WEBINAR OVERVIEW

NLRA/NLRB Updates and the Impact on Policies and Handbooks

April 26, 2023

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WEBINAR OUTLINE

I. Intro/Setting the Stage

A. Overview: What is the NLRA/NLRB?

NLRA

- The National Labor Relations Act ("NLRA") protects the rights of both union and non-union employees to engage in "concerted activities" for purposes of "mutual aid and protection," such as improving the terms and conditions of employment.
- The NLRA also guarantees unions the right to collective bargaining, the right to strike, and makes it illegal for any employer to deny union rights to an employee.

The NLRA can apply to union and non-union workplaces. It is a common misperception that the NLRA only applies to unionized workplaces.

The Board broadly applies this federal law to union and non-union companies whose activity in interstate commerce exceeds a minimal level, which varies by industry category. This includes retailers, suppliers, health care institutions, law firms, education, federal contractors, and many more.
Specifically excludes:

- Federal, state, or local government jobs
- Supervisors
- Independent contractors
- Agricultural laborers
- Employed by parent or spouse
- Domestic service

NLRB

Established in 1935, the National Labor Relations Board is an independent federal agency that protects employees from unfair labor practices and protects the right of private sector employees to join together, with or without a union, to improve wages, benefits and

working conditions. The NLRB conducts hundreds of workplace elections and investigates thousands of unfair labor practice charges each year.

- Enforces provisions of the National Labor Relations Act of 1935 ("NLRA"), 29 U.S.C. sections 151-169.
- This federal law prohibits covered employers from engaging in unfair labor practices, which is generally conduct that restrains, coerces, or interferes with employees exercising their workplace rights.

1. Concerted Activities

- An employer generally may not lawfully discipline employees for discussing with coworkers the terms and conditions of their employment, including compensation, benefits, hours, staffing levels, discipline, and other important aspects of the employment relationship.
- Evidence that the employee(s) had brought, or intended to bring, these issues to management's attention or take other steps to advance their collective position will increase the likelihood that the NLRB will conclude that the employee(s) engaged in concerted activity.

What Workplace Rights?

- Rights to join together to improve wages and working conditions, with or without a union.
- Rights to engage in "concerted activity," that is, when 2+ employees take action for their mutual aid or protection regarding their pay or workplace conditions.

2. Protected Activities

- Addressing an employer about pay
- Discussing safety concerns with a supervisor or other employees
- Speaking to a supervisor on behalf of one or more co- workers about improving workplace conditions

3. Unprotected Activities

- Personal griping or complaining
- Malicious behavior
- Violence
- Spreading lies deliberately

II. LABOR UNIONS

A. What Is a Labor Union?

- A labor union is simply a group of workers, usually in the same trade or profession, who come together to negotiate their terms of employment (like wages, benefits, or working conditions). By negotiating as a group, instead of as a single person, unions have more leverage in the negotiations and can often win more favorable terms. This group negotiating is called collective bargaining.
- Unions exist in both the public and private sectors. Unlike most private organizations—like the Boy Scouts, Lions Club, or sororities—labor unions enjoy special powers and protections from the federal government.

1. Who Is Eligible for Labor Unionization?

- Almost all employers are eligible for union organization—there is no minimum size or type of industry required for a union to represent employees.

Note: Employees often join unions because of their dissatisfaction with how management treats employees and a belief that the union can make conditions in the workplace better. While pay and benefits are often hot topics in union organizing tactics, employees are most influenced to join a union when the company is perceived to be unfair, unresponsive or offering substandard working conditions to employees.

2. How Are Labor Unions Formed?

If a majority of workers wants to form a union, they can select a union in one of two ways: If at least 30% of workers sign cards or a petition saying they want a union, the NLRB will conduct an election. If a majority of those who vote choose the union, the NLRB will certify the union for collective bargaining.

An election is not the only way to form a union. An employer may voluntarily recognize a union based on evidence - typically signed union-authorization cards - that a majority of employees want it to represent them "card check". Once a union has been certified or recognized, the employer is required to bargain over your terms and conditions of employment with your union representative.

*Special rules apply in the construction industry.

B. Employer/Union Rights and Obligations

- Employers and unions may not restrain or coerce employees who are exercising their rights under the NLRA. In a union workplace, the employer and union are obligated by law to bargain in good faith with each other over terms and conditions of employment, either to agreement or impasse.

- If a union is selected as the representative of employees, the employer and union are required to meet at reasonable times to bargain in good faith about wages, hours, and other mandatory subjects. Even after a contract expires, the parties must bargain in good faith for a successor contract, or the termination of the agreement, while terms of the expired contract continue.
- The National Labor Relations Act forbids employers from interfering with, restraining, or coercing employees in the exercise of rights relating to organizing, forming, joining or assisting a labor organization for collective bargaining purposes, or from working together to improve terms and conditions of employment, or refraining from any such activity. Similarly, labor organizations may not restrain or coerce employees in the exercise of these rights.

1. Examples of Employer Conduct that Violates the Law

- Threatening employees with loss of jobs or benefits if they join or vote for a union or engage in protected concerted activity.
- Threatening to close the plant if employees select a union to represent them.
- Questioning employees about their union sympathies or activities in circumstances that tend to interfere with, restrain or coerce employees in the exercise of their rights under the Act.
- Promising benefits to employees to discourage their union support.
- Transferring, laying off, terminating, assigning employees more difficult work tasks, or otherwise punishing employees because they engaged in union or protected concerted activity.
- Transferring, laying off, terminating, assigning employees more difficult work tasks, or otherwise punishing employees because they filed unfair labor practice charges or participated in an investigation conducted by NLRB.

2. **Examples of Labor Organization Conduct that Violates the Law**

- Threats to employees that they will lose their jobs unless they support the union.
- Seeking the suspension, discharge or other punishment of an employee for not being a union member even if the employee has paid or offered to pay a lawful initiation fee and periodic fees thereafter.
- Refusing to process a grievance because an employee has criticized union officials or because an employee is not a member of the union in states where union security clauses are not permitted.
- Fining employees who have validly resigned from the union for engaging in protected concerted activities following their resignation or for crossing an unlawful picket line.
- Engaging in picket line misconduct, such as threatening, assaulting, or barring non-strikers from the employer's premises.

- Striking over issues unrelated to employment terms and conditions or coercively enmeshing neutrals into a labor dispute.

III. Recent NLRB Initiatives, Cases and Updates

A. McLaren Macomb - NLRB Deems Confidentiality and Non-Disparagement Provisions in Severance Agreements to be Unlawful

- On March 22, 2023, National Labor Relations Board ("NLRB") General Counsel Jennifer Abruzzo issued a memorandum clarifying the NLRB's decision in *McLaren Macomb*, 372 NLRB No. 58 (2023), which deemed non-disparagement and confidentiality provisions in severance agreements to be unlawful. Specifically, the memorandum provides that the decision applies retroactively and therefore, agreements containing unlawful provisions that were entered into prior to the date of the decision will be in violation of the NLRA and a charge alleging such would not be time-barred.

- In *McLaren Macomb*, the NLRB found that a severance agreement containing provisions providing that the terms of same were confidential and must not be disclosed and a non-disparagement provision that barred the employees from making statements to anyone that could disparage or harm the image of the employer, was in violation of the NLRA. The recent memorandum was issued in response to inquiries about implications stemming from that case and it provides guidance on the impact of the decision. Following are key points from the memorandum:

1. NLRB Issues Memo Clarifying McLaren Macomb

- **Is the Decision Retroactive?**

The memorandum clarifies that the decision has a retroactive effect and therefore, it may invalidate agreements entered into prior to February 21, 2023. In addition, "while an unlawful proffer of a severance agreement may be subject to the six-month statute of limitation language under Section 10(b), maintaining and/or enforcing a previously-entered severance agreement with unlawful provisions that restrict the exercise of Section 7 rights continues to be a violation and a charge alleging such beyond the Section 10(b) period would not be time-barred."

- **Would the entire severance agreement be null and void if there is just one overbroad provision?**

The memorandum further explained that generally, the unlawful provisions and would be voided out as opposed to the entire agreement, regardless of whether there is a severability clause or not.

- **Are former employees entitled to the same protections under the NLRA as current employees?**

The memorandum also reiterates that former employees are entitled to the same protections under the NLRA. The Act states that "the term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer." The memorandum also points out that the NLRB found that Section 7 rights are not limited to discussions with coworkers, as they do not depend on the existence of an employment relationship between the employee and the employer.

- **Are there ever confidentiality provisions and non-disparagement provisions in a severance agreement that can be found lawful?**

The memorandum states that, "Confidentiality clauses that are narrowly-tailored to restrict the dissemination of proprietary or trade secret information for a period of time based on legitimate business justifications may be considered lawful. However, confidentiality clauses that have a chilling effect that precludes employees from assisting others about workplace issues and/or from communicating with the Agency, a union, legal forums, the media or other third parties are unlawful."

- **Are there ever non-disparagement provisions in a severance agreement that could be found lawful?**

The memorandum provides that a narrowly-tailored, justified, non-disparagement provision that is limited to employee statements about the employer that meet the definition of defamation as being maliciously untrue, such that they are made with knowledge of their falsity or with reckless disregard for their truth or falsity, may be found lawful.

- **Would a "savings clause" or disclaimer save overbroad provisions in a severance agreement?**

The memorandum provides that, "[w]hile specific savings clause or disclaimer language may be useful to resolve ambiguity over vague terms, they would not necessarily cure overly broad provisions. The employer may still be liable for any mixed or inconsistent messages provided to employees that could impede the exercise of Section 7 rights."

- **Are there other provisions typically contained in severance-related agreements that you view as problematic?**

Pursuant to the memorandum, "Confidentiality, non-disclosure and non-disparagement provisions are certainly prevalent terms. However, I believe that some other provisions that are included in some severance agreements might interfere with employees' exercise

of Section 7 rights, such as: non-compete clauses; no solicitation clauses; no poaching clauses; broad liability releases and covenants not to sue that may go beyond the employer and/or may go beyond employment claims and matters as of the effective date of the agreement; cooperation requirements involving any current or future investigation or proceeding involving the employer as that affects an employee's right to refrain under Section 7, such as if the employee was asked to testify against co-workers that the employee assisted with filing a ULP charge."

D. NLRB General Counsel Urges Board to Reinstate "Blocking Charge" Ruling

- Board General Counsel Jennifer Abruzzo voiced her support for the Board to return to its former rule allowing a ULP charge to suspend a representation election until the charge is resolved.
- In November 2022, the Board issued a Notice of Proposed Rulemaking and requested comments on proposed rescissions of its union representation procedures for blocking charges, voluntary recognition bar, and construction industry collective bargaining relationships.
- Abruzzo submitted a comment supporting the return to the pre-2020 procedures, including blocking a pending union election if a party files a ULP charge and the alleged conduct threatens to interfere with employee free choice.
- Abruzzo also commented on additional changes, including proposing a defined "reasonable period" of time for bargaining of one year from the date of an employer's voluntary recognition of the union before a decertification petition can proceed.

E. NLRB Announces New Initiative Encouraging NLRB to Seek Injunctive Relief

- On February 1, 2022, the General Counsel ("GC") of the National Labor Relations Board ("NLRB") announced a new initiative encouraging NLRB Regions to seek injunctive relief under Section 10(j) of the National Labor Relations Act ("NLRA" or "Act") where workers have alleged unlawful threats or other coercion by employers during union organizing campaigns—even if the employer had not followed through on its threat or coercive action.

F. NLRB Rules that Restricting Pro-Union T-Shirts Violates Labor Law

On August 29, 2022, the National Labor Relations Board (NLRB) examined workplace restrictions on the display of union insignia where employers require employees to wear uniforms or designated clothing. In a 3-2 ruling, the NLRB decided that Tesla, Inc. violated labor law by restricting employees from wearing pro-union t-shirts because such

restriction implicitly prohibits workers from substituting union attire for required uniforms.

G. Increased Scrutiny of Electronic Monitoring

On October 31, 2022, the National Labor Relations Board's General Counsel, Jennifer Abruzzo, released GC Memorandum 23-02, entitled Electronic Monitoring and Algorithmic Management of Employees Interfering with the Exercise of Section 7 Rights. In the memo, she indicated that she plans to "urge the Board to protect employees, to the greatest extent possibly, from intrusive and abusive electronic monitoring and automated management practices that would have a tendency to interfere with Section 7 rights."

H. Egregious Behavior During Collective Bargaining Can Lead to Paying Attorney's Fees to the Union

The 9th Circuit recently issued a decision upholding the right of the NLRB to award legal fees to a union incurred during the collective bargaining process. This ruling should put all unionized employers on notice of the ripple effects of decisions such as this one on their own bargaining.

While "consequential" damages and "special" remedies have long been available to the NLRB for unfair labor practices, this specific push to use them to the fullest extent possible – and create new ones – is a recent development. "Consequential" damages can include interest fees on credit card charges, interest on loans an employee takes out to cover living expenses, penalties incurred from withdrawing from retirement accounts, compensation for loss of a home or car, and compensation for damages to the employee's credit rating.

"Special" remedies have been found to include the issuance of an apology letter, reading notices out loud to employees in the presence of a NLRB agent, allowing union organizers to come onto company property, and issuing an affirmative bargaining order. This is in addition to requiring employers to reimburse the union for collective bargaining costs (including attorney's fees).

IV. HRtelligence TIPS:

An employer should decide at the highest organizational level what its objectives are with respect to unionization and what it is willing to do to achieve them. Determining these requires consideration of the employer's particular circumstances, including industry, location and availability of a qualified workforce.

It is important for an organization to decide its position on union representation as a matter of business strategy, rather than wait until a union has begun an organizing

campaign. If the organization's objective is to remain union free, then it should lay the groundwork for achieving that goal. The organization can accomplish this task by:

- Assessing its vulnerability to union organizing.
- Developing a strategy for communicating the company's philosophy regarding third-party representation that reaches both current and new employees.
- Training all levels of management to lead and manage in a manner that supports the organization's objectives and insisting on their commitment to that approach by means of performance measures.
- Developing a culture that stresses open communication, encourages employee participation and engagement, and demonstrates the values of fair treatment, respect for the individual, and personal and professional integrity.

Some organizations that operate in an area or an industry that is heavily unionized conclude that union representation may be a competitive advantage in recruiting employees and attracting customers or clients. With the exception of certain industries—notably construction and entertainment—an employer is not in a position to become unionized on its own initiative. That decision rests with the relevant group of employees.

The organization must also consider the cost of unionization. In addition to management's loss of flexibility under a collective bargaining agreement, union representation may lead not only to higher wages and benefits but also to increased overhead and a company's loss in value on the open market compared with nonunion counterparts.