

**NLRA Update: What Union and Non-Union Employers
Need to Know Now¹
Employment Roundtable**

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Although we most often hear about traditional labor issues in the context of a unionized workforce or organizing campaigns, there are a variety of protections and rights available to *all* non-supervisory employees, both union and non-union, under the National Labor Relations Act (NLRA).² This body of law, which is administered by the National Labor Relations Board (NLRB or Board), provides the basis for a robust number of decisions each year, many of which reflect policies consistent with that of the political party that happens to be in power at the time. As a result, in recent years, we have seen decades of established labor law overturned with changes in Board membership. That trend is likely to continue.

The last several years are replete with examples of changes in NLRB policy. With the prevalence of such changes, and this being an election year, savvy employers will be paying close attention to the current, hot-button labor issues. We discuss some of those issues in this memorandum, as well as the NLRA's application to the non-union workplace.

I. BRIEF HISTORY OF THE NLRA

In response to deplorable working conditions in the early 1900's, employees attempted to organize to improve working conditions. The violence and disruption that often accompanied organization efforts led Congress to pass the NLRA in 1935 to legitimize unions.³ At the same time, Congress created the NLRB⁴ as an independent federal agency to implement labor policy. It consists of five members, nominated by the President and confirmed by the Senate, who serve

¹ This memorandum contains a summary of information obtained from laws, regulations, court cases, administrative rulings, and legal publications and should not be viewed or relied upon as legal advice. Ater Wynne LLP urges readers of this memorandum to consult legal counsel regarding specific legal issues and factual circumstances.

² 29 USC § 151 *et seq.* As one author noted, "the application of the NLRA in non-union settings is ... 'one of the best-kept secrets' of employment law." Rafael Gely, Timothy D. Chandler, *Card Check Recognition: New House Rules for Union Organizing?*, 35 Fordham Urb L J 247, 271 (2008).

Undocumented workers are protected employees under the NLRA. *See Agri Processor Co., Inc. v. NLRB*, 514 F3d 1 (DC Cir 2008) (employer must bargain with union representing illegal immigrant employees who voted in the union election). So are paid union organizers acting as "salts." *NLRB v. Town & Country Electric*, 516 US 85 (1995).

³ 29 USC §151.

⁴ 29 USC §153.

staggered five-year terms.⁵ Traditionally, the NLRB has had two primary functions: (1) to conduct elections to determine whether employees wish to be represented by a union, and (2) to prevent and remedy unfair labor practices by either employers or unions.⁶

In theory, the NLRB has jurisdiction over all labor disputes affecting interstate commerce. However, the NLRB has established jurisdictional standards based on the category of industry and its gross revenues.⁷ Employers who do not meet the NLRB's jurisdictional standards may be covered by state law⁸ which, in Oregon, specifically excludes from coverage persons subject to the jurisdiction of the NLRB.⁹

In Oregon, the agency charged with the responsibility of enforcing state labor law is the Employment Relations Board (ERB).¹⁰ The ERB has issued relatively few private sector opinions.¹¹ However, federal and state labor laws are similar, and the ERB has recognized NLRB precedent as persuasive. In this memorandum, we address only federal labor law issues.

II. POLICIES THAT IMPLICATE THE NLRA

The operative language in the NLRA appears under Section 7, which extends to “employees” (not limited to union members) the right to engage in, or to refrain from engaging in, concerted activities for the purpose of collective bargaining or other mutual aid or protection.¹² As a result of the expansive scope of this language, most employers, both union and non-union, must recognize employee rights under Section 7.¹³ A covered employer that fails to recognize Section 7 rights is subject to a charge that it engaged in an unfair labor practice under Section 8.¹⁴

⁵ 29 USC § 153(a); http://www.nlr.gov/about_us/overview/board/index.aspx. Normally, one member rotates off each year. Currently, the Board has only two members, with three vacancies

⁶ See NLRB Fact Sheet at http://www.nlr.gov/about_us/overview/fact_sheet.aspx#.

⁷ *Id.*; 29 CFR 103.1 *et seq.* NLRB has no jurisdiction over airlines, railroads, agriculture, or government.

⁸ See, e.g., ORS Chapter 663.

⁹ ORS 663.005(4).

¹⁰ See ORS 243.766, 662.415, 663.020.

¹¹ See generally, LABOR AND EMPLOYMENT LAW: PRIVATE SECTOR (Oregon CLE 1990 and Supp 1997) § 15.1.

¹² “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 or 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 158(a)(3) of this title.” 29 USC § 157. Section 7 rights only extend to non-supervisory employees. 29 USC §152(3) (excluding supervisors from the definition of employee).

¹³ Section 7 does not apply to government employers. 29 USC §152(2) (excluding government employers from the definition of employer). In addition, the NLRA does not regulate airline, railroad, and agricultural employers. See note 6, *supra*.

¹⁴ 29 USC § 158, under which it is unlawful to (1) interfere with, restrain, or coerce employees in the exercise of their Section 7 rights; (2) dominate or interfere with the formation or administration of a labor organization or contribute financial or other support to it; (3) discriminate in hiring, tenure, or any term or condition of employment to encourage or discourage union membership; (4) discharge or otherwise

For activity to qualify as “concerted,” the employee must be engaged in the action with or on the authority of other employees.¹⁵ Protected concerted activity may encompass conduct that appears to have little or nothing to do with unions, as when employees act together to complain about their wages, benefits, or working conditions. Other examples of concerted activities include strikes, honoring picket lines, group complaints, and the filing or processing of grievances.

Under Section 8(a), employers are prohibited from interfering with employees’ Section 7 rights or otherwise engaging in conduct to encourage or discourage union membership.¹⁶ Employers must, therefore, avoid circumstances suggesting that employment decisions are motivated by “union animus.” Like other forms of discrimination, “union animus” may be established by circumstantial evidence, such as the timing of an employee’s union activity and the disciplinary action.¹⁷

The following is a nonexclusive list of activities that may implicate Section 7 rights.

A. Prohibitions on Use of E-mail, Blogging, and the Internet

1. E-mail

Employers may have legitimate reasons for not wanting employees to use e-mail for personal use, and often place restrictions on the use of company systems for non-work related purposes. However, many protected employee discussions about the terms and conditions of employment, whether or not a union is involved, take place by e-mail. Historically, the NLRB has taken the position that employer e-mail systems used regularly by employees to communicate are extensions of the workplace where employees are entitled to communicate about unions and the terms and conditions of their employment. The general rule was that although employers could prohibit the use of e-mail for non-work related subjects, if the

discriminate against an employee for filing charges or giving testimony under the NLRA; (5) refuse to bargain collectively with the employees’ designated union representatives.

¹⁵ See, e.g., *NLRB v. Hotel Employees Int’l Union Local 26*, 446 F3d 200, 207 (1st Cir 2006) (“it is sufficient that the *** employee intends or contemplates, as an end result, group activity which will also benefit some other employees.”) (*quoting Koch Supplies, Inc., v. NLRB*, 646 F2d 1257, 1259 (8th Cir 1981).

¹⁶ 19 USCA §158(a).

¹⁷ While this is the general rule, there are some exceptions. For example, the NLRB recently held that “the filing and maintenance of a reasonably based lawsuit does not violate [NLRA], regardless of whether the lawsuit is ongoing or completed, and regardless of the motive for initiating the lawsuit.” *BE & K*, 351 NLRB 29 (September 29, 2007). This opinion represents a change in law from an earlier 1983 Supreme Court opinion. *Id.*; see *NLRB General Counsel Guideline Memorandum GC 08-02* (December 27, 2007), http://www.nlr.gov/shared_files/GC%20Memo/2008/GC%2008-02%20Guidelines%20Memorandum%20concerning%20BE%20&%20K%20Construction%20Co.pdf, discussing the impact of the opinion on *Bill Johnson’s Restaurants, Inc. v. NLRB*, 461 US 731 (1983). In another recent decision, a court held that an employee lost the protection of the Act by intentionally falsifying the sender’s name on a package containing a complaint, and allowed the employer to discharge him on that basis alone despite allegations of union animus. *International Union, United Auto., Aerospace and Agr. Implement Workers of America (UAW), AFL-CIO v. NLRB*, 514 F3d 574 (6th Cir 2008).

employer, *in practice*, allowed the personal use of e-mail, it was discriminatory to only discipline workers who use e-mail for Section 7 purposes.¹⁸ However, that rule was afforded a somewhat narrower interpretation in *The Guard Publishing Co., d/b/a The Register Guard (The Register Guard)*.¹⁹

At issue in *The Register Guard* was a policy prohibiting the use of e-mail for “non-job-related solicitations.” The employer, in practice, permitted e-mail solicitations for personal support, but did not allow e-mails soliciting support for outside groups or organizations. In a 3-2 decision, the Board held that “employees have no statutory right to use [the company’s] e-mail system for Section 7 purposes.” The majority viewed the union as the equivalent of an outside organization and determined that the employer lawfully enforced its policy against e-mails by an employee soliciting support for the union.²⁰

On May 15, 2008, the NLRB issued a memorandum addressing the impact and proper interpretation of *The Register Guard*,²¹ and provided several examples to aid in understanding the NLRB’s current interpretation of Section 7 as it applies to e-mail policies. In one example, the employer was found to have discriminated by prohibiting union-related solicitations when it had allowed e-mail solicitations regarding sales of Avon, Mary Kay cosmetics, Tupperware, homemade crafts, and items for school fund-raising purposes. The General Counsel categorized the solicitations as on behalf of “outside groups or organizations,” as opposed to personal solicitations.

In another case, an employee was disciplined for sending e-mails to 20 employees regarding an off-sight union organizing meeting. Prior to sending the e-mail, the employee sought direction on personal use of the computer system from the employer’s IT Director, who indicated that personal use was permitted during non-work time, and, in a pinch, during work time. Although the discipline was supported by a facially valid handbook provision, there was evidence that other employees frequently sent non-work related e-mails and the employee was disciplined because of the union-related content of the e-mail.

Another example involved an employee who anonymously e-mailed a member of a medical organization’s voting delegates to request assistance in presenting an employee petition

¹⁸ See, e.g., *E.I. du Pont de Nemours and Co.*, 311 NLRB 893 (1993) (e-mail rule discriminatory where employer prohibited use of e-mail to distribute union literature but allowed it to distribute materials on other subjects, including non-company business); *Timekeeping Systems Inc. v. Lawrence LeinWeber*, 323 NLRB No. 30 (1997) (use of e-mail to express opinion regarding employer’s proposed changes to vacation policy was protected, despite containing “some flippant and rather grating language”); *Electronic Data Systems Corp.*, 331 NLRB No. 52 (2000) (e-mails warning coworkers about crossing picket line of vendor whose employees were striking was protected to extent it represented employees of vendor who were engaged in protected concerted activity, but not to extent it solicited intermittent, partial work stoppage); *Guard Publishing Co.*, 2002 WL 336963 (NLRB 2002) (employer that widely permitted non-business use of e-mail could not rely on restricted use policy to establish it would have disciplined employee absent her union activity).

¹⁹ 351 NLRB No. 70 (2007).

²⁰ *Id.*

²¹ *Report of the General Counsel*, GC 08-07 (May 15, 2008), http://www.nlr.gov/shared_files/GC%20Memo/2008/GC%2008-07%20Report%20on%20Case%20Development.pdf.

advocating changes in working conditions. After an investigation revealed the identity of the employee who sent the e-mail, the employer discharged the employee. The NLRB found “that concerted employee protests of supervisory conduct that affect employee working conditions are protected under Section 7 of the Act and [do] not lose that protection when employees reach outside an employers ‘chain of command’” The employee’s e-mails were not disruptive, could not be prohibited as solicitations (they did not encourage employee action on behalf of a union or other outside group), and were more job-related than many personal e-mails the employer permitted.

Despite the seemingly broad language in *The Register Guard*, employers must still be careful when preparing and enforcing e-mail policies that prohibit personal use. Such policies, while facially valid, are not enforceable when their purpose is anti-union, or when the enforcement is inconsistent based on content protected by Section 7.

2. Blogging/The Internet

The Internet provides employees with a *really* big bulletin board. The availability of communication via the World Wide Web has “tremendous potential to shift the balance of power from employers to employees, as employees gain the ability to communicate their concerns to other employees, customers, neighbors, stockholders, and other parties interested in the employer.”²² The web is unlike e-mail, in that its use does not generally involve the use of employer property or time -- employees typically start their own websites or blogs.²³ These can either be private, via password protection, or public and available to anyone who chooses to access them. Either way, employees often voice objections to their employer’s policies and practices on their personal websites.²⁴ Disciplining an employee for blogging may violate Section 7 if the content solicits union support or otherwise qualifies as “concerted activity” (e.g., discussing wages or other employment practices or policies).²⁵

One example of protected blogging is *Konop v. Hawaiian Airlines*,²⁶ in which a pilot maintained a secure website where he posted bulletins critical of his employer,²⁷ its officers, and the incumbent union. Konop limited access to specific individuals who were required to login with a user name and password, and electronically agree to the terms of use that prohibited users from disclosing the contents of the website to third parties. Although he was not authorized by Konop to access the site, Hawaiian’s vice president obtained access using the user names and passwords of authorized employees who gave him permission to use their information,

²² Katherine M. Scott, *When is employee blogging protected by Section 7 of the NLRA?*, 2006 Duke L & Tech Rev 17.

²³ *But see* Andrew F. Hettinga, *Expanding NLRA Protection of Employee Organizational Blogs: Non-Discriminatory Access and the Forum-Based Disloyalty Exception*, 82 Chi – Kent L Rev 997 (2007) (discussing employer-sponsored blogs).

²⁴ *See generally*, Carson Strege-Flora, *Wait! Don’t fire that blogger! What limits does labor law impose on employer regulation of employee blogs?*, 2 Shidler JL Com & Tech 11 (Dec., 16, 2005).

²⁵ *Id.*; *see also* Andrew F. Hettinga, *Expanding NLRA Protection of Employee Organizational Blogs: Non-Discriminatory Access and the Forum-Based Disloyalty Exception*, 82 Chi – Kent L Rev 997 (2007).

²⁶ 302 F3d 868 (9th Cir 2002) (Railway Labor Act case that followed NLRA protected activity analysis).

²⁷ Among other things, Konop said Hawaiian’s president did his “dirty work like the Nazis during World War II;” that “Soviet Negotiating Style [Was] Essential to [the President’s] Plan;” and he was “Suspected in Fraud!”

purportedly to identify and correct any false or misleading statements. Konop sued claiming, among other things, that Hawaiian interfered with his organizing efforts by gaining unauthorized access to his website, supported one union over another by sharing information from his website with a rival union leader, and engaged in coercion and intimidation by threatening to sue him for defamation, all in violation of his rights under the Railway Labor Act (RLA).²⁸ While there was no dispute that the website publication would ordinarily constitute protected activity, Hawaiian argued that Konop forfeited his rights by making insulting statements. Although the trial court agreed with Hawaiian, the Ninth Circuit flatly rejected this argument:

Konop did not forfeit his protection under the Railway Labor Act, as Hawaiian suggests, simply by publishing statements that were critical of and insulting to[the President]. *** “Federal law gives a union license to use intemperate, abusive, or *insulting* language without fear of restraint or penalty....” *** (“Representation campaigns are frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions.”)

We recognize that some organizing activity may be “so flagrant, violent or extreme” or so “egregious,” “opprobrious,” “offensive,” “obscene” or “wholly unjustified” that it loses the protection of the RLA. *** [W]e nevertheless find Hawaiian has failed to demonstrate that, as a matter of law, Konop’s activities were so intolerable as to lose their protection under the RLA.

*** Federal labor law protects even false and defamatory statements unless such statements are made with actual malice – *i.e.*, knowledge of falsity or with reckless disregard for the truth.²⁹

The Ninth Circuit concluded that the employer’s unauthorized access of Konop’s website could form the basis for RLA violations (analogous to Section 7 violations): (1) improper surveillance of union activity, similar to eavesdropping; (2) providing unlawful assistance to a union; and (3) unlawful coercion and intimidation.³⁰

The *Konop* case demonstrates some of the limitations on an employer’s ability to discipline an employee who blogs about working conditions. On the other hand, the NLRA does not prohibit policies against disclosing trade secrets or requiring employees to post a disclaimer explaining that they do not blog on the company’s behalf.³¹ Employers should consider the NLRA’s impact when drafting or reviewing Internet and blogging policies.

²⁸ “While employers covered under the RLA are not subject to the provisions of the NLRA, courts look to the NLRA and the cases interpreting it for guidance. *Id.* at 882, note 10.

²⁹ *Id.* at 883 (citations omitted).

³⁰ *Id.* at 884-886.

³¹ See generally, Katherine M. Scott, *When is employee blogging protected by Section 7 of the NLRA?*, 2006 Duke L & Tech Rev 17.

B. Prohibitions on Solicitation and Distribution

Employers often establish solicitation and distribution rules to maintain production and discipline. Solicitation means canvassing employees for a non-employment related purpose. Distribution is the handing out of similar written materials on the employer's property. Blanket prohibitions against all solicitation and distribution on the employer's property are not permitted.³² As a general guideline, solicitation may be prohibited in work areas and on working time, though not during all working hours.

Non-solicitation policies are presumptively invalid because they restrain employees from solicitation during the employee's own time, including rest and meal breaks.³³ However, an employer may ordinarily limit employees from soliciting during working time.³⁴

A prohibition on oral solicitation on company premises during non-working time is likely, although not presumptively, invalid. Such a ban is generally held to be invalid because oral solicitation is dependant upon having the time and space in which to conduct a discussion and hold the employee's attention. The free time of employees on company premises is a "uniquely appropriate" time for employees to conduct oral solicitation.³⁵ However, under certain circumstances, employers may limit oral solicitation in public working areas, such as on the selling floor of a department store, or at a restaurant where customers are likely to be present.³⁶ Non-solicitation policies are often found unlawful under the NLRA for their breadth, even if the employer does not enforce such a policy in a discriminatory way. For example, in 2007, the NLRB invalidated a rule prohibiting solicitation of literature while on duty or in uniform.³⁷

In contrast, a prohibition on *distribution* in working areas is facially valid.³⁸ A non-solicitation policy that "prohibited employees from soliciting or distributing literature during working time and in working areas" has been found presumptively valid.³⁹ Conversely, a distribution ban on literature in non-working areas is presumptively invalid in the absence of special circumstances requiring the rule for safety, production or discipline.⁴⁰

Another issue raised by a solicitation and distribution policy is the right of non-employees to solicit or distribute literature at the company. An employer is in a much stronger position when seeking to impose restrictions on third-parties who want to enter its property to solicit employees. A company may limit non-employee solicitation and distribution, barring

³² *NLRB v. Walton Mfg. Co.*, 289 F2d 177 (5th Cir 1961).

³³ *See Our Way, Inc.*, 268 NLRB 394, 394 (1983).

³⁴ *See Peyton Packing Co*, 49 NLRB 828 (1943) (stating long-accepted maxim, "working time is for work"); *NLRB v. Clinton Electronics Corp.*, 284 F3d 731, 739 (7th Cir 2002) (noting employer has "legitimate interest in maintaining discipline and production. *** it may, in fact, limit solicitation generally during work time").

³⁵ *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615, 1962 NLRB LEXIS 217 * 12-13, 15 (1962).

³⁶ *See Montgomery Ward & Co*, 145 NLRB 846 (1964) (department store); *Marriott Corp (Children's Inn)*, 223 NLRB 978 (1976) (restaurant).

³⁷ *Guardsmark, LLC v. NLRB*, 475 F3d 369 (DC Cir 2007).

³⁸ *Our Way, Inc.*, 268 NLRB at 411 (citing *La Marche Manufacturing Company*, 248 NLRB 1470 (1978)).

³⁹ *Webco Industries, Inc. v. NLRB*, 217 F3d 1306 (10th Cir 2000).

⁴⁰ *NCR Corp.*, 1993 NLRB LEXIS 911 * 12 (1993) (citing *NLRB v. Magnavox Co. of Tenn.*, 415 US 322, 324 (1974)).

special circumstances that make it unreasonably difficult for union organizers to reach employees.⁴¹ Supervisors may be instructed, for example, to report the presence of outsiders on company premises.

It is always best to behave in a polite and consistent manner when enforcing restrictions on solicitation and distribution policies. Employers who wish to implement such policies should be particularly careful about promulgating them during NLRA-sensitive periods, such as unionizing campaigns. Rules adopted immediately after a campaign has begun may have the appearance of being promulgated for an unlawful purpose.

C. Policies on Gossiping, Confidentiality, and Complaints

Policies on confidentiality, communication, gossip, and complaints often inadvertently implicate protections for “concerted activities” for “mutual aid and protection.”⁴² The classic example of protected activity that is often the subject to an unlawful restriction is the discussion of wages, which is protected activity.⁴³ Employees who complain about favoritism, bonuses and other wage issues are also engaged in protected activity.⁴⁴ While discussions on these subjects are more widely recognized as protected, the scope of protected activity is far broader than most employers realize.

In *Ellison Media Co.*,⁴⁵ for example, a supervisor told employees who e-mailed each other about a supervisor’s alleged sexually inappropriate comments and the resulting investigation to stop “gossiping” about the issues, which were being addressed through the appropriate human resources channels. The NLRB found that the employer violated Section 8(a)(1).

In *Cintas Corp. v. NLRB*,⁴⁶ the NLRB struck down a confidentiality provision that provided: “We honor confidentiality. We recognize and protect the confidentiality of any information concerning the company, its business plans, its partners, new business efforts, customers, accounting and financial matters.” According to the NLRB and the court, employees who read this policy could construe it to mean they could not discuss the terms and conditions of their employment with fellow employees or with the union. This could have the effect of “chilling” the rights of employees under the Act. Despite a lack of evidence that the policies had been used to punish protected discussions, the policy was found unlawful.

⁴¹ *NLRB v. Babcock & Wilcox Co.*, 351 US 105, 112 (1956); *Lechmere, Inc. v. NLRB*, 502 US 527, 537 (1992) (noting NLRA does not protect non-employees unless rare circumstances leave employees inaccessible to organizers).

⁴² See, e.g., *Double Eagle Hotel & Casino v. NLRB*, 414 F3d 1249 (10th Cir. 2005) (confidentiality policy held unlawful because it restricted “employees’ right to discuss wages and other terms of employment; list of confidential information included disciplinary information, performance evaluation and termination data).

⁴³ *Fredericksburg Glass & Mirror, Inc.*, 323 NLRB 165 (1997).

⁴⁴ *North Carolina License Plate Agency*, 346 NLRB No. 34 (2006).

⁴⁵ 2005 NLRB No. 136 (2005).

⁴⁶ 482 F3d 463 (DC Cir 2007).

In *Guardsmark, LLC v. NLRB*,⁴⁷ the court struck down a rule that required employees to address complaints solely through the chain of command, and to “not register complaints with any representative of the client.” The court reasoned that employees have a “protected right to solicit sympathy, if not support, from the general public ... [and] customers” regarding their terms and conditions of employment. As the rule’s prohibition was not limited to the time during which the employees are on duty, it was overly broad. Similarly, in *Five Star Transportation, Inc. v. NLRB*,⁴⁸ the court held that the employer committed an unfair labor practice by refusing to consider hiring applicants who had written messages critical of the employer to a customer, seeking to dissuade it from awarding a contract to the employer.

On the other hand, employees who snoop or engage in misappropriation lose the protection of the NLRA.⁴⁹ In *Asheville School*,⁵⁰ the NLRB held that disclosure of confidential wage and salary information was not a protected activity when made by a payroll accountant whose job duties required that she maintain the confidentiality of payroll information.

D. Prohibitions on Fraternization

The NLRA imposes restrictions on fraternization policies because such policies may interfere with employees’ protected rights to engage in union and other concerted activity. In *Guardsmark, LLC v. NLRB*,⁵¹ for example, the employer’s policy stated “[Y]ou must NOT ... fraternize on duty or off duty, date or become overly friendly with the client’s employees or with coemployees.” The court interpreted the word “fraternize” as something different than “dating,” holding that it could be interpreted to prohibit fraternal discussions of terms and conditions of employment. As this could have a chilling effect on employees’ rights, it violated the NLRA. The *Guardsmark* case illustrates how narrowly and carefully policies must be crafted to avoid unintended violations of the NLRA.

E. The Right to Representation (Weingarten Rights)

“Weingarten Rights” stem from the US Supreme Court’s decision in *NLRB v. Weingarten, Inc.*,⁵² in which the Court held that an employer violated Section 8(a)(1) of the NLRA by denying an employee’s request that a union representative be present at an investigatory interview which the employee reasonably believed might result in disciplinary action. According to the Court, an employee’s request for assistance falls within the literal wording of Section 7 that “employees shall have the right to engage in “concerted activities for mutual aid or protection.” The union representative whose participation was requested “safeguard[s] not only the particular employee’s interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or

⁴⁷ 475 F3d 369 (DC Cir 2007).

⁴⁸ 522 F3d 46 (1st Cir 2008).

⁴⁹ See generally, *Rock Valley Trucking Co., Inc.*, 350 NLRB 10, 18 (2007).

⁵⁰ 347 NLRB No. 84 (2006)

⁵¹ 475 F3d 369 (DC Cir 2007).

⁵² 420 US 251 (1975).

continue a practice of imposing punishment unjustly.”⁵³ Union employees, therefore, have “Weingarten Rights.”

On the other hand, an employee in a non-unionized workplace does not generally have the right to insist on the presence of a fellow employee at an investigatory review, even if the employee reasonably believes that the interview may result in disciplinary action.⁵⁴ It is notable, however, that the NLRB has reversed itself on this issue more than once over the years.

In 1982, the NLRB initially extended the Court’s ruling in *Weingarten* to the non-union setting in *NLRB v. Materials Research Corporation*.⁵⁵ In that case, a non-union employee had attempted to organize several group meetings between employees and management to discuss the implementation of a new work schedule. When the employee was called into a supervisor’s office for a meeting, the employee asserted the right to have a co-worker present. The request was denied, the employee was ordered to stay and given a warning regarding his use of production time to organize a meeting. Finding the *Weingarten* rule applicable notwithstanding the absence of a union setting, the NLRB stated:

Unrepresented employees normally do not have the benefit of a collective-bargaining agreement which serves as a check on an employer’s ability to act unjustly or arbitrarily. Nor do they usually have the protection of a grievance-arbitration procedure to police the terms of such an agreement. Correcting the relative imbalance between unrepresented employees and their employer is not achieved by forcing an employee to attend a disciplinary interview alone. To counter this imbalance, employees in an unrepresented unit must look to each other for whatever mutual aid or protection they can muster in the face of unjust or arbitrary employer action. Indeed, when confronted with the prospect of an investigatory interview which might result in discipline, the only assistance readily available to an unrepresented employee lies in fellow employees, and an employee attempt to enlist that type of protection is precisely what the Act is designed to safeguard.⁵⁶

Just three years later, in *NLRB v. Sears, Roebuck and Co.*,⁵⁷ the NLRB overruled its decision in *Materials Research*, finding *Weingarten* rights inapplicable in a non-union setting:

When no union is present, . . . the imposition of Weingarten rights upon employee interviews wreaks havoc with fundamental provisions of the [NLRA]. This is so because the converse of the rule that forbids individual dealing when a union is present is the rule that, when no union is present, an employer is entirely free to deal with its employees on an individual, group or wholesale basis. * * *
Importantly, the freedom to deal individually spans all terms and conditions of employment, including the potential or actual imposition of discipline. * * *

⁵³ 420 US at 260.

⁵⁴ *IBM Corp.*, 341 NLRB 1288, 1291-1293 (2004); *Myers v. Office Depot, Inc.*, 2007 WL 2413087 (ED Mich 2007).

⁵⁵ 262 NLRB 1010, 1982 WL 24684 (1982).

⁵⁶ 262 NLRB at 1014.

⁵⁷ 274 NLRB 230, 1985 WL 45768 (1985).

[Contrary to the majority in *Materials Research*], we cannot endorse any rule that so fundamentally alters our statutory scheme.⁵⁸

In 2000, the NLRB (under the Clinton administration) did another about face in *Epilepsy Foundation*.⁵⁹ This case involved two employees who sent a memo to their supervisor, Berger, and the Executive Director, Loehrke, in which they stated that Berger's supervision was no longer required. When the employees learned their memo was not warmly received, they sent a second memo to Loehrke outlining the reasons for believing Berger's supervision unnecessary. Thereafter, Loehrke directed one of the employees to meet with her and Berger. Having received a reprimand at a prior meeting with Berger and Loehrke, the employee was intimidated at the prospect of the meeting and asked to meet with Loehrke alone. Loehrke refused. The employee then asked to have his co-worker present at the meeting. Again, Loehrke refused. The employee persisted in his requests and was sent home. The next day he was fired. Shortly thereafter, the employee who co-authored the memo was reprimanded for writing it, and warned that further acts of insubordination would result in immediate discharge. The co-worker was subsequently fired for refusal to accept supervision and various alleged confrontations with other staff over the last nine months. In reviewing the facts this time around, the NLRB rejected the reasoning in the *Sears* case, and returned instead to the rule from *Materials Research*:

The [NLRA] clearly protects the right of employees - whether unionized or not - to act in concert for mutual aid and protection. Further, . . . the right to have a co-worker present at the investigatory interview affords unrepresented employees the opportunity to act in concert to prevent a practice of unjust punishment. While an employer is generally free to deal with employees individually in the absence of union representation, an employer may not mask the obstruction of employee efforts to exercise Section 7 rights by asserting a right to deal on an individual basis.⁶⁰

Epilepsy Foundation was subsequently reversed in 2004 (under the Bush administration) in *IBM Corp.*,⁶¹ so non-union employees currently have no Weingarten Rights. However, the *IBM* opinion was close -- a 3-to-2 split. The NLRB may well reverse itself again, particularly if the next election lands a Democrat in office.

F. Dress Codes

Employers often impose a dress code that prohibits the display on clothing (in the form of insignia, buttons, badges, etc.) of any writing, advertisement or group affiliation. An employer may set a neutral policy which prohibits employees from wearing certain items of clothing that

⁵⁸ 274 NLRB at 231.

⁵⁹ *Epilepsy Foundation of N.E. Ohio*, 331 NLRB No. 92 (2000).

⁶⁰ *Epilepsy Foundation*, 2000 WL at 967066, *4.

⁶¹ *IBM Corp.*, 341 NLRB 1288, 1291-1293 (2004).

have union insignias on them, such as T-shirts with union logos, if the policy prohibits all T-shirts or all T-shirts with writing or insignias. Such a policy must be uniformly enforced.⁶²

In contrast, employees generally have the right to wear union buttons and pins to work, unless the wearing of these items creates a safety hazard or, in the case of workers with public contact, the employees consistently are required to wear uniforms without buttons and pins.⁶³ In other words, a prohibition against employees wearing union insignia must be justified on the basis of a safety, production, or other legitimate business purpose.⁶⁴

This year the Ninth Circuit decided *Washington State Nurses Assn v. NLRB*,⁶⁵ which addressed the validity of restrictions in the immediate patient care area at a medical center. In general, restrictions on wearing union insignia in “immediate patient care areas” is presumptively valid, but presumptively invalid in other areas of a hospital, unless the employer can show special circumstances to justify the restriction. While this rule would have ordinarily supported the employer’s restrictions, the evidence in *Washington State* was that buttons were worn for several months in immediate patient care areas without incident. As a result, the NLRB found the restriction invalid for all areas.

G. Employer-Created Grievance or Bargaining Committees

Section 8(a)(2) of the NLRA provides that it is an unfair labor practice for an employer “to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.”⁶⁶ A “labor organization” is:

any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exist for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.⁶⁷

The foregoing definition is broad enough to cover, in some instances, non-union employee participation programs (*e.g.*, grievance committees, safety committees and “quality

⁶² See *Ideal Macaroni Co.*, 301 NLRB 507 (1991), enforcement denied on other grounds, 989 F2d 880 (6th Cir 1993) (employer violated the Act by strictly enforcing a dress code during a union campaign to require employees to cover union T-shirts when it had not enforced the dress code prior to the campaign).

⁶³ See, *e.g.*, *Burger King Corp. v. NLRB*, 725 F2d 1053 (6th Cir 1984) (employer did not violate the Act where it consistently enforced its policy); *NLRB v. St. Francis Healthcare Center*, 212 F3d 945 (6th Cir 2000) (employer cannot ban union pins and buttons when it regularly tolerated nonunion pins and buttons on employee uniforms that violated the employer’s policy).

⁶⁴ *Association Hospital del Maestro v. NLRB*, 842 F2d 575 (1st Cir 1988) (employer’s prohibition against wearing insignia held unlawful); *Meijer, Inc.*, 318 NLRB 50 (1995), *enforced*, 130 F3d 1209 (6th Cir 1997) (employer can restrict employees from wearing union insignia during working time only if it demonstrates “special circumstances” justifying the prohibition); *Pay’n Save Corp. v. NLRB*, 641 F2d 697 (9th Cir 1981) (employer’s ban on wearing union buttons interfered with the exercise of a protected right in violation of Section 8(a)(1) of the Act unless there were special considerations justifying the ban).

⁶⁵ 2008 WL 2096970 (9th Cir 2008).

⁶⁶ 29 USCA §158(a)(2).

⁶⁷ 29 USCA §152(5).

circles”).⁶⁸ For example, in *Electromation, Inc. v. Teamsters Local 1049*,⁶⁹ a non-union electronics employer formed employee “action committees” to consider issues such as absenteeism and attendance bonuses. The committees were created despite employee opposition and controlled by management, which dictated the purpose, procedure and makeup of the committees. In addition, the employer provided pay for committee work, and provided meeting space and supplies. The NLRB held that these committees were illegal labor organizations dominated by management in violation of Section 8.

III. UPDATE ON CAMPAIGN AND ELECTION ISSUES

A. Salting

“Salting” is the practice whereby a union inserts its organizers into some employer’s workforce in the hope that they will be able to organize it. Though salts do not intend to remain in the company’s employ after the plant or other facility is organized, the Supreme Court has held that they are employees within the meaning of the National Labor Relations Act, implying that to fire or refuse to hire otherwise qualified salts merely because they *are* salts is an unfair labor practice because on the assumption that they are qualified the employer’s motive *must* be the forbidden one of discriminating against employees on the basis of their being union supporters.⁷⁰

“Salting” has occurred in a variety of industries and has become a common organizing tactic.⁷¹

In 2002, the Seventh Circuit held in *Hartman Brothers Heating & Air Conditioning, Inc. v. NLRB*,⁷² that union salts may lie to get a job, so long as the lie is not a misrepresentation of fact relevant to their job qualifications or otherwise “material.” *Hartman* involved two salts: Till, who was not hired when he “applied for the job in the company of a known union organizer, declared he was a union organizer, and wor[e] a baseball cap with the union’s logo on it,” and Starnes, who lied on his application to get hired and then, once hired, immediately told Mr. Hartman that he was a union organizer and intended to organize the company. Hartman sent Starnes home, but did not fire him -- at least not right away.

As the Seventh Circuit aptly noted, “Starnes’s action in proclaiming his union-organizer status before doing any organizing supports the widespread suspicion that the purpose of salting is not in fact to organize, but to precipitate the commission of unfair labor practices by startled employers.”⁷³ Nevertheless, a lie about one’s union status or organizing objective is not relevant

⁶⁸ See generally, Carol Brooke, *Nonmajority Unions, Employee Participation Programs, and Worker Organizing: Irreconcilable Differences?*, 76 Chi.-Kent L. Rev. 1237 (2000).

⁶⁹ 309 NLRB 990 (1992), aff’d 35 F3d 1148 (7th Cir 1994).

⁷⁰ *Hartman Brothers Heating & Air Conditioning, Inc. v. NLRB*, 280 F3d 1110 (7th Cir 2002), citing *NLRB v. Town & Country Electric, Inc.*, 516 US 85, 87 (1995).

⁷¹ See generally, Peter J. Kok and Nathan D. Plantinga, “*Liar, Liar, Can’t Be Fired*”: *The Seventh Circuit Holds that Union Organizers Can Falsify Their Job Applications*, 2(4) Bender’s Labor & Employment Bulletin 195 (April 1, 2002).

⁷² 280 F3d 1110 (7th Cir 2002).

⁷³ *Id.* at 1112.

to an individual's qualifications, nor is it material.⁷⁴ However, Starnes also lied about his driving record. Hartman Brothers learned from its insurance company that Starnes had a poor driving record and fired him. The company had routinely checked driving records and applied its standards consistently to Starnes. The court concluded that Hartman lawfully discharged Starnes for a legitimate business reason (his driving record), but violated the NLRA by sending him home when it learned of his organizing objective.⁷⁵

In 2007, the NLRB made it significantly more difficult for salts who are denied employment to bring a claim. While the NLRB formerly presumed that an applicant was an "employee" under the NLRA and, therefore, entitled to protection,⁷⁶ this presumption is no longer recognized. In *Toering Electric*,⁷⁷ the NLRB ruled that to qualify as an "employee" entitled to protection against hiring discrimination based on union affiliation or activity, the applicant for employment must be genuinely interested in seeking to establish an employment relationship with the employer.⁷⁸ Although broadly worded, the new rule is only intended to apply in the salting context.⁷⁹

Facts that will raise a question as to the applicant's sincerity might include evidence that the applicant:

Refused similar employment with the employer; made belligerent or offensive comments on his or her application; engaged in disruptive, insulting, or antagonistic behavior during the application process; or engaged in other conduct inconsistent with a genuine desire to establish an employment relationship with the employer.⁸⁰

Facts that will rebut a challenge to the sincerity of the application may include direct testimony that the applicant would have accepted a position with the employer had one been offered. In addition, the following kinds of evidence will be relevant:

⁷⁴ *Id.*

⁷⁵ *Id.* at 1113.

⁷⁶ See generally, *Guideline Memorandum Concerning Toering Electric Company (Toering Electric Memo)*, Memorandum GC 08-04 (Revised) (February 15, 2008), [http://www.nlr.gov/shared_files/GC%20Memo/2008/GC%2008-04%20\(Revised\)%20Guidelines%20Memorandum%20Concerning%20Toering%20Electric%20Company.pdf](http://www.nlr.gov/shared_files/GC%20Memo/2008/GC%2008-04%20(Revised)%20Guidelines%20Memorandum%20Concerning%20Toering%20Electric%20Company.pdf). Section 8(a)(3), prohibits an employer from discriminating "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization ..." Under this section, it is unlawful to refuse to hire an applicant based on union affiliation.

⁷⁷ 351 NLRB No. 18 (Sept. 29, 2007).

⁷⁸ The NLRB's decision shifted to the General Counsel the burden of proving that an applicant is genuinely interested in seeking to establish an employment relationship with an employer, rather than requiring the employer to prove the applicant had no such interest. The General Counsel must show: (1) there was a bona fide application for employment; and (2) the applicant had a genuine interest in becoming employed by the employer. See *Toering Electric Memo*, note 76, *supra*.

⁷⁹ *Toering Electric Memo*, note 76, *supra*.

⁸⁰ *Id.*

that an alleged discriminatee submitted an application in accordance with the employer's procedures, arrived on time to interviews, made follow-up inquiries regarding the application, had relevant work experience with other employers, and/or was also seeking similar employment with other employers.⁸¹

B. The Kentucky River Trilogy: Who is a Supervisor Under the NLRA?

In September 2006, the NLRB issued a trio of decisions that refine the analysis of who should be considered a "supervisor" versus an "employee" under the NLRA. This question, which is relevant in determining who is properly included in a collective bargaining unit, can determine the outcome of an election because only employees are entitled to vote.

The NLRA defines "supervisor" as an employee who has authority to, among other things, "assign" work to other employees, or who must "responsibly ... direct" other employees, as long as they exercise "independent judgment." Supervisors are typically excluded from a collective bargaining unit represented by a labor union, and they are not permitted to vote in union elections. The NLRB formerly determined that employees such as nurses, who exercise ordinary professional or technical judgment in directing less-skilled employees, did not qualify as "supervisors" because they did not use "independent judgment." However, in a 2001 decision, *NLRB v. Kentucky River Community Care*, the US Supreme Court rejected the NLRB's interpretation of "independent judgment" as overly narrow and instructed the NLRB to reexamine its interpretation of the terms "independent judgment," "assign" and "responsibility to direct."⁸² In response to *Kentucky River*, the NLRB expanded the number of employees likely to meet the statutory definition of "supervisor."⁸³

- Assign

First, the NLRB construed the term "assign" to refer to "the act of designating an employee to a place (such as a location, department or wing), appointing an individual to a time (such as a shift or overtime period), or giving significant overall duties, i.e. tasks, to an employee." In contrast, the term assign does not refer to the "ad hoc instruction that the employee perform a discrete task." The NLRB provided the following example: "The assignment of an employee to a certain department (*e.g.*, housewares) or to a certain shift (*e.g.*, night) or to certain significant overall tasks (*e.g.*, restocking shelves) would generally qualify as 'assign' within our construction. However, choosing the order in which the employee will perform discrete tasks within those assignments (*e.g.*, restocking toasters before coffeemakers) would not be indicative of exercising the authority to 'assign.'"

- Responsibly to Direct

Second, the NLRB construed the phrase "responsibly direct" as not limited to clearly managerial employees such as department heads, but to any person who has "men under him," who decides "what job shall be undertaken next or who shall do it," and who provides

⁸¹ *Id.*

⁸² *NLRB v. Kentucky River Community Care*, 532 US 706 (2001).

⁸³ *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006); *Croft Metals, Inc.*, 348 NLRB No. 38 (2006); *Golden Crest Healthcare Center*, 348 NLRB No. 39 (2006).

“responsible” direction carried out with “independent judgment.” For direction to be responsible, “the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one performing the oversight if the tasks performed by the employee are not performed properly.” In other words, to prove “supervisor” status, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he or she does not adequately oversee the work. The goal of this definition is to exclude “individuals whose fundamental alignment is with management.”

- **Independent Judgment**

Finally, the NLRB concluded that whether a putative supervisor exercises “independent judgment” must be determined by assessing the degree of discretion exercised. At a minimum, a supervisor must “act, or effectively recommend action, free of the control of others and from an opinion or evaluation by discerning or comparing data.” In contrast, “independent judgment” is not exercised with respect to acts that “are of a merely routine or clerical nature” or that are “dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.” For example, “a decision to staff a shift with a certain number of nurses would not involve independent judgment if it is determined by a fixed nurse-to-patient ratio. Similarly, if a collective-bargaining agreement required that only seniority be followed in making an assignment, that act of assignment would not be supervisory [I]f the registered nurse weighs the individual needs of a patient against the skills or special training of available nursing personnel, the nurse’s assignment involves the exercise of independent judgment.”

- **Impact**

Although the leading NLRB decision, *Oakwood*, and the *Kentucky River* cases involved charge nurses, the cases have broader applications to other industries. For a company facing unionization efforts, the NLRB’s decisions may exclude some employees as “statutory supervisors” from the unit that a union proposes to represent. In particular, the company may be able to challenge a union’s inclusion of forepersons or lead employees in proposed units, and organizing efforts by those employees may be objectionable. Moreover, for those companies that already have a union workforce, the new “supervisor” guidelines may exclude employees from current bargaining units.

C. Changes to the NLRA Election Procedures

- **The Employee Free Choice Act⁸⁴**

An employer may voluntarily recognize a union (pre-election recognition). Alternatively, a union may file a representative petition with the NLRB. A union is recognized as the employees’ exclusive bargaining representative only when the majority of employees within a

⁸⁴ See Employee Free Choice Act of 2007, HR 800, <http://thomas.loc.gov/cgi-bin/query/D?c110:3:/temp/~c110b3FaGF::>

“bargaining unit” (employees who share a “community of interest” in wages, hours, and conditions of employment) have selected that labor organization to represent them for collective bargaining.⁸⁵

A union will typically demand recognition as the exclusive bargaining representative when it has a sufficient majority of support, as determined by signed authorization cards or a “card check.” The employer does not currently have to recognize the union without an election, which may be sought by the union, the employer, or the employees. When a petition for an election is filed, a NLRB agent is assigned to process it. If there is a showing (by card check or petition) that at least 30% of an appropriate bargaining unit wish to be represented by a union or by another group, the NLRB will hold a secret ballot election. If a majority of employees choose to be represented, the NLRB may certify that representative to bargain collectively with the employer on behalf of the employees in the unit.⁸⁶ However, the Employee Free Choice Act of 2007 (EFCA), which was passed by Congress⁸⁷ but did not make it to a vote in the Senate,⁸⁸ proposes to change all that.⁸⁹

As proposed, the EFCA eliminates secret ballot elections. Instead, if a majority of employees sign union authorization cards, the workforce becomes unionized without an election. Then, if the parties cannot agree on a contract within 90 days or reach agreement through mediation, an arbitrator decides what terms will govern the parties’ employment relationship for the first two years. The EFCA also imposes additional penalties on employers for unfair labor practices, although the same penalties do not apply when the union commits an unfair labor practice.⁹⁰

- **45-Day Window for Filing Petitions**

The NLRB effected another change in the election process through its decision in *Dana Corp.*,⁹¹ which modified more than 40 years of Board precedent. Prior to *Dana Corp.*, when an employer voluntarily recognized a union, the “recognition bar” prevented anyone from filing an election petition, and a reasonable time was allowed for the employer and the newly-recognized union to begin negotiations without interference. Now, there is a 45-day period after the

⁸⁵ See generally, Stephen J. Cabot and Julius M. Steiner, *How an Employer Can Prepare for a Union Organizing Campaign*, The Practical Lawyer (June 1987).

⁸⁶ NLRB Fact Sheet, http://www.nlr.gov/about_us/overview/fact_sheet.aspx; NLRB Procedures Guide, http://www.nlr.gov/publications/Procedures_Guide.htm.

⁸⁷ House Vote on HR 800, <http://www.govtrack.us/congress/bill.xpd?bill=h110-800>

⁸⁸ Senate Vote On the Cloture Motion (Motion to Invoke Cloture on the Motion to Proceed to Consider H.R.800), http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=110&session=1&vote=00227.

⁸⁹ President Bush vowed to veto the bill if it passed. *GOP Defeats Bill in Senate To Expedite Union Organizing*, Jesse J. Holland, Associated Press, Wednesday, June 27, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/26/AR2007062602132.html>. If elected President, Senator Obama promised to sign the Employee Free Choice Act as soon as it lands on his desk.. *Obama promises to sign Employee Free Choice Act*, <http://talkradionews.com/2008/04/obama-promises-to-sign-employee-free-choice-act/>.

⁹⁰ See note 84, *supra*.

⁹¹ 351 NLRB No. 28 (2007).

voluntary recognition during which an election petition or decertification petition may still be filed.

D. Restrictions on Employer Conduct During Campaigns

The NLRB has developed election procedures and safeguards to ensure that pre-election campaigns do not interfere with employees' free choice. Interference with employees' free choice may constitute an unlawful labor practice that could result in election results being overturned.⁹² While employers may aggressively campaign against a union, the NLRB rules place limitations on employers may lawfully do during a union campaign. The prohibitions on employer conduct are often referred to in shorthand as "TIPS" (which stands for threats, interrogation, promises, and surveillance). Public employers may be subject to additional restrictions.

1. Threats

Threats of reprisal or force in the event the union succeeds in an election is prohibited under the NLRA. Even threatening closure is risky.⁹³ However, Section 8(c) of the NLRA provides some protection for an employer expressing anti-union opinions generally:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.⁹⁴

Examples of impermissible threats:

- If the union gets in, the company will move.
- If the union gets in, employees will lose their jobs.
- The company will never sign a contract with this union.
- The company will "get" the employees who vote for the union.
- You'll never get another promotion in this company.

2. Interrogation

Questioning employees regarding their union sympathies may be considered coercive and, therefore, is unlawful. The NLRB's test for determining whether a particular interrogation

⁹² See generally, LABOR AND EMPLOYMENT LAW: PRIVATE SECTOR (Oregon CLE 1990 & Supp 1997) §5.26 (discussing "laboratory condition" ideal for elections to determine the free choice of employees).

⁹³ See *NLRB v. Gissel Packing Co.*, 395 US 575 (1969) (prediction that unionization would result in closure of plant held a prohibited coercive threat and not an objective economic prediction); *but see*, *UAW v. NLRB*, 834 F2d 816, 821 (9th Cir 1987) (prediction of plant closure not coercive because based on economic necessity).

⁹⁴ 29 USCA §158(c).

is unlawful is whether “under all the circumstances, the interrogation reasonably tends to restrain or interfere with the employees in the exercise of rights guaranteed by the Act.”⁹⁵ Examples of impermissible interrogation include the following:

- Do you support the union?
- Who is involved in union activities?
- How will you vote in the union election?
- Who is going to the union meeting tonight?
- How do you feel about the union?
- Who signed a union authorization card?

3. Promises

Granting benefits and/or pay increases to defeat unionization is prohibited. This has been labeled by the Supreme Court as a prohibited “fist inside the velvet glove.”⁹⁶ In most cases, employers should not offer or promise any benefits to employees during a union campaign, even if they had planned to implement it anyway. Promises are construed as bribes to buy votes. Employers should also avoid any suggestion that if employees vote against the union, they will get a raise, extra vacation, promotion, etc.

4. Surveillance of Union Activities

Spying (or creating an impression of spying) on employees’ union activities is generally considered coercive and unlawful,⁹⁷ although there may be some exceptions for legitimate business needs, such as investigating employee sabotage.⁹⁸ Employers are prohibited from engaging in any of the following conduct:

- Spying on employees or monitoring their union activities.
- Attending union meetings.
- Following employees to union meetings or parking outside to see who attends.

⁹⁵ *Blue Flash Express, Inc.*, 109 NLRB 591, 593 (1954); *see also Hotel Employees & Restaurant Emp. Union v. NLRB*, 760 F2d 1006 (9th Cir 1985) (employer questioning regarding union activities held not coercive where they were casual and evidence indicated a lack of discriminatory intent and effect).

⁹⁶ *See NLRB v. Exch. Parts Co.*, 375 US 405, 409 (1964); *but see NLRB v. Circo Resorts, Inc.*, 646 F2d 403 (9th Cir 1981) (pay increase during union campaign lawful where the increases were necessary to retain valuable employees).

⁹⁷ *NLRB v. Collins and Aikman Corp.*, 146 F2d 454 (4th Cir 1944); *Berton v. Kirschner, Inc.*, 209 NLRB 1081, 1086 (1974), *enforced*, 523 F2d 1046 (9th Cir 1975); *NLRB v. Rybold Heater Co.*, 408 F2d 888 (6th Cir 1969).

⁹⁸ *See generally*, LABOR AND EMPLOYMENT LAW: PRIVATE SECTOR (Oregon CLE 1990 & Supp 1997) §8.14.

- Following union organizers.

In 2007, the NLRB limited employees' recovery for unlawful surveillance that revealed misconduct, including drug use.⁹⁹ According to the NLRB, make-whole relief is not available to employees disciplined for misconduct that is uncovered through an unlawfully-conducted investigatory interview. In another opinion, the Board held that the employer created the impression of unlawful surveillance when a supervisor coupled instructions to employees not to sign union cards with a statement that she was "always outside taking a smoke break and she can always see somebody and who they are talking with."¹⁰⁰

⁹⁹ *Anheuser-Busch Inc.*, 351 NLRB No. 40 (Sept. 29, 2007).

¹⁰⁰ *P.S.K. Supermarkets, Inc. and United Food and Commercial Workers, Local 342*, 2007 WL 173500 (NLRB).