Webinar 11 – June 12, 2024

An Overview of Recent NLRB Decisions and How They Impact Your Business

WEBINAR OUTLINE

INTRO/SETTING THE STAGE

- Overview: What is the NLRA/NLRB
- Union Activity
- Activity Outside a Union
- Who is Covered

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WEBINAR CONTENT

INTRO/SETTING THE STAGE

Overview: What is the NLRA/NLRB?

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.

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. Employees covered by the National Labor Relations Act are afforded certain rights to join together to improve their wages and working conditions, with or without a union.

Union Activity

Employees have the right to attempt to form a union where none currently exists, or to decertify a union that has lost the support of employees.

Examples of employee rights include:

- Forming, or attempting to form, a union in your workplace;
- Joining a union whether the union is recognized by your employer or not;
- Assisting a union in organizing your fellow employees;
- Refusing to do any or all of these things;
- To be fairly represented by a union.

Activity Outside a Union

Employees who are not represented by a union also have rights under the NLRA.

Specifically, the National Labor Relations Board protects the rights of employees to engage in "concerted activity", which is when two or more employees take action for their mutual aid or protection regarding terms and conditions of employment.

A single employee may also engage in protected concerted activity if they are acting on the authority of other employees, bringing group complaints to the employer's attention, trying to induce group action, or seeking to prepare for group action.

A few examples of protected concerted activities are:

- Two or more employees addressing their employer about improving their pay.
- Two or more employees discussing work-related issues beyond pay, such as safety concerns, with each other.
- An employee speaking to an employer on behalf of one or more co-workers about improving workplace conditions.

Examples of Protected Activity:

- 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

Examples of Unprotected Activity:

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

Who is covered?

Most employees in the private sector are covered by the NLRA. However, the Act specifically excludes individuals who are:

- employed by Federal, state, or local government
- employed as agricultural laborers
- employed in the domestic service of any person or family in a home
- employed by a parent or spouse
- employed as an independent contractor
- employed as a supervisor (supervisors who have been discriminated against for refusing to violate the NLRA may be covered)
- employed by an employer subject to the Railway Labor Act, such as railroads and airlines
- employed by any other person who is not an employer as defined in the NLRA

RECENT NLRB CASES AND RULINGS

Expanded Definition of "Concerted Activity"

Miller Plastic Products, Inc.
The decision in Miller Plastic Products, Inc. and Ronald Vincer, 372 NLRB No. 134 (2023) expanded the definition of "concerted activity" under the NLRA to potentially include a single worker's actions.

The prior standard served to substantially narrow the situations in which statements made by individual employees in front of their coworkers will be found concerted.

American Federation for Children Inc.
The NLRB overruled *Amnesty International of the USA Inc.* and held that an employee's "advocacy" on behalf of a nonemployee (e.g., independent contractors) constitutes protected concerted activity when it can benefit employees. The NLRB also reaffirmed that:

- job applicants are statutory employees entitled to federal labor law protections, assuming that "there is no question that they genuinely seek employment," and

- an individual's immigration status is "immaterial" to their status as a statutory employee in most circumstances.

Work Rules

In *Stericycle*, the NLRB articulated its new standard in analyzing whether employer work rules are impermissible under the National Labor Relations Act (NLRA) (decided August 2023).
The Board's latest new standard returns to case-by-case review of rules and heightens its scrutiny of policies in at least two important ways:

- The Board now considers a rule presumptively unlawful if it "could" (rather than "would") be interpreted to limit employee rights, meaning rules may be invalidated even if there are alternative interpretations that are consistent with employee rights.

- Whether a rule implicitly limits protected activities under the new standard will be based on the perspective of someone "economically dependent" on the employer who considers engaging in activity protected by the Act.

Since the *Stericycle* decision, the NLRB has issued a series of decisions finding a wide range of work rules to be unlawful, ranging from prohibitions on insubordination to prohibitions on falsifying employment applications.

Work Rules Concerning Disrespect

In *United Electrical Contractors, Inc.*, decided November 9, 2023, the NLRB held that a prohibition on "disrespect toward supervision" violates the NLRA, because it could reasonably be construed by employees to prohibit protected concerted activity.

The NLRB found, "the act of concertedly objecting to working conditions imposed by a supervisor, collectively complaining about a supervisor's arbitrary conduct, or jointly challenging an unlawful pay scheme—all core Section 7 activities—would reasonably be viewed by employees as 'disrespectful.'"

The NLRB said the "disrespect" rule would reasonably tend to chill employees' exercise of their rights under the Act and, under *Stericycle* is presumptively unlawful.

Work Rules Requiring Honesty

Also in *United Electrical Contractors, Inc.*, the NLRB found rules requiring honesty on company records, including on employment applications, could reasonably be construed to chill an employee from leaving union-affiliated work history off of an application or falsely denying an intention to engage in organizing activity.

The rule in the case prohibited, "[d]ishonesty or falsification of any company records, including but not limited to employment applications and time entries," and "[p]roviding false or misleading information to any company representative or in any company records, including the employment application, benefits forms, time entry, expense reimbursement forms and similar records."

The NLRB found the employer's rules against dishonesty or falsification of company records (such as employment applications and time entries) were presumptively unlawful.

Other Work Rules Found to be Unlawful

In General Motors Components Holdings, LLC, an ALJ struck down employer prohibitions on:

- distracting the attention of others;
- "wasting time" or loitering;
- unauthorized soliciting or collecting contributions for any purpose whatsoever during working hours;
- misusing or removing certain items from employer premises (such as employee lists, blueprints, company records, or confidential information) without proper authorization;
- making or publishing of malicious statements concerning any employee, the company, or its products.

Prohibitions on Obscene or Abusive Language

Additionally, a rule against using obscene or abusive language was found to violate the NLRA because the rule was drafted "without stating that the rule was not intended to bar employees' Section 7 activity." "The rule does not provide any additional context showing that it is meant to address only language that involves violence or other unlawful conduct or that it does not prohibit Section 7 activity. I find that a reasonable employee would understand this rule to interfere with statements that are protected by the Act."

Employers should be aware that the NLRA has routinely decided that some profanity and even defiance must be tolerated. The NLRA protects employees even in instances where the employee is rude or disrespectful, and profanity will not bar an employee from invoking their rights under the NLRA. *See, for example, NLRB v. Chelsea Laboratories*.

Prohibitions on Use of Telephones

Employers have to be careful in limiting employee cell phone use. "On its face," said the NLRB on such a rule, "this rule gives the employer unfettered discretion to decide if an employee may use their personal phone at any time and in any area of a facility, including during breaks and other periods that are an employee's own time. Employees' would reasonably conclude that they could not, without obtaining the [employer's] authorization, engage in activities such as using their own smartphone to call a union representative during a lunch break."

The work rule in question, which simply prohibited "[u]nauthorized use of telephones" was thus found to be unlawful. The General Counsel argued, and the NLRB agreed, that "requiring an employee to seek the approval of management in order to use their personal phones for Section 7 communications is tantamount to surveillance of such activities, and would tend to have a chilling effect on employees' exercise of their rights."

Prohibitions on Discourtesy to Customers, Vendors, or the General Public

The NLRB also recently said that employees would generally construe a broad prohibition against "disrespectful" conduct and "language which injures the image or reputation" of the employer as encompassing Section 7 activity, such as employees' protected statements objecting to their working conditions or seeking the support of others to improve them. The rule, which prohibited "[d]iscourtesy to a customer, vendor, or the general public resulting in a complaint or loss of good will" was deemed unlawful.

NLRB: INITIATIVES AND UPDATES

Narrowing of Work Rules

Priorities for the Board and General Counsel Jennifer Abruzzo will continue to focus on narrowing existing work rules and expanding Union protections. Expect a continuing focus on 'reasonable interpretation' standards for reviewing workplace rules.

NLRB Issues Memo Regarding Liability for Unlawful Work Rules

On April 8, 2024, the NLRB's General Counsel issued a memo directing the Board's Regional Offices to seek full remedies for all employees harmed by an unlawful work rule or contract term – even if those employees are not identified during an unfair labor practice investigation.

The new memo targets another class of cases which do not necessarily involve specifically identified affected employees. These types of cases previously have had less comprehensive remedies – but the memo suggests that those remedies fail to make impacted employees whole.

Regional Directors are instructed to:

- identify employees who were impacted by the unlawful work rules and order the employer to remove discipline from their record and provide backpay as part of the remedy;
- obtain this information from the employer "during settlement efforts," which could greatly expand the liability of any given case and make settlement more costly for employers; and
- request legal fees and costs, if any, as part of the remedy for those eligible employees impacted by an unlawful contract term.

The Board and the Equal Employment Opportunity Commission (EEOC) plan to issue joint guidance regarding workplace profanity during union activity.

The planned guidance stems from the Board's 2023 decision returning to its setting-specific standard for determining whether an employer lawfully disciplines employees whose protected concerted activity crosses the line into abusive conduct.

That standard arguably provides employees more license to make abusive or offensive comments while engaging in putatively protected concerted activity. However, the standard creates significant conflict between Board law and workplace discrimination and harassment laws.

Joint guidance from the Board and EEOC would aim to resolve this conflict and provide needed clarification for employers.

Unfair Labor Practice Charges Are on the Rise

Unfair labor practice charges filed with the NLRB increased by 7% in the first half of FY 2024. The NLRB said this spike continues a trend over the last few years, since unfair labor charges charges were up 10% in FY 2023 over the year before, and 19% in FY 2022 compared to FY 2021.

- The NLRB has played a significant role in shaping the landscape of labor relations, particularly with its decisions that extend beyond the traditional boundaries of unionized workplaces. Non-union employers are finding themselves increasingly affected by these rulings, and non-union employers should stay informed about NLRB rulings and proactively adjust their policies and practices to align with such decisions.

- Non-union employers should pay close attention to and follow Board decisions affecting their workforces. Adhering to recent rulings will protect employers from policies, practices, and decisions that potentially violate the NLRA.

- Employers should review workplace rules and policies following recent NLRB decisions. The more narrowly tailored their work rules are to legitimate and substantial business interests, the less likely they will be deemed unlawful.

- Even presumptively unlawful work rules can survive scrutiny where employers can show that the work rule "advances a legitimate and substantial business interest" that cannot be advanced "with a more narrowly tailored rule."