



Charting a Clear Course

Labor Law for Nonunion Employers


Presented by
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Today's Speakers



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National Labor Relations Act (NLRA)

- National Labor Relations Act is a federal law passed in 1935 that governs labor relations of private companies in the United States.
- Purpose of NLRA is to define and protect rights of employees and employers, to encourage collective bargaining and to eliminate certain practices on part of labor and management that are harmful to general welfare.



Who is Covered by NLRA?

- NLRA applies to any private business that “affects commerce.”
- Almost all private employers are covered by NLRA.

What Employee Rights are Protected by NLRA?

- Section 7 of NLRA outlines rights of employees – both union and nonunion.
- Section 7 enumerates:
 - “Employees shall have 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 purposes of collective bargaining or **other mutual aid or protection**, and shall have right to refrain from any or all of such activities except to extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment...”
29 U.S.C. § 157.

How are Employee’s Section 7 Rights Protected?

- Employees’ rights under Section 7 are protected and enforced by National Labor Relations Board (NLRB) and its 52 regional offices.
- When employees’ Section 7 rights have been violated, they may bring an unfair labor practice charge with NLRB.
- It should be noted that under Section 2(11) of NLRA, supervisors are not protected employees.

Unfair Labor Practices

- There are five primary types of unfair labor practices that employer may commit in violating employees' rights. It is unlawful for employers to:
 - Section 8(a)(1) – Interfere with, restrain or coerce employees in exercise of their Section 7 rights.

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Unfair Labor Practices

- Section 8(a)(2) – Dominate or interfere with formation or administration of labor organization or contribute financial or other support to it
- Section 8(a)(3) – Discriminate in hiring, tenure or any term or condition of employment to encourage or discourage union membership

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Unfair Labor Practices

- Section 8(a)(4) – Discharge or otherwise discriminate against an employee for filing charges or giving testimony under NLRA
- Section 8(a)(5) – Refuse to bargain collectively with employee's designated union representatives

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NLRA Applies to Nonunion Employers Too!

- Section 7 protects employees who engage in “protected concerted activity.”
 - What is “protected” activity?”
 - What is “concerted” activity?”

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NLRA Applies to Nonunion Employers Too!

- Examples of “protected concerted activity” include:
 - Right to complain
 - Right to discuss wage, hours and terms and conditions of employment with co-workers
 - Right to strike

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Nonunion Employees

- Most common mistake made by nonunion employers is ignoring NLRA in its personnel matters!
- Section 7 protects any employee activity by employees (including nonunion employees) for mutual aid or protection of employees.
- Actions taken for mutual or protection of employees can be extremely vast.

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Issues for Nonunion Employers

- E-mail usage
- Internet usage (social media)
- Solicitation and distribution policies
- Confidentiality agreements
- Non-fraternization policies
- Weingarten rights
- Dress codes
- Anti-loitering policies
- Class action lawsuits

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Employee E-mail Usage

- Most employers have restrictions on employee e-mail usage.
- Most employee discussions regarding wages, hours, terms and conditions of employment occur over e-mail.
- Current position of NLRB on employee e-mail usage is set forth in *The Register Guard* case.

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Employee E-mail Usage

- Employees have no statutory right to use company e-mail for Section 7 purposes.
- Employers can prohibit union e-mail solicitation, if prohibition policy is applied universally and consistently.
- *The Register Guard* is high on list of cases to be overturned by Obama NLRB.
- Expect pro-employee changes!

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Internet Usage (Social Media)

- Use of Internet and social media (Facebook, MySpace, LinkedIn) is on the rise.
- Employees use these forums to discuss their employment issues.
- Generally does not involve employer property or time – more difficult to control
- Internet usage or Internet discussions can be considered “protected concerted activity.”

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Internet Usage (Social Media)

- Laws that impact employer oversight of Internet usage:
 - NLRA (*Amcast Automotive of Indiana, Inc.*, 348 NLRB 836 (2006))
 - The Stored Communications Act (*Pietrylo v Hillstone Restaurant Group, d/b/a Houstons*, 2009 WL 312 8420 (N.J. 2009))
 - Negligence (*Doe v XYZ Corp.*, 887 A. 2nd 1156 (N.J. supra. Ct. App. Div. 2005))

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Solicitation & Distribution Policies

- Employers often establish non-solicitation and non-distribution policies to maintain production and discipline.
- Policies restricting solicitation and distribution are only permitted as they apply “in work areas” and on “working time.”
- Blanket policies are often found to be in violation of the NLRA. (*Guardsmark, LLC v NLRB*, 475 F3d 369 (DC Cir. 2007))

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Confidentiality Agreements or Policies

- Employers utilize confidentiality agreements or policies to protect corporate information.
- Terms of agreement or policy cannot be too broad.
- They cannot be construed to prohibit employees from discussing terms and conditions of employment with co-workers or a union representative.

Non Fraternization Policies

- Fraternization policies generally prohibit off-duty interaction or dating amongst co-workers.
- Court held that “fraternizing” was different than “dating.”
- Could have chilling effect on employees rights to meet and discuss working conditions

Weingarten Rights

- Right to have co-worker or representative present during investigative interview that may lead to discipline.
- Currently, nonunion employees are not entitled to a representative. (*IBM Corp.* 341 NLRB 1288 (2004)). But, law has frequently changed over the years.
- Obama NLRB has stated intention to reverse *IBM Corp.*, creating heightened obligations for nonunion employers.

Dress Codes

- Employers may impose dress codes that prohibit display on clothing of any writing, advertisement or group affiliation.
 - i.e., union buttons, t-shirts or badges
- Policy must be uniformly enforced.
- Prohibition must be justified on basis of safety, production or other legitimate business purpose.

Anti-Loitering Policy

- Employer can implement anti-loitering policy.
 - Can only limit access to interior areas and working areas
 - Must be clearly communicated
 - Must apply to all employees (both on duty and off duty) seeking to access working areas

Mandatory Arbitration Provisions

- General Counsel Memorandum GC – 10-06
- Mandatory Arbitration Provisions
 - Employer can enforce mandatory arbitration provision regarding employees' individual claims.
 - Employees' right to engage in "concerted" action with other employees is protected by Section 7 of NLRA.

Nonunion Employers

- As a nonunion employer, please remember that the NLRA still applies to your personnel decisions.
- If you are currently nonunion, take appropriate steps to remain nonunion!
- Unions don't organize, management organizes them by the mistakes it makes!

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Union Avoidance

- Origins of union organizing drives
 - Employee dissatisfaction
 - Breakdown in personal relationships
 - Poor supervisors
- Management's failure to appropriately address employee desires regarding:
 - Fair wages and benefits
 - Job security and good working conditions
 - Fair treatment and rapid response to concerns

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Union Avoidance

- Generally not money driven
- Supervisory caused dissatisfaction
 - How are complaints handled?
 - Are current supervisors appropriate for position?
- Often times, employers are unaware a union organizing drive is going on until it is too late.

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Supervisors are Key to Union Avoidance

- Supervisors must understand role in keeping company nonunion.
- Campaigns boil down to three points:
 - Do employees feel loyalty to their supervisors?
 - Who provides job security, company or union?
 - Do employees feel they have been treated fairly?

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Supervisors Are Key to Union Avoidance

- Supervisors' goals are to test temperature of employee sentiment and to take preventative measures.

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Two Basic Management Errors

- Communications breakdown between workers and management
- Waking up too late by misreading warning signals

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Two Basic Management Errors

- Most common warning signals:
 - Slumping employee morale:
 - Increased turnover and absenteeism
 - Erratic production
 - More scrap and waste
 - Poor safety
 - Employees stop talking to management

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Two Basic Management Errors

- Poor reaction by supervisors to symptoms
- Management losing credibility by lying to employees

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Two Basic Management Errors

- Supervisors allowing misdirected peer pressure to grow by:
 - Playing favorites
 - Alienating individuals or groups of workers
 - Making an employee a martyr or rallying point

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“TIPS” for Employers

- T – No Threats
- I – No Interrogation
- P – No Promises
- S – No Surveillance

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Employers Battling Union “FOE”

- F – Employer can provide employees with facts.
- O – Employer can provide employees with opinions on unionization.
- E – Employer can provide employees examples of unionized workplaces.

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Rules to Control Turnover & Avoid Union Sentiment

- Be honest with applicants. Employers sometimes depict jobs as more responsible or interesting than they really are.
- Establish realistic job requirements.
- Provide employees with feedback early.
- Pay competitively and equitably.
- Spot trouble signs.

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Rules to Control Turnover & Avoid Union Sentiment

- Don't try to keep everyone.
- Firm, but fair, supervision is absolutely essential to maintaining stability with employees.

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Pre-Discipline/Discharge Checklist

- To avoid costly legal problems, management should ask the following questions before disciplining or discharging an employee.
- If all questions can be answered "yes," then the discipline or discharge is generally on firm ground.
- If any answer is "no," the decision to discipline or discharge should be reconsidered

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Pre-Discipline/Discharge Checklist

- Use the following questions as guidelines and don't change the "at will" policy of the company:
 - Did company give employee forewarning of possible or probable disciplinary consequences for employee's conduct?
 - Was company's rule or managerial order reasonably related to the orderly, efficient and safe operation of the business?

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Pre-Discipline/Discharge Checklist

- Did company, before imposing discipline, make effort to discover if employee violated or disobeyed a rule or management order?
- During investigation, did management obtain evidence or proof that employee was guilty?
- Was company's investigation conducted objectively?

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Pre-Discipline/Discharge Checklist

- Did company apply rules, orders and penalties uniformly to all employees?
- Was degree of discipline administered by company in the particular case related to the seriousness of the proven offense and the employee's past work record?

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Management Should Always!

- Be on the level
- Be objective
- Be open-minded
- Be self-confident
- Maintain right attitude; be positive.
- Retain control of interviews and keep them business-like.
- Let employees do the talking, but within limits.
- Help employees; be at ease.
- Do not be argumentative.
- Always allow an employee to save face.

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Management Should Always!

- Recognize each employee as an individual and treat him or her with respect and dignity.
- Do not be afraid to praise, but do so honestly and judiciously.
- Recognize importance of each employee's individual job.
- Be tactful and courteous.
- Be approachable.
- Be a good listener
- Be enthusiastic about the company.

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Management Should Always!

- Retain an employee's friendship, if possible.
- Give or get answers to all employees' questions.
- Make decisions.
- Be firm but fair; do not play favorites.

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Questions & Answers



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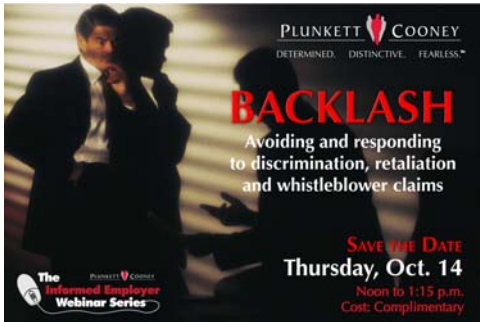


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