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**PROGRAM MATERIALS**

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# **The National Labor Relations Act: The Fundamentals**

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# **The National Labor Relations Act: The Fundamentals**

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## 01 The NLRA: A Little History

A brief introduction to set the stage for where we were and where we are.

## 02 The NLRA and the NLRB

The basics of the NLRA and the agency that enforces it.

## 03 Unfair Labor Practices and Protected Activities

A description of the actions prohibited and protected under the NLRA and how the law is enforced.

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Union organizing and the process of recognition and elections.

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# The NLRA: A Little History



# Background

Sherman Anti -Trust Act of 1890

War Labor Board of 1918

Railway Labor Act of 1926

Norris -LaGuardia Act of 1932

Wagner Act (the NLRA) of 1935

Taft-Hartley Act (Labor Management Relations Act of 1947)

Landrum -Griffin Act (Labor -Managing Reporting and Disclosure Act of 1959)

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# The NLRA and the NLRB

# Structure of the NLRB

- 5 Member Board, Political Appointments, Approved by Congress, 5 year term
- Adjudicate Representation Cases and ULP Cases
- Develop and Issue Rules
- General Counsel. Political Appointment, Approved by Congress, 4 year term
  - Litigation and enforcement priorities

# National Labor Relations Board



Marvin E. Kaplan  
Chairman  
7/29/20 – 8/27/25



David M. Prouty  
7/28/21 – 8/26

## Section 7 of the 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 except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment...”

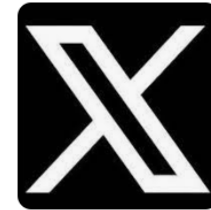
# Section 7 Rights

- Applies to Unionized and Non-Unionized Employers
  - Not including government employees and individuals covered under other law such as the Railway Labor Act
  - Generally does not apply to “supervisors”.
  
- Employees have the right to:
  - Join a “labor organization”, i.e. a union
  - Bargain collectively
  - Engage in protected concerted activity
  - Refrain from joining a union, bargaining collectively, or engaging in concerted activity

# When is activity “concerted”?

- Employees **acting together**
- One employee speaking **on behalf of** a group, trying to **initiate** group action or engaging in an activity that is an **outgrowth** of previous group action
- For example...
  - A group of employees staging a walkout or signing a petition
  - One employee bringing a complaint to management on behalf of their coworkers
  - Discussions of wages, shift schedules, or benefits
  - Taking photos of working conditions

# Protected Activity on Social Media



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# When is concerted activity NOT protected?

- Generally, loses protection if conduct/speech is defamatory or disloyal, or if it crosses a line from civil discourse to abusive, profane or threatening
- NLRB has taken the view that protected activity often involves uncivil speech or actions
- When employees engage in inappropriate or obscene outbursts, different standards apply if the conduct occurs:
  - During discussions with management in the workplace
  - As part of a discussion with other employees
  - In a picket line setting
- Double-check these decisions and make sure to collect all relevant facts

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# **Unfair Labor Practices and Protected Activities**

# Employer Unfair Labor Practices

- ❖ “to interfere with, restrain, or coerce employees”
- ❖ “to dominate or interfere with the formation or administration. . . or contribute financial or other support to it”
- ❖ to discriminate “in regard to . . .any term or condition of employment to encourage or discourage membership in any labor organization...”
- ❖ “to . . . discriminate against an employee because he has filed charges or given testimony...”
- ❖ “to refuse to bargain collectively. . .”

# Union Unfair Labor Practices

- ❖ “to restrain or coerce employees in the exercise of the rights ”
- ❖ “to cause or attempt to cause an employer to discriminate . . . or to discriminate against an employee”  
(not including a failure to tender the periodic dues and the initiation fees)
- ❖ “to refuse to bargain collectively with an employer”
- ❖ Attempt to enforce “hot cargo” clauses
- ❖ “to require of employees . . a fee in an amount which the Board finds excessive or discriminatory”
- ❖ Require “featherbedding”
- ❖ Engage in certain kinds of recognitional picketing.

# Unfair Labor Practice Processes

Charge filed with NLRB

Investigation

Determination

Withdrawal, Dismissal, Settlement

Litigation

Appeals

## In the NLRB's Fiscal Year 2023...

- **19,869** unfair labor practice charges were filed with the NLRB (Highest since 2016)
  - **743** complaints (compared to 1200+ per year in 2014-2017)
  - **5357** resulted in settlements (not much change since 2020)
  - **3497** were dismissed
- **2,594** representation petitions

# Board Remedies

- **Settlements Terms**
  - **NO Non-Admission Language**
  - **Posting the Settlement Agreement**
  - **Mandatory manager/supervisor training conducted by the NLRB**
  - **Must include “Default” language** – If Employer does not comply with the terms, Board will issue a Complaint and Employer can only argue whether it defaulted on the settlement agreement
- **10(j) injunctive relief** – Immediate reinstatement in discharge cases
- **Damages**

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# **Representational Status**

# A little historical perspective

- **Union demands recognition**
  - Employer could decline to recognize
  - Employer could voluntarily recognize
- **If not recognized, union files an “RC” petition with the NLRB requesting an election**
  - 30% showing of interest
- **NLRB processed petition and, if appropriate, set date for and held election**
  - 50% plus one vote for the union to win
    - Only considers ballots cast, not eligible voters
- ***Gissel* Bargaining Orders**

# Changes to process

*Cemex Construction Materials Pacific, LLC* (2023)

If a Union demands recognition and has majority status, the employer must either recognize the union or file its own petition – called an “RM” Petition

Must be filed within 14 days

If the company engages in any unlawful conduct before the election, they will be ordered to recognize and bargain with the union – regardless of the outcome of the vote

# Organizing / Campaigning

Union does not have to give notice of organizing efforts

Circulation of authorization cards

(30% to file RC petition)

Employer can educate employees about its position

Employer can campaign in response to union organizing efforts

Be aware of impact of *Cemex*

# WHAT EMPLOYERS CANNOT SAY AND DO...

- **T Do Not Threaten**
- **I Do Not Interrogate**
- **P Do Not Promise**
- **S Do Not Spy**

# What Employers *Can Say and Do...*

**F - Facts**

**O- Opinions**

**R- Rules**

**E - Experience/Examples**

# Results of recent elections\*

Union petitions up 30% in 2024  
2,600 petitions in 2024 fiscal year  
Unions won 79% of elections

Employer petitions up 2,000%  
Unions won 70% of elections

Decertification petitions up by 12%

\* *“Unionization Petitions Up 30% in 2024 in Wake of Cemex Decision”*, Bloomberg Law, 7/17/2024

# Results of recent elections

## Number of Days for Unions to Reach a First Contract

Time elapsed from successful NLRB election to contract ratification, 2005-2023

■ Mean number of days ■ Median number of days



Source: Bloomberg Law Labor Data. Analysis covers 454 first contracts for which Bloomberg Law has obtained dates for NLRB election, certification and contract ratification, 2005-2023. Updated January 2024.

Bloomberg Law

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# **Developments**

# Handbooks and Work Rules



Employee  
Handbook

- Stericycle Inc., (2023)
- “Under the new standard adopted in Stericycle, the General Counsel must prove that a **challenged rule has a reasonable tendency to chill employees from exercising their rights**. If the General Counsel does so, then the rule is presumptively unlawful. However, the employer may rebut the presumption by proving that the rule advances a **legitimate and substantial business interest** and that the employer is **unable to advance that interest with a more narrowly tailored rule**. If the employer proves its defense, then the work rule will be found lawful to maintain. In line with this framework, the Board rejected the categorical approach of Boeing in favor of case-specific consideration of work rules.”

# Handbooks and Work Rules

- NLRB has been looking closely at work rules, especially:
  - No-recording rules and rules prohibiting cell phones in work areas
  - Confidentiality rules – even confidentiality in investigations!
  - Social media restrictions
  - Civility and professionalism rules
  - Rules prohibiting outside employment
- Consider reviewing handbooks and policies for overbroad rules
- **Things to consider:** What is the rule intended to prevent?  
Could the language be read to apply to other benign conduct?

# Handbooks and Work Rules

- For example...



Media contact rules that prohibit employees from giving statements to the press without getting prior authorization from management



Media contact rules that prohibit employees from responding to inquiries for statements on behalf of the Company

# Restrictive Covenants

- *McLaren McComb* (2023)
  - Confidentiality and non-disparagement provisions in severance agreements
  - Violates Section 8(a)(1) of the Act simply by offering the severance agreement with a broad waiver
  - The employer's offer is "an attempt to deter employees from exercising their statutory rights"
  - "Employers cannot ask individual employees to choose between receiving benefits or exercising their rights under the National Labor Relations Act"

# New Direction

- Rescinded GC Memos:
  - GC 21-03 (vigorous enforcement of PCA)
  - GC 21-08 (student athlete rights)
  - GC 23-05 (guidance on *McLaren Macomb*)
  - GC 23-08 (non-compete agreements)
  - GC 24-04 (full remedies)
  - GC 25-01 (further addressing noncompete agreements and Stay-or-Pay)
  - GC 22-04 (refrain from captive audience speeches)
- Likely try and reverse
  - *Cemex Construction Materials Pacific*
  - *Amazon.com Services, LLC*
- NLRB Structure Unconstitutional(?)

# QUESTIONS?



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# Thank you!

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