NLRB Takeaway: Comply, Even if You Think You Don't Have To

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The General Counsel of the National Labor Relations Board issued a recent Advice Memorandum in *Northwestern University*, NLRB Case 13-CA-157467, with a strange, but practical, takeaway for employers: even if you don't think all the obligations National Labor Relations Act apply to you, you can avoid a lot of trouble if you just behave and comply anyway. Smart employers will comply, then, when the costs of compliance aren't significant compared to the costs of fighting the NLRB.

Northwestern University gained prominence over the past year as it fought the rights of its college football players to unionize. As you might expect, the university argued that college football isn't employment, that college football players are not employees, and as such, they should not be permitted to unionize. The effect of unionization would have been, well, awkward at best: imagine college athletes insisting that training schedules, and even decisions on how to field a team, are "working conditions" that a university would have to negotiate with them. The NLRB ultimately agreed with the university, at least implicitly: it denied a petition for an NLRB election that had been filed by the players.

The NLRB is always happy to expand the rights of unions and employees, however, so it ended the case somewhat passive-aggressively. Instead of formally ruling that college athletes are not employees, the NLRB just denied the petition. This is sort of like a friend who won't commit to going to see a movie with you but also refuses to decline your invitation. The NLRB isn't saying that Northwestern players *can* unionize, but it has also refused to say that college athletes can't, at least in the right case.

Fast forward a few months to the NLRB General Counsel's Advice Memorandum. Northwestern University maintained a social media policy in its "Football Handbook" that its players "protect[] the image and reputation of Northwestern University." This language is a signature target for the NLRB, since it would chill employee speech that is protected under Section 7 of the NLRA. Under Section 7, employees have a right to engage in "protected concerted activity" for their mutual aid and protection—which includes the time-honored tradition of griping about work, pay, managers, and all things job-related. So when the NLRB sees language in a policy that requires employees to "protect" an "image and reputation," it sees a policy that might prohibit employees from complaining about an employer (since publicly saying that, for example, XYZ Corp.'s low wages are abysmal may damage the "image" or "reputation" of XYZ Corp.).

Fine, but unless you have significant short-term memory problems, you will recall that the university said that football players aren't even employees—meaning that all that stuff about overbroad policies and Section 7 rights have nothing to do with them. Eager to avoid a dispute with the NLRB,

and after an unfair labor practice charge was filed over the social media policy, Northwestern changed the language of the policy anyway to get rid of the arguably overbroad language. Again, this shouldn't have mattered, since the football players are not employees.

But it did matter to the NLRB. The NLRB General Counsel recommended not pursuing a full-blown complaint against Northwestern University over the social media policy. *Why* the GC made that recommendation is the interesting part: the GC acknowledged (as had the NLRB itself) that Northwestern maintained that the players are not employees. The NLRB appears to agree with that position by not allowing the players to vote to unionize. If all that is true, then the GC should have refused to recommend that a complaint be issued because the NLRA doesn't even apply to the players. But the NLRB GC went on to say:

[W]e further conclude that it would not effectuate the policies and purposes of the NLRA to issue complaint in this case because the Employer, although still maintaining that athletic scholarship football players are not employees under the NLRA, modified the rules to bring them into compliance with the NLRA and sent the scholarship football players a notice of the corrections, which sets forth the rights of employees under the NLRA.

So let me get this straight: Northwestern "still maintains" that the players aren't employees and aren't protected as such under the NLRA, and the NLRB seems to agree. But that's not the reason why the NLRB won't issue a complaint over the social media policy. The reason is that Northwestern behaved as if the NLRA applied to the players anyway: it fixed what the NLRB would have found offensive about the social media policy *as if* the players actually *were* employees. Northwestern avoided the NLRB's wrath not by being right on the law about the players, but by placating the NLRB.

"Placating the NLRB" is not a great guidepost to develop policy, since the NLRB's ideological bent changes with each Presidential administration, and since the NLRB is constantly reversing itself as a result. But here's the practical takeaway: in the *Northwestern* case, changing the policy was not a big deal. Is it galling to have to mollify a federal agency not because you're wrong, but because the agency wants to throw its ideological weight around? Yes. Is it smart to effectuate a low-cost fix to avoid pointless and expensive legal tangles with an 800-pound left-leaning gorilla? You bet.