

A top-down view of a desk with a laptop, glasses, and a pen. The laptop is on the left, the glasses are at the top right, and the pen is on the right side. The background is a light, neutral color.

Work**Smarts** Half-Day Seminar

**Will the Real National Labor Relations Board
Please Stand Up: An Employer's Introductory
Guide to the National Labor Relations Act**

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The National Labor Relations Board

- The National Labor Relations Board (NLRB) is an independent Federal agency created in 1935 by Congress to administer the National Labor Relations Act, the basic law governing labor relations involving unions, employees, and employers.
- Consists of a Five Member Board Nominated by the President of the U.S.
- The political nature of the Board can result in significant changes to the law with each new Administration.

The National Labor Relations Act

- The National Labor Relations Act (NLRA) gives employees the right to act together to try to improve their pay and working conditions, **WITH OR WITHOUT A UNION.**
- The NLRA guarantees the rights of employees to organize and bargain collectively with their employers, or to refrain from all such activities.
- Does not apply to:
 - Airlines
 - Railroad industries
 - Governmental agencies

Section 7 of the NLRA

- Employees have the right to:
 - form, join, or assist labor organizations,
 - bargain collectively through representatives of their own choosing,
 - engage in other **concerted activities for the purpose of** collective bargaining or other **mutual aid or protection**, and to refrain from any or all of such activities.

Concerted Activities

- **Concerted** activities of employees are **protected** by law if they relate to:
 - Wages
 - Hours
 - Other terms and conditions of employment
- Employees must be engaged with other employees or on the authority of other employees.
- Not solely by and on behalf of the individual employee.

Does this constitute protected concerted activity?

- An employee makes statements at an employee meeting indicating her concern with the company's benefits which affected not only herself but all other employees.

Does this constitute protected concerted activity?

- A supervisor overhears an employee asking another employee how much she is being paid per hour.

Does this constitute protected concerted activity?

- Employee contacted a state administrative agency regarding concerns over how patients were being cared for.

Why does this matter?

- An employer violates the NLRA if it takes action against an employee **because of** the employee's protected and concerted activity.

Remedies the Board May Seek

- Traditional remedies of the NLRB include but are not limited to:
 - Back pay
 - Front pay
 - Notice postings
 - Expungement of references to termination in employment records
 - Reinstatement



NLRA's Impact on Handbook Policies

The Boeing Test for Employer Policies

- The NLRB decision in *The Boeing Co.* (Dec. 2017) overturned many previous restrictions on handbook/workplace policies.
- Rules must be **facially neutral** and must be **neutral as applied**.
- When the Board evaluates a **facially neutral policy**, it will evaluate 2 things:
 - 1) the nature & extent of the potential impact on NLRA rights; and
 - 2) legitimate justifications associated with the rule.

Workplace Rules Divided into Three Categories

- **Rules that are Generally Lawful to Maintain**
 - Rules in this category are generally lawful because when reasonably interpreted they do not prohibit or interfere with the exercise of NLRA rights or because the impact on NLRA rights is outweighed by business justifications.
- **Rules Warranting Individualized Scrutiny**
 - This category is for the rules that are not clearly lawful or unlawful. Their legality may depend on context or application.
- **Rules that are Unlawful to Maintain**
 - These rules are generally unlawful because they would prohibit or limit NLRA-protected conduct.

Examples of Presumptively Lawful Work Rules

- **Civility Rules**

- Behavior that is rude, condescending or otherwise socially unacceptable is prohibited.
- Disparaging the company's employees is prohibited

- **Insubordination, non-cooperation rules**

- Being uncooperative with supervisors or otherwise engaging in conduct that does not support the Employer's goals and objectives is prohibited.

- **Confidentiality Rules**

- Information concerning customers shall not be disclosed, directly or indirectly or used in anyway.

Examples of Rules Warranting Individual Scrutiny

- Broad conflict-of-interest rules that do not specifically *target* fraud and self-enrichment and do not restrict membership in, or voting for, a union.
- Confidentiality rules broadly encompassing “employer business” or “employee information”
 - As opposed to confidentiality rules regarding customer or proprietary information
- Rules regarding disparagement or criticism of *the employer*.
- Rules generally restricting speaking to the media or third parties
 - As opposed to rules restricting speaking to the media on *the employer’s behalf*.

Examples of Rules that are Unlawful to Maintain

- Employees are prohibited from disclosing salaries and contents of employment contracts
- Employees are prohibited from disclosing to any media source information regarding employment, the workings and conditions of Employer, or any staff member.
- Rules against joining outside organizations or voting on matters concerning employer

Policies to Avoid in Handbooks

- Preference to be Non-Union.
- Requiring Employees not to make comments adverse to the employer.
- Prohibitions on solicitation or distribution of literature for any purpose during working hours.
- Prohibitions on conducting personal business on company time or company property for any purpose during working hours.
- Requiring confidentiality of wages.



Biden Board's Significant Changes to the Law

Targeted Changes to Current Law

- Employee handbook rules and policies (*Boeing Co.*)
- Boundaries of protected concerted activity
- Remedial Issues (“make whole”)
- Union access to Employer property
- Test for determining employee status (independent contractors)
- Joint employer standard
- Expanding *Weingarten* rights
- Employer’s duty to bargain with and recognize unions
- Increased use of injunctive relief and subpoena powers

Handbook Rules

- Earlier this year the NLRB issued an invitation for briefs on the subject of Handbook Policies / Rules.
- The General Counsel advocates for a return to the *Lutheran Heritage* type standard
- This Standard evaluates handbook rules/policies based on if employees would ***reasonably construe the rule to prohibit union and other protected concerted activity.***

Independent Contractor Status

- In *SuperShuttle DFW, Inc.* 367 NLRB No. 75 (2019), the Board overruled an Obama era case that had “refined” the Board’s independent contractor analysis to an economic realities test.
- The Trump Board returned the independent contractor test to its common-law roots, which elevates the entrepreneurial factors back to a more significant place in the independent contractor analysis.
- The current General Counsel has urged the Board to overturn *SuperShuttle*, and go above and beyond the Obama era analysis to make it easier to classify independent contractors as Employees.

Weingarten Rights

- In a unionized setting, union workers may be represented by a union representative at an investigatory interview when the employee reasonably believes that the interview may lead to disciplinary action (**Weingarten rights**).
- The General Counsel has signaled an intent to focus on cases that involve the applicability *Weingarten Rights* in a non-unionized setting.
- If successful, we could see a return of *Weingarten* rights for non-union employees.
 - Employees would be entitled to a representative (e.g. coworker) during an interview that could lead to disciplinary action.

Remedies

- General Counsel has directed NLRB regional offices to seek consequential damages for damage to an individuals, including:
 - Individuals Credit Rating;
 - Credit Card Late Fees;
 - The Loss Of A Home Or Car Caused By An Inability To Make Loan Payments;
 - Compensation For Health Care Expenses Due To Unlawful Termination;
 - Compensation For emotional distress damages.
- General Counsel Has Also Pushed For Enhanced Remedies In Other Contexts, Including Union Organizing Drives, Including:
 - Reimbursement Of A Union's Campaign Costs
 - Mandating that the union be provided access to and time with a company's employees.



How Does an Employer become Unionized?

Reasons Employees Unionize

- Inconsistent and unfair application of rules.
- Gripes, complaints & grievances ignored.
- Failure to address the little things.
- Lack of due process / progressive discipline.
- Disregard for seniority.

Reasons Employees Unionize

- Favoritism and disrespect.
- Poor working conditions.
- Passing the buck – “I know it’s wrong, but...”
- Failure to keep promises.
- Changing rules and policies with no notice or input.

What Can Employers Do to Prepare?

- Provide union awareness training for all Management/supervisory personnel
- Identify who are supervisors
- Identify and change potential issues regarding the terms and conditions (handbooks)
- Talk to rank-and-file employees about issues they may have and create a process to address or resolve those issues

What Can Employers Do to Prepare?

- Practice positive employee relations
- Ensure the impact of your communications matches your intent (open communication policy)
- Make sure employees know about all the benefits the Company offers
- Have a plan in place to deal with/identify union activity (establish a communication chain)

Thank You



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