NLRB to Encourage Charging Parties to File Claims under OSHA and the FLSA

Labor & Employment Law Update

By Michael Hughes on August 14, 2014

In a recent memorandum, the Office of the General Counsel for the National Labor Relations Board ("NLRB"), informed all regional directors that the NLRB had entered into a program with the Occupational Safety and Health Administration ("OSHA") and the Wage and Hour Division of the U.S. Department of Labor ("DOL") whereby NLRB investigators, in certain circumstances, will actively encourage parties that file an unfair labor practice ("ULP") charge to also file charges or complaints with OSHA and the DOL for potential violations of the Occupational Safety and Health Act ("OSH Act," prohibiting unsafe working conditions) or the Fair Labor Standards Act ("FLSA," requiring the payment of wages and overtime).

The memorandum expands the NLRB's previous announcement that it had entered a program with OSHA whereby any individual who files an untimely OSHA whistleblower complaint (which has a short, 30-day statute of limitations) will automatically be informed by OSHA of their right to file a ULP charge with the NLRB (ULP charges have a more-generous 6-month statute of limitations). The NLRB has provided talking points for OSHA to use for such purposes and specific language to be included in letters to OSHA claimants whose charges have been administratively dismissed.

Now, the NLRB has begun a reciprocal arrangement. The new memorandum advises regional directors that their personnel investigating ULP charges should actively encourage charging parties to contact OSHA or the DOL when any witness in a ULP investigation "divulges facts that ***suggest*** that an employer ***may*** have committed a ***possible*** violation" of the OSH Act or the FLSA. The memo provides contact information for OSHA and the DOL for the board agents to pass along to charging parties or their representatives.

While the memo states that the NLRB does not expect to be experts in either the OSH Act or the FLSA, the memo nonetheless encourages the regions to inform charging parties to contact OSHA and/or the DOL when the NLRB Board Agent ***believes*** that even a ***possible*** violation of those other statutes may have occurred. The NLRB in recent years has embarked on an activist role, seeking to arm unions with easier ways to organize bargaining units and to give unions and employees increased weapons against employers in order to make it more

difficult for employers to resist unionization or union demands in bargaining. Now, the NLRB seeks to have unions and employees attack employers on several fronts (through the NLRB, OSHA and the DOL) even when its board agents (who are not experts in the highly technical areas of OSHA and wage and hour laws) merely suspect a possible violation of those laws based only on what the charging party witnesses tell the NLRB Board Agent.

Employers have come to expect the activist NLRB to seek new ways to bring within its fold every facet of the employer-employee relationship (e.g., its new and changing pronouncements with respect to at-will employment statements, social media policies, arbitration agreements and confidentiality agreements) which in any tangential way may be considered to fall under the NLRB's jurisdiction. Now, the NLRB has sought to involve itself in the enforcement, not only of that relationship, but also of statutes that its personnel are not well versed in, and based only on a suspicion of possible wrongdoing. Employers beware.

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