NATIONAL LABOR RELATIONS ACT:
NOT JUST FOR UNIONIZED EMPLOYERS

by

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Whenever the words "National Labor Relations Act" or "National Labor Relations Board" are used, most employers whose employees are not members of a union stop paying attention, thinking that whatever is being said does not apply to them. This can lead to big trouble for such employers because, in fact, the National Labor Relations Act ("NLRA") applies to all employers whose business activities affect interstate or international commerce, with some exceptions that are not relevant to independent insurance agencies. In the current economy, there are very few employers who do not purchase or sell goods or services that move across state lines at some point in their journey from maker to end user.

For ease of administration, the National Labor Relations Board ("NLRB") has established monetary minimums in terms of annual revenue or sales or purchases of goods and services in commerce to determine when it will exercise its jurisdiction over a particular employer to enforce the NLRA. As a retail business, independent insurance agencies must have at least $500,000 in gross annual revenue to be subject to the NLRA.

Under the NLRA, all employees of a covered employer have the right not only "to form, join, or assist labor organizations", but also "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Such "concerted activities" include any action taken in pursuit of a common goal by multiple employees or by a single employee who is authorized by other employees to act on their behalf. As long as such activities concern the terms and conditions of their employment, the employee engaging in them will be protected under the NLRA from any action by the employer that has the effect of interfering with, restraining, or coercing the employee's exercise of the above rights. Employees in this context do not include either independent contractors or supervisors (any individual having authority, on behalf of the employer, to direct employees in the conduct of their activities or take action or recommend that action be taken that will affect their employment).

In the past few years, the NLRB has been using the "concerted activities" portion of the NLRA to go after employers who have taken disciplinary action against employees for posting derogatory comments about the employer or fellow employees on social media sites and other internet based forums. Examples of such "concerted activities" that have lead to the finding of an unfair labor practice by the employer include the following:

(i) An employee posted negative comments about her supervisor on the employee's personal Facebook page, which comments were responded to by other

employees of the employer and lead to the posting of additional negative comments about the supervisor by the employee. Some of the comments contained profanity and other rude and disrespectful language (the supervisor was referred to as a "scumbag", among other names). The employee was subsequently discharged for violating the employer's blogging and internet posting policy, which prohibited employees from making disparaging comments about the employer, co-workers, or competitors online, and for violating its conduct policy, which prohibited language or action that was inappropriate or of a general offensive nature or rude or discourteous towards a client or coworker. The NLRB found that the employee's actions constituted protected "concerted activity" and that the employer's internet posting and conduct policies violated the NLRA because they did not contain language that exempted from their application conduct protected by the NLRA.

(ii) A salesperson paid on commissions posted on his personal Facebook page photographs of an event held by his employer for customers of the business at which event "hot dogs from a cart, small bags of chips, inexpensive cookies, semi-fresh fruit, and water" were served to the customers. When the employee and his fellow salespeople were initially informed of the event and the food and beverages that would be served at it, both the employee and his fellow salespeople expressed concern to the employer and among themselves about the service of inexpensive food and beverages due to the possible negative effect it may have on the customers and consequently, on the salespeople's ability to earn commissions from sales to those customers in the future. Along with the photographs, the employee posted sarcastic and other negative comments about the event on his Facebook page. Even though apparently no comments about the posting were made by the other salespeople on the employee's Facebook page, the NLRB found that the employee's subsequent termination by the employer was an unfair labor practice because the employee had told the other salespeople he would be posting photographs of the event on his Facebook page and thus, was acting on behalf of the other salespeople in expressing their displeasure about the event.

As noted above, an employer's work rules, as well as its actions against its employees, can be held to violate the NLRA. The NLRB has held that any work rule that would "reasonably tend to chill employees in the exercise" of their rights under the NLRA constitutes an unfair labor practice. Under this standard, work rules that prohibit (i) the posting of photographs of the employer's place of business or that contain the employer's name or logo, (ii) the posting of any photographs of or personal information about coworkers, customers, or vendors, (iii) the posting of anything that would embarrass, harass, or defame coworkers or the employer, its officers, directors, or other representatives, and (iv) the posting of statements that are untruthful or might damage the reputation of the employer or coworkers have been held to violate the NLRA.

If the NLRB finds that an employer has engaged in an unfair labor practice, it can issue what amounts to an injunction against the employer requiring it to refrain from engaging in the future in similar activity and to reinstate any improperly discharged employee with back pay. Such injunctions are enforceable by federal district courts and can result in the imposition of monetary penalties against an employer who violates them

in the future. In light of this power, every business owner, no matter how small, should examine its policies and practices with respect to the posting of comments by its employees online and refrain from taking any adverse action against its employees based on such postings if they could be considered "concerted activities" by the employees in question. All such policies should be revised to conform to the requirements of the NLRA.

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