NLRA Rights in the Nonunion Workplace

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The National Labor Relations Act

- The National Labor Relations Act (“NLRA”) applies to:
  - Private employers who have an impact on interstate commerce including manufacturing plants, retail centers, private universities and health care facilities.

- The NLRA does NOT apply to:
  - Public employers, railway and airline employers, and individuals employed as agricultural laborers.
NLRA – Section 7

Section 7 of the NLRA guarantees employees the right to:

- Organize;
- Collectively bargain through labor unions;
- Engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection; and
- Refrain from union and organizing activities.
NLRA – Section 8

- Section 8 prohibits employers from:
  - Coercing, restraining, or interfering in employees’ exercise of Section 7 rights.

- Because Section 7 gives employees the right to engage in concerted activities, independent of any effort to unionize, it also protects employees who are not represented by a union.
Who is a Protected Employee?

The NLRA defines employee as “any” employee.

- Employee is not limited to the employee of a particular employer (e.g. it may include applicants).
- Employee does not include any agricultural employee, supervisor, independent contractor, or individuals employed by a parent or spouse.
Concerted Activities

- Concerted activities exist where:
  - An employee forms, joins or helps out a labor organization.
  - An individual employee has been authorized to speak on behalf of another employee or employees, even if it is in a nonunion setting.
  - Employees join to act on or discuss terms and conditions of employment.
Protected Concerted Activities

- The NLRB broadly defines protected, concerted activities for nonunion employees.
Protected Concerted Activity

- Protected concerted activity is that activity engaged in for employees’ “mutual aid or protection.”
- “Mutual aid or protection” means the activity must be connected to the terms and conditions of employment.
  - The connection may be direct or indirect.
Protected Concerted Activities

- There is a difference between employees who discuss terms and conditions of employment and employees who discuss personal complaints.
Protected Concerted Activities

An employee engages in protected concerted activity when the activity “encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as an individual employee bringing truly group complaints to the attention of management.”
Social Media - Protected Concerted Activity?

- An employee posts a status on Facebook that her employer has not issued her paychecks on time and several co-workers comment on her status.
- Was this a protected concerted activity?
Social Media - Protected Concerted Activity?

- A bartender’s sister asks over Facebook how the bartender’s night went. The bartender responds that he has not received a raise in five years and he was required to do waitress work without tips. No co-workers comment on the thread, but a supervisor sees the thread and fires the bartender via a Facebook message.
- Was the bartender’s activity protected?
Social Media - Protected Concerted Activity?

- A car dealership employer fired an employee for two Facebook related posts.
  - In the first post, the employee complained that the employer served awful food during a sales event. Other employees commented on the post that the quality of food could affect their commissions.
  - In the second Facebook post, the employee posted pictures from another sales event of an accident that occurred at the car dealership next door, which was owned by the same company.

Which activity was considered protected?
Employees have the right to discuss matters using social media, BUT, the employer may do the following:

- Establish a social media policy that:
  - Prohibits or limits access to social media during work hours;
  - Prohibits disclosure of confidential information;
  - Prohibits harassment through the use of social media;
  - Requires employees to state on their social media page that the views expressed are those of the employees, not the employer.
Email – Protected Concerted Activity?

- An employee sends an e-mail to a co-worker about the employer’s new vacation policy.
- Was this activity protected?
Email – Protected Concerted Activity?

- It depends.

- The employer must determine whether the object of the employee’s complaint was to induce group action.
  - If yes, then the activity was protected.
  - If no, and the complaint was truly just a personal gripe, then the activity is not protected.
Weingarten Rights - Protected Concerted Activity?

- Weingarten Rights – an employee has the right to union representation during an investigatory review.
- Currently, a nonunion employee does not have the same right to have a co-worker present during an investigation.
  - If the employee requests assistance, the employer can deny the assistance, but cannot punish the employee for asking.
  - The NLRB changes position on this depending on the political party with which a majority of the Board members are affiliated.
Workplace Tape Recordings - Protected Concerted Activity?

- An employee violated an employer’s policy. The employee’s supervisor scheduled a meeting with the employee to discuss the violation. The employee requested a co-worker be present during the meeting, but the supervisor refused. The employee met with several other employees who agreed that the employee should secretly tape record the conversation to show potential labor violations. The supervisor finds out and fires the employee.

- Was this activity protected?
Workplace Tape Recordings - Protected Concerted Activity?

- Other acceptable steps by the employer may include:
  - A policy that prohibits unauthorized recordings or photographs in the workplace;
  - Enforcing the policy uniformly;
  - Evaluating whether the employee’s conduct could be a group benefit before making an employment decision.
Strikes and Other Refusal to Work

- Unrepresented employees have the same right to apply economic pressure.
- In *NLRB v. Washington Aluminum Co.*, the Supreme Court held that a spontaneous walkout of seven unrepresented employees who left work to protest the cold working conditions of a machine shop was protected.
 Strikes and Other Refusal to Work

- Actual or threatened violence do not make the strike unprotected, but the actual violence and the threats are unprotected.
- State law that makes violence a crime or a tort is not preempted by the NLRA.
Strikes and Other Refusal to Work

- Partial strikes, slowdowns, or an intermittent series of “quickie” strikes are unprotected.
- In *Polytech, Inc.* the NLRB ruled that a single concerted refusal to work overtime is presumptively protected. The activity becomes unprotected if the employer can prove that the work stoppage is part of a plan or pattern of intermittent action. (This is very hard for an employer to prove.)
Workplace Rules Vulnerable to the NLRA

- No-Solicitation
- Rules based on time:
  - Does your rule ban soliciting during an employee’s break time or lunch time; OR
  - Does your rule ban soliciting during “working time”?
Workplace Rules Vulnerable to the NLRA

- No-Distribution
- Rules based on location:
  - Does your rule forbid distribution of union literature on your premises; OR
  - Does your rule forbid distribution of union literature in working areas?
Workplace Rules Vulnerable to the NLRA

- These rules are even more vulnerable now because of the NLRB’s new poster rule.
- Under the new poster rule, private employers must notify employees of their rights under the NLRA.
Poster Rule

- After January 31, 2012, employers must post the NLRB poster where it posts other workplace posters.
- Additionally, the employer must also post the poster on an intranet or internet site if the employer posts its personnel rules or policies on those sites.
Poster Rule

- If an employer does not comply with posting the poster, it will be subject to certain penalties including:
  - Committing an unfair labor practice;
  - Extension of the statute of limitations for filing an unfair labor practice charge; and
  - Non-compliance used as evidence of unlawful motive in an unfair labor practice case.
QUESTIONS?

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