July 30, 2020

Trio of Cases Limit Union Activity

The National Labor Relations Board (Board) has continued to issue pro-employer decisions, including three that curb workplace union activity, such as soliciting other employees, using employer resources, and intimidating employees.

Employee Solicitation

In *Wynn Las Vegas, LLC*, 369 NLRB No. 91 (May 29, 2020), the Board clarified the definition of "solicitation" for the purpose of implementing and enforcing work rules. Previously, the Board narrowly defined solicitation to apply only where a union authorization card was presented to an employee for signature or where discussion among employees continued for a significant period of time. In *Wynn*, the Board overruled its prior decisions on workplace solicitation and defined solicitation to include *any act of soliciting employees' sentiments to vote for or against a union*, regardless of the length of the interaction or the presence of a union authorization card. Under this definition, an employer lawfully can establish work rules that prohibit any discussion during working time, of any duration between employees, to vote for or against union representation. Given this decision, employers should consider updating their no-solicitation/no-distribution policies. Employers must continue to uniformly administer any prohibition of solicitation during work time to avoid unfair labor practice charges, including those related to other matters, such as soliciting colleagues for donations for a local charity or to purchase Girl Scout cookies.

Employer Resources

In *T-Mobile USA*, 369 NLRB No. 90 (May 27, 2020), the Board further solidified employers' right to prohibit employees from utilizing their resources, including e-mail systems, for non-work-related purposes. The Board's decision in *Caesar's Entertainment*, 368 NLRB No. 143 (December 16, 2019), held that employers generally have a right to impose non-discriminatory restrictions, and outright bans, on employees' use of employer-owned IT systems for non-work purposes. In *T-Mobile,* the Board went a step further to find that an employer's new rule, purposefully implemented after an employee attempted to solicit hundreds of employees through the employer's computer and e-mail system, was lawful. Given these decisions, employers should consider modifying their policies to restrict employees' use of their various resources, including but not limited to computers, telephones, and e-mail systems. Again, such rules cannot be enforced in a discriminatory manner, and exceptions may apply where the employer's resource is the only reasonable means for employees to communicate with other employees during the workday.

Employee Intimidation

In *Graphic Communications v. Bemis Company, Inc.*, 369 NLRB No. 97 (June 5, 2020), the Board found that a union had violated the National Labor Relations Act by attempting to retaliate against employees who reported other employees' improper conduct to their employer. Specifically, the Board found that the union threatened employees by posting a memo indicating that it would assess fines against the employees and/or blacklist them from union jobs if they reported fellow union member misconduct and/or participated in employer investigations. The Board also found that the union's attempt to have a particular employee disciplined by the employer for violations of minor work rules because that employee reported misconduct, and participated in the employer's investigation, also violated the National Labor Relations Act. This decision helps to ensure that employers receive reports from employees regarding misconduct in the workplace, and demonstrates the Board's willingness and ability to protect employee rights, whether the infringement stems from employer or union conduct.

Would you like to receive our *Employment and Labor Quarterly Update?* Sign up here.

Authors



Francine Esposito
Partner

Parsippany, NJ | (973) 966-8275

fesposito@daypitney.com



Rachel A. Gonzalez
Partner

Parsippany, NJ | (973) 966-8201

New York, NY | (212) 297-5800

rgonzalez@daypitney.com