LABOR LAW TRAPS FOR THE NON-UNION EMPLOYER

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I. Introduction

If your employees are not covered by a union contract, or have made no efforts to obtain union representation, you may believe that the National Labor Relations Act (NLRA or Act) does not concern you. Think again. Legal developments in recent years have broadened the reach of the NLRA’s application to the non-union workplace. This is a consequence of an increasingly activist National Labor Relations Board, greater awareness by employees of their rights under the Act, and recognition by attorneys representing employees of the remedies available under the NLRA. In this article we will address how the NLRA is a trap for the unwary non-union employer in the following areas:

1. Investigation of employee discipline;
2. Termination or other disciplinary actions against employees who may have engaged in “protected” activity under the NLRA;
3. Selection and hiring of employees who may either be past union members, or self-identified as union organizers;
4. Employee handbooks and personnel policies;
5. Use of electronic mail; and
6. Employee committees and quality circles.

An understanding by a non-union employer of its rights and responsibilities under the NLRA is critical for two reasons. First, the non-union employer will be able to avoid potential liability relating to terminations or other personnel actions. Second, a proactive employer may be able to avoid possible attempts by a union to organize its workforce.

II. Who Is Covered

Employers
The NLRA covers most employers. The following employers are expressly excluded from coverage under the NLRA:

1. Agricultural employers;
2. Governmental employers;
3. Employers covered by the Railway Labor Act (e.g., railroads, airlines and some express companies);
4. Employers in the horse racing or dog racing industry; and
5. Instrumentalities of foreign governments or other sovereign entities (e.g., Indian tribes).

An employer that is not otherwise excluded will be covered provided that it is engaged in “an industry affecting commerce.” The two basic benchmarks are as follows:

Retail enterprise — $500,000 annual gross business volume plus substantial purchases from or sales to persons in other states on a direct or indirect basis.
Non-retail enterprises — Gross annual interstate in-flow or out-flow of revenue of at least $50,000.

Note: A number of other standards apply to specialized industries.

Employees
Just because a person is an employee does not necessarily mean that he/she is protected by the NLRA. There are several categories of persons who may be “employees” but are not entitled to the NLRA’s protections.

Supervisors
Supervisors are excluded from coverage under the NLRA. “Supervisor” is defined:

“The term ‘supervisor’ means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them or to adjust their grievances, or effectively to recommend such action, if in
connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.” NLRA, § 2(11).

Managerial Employees

Even if someone is not a supervisor, he may be excluded as a managerial employee. A managerial employee generally must possess authority to make significant decisions affecting the company. An employee will be excluded as managerial “only if they represent management interests by taking or recommending discretionary actions that effectively control or implement employer policy.” NLRB v. Yeshiva University, 444 U.S. 672 (1980).

Family Members and Relationships

The spouse or children of an employer are excluded. NLRA, § 2(3). The statute has been applied to situations in which a closely-held corporation is substantially owned by family members.

Other Exclusions

There are other miscellaneous exclusions such as domestic servants, medical residents and interns, independent contractors, and retired employees.

III. Overview of National Labor Relations Board Procedures and Enforcement Authority

The National Labor Relations Board (Board) is a federal agency that enforces the NLRA. It has the authority to investigate charges of unfair labor practices filed by employees or other persons. The Board will investigate a charge without expense to the charging party. If it concludes that an unfair labor practice has been committed, it can issue a formal complaint against the offending party. If the General Counsel of the Board issues a complaint, it proceeds on behalf of the charging party at the hearing. This means that an employee is not required to
retain counsel if his/her charge results in the issuance of a complaint. A respondent to an unfair labor practice complaint has a right to a hearing before an administrative law judge in a proceeding, which is similar to a court trial. An appeal of the administrative law judge’s decision may be made to a panel of the National Labor Relations Board in Washington, D.C.

The Board has authority to order some of the following remedies:
1. Reinstatement of a discharged employee;
2. Full back pay and benefits;
3. Reimbursement of employee expenses;
4. Cease and desist orders; and
5. Posting of notice.

The Board does not have authority to award damages for emotional distress, or to award punitive damages. Only in rare cases is the Board entitled to recover attorneys’ fees.

IV. Employee Protections Under The Act – An Overview Of The Basics

The core of the NLRA is § 7. It provides:

“Employees shall have 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, and shall also have the right to refrain from any and all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 159(a)(3).”

The NLRA then sets out several “unfair labor practices”. It shall be an unfair labor practice for an employer:

“(1) to interfere with, restrain, or coerce employees in the exercise of
the rights guaranteed in section 7;

“(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it; Provided, That subject to rules and regulations made and published by the Board pursuant to section G, an employer shall not be prohibited from permitting employees to confer with him during working hour without loss of time or pay;

“(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *;

“(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.”

V. The NLRA And Disciplinary Interviews Of Employees

Every employer should know the basic rule that in any interview of an employee, two members of management should be present. The NLRB recently sought to level the playing field, and afford employees in a non-union setting a right to the presence of a representative during an investigatory interview, which may result in discipline of the employee. In Epilepsy Foundation of Northeast Ohio, 331 NLRB No. 92 (2000), a non-union employer provided vocational training to persons with epilepsy. Two employees sent a memorandum to their supervisor telling him that they no longer needed his supervision, and sent another memorandum to the employer’s general manager criticizing their supervisor’s conduct. The general manager set up individual meetings with each of the employees to discuss the matter. When the first employee asked that his co-worker be permitted to attend the meeting, the general manager refused. Upon the employee’s refusal to meet, he was terminated for insubordination. The
NLRB concluded that the employer violated the rights of one of the employees by firing him when he refused to meet with them without a representative being present. The Board held that a 1975 Supreme Court decision, *NLRB v. J. Weingarten*, 420 US 251 (1975), which conferred similar rights on employees in a unionized setting, would also apply to employees in a non-union setting.

**Important Points Regarding Weingarten Rights**

1. Because supervisors and managers are not “employees” under the NLRA, they do not have *Weingarten* rights.

2. Employees need not be “Mirandized.” An employer need not notify employees of their *Weingarten* rights.

3. There are no “magic words” needed for an employee to invoke their *Weingarten* rights. If the employee puts you on notice that he would like to have a co-worker present, this is sufficient. If the meeting is for the purpose of investigating discipline, and the employee reasonably believes that a disciplinary action may result, *Weingarten* rights are available.

4. The discipline must relate to the employee who is being interviewed, not discipline of some other employee.

5. An employer can forego an interview if the employee asks for a representative. “An employer is completely free to forego the investigatory interview and pursue other means of resolving the matter.” This means that you can advise the employee that you may decide to take action without his input. Sometimes this may have the effect of convincing the employee that perhaps he should cooperate with you without a representative being present.

6. You need not negotiate with or permit the representative to interfere with the investigation. His primary function is to act as a witness.

7. The employee’s lawyer, priest, spiritual advisor, aroma therapist, spouse or mother-in-law is not a “representative.” Only a fellow employee may be a representative in a non-union setting.
VI. Disciplinary Actions For “Protected” Activity

Section 7 of the Act protects employees who engage in “concerted activities” for their “mutual aid or protection.” What this has come to mean in practice is that an employer may, in some circumstances, violate the NLRA by disciplining an employee who lodges a complaint regarding working conditions or other matters. A recent NLRB case illustrates this point. The employer, a manufacturer of gas turbines, decided to modify its break policy. A meeting was conducted with the employees to inform them of the change, and to explain the policy. One of the employees questioned the president of the company about the policy. She asked whether employees would be penalized if they violated it and asked whether it would apply to all employees. The president did not appreciate the employee’s conduct and suspended her. She was later returned to work, but put on probation. The employee filed charges with the NLRB contending that the disciplinary action interfered, restrained and coerced her and her co-workers because her questioning of the policy was protected by § 7 of the NLRA. The Board concluded that she had been unlawfully disciplined because her questions about the change, taking place in the context of a group meeting where the policy was of concern to all employees, indicated that her conduct was “concerted.” Although the employee’s questioning of the president was searching, it was not abusive or intemperate. The Board’s decision was enforced by the United States Court of Appeals. *NLRB v. Caval Tool Division, Chromalloy Gas Turbine Corporation*, 262 F3d 184 (2d Cir. 2001).

In another case, an employer had recently reorganized as a result of a merger, and employees voiced concern about possible changes in working conditions and compensation. During staff meetings some of the employees asked supervisors what the employer’s new compensatory time and holiday policy would be. The employees were dissatisfied with the answers. One of the employees, on her own initiative, called the U.S. Department of Labor’s Wage and Hour Division to find out whether the employees were entitled to receive holiday pay. When she communicated what she had learned to management, the company was, not
surprisingly, displeased, and fired her. The Board held that the discharge was illegal. Her call to the Department of Labor was “sufficiently linked to group activity to constitute concerted activity.” The phone call was a “logical outgrowth” of the protest by other employees. *Every Woman’s Place*, 282 NLRB 412 (1986).

Not all employee complaints are necessarily protected. Rather, there has to be some element of concerted activity for mutual aid or protection. In one case, an employee at a trade school failed to meet her admissions quota and was placed on probation. Not surprisingly, she went to another employee and asked him if he had ever been put on probation. He replied that he had not and he in turn called the school director. The director fired the employee who had been put on probation. The Board concluded that the inquiry by the employee who had been put on probation was the motivating factor, but the discharge was lawful because the employee’s motive in the conversation had been purely personal. There was no evidence that the employee’s concern over her probation was “directed towards group action.” Consequently, the conversation was not concerted activity and was therefore unprotected. *Adelphi Institute*, 287 NLRB 1073 (1988).

Some other examples of concerted activity include:

1. Employer unlawfully discharged four employees who, in protest over reduction of work schedule, refused to work extra hour when ordered to do so by their supervisor. *NLRB v. Mike Yurosek & Son*, 149 LRRM 2094 (9th Cir 1995).

2. Employer's rule prohibiting child care employees from discussing their terms of employment with parents, and the rule requiring employees to bring all work-related complaints to the employer were both unlawful. Employees are free to seek redress from third parties through concerted action. *Kinder-Care Learning Centers*, 136 LRRM 1057 (1990).

4. Employer unlawfully terminated salesman for bringing group complaint against special two-hour meetings which sales personnel were required to attend. *NLRB v. Henry Colder Co.*, 134 LRRM 3053 (7th Cir 1990).


6. Employees act of mailing letter to employer's parent company protected where employees complained in part that employer's president required employees to spend large amount of time on president's personal projects. *NLRB v. Oakes Machine Corp.*, 133 LRRM 2753 (2nd Cir 1990).

7. However, employer lawfully discharged employees who as a group refused to sign disciplinary notices. (Signature merely acknowledged receipt of notice, not agreement with content.) *Interlink Cable Systems*, 121 LRRM 1354 (NLRB Gen. Counsel 1986).

VII. Union “Salts”

May an employer refuse to hire an applicant who is a union business agent? The Board has held, with U.S. Supreme Court approval, that the answer is no. It makes no difference that the union business agent may have stated that he intends to try to organize the employer’s workforce. The Board holds that paid union organizers who apply for work must be treated like

Last year, an NLRB ruling involving an Oregon employer upheld a back pay award to five union “salts.” The court held that the back pay award should be based on the presumption that the employees would have been reassigned to a new project at the end of their assignment. *Tualatin Electric, Inc. v. NLRB*, 253 F3d 714 (DC Cir. 2001).

VIII. Employee Handbooks And Policies

In a variety of cases, the Board has concluded that many common personnel policies or rules contained in employee handbooks violate the NLRA. Oftentimes, the Board views certain rules as interfering with the employees’ rights to engage in concerted or other protected activity. Claims about the illegality of an employer’s rules may arise in the context of a union organizing campaign. This not only gives the union an issue around which to rally the employees, but may also result in a re-run of a representation election that the company has won. If an employee is discharged or disciplined for violation of an improper rule, the discharge may be considered unlawful by the Board and result in the employee’s reinstatement and payment of back pay.

Here are some examples of rules that the Board has found to be unlawful.

1. Rules prohibiting employees from discussing their compensation, wages or rates of pay.
2. Rules prohibiting employees from discussing their performance evaluations with co-workers.
3. Blanket rules that prohibit the disclosure of “confidential information” regarding customers or fellow employees.
4. Rules prohibiting “profane, malicious, false or vicious statements” concerning the company or any of its employees.
5. Rules that prohibit “loud, abusive or foul language, disorderly conduct, horseplay, fighting, threatening, insulting, abusing, intimidating, coercing or interfering with patrons or
employees.”

6. Rules requiring employees to leave the premises upon completion of their shift and to not return until their scheduled shift.

The Board’s reasoning as to some of these issues is not difficult to understand. Because employees are entitled to engage in concerted activity concerning wages, benefits, and other terms and conditions of employment, a rule that forbids them from discussing these matters interferes with those rights. Prohibitions on disclosure of confidential information may be unlawful to the extent that it prohibits employees from talking about wages. For these same reasons, a rule that prohibits discussions of performance appraisals has been held to be unlawful. Limitations on discussing confidential business information, however, are not improper.

The NLRB has ruled that employees are allowed to make “false” statements about their employer in situations involving concerted activity. If, however, a statement is “maliciously false,” or directly damages the employer’s interest, it may not be protected. Rules that forbid “loud, abusive or foul language” have been held by the Board to be overly broad because they may be interpreted as prohibiting lawful union organizing propaganda. A rule that requires employees to leave the premises immediately has been held to interfere with employees’ rights to meet in non-work areas to discuss workplace concerns.

Non-Solicitation Rules

The Board holds that employees have the right to solicit each other concerning union matters and other workplace issues even when on company premises, provided it is during their non-work time and in non-work areas. Employees are also entitled to distribute union-related materials in non-work areas. Consequently, a broad rule that forbids employees from soliciting or distributing material on company premises is unlawful. Generally, the NLRB will permit a non-solicitation rule, which prohibits solicitation in working areas during “working time.” However, the precise contours of the rule may vary depending upon the particular
industry. (For example, different rules may apply to retail operations or hospitals).

**Non-discriminatory Enforcement**

Non-solicitation rules should always been enforced without discrimination. If you do not, and if there is a union organizing campaign, you may be prohibited from enforcing the rule at all. For example, if you permit solicitation for charities or on behalf of other organizations, the NLRB may conclude that you have discriminatorily enforced your non-solicitation rule and invalidate it completely in the context of a union organizing campaign. Additionally, discipline of an employee for violating a non-solicitation rule that was discriminatorily enforced may be deemed unlawful by the NLRB.

**IX. E-mail Systems**

Just as rules restricting employee communication or solicitation in the workplace may violate the Act, restrictions on employee use of e-mail systems may also run afoul of the NLRA. In one case, the company’s president sent an e-mail to employees outlining a new vacation policy and bonus system. The e-mail solicited comments from the employees regarding the changes. Several employees responded. One employee pointed out some errors in the plan, as well as his objections. He sent an e-mail to all of his co-workers criticizing the plan in a less then courteous way. When the company president asked him to defend his criticism and he refused, he was terminated for his failure to treat others with courtesy and respect and to follow instructions or perform assigned work.

The Board concluded that the employee’s e-mail was itself concerted protected activity. Because the employee was communicating to other employees his criticism of the vacation plan, and was attempting to obtain support for his opposition, the activity was held by the Board to be seeking concerted action by other employees. Since the content of the communication was not so abusive or intolerable to lose the protection of the Act (i.e., it was not violent or so serious as to “render the employee unfit for further service”) his use of the e-mail was held protected and his discharge was found to be unlawful. *Timekeeping Systems, Inc.*, 323 NLRB 30 (1997).
X. **Employee Committees**

In the mid-nineties, two researchers conducted a study on workplace representation and employee participation. The answers which they received to the following questions are very revealing:

**Question:** Do you think employee organizations can be effective even if management does not cooperate with them, or do you think they can only be effective if management cooperates?

**Answer:** Seventy-three percent of employees answered that employee organizations can only be effective if management cooperates with them.

**Question:** Which one of these employee organizations would you prefer?

1. One that management cooperated with in discussing issues but had no power to make decisions; or

2. One that had more power, but that management opposed.

**Answer:** Sixty-three percent of the employees surveyed said they preferred an organization without decision making power that management cooperated with while only 22 percent reported that they would prefer a powerful organization that management did not cooperate with.

In view of the prevalence of these attitudes among employees, it is not surprising that many employers, with the support of their employees, have implemented employee participation programs. These programs may assume various forms, but typically include a committee in which employees and one or more management representatives meet and address issues in the workplace. These committees may have a number of names such as “employee teams,” “quality control circles,” “employee involvement committees” or similar names. The obvious management objective is to improve employee morale, loyalty and productivity by gaining employee involvement in decisions in the workplace. As a side benefit, such committees may also assist in holding unions at bay. However, this latter objective can be met only if the
committee is operated in accordance with rulings of the NLRB.

Two cases deserve study. In *Electromation, Inc.*, 309 NLRB 990 (1992), the Board concluded that under some circumstances, an employee committee may be an “employer dominated” labor organization and hence, unlawful. In the context of a union organizing campaign, the NLRB ordered that the committee be disestablished as an “unlawful company-dominated labor organization.” On the other hand, in a more recent case, the Board held that an employee committee did not violate the Act, provided that certain standards were met. *Crown Cork & Seal Company*, 334 NLRB No. 92 (2001). A comparison of the two cases sheds considerable light on how employee committees may be lawfully operated.

In *Electromation*, the employer initiated action committees to deal with employee dissatisfaction. The employer created five committee which were assigned specific issues: absenteeism, no smoking policy, communication, pay progression and attendance bonuses. The employer determined the composition of each committee, placed employer representatives on each committee, prescribed the policy goals and purposes of each and provided pay, time and materials. The Board found that the committees created the impression that disagreement was to be resolved bilaterally, when in truth the acceptance or rejection of any idea rested solely with the employer. The Board concluded that rather than being vehicles for neutral cooperation and communication, the committees were the medium by which the employer unilaterally imposed its own form of “bargaining.” The Board’s opinion also indicated that it would not violate the Act where the purpose of the committee was limited to achieving “quality or efficiency,” or where it was designed to be a communication device to generally promote the interest of quality or efficiency.

In *Crown Cork & Seal*, supra, the Board found that the employer’s relationship with an employee committee did not violate the Act. As a threshold matter, in order for an organization to be a “labor organization,” it must exist for the purpose of dealing with employers concerning employment conditions. This generally has meant that there must be a mutual exchange between
the organization and management on working condition issues, i.e., there must be proposals offered by each other. On the other hand, if the employer delegates certain functions to an employee committee that has no authority to formulate decisions, there can be no “dealing with,” and hence the committee is not a labor organization.

In *Crown Cork & Seal*, the Board concluded that the employee committee was not employer dominated. Instead, it functioned like a supervisor, sending recommendations to top management for acceptance or rejection. There were no negotiations, “dealing with” or any compromise on issues to reach mutually agreeable decisions with management. Instead, the committee’s decisions were given either a thumbs up or a thumbs down, even though many of the issues examined by the committee addressed terms and conditions of employment.

IX. Private Right of Action for Violations of Public Policy Under State Law

Ordinarily, federal labor law prevails in the private workplace. In Washington, however, the state Supreme Court has taken the unusual step of ruling that an employee may bring a private lawsuit based upon a violation of state public policy for violation of what are essentially Section 7 rights. This state policy protects both union and non-union employees. *See Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 888 P.2d 147 (1995); (plaintiff had cause of action for wrongful discharge in violation of public policy protecting employees from interference with concerted activities); *see Pulcino v. Federal Express Corp.*, 141 Wn.2d 629, 650-51, 9 P.3d 787 (2000) (holding that civil claim for union discrimination under state law, RCW 49.32.020, was not preempted by the federal Railway Labor Act).