



THE NLRB: A THORN IN EVERYONE'S SIDE—NOT JUST UNIONIZED EMPLOYERS!

Presented by Edward R. Noonan
Eckert Seamans Cherin & Mellott, LLC

Human Resources Forum
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PRACTICE AREAS:

[Labor & Employment](#)

[Litigation](#)

STATE ADMISSIONS:

Pennsylvania
District of Columbia

COURT ADMISSIONS:

U.S. Court of Appeals for the Third
Circuit

U.S. Court of Appeals for the
Fourth Circuit

U.S. Court of Appeals for the Ninth
Circuit

U.S. District Court for the District of
Columbia

U.S. District Court for the Western
District of Pennsylvania

Supreme Court of Pennsylvania

District of Columbia Court of
Appeals

EDUCATION:

J.D., George Washington University
Law School, 1976

A.B., Brown University, 1973



Edward R. Noonan

MEMBER

OVERVIEW

Ed Noonan exclusively practices labor law. He represents management as a counselor and a litigator in all areas of labor management relations. In the area of unfair labor practice litigation, Ed has years of experience defending employers before the National Labor Relations Board (NLRB) and courts and advising employers in avoiding the commission of unfair labor practices. While his principal focus has been on union/management relations, he has expanded his practice to include employment discrimination, wrongful discharge, and other species of nonunion-related employment litigation, and preventive counseling.

REPRESENTATIVE MATTERS

- Advises clients on grievance and arbitration matters arising from collective bargaining agreements.
- Handles arbitration proceedings and federal court suits alleging breaches of collective bargaining contracts.
- Advises public and private employers and acts as chief negotiator in collective bargaining negotiations.
- Represents employers in regard to employment discrimination complaints and suits.

PROFESSIONAL AFFILIATIONS

- Allegheny County Bar Association
- Pennsylvania Bar Association

NEWS AND INSIGHTS

Speaking Engagements:

- "Keep the NLRB's Target Off Your Back: Look Out for Overbroad Rules of Conduct," Eckert Seamans' Human Resources Forum, May 2015.
- "NLRB Update: Guidance for employers dealing with the new NLRB "ambush election rules" and other labor law developments," Eckert Seamans' Human Resources Forum, January 2015.

- "Confidentiality of Internal Investigations," panelist, American Conference Institute's National Advanced Forum on NLRB & Labor Law Disputes and Litigation, March 2013.
- "NLRB Update," co-presented with Mariah Klinefelter, Eckert Seamans' Human Resources Forum, November 2011.
- "It Takes Two Wrongs to Make a Right," co-presented with Mariah Klinefelter, Eckert Seamans' Human Resources Forum, June 2009.

Media Coverage:

- "Disclaimers in Social Media Policies Could Avoid Labor Law Problems, Attorneys Say," *Electronic Commerce & Law Report*, October 2010.

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NLRA Protections

- ❑ The National Labor Relations Act covers private sector employees.
- ❑ Both union and non-union!

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NLRA Protections

Section 7 of NLRA

- 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”
- Also protects access to the NLRB and its processes

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NLRA Protections

Section 8(a) (1)

- It is an unfair labor practice to:
 - “interfere with, restrain or coerce exercise of Section 7 rights”

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Concerted Activity for Mutual Aid or Protection

TO BE CONCERTED, ACTIVITY :

- Requires 2 people
- OR
- If one person:
 - Must be engaged with or on the authority of other employees, and not solely by and on behalf of the employee him/herself.
 - OR
 - Employee must seek to initiate or to induce or to prepare for group action
 - OR
 - Employee must bring “truly group” complaints to attention of management

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NLRA Protections

- Section 7 is broadly interpreted and covers discussions between employees and actions taken re:

➤ Wages	➤ Job opportunities
➤ Benefits	➤ Job security
➤ Time off	➤ Treatment by supervisors or managers
➤ Safety	➤ Benefits of unions
➤ Job duties	➤ Job discrimination / harassment
➤ Discipline	➤ evaluations
➤ Any other term or condition of employment	

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NLRA Protections

□ They also cover:

- complaints about supervisors, management and the company
- communications to the public or media re: working conditions, complaints, protests, etc.
- enlisting public support
- wearing of pro union buttons, insignia, etc.
- strikes and other job protests

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NLRA Protections

- Employer rules which can be “reasonably construed” to chill Section 7 rights

OR

- Employer action which chills or punishes the exercise of Section 7 rights

ARE UNLAWFUL!

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NLRA Protections

- The “Obama” NLRB has been focusing on applying and extending NLRA protections to the non-union sector
- Has been striking down rules/policies which it finds could be interpreted to prohibit or restrict the exercise of NLRA rights
- Applying broad protection to employee acts committed during exercise of concerted activity

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“Overbroad” Confidentiality Restrictions

- Defining “confidential” information as information pertaining to employees and their wages, employment policies or working conditions is unlawful
 - *... all personnel lists, rosters, personal information of co-workers, managers, executives and officers; handbooks, personnel files, personnel information such as home phone numbers, cell phone numbers, addresses and email addresses*
 - Quicken Loans 359 NLRB No. 141
- Arbitration agreement requiring proceedings be confidential
 - Covenant Care California, LLC 363 NLRB No. 80
- Broad policy of prohibiting employees from discussing investigation unlawful
 - Banner Healthcare 358 NLRB 809
- NLRB will not approve settlement agreement where more than financial terms confidential

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“Overbroad” Restrictions on Right to Communicate to Third Parties

- *“Do not contact the media, and direct all media inquiries to the Home Services Communications department.”*
- *“If law enforcement wants to interview or obtain information regarding a DIRECTV employee, whether in person or by telephone/email, the employee should contact the Security ...”*
 - Direct TV 359 NLRB No. 54

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Restrictions on Access to Board

- Mandatory arbitration policy covering all employment related claims, including claims under “federal, state or local statutes”
 - Supply Technologies, LLC, 359 NLRB No. 38
- Restricts right to file NLRB charge
- Same holding could apply to covenant not to sue in separation agreement

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Restrictions on Concerted Activity

- Arbitration policy barring class action claims unlawful
 - D.R. Horton, Inc., 357 NLRB No. 184
 - Murphy Oil 361 NLRB No. 72
- Prevents employees from banding together to litigate claims
- Opt out provisions do not save the agreement but are unlawful
 - One Assignment Staffing 362 NLRB 189

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Restrictions on Concerted Activity

T-Mobile USA 363 NLRB No. 71

- Rule banning tape recording or video recording in non-work areas on employees own time is unlawful
- Employees are protected by NLRA when:
 - recording images of protected picketing, documenting unsafe workplace equipment or hazardous working conditions, documenting and publicizing discussions about terms and conditions of employment, documenting inconsistent application of employer rules, or recording evidence to preserve it for later use in administrative or judicial forums in employment related actions.
- Rule requiring employees to:
 - “behave in professional manner” and “to maintain a positive work environment by communicating in a manner that is conducive to effective working relationships”
- IS UNLAWFUL
 - prohibits “disagreements or conflicts, including protected discussions”

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Restrictions on Right to Criticize Employer

- “employees are prohibited from criticizing, ridiculing, disparaging, or defaming Quicken or its products, services, policies, directors, officers, shareholders, or employees”
 - Quicken Loans 359 NLRB No. 141
- Board will not approve non-disparagement clauses in settlement agreements

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Restrictions on Right to Criticize Employer

- Facebook posts criticized company tax withholding calculations
 - *(Owner) is “such a shady little man. He probably pocketed it all from our paychecks”*
 - *“I owe (taxes) too. Such an asshole”*
 - Three D, LLC, 361 NLRB No. 31

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Restrictions on Right to Criticize Employer

- Employees campaigning for paid sick leave posted signs outside sandwich shop comparing “your sandwich made by sick worker” with “your sandwich made by healthy worker”
 - Can't tell the difference?
 - That's too bad because Jimmy John's workers don't get paid sick days. Shoot, we can't even call in sick.
 - We hope your immune system is ready because you're about to take the sandwich test ...
 - Miklin Enterprises 361 NLRB No. 27

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Questions?

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