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WHAT EMPLOYERS CAN AND SHOULD DO TO DEAL WITH AN OVERACTIVE AND EMPLOYEE- FRIENDLY NATIONAL LABOR RELATIONS BOARD

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Howard K. Kurman, Esq.
Offit Kurman, P.A.
hkurman@offitkurman.com
1954 Greenspring Drive, Suite 605
Timonium, MD 21093
Phone: (410) 209-6417
Mobile: (410) 925-8588
www.offitkurman.com

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I. Introduction

Prior to discussing current events at the National Labor Relations Board ("NLRB") which have real practical impact on all of you as HR professionals it is imperative to understand the statutory background and context of certain provisions of the National Labor Relations Act (the "Act") and how its provisions affect both unionized and nonunionized employers alike. Thus, I will briefly provide that context for you so we can then look at what's currently happening at the NLRB, and how you need to take proactive measures to protect your company from what I will characterize as an extremely pro-union/pro-employee and anti-employer Board.

II. The National Labor Relations Act

a. As part of FDR's New Deal legislation, in 1935 Congress passed the National Labor Relations Act (the "Act") with the express purpose of encouraging collective bargaining by protecting workers' full freedom to associate with one another for purposes of discussing wages, hours and terms and conditions of employment. Prior to the passage of this Act there was no national legislation in place which protected employee rights to organize and bargain collectively with their employer regarding wages/hours/terms and conditions of employment.

b. Significantly, and perhaps not widely understood, even by some HR professionals, the Act does NOT simply apply to currently unionized employees. Rather, the Act provides protections for all employees working for companies engaged in interstate commerce, whether such companies are currently unionized or not. And, certainly, in today's economy it's the rare company which is not involved in interstate commerce and thus subject to NLRB jurisdiction.

c. As stated by the NLRB, the agency itself is an independent federal agency whose mission is to guarantee most private sector employees the right to organize into unions, engage in group efforts (more about that below) to better wages, hours and working conditions, and importantly to REFRAIN from such activities.

d. For our purposes, you need to know that the Board itself is usually, but not always, comprised of 5 members who are appointed by the President to 5-year terms with Senate consent. The Board members hear and decide two types of cases: representation cases (where a union seeks to represent employees) and unfair labor practice cases. Presently, there are 4 Board members- 3 democrats and 1 republican, a clear democratic and left-leaning Board.

e. Historically, Board decisions can be characterized frequently as a pendulum, depending on the composition of the Board. So, for instance, during the Trump presidency, there was a republican majority and as a general rule many decisions had a pro-employer emphasis to them. Currently out of the 4 Board members, as I stated, 3 are democratic and 1 is republican. As I describe the Board currently as the "Biden Board", much of my discussion today will be related to what I describe as unprecedented activism in favor of employees and unions, and conversely distinctly anti-employer.

f. General Counsel- The General Counsel ("GC") of the NLRB is appointed by the President to a 4-year term and statutorily is a position which is independent from the actual Board members. The GC is responsible for investigation and prosecution of unfair labor practices ("ULP's"), for the general supervision of NLRB field offices across the country, and the processing of cases. Moreover, the GC typically issues memoranda which describe trends in labor law which the GC believes should be the actual state of national labor law.

g. Currently the GC of the NLRB is Jennifer Abruzzo. She was appointed by President Biden. She had previously worked for the NLRB for over two decades in various capacities, and significantly for our purposes prior to her appointment as GC she served as Special Counsel for Strategic Initiatives for the Communication Workers of America.

h. As I will explain during the course of our discussion this morning, Abruzzo, in my humble opinion is clearly one of the most hyperactive and pro-union/employee/ anti-business GC's that I have observed in my decades of practicing management labor law. As you will further see, there is very little pretense on her part to consider the practicalities of her desire to impose overly restrictive requirements on companies and to expand workers' rights beyond anything contemplated by many established and long-followed Board precedents.

i. Due to the limitations on time I have chosen to focus attention on the areas of concern to HR professionals posed by current developments at the NLRB, and to offer suggestions on how to maneuver in order to comply, as much as possible, with the extreme positions taken by Abruzzo and the current Board members.

j. For your purposes, the heart of the Act appears in Section 7 and reads as follows:

> Sec. 7. [§ 157.] Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

k. The Act describes an employer interference with Section 7 rights as follows:

UNFAIR LABOR PRACTICES

Sec. 8. [§ 158.] (a) [Unfair labor practices by employer] It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title]

l. There is what I characterize as a "free speech clause" contained within the Act which states as follows:

(c) [Expression of views without threat of reprisal or force or promise of benefit] The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act [subchapter], if such expression contains no threat of reprisal or force or promise of benefit.

So, with the formalities of the Act explained let's now look at some of the important developments which have happened even since the beginning of this year and which you need to be aware of in guiding the labor/employee relations at your respective companies. But, first a general comment regarding what I call as the resurgence of an active labor movement in the country.

III. Current statistics regarding NLRB activities:

a. As publicized by the NLRB on October 13, 2023, from fiscal year 2023 (October 1, 2022 to September 30, 2023), 22,448 cases were filed with the Agency, an increase of 10% over FY 2022, and there was a 3% increase in representation petitions filed over FY 2022. This is not a surprise since we have all seen how, for instance, union drives succeed at well-known enterprises like Starbucks and Amazon.

b. One of the things we will discuss this morning is what you all need to do to combat a growing labor movement in this country.

c. If you are a non-union company at this time, you want to remain non-union. Undoubtedly if your employer is unionized, your financial costs will increase, and your operational flexibility will drastically be diminished. Rather than dealing directly with your employees you will be compelled to deal with an outside representative in the form of a union business agent, and I guarantee that you will rue the day that your employees chose to be represented by an outside third party.

d. So, with our explanation of relevant statutory law behind us, let's take a look at what's been happening on the NLRB front and what you need to do to at least diminish, if not

eradicate, the effects of these decisions, which in many respects I characterize as unprecedented and "rogue". And keep in mind that with a change in administrations and corresponding change in the composition of the Board some of these scary developments might well be mitigated or even reversed down the line.

IV. The Board's *McLaren* decision and its impact on Employee Severance Agreements

a. In *McClaren Macomb*, decided February 21, 2023, the Board held that certain confidentiality and non-disparagement provisions contained in employee severance agreements violated section 7 of the Act, and that even offering an agreement with such provisions was violative of the Act.

b. The questionable provisions in *McClaren* involved severance agreements that "broadly prohibited employees from making statements that could possibly disparage or harm the image of the employer and further prohibited employees from disclosing the terms of the agreement to any third party".

c. Now these provisions are probably rather commonplace in your typical severance agreement, but the Board determined that such provisions have a reasonable tendency to interfere with the Section 7 rights of employees, whether unionized or not, to engage in concerted activities for their mutual aid and protection.

d. The limitation upon the employee's statements was limited to not being "disloyal, reckless or maliciously untrue."

e. From a confidentiality provision perspective, the Board took the position that such provision would preclude the subjected employee from discussing the agreement with other coworkers who may need to decide whether to accept a severance agreement of their own.

f. Following the decision, roundly criticized by management groups and attorneys, the NLRB issued what it termed an explanatory memo the terms of which include:

1. *McClaren* does not apply to supervisory employees- this is critical because for the most part I'm sure that the overwhelming majority of your severance agreements are made with exempt supervisory/managerial employees.

2. If the particular provision in question is deemed overbroad it will not invalidate the entire agreement

3. The Board's position is that its effect is retroactive- believe it or not!

4. The Board indicated that a narrowly drawn non-disparagement provision would survive scrutiny- probably meeting the legal definition of

defamation; and narrowly drawn confidentiality provisions would survive if based on protection of proprietary or trade secret information

5. TAKE-AWAY - Include a general disclaimer providing that nothing shall prevent the exercise of rights guaranteed under Section 7 of the NLRA and if necessary, seek counsel to review any potentially problematic language regarding confidentiality or nondisparagement.

6. There is a likelihood that in an appropriate case on appeal the Board's widely criticized ruling could be limited or even reversed, but until such time if you are contemplating entering into such agreement with a non-supervisory/non-managerial employee be very careful how you word your non-disparagement and confidentiality provisions and if in doubt certainly run it by your labor attorney.

V. Non-compete clauses disrespected by the NLRB

a. In a memo dated May 30, 2023, GC Abruzzo contended that the proffer, maintenance and enforcement of non-compete provisions in employment contracts violated the NLRA, under the theory that such provisions chill employee section 7 rights by: preventing an employee from threatening to resign to secure better working conditions, concertedly seek or accept employment with a competitor, etc.

b. Again, this would NOT apply to supervisory/managerial employees.

c. Would not likely affect non-solicitation and non-pirating provisions.

d. Yet to be tested in the appellate courts

e. Again, if unsure whether your particular post-termination provisions comply with the current Board position reach out to experienced labor counsel.

f. Keep abreast of the growing trend among both federal and state legislatures and courts to limit and or prohibit conventional noncompete provisions irrespective of the Board's point of view.

VII. The NLRB and independent contractor ("IC") status

a. In a decision issued in June of this year, the NLRB returned to an old standard for determining independent contractor status and overruled a decision from the Trump administration. The practical import of misclassifying an individual as an IC rather than an employee has obvious ramifications involving not only the NLRA, but under IRS regulations and the Department of Labor as well.

b. The practical import of the decision was that certain individuals who the Board believed were improperly classified as IC's rather than employees could indeed seek to organize and join a union, or to otherwise assert Section 7 rights under the Act.

c. The tests favored by the Board to assess IC status include:

    1. Extent of control exercised by Employer over the details of work

    2. Whether work is usually done under Employer's direction or without supervision

    3. Whether individual is engaged in a distinct occupation or business

    4. Degree of skill required

    5. Whether Employer furnishes supplies and tools and place of work

    6. Length of time of engagement

    7. Method of payment, whether by hour or by job

    8. Whether work is part of regular business of employer

d. TAKE-AWAY- for non-supervisory/non-managerial individuals, if you want to continue to classify someone as an IC as opposed to an employee make sure to weigh all factors above and seek counsel assistance if unsure of the correct status.

VII . The NLRB's Pronouncements on Work Rules- the *Stericycle* decision

a. The Board recently overturned the *Boeing* case decided under the Trump administration which was a much more employer-friendly decision regarding how employer work rules and policies would be analyzed under Board law.

b. The Board's test under *Stericycl*e essentially focuses on a case-by-case basis analysis to ascertain whether any questioned rule or policy in some way could be construed to violate the Section 7 rights of employees. Problematically the current case law establishes a presumption that any questioned policy/rule could potentially detrimentally affect Section 7 employee rights unless rebutted by a narrowly articulated and legitimate business reason for such policy/rule.

c. Thus, essentially what the new standard imposes on an employer is that if an employee could reasonably interpret a rule/policy to possibly interfere with Section 7 rights, the burden will shift to the employer to demonstrate a legitimate and substantial business interest, with a corresponding burden to prove that a more narrowly tailored rule could not have accomplished the same purpose as the policy/rule under consideration.

d. Thus, for example, rules governing conflicts of interest, personal conduct, and confidentiality of internal investigations will now be tested on a case-by-case basis. Formerly commonly accepted Handbook provisions such as civility, no-recording rules, media contact rules, etc. will now be subjected, if challenged, to what I would characterize as strict scrutiny by the Board and will face a hard burden to overcome, even if such rule/policy seems to be a commonsense policy to maintain order and efficiency in the workplace.

VIII. TAKE-AWAYS:

a. I would not recommend, at this time, wholesale revamping of your workplace policies or HB. There will be much litigation under the *Stericycle* test and some or all of the Board's newly mandated standards may not pass appellate muster. Furthermore, absent a firing of an individual for violation of a particular work rule/policy the penalties for a technical violation contained within a ULP charge will not be monetary, but rather corrective in nature.

b. I would recommend that in all of your HBs you utilize a general disclaimer along the lines "that nothing in the HB shall in any way prevent or limit the exercise of rights protected by the National Labor Relations Act", or something similar to that, and you may want to repeat that with regard to certain specific policies contained in either separate policies or in your HB.

c. Given the pendulum effect that is always the case with changes in administrations it is certainly possible, if not probable, that as the composition of the Board changes over time, this particular anti-employer standard may very well revert back to a more employer-friendly standard.

IX. The Board's most revolutionary case- *Cemex* and what it means for non-union companies

a. On August 29 of this year the Board, in the *Cemex case*, overturned 5 decades of established Board law in establishing a framework for when companies are required to recognize and bargain with a union, without the benefit of a representation election.

b. Briefly, under well-established law prior to *Cemex*, if a union presented a company with a demand for recognition, asserting it represented a majority of that company's employees in a specified bargaining unit, the company was well within its rights to refuse such demand and insist on a secret ballot election to be conducted by the NLRB.

c. However, under the new *Cemex* construct, if a union demands recognition by asserting majority support (probably through a showing of authorization cards) the employer will have two choices: either recognize and bargain with the union; or file its own petition (called an RM petition) with the Board. Such petition is not simply a formality and must be

supported by persuasive evidence backing the employer's claim that there is uncertainty regarding the union's support among the specified employees.

d. There are many technical nuances to the *Cemex* decision, and we simply don't have time to discuss them all here today. However, I am confident that its precedent- busting impact will be subjected in the future to appellate scrutiny, but suffice it to say that in the interim the impact on nonunion companies can be dramatic and severe if they are faced with a potential union campaign.

e. Along with the *Cemex* decision the Board has dramatically shortened the time between the filing of a representation petition and the holding of an election to be as little as 14-21 days from a union's filing of a representation petition.

f. What employers can and must do to be proactive and to blunt the chances of a successful union drive:

1. Strengthen your workplace culture- while post-pandemic there has been much written about and commented on by various workplace experts, suffice it to say that a union often seizes upon a negative workplace culture to gain a foothold into your company. There are a multitude of approaches to establish and maintain a positive workplace culture and I won't spend time discussing these, but there is an old labor adage that basically says that the company which is unionized deserves to be unionized. In other words, don't provide reasons for a union to appeal to your employees; rather, from an HR perspective assure that your employees are paid competitively, that benefits are in keeping with the market, that your supervisory/managerial staff is both responsive and sensitive to employee needs and concerns, that there are effective "open door"/grievance mechanisms in place, that the workplace is apolitical in the sense that promotions, salary adjustments, etc. are fair and equitable across the board

2. Training front line supervisors and managers on the signs of a potential union campaign is a critical dedication of time on the part of any non-union company. For instance, educating your managerial staff on how unions achieve a foothold into your company, and what "authorization cards" are and their impact on a possible union campaign; detailed training on TIPS ("threats, interrogation, promises, surveillance"); and the admonition to NEVER look at authorization cards submitted by a union representative.

3. Strong communication campaigns (Town Hall meetings) to imbue employees with a feeling of "ownership mentality", to educate them on the company's views on unionization, and to assess any outstanding grievances or problematic issues among groups of employees- for example- noncompetitive wages, flaws in benefit systems, authoritarian front line supervisors- etc.

4. Periodically conduct union vulnerability audits, either utilizing internal resources or outside labor counsel. Such vulnerability audits are a useful tool to identify any areas which may be used by a third party union to make appeals to your employees.

X. Conclusion

a. We are in a new era regarding how a nonunion company both conducts its business and deals with a possible union campaign seeking to represent its employees. It is incumbent upon HR professionals to: keep abreast of this rapidly changing and for the most part employer-unfriendly labor atmosphere at the NLRB level.

b. As stated above, proactive employee communications are paramount, as is regular union exposure analysis done either with existing staff or outside counsel.

c. The good news for all of you HR professionals is that the happenings at the NLRB provide job security for you all; your companies will be dependent on you to know what is allowed and what is prohibited according to the NLRB's rapidly changing pronouncements, and to educate your management staff on essential proactive steps to take to keep your company out of trouble- to the extent that is practicable given this very difficult and anti-employer atmosphere which has been established and consistently maintained by the Board

d. So, good luck and don't be too depressed yet- as more changes may be coming down the pike which probably will in many cases be as onerous or more restrictive regarding your company's right to conduct its business without undue interference from a government agency

Thanks for your attention!

Howard K. Kurman, Esq.
Offit Kurman, P.A.
hkurman@offitkurman.com
1954 Greenspring Drive, Suite 605
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