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Employment Practices Facing NLRB Scrutiny

Presented by

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November 16, 2012

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EMPLOYMENT PRACTICES FACING NLRB SCRUTINY

- Class Action Waivers in Mandatory Arbitration Agreements.
- Confidentiality instructions during internal investigations.
- At-will employment statements and disclaimers.
- Regulating employees' use of social media.

SECTION 7 OF THE NATIONAL LABOR RELATIONS ACT
29 U.S.C. § 157

Protects employees' rights to engage, or refrain from engaging, in:

- Self organizing.
- Forming, joining or assisting labor organizations.
- Engaging in other concerted activities for the purposes of:
  - collective bargaining; or
  - other mutual aid and protection.

CLASS ACTION WAIVERS IN MANDATORY ARBITRATION AGREEMENTS

D.R. Horton, Inc. and Michael Cuda,
357 N.L.R.B. slip op. 184 (Jan. 3, 2012)

24 Hour Fitness USA, Inc. and Alton J. Sanders,
ALJ Dec., 20-CA-035419 (Nov. 6, 2012)

CLASS ACTION WAIVERS IN MANDATORY ARBITRATION AGREEMENTS: *D.R. HORTON*

The arbitration agreement provided that:

- All disputes and claims relating to the employee's employment would be determined exclusively by final and binding arbitration.

- The arbitrator:
  - may hear only Employee's individual claims;
  - lacks authority to consolidate the claims of other employees; and
  - lacks authority to fashion a proceeding as a class or collective action or to award relief to a group or class of employees in one arbitration proceeding.

- The employee waives rights to:
  - file a lawsuit or other civil proceeding relating to his employment; and
  - resolve employment-related disputes in a proceeding before a judge or jury.

CLASS ACTION WAIVERS IN MANDATORY ARBITRATION AGREEMENTS: *D.R. HORTON*

The Board held that:

- Filing or joining a collective or class action asserting employment-related claims in court or before an arbitrator constitutes protected concerted activity under Section 7.

- The arbitration agreement at issue violated:
  - Section 8(a)(1) of the NLRA because it restricted employees' ability to exercise Section 7 right to file or join a collective or class action asserting employment related claims.
  - Section 8(a)(4) of the NLRA because its language would lead employees to reasonably believe that they were prohibited from filing ULP charges with the NLRB.

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CLASS ACTION WAIVERS IN MANDATORY ARBITRATION AGREEMENTS: *D.R. HORTON*

Pending Appeal:

D.R. Horton, Inc. v. NLRB,

(5th Cir. No. 12-60031)

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CLASS ACTION WAIVERS IN MANDATORY ARBITRATION AGREEMENTS: *24 HOUR FITNESS USA, INC.*

The employee handbook arbitration of disputes policy and handbook acknowledgment provided that:

- Employees agreed that they would submit all disputes relating to their employment exclusively to final and binding arbitration *unless* they opted out of the arbitration of disputes policy by signing and submitting an opt-out form within 30 calendar days after receiving the handbook.

- Employees could not pursue class actions through arbitration.

- Except as required by law, neither a party nor an arbitrator may disclose the existence, content, or results of any arbitration under the policy without the prior written consent of both parties.

CLASS ACTION WAIVERS IN MANDATORY ARBITRATION AGREEMENTS: *24 HOUR FITNESS USA, INC.*

The NLRB ALJ:

- Held that the class action ban and the nondisclosure restriction contained in the arbitration policy violated Section 8(a)(1) of the NLRA by restricting employees from exercising their Section 7 rights.

- Declined to distinguish the arbitration policy from the agreement in *D.R. Horton* because the opt-out was an "illusion" that required affirmative action by employees to preserve their Section 7 rights and did not reduce the chilling effects that the class action ban and nondisclosure provisions would have on employees' concerted activity.

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CONFIDENTIALITY INSTRUCTIONS DURING INTERNAL INVESTIGATIONS

Banner Health System,

358 N.L.R.B. slip op. 93 (July 30, 2012)

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CONFIDENTIALITY INSTRUCTIONS DURING INTERNAL INVESTIGATIONS: *BANNER HEALTH SYS.*

HR consultant retained to conduct investigation of internal employee complaints had a custom of asking complaining employees not to discuss the matters with their coworkers while the employer's investigations were ongoing.

CONFIDENTIALITY INSTRUCTIONS DURING INTERNAL INVESTIGATIONS: *BANNER HEALTH SYS.*

The Board held that:

- The employer's blanket confidentiality rule for matters pending investigation violated Section 8(a)(1) of the NLRA.

- To justify a prohibition on employee discussion of ongoing investigations, employers must show they have a legitimate business justification that outweighs employees' Section 7 rights, such as:

  - the need to protect witnesses;
  - the likelihood that evidence may otherwise be destroyed;
  - the threat that subsequent testimony would be fabricated; or
  - the need to prevent a cover-up.

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CONFIDENTIALITY INSTRUCTIONS DURING INTERNAL INVESTIGATIONS: *BANNER HEALTH SYS.*

Pending Appeal:

Banner Health System v. NLRB,

(D.C. Cir. Nos. 12-1359 & 12-1377)

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AT-WILL EMPLOYMENT STATEMENTS AND DISCLAIMERS

American Red Cross Arizona and Lois Hampton, ALJ Decision, 28-CA-23443 (Feb. 1, 2012)

Hyatt Hotels, Compl., 28-CA-061114 (Feb. 29, 2012)

SWH Corporation d/b/a Mimi's Café, Advice Mem., Case 28-CA-084365 (Oct. 31. 2012)

Rocha Transportation, Advice Mem., Case 32-CA-086799 (Oct. 31, 2012)

AT-WILL EMPLOYMENT STATEMENTS AND DISCLAIMERS: *AMERICAN RED CROSS ARIZONA*

"I further agree that the at-will employment relationship cannot be amended, modified or altered in any way."

AT-WILL EMPLOYMENT STATEMENTS AND DISCLAIMERS: *AMERICAN RED CROSS ARIZONA*

The NLRB ALJ held that the at-will employment acknowledgment language violated Section 8(a)(1) of the NLRA because it premised employment on an employee's agreement not to take an concerted actions to change the at-will employment status including actions that could result in union representation and in a collective bargaining agreement.

AT-WILL EMPLOYMENT STATEMENTS AND DISCLAIMERS: *AMERICAN RED CROSS ARIZONA*

American Red Cross Arizona and the NLRB settled this matter, so the Board did not consider the ALJ's determinations.

AT-WILL EMPLOYMENT STATEMENTS AND DISCLAIMERS: *HYATT HOTELS*

Employee Acknowledgment:

I understand my employment is "at will." This means I am free to separate my employment at any time, for any reason, and Hyatt has these same rights. Nothing in this handbook is intended to change my at-will employment status. I acknowledge that no oral or written statements or representations regarding my employment can alter my at-will employment status, except for a written statement signed by me and either Hyatt's Executive Vice-President/Chief Operating Officer or Hyatt's President.

AT-WILL EMPLOYMENT STATEMENTS AND DISCLAIMERS: *HYATT HOTELS*

Hyatt Hotels and the NLRB settled this matter before there was a hearing before an NLRB ALJ.

AT-WILL EMPLOYMENT STATEMENTS AND DISCLAIMERS: *MIMI'S CAFÉ*

Employee Handbook At-Will Statement:

The relationship between you and Mimi's Café is referred to as "employment at will." This means that your employment can be terminated at any time for any reason, with or without cause, with or without notice, by you or the Company. No representative of the Company has authority to enter into any agreement contrary to the foregoing "employment at will" relationship. Nothing contained in this handbook creates an express or implied contract of employment.

AT-WILL EMPLOYMENT STATEMENTS AND DISCLAIMERS: *MIMI'S CAFÉ*

The NLRB's Division of Advice found that the at-will language was lawful because, when read in context, it:

- Would not reasonably be interpreted to restrict an employee's Section 7 rights to:
  - engage in concerted attempts to change his employment at-will status; or
  - select a collective bargaining representative and bargain collectively for a contract.
- Only highlights that company representatives are not authorized to modify an employee's at-will status and reinforces that nothing in the handbook creates an employment contract.

AT-WILL EMPLOYMENT STATEMENTS AND DISCLAIMERS: *ROCHA TRANSP.*

Employee Handbook At-Will Statement:

Employment with Rocha Transportation is employment at-will. Employment at-will may be terminated with or without cause and with or without notice at any time by the employee or the Company. Nothing in this Handbook or in any document or statement shall limit the right to terminate employment at-will. No manager, supervisor, or employee of Rocha Transportation has any authority to enter into an agreement for employment for any specified period of time or to make an agreement for employment other than at-will. Only the president of the Company has the authority to make any such agreement and then only in writing.

AT-WILL EMPLOYMENT STATEMENTS AND DISCLAIMERS: *ROCHA TRANSP.*

The NLRB's Division of Advice found that the at-will employment language was lawful because, when read in context, it:

- Would not reasonably be interpreted to restrict an employee's Section 7 rights to:
  - engage in concerted attempts to change his employment at-will status; or
  - select a collective bargaining representative and bargain collectively for a contract.
- Only prohibits the employer's representatives from entering into employment contracts with employees for something other than at-will employment, but explicitly permits the employer's president to enter into written employment agreements that modify the at-will relationship, including, possibly, collective bargaining agreements.

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REGULATING EMPLOYEES' USE OF SOCIAL MEDIA

Costco Wholesale Corporation, 358 N.L.R.B. slip op. 106 (Aug. 27, 2012)

Karl Knauz Motors, Inc., 358 N.L.R.B. slip op. 164 (Sept. 28, 2012)

Echostar Technologies, L.L.C., ALJ Decision,
27-CA-066726 (Sept. 20, 2012)

Cox Communications, Inc., Advice Mem.,
Case 17-CA-087612 (Oct. 19, 2012)

Report of the Acting General Counsel Concerning Social Media Cases,
Mem. OM 12-59, (May 30, 2012)

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REGULATING EMPLOYEES' USE OF SOCIAL MEDIA: *COSTCO WHOLESALE CORP.*

Objectionable Social Media Policy provision:

The employer maintained a policy that prohibited employees from electronically posting statements that "damage the Company, defame any individual or damage any person's reputation, or violate the policies outlined in the Costco Employee Agreement."

REGULATING EMPLOYEES' USE OF SOCIAL MEDIA: *COSTCO WHOLESALE CORP.*

The Board held that:

- Although the rule does not explicitly restrict Section 7 rights, employees could reasonably construe it to prohibit Section 7 activity, because employee statements that criticize or protest the terms and conditions of employment could "damage the Company, defame any individual or damage any person's reputation."

- This overbroad rule does not provide any exception for employee statements that are protected by Section 7.

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REGULATING EMPLOYEES' USE OF SOCIAL MEDIA: *COSTCO WHOLESALE CORP.*

Pending Appeal:

Costco Wholesale Corp. v. NLRB,

(D.C. Cir. No. 12-1389)

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REGULATING EMPLOYEES' USE OF SOCIAL MEDIA: *KARL KNAUZ MOTORS*

Objectionable Social Media Policy provision:

Everyone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as their fellow employees. No one should be disrespectful or use profanity or other language which injures the image or reputation of the Dealership.

REGULATING EMPLOYEES' USE OF SOCIAL MEDIA: *KARL KNAUZ MOTORS*

The Board held that the courtesy rule violated Section 8(a)(1) of the NLRA because:

- It was ambiguous as to whether it prohibited Section 7 activity because it did expressly exempt Section 7 activity from the prohibitions on disrespectful or reputation damaging statements.

- It could be construed as prohibiting employees from discussing and criticizing with other employees their terms and conditions of employment, all of which are activities protected under Section 7 of the NLRA.

REGULATING EMPLOYEES' USE OF SOCIAL MEDIA: *ECHOSTAR TECHS.*

Objectionable Social Media Policy provisions:

- You may not make disparaging or defamatory comments about EchoStar, its employees, officers, directors, vendors, customers, partners, affiliates, or our, or their, products/services; and
- Unless you are specifically authorized to do so, you may not: Participate in these activities with EchoStar resources and/or on Company time . . . .

Handbook Savings Clause:

One or more of the polices set forth in this Handbook may be affected by the application of law. Should a conflict arise between a EchoStar policy and the law, the appropriate law shall be applied and interpreted so as to make the policy lawful in that particular jurisdiction.

REGULATING EMPLOYEES' USE OF SOCIAL MEDIA: *ECHOSTAR TECHS.*

The ALJ held that:

- The anti-disparagement rule is overbroad and would be reasonably read to interfere with employees' Section 7 rights.

- The handbook "savings clause":
  - did not create a remedy for the employee to exhaust before the force of the rules in the handbook may be tested; and
  - did not immunize the chilling effect of the overbroad anti-disparagement provision in the social media policy.

- The prohibition of social media on "company time" was unlawfully overbroad.

REGULATING EMPLOYEES' USE OF SOCIAL MEDIA: *COX COMMUNICATIONS, INC.*

Social Media Policy Language:

Nothing in Cox's social media policy is designed to interfere with, restrain, or prevent employee communications regarding wages, hours, or other terms and conditions of employment. Cox Employees have the right to engage in or refrain from such activities. . . .

DO NOT make comments or otherwise communicate about customers, coworkers, supervisors, the Company, or Cox vendors or suppliers in a manner that is vulgar, obscene, threatening, intimidating, harassing, libelous, or discriminatory on the basis of age, race, religion, sex, sexual orientation, gender identity or expression, genetic information, disability, national origin, ethnicity, citizenship, marital status, or any other legally recognized protected basis under federal, state, or local laws, regulations, or ordinances. Those communications are disrespectful and unprofessional and will not be tolerated by the Company. . .

DO respect the laws regarding copyrights, trademarks, rights of publicity and other third-party rights. To minimize the risk of a copyright violation, you should provide references to the source(s) of information you use and accurately cite copyrighted works you identify in your online communications. Do not infringe on Cox logos, brand names, taglines, slogans, or other trademarks.

REGULATING EMPLOYEES' USE OF SOCIAL MEDIA: *COX COMMUNICATIONS, INC.*

Termination Facts:

•A technical support employee informed a customer that his cable was out because of scheduled maintenance outage. The dissatisfied customer called the employee a faggot. The employee maintained a "Google+" account that listed his affiliation with Cox under his profile page, which is publicly accessible to all Google+ users, including customers of the company. The employee immediately posted on "Google+" account:

> Just because you are having problems with your tv service does not mean you should call me a faggot! F--K YOU!

• Another employee then posted a responsive sarcastic comment.

•Cox terminated the employee for using lewd language on social media which disparaged customers.

REGULATING EMPLOYEES' USE OF SOCIAL MEDIA: *COX COMMUNICATIONS, INC.*

The NLRB's Division of Advice found that:

- The policy provision restricting communications about customers, coworkers, supervisors, the Company, or vendors or suppliers was lawful because it clarified and restricted the scope of prohibitions by including examples of clearly illegal or unprotected conduct, so that they would not reasonably be construed to cover Section 7 activity.
- The policy provision directing employees to "respect the laws regarding copyrights, trademarks, rights of publicity and other third-party rights" was lawful because it did not prohibit the use, but merely urged employees to respect the laws.
- The policy's savings clause ensured that employees would not reasonably interpret any potentially ambiguous provision in a way that would restrict Section 7 activity.
- The termination was lawful because the employee did not engage in concerted activity protected by the NLRA.

REGULATING EMPLOYEES' USE OF SOCIAL MEDIA: *REPORT OF THE ACTING GENERAL COUNSEL*

The Report:

- Addresses a number of policies, explaining which provisions the Acting General Counsel believes the Board would find lawful and unlawful.

- Provides an example of a lawful social media policy.

- Explained that overbroad social media policies are not cured by including a savings clause to the effect that "the policy will be administered in compliance with applicable laws and regulations."

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REGULATING OFF-DUTY EMPLOYEE ACCESS TO AN EMPLOYER'S FACILITIES

Saint John's Health Center,
357 N.L.R.B. slip op. 170 (Dec. 30, 2011)

Sodexo America LLC,
358 N.L.R.B. slip op. 79 (July 3, 2012)

Marriott International, Inc.,
359 N.L.R.B. slip op. 8 (Sept. 28, 2012)

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Relevant PLC Resources

Available with Free Trial to PLC

- Employee Rights and Unfair Labor Practices Under the National Labor Relations Act
- Disciplining Employees for Social Media Posts in View of the NLRA
- Policy Disclaimer of Restrictions on Employees' NLRA Rights

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About the Speakers

Lafe E. Solomon, *National Labor Relations Board*

The General Counsel, appointed by the President to a 4-year term, is independent from the Board and is responsible for the investigation and prosecution of unfair labor practice cases and for the general supervision of the NLRB field offices in the processing of cases.

Lafe Solomon, a career NLRB attorney, was named Acting General Counsel by President Obama as of June 21, 2010. The Agency's top investigative and prosecutorial position, the General Counsel has supervisory authority over all Regional Offices and guides policy on issuing complaints, seeking injunctions, and enforcing the Board's decisions.

Mr. Solomon began his Agency career as a field examiner in Seattle in 1972. After taking a break to pursue a law degree, he returned as an attorney in the Office of Appeals. He transferred to the Appellate Court Branch in 1979. Two years later, he left the General Counsel side of the Agency to join the staff of former Board Member Don Zimmerman. He went on to work for another nine Board Members, including Donald Dotson, Robert Hunter, John Higgins, James Stephens, Mary Cracraft, John Raudabaugh, William Gould, Sarah Fox and Wilma Liebman.

A native of Helena, Arkansas, Mr. Solomon received a B.A. degree in Economics from Brown University in 1970 and a J.D. from Tulane University in 1976.

Mr. Solomon's nomination to serve as General Counsel was sent to the Senate on January 5, 2011

About the Speakers

Steven M. Swirsky, *Epstein Becker Green*

Steven M. Swirsky is a Member of the Firm in the Labor and Employment and Health Care and Life Sciences practices, in the firm's New York office. He regularly represents employers in a wide range of industries, including retail, health care, manufacturing, banking and financial services, manufacturing, transportation and distribution, electronics and publishing. He frequently advises and represents United States subsidiaries and branches of Asian, European and other foreign-based companies.

Mr. Swirsky:

•Advises employers on a full range of labor and employment matters involving labor and employment issues in transactional matters

•Represents employers in union avoidance, organizing campaigns, and related proceedings before the National Labor Relations Board

•Represents employers in collective bargaining and in connection with strikes, picketing and arbitration proceedings

•Handles grievances and arbitrations concerning work rule disputes and discharges, for both unionized and non-unionized employers

•Assists with employment litigation, including Title VII, ADEA, ADA and other employment discrimination matters before state and federal courts and administrative tribunals including the EEOC, and the New York State Division of Human Rights

•Prepares and revises employment manuals and personnel policy manuals

•Structures employment agreements, including those involving protection of trade secrets and proprietary technology, and litigation involving employment contracts, restrictive covenants, and protection of confidential and proprietary information.

From 1978 to 1983, Mr. Swirsky served as a Field Attorney with the National Labor Relations Board in Brooklyn, New York.

Mr. Swirsky is a contributor to the Management Memo blog and the Health Employment And Labor blog. He frequently writes and speaks on a wide range of labor and employment law matters and presently serves on the boards of several not-for-profit organizations. He also is currently noted in *The Best Lawyers in America, PLC Which Lawyer? Yearbook* and *New York Super Lawyers - Metro Edition.* In 2012, Mr. Swirsky was "Recommended" in the Labor - Management Relations - category by *Legal 500 United States*.

About the Speakers

Terence H. McGuire, *Practical Law Company*

Terence McGuire joined PLC from Epstein Becker & Green, P.C., where he was an associate in the labor and employment practice group, concentrating in traditional labor law and employment litigation matters.