Legal-Ease - #1 April 2015 NLRB Quick Update

POSTING

Last year the National Labor Relations Board (NLRB) has decided not to seek Supreme Court review of two U.S. Court of Appeals decisions invalidating the NLRB's Notice Posting Rule, which would have required most private sector employers to post a notice of employee rights in the workplace.

QUICKIE ELECTION RULE

We are awaiting the final rule; would have major impact on union organizing. Stay watchful.

JOINT-EMPLOYER STANDARD

Would have major impact on franchises; individual owners would be responsible for unfair labor practices beyond their control if the courts rule the franchisors are jointly responsible with their franchises. This would be devastating to current system.

SCHOLARSHIP STUDENT-ATHLETES AS EMPLOYEES

Northwestern University filed a Request for Review (an appeal) of the decision with the Board. The Board is reviewing the case and, recognizing its possible impact, accepted amicus briefs.

If the NLRB upholds the determination that Northwestern's student-athletes receiving grant-in-aid scholarships are "employees," it would create significant new representation rights for student-athletes at private universities and could raise issues under other labor laws.

USE OF EMPLOYER COMMUNICATIONS SYSTEMS FOR PROTECTED CONCERTED ACTIVITY

In 2007, the Board in Register Guard, 351 NLRB 1110 (2007), held that an employer could forbid employees from using company electronic communication systems (including email) for non-business purposes. The current Board, now controlled by members aligned with a different, union-friendly political party, decided this year to review the issue in the Purple Communications, Inc., 21-CA-095151.

Employers should watch for the second Purple Communications decision. If the Board overturns or limits the Register Guard electronic communications use rule to force employers to allow at least some employee use of employer email, it will make employees' ability to engage in union and protected concerted activity at work much easier.

ARBITRATION AGREEMENTS WITH CLASS OR COLLECTIVE ACTION LIMITATIONS

The Board found a violation of the Act when an employer required employees to sign arbitration agreements prohibiting class or collective action lawsuits absolutely, because, in the Board's view, such lawsuits are a form of protected concerted activity under the NLRA. That decision has been rejected by several Circuit Courts of Appeals. The NLRB still holds that class-action lawsuits are protected under the Act and agreements prohibiting them unlawful. In the coming year, we may see which of these conflicting views will prevail.

HANDBOOKS AND POLICIES

The NLRB has been policing employee handbooks and other policies that it believes "chill" employee rights under the Act. A bevy of decisions from Administrative Law Judges and the Board have called into

question seemingly innocuous policies, such as those requiring “courteous” communications between employees or forbidding “insubordination” generally. In addition, restrictions on sharing a company’s confidential information have been declared unlawfully overbroad because terms and conditions of employment could be considered “confidential.” A prohibition against using intellectual property without authorization also was found to be overbroad because it could prohibit, for example, picketers from placing a company’s logo on their signs. The Board will continue to interpret the Act broadly to declare seemingly acceptable handbook and policy language unlawful. Employers should watch carefully for these decisions so their policies can be adjusted accordingly.

SOCIAL MEDIA

The Board also has been broadening its reach into social media. It recently held, for example, that clicking the “Like” button on Facebook was protected concerted activity. On the other hand, it has found unprotected a profanity-laced rant against an employer by two employees who advocated multiple insubordinate acts. Because of the pervasive use of social media, we anticipate many more rulings in 2015 about whether employee activity on social media is protected. They may have a significant impact on social media policies and actions an employer may take against employees for these activities.