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FEDERAL AGENCY EXTENDS ITS REACH TO EMPLOYERS OF NON-UNION WORKERS

Over the last year or so, the National Labor Relations Board (the "NLRB") has issued rulings in a number of areas that impact employers without unions, on issues that have little to do with unions. But, they may not matter much. Confused? If so, you are not alone. Let's start with a brief overview of some of the NLRB's more controversial decisions in 2012. We will then touch on a recent federal appellate court decision concluding that certain appointments to the NLRB were unconstitutional, and therefore decisions of the NLRB after the date of those appointments are a nullity.

At-Will Disclaimers. Many employer handbooks have employment at-will disclaimers along the following lines: "I further agree that the at-will relationship cannot be amended, modified or altered in any way" or "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 [the Company's President or another senior executive]." In two separate decisions, the NLRB concluded that this language was overbroad and infringed on employees' rights under the National Labor Relations Act (the "Act"). They thereby concluded that this long accepted language was not enforceable — even though this issue has little to do with unions — because employees might be deterred from working together to change their at-will status.

Social Media. The NLRB and the NLRB's Acting General Counsel have taken separate actions that impact on the lawfulness of social media policies under the Act. The NLRB has decided two important social media cases. In one, the NLRB held that an employer violated the Act when it fired an employee for posting negative comments about her supervisor on her Facebook page. In the other, the NLRB ruled that a non-profit organization violated the Act when it terminated an employee over Facebook postings, applying the traditional analysis used to determine whether verbal communications among co-workers violated the Act to Facebook postings. Separately, in memoranda, the NLRB's Acting General Counsel has taken the position that principles developed under the Act long before social media apply fully in the social media context. Although the NLRB has long-held that the Act protects so-called "water cooler" discussions among employees, the Acting General Counsel



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ALERT

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may not have given sufficient weight to the differences between traditional verbal communications among workers and internet postings. Such postings are available not only to employees, but also to competitors, vendors, clients and the general public.

Litigation Waivers. On January 6, 2012, the NLRB ruled that a mandatory arbitration program (requiring employment disputes be arbitrated rather than decided in court) violated the Act because the program did not give the arbitrator the power to award relief to groups of employees, only to individuals. The Board's decision has been appealed and is currently pending in the U.S. Court of Appeals for the Fifth Circuit.

These Decisions may (or may not) be Void

On January 25, 2013, the U.S. Court of Appeals for the D.C. Circuit ruled that President Obama's "Recess Appointments" of three members of the NLRB violated the Constitution because President Obama made these appointments when Congress was not "in Recess." *Noel Canning v. NLRB*. The *Noel Canning* decision will almost certainly be appealed, but at least for now the decision casts doubt on orders the NLRB has made since January 4, 2012, when these appointments became effective. Ironically, a good argument can be made that this is good news for employers, given the nature of the NLRB's decisions.

Implications for Employers

In 2012, the NLRB issued a number of important decisions interpreting the Act in ways that impact even employers who do not have union employees. Employers should consider whether to update their policies and employee handbooks in light of the NLRB's decisions (and the Acting General Counsel's memoranda) discussed above. In conducting this analysis, employers should be aware of and monitor the *Noel Canning* decision and other cases concerning the constitutionality of the President's recent NLRB appointments and whether the NLRB's 2012 decisions remain in effect. MH&H can assist you with this analysis.



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