LEGAL ALERT FROM NECA' S LABOR RELATIONS OFFICE

This first article shall deal with a subject addressed by the Obama Labor Board that may be viewed as below the radar but has become increasingly important and controversial as that Agency has issued more and more decisions on the subject. It is important to recognize that during the Obama years, the NLRB has tirelessly tried to maintain its relevance in the face of dwindling private sector Union participation. Though it might never admit it, the NLRB majority appointed by President Obama undoubtedly consciously searched for areas to regulate that were previously untouched within the context of the National Labor Relations Act, the Act that almost exclusively serves to manage and regulate labor relations activity throughout the country.

In my view, the most prominent area where the NLRB extended its reach was in the area of handbooks, company rules and social media policies. In the earlier years of the Obama Labor Board, the NLRB General Counsel began issuing unfair labor practice complaints asserting that Employer handbooks and Employer Social Media policies were in whole or in part unlawful because such policies interfered in some way with the right of employees to exercise their Section 7 protected concerted rights, namely the right to discuss or complain about issues relating to their wages or terms and conditions of employment.

As a result of those unfair labor complaints being litigated, the NLRB began to issue decisions that were most favorable to employers. Many of these policies and provisions deemed unlawful would be considered fairly innocent and otherwise reasonable by the average business person. It is important to emphasize that these decisions involved businesses that in some cases were unionized and in many others were not. This is nothing new per se because Section 7 rights bestowed upon employees under the NLRA apply to all private sector employees within the Act's jurisdictional reach whether those employees are unionized or not. What was different about these decisions is that they found unlawful parts of employee handbooks, company rules or social media policies irrespective of whether such businesses were unionized or engaged in the middle of a union organizational drive. Up until then, these subjects were simply not a priority for attention by the NLRB except to the extent they might have arisen within the context of a union organizing campaign.

In order to give you a flavor for this new body of law, I am going to summarize some of the issues tackled by the Board. Since we are dealing with actual written policies of employers, it is critical to recognize that a slightly different approach or wording in such policies or rules could alter the legal result. Consequently, this summary, as noted above, is intended to give you an overview of the issues being considered and should not be taken as a strict guide. Furthermore, time and space naturally limit the many different policies that the NLRB has addressed. However, here are some of them:

Conflict of Interest Policy: A policy that dictates that an employee must avoid any situation "inconsistent with the best interests of the Company" may be deemed unlawful since it may reasonably be deemed to bar Section 7 activities such as filing an unfair labor practice charge or contacting a union for purposes of commencing an organizing drive.

Requests for Information: A policy stating that all requests for employee information must be directed to the HR department may be deemed unlawful since it may tend to stifle conversations about wages and working conditions among employees or with a Union.

Confidentiality Policy: A policy that declares that an employee that discloses confidential Company information may be subject to discipline up to and including termination may be deemed unlawful as it similarly inhibits employees from engaging in discussions about wages or working conditions among each other or with a union.

Telecommunications Policy including E-Mail Policy: A policy that explicitly bars all personal use of Company owned telephones and the Company email system may be deemed illegal as it prohibits the lawful use of such communications systems on non-work time (breaks and before or after work). The Board's decision on email systems [Purple Communications] was the subject of a vigorous dissent raising many practical concerns and will most likely be revisited by the Trump Labor Board.

Tape or Video Recording Policy: A policy that bars all tape or video recorded conversations and video images without exception may be deemed unlawful because that policy limits documenting unsafe working conditions or equipment, discussions about wages and working conditions or recording evidence for use in future litigation or any type of adversarial forum.

Respectful Workplace Policy: The NLRB will likely find unlawful a narrow policy that states "all employees and Management must be respected and the failure to treat them in a respectful manner may result in the discipline of such employee." In order to pass muster, the Policy must instead define "Respectful" as, for example, "not engaging in any insults, profanity, abusive, threatening, harassing, etc., behavior" Without such further language defining what is "respectful", the NLRB will likely declare such a "respectful policy" as overbroad, tending to create the impression with employees that they cannot criticize management.

This distinction is consistent with one of the most important lessons learned by these decisions. To the extent that any policy is ambiguous or deemed overbroad, the NLRB will presumptively construe it against the employer given that it was the employer that created the language now considered ambiguous or overbroad.

Social Media Policy: A policy that requires pre-approval by Management before posting anything about the company on a blog, Facebook or similar social media outlet will likely be deemed unlawful as improperly restricting employee rights to engage in protected concerted activity.

Limitations on Press Inquiries: Similarly, a total ban on unapproved contact with the Press without management advance approval will likely be considered unlawful as an improper limitation on the employees' right to engage in protected concerted conduct.

I am sure that the vast majority of employers are still largely unaware of these decisions. Many who are aware may have chosen not to change their policies in the hope that no unfair labor practice charge will ever be filed (the remedy for such violations of written policies is to rewrite the policies except to the extent that the ULP charge includes allegations that an employee was disciplined as a result of such policy; in such case, back pay and reinstatement are included in the remedy).

It is hard to say to what extent these decisions will be reversed and, if so, when. To begin with, the Trump appointed NLRB members need to be confirmed. Then, cases involving such policies will have to trickle up to the NLRB from their cadre of Administrative Law Judges which hear the cases initially. My experience tells me that some of the holdings that seem to defy common sense will eventually be modified. In the meantime, members and Chapters should review handbooks and policies to the extent that they have not already done so. Employers may be able to slightly revise a given policy by making them more narrowly tailored and less ambiguous and yet still achieve the desired objective.