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Has NLRB's Reach Exceeded its Grasp in Trashing Restaurant's Non-Board Lawsuit Settlement?

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A settlement of two ***Fair Labor Standards Act*** claims (an individual lawsuit and a class action) by employees of a Bronx restaurant and the employer's ***Racketeer Influenced and Corruption Organizations Act*** lawsuit against a union seeking to represent the employer's employees has fallen through as a result of ***National Labor Relations Board*** objections to two provisions in the settlement agreement – the non-disparagement and non-disclosure provisions.

The restaurant has been the target of a corporate campaign involving street theater and other disruptive conduct by the *Laundry Workers Center United* (activists funded by the Workers United union and the *Service Employees International Union)*. In response, the employer filed a ***RICO*** action against the activist group.

The parties agreed to settle the FLSA and RICO claims, with the restaurant reportedly agreeing to pay $1,000,000 to the employee-plaintiffs. Because the restaurant's owner suffered years of *ad hominem* character attacks by the activists, the agreement included, at the restaurant's insistence, provisions requiring mutual non-disparagement and non-disclosure of the settlement's terms. It appeared that peace was at hand, but, because several employees also had filed unfair labor practice charges at the NLRB alleging the employer had discharged them for engaging in protected concerted activities (such as filing the FLSA class action and engaging in a protest), the court insisted the settlement be acceptable to the NLRB.

The settlement did not satisfy the NLRB. The heart of the NLRA is Section 7 – guaranteeing employees' right to engage in union activity and other *protected concerted activity*. Taking Section 7 to its extreme conclusion, the NLRB would not approve the requirement that employees maintain confidentiality and not make disparaging remarks, viewing them as a limitation on employees' protected concerted activity. That the employees agreed to the terms – and would receive a handsome settlement payment – was irrelevant to agency administrators.

The Board's view of Section 7 as the paramount authority is most evident in how it has taken aim at routine workplace policies, characterizing many ordinary – and common sense – rules regarding confidentiality, disparagement (of coworkers and management), offensive behavior, misuse of company communications, harassment and more, as unlawful, usually based on its strained view that employees *might* construe these well-understood (and often inherently obvious) rules to possibly restrict them from engaging in some manner of concerted action protected under the Act.

Many say the incumbent Board majority has embraced its responsibility to enforce the Act with bureaucratic blinders, interpreting Section 7 to the *nth* degree while ignoring their decisions' practical implications.

The takeaway for employers is that no settlement, work rule or employment decision is safe without analyzing it carefully for unintended implications for inhibiting the exercise of Section 7 rights.

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