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NATIONAL LABOR RELATIONS BOARD

Colbert, Letterman, and the NLRB

by William W. Bowser

Stephen Colbert recently debuted as the new host of The Late Show. Although Colbert is a terrific talent, he acknowledged that he cannot replace his predecessor, David Letterman. Letterman is a true pioneer in the late night space, and he will be missed.

Letterman's departure marked the end of his popular long-running bits like "Will it float?" and "stupid pet tricks." Of course, his most popular and frequent shtick was his top 10 lists. Over the course of his career, Letterman and celebrity helpers such as Snoop Dog and Mick Jagger delivered 4,605 lists! Now they are gone but not forgotten. The Internet will make sure of that.

Although Letterman's lists provided comic relief, I think a top 10 list is a great way to summarize the sweeping changes the National Labor Relations Board (NLRB) has made over the past year or so.

With a new decision or policy seemingly coming out every week, it's hard to appreciate just how much has changed.

10 ways the NLRB can ruin your life

And now the list:

(10) Handbook provisions. The NLRB has attacked numerous common handbook provisions on the grounds that they somehow "chill" (dissuade) collective activity by employees. For example, the Board has found that "civility" policies that require employees to treat each other with respect violate the National Labor Relations Act (NLRA). In addition, the Board has struck down policies that prohibit the unauthorized use of company logos, copyrights, and trademarks. Incredibly, the Board has also struck down a policy prohibiting the use of confidential company information. The NLRB's so-called guidance on those issues is less than helpful and makes matters worse.

(9) Confidentiality of workplace investigations. The NLRB has complicated how employers can conduct workplace investigations. In *Banner Estrella,* the Board held that an employer could not have a blanket rule requiring that workplace investigations remain confidential while they are pending. An employer must be able to demonstrate that there is a threat to the integrity of the investigation. In *Piedmont Gardens,* the Board ruled for the first time that witness statements gathered during a workplace investigation must be turned over to the union upon request. Obviously, that decision will discourage employees who witness workplace misconduct from giving written statements.

(8) Access to corporate e-mail. In *Purple Communications,* the Board ruled that employers must allow employees to use corporate e-mail systems during nonwork time for union organizing and discussing terms and conditions of their employment. The ruling applies to both union and nonunion employers and will require employers to revise their policies on nonbusiness use of e-mail."

(7) Joint employment. Under a recent NLRB

ruling, a group of employees can have more than one employer for purposes of collective bargaining and remedying unfair labor practices (ULPs). In *Browning-Ferris,* the Board revised its "joint-employer" standard. Under the new standard, a company is a joint employer if it exercises "indirect control" over employees' working conditions or has "reserved authority" to do so. The decision may affect employers that use staffing agencies to obtain temporary employees. Those employers may be obligated to bargain with a union that organizes temporary employees and answer for ULPs committed by the staffing agency. (For more information on the *Browning-Ferris* decision, see "NLRB ruling on 'joint employers' opens door to unionization" on pg. 5.)

(6) Franchisors. In a development that is related to the joint-employment issue, the NLRB General Counsel has issued numerous complaints against McDonald's seeking to hold the company liable for the ULPs of its franchisees. The General Counsel alleges that McDonald's — through its franchise relationships and use of tools, resources, and technology — exercises sufficient control over its franchisees' operations to make it a joint employer. The Board's decision in *Browning-Ferris* makes the General Counsel's argument easier to accept.

(5) Microbargaining units. In *Specialty Healthcare,* the Board ruled that the bargaining unit proposed by a union seeking an election will be presumed appropriate and that excluded employees will be added to the unit only if they share "an overwhelming community of interest with those in the petitioned-for unit." The ruling will allow unions to pick off small groups of employees in which it has support. For example, in *Macy's, Inc.,* the NLRB allowed a bargaining unit that included only a store's fragrance and cosmetic department employees instead of the entire sales force.

(4) Social media. The Board has issued a plethora of opinions on the regulation of work-related conversations on social media sites such as Facebook and Twitter. Indeed, the ex-General Counsel issued two reports on the topic. Suffice it to say that social media communications that relate to working conditions are likely protected, even if they

are offensive or obscene or involve personal attacks on management.

(3) Drug testing. The NLRB has ruled that employees have the right to union representation during a drug test. That's right — employers may have to wait until a union representative is available before sending a worker for a drug test. Update your drug-testing procedures so you are not tripped up by this delay tactic.

(2) Electronic authorization cards. For the NLRB to schedule a union election, the union must provide evidence that at least 30 percent of bargaining unit employees support unionization. Until September 1, unions could provide evidence only by dated signatures on authorization cards or signature lists. The General Counsel has issued a new rule stating that authorization can be given electronically. As a result, unions will be able to gather signatures by e-mail and social media.

(1) "Quickie election" rules. Perhaps no act demonstrates the Board's prounion stance more than the complete revision of the rules governing representation elections. The new rules clearly make it easier for unions to organize by (1) shortening the time between the petition and the election and (2) limiting an employer's right to challenge the proposed bargaining unit and which employees are supervisors (and therefore ineligible to vote) before an election is held.

Bottom line

The NLRB's execution of its prounion agenda is in full swing. Both union and nonunion employers are in its crosshairs. HR professionals need to be proactive and review their policies to ensure compliance with the Board's new mandates. Nonunion employers should also be communicating to their employees their views on unionization and be on the lookout for signs of organizing activity.

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to provide information about current developments in Delaware employment law. Questions about individual problems should be addressed to the employment law attorney of your choice.