



Labor Law 101: What Employers Need to Understand About the National Labor Relations Act

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Learning Objectives

- Familiarize yourself with the National Labor Relations Act (“NLRA” or the “Act”) and its requirements
- Discern Rights the Act Provides to both Employees and Employers
- Understanding its Implications for You
- Identify Impact and Potential Liabilities



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”
- Covers virtually all private sector employers (other than rail and air carriers)
- Distinguished from the Federal and State laws that apply to public workforces

The NLRA Generally . . .

- Ensures employees can engage in “concerted activity”
- Concerted Activity: where two or more workers act together to improve their terms and conditions of employment (e.g. organize, vote, talk, solicit).
- Regulates the processes by which employers and employees’ collective bargaining representatives (unions) negotiate a collective bargaining agreement (“CBA”)
- Enforced by the National Labor Relations Board (“NLRB”) -- different from the Department of Labor

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 “unfair labor practice” 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
 - **“Agency Shops”** still allowed
 - Authorizes states to pass **“Right-to-Work”** laws to prohibit “Agency Shops”

Bargaining Under Section 8

- Employers required to meet at reasonable times to confer in good faith with employees' designated bargaining representative on mandatory subjects of bargaining
- Duty to bargain includes 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
- Be aware that the duty to bargain can attach if you are a successor in interest to a predecessor employer with bargaining obligation.

What impact does the NLRA have on practical business decisions and actions?

Hiring Determinations



- 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 relevant
 - Cannot issue a rule or policy that interferes with Section 7 rights
- Ex.: Confidentiality, Social Media, Non-Solicitation

Regulating Confidential Information

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

Drafting Confidentiality Policies

- Confidentiality policy cannot prohibit protected activity or convey to employees that that such discussions are prohibited
- Example: Policy that broadly prohibits employees from disclosing “employee” or “personnel” information
- Broad prohibition on disclosing “confidential” information is lawful if its does not reference information regarding employees
- Legitimate business reasons may justify some policies: e.g. Employer interest in maintaining privacy of business information

Moderating Social Media



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

Regulating Employee Conduct

- **Conduct toward supervisors**
- Employees have the right to criticize the employer's labor policies and/or treatment of employees
- This includes criticizing supervisors, but not disregarding workplace rules and instructions
- 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
- A rule can require employees to be respectful and professional to coworkers, clients or competitors

Restrictions on Employee Dress Code

- Employees generally can wear union insignia
- Special Circumstances: Exceptions for health, safety, or legitimate business reasons



Other Rules Affected

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

How to Implement Lawful Policies?

- Tailor policies to narrowly regulate specific conduct (e.g. during working time and in work areas)
- Explain the business reasons for the policies
- Apply the policies in a consistent, non-discriminatory way
- Specify that the policy is not intended to infringe on employees' NLRA rights

Discipline – Companies with Unionized and Non-Unionized Workforces

- 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 – Companies with Unionized Workforce

- 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 good-faith negotiations 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)
- Always evaluate circumstances before taking disciplinary action

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 violation
- Investigated by NLRB examiner
- Administrative Hearing
- Penalties:
 - Back pay
 - Offer of reinstatement
 - Notice
 - Policy changes

Upcoming Webinars

- **Wednesday, October 24:** SCA, DBA, and CBAs: Where Labor Law and Government Contracting Collide
- **Wednesday, October 31:** Bargaining with Your Employees' Labor Representative: The Dos and Don'ts of Union Negotiations

Thank You.

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