



NHRMA 24

86TH ANNUAL CONFERENCE + TRADESHOW

CS23

The Enduring Impact of the National Labor Relations Act on Non-Union Employers



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WORKPLACE PERFORMANCE EXPERTS

The Enduring Impact of the National Labor Relations Act on Non-Union Employers

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Today's Agenda



- Union Organizing Trends
- The National Labor Relations Board
- Unfair Labor Practices - Remedies
- Protected Concerted Activities
- Workplace Rules - Handbooks
- Investigations – Confidentiality
- Employment Agreements
- Independent Contractors

Union Organizing Trends



Once petition is filed, unions are winning 80% of elections



Teamsters, SEIU, UFCW most active unions



Smaller bargaining units in last 3 years



Boston, Seattle, and Oakland most active areas

Power of Federal Agencies

Chevron Doctrine

Loper Bright Enterprises v. Raimondo **(6/28/24 Decision)**



- Overturned the *Chevron* doctrine that has been in place for decades and required deference to federal agencies.



- Courts no longer defer to a federal agency's interpretation of a law and must instead use their independent judgment to give a statute its "best meaning."

National Labor Relations Act



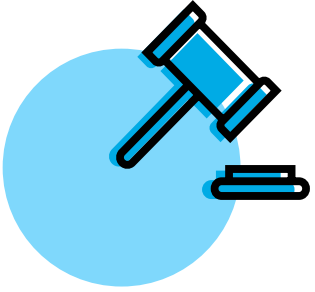
Taft-Hartley Act 1947 – Amended the Wagner Act of 1935

- Section 7 guarantees employees *"the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection,"* as well as the right *"to refrain from any or all such activities."*



- Most employees in the private sector are covered under the NLRA. The law does not cover government employees, agricultural laborers, independent contractors, and supervisors (with limited exceptions).

National Labor Relations Act



- Section 8(a)(1) - Unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7" of the Act.

- 5 unfair labor practices, and therefore, unlawful practices.
 - Interference, restraint or coercion;
 - Employer domination or support of a labor organization;
 - Discrimination on the basis of labor activity;
 - Discrimination in retaliation for contacting the NLRB; and
 - Refusal to bargain.

National Labor Relations Board

- 5 Member Board – established by the Act
- Currently 4 members are seated:
 - **3 Democratic**
 - Chair Lauren McFerran (12/16/24)
 - David Prouty (8/31/26)
 - Gwynne Wilcox (8/27/28)
 - **1 Republican**
 - Marvin Kaplan (8/27/25)



General Counsel



- **Jennifer Abruzzo**
 - Appointed on July 22, 2021, to a 4-year term
 - Independent from the Board
 - Responsible for the investigation and prosecution of unfair labor practice cases
 - Oversees 26 Regional Offices
 - Each Regional Field Offices consists of field examiners and labor attorney

Union Recognition



Cemex Construction, 372 NLRB No. 130 (8/25/2023)

- Now the Employer must either:
 - Recognize and bargain, or
 - File its own petition for election.
- However, if employer files for an election, and employer commits any unlawful conduct that would set aside the election, the petition is dismissed, and NLRB will recognize the union.
- Employers will want to exercise caution if it petitions for election, and risk recognition if it is found to commit any ULPs.

Union Recognition



Under *Cemex* now:

- Unions will more likely get a bargaining order whether or not the employer responds to the demand for union recognition.



- Demand for union recognition could come in the form of an email addressed to the plant manager or HR requesting recognition.

Fair Choice-Employee Voice Rule

Effective September 30, 2024:

- This rule returns to the Board's pre-2020 practices
 - Restoring a Regional Director's authority to delay an election if unfair labor practice conduct is sufficiently serious to interfere with employee free choice.
 - Prior rule – Election would still go forward.



Temporary Injunctions Standard for NLRB

Starbucks Corp v. McKinney (6/13/24 decision)



- Starbucks not required to reinstate employees while unfair labor practice case goes through the courts.



- Strict four-factor test must be used to grant injunctive relief.



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Unfair Labor Practices

Unfair Labor Practice



- An Unfair Labor Practice (“ULP”) occurs when intentionally or unintentionally an employer or union engages in conduct that in the view of the NLRB reasonably tends to interfere with the free exercise of employee rights.



- Employees have the right to engage in “protected concerted activities” (Sec. 7 rights); and employers and unions cannot interfere with those rights.

ULP - Process



- Non-Union and Union Employees can file a charge (online).



- Field Office investigates to determine whether there is reasonable cause to believe a violation has occurred.
 - Disposition of Charges
 - Dismiss – this can be appealed
 - Settlement Agreement
 - Formal Complaint – if not dismissed or settled
 - Case heard by Administrative Law Judge
 - Final decision may be reviewed in federal courts

ULP – Remedies | Direct or Foreseeable Damages



General Counsel Memos

21-06 (9/08/2021) & 21-07 (9/15/2021), 22-06 (6/23/22)

- Instructing Regions to seek “make whole” remedies in settlements and all remedial tools to restore the status quo.
- Traditional Remedies – back pay, reinstatement, posting.
- Now expect broader remedies... (next slide)

ULP – Remedies | Direct or Foreseeable Damages



- **Additional Remedies**

- Reimbursement of out-of-pocket medical expenses
- Apology letters to reinstated employees
- Allowing Union to post messages on company bulletin board
- Reimbursement for baby formula because of loss of pumping areas at work
- Posting Employee Rights in the workplace

- Add language to settlements addressing on compliance.

- Remove language that “employer not admitting to any wrongdoing.”

ULP - Employer Dominance Over or Unlawful Assistance to Union

T-Mobile USA, Inc. v. NLRB, 90 F.4th 564 (D.C. Cir. 2024)



The Communications Workers of America (“CWA”) has attempted to organize CSRs at T-Mobile since 2009.



Employer established an organization called T-Voice in 2016.



CWA filed an Unfair Labor Practice.



NLRB held this group was an employer-dominated employee representation committee to deal with management concerning working conditions.



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Protected Concerted Activities

Protected Concerted Activities

Advocating for Non-employees

American Federation for Children, 372 NLRB No. 137 (2023)

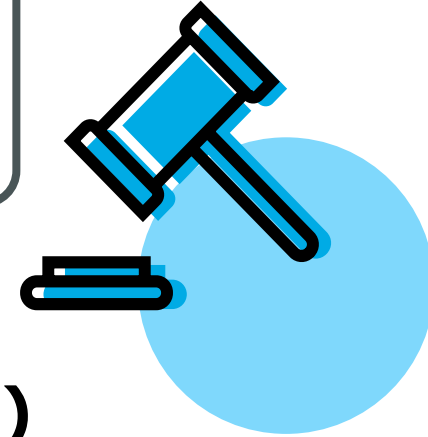


- Employee was disciplined after she tried to get support for a former coworker with an expired work permit to be rehired.



- NLRB held that employees may be engaged in PCA when advocating for non-employees.

NLRA Section 7 Rights Protest of Racial Discrimination in Workplace



Home Depot USA, Inc. Morales, 18-CA-273796 (2/22/24)

- Employee's display on their work uniform of "BLM," an acronym for Black Lives Matter, constituted protected concerted activity under Section 7 of NLRA.



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Workplace Rules and Handbooks

Workplace Rules



Stericycle, Inc. 372 NLRB No. 113 (8/4/2023)

- Overruling the *Boeing* decision.
 - Employer maintained overbroad work rules governing personal conduct, conflicts of interest, and confidentiality of harassment complaints.
- The Board adopts new standard for evaluating workplace rules
 - “Strict scrutiny”
 - Reasonable employee standard
- Retroactive Application to any pending cases.

Workplace Rules



Rules not impacted by *Stericycle* – always a ULP

- Rules that –
 - Implicitly restrict Sec 7 activity; or
 - Promulgated in response to union activity.
- Application of rules to restrict Sec 7 rights.
- Rules restricting employee association, solicitation, or distribution, or wearing pro-union clothing, buttons, stickers or insignia.

Workplace Rules



Workplace Rules Impacted by Stericycle

- Confidentiality
- Employer Email Systems –
 - Purple Media (2019)
 - Reinstated Rule that employers may restrict non-business use of IT resources unless the employees have no other reasonable means of communication and non-discriminatory on its face and application.
- Social Media
 - Use of company logos, copyrights and trademarks
 - Employees allowed fair use of logos when engaging in protected activity.

Solicitation & Distribution Policies



Apple, Inc. and CWA (5/6/24 NLRB)

- NRLA protects employees' rights to distribute union materials during nonworking time in non work areas, absent showing of special circumstances.
- Held that Apple violated NRLA when its store managers threw away union flyers left on a break room table.
- Table was not a "bulletin board."
- Other flyers on Shake Shack coupons, fruit baskets, newspapers on table.

Offensive Language

Lion Elastomers LLC v. NLRB **(5th Cir., 7/9/24)**

- In 2023, the NLRB Decision in this case overturned its employer-friendly 2020 *General Motors* decision. Under *General Motors*, employers had more authority to discipline for offensive and abusive language, even during protected concerted activity.
- 5th Circuit now found that NLRB exceeded its authority when it overturned *General Motors* and sent it back to the NLRB again. So, for the time being, we are back to *General Motors*, though that could change!

Handbook Policy Disclaimers



Disclaimers

- “This policy is not intended to interfere with or dissuade employees from engaging in activities protected by state, federal, and local law, including the National Labor Relations Act, such as discussing wages, benefits, or other terms or conditions of employment, or legally required activities.”
- GC proposed a model (more detailed) disclaimer in Stericycle, but Board did not adopt it.
- Unclear whether the disclaimer would save an overly broad work rule.

Employment Investigations



Confidentiality Instructions

- Stericycle – resets the standard set out by Boeing
 - A blanket request of confidentiality in every single employer conducted investigations is likely unlawful.
 - A valid request must be narrowly tailored to and applied on a case-by-case basis.

Employment Agreements Non-Competes



GC Memo 23-08 (May 30, 2023) – Non-binding

- Finds that most non-compete provisions are overly broad and chill exercise of Sec 7 rights;
- Business interests in retaining or protecting special investments in training employees does not justify a non-compete
 - Overly broad, and employers could protect this interest by less restrictive means, such as a longevity bonus
 - Protecting proprietary or trade secrets can be protected in a narrowly tailored agreement.

Employment Agreements Non-Competes



J.O. MORY, INC. 25-CA-309577 (Indiana)

- First case since GC Memo on non-compete agreements.
- ALJ finds the employee's non-solicitation and non-compete agreement chilled employees' rights to engage in union and other protected concerted activity.

Separation/Release Agreements

McLaren Macomb 372 NLRB No. 580 (2/21/23)

- Clauses that violated the NLRA:
 - Confidentiality - “Terms of the agreement were confidential.”
 - Non-Disclosure - Prevented disclosure of “information, knowledge, or materials” and prohibited disparaging/harmful statements about the “Employer, its parent, and affiliated entities and their officers, directors, employees, agents and representatives.”



OSHA Walkaround Rule

Safety Inspections

Effective May 31, 2024:



- New rule allows nonemployees to accompany OSHA officers during an inspection on behalf of employees.



- Union officials are nonemployees and could be allowed to participate in inspections of nonunion workplace.

Concluding Tips



Review handbook policies and rules for overly broad restrictions



Review employment agreements



Be ready for a letter from a union demanding union recognition



Plan for OSHA inspections w/ 3rd party



Watch for impact of overruling of Chevron Doctrine



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Questions?

Thank You



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