

Human Resource Issues in a Family Business: “Critical Items for Business Families to Understand”



THE NETWORK OF
FAMILY BUSINESSES

April 19, 2012

Jacqueline Shulman
Jacqueline.shulman@obermayer.com
215-665-3134



1

Today's Topics – The NLRB: Your New Business Partner & More

- 1. Guess Who Has to Post a Notice Telling Every Employee about Joining a Union!**
- 2. New Faces on the NLRB Board: Will the Board now be more Employee-friendly?**
- 3. The NLRB is now “interested” in every Employer’s Social Media policies**
- 4. Helping Family to become better Employees, Handbooks & other Hints!**



2

NLRB Notice-Posting Rule

Notice-posting rulemaking:

- **December 22, 2010:** Proposed Notice rule published
- **Approximately 7,000 public comments** were submitted
- **Effective date postponed several times:**
 - ▲ Final Notice Rule's original effective date was November 14, 2011
 - ▲ The Board then moved the effective date to January 31, 2012, and now to April 30, 2012

Will there be another postponement because of the pending legal challenges to the posting????



NLRB Notice-Posting Rule

Summary of NLRB Notice-Posting Requirement:

- All employers subject to the NLRA must post the required notice
- Notice-posting is required in “all places where notices to employees concerning personnel rules or policies are customarily posted”
- Notices must be posted or distributed in foreign languages where 20 percent of the workforce “is not proficient in English and speaks a language other than English”
- Notices must also be posted on intranet/internet sites “if the employer customarily communicates with its employees about personnel rules or policies by such means”
- The posted notice must be at least 11 inches by 17 inches, as released by the Board (available at www.nlrb.gov/poster) --Foreign language posters also available at this site
- **Penalties for non-compliance with notice-posting requirement:**
 - ▲ possible Unfair Labor Practice litigation based on failure to post required notice;
 - ▲ potential tolling of six-month statute of limitations for Unfair Labor Practices;
 - ▲ potential inference of unlawful motivation or anti-union animus

NLRB Notice-Posting Rule

Under the NLRA, you have the right to:

- Organize a union to negotiate with your employer concerning your wages, hours, and other terms and conditions of employment.
- Form, join or assist a union.
- Bargain collectively through representatives of employees' own choosing for a contract with your employer setting your wages, benefits, hours, and other working conditions.
- Discuss your wages and benefits and other terms and conditions of employment or union organizing with your co-workers or a union.
- Take action with one or more co-workers to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government agency, and seeking help from a union.
- Strike and picket, depending on the purpose or means of the strike or the picketing.
- Choose not to do any of these activities, including joining or remaining a member of a union.

NLRB Notice-Posting Rule

Under the NLRA, it is illegal for your employer to:

- Prohibit you from talking about or soliciting for a union during non-work time, such as before or after work or during break times; or from distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms.
- Question you about your union support or activities in a manner that discourages you from engaging in that activity.
- Fire, demote, or transfer you, or reduce your hours or change your shift, or otherwise take adverse action against you, or threaten to take any of these actions, because you join or support a union, or because you engage in concerted activity for mutual aid and protection, or because you choose not to engage in any such activity.

NLRB Notice-Posting Rule

- Threaten to close your workplace if workers choose a union to represent them.
- Promise or grant promotions, pay raises, or other benefits to discourage or encourage union support.
- Prohibit you from wearing union hats, buttons, t-shirts, and pins in the workplace except under special circumstances.
- Spy on or videotape peaceful union activities and gatherings or pretend to do so.

NLRB Notice-Posting Rule

Under the NLRA, it is illegal for a union or for the union that represents you in bargaining with your employer to:

- Threaten or coerce you in order to gain your support for the union.
- Refuse to process a grievance because you have criticized union officials or because you are not a member of the union.
- Use or maintain discriminatory standards or procedures in making job referrals from a hiring hall.
- Cause or attempt to cause an employer to discriminate against you because of your union-related activity.
- Take adverse action against you because you have not joined or do not support the union.

NLRB Notice-Posting Rule

If you and your co-workers select a union to act as your collective bargaining representative, your employer and the union are required to bargain in good faith in a genuine effort to reach a written, binding agreement setting your terms and conditions of employment. The union is required to fairly represent you in bargaining and enforcing the agreement.

NLRB Notice-Posting Rule

Illegal conduct will not be permitted. If you believe your rights or the rights of others have been violated, you should contact the NLRB promptly to protect your rights, generally within six months of the unlawful activity. You may inquire about possible violations without your employer or anyone else being informed of the inquiry. Charges may be filed by any person and need not be filed by the employee directly affected by the violation. The NLRB may order an employer to rehire a worker fired in violation of the law and to pay lost wages and benefits, and may order an employer or union to cease violating the law. Employees should seek assistance from the nearest regional NLRB office, which can be found on the Agency's Web site: <http://www.nlr.gov>.

NLRB Notice-Posting Rule

You can also contact the NLRB by calling toll-free: **1-866-667-NLRB (6572)** or (TTY) **1-866-315-NLRB (1-866-315-6572)** for hearing impaired.

If you do not speak or understand English well, you may obtain a translation of this notice from the NLRB's Web site or by calling the toll-free numbers listed above.

This is an official Government Notice and must not be defaced by anyone.



11

■ Do I have to post the notice?

The following employers are excluded from NLRB jurisdiction by statute or regulation:

- Federal, state and local governments, including public schools, libraries, and parks, Federal Reserve banks, and wholly-owned government corporations.
- Employers who employ only agricultural laborers, those engaged in farming operations that cultivate or harvest agricultural commodities or prepare commodities for delivery.
- Employers subject to the Railway Labor Act, such as interstate railroads and airlines.



12

What if I communicate with employees electronically?

Employers who typically post personnel rules and policies on an internet or intranet site should also post the Notice of NLRA rights there, in addition to a physical posting. Employers are not required to distribute the posting by email, Twitter, Facebook or other electronic means.

Many of my employees speak a language other than English. Will I still have to post the Notice?

Yes. The Notice must be posted in English and in another language if at least 20% of employees are not proficient in English and speak the other language. The Board will provide translations of the Notice, and of the required link to the Board's website, in the appropriate languages. If a translation of the appropriate language is not available, the employer will not be liable for non-compliance.

If a workforce includes two or more groups, each constituting at least 20 percent of the workforce, who speak different languages, the employer must post the Notice in the language spoken by the larger group, and then may either post the Notice in the language(s) spoken by the other group(s) or, at the employer's option, distribute copies of the Notice to those employees in their language(s). If such an employer is also required to post the Notice electronically, it must do so in each of those languages.

What will be the consequences for failing to post the Notice?

The NLRB does not audit workplaces or initiate enforcement actions on its own, nor does it have the ability to assess fines or penalties. A failure to post the Notice would need to be brought to the Board's attention in the form of an unfair labor practice charge by employees, unions, or other persons. In most cases, the Board expects that employers who fail to post the Notice were unaware of the rule and will comply when requested by a Board agent. In such cases, the unfair labor practice case will typically be closed without further action. The Board also may extend the 6-month statute of limitations for filing a charge involving other unfair labor practice allegations against the employer.

If an employer knowingly and willfully fails to post the Notice, that failure may be considered evidence of unlawful motive in an unfair labor practice case involving other alleged violations of the NLRA.

How can I get copies of the Notice?

The easiest way to obtain the Notice is to download it from www.nlr.gov/poster and print it on a single 11-by-17 paper or two 8-by-11 papers taped together. Free copies of the Notice are available on request from [any NLRB regional office](#). Finally, employers can satisfy the rule by purchasing and posting a set of workplace posters from a commercial supplier.

New Faces On The NLRB

- **NLRB governed by a five person Board and a General Counsel, all appointed by the President with the consent of the Senate (3 Democrats/2 Republicans).**
- **Obama made two recess appointments in 2010 (Craig Becker – SEIU attorney and Mark Pearce – NY Dept. of Labor).**
- **Becker’s term ended December 31, 2011, leaving Board without a quorum.**

New Faces On The NLRB

- **Pearce named Chairman to replace Wilma Liebman whose term expired.**
- **January 4, 2012 – Obama made 3 more recess appointments (Sharon Block, Terrence F. Flynn and Richard Griffin).**
- **June 21, 2010, Obama named Lafe Solomon named Acting General Counsel (Career NLRB attorney and very pro-union/ anti-business).**

The NLRB Offers Guidance On Social Media Policies And Practices

The NLRB's Acting General Counsel ("AGC") released a report summarizing a number of recent NLRB decisions involving employers' restrictions on employee use of social media. Although these decisions do not have the same force and effect as cases decided by a court of law, they provide insight as to how the NLRB is currently reviewing social media issues that impact employee rights which are protected by Section 7 of the National Labor Relations Act

It is important to remember that an employee need not be represented by a Union to be protected under the Act

In general, an employer commits an unfair labor practice by interfering, restraining or coercing an employee in the exercise of his/her rights under Section 7 of the Act. Section 7 provides, in relevant part, that "an employee shall have the right to . . . engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection"

The NLRB Offers Guidance On Social Media Policies And Practices

The AGC's Report summarizes the facts of each case and identifies which employer social media policies and practices violated employee Section 7 rights and which were deemed to be lawful

The following are examples of cases where the NLRB found unlawful employer policies or practices (i.e., a violation of employee Section 7 rights and lawful employer policies and practices:

The NLRB Offers Guidance On Social Media Policies And Practices

■ Unlawful Policies and/or Practices

- Terminating an employee who made and received comments about her supervisor on her Facebook page, whom she called a “scumbag.”
- Terminating an employee who commented on a coworker’s Facebook page that their manager was “such an asshole” for improperly deducting taxes from their pay.
- Maintaining a social media policy that prohibited “rude and discourteous” language to a client or co-worker.
- Maintaining a social media policy that prohibited employees from posting pictures of themselves which depict the company in any way, including a company uniform, corporate logo, or company vehicle.
- Terminating an employee who posted pictures of, and sarcastic comments about, food and beverages that were served by his company as a part of a sales promotion event.

The NLRB Offers Guidance On Social Media Policies And Practices

■ Lawful Policies and/or Practices

- Terminating an employee who posted inappropriate comments about mentally disabled patients she cared for during a Facebook conversation with two friends who were not coworkers.
- Terminating a bartender who commented on Facebook about customers and his employer’s tipping policy in response to a question from a relative who was not an employee. The bartender referred to his customers as “rednecks” and stated that he hoped they choked on glass as they drove home drunk.
- Maintaining a policy that required employees to respond to all media questions by replying that they were not authorized to comment for the employer, to take the name and number of the media organization and to call the company’s public affairs office.

The NLRB Offers Guidance On Social Media Policies And Practices

- If your Company has a Social Media Policy, make sure it complies with the law!!!
- **Practice Tip** – Add a statement that: *“Nothing in this policy is intended to violate an employee’s rights under the National Labor Relations Act or any other state, federal or local law”*.

Family Members Need To Be Good Employees Too!

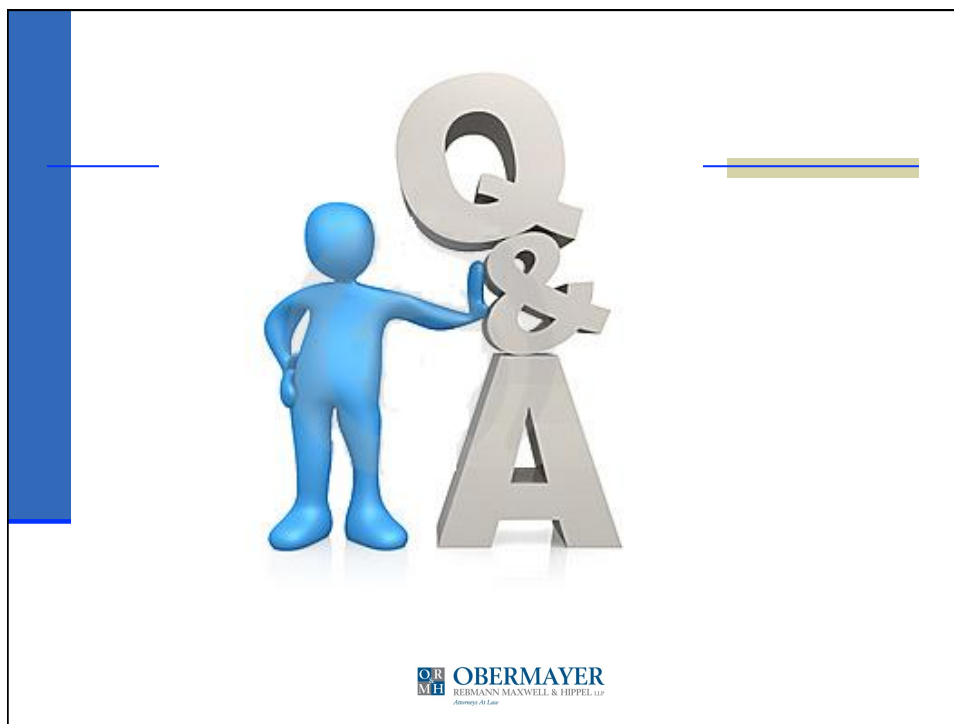
- No special protection for family members who violate federal, state or local employment and discrimination laws.
- In fact, violations by family members may place a company at greater risk for lawsuits and large monetary awards from juries.
- Critical to have policies and procedures that are applied consistently to all employees, including family members.

Helpful Hints for Success


- **Employee Handbooks – an effective way to communicate that your company is a great place to work – but only if the policies are applied consistently to all.**
- **Communication is key - and with family members setting the proper tone.**
- **If it feels good – don't do it!**
- **Follow the “Golden Rule” and almost any claim of unfair treatment/discrimination will be defensible.**

Helpful Hints for Success

- **Unfair treatment and/or poor communication by management are primary reasons employees try to bring in a union (not wages or benefits).**
- **Difficult to win a union election if a supervisor has treated employees unfairly (common problem in family businesses).**
- **Riskier now with the new Posting and anti-business NLRB.**
- **Supervisory Training is key!**




***Human Resource Issues in a
Family Business:
“Critical Items for Business
Families to Understand”***



THE NETWORK OF
FAMILY BUSINESSES
April 19, 2012

Jacqueline Shulman
Jacqueline.shulman@obermayer.com
215-665-3134



28