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Using the NLRA to enforce the rights of non-union employees

The steps to enforce the right to engage in protected activity under Section 7

BY SCOTT M. STILLMAN

When evaluating an employment case, many lawyers do not consider whether the National Labor Relations Act (“NLRA” or the “Act”) has any relevancy to the fact pattern before them. The NLRA is often ignored because the attorneys believe the Act only covers the unionized workforce or workers engaged in an organizing drive. That misconception deprives their non-union clients of a valuable tool. The NLRA contains a provision that grants important rights to most private sector workers, whether unionized or not. This provision is Section 7 of the Act and all employment attorneys should become familiar with it. Section 7 provides employees the right to speak out and mobilize in pursuit of better terms and conditions of employment and not to be retaliated against for doing so.

As union membership has steadily declined, more workers have been left to fend for themselves. The NLRA’s application of Section 7 to the non-union workforce can help ensure these employees enjoy some level of protection when they act together to confront their employer about working conditions.

Typically these claims arise from the employer taking adverse action against the employee for conduct that allegedly violated workplace policies, but which the employee contends was protected activity under Section 7. This article evaluates some customary workplace policies and whether they violate employees’ rights under the NLRA. It concludes by detailing the steps to enforce rights under the NLRA.

Background on the NLRA

Congress enacted the NLRA in 1935. (See 29 U.S.C. §§ 151-169.) The Act regulates the relationship between most employees and employers in the private sector, setting forth rules related to unionization, collective bargaining, and the right to engage in “protected concerted activity” under Section 7. The Act does not cover public employees, agricultural workers, independent contractors, railroad laborers, and supervisors.

The National Labor Relations Board (“NLRB” or the “Board”) is the independent federal agency tasked with enforcing the NLRA. It is composed of three main units: (1) regional offices under the direction of the NLRB General Counsel; (2) the Division of Administrative Law Judges (“ALJ”); and (3) a five-member board.

Sections 7 and 8 of the Act

For employment lawyers, the key provision of the NLRA is Section 7. (29 U.S.C. § 157.) This section establishes employees’ right to engage in concerted activity for their mutual aid or protection. Specifically, Section 7 provides that:

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... (emphasis added).

If employers “interfere with, restrain or coerce employees in the exercise of the

rights guaranteed in [Section 7]”, then they violate Section 8(a)(1) of the NLRA. (29 U.S.C. § 158.)

Thus, in order for an employee’s actions to be protected under the NLRA, the actions must be “concerted activity” and must be for “mutual aid or protection.” But what do these terms actually mean?

Concerted activity

Concerted activity occurs when an employee acts “with or on the authority of other employees and not solely by and on behalf of the employee himself.” (*Meyers Indus.*, 281 NLRB 882 (1986).) Even when the employee is acting alone, concerted activity can still be found if the employee “seeks to initiate or to induce or to prepare for group action” or is bringing “truly group complaints to the attention of management.” (*Ibid.*) If the employee merely complains about concerns specific to the individual, the action is not concerted activity. Thus, the more an employee links his conduct to other employees, the more likely the employee’s actions will be considered concerted, e.g. “I and my co-workers want to know why . . .” (See *Grimway Enters.*, 315 NLRB 1276 (1995).)

Mutual aid and protection

The action must not only be concerted, but the employee must be acting for the purpose of mutual aid or protection. In other words, an employee’s actions must be aimed at improving the working conditions for more than just herself. An employee can do so in various ways, even “through channels outside the immediate employee-employer relationship.”



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(*Eastex, Inc. v. NLRB* (1978) 437 U.S. 556, 565.)

However, employees' conduct, although concerted and for mutual aid, will not be protected if it reaches the level of insubordination, disobedience, or disloyalty. To determine whether an employee's behavior loses protection becomes a balancing test involving various factors, such as whether the conduct was provoked by the employer's unfair labor practices or whether statements made by the employee were knowingly false. (See *Atlantic Steel*, 245 NLRB 814 (1979); *NLRB v. IBEW, Local No. 1229*, 346 U.S. 464 (1953) (*Jefferson Standard*.)

Workplace policies

For the non-union workforce, the NLRA most frequently comes into play when employees take action that the employer alleges violated its workplace policies. The question becomes whether the workplace policy unlawfully restricted or "chilled" employees' exercise of Section 7 rights, such that any adverse action taken against the employee constituted a violation of Section 8(a)(1).

To determine if a workplace policy violates Section 8(a)(1), the Board conducts a two-part inquiry. (See *Lutheran Heritage Village-Livonia* 343 NLRB 646 (2004).) To begin, a rule will be found unlawful if it explicitly restricts activities protected by Section 7. (*Ibid.*) If the rule is not explicit on its face, a violation of Section 8(a)(1) will be found upon a showing of one of the following:

(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. (*Ibid.*) The more ambiguous a policy or the more it fails to contain language clarifying that the rule does not restrict Section 7 rights, the more likely the policy will be held unlawful.

This article will focus on some of the typical workplace policies that impact the Section 7 rights of non-union employees.

These include policies involving: confidentiality; access to the worksite; leaving work without permission; arbitration; and use of social media.

Confidentiality policies

The question with regard to an employer's confidentiality policy is whether the policy is so overly broad that employees would reasonably construe the policy to prohibit discussing the terms and conditions of their employment. Employer rules regarding confidentiality often arise in two ways: (1) a policy that prohibits employees from discussing information the employer has designated "confidential"; and (2) directives to employees not to discuss the subject matter of a workplace investigation.

Restrictions on fraternization

As a general rule, if employees would reasonably construe the confidentiality policy as prohibiting employees from discussing the terms and conditions of employment with co-workers, the policy will be considered too broad. In other words, employees have a right under Section 7 to talk to each other about their working conditions and if a policy restricts that right, it will violate Section 8(a)(1). However, not many employers have express policies that employees cannot speak about the terms and conditions of work with each other. Instead, the typical policies contain language that is less explicit, so the issue becomes what language is appropriate in these types of policies as to not unlawfully restrict employees' Section 7 rights.

Two cases help illustrate what language will be considered so broad as to restrict employees' right to speak about the terms of their work: (1) *Costco Wholesale Corp.*, 358 NLRB No. 106 (2012); and (2) *Target Corp.*, 359 NLRB No. 103 (2013). In *Costco Wholesale Corp.*, the Board examined the appropriateness of a confidentiality policy that prohibited discussing "private matters" and "sensitive information." The Board agreed with the ALJ's conclusion that a reasonable

employee would read the terms "private matters" and "sensitive information" as encompassing the employee's wages and other conditions of employment. Therefore, the employer's restrictions on discussing these subject matters inhibited the exercise of Section 7 conduct.

In *Target Corp.*, a provision in the employer's handbook restricted employees from sharing "confidential information" in the breakroom, at home or in public places. The policy defined "confidential information" as all company information that was not public, which included employee personnel records. The company argued that personnel records did not encompass information such as wages and benefits. The ALJ disagreed and the Board affirmed his opinion. The ALJ found that the company defined "confidential information" too broadly because it included all company information that was not public. Since an employee's terms of employment (*e.g.* wages) were not public, such information would be considered confidential under the company's confidentiality policy. Therefore, employees would reasonably construe the rule to prohibit Section 7 activity. (*Cf. Copper River of Boiling Springs*, 360 NLRB No. 60 (2014) (recent Board decision holding that an employer policy prohibiting a "negative attitude" did not violate the NLRA).)

Confidentiality during investigations

Imagine the following scenario: your client was requested by the company to meet with the Human Resources department as part of an investigation into how much overtime employees had been working. At the end of the meeting, HR instructs your client not to discuss the investigation with co-workers per company policy. But your client disregards this directive and, instead, discusses the investigation with colleagues. The company terminates your client for discussing the investigation. Has the company violated Section 8(a)(1) by doing so? Possibly.

If the employer's policy institutes a blanket prohibition against employees discussing matters under investigation, then



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such a policy will likely be a violation of Section 8(a)(1). Indeed, the NLRB has taken the viewpoint that Section 7 generally grants employees the right to talk with each other about investigations. However, the right is not absolute.

In *Banner Health Systems*, 358 NLRB No. 93 (2012), the Board concluded that a company must demonstrate a legitimate business justification if the confidentiality restriction will outweigh employees' Section 7 rights. The analysis becomes a balancing test. Factors looked at are whether (1) witness safety was at issue; (2) evidence was in need of protection; and (3) there was a need to prevent a cover up. (See also *Hyundai Am. Shipping*, 357 NLRB No. 80 (2011); *Verso Paper*, NLRB Div. of Advice, No. 30-CA-89359 (2013).)

Accessing the workplace

Can your client return to the workplace in order to speak with employees onsite to collect information for your case? Under the NLRA, the answer depends on your client's current employment status.

Generally speaking, an off-duty employee has a protected right to enter the external premises of the workplace. An employer cannot simply kick an employee off the worksite following a shift or prevent an off-duty employee from entering the exterior of the employer's property (such as points of entrance like gates or workplace parking lots). If a no-access rule is to be valid, it must (1) limit access solely with respect to the interior of the facility; (2) be clearly disseminated to all employees; (3) apply to off-duty employees seeking access to the building for any purpose and not just to those employees engaging in concerted activity; and (4) be justified by valid business reasons. (See *Tri-County Med. Ctr.*, 222 NLRB 1089 (1976).)

For instance, in *Saint John's Health Center*, 357 NLRB No. 170 (2011), the company had a policy that permitted off-duty employees access to the cafeteria

and into the building for attending company-sponsored events like retirement parties and baby showers. The Board found the no-access rule violated Section 8(a)(1) because "discussing self-organization or terms and conditions of employment are among the purposes for which the [company's] policy does not allow access." Therefore, the policy discriminated against engaging in protected concerted activity. (See also *Mariott Int'l Inc.*, 359 NLRB No. 8 (2012); *Sodexo Am., LLC*, 358 NLRB No. 79 (2012).)

If your client is no longer employed, then the company can legally prohibit him/her from entering any portion of the worksite. However, the employer cannot restrict your client from the public property surrounding the workplace.

Leaving work without permission

Non-union employees may walk off the job without permission in certain scenarios. If the walk-off was a concerted refusal to work because of working conditions, it will be considered protected concerted activity under Section 7 (in essence, a protected strike). (See *NLRB v. Washington Aluminum Co.* (1962) 370 U.S. 9, 16 (non-union employees that protested their working conditions by walking off the job engaged in concerted activity protected by Section 7); *NLRB v. Leslie Metal Arts Co.* (6th Cir. 1975) 509 F.2d 811, 814 (finding walkout protected where the employer's failure to maintain discipline rose to the point of threatening employee safety).) Most recently, for instance, thousands of non-union fast food workers participated in one-day strikes throughout the nation in an effort to improve wages and working conditions and protest improper employer behavior. (See also *Greater Omaha Packing Co.*, 360 NLRB No. 62 (2014) (finding beef processing company unlawfully fired three non-union workers who struck in protest of their working conditions).)

However, employers may implement policies restricting employees from leaving

the job without permission as long as such policies are properly tailored to not restrict Section 7 rights. In evaluating these policies, the key question is whether the policy's language could be considered by an employee to prohibit strikes or walking off the job in a concerted refusal to work because of working conditions. As demonstrated by the following cases, the case law in this area can be confusing.

In *Labor Ready, Inc.*, 331 NLRB 1656 (2000), the company maintained a policy promulgating that "employees who walk off the job will be discharged." The posted rule had no exceptions. The NLRB found the rule unlawfully broad and therefore in violation of Section 8(a)(1).

In *2 Sisters Food Group, Inc.*, 357 NLRB No. 168 (2011), employees were prohibited from "stopping work before shift ends or taking unauthorized breaks." The NLRB found this rule to be permissible. It reasoned that the rule "only prevent[s] an employee from taking unauthorized leaves or breaks and do[es] not expressly restrict concerted action by employees." Therefore, "an employee reading these rules would not reasonably construe them to prohibit conduct protected by Section 7."

In *Costco Wholesale Corp.*, 358 NLRB No. 106 (2012), the employer handbook contained a rule prohibiting employees from "[l]eaving Company premises during working shift without permission of management." The Board found this rule to be more similar to *2 Sisters* than to *Labor Ready*. It concluded that the policy "does not include a reference to any term that would reasonably be construed as similar to the term strike or 'walk out.'" Therefore, reasonable employees would not construe the rule as restricting them from leaving their posts if the reason for the departure was to engage in concerted activity.

Thus, in these scenarios, the specific words contained in the policies matter. The closer the language of the policy is to prohibiting terms similar to strike or walking off the job, the more likely the



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policy is to be unlawful under the NLRA.

Class-action waivers in mandatory arbitration provisions

A growing number of companies make their employees sign, as a condition of employment, mandatory arbitration provisions that waive the employee's right to proceed with a class or collective action in arbitration. Does taking away employees' ability to proceed as a class interfere with their right to join together to exercise Section 7 rights? At the moment, the answer depends on who is being asked: the courts or the NLRB.

The case in the middle of this controversy is *D.R. Horton*, 357 NLRB No. 184 (2012). In *D.R. Horton*, the employer's arbitration agreement provided, in relevant part, that the arbitrator "may hear only Employee's individual claims," and "does not have authority to fashion a proceeding as a class or collective action . . ." The Board held that the arbitration agreement's categorical prohibition of class claims in any forum violated the substantive rights vested in employees by Section 7. In other words, the arbitration provision and its class action waiver would lead employees reasonably to believe that they were prohibited from engaging in concerted action for mutual aid or protection. With respect to the Federal Arbitration Act ("FAA"), the Board reasoned that the employer's class-action waiver did "not conflict with the FAA, because the waiver interferes with substantive statutory rights under the NLRA, and the intent of the FAA was to leave substantive rights undisturbed."

The Board's decision was appealed to the Fifth Circuit where it was overturned. (See *D.R. Horton, Inc. v. NLRB* (5th Cir. 2013) 737 F.3d 344.) Finding that "[t]he NLRA should not be understood to contain a congressional command overriding application of the FAA," the Fifth Circuit concluded that "the Board's decision did not give proper weight to the Federal Arbitration Act." (*Ibid.* at 348, 362.)

So what does this all mean? Defense attorneys and the Fifth Circuit have pointed to decisions out of the Second, Eighth and Ninth Circuits that they argue have all refused to follow the NLRB's holding in *D.R. Horton: Sutherland v. Ernst & Young LLP* (2d Cir. 2013) 726 F.3d 290, 297-98 n.8; *Owen v. Bristol Care, Inc.* (8th Cir. 2013) 702 F.3d 1050, 1055; *Richards v. Ernst & Young LLP* (9th Cir. 2013) 734 F.3d 871, 873-74. These cases barely, if at all, analyzed *D.R. Horton* and therefore, carry little weight.

Meanwhile, the administrative law judges of the NLRB have continued to follow the Board's decision in *D.R. Horton* and not the Fifth Circuit's decision. (See *Leslie's Poolmart, Inc.* 198 L.R.R.M. 1292 (2014).) Additionally, the NLRB has petitioned the Fifth Circuit for a rehearing by the panel or a rehearing en banc.

Although *D.R. Horton* may become moot depending on the Supreme Court's decision in *Noel Canning Div. of Noel Corp. v. NLRB* (likely to come down in June 2014 and which addresses whether the Board members who decided *D.R. Horton* and other cases were acting as constitutional recess appointments), cases similar to *D.R. Horton* are making their way through the newly confirmed NLRB. Thus, even if *D.R. Horton* becomes moot, the class-action waiver issue will continue to be litigated and likely make its way to the Supreme Court.

Social media

For employees, social media has become the new, albeit more public, "water cooler" or "bulletin board." Yet, analyzing the NLRA's application to employees' social-media postings remains similar to the analysis for any other type of conduct: (1) determine whether the social-media posting was protected concerted activity for mutual aid or protection, and (2) determine whether the employer's social-media policy was overly broad such that it would likely chill employees' exercise of their rights under Section 7.

For instance, in *Karl Knauz Motors, Inc.*, 358 NLRB No. 164 (2012), the

employee worked as a car salesman for a BMW dealership and was paid, in part, by commissions. The employee made two separate postings on his Facebook account on the same day. The first post contained photos of and sarcastic criticisms about the cheap quality of food the dealership provided customers who attended an event to promote BMW's newest car. The second post contained photos of and comments about an accident that had occurred at a nearby Land Rover dealership where the employee did not work but whose owners also owned the BMW dealership. After finding out about the postings, the company terminated the employee.

The Board found the first post to be protected under the NLRA, but not the second post. The Board adopted the ALJ's finding that the first post was protected concerted activity because the low-end food at an event for a luxury car dealership could have had an impact on his ability to sell cars and therefore hurt his commissions. Further, the employee and other workers had previously commented about the food to management such that his Facebook post was a "logical outgrowth" from prior concerted activity. And although the posting contained sarcastic criticism, it did not rise to such a level of disparagement as to deprive the activity of protection. The second post was not protected because it lacked connection to any of the employee's terms and conditions of employment. (See also *Triple Play Sports Bar and Grille*, 34-CA-12926 (2012) (ALJ decision finding an employee's clicking of the Facebook "Like" button "sufficiently meaningful as to rise to the level of concerted activity".))

In *Costco Wholesale Corp.*, 358 NLRB No. 106 (2012), the company's social-media policy stated that employees could be disciplined for any electronic posts that "damage the Company, defame any individual or damage any person's reputation . . ." The Board found this rule too broad because it restricted communications protesting employees' working conditions.



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Nothing in the rule clarified that “protected communications are excluded from the broad parameters of the rule” such that “employees would reasonably conclude that the rule requires them to refrain from engaging in certain protected communications.” (See also *Dish Network Corp.*, 359 NLRB No. 108 (2013).)

Although the number of Board decisions involving social media is fairly limited at the moment, it is sure to grow rapidly. In the meantime, the NLRB’s General Counsel has issued three helpful advice memoranda concerning social-media cases. (See Memorandum OM 12-59 (2013); OM 12-31 (2012); OM 11-74 (2011).)

Filing an unfair labor practice charge

An employee’s recourse for an employer’s violation of Section 8(a)(1) is to file an unfair labor practice (“ULP”) charge with the NLRB. Violations of the NLRA cannot be filed in court. Instead, the ULP charge is filed with the regional office of the NLRB where the ULP occurred. (See 29 C.F.R. § 102.10.) If the ULP occurred in multiple regions, it may be filed in any of them.

The time by which an employee must file the ULP charge is relatively short. It must be filed within six months of the alleged unlawful practice. (See 29 U.S.C. § 160(b).) A copy of the filing must also be served on the defendant within that six months. (*Ibid.*) Note, however, that the statute “does not begin to run until . . . the aggrieved party knows or should know that his statutory rights have been violated.” (See *John Morrell & Co.*, 304 N.L.R.B. 896, 899 (1991).)

Once the regional office receives the charge, the office investigates, often receiving assistance from the filing party as well as asking for a statement of position from the employer. (See 29 C.F.R. § 101.4.) It is often important to stay engaged with the regional office to advocate

for your client’s position. This requires the filing of a representation form. Upon completion of the investigation, the matter may be disposed of through informal methods such as withdrawal, dismissal, or settlement. (See 29 C.F.R. § 101.5.) Generally, you will want to be part of any settlement discussions.

If the case cannot be resolved informally and the charge appears to have merit, the Regional Director institutes formal action by issuance of a ULP complaint and notice of hearing before an ALJ. (See 29 C.F.R. § 101.5, 10.)

At the ALJ hearing, the NLRB region will assign a staff lawyer to prosecute the case on behalf of the employee, but an employment attorney can also participate in the case, including cross-examining witnesses and filing a separate post-hearing brief. Once the hearing concludes, the ALJ will issue a written decision stating finding of facts and making recommendations as to any action that should be taken. (See 29 C.F.R. § 101.11.)

A party who disagrees with the decision may file exceptions to the Board in Washington, D.C., who will then take the case up on appeal. The Board will issue its own decision and order, which may adopt, modify, or reject the findings and recommendations of the ALJ. (See 29 C.F.R. § 101.11, 12.) An enforcement or appeal of a NLRB decision goes directly to a U.S. Circuit Court of Appeals.

Remedies for a successful ULP charge

Unfortunately for employees, the penalties for violating the NLRA are not stiff. The NLRB’s enforcement is “remedial” in nature. The NLRB does not have the power to impose monetary “penalties” for violations of the Act. (*Republic Steel Corp. v. NLRB* (1940) 311 U.S. 7, 10-12.) Further, no punitive damages or attorneys’ fees are available for filing a successful ULP charge. Instead, the NLRB’s remedies include ordering the

employer to fix any policies that violate Section 8(a)(1) and broadly post notice of these changes along with a statement that the employer will refrain from interfering with Section 7 rights going forward.

With respect to individual employees, if the employer took adverse action against the employee in violation of the Act, the NLRB can require that action be rescinded. For instance, if the employee was terminated, the Board can order reinstatement of the employee and award backpay (with interest compounded daily). (See 29 U.S.C. § 160.)

Thus, although the NLRA is no substitute for the protection of a union contract, the Act can be a useful source of additional tools for reversing unfair disciplinary action or eliminating a workplace policy that discourages employees from taking collective action to improve their working conditions. As such, employment lawyers should familiarize themselves with the Act and keep abreast of the major case developments under Section 7.

[**Author’s note:** For an additional discussion of these issues, review the following: Johnda Bentley & Jennifer Platzkere Snyder, *Applying the Act to the Non-Union World*, ABA Committee on Practice and Procedure under the NLRB (2014); Mark G. Kisicki, *Non-Union Employers Beware: NLRB Rules that Affect You*, The American Law Institute Continuing Legal Education (2013).]



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