (ALJ) rejected the argument that the "WTF" and "FTW" buttons and stickers were profane or vulgar and tended to impugn the employer's reputation with its customers. He found that the employer violated the Act by sending the employees home and having them remove the buttons and stickers.

In scenario 4, another NLRB ALJ found the rule regarding lack of respect and cooperation with fellow employees or guests to be unlawful because the language was too broad and subjective and therefore tended to have a "chilling" effect on employees' protected rights.

Scenarios 1, 2 and 3 reflect how far the NLRB has been going to find concerted activity to be protected from employer action notwithstanding its offensive character. Scenario 4 is but one of a series of recent NLRB decisions striking down seemingly benign work rule policies on the premise that the policy could be read by employees as limiting their ability to exercise their rights to complain about their wages and conditions of employment. Other policies that have been struck down by the NLRB or its ALJs as similarly unacceptably vague or overbroad are confidentiality and non-disclosure rules, rules regarding social media, and rules on usage of the company brand and logo.

NLRB Also Expands Bounds of What Is "Concerted Activity"

In a very recent decision, the NLRB also appears to be pushing the bounds of what is considered to be "concerted" activity for the purpose of "mutual aid or protection." In that case, an individual employee who felt sexually harassed by what had been written on a whiteboard asked some fellow employees to sign a paper confirming that they had seen what was written on the board. There was no evidence that the other employees wished to make common cause with the offended employee. They were simply witnesses. But the NLRB panel majority found that by simply approaching her co-workers to seek support of her efforts, the individual employee was engaged in "concerted activity" protected by the Act.

More Substantive Changes on the Horizon?

There also may be even more dramatic substantive changes in existing NLRB standards in the not too distant future. Right now, there is a push by the NLRB's General Counsel to stretch the concept of who is a "joint employer." The present, longstanding standard for measuring whether a franchisor is a joint employer is whether the franchisor controls the working conditions of the employees (e.g., setting individual wages or individual schedules, or involvement in the hiring and disciplining of those employees). In a recent case against McDonald’s USA, however, the NLRB’s General Counsel sided with the union in asking the NLRB to abandon that standard in favor of a more expansive “totality of the circumstances” test in which the NLRB would look at whether the franchisor wields sufficient economic influence over the direct employer such that meaningful bargaining could not occur without its involvement.

In a related development, the NLRB asked for briefs on the same issue in another case involving a contractor-subcontractor relationship. These developments portend a potential sweeping new standard that could apply not only to franchisors but also to general contractors, supplier companies and venture capitalists.

Also in the works is the possible reappearance of revamped union election rules that would cut down on the time to schedule an election after a union election petition, thereby limiting the time period the employer would have to campaign against the union. The NLRB originally proposed such rules in 2011, but withdrew them when a U.S. court of appeals ruled that the NLRB lacked a proper quorum at the time. Now that the NLRB has a proper quorum, it likely will try again to enact these rule changes.

Given the foregoing developments, employers (as well as other entities that potentially may be considered to be “joint employers”) may be well advised to educate themselves and adjust their practices and procedures.

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