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Labor Day Wouldn't Be Labor Day Without New NLRB Decisions: September 2016 NLRB Summary

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The onset of Labor Day and the end of the NLRB fiscal year (September 30) one can count on seeing a number of decisions issued. This year is no different, and perhaps more are being issued during these last few days because Member Hirozawa's term expired on Saturday August 27.

Here is a summary of a couple of decisions of note issued by the NLRB in the last few days.

Pre-Discipline Bargaining In Newly Represented Units Required (Again)

Over three years ago, a constitutionally infirm panel issued a decision requiring employers to bargain over discipline and termination in a newly organized workplace if the employer's discipline system was discretionary. That case ultimately was voided by the Supreme Court's decision in Noel Canning.

The NLRB in a new case Total Security Management Illinois 1, LLC, 364 NLRB No. 106 (August 26, 2016) returned to the invalidated standard, which applies to newly organized units before a collective bargaining agreement is negotiated (after which, all discipline/discharge would be submitted to a contractual grievance procedure). The Board stated the new bargaining obligation as follows:

> Under today's decision, after the employer has preliminarily decided (with or without an investigatory interview) to impose serious discipline, it must provide the union with notice and an opportunity to bargain over the discretionary aspects of its decision *before* proceeding to impose the discipline. At this stage, the employer need *not* bargain to agreement or impasse, if it commences bargaining promptly. In exigent circumstances, as defined, the employer may act prior to bargaining provided that, immediately afterward, it provides the union with notice and an opportunity to bargain about the disciplinary action and its effects.

"Exigent circumstances" according to the Board is a reasonable good faith belief by the employer that the "employee has engaged in unlawful conduct that poses a significant risk of exposing the employer to legal liability for the employee's conduct or threatens the safety, health or security inside

or outside the workplace."

What this means is that in the narrow circumstances of the date a union gains representational rights until the date a contract is reached, the employer must bargain over the discretionary aspects of discipline prior to imposing such discipline. The risk of not engaging in such discipline of course, is now that a bargaining obligation attaches to the decision is that the discipline could be overturned by the NLRB.

The NLRB declined to extend this standard retroactively, so it will apply to discipline situations going forward as of August 26, the date of the decision.

Social Media Continues to Vex Employers

The explosion of social media, in particular the ability of employees to immediately express themselves to a wide audience, is an area that has caused significant hand wringing when it comes to the NLRB. We have discussed this issue many times including here and here.

Employers often want to regulate or outright prohibit the posts of employees, only to find out the NLRB deems such activity to violate the Act. The decisions can seem confusing and conflicting.

A recent NLRB decision on this issue adds to the confusion. In Chiptole Services LLC, 364 NLRB No. 72 (August 18, 2016) involved an employee who would use his Twitter account to respond to customers and sometimes fellow employees. The case involved, among other things, three "Tweets" the employer asked the employee to delete from his account, which he did. These Tweets were as follows:

- The employee tweeted the employer's communication director a copy of a news article about people who have to work on snow days when public transportation was closed, adding the comment "Snow days for 'top performers' [communications director]?"

- A customer posted "free Chipotle is the best thanks." In response, the employee tweeted "nothing is free only cheap #labor. Crew members make only $8.50hr how much is that steak bowl really."

- A customer posted about guacamole. The employee responded "its not free like #Qdoba. enjoy the extra $2.

The employee deleted the tweets. As part of a larger unfair labor practice case (involving other issues including the employee's termination), the issue of the deleted tweets was alleged as unlawful.

In finding a violation of Section 8(a)(1) the NLRB ALJ noted that the analysis for evaluating whether an employee's actions are "protected, concerted activity" involves two prongs which are analyzed separately and objectively. First, the employee's action must be concerted. Second, the purpose of the employee's action must be for "mutual aid or protection.". In this case the Judge noted that the employee had not sought out other employees nor had he consulted with them before sending the tweets. Nevertheless, the ALJ ruled the first prong was met because the employee was seeking group action because the tweets "did not pertain to wholly personal issues relevant only to [the employee] but were truly group complaints."

On appeal a majority of the three member NLRB panel reversed this finding holding, simply, “On this record, we do not find that [the employee’s] were concerted.” The footnote also states Chairman Pearce dissents, and would affirm the ruling except with respect to the tweet about the guacamole.

In sum, whether a social media posting by an employee constitutes protected concerted activity can be very confusing. This case illustrates that four NLRB employees (the ALJ and three Board members) were split evenly over whether the tweet constituted activity protected by the Act.

The best course is to be extra careful when considering taking action for an employee’s personal social media post, whether it is to ask the employee to delete the post or issue discipline. If the post does not violate a clear (and lawful) employer policy there will be risk taking action.

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