
LABOR & EMPLOYMENT LAW

ASSERTING INFLUENCE AND POWER IN THE 21ST CENTURY: THE NLRB FOCUSES ON ASSISTING NON-UNION EMPLOYEES

By Elizabeth Milito*

Note from the Editor:

This article is a discussion about the National Labor Relations Board's relationship to non-union workplaces under sections 7 & 8 of the National Labor Relations Act. As always, the Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author. The Federalist Society seeks to further discussion about the NLRB, NLRA, and other labor law issues. To this end, we offer links below to different perspectives on the issue, and we invite responses from our audience. To join this debate, please email us at info@fed-soc.org.

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 - *Interfering with employee rights (Section 7 & 8(a)(1))*, NATIONAL LABOR RELATIONS BOARD: <http://www.nlr.gov/rights-we-protect/whats-law/employers/interfering-employee-rights-section-7-8a1>
 - NLRB Acting General Counsel Memorandum Concerning Social Media Cases (Jan. 24, 2012): [http://op.bna.com/tpif.nsf/id/mlon-8wypya/\\$File/NLRB%20GC%20Jan%2024%202012%20Memo.pdf](http://op.bna.com/tpif.nsf/id/mlon-8wypya/$File/NLRB%20GC%20Jan%2024%202012%20Memo.pdf)
 - Michael K. Chropowicz, *Social media and employer liability under the NLRA*, ILL. ST. BAR ASS'N NEWSL., March 2013: <http://www.isba.org/sections/laboremploymentlaw/newsletter/2013/03/socialmediaandemployerliabilityunde>
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"A right only has value when people know it exists. We think the right to engage in protected concerted activity is one of the best-kept secrets of the National Labor Relations Act, and more important than ever in these difficult economic times. Our hope is that other workers will see themselves in the cases we've selected and understand that they do have strength in numbers."

National Labor Relations Board Chairman Mark Gaston Pearce (June 12, 2012)¹

Introduction

The National Labor Relations Act (NLRA or Act)² is a 78-year-old law that outlines employees' rights to unionize and bargain collectively in private sector workplaces. Pursuant to the NLRA, the National Labor Relations Board (NLRB or Board)³ is an independent federal agency charged with conducting union elections and investigating and remedying unfair labor practices. Although the Act governs private sector employers and employees, most non-unionized employers have little appreciation for the breadth of the NLRA and the Board's jurisdiction. Historically, the Board's activities primarily focused on monitoring workers' efforts to organize or bargain collectively with employers.⁴ As such, the NLRB meant little or nothing to a business unless it was already unionized or faced

an organizing campaign.⁵ Over the last few years, however, the NLRB has increasingly applied the Act to employer policies, practices, and actions that have not previously been the concern of the Board. While less than seven percent of private sector employees belong to a union,⁶ creative marketing and legal maneuvering demonstrate the Board's intent to wield its authority in the other 93 percent of the workplaces. The motivation for the entry into non-union workplaces is no mystery.⁷ But the method and manner has surprised many employers.⁸ Under the leadership of Chairman Mark Gaston Pearce, the NLRB has issued complaints attacking well-established employer policies in non-union workplaces concerning employment-at-will,⁹ employer proprietary and confidential information, and employee use of social media.¹⁰ Other aggressive moves by the NLRB include a notice poster regarding employee rights and accelerated union election rules.¹¹

The NLRB's recent focus on non-unionized workplaces comes from a broad reading of sections 7 and 8 of the Act, which apply to both unionized and non-unionized workplaces.¹² Section 8(a)(1) provides that it shall be an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of their rights guaranteed in section 7.¹³ Section 7 states that employees shall, in addition to the right to organize and join unions, have the right to engage in "other concerted activities for the purpose of collective bargaining or other mutual aid or protection."¹⁴ Courts generally find that concerted activity occurs when employees act jointly—*i.e.*, in concert—to improve working conditions. Using broadly interpreted section 7 rights, the Board, under the leadership of Chairman Pearce and Acting General Counsel Lafe Solomon, has challenged employer policies that allegedly impede employees' rights to

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act in concert with other workers.

The Board has gained entry into non-unionized workplaces with two simultaneous and campaigns. First, the Board has adopted an extensive marketing effort to educate non-union employees about their rights under the Act. Under this approach, the Board has updated and expanded its social media operation and issued a rule requiring employers to display a poster describing employees' NLRA rights.¹⁵ Additionally, the Board has expanded an employee's section 7 rights by challenging a wide array of activities, including employer policies concerning social media, at-will employment, and workplace investigations.¹⁶ The vigorous education campaign coupled with enforcement has caught employers, particularly non-unionized employers, unprepared.

This article will examine how the NLRB has expanded its reach into non-union workplaces with these education and enforcement campaigns and explore the impact on employers' rights. It concludes by suggesting that the Board has gone too far in supporting employees' rights under the guise of protected concerted activity to the detriment of employers' constitutional and statutory rights. If the Board continues on course, as legal experts anticipate it will, employers large and small, union and non-union, should prepare for further challenges to previously accepted policies.¹⁷

I. A NEWLY INVIGORATED BOARD LAUNCHES A TWO-PRONG CAMPAIGN: EDUCATE AND ENFORCE

A. Educating Non-union Employees on Protected Concerted Activity

In the last two and a half years, the NLRB has adopted an outreach campaign intended to educate non-union employees about their NLRA rights. The campaign launched on August 30, 2011, when the Board issued a rule that would require employers to display a poster describing rights under the NLRA.¹⁸ The poster rule signaled the advent of a new era; one in which the Board would increasingly focus on activities in non-union workplaces.

After the NLRB issued the notice, several groups, including the National Association of Manufacturers, the Associated Builders and Contractors, the National Federation of Independent Business, the Coalition for a Democratic Workplace, the National Right to Work Legal Defense Foundation, and the U.S. Chamber of Commerce, challenged the rule in related lawsuits. Besides taking issue with the poster's pro-union language, challengers argued that the NLRB does not have authority to impose a posting requirement on over six million employers and that the rule violated the First Amendment.¹⁹ While notifying employees of their statutory rights may not sound all that bad, challengers insisted that rule would undercut employers' free speech rights to "engage in non-coercive speech about unionization."²⁰

In response, the Board argued that changing workforce demographics justified the poster rule. According to the NLRB, a higher percentage of non-English speaking workers combined with a lower percentage of union members means that workers do not know their NLRA rights.²¹ Opponents of the rule said

such an assumption is dubious in the Internet age and pointedly noted that the agency conducted no empirical study to back up its assertion that a (one-sided) poster in the break room will increase awareness of NLRA rights.²² In other words, the NLRB had not shown the rule was necessary, a requirement for federal rulemaking even assuming the FLRA conveyed authority to issue a poster rule.

In March, 2012, Federal District Court Judge Amy Berman Jackson ruled that the NLRB had authority to issue the poster rule.²³ The groups appealed Jackson's order and asked the U.S. Court of Appeals for the D.C. Circuit to adopt the opinion of a federal district court judge in South Carolina who, in another lawsuit, struck down the rule.²⁴ On May 7, 2013, the U.S. Court of Appeals for the D.C. Circuit struck down the rule.²⁵ The court found unpersuasive the NLRB's claim that its posters are the Board's speech, not employer speech. In dismissing this argument, the court observed that the "dissemination" of messages others have created is entitled to the same level of protection as the "creation" of messages . . . [The] right to disseminate another's speech necessarily includes the right to decide not to disseminate it."²⁶ Moreover, the D.C. Circuit noted that Congress intended that section (8)(c) "encourage free debate on issues dividing labor and management" and therefore permits "employers to present an alternative view and information that a union would not present."²⁷ The decision was hailed by champions of free speech and free enterprise. The National Federation of Independent Business, one of the groups challenging the rule, said in a statement that the NLRB has "consistently failed to act as a neutral arbiter . . . and it overstepped its authority by compelling [employers] to post a pro-union notice."²⁸ On June 14, 2013, the U.S. Court of Appeals for the Fourth Circuit similarly struck down the rule.²⁹

Although courts have thwarted the Board's attempt to make employers promote pro-union speech, educational outreach has continued unabated in other fora. In June 2012, the Board launched a webpage dedicated to protected concerted activity,³⁰ which explains the right of employees to act together for mutual aid and protection:

The law we enforce gives employees the right to act together to try to improve their pay and working conditions or fix job-related problems, even if they aren't in a union. If employees are fired, suspended, or otherwise penalized for taking part in protected group activity, the National Labor Relations Board will fight to restore what was unlawfully taken away. These rights were written into the original 1935 National Labor Relations Act and have been upheld in numerous decisions by appellate courts and by the U.S. Supreme Court.³¹

The site's centerpiece consists of an interactive map of the United States, which allows visitors to click on a particular state and read about how an employee's workplace grievance in State X was protected concerted activity. The webpage also encourages non-union employees to contact the NLRB if they need help.³² According to the site, upon receipt of an inquiry, the Board's Information Officer will investigate the nature of the activity, whether it sought to benefit other workers, and whether it was

carried out in a way that might cause it to lose protection under the NLRA.³³ Presumably, the Board could then encourage an employee to file a charge against the employer. Overall, the website provides evidence that the Board's reach now extends far beyond traditional union organizing.

And just in time for Labor Day 2013, the Board further expanded its educational and PR campaign with the release on August 30, 2013, of a mobile app that allows employees to download provisions from the NLRA and offers a convenient direct dial telephone connection to the NLRB.³⁴ In a press announcement, Chairman Mark Gaston Pearce again highlighted the Board's interest in the non-union workplace:

The National Labor Relations Act guarantees the right of workers to join together, with or without a union, to improve their working lives. The promise of the law can only be fulfilled when employers and employees understand their rights and obligations. With this app, we are using 21st Century technology to inform and educate the public about the law and their rights.³⁵

The Board's educational efforts have seemingly paid off. According to the agency, the NLRB received more than 82,000 public inquiries regarding workplace issues last year.³⁶

B. Enforcing Newly-Expanded Section 7 Rights

When Congress passed the National Labor Relations Act in 1935, concerted activities consisted largely of in-person communications.³⁷ These conversations amongst co-workers led to the frequently-used term "water cooler" talk.³⁸ The arrival of the Internet, including email and social networking, has changed the face and scope of "concerted activities." As more employees communicate with coworkers online, the Board has found these communications may be recognized as concerted activity and taken on an increasing role in scrutinizing employers who respond to their employees' online activity.³⁹ Three times now, the NLRB has issued guidance and memoranda on social media policies and disputes.⁴⁰ On May 30, 2012, the NLRB released its third and most recent memorandum, in which the Board reviewed seven social media policies and found all but one to be unlawful.⁴¹ The NLRB's memoranda and subsequent decisions regarding social media rules and employer policies have broadened the scope of protected concerted activity. And the Board's enhanced enforcement of this expanded right has provided a means of enforcement in non-union workplaces.

Take, for instance, the NLRB's seminal "Facebook termination" case. The disgruntled message posted by employee Dawnmarie Souza—"Looks like I'm getting some time off. Love how the company allows a 17 to be a supervisor"—elicited responses from coworkers, among them negative remarks about a supervisor that included expletives.⁴² Souza's employer, the American Medical Response of Connecticut (AMR), subsequently fired her. As a result, Souza filed a complaint against AMR, which alleged that Souza's Facebook postings were protected concerted activity.⁴³ The employer responded that the termination resulted from Souza's "rude and discourteous service."⁴⁴ While this case ultimately settled, the Board's action signaled the dawn of a new era where nearly any employee

communication with or to other employees about terms and conditions of employment, whether at the water cooler or online, garners the employee NLRA protections.⁴⁵

In a more recent decision that also gained significant media attention, a Chicago-area car dealer disciplined a sales person for complaining on Facebook about the dealership's cheap food and beverage choices for a public event intended to advertise a new luxury car model.⁴⁶ Irked at the negative and sarcastic tone of the employee's Facebook posts, management asked him to delete the posts but later fired him anyway. The NLRB challenged the employer's disciplinary action, claiming that the employee was engaged in "protected concerted activity" under section 7.⁴⁷ While an administrative judge ultimately upheld the employee's termination based on another incident, the judge found that section 7 protected the employee's Facebook that mocked the sales event. Overall, it presented an equivocal opinion that distressed employers concerned about workers' ability to gripe online.⁴⁸

In addition to social media cases, the NLRB has taken issue with other long-accepted employer policies that the Board alleges could reasonably chill an employee's ability to exercise section 7 rights. For instance, many employers routinely instruct employees not to discuss ongoing investigations. Such a practice could run afoul of the NLRA, according to a Board ruling announced on July 30, 2012.⁴⁹ The decision came in the case of James Navarro, a technician at Banner Estrella Medical Center. Banner used steam to sterilize equipment. During 2011, a broken steam pipe prevented the normal sterilization process. Navarro deemed alternate methods, which a supervisor had ordered, to be inadequate. Navarro discussed his concerns with co-workers, but a human resources manager directed him not to discuss the matter while the investigation was ongoing. Navarro filed a charge with the NLRB, and the Board found a violation of section 8(a)(1). The Board held that Banner's concern over protecting the investigation's integrity was insufficient to overcome the employee's right to engage in protected, concerted activity.

II. THE BALANCE TIPS

In January of 2013, Chairman Pearce proclaimed that "[m]any view social media as the new water cooler. All we're doing is applying traditional rules to new technology."⁵⁰ The Board's guidance and opinions on social media, however, indicate that the Board is not applying the same rules to social media or employer policies. Instead, the General Counsel's own report stated that traditional standards used to determine whether employee speech is protected under section 7 do not adequately address Facebook postings.⁵¹ In a ruling finding that a posting was protected, the Board analyzed the dispute under a new test that weighs in favor of protection.⁵² This modified analysis considered disruption in the workplace as a dispositive factor, concluding that online activity that occurs outside working hours does not disrupt the workplace.⁵³ The new test makes it virtually impossible for an employer to show that any Facebook posting about work is disruptive of the workplace and, therefore, not protected.⁵⁴

Recent decisions by the Board highlight how broadly it

now interprets protected concerted activity and constrains employers when it comes to disciplining or discharging employees who engage in social media activity about the employer. This transformation presents unforeseen challenges to employers seeking to protect civility in the workplace while upholding their business reputation in the community. With every disciplinary action, employers are more likely to run afoul of the NLRB based on its expanding definition of concerted activity. This cannot be what was intended when Congress enacted the NLRA. In fact, when the U.S. Supreme Court first definitively addressed the scope of section 7 with regard to the employment-at-will doctrine it proclaimed that the NLRA “does not interfere with the normal exercise of the right of the employer to select its employees or discharge them.”⁵⁵ Today, few employers would likely find much comfort in this 1937 quote.

Employers, like the Chicago-area car dealership discussed *infra*, are justifiably concerned about protecting their reputation. Moreover, the public nature of social networking posts means that employers confronted with inappropriate postings will want to act quickly to extinguish further improper activity.⁵⁶ At the same time, the Board’s broad reading of concerted activity converts nearly every employee rant or comment about employers into protected activity under section 7 of the Act. And unfortunately for employers, a determination as to what activity exceeds the boundary of protection often depends on the “eye of the beholder.”⁵⁷ As a result, employees can render themselves nearly termination-proof simply by posting an employment-related rant on social media, or “liking” an inappropriate posting concerning their job. Online comments about work under the Board’s reading of section 7 may convert an at-will employee to one with almost tenured status.⁵⁸ Employers who confront and discipline employees for on-line misconduct or pursuant to a policy relating to on-line conduct face back pay awards and reinstatement of employees who engaged in actual misconduct or even intentionally tried to get fired.⁵⁹ This means that disciplinary action taken by an employer for online activity could land the employer in a legal quagmire. And even if terminated or disciplined employees do not pursue action with the Board, the potential risks are too serious and too expensive to dismiss as insignificant, especially in this pro-litigation era.⁶⁰ Regardless of the outcome, an employer’s business reputation can be materially and irrevocably tarnished with just one adverse press release.⁶¹

Conclusion

In July 2013, the NLRB acquired, for the first time in ten years, a full slate of confirmed members.⁶² Employers should be alert for additional labor-friendly initiatives. The NLRB’s expansion of the law affects all employers, whether their employees are represented by a union or not. But many recent decisions by the Board will be more likely to affect non-union employers.

Endnotes

- 1 *NLRB Launches Website on Rights*, TEAMSTERS FOR A DEMOCRATIC UNION (June 20, 2012), <http://www.tdu.org/media/nlr-launches-website-rights>.
- 2 National Labor Relations Act (Wagner Act), 29 U.S.C. §§ 151–169 (1935).
- 3 *Id.* § 153.

- 4 *Beware nonunion employers: NLRB may knock at your door*, HR.BLR.COM (November 12, 2012), <http://hr.blr.com/HR-news/Unions/National-Labor-Relations-Act-NLRA/Beware-nonunion-employers-NLRB-may-knock-at-your-door>.
- 5 See Bryance Metheny, *Labor: The NLRB will not be ignored*, INSIDECOUNSEL (May 6, 2013), <http://www.insidecounsel.com/2013/05/06/labor-the-nlr-wil-not-be-ignored>.
- 6 *Economic News Release: Union Members Survey*, BUREAU LAB. STAT. (January 13, 2013), <http://www.bls.gov/news.release/union2.nr0.htm>.
- 7 See Metheny, *supra* note 5 (describing aggressive stance in non-union workplaces).
- 8 *Id.*
- 9 In 2012, the NLRB alarmed the business community when an administrative law judge in American Red Cross decided that an at-will disclaimer in an employee handbook violated Section 7. *American Red Cross Arizona Blood Services Region*, Case No. 28-CA-23443, 2012 WL 311334 (ALJD February 1, 2012).
- 10 Metheny, *supra* note 5.
- 11 See Raymond J. LaJeunesse, Jr., *Union Organizing and the NLRB Under President Obama*, ENGAGE: J. FEDERALIST SOC’Y PRAC. GROUPS, Oct. 2012, at 107 (2012) (analyzing the current administration’s efforts to “ease union organizing” with expedited election procedures, mandated union notice, and aggressive actions by NLRB’s Acting General Counsel).
- 12 29 U.S.C. §§ 157-158; *Who We Are*, NATIONAL LABOR RELATIONS BOARD, <http://www.nlr.gov/who-we-are> (last visited June 3, 2014) (“The National Labor Relations Board is an independent federal agency that protects the rights of private sector employees to join together, with or without a union, to improve their wages and working conditions.”).
- 13 29 U.S.C. § 158.
- 14 29 U.S.C. § 157.
- 15 See *infra* Part I.A.
- 16 See *infra* Part I.B.
- 17 See Lauren K. Neal, *The Virtual Water Cooler and The NLRB: Converted Activity in the Age of Facebook*, 69 WASH. & LEE L. REV. 1715 (2012) (discussing the Board’s attack on common workplace policies).
- 18 Notification of Employee Rights under the National Labor Relations Act, 76 Fed.Reg. 54,006 (Aug. 30, 2011) (codified at 29 C.F.R. pt. 104).
- 19 Nat’l Ass’n of Mfrs. v. NLRB, 717 F.3d 947 (D.C. Cir. 2013).
- 20 *Id.* at 954 (internal citations omitted).
- 21 *Id.* at 951.
- 22 See Final Rule, 29 C.F.R. pt. 104 (2011) (Member Hayes dissenting), available at <http://www.gpo.gov/fdsys/pkg/FR-2011-08-30/html/2011-21724.htm>.
- 23 Nat’l Ass’n of Mfrs. v. NLRB, 846 F.Supp.2d 34, 48 (D.D.C. 2012).
- 24 Chamber of Commerce v. NLRB, 856 F.Supp.2d 778, 790 (D.S.C. 2012).
- 25 Nat’l Ass’n of Mfrs. v. NLRB, 717 F.3d 947, 947 (D.C. Cir. 2013).
- 26 *Id.* at 956.
- 27 *Id.*
- 28 *NFIB Strikes Another Blow to the NLRB*, The Brief, NFIB SMALL BUS. LEGAL CTR., (Summer 2013) <http://www.nfib.com/LinkClick.aspx?fileticket=NrXy6mG3xQ8%3D&tabid=91>.
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35 *Id.*

36 *Id.*

37 See Neal, *supra* note 17.

38 *Id.*

39 *Id.*

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41 NLRB Office of the Gen. Counsel, Memorandum OM 12-59, Report of the Acting General Counsel Concerning Social Media Cases (2012).

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43 *Id.*

44 *Id.*

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49 *Banner Health System d/b/a Banner Estrella Medical Center and James A. Navarro*, 358 N.L.R.B. 93, Case 28–CA–023438 (July 30, 2012), available at <http://www.nlr.gov/case/28-CA-023438>.

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51 NLRB Office of the Gen. Counsel, Memorandum OM 12-31, *supra* note 40, at 24.

52 See *id.*

53 *Id.*

54 See Bielan, *supra* note 45, at 814 (concluding that absent a change in Board direction or legislative amendment observers should expect to see “continued infringement upon employer’s rights”).

55 *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937).

56 Bielan, *supra* note 45, at 156.

57 See Jon E. Pettibone, *Don’t Forget the NLRA*, ARIZ. ATT’Y, May 2003, at 18, available at <https://www.myazbar.org/AZAttorney/PDF>

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58 Robert Sprague and Abigail E. Fournier, *Online Social Media and the End of the Employment-At-Will Doctrine*, 52 WASHBURN L.J. 557 (2013) (examining the interplay between the NLRA and social media in the private sector non-union workplace).

59 Each month, an average of 2,000 unfair labor practice charges and 200 representation petitions are filed with the NLRB. In 2012, the NLRB collected more than \$44 million in backpay or the reimbursement of fees, dues and fines. More than 1,200 employees were offered reinstatement as a result of NLRB enforcement efforts. NLRB Press Release, *supra* note 34.

60 The fear of litigation can be extremely effective in driving employers to settle even the most frivolous of claims. See Gary Blasi & Joseph W. Doherty, *California Employment Discrimination and Its Enforcement* (UCLA-RAND Ctr. L. & Pub. Pol’y Research Paper No. 10-06) (estimating the median cost of defending an employment discrimination case by private counsel through trial is \$150,000, with summary judgment proceedings costing an estimated \$75,000), available at http://www.dfeh.ca.gov/res/docs/Renaissance/FEHA%20at%2050%20-%20UCLA%20-%20RAND%20Report_FINAL.pdf. See also Jon E. Pettibone, *Don’t Forget the NLRA*, ARIZ. ATT’Y, May 2003, at 18, available at https://www.myazbar.org/AZAttorney/PDF_Articles/0503NRLApgs18-19.pdf

61 See, e.g., Julianne Pepitone, *Facebook Firing Test Case Settled Out of Court*, CNN MONEY (Feb. 8, 2011), http://money.cnn.com/2011/02/08/technology/facebook_firing_settlement/; Jim Stanley, *Guilty Until Proven Innocent: Questions Regarding OSHA’s Enforcement Approach*, OH&S BLOG (Jul. 29, 2013), <http://ohsonline.com/blogs/the-ohs-wire/2013/07/osha-enforcement.aspx> (discussing impact of agency’s “public shaming” press releases).

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