

Labor Smart 101:

What All Employers Need to Understand about the National Labor Relations Act

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About PilieroMazza

PilieroMazza PLLC is a full-service law firm located in Washington, D.C. We are most well known as a government contracting firm and for more than 25 years we have helped our clients navigate the complexities of doing business with the federal government. We also provide a full range of legal services including advice on business, corporate, labor and employment, SBA procurement programs, and litigation matters. Our clients value the diverse array of legal guidance they receive from us and our responsiveness as we guide their growth and secure their success.

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PM Legal Minute – our blog, written by all of PilieroMazza’s attorneys, provides trending insight to small and mid-sized businesses.

Legal Advisor Newsletter – our quarterly publication which addresses current issues that are of concern to federal government contractors and commercial businesses nationwide. The Legal Advisor articles focus on recent legal trends, court decisions, legislative and regulatory rule-making, as well as other newsworthy events.

Weekly Update – an email sent every Friday that provides an up-to-the-minute recap of legislative and regulatory issues affecting small businesses.

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Objectives



- Familiarize yourself with the National Labor Relations Act (“NLRA”)
- Recognize prohibitions of the NLRA
- Discern Rights of Employers and Employees
- Identify Impact
- Understanding Implications for You



What is the National Labor Relations Act?

- Federal statute passed by Congress in 1935 to address the “inequality of bargaining power between employees . . . and employers” 
- Union membership has declined since its height in the 1950s (Bureau of Labor Statistics: union membership declined from 20.1% in 1983 to 11.3% in 2013)
- Covers virtually all private sector employers (other than rail and air carriers)



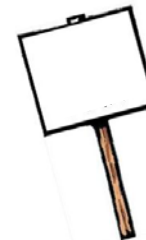
The NLRA Generally ...

- Ensures employees can engage in “concerted activity,” mainly through representation by unions
- Regulates the processes by which employers and unions negotiate a collective bargaining agreement (“CBA”)
- Enforced by the National Labor Relations Board (“NLRB”)



Section 7 of the NLRA

- Applies to almost all workforces -- whether represented by a union or not
- Employee activities **protected** by the NLRA include:
 - Organizing, forming, joining or assisting labor organizations
 - Collectively bargaining for changes in wages and working conditions
 - Engaging in protected concerted activities (e.g., **picketing, striking, hand-billing, bannering, and talking to each other about terms and conditions of employment**)
 - Refraining from any of these activities



Section 8 of the NLRA

- An employer cannot **interfere with, restrain or coerce** employees in the exercise of their “Section 7 rights”
- An employer cannot **dominate or interfere** with the formation or administration of any labor organization or contribute financial or other support
- An employer cannot **discharge or otherwise discriminate** against an employee engaging in activities protected under the NLRA, including:
 - Filing charges with the NLRB
 - Giving affidavits to NLRB investigators
 - Testifying at NLRB hearings



Section 8 of the NLRA

- An employer cannot discriminate in hiring, tenure, or any other term or condition of employment for the purpose of encouraging or discouraging union membership
- Labor Management Relations Act made bargaining for **“Closed Shops”** a ULP
 - **“Union Shops”** and **“Agency Shops”** still allowed
 - Authorizes states to pass **“Right-to-Work”** laws to prohibit **“Union Shops”** and **“Agency Shops”**



Bargaining Under Section 8

- An **employer** cannot refuse to bargain in good faith with the union about wages, hours and other conditions of employment

Section 8(a)(5)

- The **union** cannot refuse to bargain in good faith with the employer

Section 8(b)(3)



Bargaining Under Section 8

- Employers required to bargain and meet at reasonable times to confer in good faith with employees' designated bargaining representative on mandatory subjects of bargaining
- Duty to bargain includes other union-relations issues including duty to:
 - Deal with **whomever** is designated by the employees to conduct negotiations
 - On request, **supply information** relevant to wages, hours, and other conditions of employment
 - Refrain from **unilateral changes** in terms and conditions of employment without consulting with the employees' representative

Section 8(d)



What Does This Mean For You?



Hiring

- During an interview do not ask about affiliation with a labor organization
- When should you bring up the topic of the union?
- Questions to get an employee's opinion on unions?



Promulgating New Rules

- If affecting terms or conditions of employment, must negotiate with the union
- No union?
 - Still applies
 - Cannot issue a rule or policy that interferes with Section 7 rights
- Ex: Confidentiality, Social Media, Investigations



Confidential Information

- Employees may discuss wages, hours, and other terms and conditions of employment with fellow employees and union representatives
- Employers cannot question employees regarding employees':
 - Union activities
 - Observations of other employees' union activities
 - Views about unions



Confidentiality Policy

- Confidentiality policy cannot prohibit protected activity or reasonably communicate to employees that that such discussions are prohibited and unlawful
- Example: Policy that broadly encompasses “employee” or “personnel” information
- Broad prohibition on disclosing “confidential” information is lawful if they do not reference information regarding employees or anything that would be construed as a term or condition of employment
- Employer interest in maintaining privacy of business information



Confidentiality of Investigations



- Blanket rule that employees must keep information from ongoing workplace investigations confidential likely to be unlawful in the NLRB's eyes
- Justifications that can support confidentiality:
 - Protect an investigation witness
 - Preserve evidence that is in danger of being destroyed
 - Preclude fabrication of testimony that is in danger of being fabricated
 - Prevent a cover-up
- NLRB balances Section 7 rights and justifications

Social Media

- Cannot prohibit employees engaged in Section 7 activity
- Prohibitions on using company logos, trademarks, graphics or advertising materials on social media unlawful
- Cannot prevent employee from saying anything negative on social media
- Legitimate interest in ensuring employee communications does not misrepresent the employer's official position



Conduct

- **Conduct toward supervisors**
- Employees have the right to criticize the employer's labor policies and/or treatment of employees
- Rules cannot prohibit this activity
- Example: Rule is unlawfully overbroad if it prohibits employees from being "disrespectful," "negative," or "rude" toward employer or management unless the context is to provide clarification
- Act protects criticism that might be false or defamatory unless the policy states that only maliciously false statements are prohibited
- Rule can require employees to be respectful and professional to coworkers, clients or competitors



Dress Code

- Cannot prohibit employees from wearing logos
- Employees generally can wear union insignia
- Exceptions for health, safety, or legitimate business reasons



Photography, Recordings

- Employer policies regarding recordings in the workplace under review
- Generally cannot prohibit recordings or photography in the workplace if the policy does not specify conditions under which recordings are not permissible and does not interfere with Section 7 rights
- Cannot ban use or possession of personal cameras or recording devices



Other Rules Affected

- Conduct toward coworkers
- Communications with third parties (media)
- Use of company logos, copyrights, trademarks
- Restricting employees from leaving work
- Conflict of Interest rules
- Rules prohibiting disclosure of the handbook



Discipline

Non-Union Employers

- May not fire or punish, lay off or discharge, employees for engaging in union activity or the exercise of any Section 7 rights
- Consider whether imposing discipline interferes with employees' exercise of Section 7 rights



Discipline

Union Employers (or when organizing)

- Comply with the CBA
- When there is no operating CBA and no operating grievance procedure applicable, employers must:
 - Impose non-discretionary discipline *in line* with past disciplinary practices and procedures
 - Engage in *collective bargaining* about discretionary components of individual decisions to discipline employees



Discipline

- Apply disciplinary policies uniformly and consistently
- NLRB tends to give employees leeway when they engage in heated discussions about terms and conditions of their employment:
 - Scream
 - Curse
 - Engage in other spirited acts (e.g., denouncing supervisor in obscene, personally-denigrating and insubordinate terms)



Discipline

- Employers may still commit ULPs by:
 - More strictly interpreting and applying existing disciplinary policies
 - Imposing discipline under a rule applied in an overbroad manner





Weingarten Rights



- Employees have *Weingarten* rights if:
 - **Represented** by a union
 - Reasonably believe investigatory interview with employer may lead to **discipline**
- Under *Weingarten*, union-represented employees have the right to:
 - Ask for representation by a union agent or fellow employee
 - Forego representation and proceed with interview without a union representative or co-worker present



What is a ULP?

- An ***Unfair Labor Practice*** is an action taken by an employer or union that violates the NLRA
- Charge submitted to the NLRB alleging NLRA violation
- Investigated by NLRB agent
- Administrative Hearing
- Penalties:
 - Back pay
 - Offer of reinstatement
 - Notice
 - Policy changes



10 Things You Need to Know as a Manager



10 Things to Know

1. Avoid Reactionary behavior (“You’re Fired!”)
2. You are the Company:
 - What supervisors do and don’t do can bind and be held against the Company
3. Think long term
4. Don’t threaten (loss of employment, benefits, job) or promise or reward in connection with Section 7 rights
5. Don’t interrogate employees regarding union activity or opinions



10 Things to Know

6. Don't spy (or pretend to!)
 - No attending union meetings
 - No impression of surveillance of union activities
7. If in doubt, allow a union representative to be present
8. Know the Company's procedure for discipline/investigations
9. Don't disparage the union or union activity to employees
10. Apply Company policies consistently and uniformly



Labor Smart Training Program

PilieroMazza is pleased to provide a comprehensive training program for employers:

- 4 Hour Intensive and Interactive Program
- Designed for executives, managers and supervisors
- Includes in depth informational training, role playing and simulated exercises
- Prepare your workforce!

Please contact Nichole Atallah if you are interested in more information.



Questions?

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