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THE NEW NLRB: IT'S COMING FOR NON-UNION EMPLOYERS

By Aurora Kaiser

In this second part of a two-part series, we analyze the Obama Administration's initiatives at the National Labor Relations Board, and its increasingly aggressive decisions affecting non-union employers in areas ranging from the enforceability of arbitration agreements, to employment at will, and to policies prohibiting "walking off the job."[1]

Breaking News: Shortly before going to press, the U.S. Court of Appeals for the District of Columbia struck down President Obama's January 2012 "recess" appointment of three members of the National Labor Relations Board (the "NLRB" or the "Board"). *Noel Canning v. NLRB*, No. 12-1115 (D.C. Cir. Jan. 25, 2013). This decision resulted in a lack of a quorum, thereby invalidating every decision of the Board since January 4, 2012. The Court of Appeals agreed with the argument that the Senate was not in recess at the time and thus the recess appointments made by the President were not valid.

This decision will almost surely be appealed to the U.S. Supreme Court.

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Beginning January 1, 2013, employers will need to change the Fair Credit Reporting Act ("FCRA") notices that they provide to consumers in connection with the use of background screening reports.

Under the FCRA, employers are required to provide employees or applicants with a "Summary of FCRA Rights" before taking adverse action against the individuals based on a consumer report. *See* 15 USC 1681b(b)(3)(A)(ii). The Federal Trade Commission ("FTC") initially prescribed the model form Summary of FCRA Rights. In connection with the recent transfer of FCRA rulemaking authority to the Consumer Financial Protection Bureau ("CFPB") under the Dodd-Frank Act, the CFPB has republished the model form of notice for consumers. *See* https://www.federalregister.gov/articles/2012/11/14/2012-27581/fair-credit-reporting-regulation-v-correction; 12 CFR Pt. 1022, App. K (Summary of Consumer Rights).

The new form includes contact information for the CFPB, and makes certain other non-substantive and technical changes to the FTC model forms. Use of the CFPB's model form will satisfy any notification requirements that employers may have under the FCRA.

A few things to keep in mind with regard to the ongoing effect of the decisions discussed in this Commentary, which have now, potentially, been largely invalidated:

First, in 2010, the U.S. Supreme Court invalidated a large number of Board decisions for lack of a quorum, *New Process Steel v. NLRB*, 130 S. Ct. 2635 (2010). After *New Process Steel*, the Board essentially rubber-stamped each of its decisions that the Supreme Court invalidated. If President Obama is able to get confirmation of new Board members, rubber-stamping of these recently invalidated decisions is a real possibility. But it remains to be seen what compromises the President will need to make in order to get confirmation of new members.

Second, the decisions are likely to have a strong persuasive effect on the Board's administrative law judges and regional directors. This is true at least until an alternative policy is announced by the Board, if that occurs as a result of the new appointees. After the decision was issued, the Chairman of the NLRB, Mark Gaston Pearce, indicated that the Board would continue to operate while pointing out that the case only applied to one decision and that similar cases in other circuits were still pending.

Background

On July 5, 1935, President Franklin Roosevelt signed the National Labor Relations Act (the "NLRA" or the "Act") into law, stating that its purpose was to achieve "common justice and economic advance." The Board celebrated its 75th anniversary in 2010, but union membership has declined since its peak in 1954. In fact, on January 23, 2013, the U.S. Bureau of Labor Statistics announced the membership rate for 2012 in the private and public sectors combined was 11.3%, representing 7.3 million employees in the public sector and 7.0 million workers in the private sector. This reflects a drop of 0.5% from 2011, and is well under half of the high-water mark set in 1954 of 28.3%.[2] And the percentage is even lower for private sector employees, a mere 6.6% in 2012.

Given the decreasing relevance of traditional labor to most private sector employers, what does the Board focus its attention on? "The agency also acts to prevent and remedy unfair labor practices committed by private sector employers. . . ."[3]

The NLRA and "Unfair Labor Practices."

To understand the Board's recent decisions, it is helpful to understand the structure of the NLRA. Section 7 of the Act sets out employee rights, and Section 8 then makes infringing on those rights, among other things, an unfair labor practice.

Under Section 7, employees have the right to engage in concerted activity for their "mutual aid or protection," including, *e.g.*, talking to each other about the terms and conditions of their employment. 29 U.S.C. § 157.[4] The Board's recent controversial decisions hinge on its interpretation of the employees' right to engage in concerted activity.

Section 8 of the Act describes various unfair labor practices. Under Section 8(a)(1), it is an unfair labor practice for an employer to "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." 29 U.S.C. § 158.[5]

An employer's rule violates Section 8(a)(1) if the rule would reasonably tend to "chill" employees in the exercise of their Section 7 rights. If the rule expressly restricts Section 7 activity it is unlawful. *Lutheran Heritage Village,* 343 NLRB 646 (2004). If the rule does not expressly restrict Section 7 activity, it is still unlawful if "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Id*. The Board has recently been relying on the first prong in determining that various policies violate Section 8(a)(1).

The Board's Increasingly Aggressive Interpretation of Section 7.

Arbitration Agreements

In *Concepcion v. AT&T Mobility*, the U.S. Supreme Court expressed the strong pro-arbitration policy contained in the Federal

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Arbitration Act (FAA), and concluded that it preempted California state law invalidating class-action waivers.[6] Since then, companies have been including class action waivers in their arbitration agreements with employees and consumers.

In a now notorious decision, *D.R. Horton, Inc. v. Cuda*, 357 NLRB No. 184 (2012), the Board invalidated a class-action waiver in an arbitration agreement, holding that it violates Section 7. The Board reasoned that filing class action lawsuits is "concerted activity" for the employees' "mutual aid and protection," and the waiver interferes with the employees' rights to engage in that concerted activity. The Board somehow concluded that its decision was consistent with *Concepcion v. AT&T*. Other courts to consider the matter have concluded that *D.R. Horton* is in direct conflict with the FAA in light of *Concepcion*'s clear directive to enforce arbitration agreements.[7]

Although most state and federal courts that have considered the matter have declined to follow *D.R. Horton*,[8] administrative law judges (ALJs) in the lower ranks of the NLRB have continued to extend the holding to various novel circumstances.[9] For example, an arbitration policy with a class/collective action waiver violates the NLRA even if the policy allows employees to act concertedly to change the terms of the policy and waiver, and even if the policy allows class actions to proceed with the employer's consent.[10] Similarly, an arbitration clause with a class waiver runs afoul of *D.R. Horton*, even with a 30-day opt-out provision, since the opt-out process was illusory, left employees who opted out unable to act concertedly with non-opted-out employees, and made it difficult for employees to identify other opted-out employees.[11]

D.R. Horton is currently under appeal before the Fifth Circuit (5th Cir. Case No. 12-60031). Oral arguments are tentatively scheduled for the week of February 4, 2013.

At-Will Employment

Although not decided by the Board itself, two Board proceedings brought by a NLRB regional director raised concern among employers that the NLRB may conclude—for the first time—that at-will employment policies violate employees' rights to engage in concerted activity to change the policy. *American Red Cross*, No. 28-CA-23443 (NLRB Feb. 1, 2012) and *Hyatt Hotels Corp.*, No. 28-CA-061114 (complaint filed with NLRB, Feb. 29, 2012). Both cases settled before they reached the Board.

After much press about *American Red Cross* and *Hyatt Hotels*, the NLRB ordered that all at-will cases should be referred to the Division of Advice so the Board's Acting General Counsel Lafe Solomon can advise on whether they violate Section 7.

The Acting General Counsel thereafter issued two advice memos for *MiMi's Café*, No. 28-CA-084365, and *Rocha Transportation*, No. 32-CA0086799, both issued on October 31, 2012. Both memos distinguished (but did not disavow) the ALJ's decision in American Red Cross, and concluded that at-will policies did not violate Section 7.

MiMi's Café had an at-will policy providing: "No representative of the Company has authority to enter into any agreement contrary to the foregoing 'employment at will' relationship."

Acting General Counsel concluded that this policy was distinguishable from the *American Red Cross* policy because it restricted management, not employees. The American Red Cross policy could not be changed or amended "in any way." On the other hand, the MiMi's Café policy does not implicate Section 7 rights because it does "not require employees to refrain from seeking to change their at-will status or to agree that their at-will status cannot be changed in any way. Instead, the provision simply highlights the employer's policy that its own representatives are not authorized to modify an employee's at-will status."

Rocha Transportation's policy provided:

> Employment with Rocha Transportation is employment at-will. . . . No manager, supervisor, or employee of Rocha Transportation has any authority to enter into an agreement for employment for any specified period of time or to make an agreement for employment other than at-will. Only the president of the Company has the authority to make any such agreement and then only in writing.

This policy could not reasonably be interpreted to restrict Section 7 rights for the same reason as MiMi's Café: "the provision does not require employees to refrain from seeking to change their at-will status or to agree that their at-will status cannot be changed in any way. Instead, the provision simply highlights the employer's policy that its own representatives are not authorized to modify an employee's at-will status."

Takeaway: The Board apparently now concerns itself with at-will policies, but it distinguishes between at-will policies that can *never be changed* and at-will policies that can *never be changed by the company or its representatives*. Only the former violate Section 7, while both are more than capable of effectuating an employer's needs. Policies should be reviewed with an eye toward directing the prohibition on changing the policy to representatives of the company rather than directing the prohibition to employees.

Confidentiality and Investigations

Over dissent by Member Hayes, the Board concluded that Banner Estrella Medical Center violated Section 7 when its HR consultant routinely instructed employees not to discuss matters under investigation while the investigation was ongoing. *Banner Health System d/b/a Banner Estrella Medical Center*, 358 NLRB No. 93 (2012). This decision is currently on appeal before the D.C. Circuit.

The Board concluded that the blanket confidentiality rule violated Section 8(a)(1). Although there can be a justification to prohibit discussion of ongoing investigations, the company must show a "legitimate business justification" that outweighs the employees' Section 7 rights. A generalized interest in "protecting the integrity of its investigations" is insufficient.

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Examples of legitimate business justifications include:

- The need to protect witnesses;
- The need to prevent the destruction of evidence;
- The threat that subsequent testimony may be fabricated; or
- The need to prevent a cover up.

The Board rejected the argument that because there was no discipline for violating the rule, it did not infringe on the employees' rights.

Member Hayes dissented because he did not believe that suggesting employees maintain confidentiality, without more information, specific guidelines, and without potential discipline, was not a "rule" within the meaning of applicable precedent.

Takeaway: Unless a company can articulate a reason why confidentiality is necessary, it should consider refraining from admonishing employees to maintain confidentiality with regard to current investigations.

Disclosure of Company Information

The at-will employment policy of respondent FlexFrac Logistics, a trucking company, contained a confidentiality provision as follows:

> Confidential Information includes, but is not limited to, information that is related to: our customers, suppliers, distributors; [our] organization management and marketing processes, plans and ideas, processes and plans [*sic*]; our financial information, including costs, prices; current and future business plans, our computer and software systems and processes; p*ersonnel information and documents*, and our logos, and art work. No employee is permitted to share this Confidential Information outside the organization . . . .

FlexFrac Logistics, LLC, 358 NLRB No. 127 (2012) (emphasis and alterations supplied by Board).

The Board held that the policy infringed upon the employees' Section 7 right to discuss the terms and conditions of their employment. The language of the rule was overbroad, and could cause employees to reasonably believe that they were prohibited from discussing wages or other terms and conditions of employment.

The fact that the rule only prohibited disclosure outside the company did not change this analysis, since the rule would prohibit disclosure to union representatives.

The case is currently on appeal before the Fifth Circuit.

Takeaway: Now is a good time to take a look at those confidentiality provisions to be sure that they are narrowly drafted or contain a clear carve-out for information that may fall under Section 7.

Off-Duty Access by Employees

In 1976, the NLRB issued its decision in *Tri-County Medical Center*, 222 NLRB 1089 (1976), in which it laid out guidelines for off-duty access by employees policies. In the 35 years since *Tri-County*, the Board has found policies limiting off-duty access to be lawful under Section 8(a)(1) so long as the policy: (1) limits access solely to the interior of the facility and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the facility for any purpose and not just to those engaging in union activities.

In three decisions issued since December 2011, however, the Board focused on the third prong to determine that the policy at issue violated the NLRA: *Sodexo Am*. LLC, 358 NLRB No. 79 (2012); *Marriott Int'l Inc*., 359 NLRB No. 8 (2012); and *Saint John's Health Center*, 357 NLRB No. 170 (2011).

The three policies at issue had various rules limiting access to company premises when the employees were off shift. The policies—each found invalid as they could be used to discriminatorily limit union activity—were as follow:

- "Off-duty employees are not allowed access to the interior of the Health Center's building or to other working areas at the Health Center. Off-duty employees are permitted access to the cafeteria and are also permitted access to the building to attend Health Center sponsored events, such as retirement parties and baby showers." *Saint John's Health Center*.

- "Off-duty employees are not allowed to enter or re-enter the interior of the Hospital or any other work area outside the Hospital except to visit a patient, receive medical treatment or to conduct hospital-related business." The policy defined "hospital-related business" as "the pursuit of the employee's normal duties or duties as specifically directed by management." *Sodexo*.

- Employees can only enter company property with a supervisor's permission. *Marriott Int'l*.

The Board concluded in each case that the policy failed under the third prong of *Tri-County* for not uniformly prohibiting off-duty employee access for any purpose. The policies gave the companies free rein to set the terms of off-duty employee access, and therefore violated Section 8(a)(1) of the Act under the third prong of *Tri-County*.

In each case Member Hayes dissented that the Board was expanding the application of *Tri-County*, concluding that the policies did not in fact discriminate against union activity.

Takeaway: Although the principles have not changed for decades, it does appear—as suggested by Member Hayes—that the NLRB is taking a more aggressive approach to the application of the *Tri-County* test. It would be prudent to consider whether off-duty access policies should be revised in light of this increased scrutiny.

"Walking Off" the Job

Both TT&W Farm Products and Ambassador Services, Inc. had policies that prohibited employees from leaving their work stations

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without authorization. The Board invalidated them both as potentially prohibiting union activity, because of similarity between the phrases "walking off the job" and "walkout." *Ambassador Servs., Inc.*, 358 NLRB No. 130 (2012); *TT&W Farm Products*, 358 NLRB No. 125 (2012).

In *TT&W Farm Products*, the Board invalidated only the last two of the following rules, reversing the ALJ's conclusion that the first three violated Section 7:

1. "You are expected to be at your work station during working hours and you should obtain permission from your supervisor or the plant manager before leaving the work station or plant";
2. "Leaving the plant without your supervisor/group leader's permission is considered a major violation of the attendance policy and such an incident will be treated as a voluntary quit";
3. "Leaving your work station without permission or approval will be considered cause for disciplinary action";
4. "Walking off the job or leaving the plant without permission or notifying the supervisor will be considered cause for immediate discharge"; and
5. "Willfully restricting production, impairing or damaging product or equipment, interfering with others in the performance of their jobs or engaging or participating in any interruption of work will be considered cause for immediate discharge."

As to the fourth policy, the Board concluded that "walking off" the job prohibits Section 7 activity such as a strike, "given the common use of the term 'walkout' as a synonym for strike." Similarly, the fifth rule violated Section 8(a)(1) because an employee could reasonably believe that it prohibited going on strike.

However, the first three rules simply prohibit an employee from leaving the plant or their workstation without permission, and the Board found "that a reasonable employee would read these rules to prohibit only unauthorized leaves or breaks, not to prohibit conduct protected by Section 7."

In *Ambassador*, the policy prohibited "walking off" the job, and that was sufficient for a finding of an unfair labor practice for the same prohibition in *TT&W*.

Takeaway: Luckily, *TT&W* describes both policies that prohibit unauthorized breaks and those that—in the Board's opinion—cross the ambiguous line between prohibiting unauthorized breaks and strikes. It is clear, in any event, that the phrase "walking off the job" should be avoided. Companies should review their comparable policies in light of the described policies.

Conclusion

Given how expansive the Board has been, it is likely that we will continue to see the Board finding violations of the NLRA in areas that have been considered settled for decades. Although it is difficult to say what the Board's next target will be, it's a fair bet it will be based on a violation of Section 7. It is also not clear what will happen as courts continue to review these decisions, but so far with *D.R. Horton* and the various regulatory changes the Board sought to implement, courts have shown little deference to the NLRB.

In the meantime, employers should keep an ear open and consider revising policies that the Board has already weighed in on.

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1 This Commentary does not address the NLRB's focus on social media. For a full discussion of the Board's decisions and advice regarding social media policies, please see Morrison & Foerster LLP's social media blog, Socially Aware, *available at* www.sociallyawareblog.com. For a discussion of the most recent NLRB guidance on social media policies, see Socially Aware: The Social Media Law Update, "The NLRB Weighs in (Again) on Social Media Policies," Vol. 3, No. 4 (Aug. 2012).

2 Gerald Mayer, "Union Membership Trends in the United States," CRS Report for Congress (Aug. 31, 2004).

3 NLRB, "What We Do," *available at* http://www.nlrb.gov/what-we-do

4 Specifically, Section 7 provides:
Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and *to engage in other concerted activities for the purpose of* collective bargaining or *other mutual aid or protection.*
29 U.S.C. § 157 (emphasis added).

5 The other unfair labor practices described in Section 8(a) more directly involve unions, such as interfering with the formation of unions (8(a)(2)) or discriminating against an employee on the basis of union membership (8(a)(3)). *See* 29 U.S.C. § 158.

6 We discussed Concepcion and its aftermath in California in our January 2012 Commentary. "Titans Clash and Uncertainty Abounds – The Ongoing Turmoil Regarding Enforceability of Mandatory Employment Arbitration Agreements in California," ELC, Vol. 24, No. 1 (Jan. 2012).

7 *See, e.g., Iskanian v. CLS Transportation Los Angeles, LLC*, 206 Cal. App. 4th 949 (2012), *rev. granted*, No. S204032, 2012 Cal. LEXIS 8925 (Cal. Sept. 19, 2012) (declining to defer to *D.R. Horton* decision interpreting the FAA, a statute outside of the Board's charge, and concluding the FAA compels enforcement of a mandatory class action waiver); *Jasso v. Money Mart Express, Inc.*, No. 11-CV-5500 YGR, 2012 U.S. Dist. LEXIS 52538 (N.D. Cal. Apr. 13, 2012) (arbitration agreements are enforceable despite *D.R. Horton*, as a contrary holding would put the NLRA in direct conflict with the FAA in light of *Concepcion*).

8 *See, e.g.*, J*ohnmohammadi v. Bloomingdales, Inc.*, No. 2:11-cv-06434 (C.D. Cal. Jan. 26, 2012); *Carey v. 24 Hour Fitness USA, Inc.*, No. H-10-3009, 2012 WL 4754726 (S.D. Tex. Oct. 4, 2012); *Tenet HealthSystem Philadelphia, Inc. v. Rooney*, No. 12-mc-58 (E.D. Pa.. Aug. 14, 2012); *Delock et al. v. Securitas Security Services USA, Inc. et al.*, No. 4:11-cv-520-DPM (E.D. Ark. Aug. 1, 2012); *Spears et al. v. Mid-American Waffles, Inc. et al.*, No. 2:11-cv-02273-CM-JPO (D. Kan. July 2, 2012); *Brown et al. v. Trueblue, Inc. et al.*, No. 1:10-CV-0514 (M.D. Pa. Apr. 16, 2012); *Reyes v. Liberman Broadcasting, Inc.*, 208 Cal. App. 4th 1537 (2012), *rev. granted*, 2012 Cal. LEXIS 11735 (Dec. 12, 2012); *Nelsen v. Legacy Partners Residential, Inc.*, 207 Cal. App. 4th 1115 (2012), *modified and rehearing denied*, 2012 Cal. App. LEXIS 876 (Aug. 14, 2012), *rev. denied*, 2012 Cal. LEXIS 10188 (Oct. 31, 2012). *But see Herrington v. Waterstone Mortgage Corp.*, No. 11-cv-779-bbc, 2012 U.S. Dist. LEXIS 36220 (W.D. Wis. Mar. 16, 2012) (applying *D.R. Horton* to conclude that a class action waiver does violate the NLRA, perhaps even if entered into without coercion); *Sutherland v. Ernst & Young LLP*, 847 F. Supp. 2d 528, (S.D.N.Y. 2012) (extending the reasoning of *D.R. Horton* to a FLSA collective action context).

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9 *See also Convergys Corp.*, Nos. 14-CA-075249 and 14-CA-083936 (NLRB Oct. 25, 2012) (ALJ concluded that *D.R. Horton* also applies when [1] a class action waiver has no underlying arbitration provision and [2] the charging party signed as a job applicant rather than current employee); (ALJ ruled that an arbitration clause with class waiver runs afoul of *D.R. Horton*, even with a 30-day opt-out provision, since the opt-out process was illusory, left opted-out employees unable to act concertedly with non-opted-out employees, and made it difficult for employees to identify other opted-out employees); *Concord Honda*, No. 32-CA-072231 (Advice Mem., NLRB Nov. 9, 2012) (regional director concluded that a mandatory arbitration agreement silent as to class or collective action runs afoul of *D.R. Horton* when that agreement is interpreted to preclude employees from proceeding as a class).

10 *Advanced Services, Inc.*, No. CA-63184-71805 (NLRB July 2, 2012).

11 *24 Hour Fitness USA, Inc.*, No. 20-CA-035419 (NLRB Nov. 6, 2012).

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