

Employers Beware: NLRA Ignorance is Not a Defense

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Introduction

- Our new labor and employment law attorney --- Clay Haag

Introduction

- Common NLRA Misperception.
- Landmines are plentiful – for both union and non-union employers.
- Intent is to provide teaching tool for entire management team.

Are Employees Protected When They Criticize Progressive Employer Initiatives?

- Stereotypical employee complaints –
 - “progressive”
 - concession based



- What about anti-populist views?

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Can Employers Post Anti-Union Rants on Social Media?

- Section 8(a)(1) of the NLRA makes it unlawful for an employer to coerce employees not to engage in protected activity
- Typically thought to apply to employer’s direct, verbal communication. Now it applies to online employer speech as well.



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Are Employees Legally Entitled to Demean Their Employer Through Social Media?



- The right to engage in “protected, concerted activity...”
- Does protection extend to damaging employer reputation?

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Can Employers Prohibit Wage and Salary Discussion Among Coworkers?

- Discussion of wage and salary = "for the purpose of collective bargaining or other mutual aid and protection."
- This typically comes in the form of "Confidentiality Rules"
- Boeing Co. reminds everyone to CHECK YOUR EMPLOYEE HANDBOOK—an employer can still violate the NLRA by enacting these rules even when:
 1. No employees engage in the concerted activity; and
 2. The employer does not enforce the rule.



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Can Employers Require Confidentiality During Ongoing Investigations?

- **Old Rule (Banner Estrella):** An employer could not restrict discussion unless it proved a need for witness protection, protecting evidence, or avoiding fabricated testimony.
- **New Rule (Apogee Retail):** Investigative confidentiality is lawful when strictly limited to the duration of the investigation. If confidentiality is required after the investigation is complete, the NLRB will determine its lawfulness on a case-by-case basis.
 - Boeing Co.: Weigh legitimate justifications in case-by-case scenarios



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Can Employers Prohibit Non-Business Use of Email?



- Back and forth NLRB swings...
 - 2007 landmark
 - 2014 reversal
 - December 2019 reset
- Beware of tricky enforcement.

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Can Employers Prohibit Cell Phone Usage/Possession in Employer Vehicles?



- An employer can prohibit cell phone usage in settings where there is a legitimate justification (e.g. safety).
 - Argos USA LLC: Prohibition of cell phones in heavy commercial trucks to increase employee and public safety is lawful.
 - Coft Beverages Inc.: Prohibition of cell phones on the manufacturing floor and workstations is lawful.
- Avoid making your phone usage policy too broad. It should not prohibit employees from documenting working conditions.

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Can Employees Supporting Organizing Drives be Discharged for Performance Infractions?

- Unequivocal right to support representation balanced against ...
- The right to enforce performance and conduct standards.
- Evaluating past practice.



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Can Employers Prohibit the Wearing of Union Buttons at Work?

- Wal-Mart Stores Inc.: The NLRB's position on this matter changes depending on the location
 - Prohibition is justified in locations where employees encounter customers because it enhances customer experience
 - Where there is no customer contact, there is likely no justification for restricting union logos
- Overbroad content-neutral prohibitions on all insignia, without further justification, likely violate the NLRA



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Is Profanity-Laced Criticism of Employers
Legally Protected?

- Recall the staunchly protected right to protest working conditions.
- 3 prior standards.
- Employee must now prove protest was "motivating factor."
- Employer may still win with customary enforcement.



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Questions?

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