



The Top 5 Reasons Why All Employers Should Care About the NLRA

Ben Eckhart | Attorney

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Today's Agenda

- The National Labor Relations Act
- The Board, Section 7 Rights, Make Whole Remedies
- **Top 5 Reasons**
 - Workplace Rules
 - Investigations – Confidentiality
 - Employment Agreements
 - Independent Contractors
 - Elections
- **Bonus Reasons!**



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Objectives

- Understanding the NLRA and how the NLRB applies it to all workplaces, both union and non-union.
- Procedural overview of an Unfair Labor Practice and including liability for “make whole” remedies passed in 2022.
- Review of employee conduct the current NLRB considers “concerted protected activity”, and therefore subject to unfair labor practices.



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Objectives

- Overview of coordinated federal efforts of the NLRB, EEOC, OFCCP, and DOL and identify risk management issues triggered by discrimination complaints and investigations (confidentiality), safety, wage and hour (pay transparency), and political activity.
- Recommend handbook policies that are legally compliant.

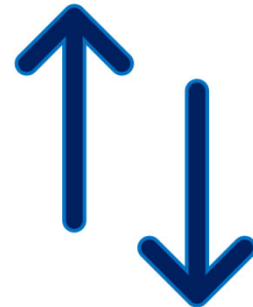


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State of the "Union"

- Public polling shows highly favorable views of unions
- Union Representative Petitions and Unfair Labor Practice charges are up.
 - 53% and 19%
 - Percentage increases higher since 1959.
- Barriers to unionization are down – internet and social media
 - Recent NLRB decision – quickie elections
- However, the share of unionized workers in workplace remains at **10%**.



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State of the "Union"

- Current Administration
 - President Biden – *"I intend to be the most pro-union president leading the most pro-union administration in American history."*
 - Established the White House Task Force on Worker Organizing and Empowerment
 - More than 20 participant agencies to promote the administration's policy of support for worker power, worker organizing and collective bargaining.
- National Labor Relations Board



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National Labor Relations Act

Taft-Hartly Act 1947 – Amended the Wagner Act of 1935

- Section 7 of the National Labor Relations Act (the Act) guarantees employees *"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,"* as well as the right *"to refrain from any or all such activities."*
- Most employees in the private sector are covered under the NLRA. The law does not cover government employees, agricultural laborers, independent contractors, and supervisors (with limited exceptions).



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National Labor Relations Act

- Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7" of the Act.
- The Act Identifies 5 unfair labor practices and declared these practices unlawful.
 - Interference, restraint or coercion;
 - Employer domination or support of a labor organization;
 - Discrimination on the basis of labor activity;
 - Discrimination in retaliation for contacting the NLRB; and
 - Refusal to bargain.



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National Labor Relations Board

- 5 Member Board – established by the Act
- Currently 4 members are seated:
 - **3 Democratic**
 - Chair Lauren McFerran (12/16/24)
 - David Prouty (8/31/26)
 - Gwynne Wilcox (8/27/28)
 - **1 Republican**
 - Marvin Kaplan (8/27/25)

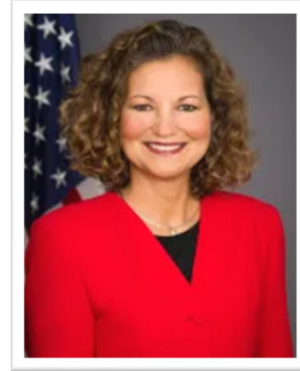


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General Counsel

- **Jennifer Abruzzo**
 - Appointed on July 22, 2021, to a 4-year term
 - Independent from the Board
 - Responsible for the investigation and prosecution of unfair labor practice cases
 - Oversees 26 Regional Offices
 - Each Regional Field Offices consists of field examiners and labor attorney



Unfair Labor Practice

An Unfair Labor Practice (“ULP”) occurs when intentionally or unintentionally an employer or union engages in conduct that in the view of the NLRB reasonably tends to interfere with the free exercise of employee rights.

Employees have the right to engage in “protected concerted activities” (Sec. 7 rights); and employers and unions cannot interfere with those rights.

ULP - Process

- Non-Union and Union Employees can file a charge (online)
- Field Office investigates to determine whether there is reasonable cause to believe a violation has occurred
 - Disposition of Charges
 - Dismiss – this can be appealed
 - Settlement Agreement
 - Formal Complaint – if not dismissed or settled
 - Case heard by Administrative Law Judge
 - Final decision may be reviewed in federal courts

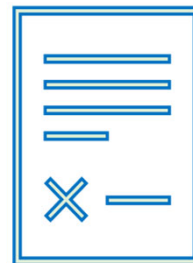


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ULP – Remedies | Direct or Foreseeable Damages

- **General Counsel Memos 21-06 (9/08/2021) & 21-07 (9/15/2021), 22-06 (6/23/22)**
 - Instructing Regions to seek “make whole” remedies in settlements and all remedial tools to restore the status quo
 - Traditional Remedies – back pay, reinstatement, posting
 - Now expect broader remedies... (next slide)







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ULP – Remedies | Direct or Foreseeable Damages

• Additional Remedies


- Reimbursement of out-of-pocket medical expenses 
- Apology letters to reinstated employees
- Allowing Union to post messages on company bulletin board
- Reimbursement for baby formula because of loss of pumping areas at work 
- Posting Employee Rights in the workplace 
- Add language to settlements addressing on compliance
- Remove language that “employer not admitting to any wrongdoing” 



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The Top 5...

- 1 Workplace Rules
 - 2 Investigations
 - 3 Employee Agreements
 - 4 Independent Contractors
 - 5 Recognition & Quickie Election Rules
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Workplace Rules

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- **The Boeing Co.** (2017) – Overruled by **Stericycle**
 - 3 Categories – for presumptively valid workplace rules
 - Category 1 – lawful to maintain
 - Rule does not prohibit or interfere with Sec 7 Rights
 - Rule’s justification outweighs the interference
 - Category 2 – rules that required individualized scrutiny (case by case)
 - Does the rule have an adverse impact on NLRA rights?
 - Category 3 – Unlawful because the rule prohibits or limits NLRA protected conduct
 - For example - a rule prohibiting discussing wages



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Workplace Rules

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- **Stericycle, Inc.** 372 NLRB No. 113 (8/4/2023)
 - Overruling the *Boeing* decision.
 - Employer maintained overbroad work rules governing personal conduct, conflicts of interest, and confidentiality of harassment complaints.
 - The Board adopts new standard for evaluating workplace rules
 - “Strict scrutiny”
 - Reasonable employee standard
 - Retroactive Application to any pending cases



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Workplace Rules

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- **Rules not impacted by *Stericycle*** – always a ULP
 - Rules that –
 - Implicitly restrict Sec 7 activity; or
 - Promulgated in response to union activity
 - Application of rules to restrict Sec 7 rights
 - Rules restricting employee association, solicitation, or distribution, or wearing pro-union clothing, buttons, stickers or insignia



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Workplace Rules

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- **Workplace Rules Impacted by *Stericycle***
 - Confidentiality
 - Employer Email Systems –
 - Purple Media (2019)
 - Reinstated Rule that employers may restrict non-business use of IT resources unless the employees have no other reasonable means of communication and non-discriminatory on its face and application
 - Social Media
 - Use of company logos, copyrights and trademarks
 - Employees allowed fair use of logos when engaging in protected activity



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Workplace Rules

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- **Photography and Recording**
- **Conflict of Interest**
- **Interaction with 3rd Parties**
 - Media, Government Agencies, or Outside Parties



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Workplace Rules

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- **Civility Rules – Can you discipline for offensive conduct?**
 - *Lion Elastomers II*, 372 NLRB No. 83 (5/1/2023)
 - Overruled *General Motors* –back to standard set forth in *Atlantic Steel*
 - 4 factors to consider:
 - (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice
 - Board also noted that the NLRA is not a civility code, just like Title VII



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Workplace Rules

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Civility Rules - Example

- *Starbucks 04-CA-294636* (applying *Stericycle* holding)
 - Employee was discharged for using foul language in a private social media group exchange.
 - The Starbucks rule - "How We Communicate" Rule was overly broad and presumptively unlawful.
 - Language that is "vulgar" and "profane" is almost always apparent, but a rule for "respectful" and "professional" language is not.



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Workplace Rules

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- **Disclaimers** –
 - "This policy is not intended to interfere with or dissuade employees from engaging in activities protected by state, federal, and local law, including the National Labor Relations Act, such as discussing wages, benefits, or other terms or conditions of employment, or legally required activities."
 - GC proposed a model (more detailed) disclaimer in *Stericycle*, but Board did not adopt it.
 - Unclear whether the disclaimer would save an overly broad work rule.



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Employment Investigations

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Confidentiality Instructions

- *Stericycle* – resets the standard set out by *Boeing*
 - A blanket request of confidentiality in every single employer conducted investigations is likely unlawful.
 - A valid request must be narrowly tailored to and applied on a case-by-case basis.



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Employment Agreements

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- **Separation/Release Agreements**
- **Non-Competes, NDAs, & Non-Solicitation**
- **Arbitration – Confidentiality**



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Separation/Release Agreements

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- **McLaren Macomb 372 NLRB No. 580 (2/21/23)**
 - Clauses that violated the NLRA:
 - Confidentiality - "Terms of the agreement were confidential."
 - Non-Disclosure - Prevented disclosure of "information, knowledge, or materials" and prohibited disparaging/harmful statements about the "Employer, its parent, and affiliated entities and their officers, directors, employees, agents and representatives."



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Separation/Release Agreements

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- **McLaren Macomb 372 NLRB No. 580 (2/21/23)**
 - Allowable clauses –
 - Non-disparagement - limit to malice/false statement (defamation)
 - Non-disclosure as to financial terms – GC recognizes that amounts are kept confidential for resolving other disputes.
 - Board will void offending language and not the entire agreement
 - Does not apply to management and supervisory employees or independent contractors.
 - Retroactive application



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Non-Competes

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- **GC Memo 23-08 (May 30, 2023) – Non-binding**
 - Finds that most non-compete provisions are overly broad and chill exercise of Sec 7 rights;
 - Business interests in retaining or protecting special investments in training employees does not justify a non-compete
 - Overly broad, and employers could protect this interest by less restrictive means, such as a longevity bonus
 - Protecting proprietary or trade secrets can be protected in a narrowly tailored agreement.



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Non-Competes

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- **GC Memo 23-08 – (Cont.)**
 - Therefore, non-competes:
 - Must be narrowly tailored to special circumstances justifying the infringement on employee rights.
 - Exceptions:
 - Agreements that clearly restrict only an individual's managerial or ownership interest in a competing business.
 - True independent contractor relationships
 - GC asking regions to submit cases to the board especially ones that show employees lost specific employment opportunities.



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Arbitration

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Confidentiality Requirements

- *Ralph's Grocery Company*, 371 NLRB No. 50 (2021) – Board invited briefs on whether confidentiality requirements in a mandatory arbitration agreement violate NLRA.
- Prior case *Anderson Enterprises* decided under *Boeing*
 - Confidentiality - The content and placement of the agreement's savings clause
 - Does a “saving clause” uphold the agreement as valid?



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Independent Contractors

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- ***The Atlanta Opera Inc.*, 372 NLRB No. 95 (6/13/2023)**
 - Stylist filed an election petition for union representation
 - Employer countered that stylists were independent contractors
 - NLRB overruled *SuperShuttle DFW* (which focused on entrepreneurial opportunity of independent contractors)
 - NLRB reverts to standard adopted under *FedEx II (2014)*
 - *Common-law factors*
 - *Entrepreneurial opportunity is but one factor*



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Union Recognition and Quickie Elections

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- **Union Recognition – Shorter Process**
 - NLRB Rule - Representation Case Procedures 8/24/2023
 - “[t]o remove unnecessary barriers to the fair, efficient, and expeditious resolution of representation questions.”
 - Elections are held “Earliest Date Practicable”
 - Pre-election hearings
 - 8 calendar days is the goal
 - Effective December 26, 2023.



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Union Recognition and Quickie Elections

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- ***Cemtex Construction*, 372 NLRB No. 130 (8/25/2023)**
 - Partial return to *Joy Silk* (1949)
 - Employer must either:
 - Recognize and bargain, or
 - File its own petition for election
 - However, if employer files for an election, and employer commits any unlawful conduct that would set aside the election, the petition is dismissed, and NLRB will recognize the union
 - Employers will want to exercise caution if it petitions for election, and risk recognition if it is found to commit any ULPs



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Bonus Round #1

Single Worker Action is Protected Activity

- Miller Plastics Products, Inc., 372 NLRB No. 134 (8/24/2023)
 - Board will consider 'totality of circumstances'
 - Overrules 2019 Alstate Maintenance's 5-factor test. requiring evidence of group discussions
 - Ruled that the Miller Plastic Products Inc., fired an employee for questioning its decision to keep the plant open in the early days of the COVID-19 pandemic



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Bonus Round #2

Safety Inspections

- **OSHA Notice of Proposed Rulemaking**
 - Potential revival of 2013 Fairfax Memo
 - In the Fairfax Memo, OSHA declared that "workers at a worksite without a collective bargaining agreement [may] designate a person affiliated with a union or a community organization."
 - Proposed revisions do not change existing regulations.
 - OSHA Compliance Officers have the authority to determine if an individual is authorized by employees and to prevent someone from participating in the walkaround inspection if their conduct interferes with a fair and orderly inspection, or to limit participation to protect employer trade secrets.



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Bonus Round #3

Joint Employers

- NLRB released notice of proposed rulemaking September 2, 2022.
 - Current Rule
 - Direct control – must exercise “substantial direct and immediate control” over the employees’ essential terms and conditions of employment.
 - *Proposed Rule*
 - Direct and **Indirect Control** pursuant to decision in Browning-Ferris Industries of California, Inc. v. NLRB, 911 F.3d 1195, 1222 (D.C. Cir. 2018), as to “wages, benefits, and other compensation; hours of work and scheduling; hiring and discharge; discipline; workplace health and safety; supervision; assignment; and work rules and directions governing the manner, means, or methods of work performance.”



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Bonus Round #4

AI and ChatGPT

- Likely will replace some work;
 - Unions are reacting
 - SAG-AFTRA Strike – Ramifications of AI on actors and writers
- But will it replace workers?
 - Yes, but...
 - Before the invention of the computer no one predicted the job of a computer programmer.
 - Previous rounds of automation affected factory jobs, but AI’s impact will be felt by white collar workers.



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Bonus Round #4

AI and ChatGPT

- **GC Memo 23-02 (10/31/22) Electronic Monitoring and Algorithmic Management of Employees and Section 7 rights**
 - “An issue of particular concern to me is the potential for omnipresent surveillance and other algorithmic-management tools to interfere with the exercise of Section 7 rights by significantly impairing or negating employees’ ability to engage in protected activity and keep that activity confidential from their employer, if they so choose.”
 - GC states a commitment to interagency cooperation in this areas with FTC, CFBP, DOJ, EEOC and DOL.



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Concluding Tips

- Be aware of rules impacting concerted activity and any retaliation.
- Review handbook policies and rules for overly broad restrictions.
- Review employment agreements
- Be ready for quickie elections.
- Safety Plan for OSHA inspections.



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Questions?

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Thank you!



Ben Eckhart
Attorney
beckhart@archbright.com

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