Collective Investigating? NLRB Increases Cooperation with Other Governmental Agencies

Labor & Employment Law Update

By Beverly Alfon on May 28, 2014

If you are an employer, the latest rash of formal agreements between the National Labor Relations Board (NLRB) and various government agencies (local, state and national) warrants some real attention.

Last week, the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA), announced that it will start advising employees who fail to timely file whistleblower retaliation complaints under OSHA that they may still have time to seek relief under the National Labor Relations Act (NLRA). While Section 11(c) of the OSH Act only allows 30 days for an employee to file a complaint alleging that s/he was discharged or otherwise discriminated against because s/he filed a complaint under the workplace safety statute or engaged in other acts protected by that statute, the NLRA allows up to six months after the employer's alleged unlawful conduct (assuming that the safety complaints constitute protected activity) to file an unfair labor practice charge with the NLRB. The new policy provides OSHA agents with sample letters and talking points to use to inform employees about their rights under the NLRA. It is just one example of the NLRB's efforts to widen its reach.

Other recent examples of broad NLRB collaboration with other pro-labor agencies are as follows:

- Ten months ago, the NLRB entered into a Memorandum of Understanding with the U.S. Department of Justice (DOJ) and the Civil Rights Division's Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) to formalize their collaborative efforts to enforce the NLRA and the Immigration and Nationality Act, which prohibits citizenship status and national origin discrimination in hiring, firing and recruitment or referral for a fee, as well as discriminatory Form I-9 and E-Verify practices.
- In March 2014, Region 13 of the NLRB (Chicago) and the Illinois Department of Labor entered into a Memorandum of Understanding to "[strengthen] its collaborative efforts." IDOL enforces a multitude of laws, ranging from child labor laws to prevailing wage requirements.

- Last month, Region 13 of the NLRB entered into a Memorandum of Understanding with the Chicago Commission on Human Relations, which is charged with enforcing the local Chicago Human Rights Ordinance and the Chicago Fair Housing Ordinance. These ordinances prohibit discrimination in the areas of housing, employment, credit transactions, bonding and public accommodations.

Each of the agreements provides for the sharing of information, referral of matters between the agencies, and coordination of investigative and enforcement actions. They even require cross-training and technical assistance to staff members so that they can identify when a referral to the other agency is appropriate.

Although it is common for government agencies to cooperate, these latest agreements are somewhat surprising in light of the clear distinction between the laws that the agencies are charged to enforce. For example, now the NLRB may refer a matter to OSC if it suspects potential discrimination related to citizenship status and national origin discrimination in hiring, termination, and recruitment, or discriminatory practices in the employment eligibility verification process. Likewise, if the IDOL is investigating a prevailing wage issue and an employee or union alleges employer conduct that may violate the NLRA, it is now more likely to spur an NLRB investigation.

Bottom line: The NLRB has not been thwarted by the high-profile legal defeats that it has faced in its attempts to increase its presence among workers (e.g., NLRA posting requirement) and promote union representation. Increased inter-agency cooperation will result in increased government scrutiny of employers and in turn, increased exposure to liability. Risk assessment and management is necessary, now more than ever.

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