

# Labor Law for the Employment Lawyer

**T**o some employment lawyers, traditional labor law is a relic of a bygone era that they need not consider when evaluating workplace issues. This is a mistake. Labor law applies to union and non-union employers alike and with largely equal force. Employment lawyers with a working knowledge of the fundamental labor law concepts will become much-improved advocates for their clients.

## The National Labor Relations Act and Its Enforcement

The National Labor Relations Act guarantees most private-sector employees the right to organize; engage in protected, concerted activity; and collectively bargain over wages, hours, and other terms and conditions of employment.<sup>1</sup>

The five members of the National Labor Relations Board function as a quasi-judicial body, deciding cases through administrative litigation, and interpreting and administering the act. The President appoints the board members, with the advice and consent of the Senate. Under longstanding tradition, the President's party appoints three members and the opposition party selects the remaining two.

The President also appoints the board's general counsel, whose office serves as the agency's enforcement arm. The general counsel's office (assisted by 27 regional offices) investigates and prosecutes claims arising under the act, referred to as unfair labor practice charges, and conducts elections.

A regional director leads each regional office, assisted by a staff of attorneys and investigators. In unfair labor practice charge proceedings, the regional offices play a dual role of both detective and prosecutor. When a charge is filed, an investigator gathers information from both sides and the involved witnesses. The regional director then reviews the information and decides whether to issue a complaint. If a complaint is issued, attorneys in the regional office prosecute it on behalf of the regional director. An administrative law judge hears the case at a formal hearing under normal evidentiary rules. The judge issues a final written decision unless a party requests review by the board, which may adopt, reject, or modify the decision. The board's decision may be appealed to the U.S. Court of Appeals where the regional office is located or to the Court of Appeals for the District of Columbia, and potentially, to the U.S. Supreme Court.

## Section 7 Rights

Often described as the heart of the National Labor Relations Act, Section 7 gives employees the right to organize, join, or assist a labor union and to engage in "other concerted activities for the purpose

of ... other mutual aid or protection."<sup>2</sup> This latter piece—the right to engage in concerted activity for other mutual aid or protection—gives the act substantial breadth, affecting even non-unionized workplaces. The board and courts have interpreted the concept of protected, concerted activity so broadly that most employee conduct will generally find protection in the statute if it is aimed at improving the workplace.<sup>3</sup>

Importantly, the act makes it an unfair labor practice for employers to coerce, restrain, or interfere with employees' Section 7 rights.<sup>4</sup> This means that employers can potentially commit unfair labor practices when they discipline, reprimand, or even threaten employees in response to their Section 7 activity. (The board and the courts often use the phrase "protected, concerted activity" and "Section 7 activity" interchangeably.)

Common threshold issues that arise when evaluating potential Section 7 activity include whether the conduct:

- Was for mutual aid or protection, i.e., whether it qualifies as "protected" activity;
- Occurred as part of a group effort, i.e., whether it qualifies as "concerted" activity; and
- While perhaps both technically protected and concerted activity, the conduct may still fall outside the protection of statute because of the means in which employees exercised their Section 7 rights.

The notion of "protected" activity is expansive and includes most employee actions that have some connection to the workplace. For example, when employees protest or lodge group complaints about employment discrimination they engage in activity protected by the act, in addition to activity protected by Title VII of the Civil Rights Act of 1964.<sup>5</sup>

Activity taken by a group of employees (two or more) easily qualifies as concerted activity. But even a single employee's activity could meet the definition of concerted if a group of employees designated that employee as their spokesperson or authorized him to act on their behalf.<sup>6</sup> Likewise, an employee's seemingly individual complaints that seek a group remedy or objective can constitute concerted activity. On the other hand, an employee's purely individual or personal gripes are not concerted activity.<sup>7</sup>

While activity may qualify as both protected and concerted, it may still fall outside the protection of the act when exercised in an abusive, violent, or intensely hostile manner or in a way that completely abandons the duty of loyalty to the employer. The board will

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*Mark Wilkinson is a partner at Franczek Radelet in Chicago and splits his practice almost evenly between labor law and employment law. He received his J.D. cum laude from Wayne State University Law School and his B.A. magna cum laude from Western Michigan University. Josh Meeuwse received his J.D. from the University of Michigan Law School, and his B.A. summa cum laude from Western Michigan University. He is a labor attorney in Caterpillar Inc.'s Legal Services Division in Peoria, Illinois.*

examine the conduct and surrounding circumstances to determine if, on balance, the conduct crossed the line from “protected activity ... [to] opprobrious conduct,” where the worker loses the protection of the act.<sup>8</sup> Here, context matters enormously, and it predictably does not generate bright-line rules. For example, while some profanity-laced outbursts may be unprotected,<sup>9</sup> the board expects employers to tolerate some level of gritty behavior.<sup>10</sup> Violence, threats, and intimidation, however, are clearly not protected.<sup>11</sup>

Section 7 activity in non-union workplaces may arise from seemingly mundane facts that employment counsel sometimes overlook. For instance, if a group of employees wore orange shirts to work and the employer fired them for it, this would not pose an apparent problem under the employment laws. But if those same employees wore orange to protest their working conditions (likening them to a prison), this probably qualifies as protected, concerted activity.<sup>12</sup> Employers in this situation would not benefit from the doctrine of at-will employment, and the reflexive refrain that an employer may “fire for a good reason, a bad reason, or no reason at all” does not apply since the firing would interfere with their Section 7 rights.

Employer handbooks and policies provide fertile ground for the application of labor law in non-union workplaces.<sup>13</sup> The board routinely finds the following workplace policies unlawful regardless of the presence of a union:

- *Policies prohibiting discussions of pay.* Employees have the right to discuss their pay and benefits because preventing these discussions would chill Section 7 activity.<sup>14</sup>
- *Confidentiality rules.* Employers may legitimately protect their

proprietary business information but often go too far and include employee information within the realm of confidential information that employees cannot discuss.<sup>15</sup>

- *Antifraternalism rules.* Unless narrowly tailored, antifraternalism rules are unlawful under the act.<sup>16</sup>
- *Nondisparagement policies.* Employees have the right to criticize the workplace and discuss their dissatisfaction.<sup>17</sup>
- *Negative conversations or attitudes.* Many employers have rules that require employees to speak and behave nicely toward each other, but the board will find those policies unlawful if employees would understand them to prohibit workplace complaints.<sup>18</sup>
- *Restricting off-duty access.* An employer may only maintain this kind of policy if it limits the restriction to work areas during work times and applies it equally to deny all access requests—not just to employees engaging in Section 7 activity.<sup>19</sup>
- *Social media policies.* While this area has received a lot of attention recently, it reflects the application of a well-established precedent to emerging technology. Since employees have long had the right to complain about the workplace at the water cooler, they have the right to do the same on Facebook, Twitter, and the like (the modern-day water cooler).<sup>20</sup> The board will find unlawful policies limiting this right, but it has published a model social media policy.<sup>21</sup>
- *Class arbitration claims.* According to the board, the Section 7 right to lodge group complaints extends to arbitration and policies that restrict the right to pursue class arbitration are unlawful.<sup>22</sup>



## Employee Misconduct Investigations

The concept of Section 7 activity can apply in non-union workplaces during employee misconduct investigations. The board finds it unlawful for employers to question employees about their protected, concerted activity because it may generate fear that employees will face retaliation. Even if no adverse consequences result, the questioning is enough to support a violation of the act if considered coercive.<sup>23</sup> Similarly, a violation will follow when employers actively monitor employees' protected, concerted activity because the surveillance has the same chilling effect.<sup>24</sup>

Unlawful coercion or interrogation may occur even when an employer or its attorney interviews employees in preparation for defending an unfair labor practice charge or litigation. To safeguard against such a claim, employers and their representatives should take several steps when interviewing employees:

- Communicate the purpose
- Assure that no retaliation will occur
- Make sure participation is voluntary
- Question the employee in a way that shows no hostility toward unions or protected, concerted activities
- Limit the questions to necessary information and do not pry into unrelated matters, like how employees feel about unions<sup>25</sup>

Employment lawyers must further recognize that represented employees have the right to union representation during an investigatory interview if the employee reasonably believes that the interview might lead to the employee's discipline—known as the *Weingarten* right, after the case that established the rule.<sup>26</sup> Under current board law, nonrepresented employees do not have comparable rights; however, the board's position has changed repeatedly in conjunction with its members' political affiliation.<sup>27</sup> Given the political makeup of the current board, it may overturn the rule once again.

To exercise the *Weingarten* right, an employee must clearly request representation during the interview.<sup>28</sup> The employer must respond by granting the request, discontinuing the interview, or offering the employee the choice of either proceeding without representation or foregoing the interview.<sup>29</sup> The employee may request a particular representative, and if the requested individual is available, the employer must honor the request.<sup>30</sup> If the requested individual is not available, however, the employee must use another available representative. Should the employee refuse and insist on the presence of the unavailable representative, the employer may ignore the request and proceed with the interview.<sup>31</sup>

## Common Labor Contract Issues

If a union wins representation of employees, under Section 8 of the act, an employer has the duty to bargain with the union over mandatory subjects, including wages, hours, and other terms and conditions of employment.<sup>32</sup> An employer violates the act if it unilaterally changes these items without first bargaining to impasse.<sup>33</sup> Examples of mandatory subjects include rates of pay, bonuses that are compensation rather than gifts, pension benefits and retirement plans, health insurance, profit-sharing plans, merit wage increases, grievance and arbitration procedures, layoff and recall, work rules, discipline, discharge, holidays, vacation, sick leave, absentee policies, and scheduling.<sup>34</sup> Employment lawyers must keep in mind that

issues that may seem minor may not be. For example, the board has held that an employer violated the act by unilaterally eliminating free coffee.<sup>35</sup>

Once the parties have negotiated a collective bargaining agreement, issues often arise as to the meaning and interpretation of the agreement. Labor contracts are unique in they often rely on custom and past practices to interpret the parties' intent. Past practice may become an enforceable part of the parties' agreement, clarifying ambiguities, and filling gaps, but it is important to note that merely following a particular course of action does not turn that practice into a binding part of the agreement.<sup>36</sup> A binding past practice exists when it is: "(1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both [p]arties."<sup>37</sup> Importantly, there must be evidence of mutual acceptance by both parties, whether explicit or implicit, that the practice is a binding part of their agreement.<sup>38</sup>

## Conclusion

While union density in private-sector employment has declined, sophisticated employment lawyers know that traditional labor law questions will persist. The ability to identify labor law issues during the analysis of employment law questions will help advance your client's interests, regardless of whether you represent employees or employers. ☉

## Endnotes

<sup>1</sup>29 U.S.C. §§ 157 and 158(d).

<sup>2</sup>29 U.S.C. § 157.

<sup>3</sup>See, e.g., *Walls Mfg. Co. v. NLRB*, 299 F.2d 114 (D.C. Cir. 1962), *after remand* 321 F.2d 753, 754 (D.C. Cir. 1963) (complaints of unsanitary working conditions found protected).

<sup>4</sup>29 U.S.C. § 158(a)(1).

<sup>5</sup>See, e.g., *Ellison Media Co.*, 344 NLRB 1112, 1113-14 (2005) (employee encouraging others to complain about sexually offensive comments found protected); *Dearborn Big Boy*, 328 NLRB 705, 710 (1999) (concerted protest over alleging race discrimination found protected); *Gatliff Coal Co. v. NLRB*, 953 F.2d 247, 251 (6th Cir. 1992) (same for sex discrimination protest).

<sup>6</sup>*Fotomat Corp.*, 207 NLRB 461, 463 (1973); *Pacific Electric Cord Co.*, 153 NLRB 521, 521-22 (1965).

<sup>7</sup>See, e.g., *K-Mart Corp.*, 174 NLRB 1476, 1477-78 (2004) (employee did not engage in protected, concerted activity since there was no evidence that he acted on the authority of, or with, other employees in protesting break rules); *Tabernacle Cmty. Hosp. & Health Ctr.*, 233 NLRB 1425, 1429 (1977) (employer lawfully discharged employee for writing letter to management protesting transfer decision since activity was purely personal and no other workers were involved or would have benefited had she been successful in her protest).

<sup>8</sup>*Atlantic Steel Co.*, 245 NLRB 814, 816 (1979).

<sup>9</sup>*Media Gen. Operations Inc. v. NLRB*, 394 F.3d 207, 212-13 (4th Cir. 2005).

<sup>10</sup>See *CKS Tool and Eng'g*, 332 NLRB 1047, 1584-86 (2000) (finding protected employee's use of loud, profane language in response to plant manager's criticisms of workers).

<sup>11</sup>See *Daimler Chrysler Corp.*, 344 NLRB 313, 317 (2005) (conduct found unprotected because employee called supervisor an

“asshole” to his face and physically approached him in an “intimidating” manner); *Fla. Steel Corp. v. NLRB*, 529 F.2d 1225, 1234 (5th Cir. 1976) (threats of violence found unprotected); *Corriveau and Routhier Cement Block Inc. v. NLRB*, 410 F.2d 347, 351 (1st Cir. 1969) (“Threats of violence are not only not protected activity, they are the very antithesis of protected activity”).

<sup>12</sup>See *Elizabeth R. Wellborn PA*, NLRB Case Nos. 12–CA–078768 & 12–CA–079608 (Apr. 13 and 26, 2012) (unfair labor practice charges filed against non-union employer where employees wore orange shirts in solidarity to protest working conditions and were fired); see also Susana Kim, *Fired Orange Workers File Federal Complaint Contesting Firing*, ABC NEWS (Apr. 12, 2012), [abc-news.go.com/business/fired-orange-workers-file-complaint-national-labor-relations/story?id=16004370](http://abc-news.go.com/business/fired-orange-workers-file-complaint-national-labor-relations/story?id=16004370).

<sup>13</sup>*Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004); *Lafayette Park Hotel*, 326 NLRB 824 (1998).

<sup>14</sup>*NLS Group*, 352 NLRB 744, 745 (2008).

<sup>15</sup>*Cintas Corporation v. NLRB*, 482 F.3d 463, 470 (D.C. Cir. 2007).

<sup>16</sup>*Guardsmark LLC v. NLRB*, 475 F.3d 369, 378-80 (D.C. Cir. 2007).

<sup>17</sup>*Quicken Loans Inc.*, 359 NLRB No. 141, at \*5 (June 21, 2013).

<sup>18</sup>*Claremont Resort and Spa*, 344 NLRB 832, 832-33 (2005).

<sup>19</sup>*Tri-County Med. Ctr.*, 222 NLRB 1089, 1089 (1976).

<sup>20</sup>*Costco. Wholesale Corp.*, 358 NLRB No. 106, at \*1-2 (Sept. 7, 2012).

<sup>21</sup>NLRB Operations Memo. No. 12-59, at 22-24 (NLRB Gen. Counsel May 30, 2012).

<sup>22</sup>*D.R. Horton*, 357 NLRB No. 184, at \*13 (Jan. 3, 2012), *enf. denied* \_\_ F.3d \_\_, 2013 WL 6231617 (5th Cir. Dec. 3, 2013). The status of class arbitration waivers continues to evolve and may ultimately require a decision from the Supreme Court to settle the debate.

<sup>23</sup>*Frances House Inc.*, 322 NLRB 516, 522 (1996).

<sup>24</sup>*NLRB v. Prince Macaroni Mfg. Co.*, 329 F.2d 803, 811-12 (1st Cir. 1964).

<sup>25</sup>*Johnnie’s Poultry Co.*, 146 NLRB 770, 775 (1964) *enf. denied* 344 F.2d 617 (8th Cir. 1965) (denying enforcement because there was not substantial evidence of coercion, but not rejecting the legal standards established by the board).

<sup>26</sup>*NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

<sup>27</sup>When President Carter’s appointees made up the majority of the board, they extended *Weingarten* rights to non-represented employees. *Materials Research Corp.*, 262 NLRB 1010 (1982). President Reagan’s board overruled the decision several years later (*Sears Roebuck & Co.*, 274 NLRB 230 (1985)), only to have its decision reversed by President Clinton’s board. *Epilepsy Found. of Ne.*

*Ohio*, 331 NLRB 676 (2000), *enf. d. in rel. part* 268 F.3d 1095 (D.C. Cir. 2001). President George W. Bush’s board once again changed course, holding that non-represented employees do not have *Weingarten* rights. *IBM Corp.*, 341 NLRB 1288 (2004). This remains the current rule. See *Praxair Distrib. Inc.*, 358 NLRB No. 7, at \*1 n.2 (Feb. 21, 2012) (President Obama’s board finding it unnecessary to reexamine the rule in *IBM Corporation* because the employee did not request the presence of a co-worker).

<sup>28</sup>*Consol. Casinos Corp.*, 266 NLRB 988, 1008 (1983).

<sup>29</sup>*Washoe Medical Ctr., Inc.*, 348 NLRB 361, 361 n.5 (2006).

<sup>30</sup>*Consol. Coal Co., Robinson Run Mine No. 95*, 307 NLRB 976, 978 (1992).

<sup>31</sup>*Id.*; *Coca-Cola Bottling Co. of L.A.*, 227 NLRB 1276, 1276-77 (1977).

<sup>32</sup>29 U.S.C. § 158(a)(5), (b)(3) & (d).

<sup>33</sup>See, e.g., *Aggregate Indus.*, 359 NLRB No. 156, at \*4 (July 8, 2013). The parties may voluntarily bargain over permissive subjects, but are not compelled to do so. *Id.* The phrase “permissive” is misleading, however—it does not mean that an employer is free to change permissive subjects *carte blanche*. Neither party may insist to impasse over a permissive subject, and an employer may not implement a permissive subject absent the union’s consent. *Id.*

<sup>34</sup>*NLRB v. Katz*, 369 U.S. 736, 744 (1962) (sick leave); *Kroger Co. v. NLRB*, 401 F.2d 682, 687 (6th Cir. 1968) (profit-sharing plans); *N. Am. Pipe Corp.*, 347 NLRB 836, 837 n.6 (2006) (bonuses that are compensation rather than gifts); *United Cerebral Palsy of N.Y.C.*, 347 NLRB 603, 607-09 (2006) (discipline and discharge, grievance and arbitration procedures, holidays, vacation, scheduling, and absentee policies); *Toledo Blade Co.*, 343 NLRB 385, 387 (2004) (work rules); *Odebrecht Contractors of Cal. Inc.*, 324 NLRB 396 (1997) (layoffs); *Quality Packaging Inc.*, 265 NLRB 1141, 1149 (1982) (recall); *Stewart Granite Enter.*, 255 NLRB 569, 575-76 (1981) (rates of pay and health insurance); *Inland Steel Co.*, 77 NLRB 1, 2 (1948) (pension and retirement plans); *J.H. Allison & Co.*, 70 NLRB 377, 378 (1946) (merit wage increases).

<sup>35</sup>*Universal Builders Supply Inc.*, Case 3-CA-27287, 2010 WL 3285411 (May 4, 2010) (relying on prior board case law holding that a practice of providing free coffee in the workplace is a mandatory subject of bargaining).

<sup>36</sup>See ELKOURI AND ELKOURI, *HOW ARBITRATION WORKS* 623-30 (Alan Miles Ruben, 6th ed. 2003). Most arbitrators will not consider past practices that contradict the clear language of the agreement, although some may rely on evidence of past practice to show that the parties have amended the agreement. *Id.* 627-30.

<sup>37</sup>*Id.* 608.

<sup>38</sup>*Id.* 608-10.

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