Union Organization and Protected Activity: *The Legacy of the Obama NLRB*

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Topics

- Overview of NLRB and NLRA
- Protected Concerted Activity
- Handbooks and Rules
- Expedited Election Rules
- Updates in Higher Education

The National Labor Relations Board

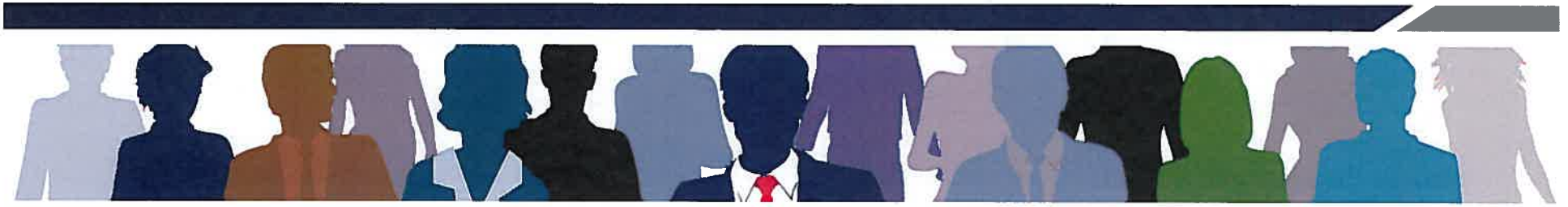
- Oversees the enforcement of the National Labor Relations Act ("NLRA")
- Oversees claims that employee rights have been infringed
- Oversees petitions for selection of bargaining representatives
- Determines what is appropriate unit for an election
- Determines who is eligible to be in a particular bargaining unit

The National Labor Relations Board

- Five members appointed by President for five-year terms
- Currently four members, all appointed by President Obama
  - Three Democrats, one Republican

The Law:
The National Labor Relations Act

- Section 7 Rights
  - Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing,
  - And to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities



The Law:
The National Labor Relations Act

- Section 7 Rights
  - Apply to all employees – union and nonunion
  - Right to self-organization, to join labor organizations, to bargain collectively
  - Protection from discrimination on the basis on labor activities

The Law:
The National Labor Relations Act

- The law has been in existence for decades, and the statutory language has not changed
- However, the NLRB's interpretation of the law has evolved and changed
- The NLRB's interpretations have resulted in expanding the role of the NLRB

Protected Concerted Activity

What does the law say?

- 29 U.S.C. § 157: "Employees shall have the right…to engage in other concerted activities for the purpose of…other mutual aid or protection"
- Known as "Section 7 rights"

How has the NLRB interpreted the law?

- Examples of activities that have been found to be Protected Concerted Activities:
  - An employee speaking to coworkers and a supervisor about perceived preferential treatment given to certain employees in their assignments
  - Three employees complaining to a manager about favoritism, wages, and bonuses and threatening to complain to a state agency with whom the employer has a contract

- Examples of Protected Concerted Activities cont'd
  - A nonunion employee complaining about a fuel surcharge that decreased employees' net pay
  - A nurse making statements to a website and a newspaper about patient-care issues, when the concerns related to staffing levels
  - An employee telling a supervisor at lunch that the employer should have hired more workers instead of an executive earning $400,000 per year, when other workers agreed with the employee

- Examples of Protected Concerted Activities cont'd
  - Discussing a potential sexual harassment complaint with a coworker who had previously complained to management
  - Lying to supervisors about prior conduct during an investigation into that conduct, when the underlying conduct was protected

"Inherent" Protected Concerted Activity

- NLRB says conduct does not even need to be "concerted" to be Protected Concerted Activity
- Discussions about wages, work schedules, and job security are likely to spawn collective action
- Example: an employee asks a coworker about a help-wanted advertisement to identify who would be terminated

Is anything excluded from the NLRB's expanded interpretation?

- Conduct that is <u>not</u> protected:
  - Posting unprofessional "tweets" where employee had not discussed concerns with co-workers
  - Complaints about the tip sharing policy
  - Criticizing employer on page of U.S. Senator
  - Facebook post made on the way to pick up a patient making fun of coworker

Handbook Rules

What does the law say?

- 29 U.S.C. § 158(a)(1): "It shall be an unfair labor practice for an employer…to interfere with, restrain, or coerce employees in the exercise of" protected concerted activities

The NLRB's previous interpretation of the law

- Lutheran Heritage Village-Livonia (2004): the mere maintenance of a work rule may violate the law if:
  - An employee could "reasonably construe" the rule to prohibit or impede an employee's Section 7 rights
  - The rule was promulgated in response to protected activity
  - The rule has been applied to restrict protected concerted activity

How has the interpretation changed?

- March 18, 2015 – the NLRB's General Counsel issued a report on handbook rules
  - Seems to think that employees will not understand restrictions and the context when construing the language of rules
- Numerous NLRB decisions have adopted a similar stance

The Policy Can Not Be Overly Broad

- Will employees reasonably construe the language to prohibit protected concerted activity?
- Was the rule promulgated in response to union activity?
- Was the rule applied to restrict concerted protected activity?
- Is the language ambiguous and potentially misleading?

- In general, rules that are so ambiguous as to their application to Section 7 activity, and contain no limiting language or context that would clarify to employees that the rules does not restrict Section 7 rights, are unlawful. In contrast, rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such that they would not reasonably be construed to cover protected activity, are not unlawful.

Unlawful Confidentiality Rules

- *Do not discuss customer or employee information outside of work, including phone numbers and addresses.*
- Why the NLRB considers it unlawful:
  - "Employee information" is an overly broad term – includes wages
  - A blanket ban on employee contact information is also overly broad
  - Inhibits contacting others for union organizing

Unlawful Confidentiality Rules

- *Never publish or disclose the Employer's or another's confidential or other proprietary information. Never publish or report on conversations that are meant to be private or internal.*
- Why the NLRB considers it unlawful:
  - Reference to "another's . . . information" could reasonably be interpreted to include other employees' wage and employment information

Unlawful Confidentiality Rules

- *If something is not public information, you must not share it.*
- Why the NLRB considers it unlawful:
  - Employees would reasonably interpret this rule to include employee wages, benefits, and related information

- Rule
- "Voice your complaints directly to your immediate superior or to Human resources through our 'open door' policy. Complaining to your fellow employees will not resolve problems. Constructive complaints communicated through the appropriate channels may help improve the workplace for all."
- Unlawful as discourages sharing concerns about wages, hours and other terms and conditions of employment

Unlawful Confidentiality Rules

- A rule prohibiting employees from *disclosing details about the employer.*
- Why the NLRB considers it unlawful:
  - The rule is broad; not defined
  - No clarification that the rule does not restrict Section 7 rights

Confidentiality Rules that the NLRB Will Allow

- *No unauthorized disclosure of business secrets or other confidential information.*
- Why the NLRB will allow this rule:
  - No reference to employee information
  - No overbroad definition of "confidential"
  - Context indicates business confidintial

Confidentiality Rules that the NLRB Will Allow

- *Do not disclose confidential financial data, or other non-public proprietary company information. Do not share confidential information regarding business partners, vendors or customers.*
- Why the NLRB will allow this rule:
  - "Confidential" is narrowly defined
  - Rule only applies to company information

Unlawful Courtesy and Respect Rules

- *Be respectful to the company, other employees, customers, partners, and competitors.*
- Why the NLRB considers it unlawful:
  - The ban is overly broad
  - Employees would reasonably construe the rule to prohibit criticisms of supervisors and management

Unlawful Courtesy and Respect Rules

- *Disrespectful conduct or insubordination, including, but not limited to, refusing to follow orders from a supervisor or a designated representative.*
- Why the NLRB considers it unlawful:
  - The ban is overbroad and applies to conduct that is not as bad as insubordination

Unlawful Courtesy and Respect Rules

- *Refrain from any action that would harm persons or property or cause damage to the Company's business or reputation.*
- Why the NLRB considers it unlawful:
  - The ban is overly broad because it could prevent an employee from criticizing the company in public
  - There is no context to suggest that the rule does not apply to protected conduct

Unlawful Courtesy and Respect Rules

- *Material that is fraudulent, harassing, embarrassing, sexually explicit, profane, obscene, intimidating, defamatory, or otherwise unlawful or inappropriate may not be sent by e-mail.*
- Why the NLRB considers it unlawful:
  - Employees will consider "intimidating" to refer to protected unionization activities
  - Many of the terms are undefined

Courtesy and Respect Rules that the NLRB Will Allow

- *No rudeness or unprofessional behavior toward a customer, or anyone in contact with the company.*
- Why the NLRB will allow this rule:
  - No mention of courtesy toward the employer
  - Employees can be required to be courtesy towards clients and customers

Courtesy and Respect Rules

- Not make negative comments about fellow team members, speak well of each other
- Represent employer in a positive and professional manner in every opportunity, not engage in or listen to negativity or gossip
- Prohibiting conduct that impedes harmonious interactions and relationships
- NLRB found overly broad

Courtesy and Respect Rules that the NLRB Will Allow

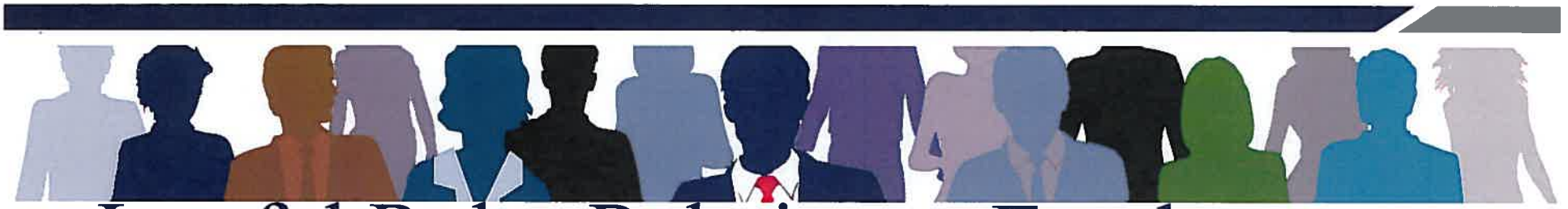
- A rule prohibiting *threatening, intimidating, coercing, or otherwise interfering with the job performance of fellow employees or visitors.*
- Why the NLRB will allow this rule:
  - No requirement of courtesy towards management

Media Rules that the NLRB Will Allow

- *It is imperative that one person speaks for the Company to deliver an appropriate message and to avoid giving misinformation in any media inquiry.*
- Why the NLRB will allow this rule:
  - The context of the rule indicated that it relates to controlling the company's message, not restricting Section 7 rights

Unlawful Rules Relating to Employee Communications with Third Parties and the Press

- "[A]ll inquiries from the media must be referred to the Director of Operations in the corporate office, no exception."
- "If you are contacted by any government agency you should contact the Law Department immediately for assistance."



Lawful Rules Relating to Employee Communication

- The company strives to anticipate and manage crisis situations in order to reduce disruption to our employees and to maintain our reputation as a high quality company. To best serve these objectives, the company will respond to the news media in a timely and professional manner only through the designated spokesperson.

Confidentiality of Human Resources Investigation

- There can be no automatic requirement of confidentiality respecting human resources investigations, even though the employer does not threaten or impose discipline for violating confidentiality. Confidentiality may be required when necessary to protect the complainant or the employer's discovery of the truth.

- Balancing employee right to speak out with employer concern to protect individuals from harassment, but must be based on a legitimate and substantial business justification.
- The Company has a compelling interest to protect witnesses from harassment, intimidation and retaliation, to keep evidence from being destroyed, to ensure that testimony is not fabricated, and to prevent a cover-up.

Social Media

- Rule requiring employee to identify him/herself if commenting about employer
- Unlawful: Interferes with protected activity;
  - Surveillance of concerted activity by employer
- Protest letter sent with support of other employees protected

Employee Social Media Posts

- Examples of Protected Concerted Activities
  - "Liking" a coworker's Facebook comments complaining about supervisor
  - Posting on Facebook that the supervisor "is such a NASTY MOTHER F*@KER don't know how to talk to people!!!!!! F*@k his mother and his entire f*@king family!!! What a LOSER!!!! Vote YES for the UNION!!!!!!"

- Not lose protection for being false or misleading statement, employer must show employee had a malicious motive
  - Made with knowledge of falsity or with reckless disregard for their truth or falsity

- Can lose protection if sufficient disloyal or defamatory (with knowledge of falsity or reckless disregard for truth) false alone not sufficient
- Discussion on line about screw up by employer of tax withholding laced with profanity protected
- No mention of product, services – not disparage, not maliciously untrue
- Protected – discharges unlawful

At Will Statements

- "Cannot be amended, modified or altered in any way"
  - Too broad – can be amended through collective bargaining
- "Modified in writing only by President"
  - Not violation as could be modified through bargaining with President signing the agreement.

Arbitration Provisions

- Rules that require all disputes go to arbitration but restrict arbitrating Class actions or collective actions
- Rules implies employee can not file complaint with NLRB
  - Overly broad and unlawful

E-Mail Systems

- Employees have right to use email system on non-working time
  - Restrictions not related to production or discipline
- Email similar to allowing employees to solicit on own time

Logos

- Any logo or graphics work by employees "must not reflect any form of violent, discriminatory, abusive, offensive, demeaning, or otherwise unprofessional message.
  - The Board held that an employer could not lawfully prohibit employees from wearing buttons and stickers containing the phrase "Cut the Crap" and the abbreviation "WTF." According to the decision, "the color used on the word 'Crap' is orange and I am unable to tell if the word 'Crap' represents feces, cheese or Cheetos."

Unlawful Rules Relating to Use of Logos & Trademarks

- Do "not use any Company logos, trademarks, graphics, or advertising materials, in social media
- "use of [the Employer's] name, address or other information in your personal profile [is banned] . . . . In addition, it is prohibited to use [the Employer's] logos, trademarks or any other copyrighted material."

Lawful Rules Relating to use of Logos & Trademarks

- "Respect all copyrighted and other intellectual property laws. For [the Employer's] protection as well as your own, it is critical that you show proper respect for the laws governing copyright, fair use of copyrighted material owned by others, trademarks and other intellectual property, including [the Employer's] own copyrights, trademarks and brands."

Expedited Election Procedures

NLRB's New Rule on "Quickie Elections"

- Went into effect April 2016
- Designed to speed up election process
- Effect is to give management less time to respond or challenge union actions

Major Changes

- Union may electronically file its petition with the NLRB, and Union must serve petition on employer
  - Effect: speeds up the initial process, but also provides employer with notice earlier
- Employer must post a Notice of Petition for Election within 2 days of petition being filed
  - Effect: employers must be alert to ensure that they do not miss this deadline
- Bargaining Units – Smaller and Smaller
  - Macy's Cosmetic and perfume department

Major Changes

- Employer must file a Statement of Position, along with employee information, within a week of notice from NLRB
  - Effect: puts burden of identifying potential issues with unit on employer, who must commit them to writing or risk waiving them
- Hearing is limited to issues of representation, not eligibility
  - Effect: employer can't identify supervisory employees

Updates in Higher Education

Growth of Faculty Unions

- Non-tenure track adjunct faculty at Siena College – certification 6/11/15
- Part-time adjunct faculty at Bentley College – certification 3/9/15
  - Covers faculty who teach one credit-bearing course and compensated per course, but excluding on-line courses, non-degree granting courses, 1st year seminar, transfer seminar or career development seminar courses
- Webster University adjunct faculty – Union not selected on 5/26/15
- Part time/adjunct faculty and part time reference librarians at Robert Morris University – certification 3/27/15

Growth of Faculty Unions

- Adjunct faculty at Duquesne University – certification 6/5/15
- Manhattan College adjunct faculty
  - Organizing began in 2010
  - Election ordered, but challenged on First Amendment religious grounds
  - 9/9/15 appeal to the NLRB
- Saint Xavier University – challenge filed 6/1/15
- Adjunct faculty at Laguna College – 6/15/15
  - Covers adjunct faculty who teach at least one-credit earning class, lesson, or lab

Growth of Faculty Unions

- Tufts University – SEIU won by mail-in ballot
  - Election was 9/26/13
  - Bargaining began in February 2014, tentative agreement reached in September 2014
  - 3-year agreement covers 200 part-time lecturers – provides benefits, pay, job security
- Seattle University – petition was filed on 2/20/14
  - Votes still have not been counted as University's challenges are litigated
  - Union is attempting to represent non-tenure-eligible faculty employed by the Employer, including but not limited to all non-tenure-track instructors, senior instructors, adjunct faculty, senior adjuncts, lecturers, senior lecturers, legacy titles including but not limited to visiting professors, visiting assistant professors, and core lecturers

Recent Developments with Faculty Unions

- Northeastern University – reached first tentative agreement in January 2016 and avoided a threatened strike
- Boston University – election was February 2015
  - Tentative agreement reached in April 2016
  - Covers over 800 adjuncts and lecturers
- Duke University's full-time faculty also voted overwhelmingly to unionize in March 2016

Recent Developments with Faculty Unions

- Boston University's full-time faculty voted to unionize in April 2016
- Washington University in St. Louis - reached a tentative agreement in April 2016 after 21 bargaining sessions
- University of Illinois at Urbana-Champaign - adjuncts went on strike in April 2016 over stalled negotiations for initial contract

Recent NLRB Rulings with Faculty Unions

- January 2016 – NLRB's Regional Director in Seattle ruled that adjuncts at Carroll College (Catholic school in Montana) could not unionize because they were managerial employees
  - Also relied on faculty handbook to conclude that the faculty were part of "religious educational environment" and could be disciplined for disrespecting Catholic character of school
- March 2016 – NLRB ruled that Columbia College Chicago committed unfair labor practice by unilaterally reducing credit hours associated with several courses
  - Contract gave college right to make academic decisions
  - NLRB's concern was that adjuncts were paid based on credits, so the change impacted adjuncts' pay

Teaching Assistants

- 2000 – *New York University* NLRB case used "compensated services" approach to determine that TAs are employees who can unionize
- 2004 – *Brown University* NLRB case reversed *NYU*, applying "primary purpose" test to conclude that TAs are primarily students
- 2014 – graduate student groups at Columbia University and the New School filed petitions to challenge *Brown University* case

Teaching Assistant Unions

- Currently 33 unions nationwide representing graduate students
- Primarily at public or quasi-public universities
- Notable universities:
  - UConn
  - SUNY system
  - University of California system and California State University system
  - University of Michigan
  - Rutgers
  - Various UMass campuses

Student Athletes

- In 2014, NLRB regional director concluded that Northwestern University football players were employees
- In 2015, NLRB itself dismissed football players' petition
  - NLRB did not decide whether athletes are "employees"
  - Decision was based on goal of avoiding instability in labor relations and college sports

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Gary Starr provides practical advice to a wide range of clients in the private and public sector, bringing over 30 years of experience to counseling clients in traditional labor relations matters as well as human relations problems. His experience helps clients avoid the "big mistakes" as well as the day-to-day hassles.

Gary also defends employers in state and federal courts, regularly appearing before judges, juries, and administrative agencies. He provides strategic and creative approaches to difficult employee issues, seeking practical solutions and aggressively litigating where and when necessary. Gary is the author of many articles on labor relations matters, including articles which regularly appear in the Connecticut Association of Nonprofit's newsletter. He is a frequent speaker to business and professional groups on labor and employment law topics.

EDUCATION

- New York University School of Law LL.M., 1978, with honors
- University of Connecticut School of Law J.D., 1975, with honors
- Union College B.A., 1972, *cum laude*

BAR ADMISSIONS

- Connecticut

COURT ADMISSIONS

- U.S. District Court, District of CT
- U.S. Court of Appeals for the Second Circuit
- U.S. Supreme Court

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- BV Peer Review Rated, Martindale-Hubbell
- Listed as a Connecticut Super Lawyer®: *Employment & Labor* (2007-2015)
- Volunteer of the Year: Union College, Admissions Department (2002)
- Editor, *Connecticut Law Review* (1974-1975)

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- American Bar Association: Labor and Employment Law Section; Litigation Section
- Connecticut Bar Association: Labor and Employment Law Section; Federal Bar Section

COMMUNITY INVOLVEMENT

- The Lawyers Collaborative for Diversity: Nominating Sub-Committee Chair, Edwin Archer Randolph Diversity Award (2007), Committee Member (2006-2011)
- Beth El Temple, West Hartford: President (2009-2011); Vice President (2005-2009); Chair, Personnel Committee (1995-present); Endowment Fund Board of Trustees (1997-2011)
- Greater Hartford Jewish Federation: Allocation Committee (2000-2004); Long Range Planning Committee (2011-present); Community Trustee (2011-present)
- Jewish Association for Community Living: President (2002-2004); Vice President (1998-2002); Board of Trustees
- Union College: Coordinator, Alumni Interviewing
- Connecticut Association of Nonprofits, Inc.: Board of Trustees (2005-present)