

The National Labor Relations Act Is Not Just for Unionized Employers Anymore

by Adam Klausner, Paul Salvatore, and David Sherwyn

EXECUTIVE SUMMARY

Created by the U.S. Congress as the statute governing the activities of management and labor unions in connection with employee associations, the National Labor Relations Act governs concerted employee action, which does not always involve unions. In recent years, the National Labor Relations Board has extended its purview beyond union-related actions of employers and workers to include actions of groups of employees. This paper gives examples of several cases where employers' actions with regard to employees were reviewed by the NLRB, despite the absence of a labor union. NLRB rulings addressed employers' attempts to control employees' speech, sexual harassment issues, and employment-at-will language. Certain rulings are in question, however, due to complications of the political appointment process. Regardless of politics, the trend for employers is that their actions may be scrutinized by the NLRB when employees act in a concerted fashion.

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The National Labor Relations Act (NLRA) provides employees with the right to engage in “protected concerted activity,” including the right to discuss wages, hours, and terms and conditions of employment. It is often considered the “union law” in that it provides employees with the right to form a union and it regulates the union–management relationship. Because of this strong association with unions, non-union employers’ human resource directors rarely think of the act when making decisions on whom to hire, fire, promote, demote, or discipline. While it was true that in the past the National Labor Relations Board (NLRB, the agency that enforces the NLRA) rarely involved itself in disputes that did not include union organizing, collective bargaining, or any other union–management dispute, this is no longer the case. The NLRB is now enforcing the NLRA’s protection of “concerted activity” to non-union employers, who indeed must understand and comply with the act.

Congress passed the NLRA in 1935 in order to provide a mechanism for employees to organize and collectively bargain. Section 7 of the act states: “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 their concerted activities for the purpose of collective bargaining, or other mutual aid or protection...” The last phrase, other mutual aid or protection, is the often ignored concept that has drawn increasing focus in the last couple of years. However, while the emphasis is new, the concept is not.

In *Washington Aluminum*¹ a number of employees determined that the plant was too cold and walked off the job. The employees were not part of a union, did not make a list of demands, and did not tell the employer that they were on strike. Despite the lack of “normal union” actions, the Supreme Court held that the employees engaged in actions protected by the NLRA. Because the employees had complained about the broken furnace in the past, the court held that there was a labor dispute and the walkout was protected because: Having no bargaining representative and no established procedure by which they could take full advantage of their unanimity of opinion in negotiations with the company, the men took the most direct course to let the company know that they wanted a warmer place in which to work. So, after talking among themselves, they walked out together in the hope that this action might spotlight their complaint and bring about some improvement in what they considered to be the “miserable” conditions of their employment. This we think was enough to justify the Board’s holding that they were not required to make any more specific demand than they did to be entitled to the protection of § 7.²

While *Washington Aluminum* is often cited for the proposition that the NLRA governs the employee–employer relationship regardless of whether there is a union on the scene or not, the application of the case was rarely invoked. Non-union employees who felt their rights were violated would go to the EEOC (discrimination), the Department of Labor (wage and hour issues), Occupational Safety and Health, or the Worker’s Compensation Board. Moreover, the NLRB concentrated its efforts on traditional union–management concerns.

In the last few years, however, the NLRB has expanded its focus so that now, more than ever, non-union employers need to understand the NLRA. Indeed, certain employer policies and practices that may have been in effect for years may actually violate the act and may invoke the Board’s scrutiny. The cynical NLRB observer could contend that with union private sector density now below 7 percent, the Board is attempting to stay relevant. While this may or may not be true, the Board’s motivation is irrelevant. The fact is this board is focus-

ing on non-union employers more than ever before. The purpose of this article is to alert employers to the policies and the employer actions that the Board has addressed so that the companies can effectively self-monitor compliance and avoid a NLRB charge and the associated costs.

Social Media, Facebook, and Employee Speech

In *Hispanics United of Buffalo*, an employee posted the following on Facebook:³

“Lydia Cruz, a coworker, feels we don’t help our clients enough at HUB. I about had it! My fellow co-workers how do u feel?”

“What the f... Try doing my job I have 5 programs”

“What the Hell, we don’t have a life as is, What else can we do???”

The employer discharged the posting employee for bullying and harassment. This case is instructive because there is nothing in the speech that implies or would allow anyone to infer that the employees were thinking of unionizing. The employer’s action was not to stop union organizing, but to protect employees from cyberspace bullying. Given the sometimes tragic outcomes of such bullying, one could argue the employer’s actions were laudable. Regardless, at least two employees were discussing this topic so it was concerted.⁴ Although the purpose of the Facebook discussion was not overtly collective action (i.e., there was no discussion of forming a union or even a group to address any employment concerns with the employer), under the Board’s broad interpretation, this matter is covered by the act’s mutual aid and protection clause. Cruz, according to the post, was criticizing the work of her coworkers. The coworkers were protecting themselves by stating that they were overworked and could not do anymore.

The question before the Board was whether this concerted activity was protected. The employer argued that this type of cyber-bullying was not protected. One can easily imagine cases where concerted activity is not protected. For example, it would not be protected if two employees, for their mutual aid and protection, abducted and held hostage a particularly tough supervisor to stop the supervisor from working the employees too hard. It is, of course, protected if two employees complained to the company president that the supervisor worked the employees too hard. The question for the Board was on what side of the ledger did this cyber-exchange fall. The Board found the

³ 359 NLRB No. 37 (Dec. 14, 2012)

⁴ The term concerted has broadened with the advent of Facebook—now a statement that is “liked” by another employee can be considered concerted.

¹ 370 U.S. 9 (1962).

² *Id.*

employer's generalized concern, to protect employees from bullying each other, to be insufficient to overcome the act's protection of speech.

Policies Curtailing Employee Speech Inside and Outside the Workplace and in Social Media

Employers have many reasons to regulate employee speech. Accordingly, many employers prohibit employees from disparaging the company, its customers, its managers, and its employees. On the other hand, many employers either do not have these policies or rarely enforce such policies if they have them. An employee "letting off steam" or "griping" in the employee break room may do little damage and not be worth the loss of an otherwise good worker or the employee relations fallout of discharging such an employee.

In the last several years employers have recognized both the power and the threat of social media. As companies created Facebook pages and Twitter accounts they often created policies regarding employee use of social media. Accordingly, HR professionals and many employment lawyers drafted and had employers implement social media policies without even thinking about the NLRB. This was a mistake.

The NLRB has long interpreted limitations on speech as potential NLRA violations. Some employers argue that the power of the internet changes the calculus because the effect of disparaging the company on Facebook or another social media outlet greatly exceeds that of pre-internet speech. Accordingly, these employers argue that limitations of social media speech should be analyzed under a different rubric. This argument has been unconvincing to the NLRB. According to former NLRB Chair Wilma Liebman,⁵ the social media issue is straightforward—the law applies to social media in the same manner that it applies to any other kind of speech.⁶ Indeed, that is the position of the current board as it applies the same test for social media as it does to any other work place rule:

(1) Does the rule directly interfere with or restrain protected activity?

If not:

(2) Can the rule be reasonably read to interfere with or restrain protected activity?

(3) Was the rule enforced to interfere with or restrain protected activity?

⁵ Liebman was appointed by Clinton, reappointed by Bush and made chair by Obama.

⁶ Liebman graciously spoke to a class of undergraduate students at Cornell University on April 29, 2013.

(4) Was the rule issued in response to protected activity?

On their face, it is easy to split the two tests into two categories. The first two tests simply look at the policy on its face. Tests 3 and 4 look to employer intent. The Board's application of both types of standards may surprise employers.

With regard to the tests 1 and 2, this board and its predecessors have held that broad categories of statements and conduct violate the law. Thus, a policy that states employees may not discuss confidential information or must be respectful when discussing the company, its management, and its employees would likely be seen as violating the law. Of course, employers can protect trade secrets, but personal decisions, for example, are not trade secrets.

One would think that tests 3 and 4 would not concern non-union employers in locations with little or no union activity because such employers who are unconcerned about unions would certainly not issue policies to stay non-union. The standards, however, are not about union activity and instead are about protected concerted activity. Thus, policies that employers never intended to have any effect on union activity can be found to have been implemented to curtail protected activity.

Below we discuss several cases where employers' policies regarding employee speech were analyzed under the NLRA in both the social media context and as just a general rule. Much to the dismay of employers, the NLRB has not seen the internet as a reason to relax the rules against limiting speech. Instead, social media have allowed the Board to expand the definition of concerted activity. Instead of just listing the unlawful policies, we state the policy, provide an employer's rationales for such a policy, and then provide the Board's rationale for holding the policy unlawful.

In *Direct TV Holdings LLC*,⁷ the Board found that the following rules violate the NLRA:

(1) Employees should not contact or comment to any media about the company unless pre-authorized by public relations;

Employer: In today's business world establishing and protecting a brand are crucial. Companies protect their brand and attempt to increase market share by controlling public information in order to put the company in the best light.

Unlawful: Employees and unions often use media to pressure employers to acquiesce to employee or union demands.

⁷ 359 NLRB No. 54 (Jan. 25 2013).

(2) If law enforcement wants to interview or obtain information regarding a DirecTV employee...the employee should contact the security department...who will handle the contact with the law enforcement;

Employer: Employees are agents of the employer and thus employee actions can result in large damage awards against the employer. The employer needs to know about such issues and needs to make sure that law enforcement hears the company's side from someone with full knowledge.

Unlawful: This rule interferes with protected activity in that an employee who believes that the employer is engaging in unlawful activity may need to notify law enforcement to avoid personal harm.

(3) Never discuss details about your job, company business, or work projects with anyone outside the company;

Employer: The TV market is very competitive and the employer does not want its competitors to know about new products or strategies.

Unlawful: Union organizers are "outside the company," and employees need to share the details of their jobs and the company's finances...in order for the organizer to access whether a union organizing drive would be successful.

(4) Never give out information about customers or DirecTV employees;

Employer: In this information age companies must protect information in order to attract and retain customers and employees;

Unlawful: To organize, unions need to know how employees feel about the company, what the employees do, and what their compensation is. ... Customers are often used as leverage to force the company to acquiesce to union demands because a fight between labor and management may drive customers away. Union organizers would find it useful if DirecTV had customer profiles showing customers' union affiliations and political leanings.

(5) Employees may not blog, enter chat rooms, post messages on public websites, or otherwise disclose company information that is not already disclosed as a public record

Employer: As stated above, companies need to protect the brand;

Unlawful: Speech is speech whether on the shop floor, on the street, or on the internet.

In another case, Costco Wholesale Corp., Costco's policies prohibited employees from: (1) posting, removing, or altering any material on company property; (2) discussing private matters of members or employees, including sick leaves, leaves of absence, ADA accommodations, and personal health information... and (3) sharing employee names, addresses, telephone numbers, and e-mail addresses. The Board found that these policies violate the act.⁸ Looking at each of these policies, it is simple to see how employers could have legitimate business reasons for implementing each policy—reasons that have nothing to do with preventing unionization or curtailing protected activity. At the same time, it is easy to see how the Board could easily find that each of these policies violates the NLRA.

What Is an Employer to Do?

There is no easy answer for a company that wants to control speech and not violate the law. Some helpful hints are to: (1) narrowly tailor social media rules to address what the employer's real concerns are; (2) rely on externally imposed restrictions (e.g., the securities industry restricts the types of communications brokers and traders can have with the public); and (3) follow broad language with specific examples to clarify the policy so that it will not be read as interfering with the act.

The most interesting and controversial way to avoid NLRA violations is the so-called "savings clause" or "disclaimer." While they come in many shapes and forms, a savings clause is a catch-all phrase at the end of a policy stating that the nothing in the policy should be read as interfering with employees' rights under the act. There are two problems with the savings clause: (1) it may lead employees who would have never thought of the act to file charges with the NLRB; and (2) it may not work. The first problem is obvious. The second problem comes directly from Laif Solomon, the NLRB's (soon to be former) acting general counsel. Solomon has publicly stated through advice memorandum of the general counsel's office that a savings clause at the end of an unlawful policy will not, by itself, protect the employer. Lawyers are split on the value of the savings clause because of these two concerns. An employer in a city with low union density would be more concerned about the first issue than an employer in New York, Chicago, or San Francisco. Employers should check with counsel and weigh the pros and cons. If the employer truly wants to implement a broad communications policy that does not violate the act it can borrow a page from Boeing's book. The Boeing Company had policies that could be read as being unlawful, but they provided employees with a day-long seminar and provided employees with pages and pages of examples of what would and would not violate the policy. Moreover, Boeing had a

⁸ See: Costco Wholesale Corp., 358 NLRB No. 106 (Sep. 7, 2012).

union representative at the meetings. Thus, savings clauses can really save—if the company makes it clear that Section 7 rights will not be compromised by providing training, giving examples, and otherwise demonstrating that the rights the act provides will not be affected by the policy.

The NLRB and Sexual Harassment

There is nothing more confusing and disconcerting for employers and employees than having two laws that conflict with each other. The NLRB seemingly created such a dichotomy in *Banner Health System*⁹ by holding that an employer's investigative policy that routinely asked witnesses not to discuss a matter with their coworkers while the investigation was going on was unlawful. The first thought for many labor and employment relations professionals was the effect of such a ruling on sexual harassment investigations. Under the *Ellerth–Faragher* affirmative defense to sexual harassment, employers must exercise reasonable care to prevent and correct harassment. In order to correct harassment, employers often need employees to complain and the employer must investigate. A hallmark of a properly conducted investigation (one that exercises reasonable care) is promising to protect the complaining employee by requiring witnesses to keep the investigation confidential. Accordingly, the vast majority of employer policies promise confidentiality. In fact, in *Robinson v. Jacksonville Shipyards*,¹⁰ the court found that in order to be effective a sexual harassment policy needs to “promise and provide confidentiality and protection from retaliation for complainants and witnesses.”

Commentators saw *Banner* as another example of this activist NLRB contradicting the view of the courts with regard to sexual harassment. This is not really the case, because this conflict has existed for at least ten years. In *Phoenix Transit Sys. v. NLRB*,¹¹ a 2003 case, the United States Court of Appeals for the D.C. circuit found that an employer's policy of requiring confidentiality in all sexual harassment investigations was overbroad and unlawfully interfered with the employees' Section 7 rights. Thus, *Banner* simply applies the law and provides guidelines for justifying confidentiality, to wit: (1) do the witnesses need protection; (2) is evidence in danger of being destroyed or fabricated; or (3) is there a need to protect a cover-up.

Employers who wish to satisfy *Ellerth* and not violate the NLRA should: (1) check the state of the law with regard to their jurisdiction's holdings on confidentiality; (2) document the reasons for confidentiality; (3) give witnesses a form that advises them about confidentiality and why it's necessary; and (4) remember the NLRB does not apply to

supervisors, so the employer must make sure that supervisors keep the investigations confidential. If it is a close call, employers should consider the potential costs of non-compliance. If a policy violates the NLRA the employer will have to post a notice stating that its policy violated the act and that it will not do so in the future. Conversely, failure to comply with *Ellerth* can result in a finding of sexual harassment, for which federal law provides up to \$300,000 in punitive damages as well as back pay, attorney's fees, and litigation costs

Employment-at-Will Language

Most employee handbooks state that employees are subject to employment-at-will. In *American Red Cross Blood Services Region*,¹² the employee handbook stated that: “the at-will employment relationship cannot be amended or altered in any way.” Of course, unionizing can change the at-will relationship, and thus this language was found to be unlawful. Subsequent cases and two NLRB advice memoranda have provided additional guidance for employers. Namely, the at-will language simply cannot state that the nature of the relationship cannot be changed. But language stating that no supervisor can change the nature of the relationship is OK because it does not state that the relationship cannot be altered.

Big Proviso

It is important to note that as of this writing many of the NLRB's most recent decisions may not be controlling. The Board, which is supposed to have five members (three from the President's party and two from the minority party), must, according to the United States Supreme Court in *New Process Steel L.P. v. NLRB*,¹³ have a quorum of at least three members in order to issue decisions or implement rules. On March 27, 2010, President Obama used a recess appointment to appoint Craig Becker to the Board. From August 28, 2011, through January 3, 2012, when Becker left the Board, he was one of just three NLRB members, as the other two seats were unfilled. Upon Becker's departure from the Board, President Obama, on January 4, 2012, made recess appointments of three new members: Sharon Block (D), Richard Griffin (D), and Terence Flynn (R, who resigned July 24, 2012). Thus, the Board from August 28, 2011, through July 30, 2013, had only two confirmed members, Mark Pearce (D, Chairman, confirmed by the Senate on June 27, 2010) and Brian Hayes (R, whose term expired December 16, 2012), as well as either one (Becker), two (Block and Flynn), or three (Block, Flynn and Hayes) recess appointees.

⁹ 358 NLRB No. 93 (July 30, 2012)

¹⁰ 57 Fair Empl. Prac. Cas. (BNA) 971 (M.D. Fla. 1991)

¹¹ 63 Fed. Appx. 524, 2003 U.S. App. LEXIS 9429 (D.C. Cir. 2003)

¹² Case 28-23443 (Feb 1, 2012).

¹³ 130 S. Ct. 2635.

In *Noel Canning v. the NLRB*,¹⁴ the United States Court of Appeals for the D.C. circuit held that President Obama's recess appointments of Block, Griffin, and Hayes were unconstitutional because the Senate was not really in recess in January 2012. On May 16, 2013, the United States Court of Appeals for the Third Circuit followed *Noel Canning*, holding that the Becker recess appointment was unconstitutional.¹⁵ The Board, however, has rejected *Noel Canning* because, according to Chairman Pearce, the Board believes that President's position regarding the recess appointments will be ultimately upheld. Thus the Board continues to issue decisions and otherwise operate as if it had a legitimate quorum. At a February 13, 2013, hearing of the House Committee on Education and the Workforce, Roger King, an attorney at Jones Day, stated that the Board has issued nearly 1,000 invalid board decisions since August 27, 2011. On June 24, 2013, the Supreme Court granted review of *Noel Canning* and the Court will hear argument on the recess appointment issue during the next term, which starts in October 2013.

On July 30, 2013, the Senate, as part of a political compromise, approved all five of the President's nominees to the Board. The NLRB now consists of three Democrats (Chairman Mark Pearce, Kent Hirozawa, and Nancy Schiffer) and two Republicans (Harry Johnson and Phillip Miscimarra).

The Senate confirmation means that the Board has had valid authority to issue decisions from July 30, 2013, onward. The fact that these future decisions will have appropriate authority does not, however, change the fact that the 1,000 decisions decided by recess boards are still in a state of flux. The new board could attempt to fix the problem by reissuing decisions. This however, would not be simple because litigants would be unlikely to accept decisions from current board members who were not present for the arguments, and such decisions may not survive appellate review. Thus, the Board would have to rehear all these cases, engage in rule-making with regard to the issues decided, or come up with another mechanism to resolve this problem. Another fix could come from the Supreme Court when it hears *Noel Canning*. The Supreme Court decision, however, could take eight months from this writing to be issued. Without an overt act by the new board the state of flux over these past decisions will continue until the Supreme Court issues a

¹⁴ 705 F.3d 490 (D.C. 2013).

¹⁵ The 4th Circuit has also followed *Noel Canning*.

decision in favor of the NLRB. If the Court rules against the Board, the issue could remain unsettled.

The unclear status of the Board is not healthy for unions, employees, or employers. With the Board operating as if there is no issue regarding its powers and prior decisions, stakeholders must decide whether to follow board holdings or not. This is especially problematic because board members, unlike federal court judges, have limited terms and are openly politically affiliated. Thus, it is common when a Democrat replaces a Republican in the White House (or vice versa) that the new board overturns the holdings of the previous board. The latest Obama board is no exception to this rule, as there have been a number of decisions issued by this board that either overturn or "clarify" older cases to make the law more union or employee friendly. This is exactly what the last Bush board did (on the employers' side) and what the Clinton board did (on the unions' side) before that, and the list goes on.

Unions and employers are in limbo as of this writing. In practice, unions and employees argue that the new case decisions are, in fact, the law. As a practical matter, one could assume that the new Obama board will follow the decisions made by the Obama "recess boards." But, to the contrary, according to the Third, Fourth, and D.C. circuit courts, cases overturned by the recess boards are still good law and cases issued by the recess board are invalid.

Productive negotiations and resolutions are difficult enough to achieve when the two sides know the common set of rules. Union-management relations may be at a standstill in some cases, or at the mercy of the maturity of the parties' relationships. With regard to the application of the NLRB to non-union employers and employees, the flux may make it nearly impossible to resolve some disputes. To make matters more complex, some of the cutting edge issues before the Board dealt with technology. As is often the case, the speed of technology greatly exceeds that of the law. Nowhere is this clearer than with speech on the internet.

Conclusion

For many years the legal checklist for non-union employers who were not being organized did not include the NLRA. This has changed. The NLRA is now being used in non-union situations. Employers need to be aware of the basic concepts of the NLRA and make sure that policies or practices, regardless of their true intent, do not violate the act. ■



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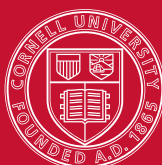
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