Flurry of NLRB Decisions Bring Holiday Cheer to Employers

Labor & Employment Law Update

on December 18, 2019

It has been a busy week for the National Labor Relations Board which issued three decisions in quick succession on December 16 and 17. Each of the three is a clear win for employers.

In the first of the three, the Board restored employers' right to stop deducting and remitting union dues after the expiration of the collective bargaining agreement requiring it to do so. *Valley Hospital Medical Center*, 368 NLRB No. 139 (2019). The Board held that so-called "dues checkoff provisions" exist only by virtue of the parties' contract and therefore cease when that contract expires. This had long been the rule until the Board's 2015 decision in *Lincoln Lutheran of Racine,* 362 NLRB 1655 (2015) found checkoff agreements were among those terms and conditions of employment that an employer can not unilaterally change absent the parties reaching a lawful impasse in negotiations. Monday's decision expressly overruled *Lincoln Lutheran* restoring employers' right to cease collections of union dues upon the expiration of the collective bargaining agreement.

On Tuesday, December 17, the Board's decision in *Apogee Retail*, 368 NLRB No. 144 (2019), held that employer rules mandating confidentiality with respect to ongoing workplace investigations do not violate the National Labor Relations Act. The employer policy in question required those employees who reported "illegal or unethical behavior," as well as those employees who were interviewed in connection with investigations into such reports, to "maintain confidentiality regarding these investigations" and further cautioned that employees could be disciplined for engaging in "unauthorized discussion of investigation or interview with other team members." In holding that it is presumptively lawful to impose such a rule *during the course of the investigation,* the Board overturned a 2015 decision requiring a case by case determination of whether the employer's need to confidentiality as to the particular investigation outweighed the employees' section 7 rights. The Board further held that an employer can impose confidentiality *even after the investigation is complete* without violating the NLRA if its legitimate reasons for imposing confidentiality outweigh the impact the confidentiality obligation has on the employees' exercise of their Section 7 right to discuss terms and conditions of employment for "mutual aid or protection." However, employers must be mindful of state and federal EEO laws and state

laws such as the Illinois Workplace Transparency Act set to take effect January 1, 2020, that place separate limits on employer's ability to require confidentiality with respect to workplace harassment. See our comprehensive overview of the new Illinois changes in our blog post from August 2019.

Also on Tuesday, the Board overturned the 2014 *Purple Communications* decision, ruling that employers are once again free to legally prohibit employees from using company email / IT systems for non-work related reasons. *Caesars Entertainment,* 368 NLRB No. 143 (2019). As we reported back in 2014, Purple Communications had held that an employer that allowed its employees access to its email systems, was presumptively required (absent extenuating circumstances) to allow those employees to use that email system for discussions protected by Section 7, including discussions of terms and conditions of employment, union business, and union organizing during non-working time. Tuesday's decision expressly overturned *Purple Communications*, holding "there is no statutory right to employees to use employer-provided email for nonwork, section 7 purposes in the typical workplace." The majority of the Board concluded that a company's communication systems are company property, and that *Purple Communications* had "impermissibly discounted employers' rights in their IT resources while overstating the importance of those resources to [employee's] Section 7 activity." To be clear, it is still unlawful for an employer to discriminate against section 7 activity. An employer still cannot legally prohibit only union-related emails or other activities protected by section 7 while allowing other non-work communications either in the terms of the policy itself or in its enforcement. However, employers may now legally maintain "facially neutral" bans on non-work related use of company email and other communications systems so long as they do not apply those policies in a discriminatory manner.