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MEMORANDUM

DATE: December 19, 2014

TO: Hotel Association of New York City, Inc.
Labor Relations Members
General Manager, Human Resource Directors

FROM: Kane Kessler, P.C.
Labor and Employment Law Department

RE: Recent National Labor Relations Board Decisions

INTRODUCTION

The National Labor Relations Board (“NLRB” or “Board”) has recently issued a trilogy of rulings with significant impact on Employers. The following is a summary of these decisions.

A. Employee Use of Employer Email System

Continuing a trend of NLRB decisions favoring employee rights in the workplace, on December 11, 2014, the National Labor Relations Board reversed precedent and held in Purple Communications, Inc., that employees with an Employer-issued email account and regular access to Employer email have the right to use Employer email for non-business purposes including discussion of wages, working conditions and union organizing during non-working time.

Clearly, this decision has a significant effect on Employers, particularly as it relates to maintaining and enforcing policies on employee use of Employer email. While it is very likely that the NLRB’s decision will be appealed (potentially to the U.S. Supreme Court) and, further, the decision could be stayed during the appeal process, the NLRB can still enforce Purple Communications on Employers.

The Board’s decision provides the following guidelines to Employers:

- The decision is limited to email and not text messages and social media, although the Board left open the possibility that it may apply to additional methods of communication.
- The decision does not open corporate email systems to all employees who do not need to use email for work purposes or non-employees, nor does it require Employers to provide access to employees off-site on non-working time or to grant access to those employees who have not been granted e-mail access.
- The decision does not prohibit Employers from continuing as they have in the past to monitor email systems. However, Employers cannot change its monitoring system in response to protected concerted activity (i.e., employee discussion of wages, benefits and terms and conditions of employment).
- An Employer will face a heavy burden to limit non-business email usage by demonstrating rare “special circumstances” necessary to maintain production or discipline to justify email access restrictions. Although the NLRB did not give specific examples of such special circumstances, overload of the e-mail system (such as through a large attachment) and circumscribed storage capacity may provide justification.
- Employers that maintain policies that broadly prohibit all non-business use of email, or solicitation on behalf of political groups or membership organizations may be required to rescind those policies.

In view of the applicable statute of limitations, where a charge may be filed with the NLRB, it is recommended that Employers retain emails for at least six (6) months.

While there is some opinion that the NLRB Purple Communications decision will have little practical impact on Union organizing, given the various other forms of electronic communication available, it is clear that Employers will have to revise their workplace policies to conform to the decision.

B. “Quickie” NLRB Elections

On December 12, 2014, the NLRB issued a final rule amending its longstanding regulations governing Union election procedures. The new rule is effective on April 14, 2014. The new rules are plainly designed to make it easier for Unions to file for, and win, NLRB elections.

The rules:

- (i) accelerate the filing and service of the Petition;
- (ii) force Employers to post the Petition;
- (iii) shorten the time and manner in which an Employer may challenge unit issues;
- (iv) allow Unions greater access to employees by requiring Employers to provide employee email addresses and phone numbers to the Union; and

(v) allow for a more expedited election process that may limit an Employer's ability to challenge certain issues after the election. It is estimated that elections will now be held 14 to 21 days after a Petition is filed. Currently, elections may be held as much as 45 days after a Petition is filed.

C. Deferral Standard

On December 15, 2014, the Board issued a decision altering its 30-year standard for deferral to arbitration stemming from allegations of a labor law violation. The Board now requires that the party raising deferral has the burden of proof, and that statutory unfair labor practice issues be raised and considered by the arbitrator in rendering his/her award.

If you have any questions, please do not hesitate to contact David R. Rothfeld, Judith A. Stoll, Robert Sacks, Lois Traub, Alexander Soric or Michael Lydakakis.

cc: Joseph E. Spinnato, Esq.
Geoffrey A. Mills, Chairman