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# The "NLRB": What on *Earth* Is That? and Why Should I Care About It?

Jonathan M. Minear
Helsell Fetterman LLP

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# The National Labor Relations Board (NLRB)

- What is the NLRB?
  - Five political appointees
  - Panel of judges hearing cases of alleged unfair labor practices
  - Subpoenas, testimony, and documents
  - Cease and desist orders
  - Provides remedies to employees

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# What Does the NLRB Do?

- Enforces provisions of the National Labor Relations Act of 1935 (“NLRA”), 29 U.S.C. sections 151-169.

- This federal law prohibits covered employers from engaging in unfair labor practices, which is generally conduct that restrains, coerces, or interferes with employees exercising their workplace rights.

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# What Workplace Rights?

- Rights to join together to improve wages and working conditions, with or without a union.
- Rights to engage in “concerted activity,” that is, when 2+ employees take action for their mutual aid or protection regarding their pay or workplace conditions.

# Protected Activities

- Addressing an employer about pay

- Discussing safety concerns with a supervisor or other employees
- Speaking to a supervisor on behalf of one or more co-workers about improving workplace conditions
- Some leeway for impulsive behavior by employees

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# Unprotected Activities

- Personal griping or complaining
- Malicious behavior
- Violence
- Spreading lies deliberately
- Etc.

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# Okay, but why should I care?

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# Question:

- Who here belongs to a union?
- Who here works somewhere that has unions?


http://www.huffingtonpost.com/richard-dare/unions-friends-or-foes-of_b_1652062.html

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# Answer:

- ***It doesn't matter.*** The NLRA can apply to union and non-union workplaces, most of which fall within the federal guidelines.

- It is a common misperception that the NLRA only applies to unionized workplaces.

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# Wait, this labor board is making law that affects my company?

- Yes, most likely. The Board broadly applies this federal law to union and non-union companies whose activity in interstate commerce exceeds a minimal level, which varies by industry category. This includes retailers, suppliers, health care institutions, law firms, education, federal contractors, and many more. *See, e.g.*, http://www.nlrb.gov/rights-we-protect/jurisdictional-standards.
- Specifically excludes:
  - Federal, state, or local government jobs
  - Supervisors
  - Independent contractors
  - Agricultural laborers
  - Employed by parent or spouse
  - Domestic service

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# Increased Regulation by the Board

- Pursuing an aggressive agenda to target employer policies and expand the scope of employee rights to engage in protected, concerted activity.

- Actively scrutinizing and striking down social media policies, confidentiality provisions, arbitration agreements, etc.

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# Social Media


http://blog.studio.aibrean.com/2009/09/free-social-media-icons.html.

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# Social Media

- Lately, the Board has been aggressively targeting company policies that could be read to chill employees' rights to protected, concerted activities online.

- Companies should tread carefully when crafting social media and confidentiality policies.

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# Social Media

- Facebook, Twitter, YouTube, Linked-In, Flickr, Google+, Myspace, Pinterest, internet posts, blogging, etc….
- Wikipedia lists nearly 200 “well-known” sites.

  http://en.wikipedia.org/wiki/List_of_social_networking_websites.
- “Likes” (thumbs up)

# Social Media

- A company policy that is ambiguous as to its application to "Section 7" activity, and contains no limiting language or context that would clarify to employees that the policy does not restrict these rights, is unlawful. *See, e.g.*, *Univ. Med. Ctr.*, 335 NLRB 1318, 1320-22 (2001).

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# Social Media (Example 1)

- Example 1: The following retail company's policy was held to chill employees' exercise of protected concerted activity:

> "If you enjoy blogging or using online social networking sites such as Facebook or YouTube..., please note that there are guidelines to follow it if you plan to mention [Employer] or your employment with Employer] in these online vehicles...
>
> - **Don't release confidential** guest, **team member, or company information**."

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# Social Media (Example 1)

- This policy was unlawful because it would be reasonably interpreted to prohibit employees from discussing and disclosing information regarding any work conditions.
- This includes discussing specific employee names and workplace conditions.

→ This policy should be clarified to exempt protected, concerted activities.

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# Social Media (Example 2)

- Example 2: The following healthcare services company's policy was held to violate the NLRA:

> "Respect Privacy. If during the course of your work you create, receive, or become aware of **personal information about [Employer's] employees, contingent workers**, customers, customers' patients, providers, business partners, or third parties, **don't disclose that information in any way** via social media or other online activities. You may disclose personal information only to those authorized to receive it in accordance with [Employer's] privacy policies."

# Social Media (Example 2)

- Same problem as Example 1.

→ This policy should also be clarified to exempt protected, concerted activities.

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# Social Media (Example 3)

- Example 3: The following healthcare services company's policy was held to violate the NLRA:

> "Legal matters. Don't comment on any legal matters, including pending litigation or disputes."

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# Social Media (Example 3)

- This policy is unlawful because it restricts employees from discussing the protected subject of potential claims against the Employer.

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# Social Media (Example 4)

- Example 4: What if a company simply included a "savings clause" like the following? Does that solve the problem?

> "National Labor Relations Act. This Policy will not be construed or applied in a manner that improperly interferes with employees' rights under the National Labor Relations Act."

# Social Media (Example 4)

- No, this does not cure the problem.
- Employees would not necessarily understand from this disclaimer that lawful organizing activities seemingly prohibited elsewhere are nevertheless permitted. *McKesson Corp.*, case no. 06-CA-066504; *Clearwater Paper Corp.*, case no. 19-CA-064418.

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# Social Media (Example 5)

- Example 5: The following non-profit organization's policy was held to be lawful:

> "No unauthorized postings: Users may not post anything on the Internet in the name of [Employer] or in a manner that could reasonably be attributed to [Employer] without prior written authorization from the President or the President's designated agent."

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# Social Media (Example 5)

- This policy requires an employee to receive prior authorization before posting a message that is either in the employer's name or could reasonably be attributed to the employer.
- As such, the policy cannot reasonably be construed to restrict employees' protected concerted rights to communicate about working conditions. *See, e.g.*, *Us Helping Us*, case no. 05-CA-036595.

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# Class-Action Waivers

- Many employers require employees to sign mandatory arbitration agreements for employment-related disputes.
- These agreements often contain language which waives an employee's right to bring or join class-action claims against the employer.

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# Class-Action Waivers

- The Board decided that these class-action waivers violated the NLRA.
- But dozens of other federal and state court decisions have held that these waivers are lawful.
- Tension between the Board and the courts.

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# Labor rights? Now, there's an App for that.

- The Board has created a App for your iPhone and Android phones, in line with the Board's aggressive agenda and employee outreach.
- Information on rights to unionize, picket, protest, and organize.
- Hotlines to report unlawful labor practices.

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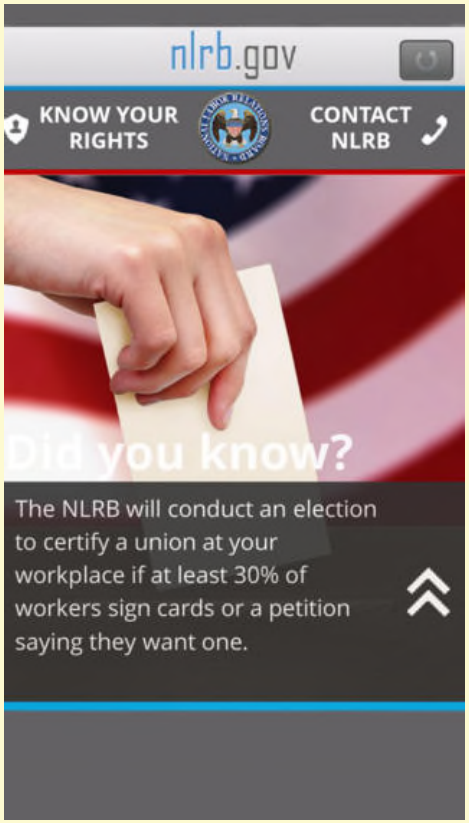
# NLRB App




http://www.nlrb.gov/apps

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# Questionable Validity of Recent Decisions

- To complicate things, many of these recent decisions by the Board may be overturned in a case up for review this term at the U.S. Supreme Court called *NLRB v. Noel Canning*.

- *See generally* http://www.scotusblog.com/case-files/cases/national-labor-relations-board-v-noel-canning/.

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# Today's Three Takeaways

1. The NLRB is a government labor board issuing binding legal decisions.
2. In all likelihood, these decisions apply to your company and make unlawful many common employment policies.
3. If your company fails to stay informed, it could be held liable for violating these rules.

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# Don’t Fret

- Helsell Fetterman LLP is continuing to follow all of the recent developments in this area of employment and labor law.
- Check the firm’s blog periodically for updates.