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Recent Developments in Labor Law

Traditional labor law issues are often thought of as laws that rarely change and that most employers in the private sector never encounter. This assessment is supported by statistics: in 2011, only 6.9 percent of the private sector was unionized.[1] In 2011, however, the National Labor Relations Board (NLRB) began reshaping labor laws through its rule-making process as well as through reports issued by the NLRB's general counsel bringing labor law issues into the spotlight. This column discusses these changes, including the following:

- a new poster requirement for employers (with penalties that were recently barred by a federal court);
- new guidance on when an employer's social media policy may constitute an unfair labor practice; and
- new union election procedures.

New Poster Requirement for Employers

In December 2010, the NLRB issued a proposed rule requiring most private-sector employers to display a poster notifying employees of their rights under the National Labor Relations Act (NLRA).[2] The rule included penalty provision that automatically made failure to comply with the rule an unfair labor practice. The rule also indefinitely extended the statute of limitations for filing an unfair labor practice against employers who failed to display the poster for the normal six-month limitation period.

The date on which the rule was to take effect was postponed from Nov. 14, 2011, to Jan. 31, 2012, after the National Association of Manufacturers and other business groups filed a complaint in the U.S. District Court for the District of Columbia, alleging the rule's requirements violated the NLRA.[3] The plaintiffs claimed that the rule violated § 6 of the NLRA (which gives the NLRB the authority to "make, amend, and rescind … rules and regulations as may be necessary to carry out the provisions of the [National Labor Relations] Act") because that section does not expressly grant the board, "the authority to promulgate and issue a specific rule requiring employers to post a notification of employee rights under the NLRA."[4]

On March 2, 2012, Judge Amy Jackson held that § 6 of the NLRA give the NLRB the authority to promulgate regulations requiring employers to display the poster.[5] Pointing to the broad language of § 6, Judge Jackson held that the board was simply regulating those entities and individuals "that Congress expressly authorized it to regulate."[6] Nevertheless, Judge Jackson found that the NLRB exceeded its authority when it added automatic penalties for failure to display the poster.[7] After this ruling, the poster rule was scheduled to go into effect on April 30, 2012.

However, on April 17, 2012, the U.S. Court of Appeals for the District of Columbia issued an emergency injunction, enjoining the rule entirely.[8] In this order, the Court of Appeals denied a request from the NLRB to permit the rule to take effect while the court system continued to review the legality of requiring the posting.[9] In denying the NLRB's request, the court determined that the uncertainty surrounding the legality of such enforcement necessitated postponement of the rule. The April 17 order is aligned with an April 13, 2012, order from a district court judge for the District of South Carolina, which invalidated the poster in its entirety and determined that the NLRB overstepped its authority.[10] The court's April 17 order granting the emergency injunction set oral argument on the matter for September 2012. As a result, the court will not decide whether this posting will be required until sometime after September 2012 and the requirement to hang the poster has been suspended indefinitely.

Social Media Policies

In January 2012, the NLRB's acting general counsel issued a report that was intended to provide employers with guidance on what prohibitions can lawfully be placed on an employee's use of social media.[11] The NLRB's overall concern about employer's social media policies revolves around the NLRA's § 7 and § 8(a)(1). Under these sections, an employer is subject to a charge of unfair labor practice when the employer enforces work rules that "reasonably tend to chill employees in the exercise of their Section 7 rights"—the section that guarantees employees the right to self-organize.[12]

The NLRB report set forth the following parameters:

- Employers may not implement a rule prohibiting employees from "inappropriate postings" or "inappropriate comments" if the policy does not define these terms.
- Employers may not discipline an employee for violating an overly broad rule or policy related to use of social media in the workplace.
- Employers may impose rules forbidding postings

that are slanderous or detrimental to the company.
- Employers may impose rules prohibiting postings about the company, co-workers, supervisors, customers, or clients that violate an employer's nondiscrimination and anti-harassment policies.

The report was predicated upon 14 cases that constituted the primary basis for the development and explanation of these parameters. For example, in one such case, an employer terminated an employee in response to her Facebook posting in which she complained about her recent demotion. The NLRB held that the employee's termination was unlawful under the NLRA, because her posting on Facebook was a protected complaint about the employee's working conditions. In another case, the employer prohibited employees from identifying their employer on Facebook, unless the identification was done in an "appropriate" manner. Because the employer failed to define the term "appropriate," the NLRB held this restriction was overly broad, because employees could reasonably conclude that they were restrained from criticizing the employer's "labor policies, treatment of employees, and terms and conditions of employment."[13] Conversely, the acting general counsel's report also cited a case in which the NLRB found an employer's decision to terminate an employee lawful when the employee used Facebook to voice her own personal anger toward her co-workers. The NLRB reasoned that the employee's posting was not protected activity under § 7, because her statement was not posted in a forum in which employees shared common concerns, and her posting merely contained "personal rants against coworkers and general profanities about the Employer."[14]

As a result of this report, at a minimum, employers should review their social media policies to ensure they are not overly broad. Also, prior to disciplining an employee, the employer should analyze whether the social media communication is protected under the NLRA.

New Union Election Procedures

On Dec. 22, 2011, the board published a final rule containing new union election procedures, which were scheduled to take effect on April 30, 2012.[15] These procedures include the following changes:

- Hearing officers will have the authority at pre-election hearings to limit evidence heard on the issue of whether an election should be conducted.
- Post-hearing briefs will be allowed only at the discretion of the hearing officer rather than as a matter of right.
- Pre-election rulings will no longer be reviewable prior to the election (and will only be reviewable after the election if the issues are not rendered inapplicable because of the results of the election.
- The NLRB's review of post-election disputes will be conducted at the board's discretion.
- The current procedural recommendation that a regional director should not schedule an election sooner than 25 days after the direction of election will be eliminated.

Following the publication of the rule, the U.S. Chamber of Commerce and Coalition for a Democratic Workplace filed a complaint for declaratory and injunctive relief in the U.S. District Court for the District of Columbia.[16] The plaintiffs allege that the decrease of time for the election period eliminates the current safeguard against employees rushing into an election uninformed and unfamiliar with the process. On Feb. 3, 2012, both sides filed for summary judgment. To date, no decision has been issued.[17]

The new election procedures are a diluted version of the original proposed rule that was published in the Federal Register in June 2011.[18] In that rule, the change to the election procedures drastically altered the timetable for a legally recognized union election by holding the election within as few as 10 days (or as many as 21 days) after the union files a petition for election—a drastic cut from the current 42-day window. The final version of the rule that was published in December 2011 was a result of an NLRB resolution issued in November 2011 by Mark Pearce, the board's chairman.[19] The resolution was issued after Pearce called for a vote on the rule that was proposed in June 2011 to be held fewer than five months after its publication. Because of the rule's significant impact on union election procedures in conjunction with the unprecedented short timetable toward a push for a final rule (rules typically take years, not months, to become final), a member of the board publicly spoke out against the rule and the rushed vote and threatened to resign. This rush to a final rule was not coincidental. In 2010, the U.S. Supreme Court held that the NLRB must have a quorum of three of its five members to issue decisions.[20] At the time the chairman called for the vote, the five-member board was only made up of three members, and the term of one of them expired on Dec. 31, 2011, leaving the Board one member shy of a quorum.

Although the final rule published in December 2011 does not set a minimum time period between the petition and the election, the net effect gives employers less time to engage in meaningful discussions with its employees about the effect of unionization on the workplace. **TFL**

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IMMIGRATION *continued from page 19*

[3]Repealed by § 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009.

[4]Immigration and Nationality Act § 240A(a), 8 U.S.C. 1229b(a).

[5]*INS v. St. Cyr*, 533 U.S. 289 (2001).

[6]*Matter of Blake*, 23 I&N Dec. 727 (BIA 2005), *rev'd*, *Blake v. Carbone*, 489 F.3d 88 (2d Cir. 2007).

[7]*Matter of Meza*, 20 I&N Dec. 257 (BIA 1991).

[8]*See Matter of Azurin*, 23 I&N Dec. 695 (BIA 2005).

[9]*See Matter of Breiva-Perez*, 23 I&N Dec. 766 (BIA 2005) (aggravated felony "crime of violence" has no inadmissibility counterpart).

[10]*Judulang v. Gonzales*, 249 Fed. Appx. 499, 502 (9th Cir. 2007). Notably, only one circuit, the Second Circuit, had rejected the *Blake* rule. *Blake v. Carbone*, 489 F.3d 88 (2d Cir. 2007). In addition to the Ninth Circuit, three other circuits—the First, Third, and Sixth Circuits—had approved the BIA's interpretation. *Kim v. Gonzales*, 468 F.3d 58 (1st Cir. 2006); *Caroleo v. Gonzales*, 476 F.3d 158 (3d Cir. 2007); *Koussan v. Holder*, 556 F.3d 403 (6th Cir. 2009).

[11]*Marcello v. Bonds*, 349 U.S. 302 (1955).

[12]*See Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984).

[13]*Judulang* at 484 n.7.

[14]*Id.* at 484 (emphasis added).

[15]*Id.* at 487.

[16]*Id.* at 488.

[17]*Id.*; *see, e.g., Matter of L-,* 1 I&N Dec. 1 (AG 1940); *Matter of Silva*, 16 I&N Dec. 26 (BIA 1976), which in return was a response to *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976).

[18]*Judulang* at 488.

[19]*Id.*

[20]*Id.* at 489.

[21]*Id* .at 490.

[22]*Id.* at 486.

[23]*Id.* at 485.

[24]For an immigration advocacy group's view of some of the possible broader court challenges that *Judulang* might inspire, *see,* generally, Legal Action Center, *"Practice Advisory: Implications of* Judulang v. Holder *for LPRs Seeking 212(c) Relief and for Other Individuals Challenging Arbitrary Agency Policies,* available at www.legalactioncenter.org/sites/default/files/Judulang-212-c-relief.pdf.

[25]Interestingly, Justice Kagan recently received a legal writing award from *The Green Bag*, "the unconventional law review that honors exemplary legal writing every year," for her dissenting opinion in another case. *See Roberts, Kagan among Winners of Legal Writing Awards*, The Blog of the Legal Times, available at legaltimes.typepad.com/ (Dec. 20, 2011).

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regulations set forth by OSHA, and employment discrimination. He can be reached at gpeters@seatonlaw.com.

Endnotes

[1]U.S. Department of Labor, Bureau of Labor Statistics, News Release, available at www.bls.gov/news.release/pdf/union2.pdf (last visited March 8, 2012).

[2]National Labor Relations Board, *Proposed Rules Governing Notification of Employee Rights Under the National Labor Relations Act,* 75 Fed. Reg. 80, 410–480, 420 (Dec. 22, 2010).

[3]*National Association of Manufacturers v. NLRB*, No. 11-1629 (D.D.C. Mar. 2, 2012).

[4]*Id.*

[5]*Id.*

[6]*Id.*

[7]*Id.*

[8]*National Association of Manufacturers v. NLRB*, No. 12-5068 (D.C. App. April 17, 2012).

[9]*Id.*

[10]*Chamber of Commerce v. NLRB*, No. 11-cv-2516 (D.S.C. April 13, 2012).

[11]Office of the General Counsel, Division of Operations Management, *Report of the Acting General Counsel Concerning Social Media Cases*, available at www.nlrb.gov/news/acting-general-counsel-issues-second-social-media-report (Jan. 24, 2012).

[12]*Id.*

[13]*Id.*

[14]*Id.*

[15]National Labor Relations Board, *Representation Case Procedures*, 76 Fed. Reg. 80, 138–180, 189 (Dec. 22, 2011).

[16]*Chamber of Commerce of the United State of America, et al. v. NLRB*, 1:11-cv-02262 (D.C.C. 2011).

[17]*Id.*

[18]National Labor Relations Board, *Representation Case Procedures,* 76 Fed. Reg. 36, 812–836, 847 (June 22, 2011).

[19]National Labor Relations Board Resolution 2011-1, available at www.nlrb.gov/sites/default/files/documents/3089/final_rule_resolution_11-28.pdf (last visited March 9, 2012).

[20]*New Process Steel v. NLRB*, 130 S. Ct. 2635 (2010).