




EMPLOYMENT LAW UPDATE 2023


Session 3: Labor Practices for All Employers. What is Fair and Unfair?

Presented by:
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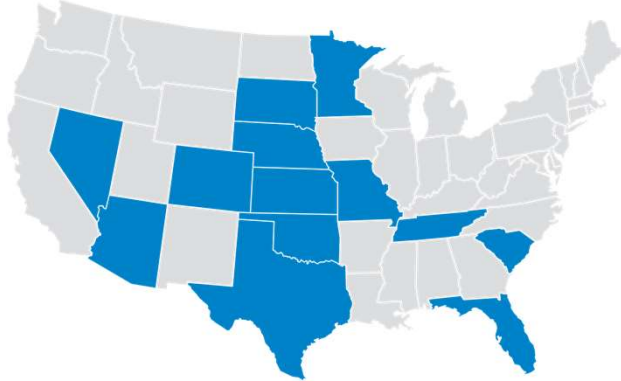
Welcome



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Disclaimers (We Are Lawyers, After All ...)

- This presentation is for educational purposes only.
- Not legal advice.
- Information presented as of March 9, 2023.
- Laws, regulations, and guidance continuously change.

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Agenda

- NLRA & NLRB Overview
- Unfair Labor Practices
- Union Organizing Trends
- “Hot” NLRB Issues for 2023
 - Electronic Monitoring
 - Expanded NLRA Remedies
 - Severance Agreement Restrictions
 - Micro-units
 - Scrutiny of “Neutral” Policies

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NLRA & NLRB Overview

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NLRA Overview

- National Labor Relations Act: Passed in 1935
- Purpose: Address inequality in bargaining power
- Covers nearly all private employers
- Established the National Labor Relations Board



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NLRA Overview: Common Misconceptions

- Only applies to unionized workforces
- Only applies to large employers

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NLRA Overview: Employee Rights

- Forming and attempting to form a union
- Joining or leaving a union
- Engaging in concerted activity:
 1. When two or more employees take action for their mutual aid or protection relating to terms and conditions of employment; or
 2. When one employee, acting on authority of others, brings forward group complaints, tries to induce group action, or prepares for group action.

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NLRA Overview: Employer Taboos

- Interfering with union organizing campaigns
- Retaliating against employees for attempting to form unions
- Discouraging employees from discussing concerns re: wages, hours, and other terms and conditions of employment
- Questioning employees and applicants about their views on unions

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NLRB Overview

- NLRB is an independent federal agency
- Charged with administering the NLRA
- Five Board Members and a General Counsel, all appointed by the President, with Senate consent
 - Board Members: 5-year terms with one term expiring each year
 - General Counsel: 4-year term
- The Board's agenda swings based on political control
- Current Board: 3 Democrats, 1 Republican, 1 Vacant Seat (as of 12/16/22)

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NLRB Overview: Board Authority

- General Counsel acts as prosecutor
- Unions and employees can file charges alleging unfair labor practices
- ~ 20,000 to 30,000 charges per year
- Board agents investigate charges, interview witnesses, obtain affidavits
- Regional Directors decide whether charges have merit
- Charges can result in dismissal, settlement, or complaint issuance
- Complaint results in a hearing before an NLRB judge

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NLRB Overview: Process

- Board Hearings = Trials
- Testimony and evidence presented by both sides
- Remedies can include:
 - Reinstatement
 - Back pay
 - Search-for-work costs
 - Notice posting requirements
 - Injunctive relief
 - *NEW*: All foreseeable damages resulting from unfair labor practice (discussed later)

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Unfair Labor Practices

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Common Unfair Labor Practices

- Threatening to fire employees who talk about forming a union
- Prohibiting employees from discussing their wages with coworkers
 - This may also violate state law. Example: Minn. Stat. § 181.172
- Rejecting a job applicant because she is pro-union
- Offering bonuses to employees who vote against organizing
- Asking an employee to resign from a union
- Making unfavorable scheduling changes based on an employee's union involvement

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Union Organizing Trends

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Increased Union Organizing

- Union election petitions increased 53% between Oct. 2021 and Sept. 2022
- Highest single-year increase since FY 2016
- 200,000 more workers represented by union in 2022 than in 2021
- But yet, share of workers represented by a union declined from 11.6 to 11.3%. How?
- 16 million+ workers represented by unions in 2022

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Increased Union Organizing

- In the headlines: Starbucks
 - More than 275 locations have unionized in the last ~1.5 years
 - The company has been accused of firing more than 200 workers for organizing efforts
 - Federal judge issued an injunction ordering Starbucks to stop firing workers for seeking to form a union on Feb. 17, 2023
 - Example: Shift supervisor and “star” employee in Michigan left when her shift ended
 - Same employee had spearheaded union organizing campaign
 - Coworker had refused to take their lunch break before she left
 - Because coworker took meal break after she left, another barista was left alone for 10 minutes in violation of company policy. Shift supervisor terminated.

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Increased Union Organizing

- In the headlines: Amazon
 - Staten Island warehouse workers won historic campaign in April 2022
 - Two additional warehouse campaigns then failed
 - Amazon’s strategy includes mandatory “anti-union” small meetings
 - Stated Intent: Educate workers about what a union could mean for them
 - Provides examples of union’s lack of success in negotiations with other companies
 - Explains that employees will be required to pay \$\$\$ for union dues
 - Warns employees they might end up worse off than they are now

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Increased Union Organizing

- Are mandatory “anti-union” meetings lawful?
 - Generally, yes (for now)
 - But NLRB’s General Counsel wants to change that
 - April 2022 memo: “I believe that the NLRB case precedent, which has tolerated such meetings, is at odds with fundamental labor-law principles, our statutory language, and our Congressional mandate.”
 - Jan. 2023: Federal judge held Amazon’s mandatory meetings were lawful. “I am required to apply current law.”

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Increased Union Organizing

- Same NLRB action alleged 19 unfair labor practices by Amazon
- Judge concluded 2 of 19 challenged actions violated the law:
 1. Supervisors illegally threatened to withhold wage and benefit increases from employees if they voted to unionize; and
 2. Amazon illegally removed posts on a digital message board from an employee inviting coworkers to sign a union petition.

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Reasons Employees Organize

- Inconsistent and unfair application of rules
- Gripes, complaints, and grievances ignored by management
- Failure to address “the little things”
- Lack of due process/progressive discipline
- Disregard for seniority

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Reasons Employees Organize

- Favoritism
- Disrespect from supervisors/managers
- Poor working conditions
- Failure to keep promises
- Changing policies without notice or employee input

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Preparing for and Preventing Organizing Efforts

- Train your supervisors and managers
 - Consistent policy application
 - Collaborative work environments
 - Union awareness
- Open Communication
 - Encourage employees to bring forward concerns
 - Do not ignore concerns once raised
- Provide competitive pay and benefits
- Be receptive to changing problematic policies
- Have a plan if it appears organizing is on the horizon

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“Hot” NLRB Issues for 2023

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Electronic Monitoring

- Employers utilize a wide array of monitoring and surveillance tools
 - Security cameras and audio recording
 - GPS tracking and wearable devices
 - Computer and mobile devices, keyloggers, and screenshot apps
- Oct. 2022 NLRB GC Memo: “[P]otential for omnipresent surveillance ... to interfere with the exercise of Section 7 rights by significantly impairing or negating employees’ abilities to engage in protected activity and keep that activity confidential from their employer, if they so choose.”

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Electronic Monitoring

- Current law: Prohibits adoption of new surveillance practices intended to monitor or curtail current organizing activity.
 - E.g., videotaping picketers across the street.
- But does not prohibit otherwise neutral practices that are not intended to interfere with protected concerted activity.
 - E.g., security cameras capture activity outside employer’s building.

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Electronic Monitoring

- GC memo: Proposes new framework under which any surveillance activity is **presumptively invalid**.
 1. Employer has burden to show surveillance is **narrowly tailored to address a legitimate business need**.
 2. NLRB then applies a **balancing test**. Even if employers shows there is no narrower alternative available, the Board can still find a violation if it determines the employer's interest is outweighed by employees' rights.
 3. Mandatory disclosure of any covert monitoring practice, including rationale, to all workers.

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Expanded NLRA Remedies

- NLRB cannot impose “penalties” on employers that violate the NLRA
- Historically, relief limited to “make whole” remedies:
 - Reinstatement
 - Backpay and benefits
 - Personnel record revisions
 - Notice posting requirements (“We will not violate the law ...”)
 - Injunctive relief (compliance going forward)

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Expanded NLRA Remedies

- Dec. 13, 2022: NLRB issues the *Thryv, Inc.* decision
- “Make whole” encompasses all “**direct or foreseeable pecuniary harm**” resulting from unfair labor practices
 - Out-of-pocket medical expenses
 - Credit card debt
 - Travel costs incurred to obtain new employment
 - Missed retirement fund contributions, including investment growth and interest
- Board is applying this decision retroactively to all pending charges
- What is “direct and foreseeable”? Only time (and litigation) will tell

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Severance Agreement Restrictions

- Feb. 21, 2023: NLRB issues *McLaren Macomb* decision
- Hospital offered severance agreements to 11 employees “permanently furloughed” due to Covid-19
- Agreements contained **non-disparagement** clause
- Terms of agreement also **confidential**
- Such clauses lawful under prior NLRB decisions (*Baylor, IGT*)
- *McLaren* **overturns** those previous cases

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Severance Agreement Restrictions: Clauses at Issue

6. **Confidentiality Agreement.** The Employee acknowledges that the terms of this Agreement are confidential and agrees not to disclose them to any third person, other than spouse, or as necessary to professional advisors for the purposes of obtaining legal counsel or tax advice, or unless legally compelled to do so by a court or administrative agency of competent jurisdiction.

7. **Non-Disclosure.** At all times hereafter, the Employee promises and agrees not to disclose information, knowledge or materials of a confidential, privileged, or proprietary nature of which the Employee has or had knowledge of, or involvement with, by reason of the Employee's employment. At all times hereafter, the Employee agrees not to make statements to Employer's employees or to the general public which could disparage or harm the image of Employer, its parent and affiliated entities and their officers, directors, employees, agents and representatives.

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Severance Agreement Restrictions

- “[U]pon careful analysis of the terms of the non-disparagement and confidentiality provisions at issue here, we find them to be unlawful, and thus find the severance agreement proffered to employees unlawful.”
- NLRB faulted the hospital for:
 1. Not notifying the union and giving it an opportunity to bargain over the furloughs.
 2. Bypassing the union and directly dealing with the employees.
 3. Interfering with the employees' rights to engage in concerted activity (Section 7)



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Severance Agreement Restrictions

- Lingering questions:
 1. Do these restrictions extend to handbooks and policies?
 2. Under what circumstances will non-disparagement and confidentiality be permitted?
 3. How about in the context of threatened and pending legal claims?



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Micro-units

- Dec. 14, 2022: Board issues *American Steel Construction* decision.
- Reverses Trump-era decisions that limited the ability of unions to organize “micro” bargaining units
- Micro-units can be a way for unions to get a foot in the door with an employer by organizing a unit of only a few workers
- New test:
 1. Does the proposed unit share an “internal community of interests”?
 2. Is the unit readily identifiable as a group and sufficiently distinct?

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Scrutiny of “Neutral” Policies

- Return to *Lutheran Heritage*? Neutral employees unlawful if employees would reasonably construe the policy’s language to prohibit concerted activity
- Might be implicated by policies that regulate:
 - Confidentiality
 - Workplace conduct/offensive language
 - Restrictions on communications with media
 - Conflicts of interest
 - Photography and recording

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Questions?

Thank you!



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