RECENT NATIONAL LABOR RELATIONS BOARD DEVELOPMENTS

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FIRING "AT WILL" EMPLOYEES FOR INSUBORDINATION MAY BE RISKY

While most employees who are not under union contracts are employed "at will," and may be terminated for any reason or no reason so long as the reason is not based on their protected status (age, race, gender, etc.), they may also be protected from firing by the National Labor Relations Act (NLRA).

A case in point is a recent decision of the National Labor Relations Board (NLRB) general counsel to bring formal complaint proceedings against an employer who fired an at will employee because he made a boisterous and argumentative protest at a luncheon meeting that the employer called for the purpose of hearing employee concerns about working conditions.

The employer's general manager had asked a group of employees if they had any questions. This employee raised issues about employee evaluations, employee pay raises, the incentive/bonus plan, and the employer's 401(k) plan.

During the discussion, however, he challenged some of the manager's responses. He referred to one of the manager's explanations as "baloney" and spoke in a heated, disrespectful, challenging and insubordinate tone. The employee later refused to sign a memorandum acknowledging his behavior and was fired.

Citing a number of labor board cases holding that the National Labor Relations Act gives employees the right to complain about working conditions even without a union in the picture and that this right would be meaningless if the board were not to take into account the fact that disputes over wages, hours, and working conditions are likely to engender ill feelings and strong responses, the employer was charged with an unfair labor practice.

RESTRICTING EMPLOYEES FROM PROVIDING INFORMATION TO A GOVERNMENT AGENCY WITHOUT COMPANY APPROVAL

A provision in a company's employee handbook stated that employees were prohibited from volunteering any information, or admitting or denying the truthfulness of any allegation or statement that a federal agent may ask or sign any written statements, such as a report or an affidavit without *express company approval* from a company attorney.

While imposing such a restriction on its employees in an era where government intrusiveness in a company's business can expose the company to financial penalties would appear to be prudent and entirely reasonable, the NLRB ruled that such a restriction interfered with employees' rights under the National Labor Relations Act and was illegal. According to the Board, this restriction would restrain employees in their right to provide evidence to Board agents or testify in Board matters and would chill employees' involvement in Labor Board proceedings. *Jack in the Box,* 339 NLRB No. 5 (May 19, 2003).

PROHIBITING DISTRIBUTION OF UNION LITERATURE BY OFF-DUTY EMPLOYEES

The issue of a company's right to forbid union conduct on its own property was the subject of a recent case.

In *Solutia, Inc.* 339 NLRB No. 9 (May 19, 2003), a union was attempting to organize a company's work force. A group of off-duty company employees began distributing union literature on company property at the plant entrance. When the company learned that the employees were distributing union literature, the company ordered them to leave the premises. When charged with a violation of employees' rights, the company failed to establish any business justification for prohibiting the hand billing. In addition, it was shown that the company allowed spouses and outside vendors access to the parking lot. By barring the off-duty employees the right to handbill, the Board ruled that the company discriminated against them.

WITHDRAWING UNION RECOGNITION BASED UPON A DECERTIFICATION PETITION

Despite the influence that many observers thought the Bush administration would have on the federal labor laws, in at least one important respect, the Labor Board has given additional protection to unions. According to long held Labor Board doctrine, after a union agreement expires, an employer is permitted to withdraw recognition from a union if it could show that it had a *good-faith doubt*, based on objective considerations, of the union's continued majority status. On the same showing of good-faith doubt, the NLRB permitted an employer to test an incumbent union's majority status by filing a decertification petition or to poll its employees to ascertain their union sentiments.

In 2001, however, the NLRB dramatically changed its position on the circumstances upon which an employer would be permitted to withdraw recognition from an incumbent union. In *Levitz Furniture Company of the Pacific, Inc. (*formerly Levitz Furniture Company of Northern California, Inc. d/b/a Levitz), 333 NLRB No.10, the Board held that an employer cannot withdraw recognition from a union merely because it harbors uncertainty or even disbelief concerning a union's majority status. It therefore held that an employer may unilaterally withdraw recognition from an incumbent union only where the employer can show that the union actually lost the support of the majority of the bargaining unit employees.

In a recent case, an employee filed a decertification petition with the Regional Office of the Board asking for an election. The petition was signed by a majority of the company's employees who asked for an election. The Employer verified the petition signatures and then withdrew recognition from the Union. The General Counsel held that based on the Board's decision in *Levitz*, the employer had no right to withdraw recognition from the union because the decertification petition was not proof that the union actually lost majority support, even though it was signed by a majority of employees in the unit. The petition only indicated the employees' desire to obtain an election; it did not unequivocally indicate the employees' desire to have the union decertified.

REMEDIES
CONSEQUENTIAL DAMAGES

The usual financial penalty on an employer for committing an unfair labor practice is payment for lost wages and benefits. In a recent case in which an employer was guilty of firing two union supporters because of their union activities, the employees also asked for monetary damages for the losses they sustained because they were unable to pay their bills including mortgage, credit cards, bank loans, life and health insurance while waiting for the Board to rule in their cases. The General Counsel considered whether to seek consequential damages, including foreclosure charges, damage to credit, medical bills, finance charges and fees for late loans payments, repossession costs and storage fees for a repossessed automobile, and the amount necessary to obtain similar homes with similar mortgage terms and a similar automobile with the same payment terms.

The language of the NLRA and its legislative history is broad enough to conclude that the Board may order a remedy for economic consequences directly resulting from an employer's unfair labor practice. However, current Board law does not permit recovery for collateral losses. Therefore, the General Counsel decided to not seek consequential damages.