Navigating the New Labor Landscape: NLRB Changes Impacting All Employers

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From the outset of the Biden Administration, the National Labor Relations Board ("NLRB") has made markedly pro-employee changes in caselaw and policies affecting a wide variety of workplace issues. One reflection of that trend may be the fact that between 2020 and 2022, the rate at which unions won representation elections conducted by the NLRB rose by almost six percent.[1] Additionally, in 2022, unions represented approximately 200,000 more employees than in 2021.[2] But the impact of the NLRB's case-handling decisions is not limited to union elections and membership. Regardless of whether a company's workforce is unionized, changes to the NLRB's approach to several workplace issues impact all employers. This article briefly covers some of these key developments.

ENFORCEMENT OF PROTECTIONS FOR PROTECTED CONCERTED ACTIVITIES

At the heart of the rights guaranteed to employees under the National Labor Relations Act ("NLRA") is the right to engage in "concerted" activities for the purpose of "mutual aid or protection" of their working conditions and related rights in the workplace – commonly known as "protected concerted activities." The right to engage in protected concerted activities is the cornerstone of U.S. labor law, and infringement of this right constitutes an "Unfair Labor Practice" ("ULP") under the NLRA. On March 31, 2021, the Acting General Counsel of the NLRB, Peter Ohr, released a Memorandum setting the tone for the Biden Administration's anticipated enforcement of this right and the NLRA.[3]

Ohr's memorandum affirmed that NLRA "protection applies not only to union activity and labor organizing; it may also cover the fundamental precursor actions that form the cornerstone of any other actions the employees may take, like discussing or protesting wages, hours, and working conditions." Further, Ohr stated that employees' concerted activities can have the goal of "mutual aid or protection" even if those activities do *not* connect their activity to workplace concerns. For example, Ohr's memo notes that even "political and social justice advocacy" may constitute protected concerted activity where there is some connection between the activity and the employees' "interests as employees." Such a sweeping view of "protected concerted activities" signaled that the NLRB would be taking a much greater interest in employers' workplace rules and policies and whether such workplace policies infringed, or 'chilled' employees' exercise of their rights under the NLRA.

Most recently, the NLRB published a decision in the *Stericycle, Inc.* case, overhauling the analysis that it will use to examine employers' workplace policies and judge whether those policies unlawfully

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1 Bloomberg Law, *NLRB Election Statistics: Year-End 2022* (Jan. 2023) (available at https://aboutblaw.com/6FJ (last accessed Oct. 9, 2023)).
2 *See* U.S. Bureau of Labor Statistics, *Union Members Summary* (Jan. 19, 2023) (available at https://www.bls.gov/news.release/union2.nr0.htm (last accessed Oct. 9, 2023)).
3 *See* NLRB Memorandum GC 21-03, *Effectuation of the National Labor Relations Act Through Vigorous Enforcement of the Mutual Aid or Protection and Inherently Concerted Doctrines* (March 31, 2021).

infringe upon employees' rights under the NLRA.[4] Under its former analysis, the Board examined: (1) the nature of a rule and its potential impact on employees' rights under the NLRA; and (2) any legitimate justifications for the rule. If an employer's justifications for the rule outweighed any potential adverse impact of applying the rule, the Board deemed the rule lawful. However, the new *Stericycle* standard visits a more onerous standard on companies and their policies. Under *Stericycle*, the Board will *presume* that a workplace rule is unlawful if it has any "chilling effect" on the exercise of employees' rights under the Act. In defense of any disputed rule, an employer must present a legitimate and substantial business interest justifying the rule, but must also demonstrate that it is unable to advance that interest with a narrower rule.

As noted above, exercise of protected concerted activities typically involves employee communications relating to workplace conditions. As a result, some common workplace policies that govern employee communications will now be subject to strict scrutiny under *Stericycle*, including policies governing, for example:

- Solicitation and distribution of flyers, pamphlets, etc.;
- Employee dress codes;
- Employee use of electronic equipment; and
- Employee use of social media.

Employers should carefully review these and other workplace policies to determine whether the NLRB might rule that the mere existence – and enforcement – of such rules run afoul of the Board's new standard.

WORKSITE MONITORING AND ELECTRONIC MANAGEMENT

The Board's recent vigorous enforcement of employees' rights to engage in protected concerted activities extends beyond an employer's mere maintenance of policies and reaches their workplace practices as well. For example, the NLRB now closely examines employers' use of electronic monitoring and management systems in the workplace. On October 31, 2022, the NLRB's current General Counsel, Jennifer Abruzzo, published a memorandum exploring the lawfulness of such systems.[5] Abruzzo made clear her position that "numerous practices employers may engage in using new surveillance and management technologies are already unlawful." General Counsel Abruzzo noted that such practices include any action involving an employer's "observation" of any open exercise of protected concerted activity and/or union activity, such as picketing or handbilling, or practices which create the impression of surveillance of such activities.

General Counsel Abruzzo identified other related activities which, in her view, violate the NLRA as well. These include:

- Installing new monitoring technology in response to protected concerted activity;
- Using existing and installed technology to discover protected concerted activity;
- Coercive questioning of employees with personality tests to evaluate employees' propensity to seek union representation; and
- Using artificial intelligence to screen job applicants where the underlying algorithm makes decisions based on an employee's protected concerted activity.

4 *See Stericycle, Inc.*, 372 NLRB No. 113 (Aug. 2, 2023).
5 See NLRB Memorandum GC 23-02, *Electronic Monitoring and Algorithmic Management of Employees Interfering with the Exercise of Section 7 Rights* (Oct. 31, 2022).

On April 11, 2023, the NLRB published its decision in the *Stern Produce Company* case, holding that an employer had created an unlawful "impression of surveillance" where a supervisor observed the camera of a driver – a known union supporter – and instructed him to uncover his camera.[6] The Board focused its attention on whether the driver would have reasonably interpreted the supervisor's activity as an indication that the employer was monitoring his protected union activities. The Board found that such a conclusion was reasonable in light of the circumstances and found it irrelevant that the driver was not actually engaged in any union activity at the time the supervisor observed him.

Given the NLRB's position on alleged electronic surveillance, employers would be prudent to review any electronic systems they use to monitor workplace activity and productivity. More specifically, employers should examine (1) any surveillance systems they have in place and the manner in which they function, and (2) the manner in which managers and supervisors utilize those systems. For the moment, employers are not prohibited from using electronic monitoring and management systems, but should be mindful of the NLRB's new policy in this area when installing and using them.

SCRUTINY OF SEVERANCE AND SEPARATION AGREEMENTS

In an area of interest to all employers, the Board's potential scrutiny also extends to severance agreements utilized in connection with employees' departure from employment. On February 21, 2023, the NLRB published its decision in *McLaren Macomb*, holding that severance agreements containing non-disparagement or confidentiality/non-disclosure clauses may violate the rights of employees under the NLRA if they are so broad that they potentially prohibit the exercise of those rights.[7] On March 22, General Counsel Abruzzo published a Memorandum to provide guidance on the scope of the Board's decision.[8] Some key takeaways of the Board's decision and General Counsel Abruzzo's guidance include:

- Severance agreements are not prohibited! Only agreements with overly broad provisions are unlawful;
- Confidentiality and non-disparagement provisions are not prohibited! However, they must be narrowly-tailored to prevent violations of rights conferred under the NLRA;
- Severance agreements should not be declared void, in their entirety, if they include unlawfully broad provisions;
- Disclaimer language in confidentiality and non-disparagement provisions does not necessarily cure an overly broad provision; and
- *McLaren Macomb* applies retroactively! Agreements which were effective before the decision will be retroactively governed by this new decision.

In addition to confidentiality and non-disparagement restrictions, General Counsel Abruzzo's Memorandum provides that other common provisions in severance agreements could also be "problematic," including noncompete clauses, no-solicitation clauses, no-poaching clauses, broad liability releases, covenants not to sue, and/or provisions requiring employee cooperation in any current or future investigation or proceeding.

Employers must exercise caution and closely examine the agreements they use to govern the end of their employees' employment to ensure that they are not subject to NLRB scrutiny.

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6 *See Stern Produce Company*, 372 NLRB No. 74 (April 11, 2023).
7 *See McLaren Macomb*, 372 NLRB No. 58 (Feb. 21, 2023).
8 *See* NLRB Memorandum GC 23-05, *Guidance in Response to Inquiries about the McLaren Macomb Decision* (March 22, 2023).

TAKEAWAYS

When most of us think about rights and restrictions arising under the National Labor Relations Act, we tend to focus on employees' membership and activities in labor organizations. Employers whose employees are not represented by unions may tend to regard the NLRA and the Board's decisions as generally irrelevant to their workforce and workplace. However, as these caselaw and policy positions of this Board and General Counsel suggest, employee rights under the NLRA have the potential to impact all private-sector employers, regardless of whether their employees carry union membership cards. For those reasons, all employers should carefully evaluate their policies, practices, and agreements to ensure compliance with the NLRB's interpretations of employee rights under the NLRA and to avoid potential violations and resulting liability. Employers should also take care to apprise themselves of additional developments as they arise and respond accordingly.