Confidentiality, E-mail, and Dues: NLRB Reverses Three Major Obama-Era Rulings

Related People:
Hugh F. Murray, III
Peter D. Stergios

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With a steady decline in private sector unionization and a lack of political muscle to change the National Labor Relations Act ("Act"), organized labor in the Obama era relied heavily on decisional rulings from the National Labor Relations Board ("Board") as a key way to expand workers' rights and advance unions' goals. In 2017, however, the Republican-dominated Board's new General Counsel identified many of the recent pro-union decisional rulings as ones that might be subject to "alternative analysis." See NLRB General Counsel: There's a New Sheriff in Town. The Board then promptly began dismantling several of those Obama-era union-friendly decisions. See Two Days, Four Decisions: NLRB Begins Dismantling Obama-Era Rules.

Now, hot on the heels of a rollback of its earlier union election rules (RIP "Ambush Elections": NLRB Substantially Modifies Union Representation Election Rules), the Board has reversed three high-profile decisions from the previous administration. With the reversal of precedent involving the confidentiality of employee investigations, the use of a company's e-mail system for union organizing purposes, and the unilateral discontinuance of union dues after a collective bargaining agreement expires, the current Board has adopted "alternative" analyses for almost half the issues spotlighted in 2017 by the General Counsel.

1. **Confidentiality of Investigations**

   In 2015, the NLRB created a stir when it interpreted the Act as generally prohibiting an employer from requiring an employee to maintain the confidentiality of an internal investigation unless the employer decided on a case-by-case basis that preserving confidentiality was, for specific reasons, important to the investigation. Human resources professionals, and for a while the Equal Employment Opportunity Commission, decried this ruling, arguing that confidentiality was critical to handling sensitive complaints concerning such matters as sexual harassment allegations.

   On December 17, 2019, however, the NLRB reversed itself. In *Apogee Retail, LLC*, 368 NLRB No. 144 (2019), the Board divided employer confidentiality rules into two categories to determine their enforceability.

   First, the Board held that a rule that requires employees to

maintain confidentiality *only for the duration of the investigation* is always lawful. Second, the Board held that a workplace rule not on its face limited to the duration of the investigation can survive scrutiny only if the employer can show "one or more legitimate justifications" for requiring post-investigation confidentiality.

Employers, whether unionized or not, should review their confidentiality policies surrounding internal investigations given the Board's new ruling.

2. **Use of Employer E-Mail for Union Organizing**

Also on December 17, 2019, the NLRB reversed a controversial 2014 case, holding for the first time that any access to company e-mail at work must include its use for union organizing purposes. This decision effectively negated workplace rules prohibiting employees from using employer e-mail for any purpose not related to the employer's business.

In *Caesars Entertainment*, 368 NLRB No. 143 (2019), the Board held that an employer does not violate the Act by restricting the nonbusiness use of its various information technology resources—such as e-mail, smartphones, or social media—unless there is proof that employees could not otherwise reasonably communicate with each other, or if the employer allows some nonbusiness use but not for union organizing.

Employers may wish to review their employee e-mail usage policies to take advantage of the new flexibility the NLRB has allowed.

3. **Union Dues Deductions After Contract Expiration**

Collective bargaining agreements commonly require dues deductions from employee paychecks along with written employee authorization for such deductions. From 1962 until 2015, this "dues checkoff" obligation automatically ended when the collective bargaining agreement expired, leaving only a duty to bargain over whether deductions should resume under a new contract. Taking a different approach, the Board held in *Lincoln Lutheran of Racine*, 362 NLRB No. 1655 (2015), that stopping dues deductions pending negotiations was similar to unilaterally changing other mandatory subjects of bargaining—such as wages or benefits—without first negotiating with the union over such changes.

On December 16, 2019, however, the Board announced in *Valley Hospital Medical Center*, 368 NLRB No. 139 (2019), that it was returning to its half-century-old rule that a dues checkoff expires with the labor contract. Employers, therefore, can now once again use this tool as bargaining leverage upon contract expiration. A caveat for employers, as with adoption of the Board's other new rules, is that such employer freedoms could change in the future, either under a newly constituted Board or from federal court review.

As with any of the Board's new rules, employers should consult with labor counsel before revising policies.