HRWS TRENDING

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HRWS HR WORKPLACE SERVICES

5 RECENT NLRB DECISIONS
MAKING A SIGNIFICANT IMPACT

From year to year and administration to administration, the National Labor Relations Board (NLRB) levies decisions that directly impact the way American companies operate.

The Board oversees the National Labor Relations Act which was originally enacted by Congress in 1935 to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices which could harm the general welfare of workers and businesses.

THE BIG 5

At any given time, there are scores of issues on the NLRB docket - those in process and those recently completed. Because of the volume of our HRWS advisory teams' case work, we typically see ripple effects from virtually all of them at some point – once the NLRB hands them down. Of course, there are usually a few that create more of a stir – some because of confusion, others because of implementation concerns or compliance implications. Here are five recent decisions queuing the lions' share of client questions:

1. Misclassification – The misclassification of employees as independent contractors has been a hot button issue for some time now. The DOL has estimated up to 30% of firms misclassify workers as independent contractors.

This practice takes away many employees' rights under the NLRA, because independent contractors are not covered or protected by the Act. Employers had been seeking clarification since last August, when the NLRB overruled an administrative law judge decision, ruling that misclassification is not a violation of the Act.

2. Narrowing Scope of Protected Activity - The NLRA protects concerted activity—activity by one or more workers asserting a shared concern—on workplace issues, whether or not workers are engaged in the activity through a formal union.

If workers are engaged in advocacy around a workplace issue in a group or on behalf of a group—be it protections against sexual harassment, equal pay, health and safety protections, scheduling fairness, or any other workplace

issue—an employer may not interfere with this activity or retaliate against workers engaged in this activity.

Recently the NLRB changed the law to narrow what counts as protected concerted activity - meaning that in some circumstances, it is not illegal for a company to fire a worker because of certain public protest activities.

3. Handbook Rules – The NLRB recently overturned a long-standing precedent to make it easier for employers to adopt rules, policies, and handbook provisions that workers may reasonably believe restrict them from exercising their NLRA rights.

Prior to this decision, the board would find unlawful employer rules that workers could "reasonably construe" to restrict their NLRA rights. For example, an employer's "no loitering" rule would be deemed unlawful if it was so broad as to be interpreted to prevent workers from remaining at their workplace to engage in protected concerted activity. Now the board will no longer automatically find these rules unlawful, but will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule.

4. Company Email - NLRB now finds that employers may legally prohibit employees from using the company email system to discuss workplace issues, including unionization, even if the email system is regularly used for non-work-related communications. Additionally, employee personal use of company email, during non-working hours, may also be restricted by the company.

5. Student Employees – A new rule disallows NLRA protection for students who work in connection with their studies. In other words, roles such as teaching assistants and other private college student employees are precluded from bargaining over pay, benefits, sexual harassment protections, and other issues of concern.

A BIT MORE ABOUT NLRB OPERATIONS

NLRB members are appointed by the President with Senate approval for five-year terms. The only exception coming from the general counsel position who is appointed

the same way, for just a four-year term. Historically, NLRB perspectives and actions tend to shift from one administration to the next.

The NLRB will weigh in on and outright decide legal matters concerning jurisdictional standards and law clarifications. Further, they enforce Employee Rights, Employer/Union Rights & Obligations, Retaliation Matters, Right to Strike, and Social Media Rights.

These matters are handled via case decisions, order enforcements, settlement facilitation, charge investigations and rulemaking. Traditionally, we see more rapid changes come in as one administration's appointees become the NLRB's active majority.

A Recent Decision

Last December, the NLRB reestablished the rights of employers to restrict employee use of their company email systems. The right had not been altered since 2014, when the Board ruled that an employee had a presumptive right to use an employers' email system on nonworking time.

This is a good example of an NLRB decision that can impact the way companies operate. If an organization overlooks such a change or fails to integrate it, it could either limit their own operational effectiveness. In other situations, failing to acknowledge an NLRB ruling could expose an organization to litigation.

In short, most organizations would benefit from having a legal or workplace operations professional examine their current policies. HRWS includes an employee handbook review for clients of our broker partners – designed to ensure they follow all regulatory standards … including current NLRA rules and guidelines.

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