Pre-Conference Special Briefings

THE UNFAIR LABOR PRACTICE PROCESS

RECENT UPDATES FROM THE NLRB AND BEST PRACTICES

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The Unfair Labor Practice Process: Recent Updates From the NLRB and Best Practices

Presenters
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What’s a ULP?
- Unfair Labor Practice Charge
- Alleges a Violation of NLRA
- Filed by ???
Investigated, Litigated, and Decided by the NLRB

- Odds favor the House
- Board Agents
  - Not neutrals
  - Attorneys?
  - All represented by a union
- “Field Attorneys” and “Field Examiners”
  - Hiring criteria

Update: NLRB ULP Cases Continue to Decline

- ULP Cases Filed in FY 2018: 18,870
- ULP Cases Filed in FY 2013: 21,394
- Board projects 2020 drop
  - Between 500-1,000 (total)
- Merit Findings: Approx. 33%
  - Varies greatly by region
    - Region 28 (Phoenix, Vegas): Avg. 40-65%
Get a ULP Charge?
Highest Priority – Figure Out Why

- If workforce represented:
  - Union seeking leverage?
    - CBA expiration pending?
- If not represented:
  - Union campaign going on?
  - If post-petition, timing generally important
    - Close to election date?

So You Say There’s No Campaign?

- Really?
  - It’s just an employee acting alone who found his/her way to the NLRB?
  - Don’t make assumptions. Nail it down.
- If you are certain no campaign, evaluate if any issues that might cause a campaign
- If employee found the NLRB, can also find a union
After Figuring Out the Why, Start Thinking About Who

- Board agents are people, too
- Very different styles, perhaps interests, perspectives, and approaches based on experience
- Try and get info about agent
- Mirror agent’s approach
- Understand agent’s concerns and deadlines

Evaluate How to Respond

- Request EAJA letter
- Prepare position statement. Like one for EEOC, but argue the facts and the law.
- Ask for an extension
  - Case processing deadlines and RD’s approach can affect agent’s ability to grant extension
What About Providing Witnesses for Affidavits?

- Almost always requested
- Generally, don’t do it
- Limited exceptions:
  - Complicated relevant technical info
  - Credibility is crucial to allegation and you can corroborate your witness (compellingly)
  - You filed the charge
  - Agent tells you “management views failure to provide this/any witness as a “substantial refusal to cooperate.” OM 19-05 (more on that later)

Provide – And Argue – The Law

- Board agents know the basics and settled law
- Not all cases are basic, and all have nuances
- Recent developments might be helpful, and should be explained and emphasized
  - Great resources available:
    - NLRB public website search function for cases
    - NLRB manuals (website)
    - CiteNet
    - DLL treatise
Your Position Statement Isn’t Likely the End

- Expect additional requests, especially if witnesses identify other witness or documents (...emails 😞)
- Might get an investigative subpoenas
  - Recently “disfavored” (OM 19-05)
    - Cause delay
    - Trade-off: potential negative inference if deemed “substantial failure to cooperate”
  - Subpoenas for testimony uncommon

Behind the Closed Doors ...

- “Final Investigative Report” or “Agenda Outline”
- “Management” reviews
- Generally: RD (or another manager) decides based on Report and supervisor comments
- Close cases go to “Agenda” – a meeting of investigating agent, RD, and other managers to discuss, debate, and decide
Allegation: Nevada General Hospital disciplined tech Kisicki for engaging in PCA.

- Kisicki was never disciplined previously.
- On weekend, washer to clean surgical tools broke.
- Supervisor Adlong directed Kisicki to use hot water from coffee machine, then the ultrasonic sterilizer.
- Kisicki told a nurse and an x-ray tech about Adlong’s instruction, and asked what they thought about Adlong’s directive.
- Without telling Adlong, and without cleaning the tools (with hot water from the coffee maker or using the ultrasound machine), Kisicki went home.

Welcome to an Agenda Meeting

- Adlong called Kisicki, angrily asked why he disregarded directive.
- First thing Monday, Kisicki went to HR about it.
- Adlong fired Kisicki for insubordination.
- Adlong had not disciplined any other employee for insubordination.
- Kisicki is not represented.
- There is no active union campaign.
Agenda Results: RD Decision

Merit?
No Merit?

Agenda Results: Individual Votes

Merit?
No Merit?
Well, This RD Found “Merit.”

Now What?

- Settlement offer from the region
- So we negotiate, both parties compromise, and get a deal, right?
- Not at the NLRB
- Board’s primary concern is not working toward a deal, but vindicating the purposes of the Act
  - Secondarily, the aggrieved employee

So, What’s the Settlement Offer?

- Reinstatement
- 100% back pay (maybe bills Kisicki couldn’t pay while unemployed?)
- A “Notice” posting to inform all employees
A Notice Posting?

- Extensive Notice Detailing Employee Section 7 Rights
  - Posted in all breakrooms, all facilities
  - Posted on Hospital Intranet or emailed to all employees
  - A provision stating employees have the right to criticize the Hospital and its managers
  - A provision stating that employees have the right to talk to each other about all terms and conditions of employment, including directives issued by their managers
  - Series of promises that the Hospital won’t do anything to interfere with those rights
  - Promise to reinstate Kisicki with full back pay
  - Promise that Hospital will not retaliate against Kisicki or other employees for exercising their Section 7 Rights

And a Settlement Agreement With Default Language

- Default?
  - If Hospital violates agreement’s extensive list of promises, the Board has the right to reinstate the complaint and request default judgment
  - At any future time
  - Even if Kisicki was re-employed and paid
What’s the Bottom Line?

- Reinstatement, or waiver by employee
- At least 80% of back pay; more if employee waives that right
- Notice regarding employee Section 7 rights
- Promise Hospital won’t interfere with those rights
- Statement that Hospital offered reinstatement, Kisicki declined with back pay
- Promise that Hospital will not retaliate against employees for exercising their Section 7 rights

What’s the Bottom Line?

- Default language in settlement agreement?
  - Not required by NLRB GC
  - Discretion of RD
    - So varies greatly based on RD
    - E.g., Region 28 – very unusual to get agreement without it
Non-Admissions Clause in Settlement Agreement?

- Less likely after Complaint
- Can’t post the agreement with non-admissions clause
- What good are they?
- Worth it for potential defensive value – if union spins

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