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Do Your Company Policies & Procedures Stand up against the NLRB?

By Rachelle Hill

Many private businesses may be surprised to learn that the National Labor Relations Board (the "NLRB" or "Board") can and will regulate policies and procedures that impact employees' right to organize under Section 7 of the National Labor Relations Act ("the "NLRA"), regardless of whether there is any union activity. The NLRB has taken the position that its powers extend to all private companies, regardless of size, and has become increasingly more active as of late. Given the increased activity of the NLRB, employers need to stay apprised of the particular areas of inquiry and review and revise their policies to confirm compliance with the NLRA.

Background of NLRB

The Board is charged with investigating unfair labor practices that affect or may affect protected concerted activity. Concerted activity includes situations in which two or more employees act in concert to try to improve their employment conditions. One employee can also engage in protected concerted activity in which he or she is acting on behalf of other employees or attempting to engage group action.

The Board's increased involvement in non-union workplaces is a result of the decline in union memberships[1]. A company is subject to the jurisdiction of the NLRB if it has an annual volume of business greater than $500,000 or if it is involved in interstate commerce. The NLRA protects all employees other than supervisors.

The NLRB is "empowered to prevent any person from engaging in any unfair labor practice affecting commerce." 29 USCS § 160(a). To accomplish this goal, the NLRB can obtain injunctive relief in many forms, including, but not limited to, the following:

- Reinstatement of an employee to his/her former job;
- Payment of back pay and benefits to a former employee;
- Removal of any reference in employee's personnel file to unlawful discharge;
- Posting and distributing a Notice regarding the Board's Order; and
- Negotiation costs incurred if respondent is found to have engaged in aggravated misconduct.

[1]As of 2014, the percentage of US workers belonging to a union was only 11.1%, compared to 20.1% in 1983.

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Some specific areas the NLRB has focused on recently include the following:

Confidential Policies and Agreements Regarding Salary

Employer policies that require employees to keep salary information confidential are unlawful under the NLRA. The NLRB will look not only to a company's written policies but also to any other written documents or verbal communications that might chill an employee's right to engage in protected activity. This includes language in non-compete and/or employment agreements that require employees to keep "financial information" or "personnel information" confidential.

Prohibiting Employees from Using Work Email for Non-Work Purposes

According to the NLRB, employees have the right to use work email to communicate with coworkers about protected concerted activity during non-working hours. In Purple Communications, the NLRB handed down a 3-2 decision finding a policy prohibiting employees from using work email except for work purposes unlawful. While the Board acknowledged the possibility of a complete ban being lawful in certain circumstances, employers should not take any comfort in this, as the Board further commented it would only be "the rare case where special circumstances justify a total ban on non-work email use by employees."

Non-Disparagement and Employee Conduct

While anti-harassment policies are lawful, any policy requiring employees to act "respectful" or "courteous" may be a NLRA violation. The NLRB's reasoning is activity that might be targeted at improving workplace conditions may not be interpreted by an employer as "respectful."

Social Media Policies

The Board has also scrutinized any social media policy that restricts what an employee can write online. Non-disparagement policies prohibiting negative comments about an employer violate the NLRA. The Board also takes issue with blanket restrictions that prohibit employees from discussing work matters publicly, that prohibit the use of the employer's name or that prohibit employees from becoming online friends with colleagues.

Employment At Will Language

The NLRB has ruled that language which implies an employee cannot act collectively to modify his or her at-will status is a violation of the NLRA. Specifically, requiring an employee to sign an agreement stating "I further agree that the at-will employment relationship cannot be amended, modified or altered in any way" is unlawful. The Board's recent decisions finding at-will language to be lawful shows the analysis must be done on a case-by-case basis and that the Board will not find the at-will language to be unlawful unless it forecloses the ability to later modify the employee's status.

Steps Employers Should Take in Light of the Increased Role of the NLRB

Employers should review and revise their employee policies to remove any policy or language that is an obvious violation of the NLRA, such as a prohibition of discussion of wages or working conditions, a ban on non-work emails, an extremely broad social media policy or any use of subjective terms such as "respectful" or "courteous." Employers should also consider adding a Section 7 disclaimer in their policies and procedures manuals to indicate that protected activity is not prohibited. Employers also need to be particularly careful when terminating an employee that the reason for the termination could not be interpreted as a violation of the NLRA. While the NLRA does not contain the same type of monetary penalties as other federal employment laws, it can create havoc in an office by requiring the reinstatement of a former employee.

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Potential Pitfalls of Terminating an Employee who Requests Extended Leave

By Doug Taylor

An employee who requests time off due to a medical or disability-related issue may have rights under the Family and Medical Leave Act or FMLA, the Americans with Disabilities Act or ADA and state and local corollaries to those laws. Depending on the factual circumstances, one or more of these laws can apply simultaneously to the same employee. The overlap of these statutes can create a "perfect storm" of laws because it is so easy to get lost or disoriented in trying to follow them.

Consider the following scenario. You are an employer to which the FMLA and ADA are applicable. One of your clerical employees has been on unpaid FMLA leave because of a series of medical conditions that has required ongoing treatment by a team of medical providers. The employee has exhausted all of his sick leave and paid time off and is nearing the conclusion of the twelve weeks of unpaid leave to which he is entitled under the FMLA. You prepare and send a letter informing him, among other things, that he must report back to work on the day after his leave has run out. Just prior to that date, however, the employee provides you with a note from his doctor advising that the employee requires additional medical testing as a part of his treatment, is unable to return to work at the present and does not know when he will be able to return to his job without the additional testing.

Do you terminate the employee because he is unable to return at the end of his twelve weeks of FMLA leave? Does the ADA require you to provide the employee with extended unpaid leave as a reasonable accommodation of his medical condition? Unfortunately for employers looking for certainty about what to do, it depends on the specific facts of each situation.

FMLA Leave

In a nutshell, the FMLA entitles eligible employees to take up to 12 weeks of unpaid personal medical or family care leaves of absence during any 12-month period. Among the occurrences that give rise to FMLA leave entitlement is a "serious health condition" that prevents the employee from performing an essential function of his job. Under the FMLA, an employer is required to reinstate the employee to the same job or a substantially equivalent job at the conclusion of the employee's FMLA leave. Such reinstatement is not required, however, if the employee is unable to perform one or more of the essential functions of the job at the time that the employee's FMLA leave ends.

Americans with Disabilities Act

The ADA requires that a covered employer make "reasonable accommodations" to the known physical or mental limitations of an otherwise qualified individual with a disability, unless the employer can demonstrate that the accommodation would pose an undue hardship on the operation of the employer's business. A "qualified individual with a disability" means an employee who satisfies the requisite skill, experience, education and other job-related requirements of the job the individual holds, with or without a reasonable accommodation, and can perform the essential functions of the job. "Disability" under the ADA has been defined as: (1) an impairment, physical or mental, that substantially limits one or more major life activities; (2) a record of such impairment; or (3) being regarded as having such an impairment.

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The Outcome

What happens when both the FMLA and ADA arguably apply, as in the hypothetical above? Under the FMLA, it seems clear. The employer would be well within its rights to terminate the employee, if desired, because the employee has exhausted all available forms of leave, including the 12 weeks permitted under the FMLA, but is unable to return to work. Does that outcome change if the employee has made it known that he is unable to return to work when his statutorily-mandated leave runs out because of a “disability”? Possibly. The overlapping requirements of the ADA somewhat roils the waters and clouds the employer’s decision-making process.

Recall that under the ADA, it is discriminatory for an employer to deny a request for a reasonable accommodation to a qualified employee with a disability. A reasonable accommodation is one that will allow the employee with a disability to perform the essential functions of his or her job, so long as it does not create an undue hardship on the employer. It is well-settled law that extended unpaid leave can be a reasonable accommodation under the ADA. The Equal Employment Opportunity Commission and every federal circuit that has considered the question have recognized at least some form of leave for medical treatment or recovery as a reasonable accommodation. 29 C.F.R. Part 1630 App. § 1630.2(o); e.g., Myers v. Hose, 50 F.3d 278 (4th Cir. 1995) (recognizing the EEOC’s guidelines on unpaid leave as a reasonable accommodation). The questions that are left open for discussion as to “reasonableness” in each particular employment situation, however, are: (1) When does a request for unpaid leave become too attenuated to be considered reasonable under the ADA; and (2) Under what circumstances does the employee’s request for unpaid leave become so burdensome on the employer that it becomes unreasonably burdensome?

One federal appeals court answered the first of those questions succinctly: “The employee must provide the employer with an estimated date when [he] can resume [his] essential duties. . . . [W]ithout an expected end date, an employer is unable to determine whether the temporary exemption is a reasonable one.” Robert v. Bd. of County Comm’rs, 691 F.3d 1211, 1218 (10th Cir. 2012). Thus open-ended leave requests are unreasonable as a matter of law. As to the question of what leave duration would be reasonable, the outcome is not as certain, and depends to a large degree on the facts of the particular situation. A six month leave request was too lengthy to be reasonable, in the view of one court. Epps v. City of Pine Lawn, 353 F.3d 588, 593 (8th Cir. 2003).

On the question of under what circumstances a request for extended leave would impose an undue hardship, some of the factors important to the determination are: (1) the nature and cost of the accommodation; (2) the overall size and financial resources of the employer; (3) the type of business operations, structure, and geographic separateness of the employer; and (4) the extent to which the accommodation could adversely impact the abilities of other employees to perform their work and the overall impact on the employer’s ability to conduct its business. 29 C.F.R. § 1630.2(p)(2).

The prudent employer will give careful consideration to the above analyses before denying an employee’s request for leave as a reasonable accommodation of a disability, even in those instances when the employee has already exhausted all sources of employer-provided paid and unpaid leave and statutorily-mandated leave under the FMLA.

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