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The Revolving World of Organized Labor and the NLRB

Where are we now?

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“We do Not Have a Union, So Why Should We Care?”

- Non-Union Employers still need to worry about:

  - ✓ Social media policies
  - ✓ Policies governing workplace behavior
  - ✓ Policies governing third-party access to your premises
  - ✓ Confidentiality requirements
  - ✓ The threat of union campaigns

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“Protected Concerted Activity”

- Section 7 of the National Labor Relations Act (NLRA) gives ALL employees the right to engage in protected concerted activity.
- Protected concerted activity occurs when two or more employees act together to address a **collective employee concern** related to **wages, hours, or working conditions**.
- A single employee acting on behalf of others, or who is initiating group action, or who has discussed the matter with co-workers, can also be engaged in protected concerted activity.

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2017 Boeing Balancing Test

"Nature and extent of the potential impact on NLRA rights"

versus

"The employer's legitimate justifications associated with the rule"

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Real Life Workplace Policy Examples:

- Acme Health colleagues who choose to mention or discuss their work, Acme Health, colleagues, or Acme Health products or services in personal social media interactions must identify themselves by their real name and, where relevant, title or role.
- Our Code of Conduct makes clear the importance of protecting the privacy and security of PHI [protected health information], PII [personally identifiable information], and employee information. It is not permissible to disclose this information through social media or other online communications.
- Acme Health has a culturally diverse workforce with employees from many different backgrounds and religious traditions. We therefore prohibit the use of any company owned resources for the use of proselytizing for any religious or social causes.

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Rule-Making and Decision Changes for all Private Employers:

1. NLRB Union Election Rules
2. Use of Business E-mail
3. Union Insignia
4. Confidentiality Requirements in Workplace Investigations
5. Joint Employer Status
6. Workplace Grievance Procedures
7. Offensive Speech
8. Union Dues Collections

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NLRB Election Rules - 

- Obama-era changes shortened the voting process by tightening deadlines and streamlining procedures
  - Example: Disputes over voter eligibility (e.g. who is a supervisor) are determined after the election, not before
- Unions usually have the most worker support before filing a petition with the NLRB
- Experience tells us that with time, as the employees learn more about the pros and cons of having a union, the union loses support
- The Union' spin -- If there's more time from petition to election, there's more time for employers to coerce and intimidate workers

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NLRB Election Rules - NOW

- Board is adopting new election procedures
- Take effect in April 2020
- Timelines now business days rather than calendar days
- New procedures require that disputes over bargaining unit composition and voter eligibility get resolved before workers cast their votes
- The time between the filing of a petition and the election may double or triple as a consequence of the new procedures
- Unions won more elections under the Obama rules and will likely have less success under the new rules

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Use of Business E-Mail - 

- NLRB ruled in 2014 that workers who have access to the Company's e-mail system can use e-mail for pro-union activities
- The Board determined that email has become a central and natural way for co-workers to organize and communicate
- Businesses could still ban all non-work use of email, as opposed to a specific prohibition on union-related uses, if they could demonstrate that special circumstances justified a total ban

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Use of Business E-Mail - NOW

- On 12/17/19, the NLRB overturned earlier precedent in a case involving Caesars Entertainment
- Employers now may restrict use of their email and other information technology systems to certain purposes so long as they don't target union-related communications and activity
  - Employers have property and First Amendment rights to limit the use of their own email systems. Requiring access to email networks also could cause workplace disruption and increase cybersecurity threats.
  - Creates an exception for situations where there aren't other reasonable means to communicate on non-working time.
- Potential traps – Does the employer have a (i) clear neutral policy that is (ii) strictly enforced?

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Union Insignia - 

- Past precedent recognizes a worker's right to wear union insignia, and presumes that employers' limitations are unlawful unless they demonstrate "special circumstances" justifying the restriction
  - E.g., Patient / employee safety
  - But cannot apply to non patient areas
- Walmart imposed a rule that workers can only wear "small, non-distracting" insignia no larger than the size of employee name badges

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Union Insignia - NOW

- 12/23/19 Board Ruling – Walmart's rule is lawful.
  - Upheld extension of the policy outside of the selling area too!
- Employers now can more easily restrict workers from wearing union buttons and other insignia
- Analysis: No longer need to show "special circumstances"
  - First: Is it a facially neutral rule or policy?
  - Second: Weigh the nature and extent of the potential impact on union rights against the employer's legitimate justifications
- This opens the door to apply the same analysis to other areas involving the clash between facially neutral policies and Section 7 rights

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Confidentiality Requirements in Workplace Investigations -

- In 2015 the NLRB ruled that employers must justify the use of nondisclosure rules that ban employees from discussing an ongoing investigation
- That 2015 ruling required businesses to make a case-by-case determination of whether an investigation would be compromised if there isn't a nondisclosure requirement
- An employer can require confidentiality in a workplace investigation only if it has a "legitimate and substantial business justification" that outweighs workers' right to engage in concerted activity

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Reaction from Employers

- How can you really know at the outset whether you're going to have a specific reason for confidentiality?
- Does the employer have to explain we are insisting on confidentiality in this instance because you are the kind of person who may destroy evidence or we have employees who I think will retaliate against you?
- Without confidentiality, employees can coordinate their stories and tip each other off about what the Company does or does not know. It is about maintaining the integrity of the investigation.

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The Clash with the EEOC

- The EEOC says harassment investigations should be kept as private as possible to encourage victims to come forward, guard against retaliation, and protect witnesses and persons accused of bad behavior
- The NLRB in 2015 maintained that "concerted activity" includes the freedom to talk to each other about job-related complaints
- Worker advocates also argued that "gag orders" make it harder for victims of workplace illegality to share critical information that can help them deal with the working environment, or enable them to sue, and that "gag orders" complicate cases where an employer retaliates against a worker for legally protected organizing activity, but claims the firing was for harassment

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Confidentiality Requirements in Workplace Investigations - NOW

- On 12/17/19, the NLRB overturned this precedent ruling that employers may implement blanket nondisclosure rules requiring confidentiality during workplace investigations
- Another instance of the Board examining a facially neutral policy and then balancing an employer's legitimate interests against the potential interference of workers' rights
- This ruling relates to DURING the investigation – May need a more compelling reason to require confidentiality after the investigation is completed, for example the safety of the informant. Section 7 says that employees have the right to discuss disciplinary actions taken or not taken by the employer

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Joint Employer Status - 

- Many businesses you interact with are locally owned franchises
- A Dunkin Donuts restaurant worker is actually an employee of the franchisee
- This makes it difficult to bring enforcement actions against the entire chain
- Worker advocacy groups and Obama-era NLRB General Counsel sued McDonalds Corp. for labor violations committed by franchisees

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Joint Employer Status - NOW

- After new appointees took over the NLRB, the Trump-era General Counsel settled the case over the objection of the worker groups
- The Administrative Law Judge rejected the settlement as inadequate
- Newly appointed board members overruled the judge and dismissed the case

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Workplace Grievance Procedure - THEN

- In most legal cases, the decision of an arbitrator is given significant weight
- But, if an unfair labor practice was grieved in arbitration before it was brought to the NLRB, the NLRB would not defer to the arbitrator unless certain circumstances were present
  - Arbitrator authorized to hear the issue
  - Arbitrator presented with and considered the issue
  - Burden on the party urging deferral
- *Babcock & Wilcox Const.*, 361 NLRB 1127 (2014)

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Workplace Grievance Procedure - NOW

- NLRB returns to the prior standard of deferral
  - Were the proceedings fair and regular?
  - Did all parties agree to be bound by the decision of the arbiter?
  - Was the arbiter's decision clearly repugnant to the purposes and policies of the Act?
- Olin Corp., 268 NLRB 573 (1984)

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Offensive Speech - 

- Four Part Balancing Test:

  - ✓ The place of the discussion
  - ✓ The subject matter of the discussion
  - ✓ The nature of the employee outburst
  - ✓ Whether the outburst was provoked by the employer's unfair labor practices

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Offensive Speech - NOW

- Opened hearings on the effectiveness of the balancing test after NLRB rulings upholds worker's rights to yell racial slurs at replacement workers and management
- Expect to see a bright-line rule

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Union Dues Collection - 

- Employers are required to keep deducting union dues and transmit those funds to the union even after a contract ends
- Provides the union with capital and strengthens their bargaining position
- Union negotiations can last months or even years

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Union Dues Collection - NOW

- Now Employers can unilaterally stop deducting union dues upon the expiration of a contract
- Likely boost the employer's leverage in negotiations

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Conclusion

- Traditional labor law is made and interpreted by an agency
- Changes in the administration can mean large changes in labor policy
- For this reason, labor law tends to be more dynamic and changes faster than most other areas of the law
- If you are an employer with a union or one where there is a potential for an organizing effort, you need to watch this carefully