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Labor Board Sets New Traps for Unwary Employers

The fact that the National Labor Relations Board has broken new ground under the Obama administration is not new news, but the pace of change within the past few months is truly unprecedented.

We've reported before on the Board's recent focus on issues arising primarily in non-union settings, including its attacks on employment-at-will policies that it considers overly broad, waivers of rights to pursue class action claims against employers, and prohibitions against public criticism of employers, supervisors or co-workers, such as those often set forth in social media policies. The NLRB has also gone after companies for disciplining workers who have engaged in misconduct, arguing that the real reason for the discipline was the employee's gripes about working conditions that were shared with co-workers. In other words, the Board sees "concerted protected activity" behind every tree and under every rock.

Here are a few of the agency's eye-opening decisions just in the last quarter of 2012. One NLRB judge found unlawful Dish Network's social media policy prohibiting employees from making "disparaging or defamatory comments" about the company. Another ruled unlawful a Connecticut sports bar's discharge of employees who exchanged messages that included derogatory comments about the bar's owner, rejecting claims that the employees were fired for excessive cell phone use and unauthorized smoke breaks. One of the derogatory Facebook messages was deemed to constitute "concerted" activity simply because a co-worker clicked the Like button in response.

The NLRB has also reversed decades of precedent in cases important to unionized employers. Since 1978 the Board has held that the duty to provide information to a union does not include a duty to provide witness statements taken in the course of a disciplinary investigation. Last month the Board said that ruling only applied when the witness was promised confidentiality, and just a few days ago it overturned the 34-year-old ruling entirely, holding instead that witness statements must be disclosed unless the potential for retaliation or other security concerns outweigh the benefits of disclosure. Also in December, the Board

reversed 50 years of precedent when it said that a union dues checkoff clause remains binding even after the contract containing it expires.

Another unpleasant year-end surprise primarily affects employers with a newly certified union but no collective bargaining agreement. The Board ruled that in the absence of negotiated procedures covering disciplinary action and challenges to such discipline, employers must negotiate with the union before taking serious disciplinary action, unless the employer's policies and practices are so inflexible that no discretion is involved in their application. Obviously, such exceptions will be rare, except perhaps in the case of a rigid attendance policy or the like.

The Board also held this month that an employer policy requiring employees to submit disputes to a grievance and arbitration procedure was unlawful because reasonable employees might believe they could not file unfair labor practice charges. Although the procedure clearly allowed filing of charges or complaints with a "government agency," the Board majority found that was insufficient because the policy did not specifically reference the NLRB or the Act it administers. As with many other recent decisions, the Board's sole remaining Republican appointee, whose term has now ended, filed a dissenting opinion criticizing "the Board's continued reluctance to endorse any form of mandatory alternative dispute resolution encompassing statutory claims for individual workers in a nonunion setting."

Not all the news is bad for employers. For one thing, the courts don't always agree with the Board. As an example, one federal appeals court has refused to honor the NLRB's prohibition against waivers of class action claims against employers. Other courts have halted, at least temporarily, the Board's effort to require virtually all employers to post a notice advising employees of their right to unionize. The General Counsel of the Board has also issued advice memoranda citing employment-at-will policies and a social media policy that have been found to be unobjectionable, providing employers with a safe harbor if they wish to follow these examples.

Our opinion, however, is that private sector employers, whether unionized or not, have good reason to wonder what's next. After all, the current pro-labor appointees to the Board have four more years to advance their agenda. Public employers in Connecticut also have an interest in these matters, since the State Board of Labor Relations historically has adopted most NLRB principles as its own. While there are good reasons to be concerned about the plight of the average American worker in today's economy, we wonder whether the NLRB's current crusade against traditional employer rights is a sensible approach to solving those problems.

Don't Neglect COBRA: It Can Bite You!

Some employers are a little too casual about giving departing employees notice of their COBRA rights. Recently an employer was assessed a penalty of almost $40,000 plus an even larger sum for attorneys fees and costs.

Although the case didn't arise in Connecticut, COBRA is a federal law that applies in every state. It allows penalties of up to $110 per day for up to eighteen months. In this case, the judge assessed a penalty of $75 per day for eighteen months, even though the employee only went without coverage for five months before obtaining coverage from her new employer, and even though she had only been on the employer's dental plan, because she was covered under her husband's medical plan.

The total judgment against the employer included $37,950 in penalties, $42,192 in attorneys fees and $2,910 in costs. Although the company claimed its omission was an oversight, the judge said there were "too many contradictions and evasions and disingenuous answers" from its employees to conclude that the

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failure to provide a COBRA notice was inadvertent, especially since no notice was issued even after the employee called to inquire about COBRA.

Our opinion is that something else must have been going on here, because the judge in effect "threw the book" at the employer. However, the message to every HR department is not to overlook the requirements of COBRA, because the consequences can be substantial.

Shooting Threat By a Cop ????

This wasn't your run-of-the-mill discipline case. A Groton police officer complained at a departmental meeting that someone had been taking peanuts from a private stash in his desk drawer, and threatened to "f----ing shoot" the individual if he found out who was responsible. One of the detectives thought the officer was looking at him when he made the statement, and complained to human resources.

The officer was given a five-day suspension for inappropriate and unprofessional conduct, but did not charge him with a violation of the "zero tolerance" policy, because he did not intend to make a serious threat. The police union argued he shouldn't have been suspended at all, because officers often made joking threats or sent each other offensive messages on their computers.

When the matter was heard by the State Board of Mediation and Arbitration, the panel found discipline was warranted, in part because the officer had a history of inappropriate conduct, but that five days was too harsh. The suspension was reduced to three days.

Our opinion is that this case raises several interesting questions. Would this type of threat be tolerated in any other professional setting, especially in the current environment? Shouldn't police officers be held to a higher standard, since they carry guns and are supposed to be protecting the public? Even if one accepts the premise that this threat wasn't serious, and therefore a "slap on the wrist" was all that was needed, what purpose is served by shaving two days off the penalty, other than to encourage appeal of any disciplinary action in the hope of achieving some reduction?

Legal Briefs
and footnotes...

Retaliatory Firing Revisited: Our fall story about retaliation claims was prescient. Since then there have been two significant related developments in Connecticut. In one case, an employer in East Bridgewater agreed to pay $12,000 in back wages to a worker who was fired shortly after she filed an OSHA complaint about an inoperative eyewash station and inadequate worksite ventilation. The settlement avoided heftier penalties. The other decision was issued by a federal judge in Bridgeport in a whistleblower case brought by an HR executive who contacted the SEC and complained to his superiors about irregularities in the administration of his company's pension plan. The judge said it didn't matter that he had not filed a formal complaint, since the intent of the law is to

SHIPMAN & GOODWIN LLP®
COUNSELORS AT LAW

ANDREANA BELLACH
GARY BROCHU
BRIAN CLEMOW*
LEANDER DOLPHIN
BRENDA ECKERT
JULIE FAY
VAUGHAN FINN
ROBIN FREDERICK
SUSAN FREEDMAN
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JESSICA STEIN
CLARISSE THOMAS
CHRIS TRACEY
LINDA YODER
HENRY ZACCARDI
GWEN ZITTOUN

* Editor of this newsletter. Questions or comments? Email bclemow@goodwin.com.

encourage disclosure of impropriety by any reasonable means.

CHRO Interprets Its Own Statute: In December, the Commission on Human Rights and Opportunities voted to issue a declaratory ruling in effect defining its own jurisdiction. It said that our state's anti-discrimination law's requirement that employers must have at least three employees to be covered means at least three employees anywhere; only one of them needs to be in Connecticut. Apparently the CHRO doesn't follow the logic of the state's Supreme Court, which only last fall ruled that the 75-employee minimum for CT FMLA coverage means 75 employees in Connecticut.

Healthbridge Strikers Reinstated – Not: The Hartford office of the NLRB won a short-lived victory when it persuaded a federal judge to order reinstatement of 700 strikers at Healthbridge nursing homes. The judge found that unilateral changes the employer made in 2010 were unlawful because negotiations with the union representing its employees were not at an impasse. Therefore, when the employees struck in 2011 in response to the changes, the employer could not permanently replace them because they were engaged in an unfair labor practice strike. The judge ordered Healthbridge to rescind the changes and reinstate the strikers. However, Healthbridge persuaded the Court of Appeals to stay that order while it considered the employer's arguments. These included the risk to patients inherent in reinstating employees who switched patient identifications and hid key pieces of equipment when they struck.

Individual Liability Under FMLA: When a Connecticut state employee was denied federal FMLA rights despite a "cluster headaches" diagnosis, he sued both the state and the supervisor who turned down his request for intermittent leave. The state moved for dismissal based on the principle of "sovereign immunity." However, a federal judge ruled that the supervisor could be held responsible for the FMLA violations, including interference with FMLA rights and retaliation for asserting those rights, because the law defines "employer" to include any person who acts in the interest of an employer. Presumably that includes HR executives and administrators.

Truck Drivers Aren't Independent Contractors: We've said it (more than once) before, but apparently some employers aren't getting the message. You can't turn an employee into an independent contractor, and thereby avoid payroll taxes and other costs, just by having him or her sign an agreement to that effect. A Connecticut company that provided truck drivers to other employers found that out the hard way. Though the drivers signed independent contractor agreements and obtained their own insurance, only one out of 53 had invested in his own truck and was available for hire by other companies. Under such circumstances, it is difficult if not impossible for an employer to prove that its workers aren't employees, and a Superior Court judge rejected the company's arguments to that effect.

Welcome New Lawyers: We are pleased to introduce two additional members of our labor and employment group. **Jessica Stein**, a graduate of the University of Connecticut Law School, focuses her practice on the representation of school districts, and **Harrison Smith**, who graduated from Howard University Law School, concentrates on employer defense and counseling. Both Harrison and Jessica were law review editors at their respective institutions. Additional information about them can be found on our website, www.shipmangoodwin.com.

One Constitution Plaza
Hartford, CT 06103-1919
860-251-5000

300 Atlantic Street
Stamford, CT 06901-3522
203-324-8100

1133 Connecticut Avenue NW
Washington, DC 20036-4305
202-469-7750

289 Greenwich Avenue
Greenwich, CT 06830-6595
203-869-5600

12 Porter Street
Lakeville, CT 06039-1809
860-435-2539