

NLRA Covers Union and Nonunion Workplaces

- National Labor Relations Act (“NLRA”) protects employees’ rights to self-organize (*i.e.*, join or seek to join a union), or not, and to engage in protected, concerted activities.
- Protected concerted activities can include:
 - Talking to co-workers about wages, benefits, workplace safety, or other working conditions
 - Participating in a concerted refusal to work in unsafe conditions
 - Joining with coworkers to talk directly to their employer, to a government agency, or to the media about problems in your workplace.
- Employers are prohibited from taking any action, including implementing terms and conditions of employment, that could reasonably chill employees from exercising their rights under the NLRA.

Current State of Affairs

- **Trending** – Social Media Activity and Impact
 - Organizing is moving online in addition to traditional activities
 - Some employers are voluntarily recognizing unions at their worksite to avoid negative publicity
- **Trendy** – Unions are targeting nontraditional industries and enterprises
- **Trajectory** – Union organizing is on the rise
 - Petitions are up 35% in the first half of FY 2024
 - Unfair labor practice charges are up 7%



Some Recent Case Law Developments

- ***McLaren Macomb***, 372 NLRB No. 58 (2/21/23), and its aftermath
 - Separation and release agreements
 - Overly broad confidentiality and non-disparagement provisions in severance agreements interfere with workers' Section 7 rights.
- ***J.O. Mory, Inc.***, 2024 NLRB LEXIS 270, 2024 WL 3010808 (6/13/24)
 - Applied *McLaren Macomb* to invalidate a non-solicitation agreement and a non-compete agreement, both of which were very typical provisions of this kind.
 - Non-solicitation provision would “dissuade a reasonable employee from engaging in protected activity like telling their coworkers about the wages and benefits offered by the Union out of a reasonable fear that the [employer] might accuse them of inducing other employees to quit.”
 - Non-compete provision found unlawful because “if an employee knows that they are barred from being involved in any capacity with a company that operates a similar business to the [employer], they will logically be more fearful of being fired and less willing to rock the boat because they face the prospect of being unable to find any work in their geographic area if they are fired or forced to leave their job.”
 - Also found that union free statement in handbook violated Section 8(a)(1) of the NLRA.

Case Law Developments cont'd

- ***Stericycle Inc.***, 372 N.L.R.B. No. 113 (8/2/23)
 - Employer policies will be ruled unlawful if an employee reasonably interprets them as restricting their rights, even if the rule could also be interpreted as not restricting workers' rights.
 - Employer's intent is irrelevant.
 - Employers can maintain workplace policies as long as they are ***narrowly tailored*** to “advance legitimate and substantial business interests,” and minimize the risks of interfering with workers' rights to act collectively.
- **Social Media Policies**
 - Board rulings have found violations of the NLRA where the policies contained broad restrictions on employees' rights to post on social media, were impermissibly broad, or severely restricted employees from discussing or complaining about any terms and conditions of employment.
 - Takeaway – Use limiting language in your social media policy when describing restrictions and provide examples that demonstrate that you are not trying to prohibit posts that are job-related, but “the manner in which the subject matter is articulated and debated among the employees.” *Landry's Inc.*, 32-CA-118213, 199 LRRM 2103 (ALJ Wacknov, 6/26/24).

Additional Board Action

- Joint Employer Rule, published 10/26/23, vacated by district court on 3/8/24, NLRB appealed to 5th Circuit on 5/7/24, NLRB voluntarily dismissed its appeal on 7/19/24.
 - Takeaway – Board will be using case law to further delineate the joint employer test.
 - Joint employer test changes regularly; how do you navigate the landscape?
- General Counsel Advice Memorandum - released 1/31/24.
 - Moonlighting
 - Employment agreement stated that employee was to “devote her full time to the conduct of the business of the employer.”
 - Employee required to promise not to, “during the course of her employment, directly or indirectly engage in any activity competitive with or adverse to the corporation’s business or welfare...as an individual or as an employee of any other business.”
 - GC advised that this provision was unlawful because it: may deter employees from being a “union salt” at another business.

NLRB Revised Election Rules



New Rule and Uptick in Representation Petitions

- NLRB issued a final rule changing election procedures for representation petitions in 2023.
- Representation petitions are petitions filed by employees, unions, or employers seeking to have the NLRB conduct an election to determine if employees wish to be represented for purposes of collective bargaining with their employer.
- The Rule became effective 12/26/2023, so the new election rules apply to representation petitions being filed now.

What has changed in the new election rules?

- Scheduling of Pre-election Hearing
 - Occurs 10 days earlier
- Postponement of Pre-election Hearing
 - Can only be postponed under limited circumstances and only for up to two business days
- Due dates for Employer Statement of Position
 - Due earlier and can only be postponed under limited circumstances
- Elimination of Responsive Statement of Position
 - Petitioners no longer need to file responsive statements of position

What has changed in the new election rules?

- Posting of election notices
 - Employers only have 2 days to post notices
- Litigation of Issues in Pre-election Hearing
 - Only able to litigate questions of representation, not individual inclusion issues
- No briefing after Pre-election Hearing without special permission
- Elimination of waiting period for election
 - Elections will be scheduled for “earliest date practicable”

Takeaways from New Rule

- Aggressively expedites time between filing of petition and election
- Eliminates opportunities for employers to gain time in the process to understand or litigate unit composition issues
- Application of rules makes it more difficult for employers to run a campaign and educate employees prior to the election
- Restricts regional director and hearing officer discretion on many issues

What's ahead?

- NLRB is reasserting its administrative muscle.
- Expedited election rules leave little time to act.
- Board decisions are shifting back to prior precedent.
- Employers need to continually audit workplace activities.
- NLRB decisions demonstrate that employers can be found to have inadvertently committed unfair labor practices.

To Do List . . .

- Monitor Board Decisions and Timely Review of –
 - Handbook
 - Confidentiality Agreements
 - Social Media Policy
 - Policies on Cell Phone Use (Photos and Recordings)
 - Policies that can unwittingly infringe on Section 7 Rights
- Assess –
 - Marketplace
 - Wages and Benefits
 - Smart Hiring
 - Supervision
 - Human Resources
 - Communication Programs
 - Labor Audit
 - Fair Treatment Issues



Employers Must Be Vigilant . . .



- Strategically assess (and re-assess) vulnerability to union activity and take appropriate steps to promptly and effectively address the areas where there is exposure.
- Develop and communicate a clear and consistent position that aligns with company's strategic plan; don't ask employees to sign a "union free statement."
- Create a culture of transparency, organizational consistency and trust that demonstrates the company's commitment to positive employee relations.
- Ensure supervisors, managers, executives and board members understand their respective roles in implementing a union-free strategy and have the necessary training.
- Identify – and promptly and effectively respond to – any union organizing activity.

