Northwest Ohio Human Resource Association

AFFILIATE OF SHRM SOCIETY FOR HUMAN RESOURCE MANAGEMENT

LEGISLATIVE UPDATE

January 2020

NLRB Update

Established in 1935, the National Labor Relations Board (NLRB) is an independent federal agency that protects employees, employers, and unions from unfair labor practices and protects the right of most private-sector employees to join together, with or without a union, to improve wages, benefits and working conditions. In 2019 the NLRB has been a very active agency, issuing precedent-shifting decisions, new standards, administrative rules and guidance materials, many of which have taken an employer-friendly approach.

NLRB Issues Rule Extending Union Election Process

The NLRB finalized a rule on December 13, 2019, scaling back regulations which accelerated the union election process, commonly known as the "ambush" election rule. The new rule loosens the union election process timeline. The rule makes several changes to the union election process:

1. Parties are now given a two weeks notice of any pre-election hearings to resolve disputes rather than the eight days provided by the old rule.
2. Employers are now given eight days after they receive notice to compile briefs articulating their arguments.
3. The new rule gives NLRB regional officials more discretion to extend deadlines.
4. Disputes over what employees are ineligible to join the union and which employees belong in a bargaining unit should be resolved before an election. However, if the employer and union agree, these issues can be resolved following the election.
5. Elections should be set at least 20-days following the NLRB's approval unless the parties agree otherwise.

This rule becomes effective, April 16, 2020, and was published in the Federal Register on December 18, 2019, which can be found here.

NLRB Restores Longstanding Union Dues Checkoff Rule

In *Valley Hospital Medical Center, Inc. d/b/a Valley Hospital Medical Center, 368 NLRB No. 139 (2019)*, issued December 16, 2019, the NLRB overruled Lincoln Lutheran of Racine,362 NLRB 1655 (2015), restoring the NLRB's longstanding precedent established by *Bethlehem Steel, 136 NLRB 1500 (1962)*, holding an employer's statutory obligation to check off unions dues ends upon expiration of the Collective Bargaining Agreement (CBA) containing the checkoff provision. A "checkoff" provision in a CBA allows a union to collect union dues through automatic payroll deductions.

In Valley Hospital Medical Center, although the CBA expired but the parties continued to operate under the terms of the expired agreement, which contained a "check-off" provision that stated: "the Check-Off Agreement and system heretofore entered into and established by the Employer and the Union for the check-off of Union dues by voluntary authorization … shall be continued in effect for the term of the Agreement." Months following the expired agreement, the employer ceased checking off and remitting employees' union dues. The NLRB found that a dues-checkoff provision properly belongs to the limited category of mandatory bargaining subjects that are exclusively created by the contact and are enforceable through Section 8(A)(5) of the [NLRA] only for the duration of the contractual obligation created by the parties." Accordingly, Valley Hospital Medical Center had no obligation under the NRLA to continue dues checkoff after the parties' CBA expired.

Employers May Forbid Workers From Discussing Pending Investigations

On December 17, 2019, the NLRB issues another decision favoring employers and returning federal labor law back to its prior rule. In Apogee Retail LLC dba Unique Thrift Store and Kathy Johnson, cases number 27-CA-191574 and 27-CA-198058, the NLRB found employers do not automatically violate employee's rights when it requires employees to maintain confidentially regarding active workplace investigations. The NLRB also found if the employer's confidentiality rule exceeds an active investigation, the employer must show a substantial business justification for its rule.

This decision overrules Banner Estrella Medical Center, 362 NLRB 11008 (2015) which demanded a case-by-case determination of whether confidentiality can be required. The NLRB's analysis in Apogee Retail is founded on the standard announced in The Boeing Company, 365 NLRB No. 154 (2017) decision for evaluating whether and employers' facially neutral workplace rule violates federal labor law. The Boeing standard balances an employer's business interest in maintaining a given workplace rule with the rule's effects on employers' labor organizing rights and establishes three categories of workplace rules:

- Rules are those that are presumptively legal because they don't affect workers' rights or because employers' reasons for maintaining them outweigh any infringement.
- Rules more strongly affect workers' rights but may be legal on a case-by-case basis if employers can justify them.
- Rules are always illegal because employers can't explain away their adverse effects on workers.

Applying the *Boeing* Standard, the majority found investigative confidentiality rules are lawful and fall within *Boeing* Category 1, saying that they have a "comparably slight" effect on NLRA rights while protecting workers' privacy and aiding probes. Confidentiality rules which are not limited to ongoing investigations fall within Boeing Category 2.

Workplace Rules Banning Use of Employer's Email System for Non-Business Reasons Do Not Violate Federal Labor Law

On December 17, 2019, the NLRB ruled in a 3-1 decision that Caesars Entertainment's Rio All-Suites Hotel and Casino did not violate the National Labor Relations Act when it imposed a policy prohibiting employees from using its email system for non-business purposes. The decision in *Caesars Entertainment Corp. d/b/a Rio All-Suites Hotel and Casino, case number 28-CA-060841* overturned a 2014 decision, which found workplace policies prohibiting employees from using the employer's email systems for union activity was unlawful. The NLRB's opinion is founded on the fact that Section 7 of the NLRB does not give employees a statutory right to use employer equipment, including IT resources. The decision, however, carves out an exception letting employees use employers' email when it is "the only reasonable means for employees to communicate with one another." This ruling restores the 2007 standard, which found an employer may ban employees from using the employer's email system unless such ban is applied discriminatorily.

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