

The NLRB Is Giving Employers Something New To Worry About

Presented by:

Edward Young

165 Madison Avenue

Suite 2000

Memphis, TN 38103

Email: eyoung@bakerdonelson.com

Phone: 901.577.2341

Steve Goodwin

165 Madison Avenue

Suite 2000

Memphis, TN 38103

Email: sgoodwin@bakerdonelson.com

Phone: 901.577.2141

Rights of Employees

Sec. 7. [§ 157.] 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 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 as authorized In section 8(a)(3) [section 158(a)(3) of this title].



Trinity Protection Services Inc.
Case No. 5-CA-067256 (2011)

Consistent with *Eastex*, the Board has held that every employee's concerted communications regarding matters affecting their employment with their employer's customers or with other third parties, such as governmental agencies, are protected by Section 7.

Unfair Labor Practice Charges

Unfair labor practices generally concern:

- Interfering with employees rights under Section 7 of the Act
- Discriminating against employees because of union activity
- Failing to bargain in good faith with the union

Process for Unfair Labor Practice Charges

1. A charge is filed
2. Investigation by Regional Director's Office
3. Charge is withdrawn or dismissed
4. Complaint Issues
5. Hearing before an Administrative Law Judge (ALJ)
6. Decision by ALJ
7. Appeal to the Board in Washington
8. Review by a federal Court of Appeals



Non-Solicitation Rules

Solicitation of Business or Materials, Except for solicitation that is part of actual job duties, Company policy prohibits any solicitation of an employee by another employee on Company premises such as distribution of any written, printed, visual or audio material except in non-work areas and at times when the distributor and recipient employees are on authorized break or meal times. Additionally, ABC, Inc. prohibits any visitor from soliciting ABC, Inc. employees anywhere on the Company premises at any time. Any ABC, Inc. employee who witnesses solicitation, or who is solicited, in violation of this policy must immediately report such activity to their immediate supervisor or any member of management.

Non-Solicitation Rules

- “Employees of the company may not solicit or distribute literature during work time or in work areas for any purpose.”
- “Work areas are all areas where employees perform work.”
- “Work time: Does not include break periods and meal times or other periods during the work day when employees are not engaged in performing their work tasks. Work time includes the time of both the employee doing the solicitation or distribution and the employee to whom the solicitation is directed.”



Confidentiality Rules

A confidentiality rule will be found to be unlawful if it prohibits employees from divulging information concerning employee wages or benefits.



Social Media



Employer Policies Found to be Unlawful by the NLRB's General Counsel

- Prohibition of “disparaging remarks when discussing the company or supervisors.”
- Prohibition of employees posting pictures that depict the company, the company’s uniform, or the company’s logo.
- Prohibition of “offensive conduct” and “rude or discourteous behavior.”
- Prohibition of “inappropriate discussions” about the company, management, or co-workers.
- Prohibition of “using any social media that may violate, compromise or disregard the rights and reasonable expectations as to privacy or confidentiality of any person or entity.”

Employer Policies Found to be Unlawful by the NLRB's General Counsel

- Prohibition of “communication or post that constitutes embarrassment, harassment, or defamation” of the company or any of its employees.
- Prohibition of “statements that lack truthfulness or that might damage the reputation or goodwill” of the company.
- Prohibition of “talk about company business” on personal social media accounts.
- Prohibition of “posting anything that [the employees] would not want their supervisor to see or would put their job in jeopardy.”
- Prohibition of “use of the employer’s logos and photographs of the employer’s store, brand or product without written authorization.”

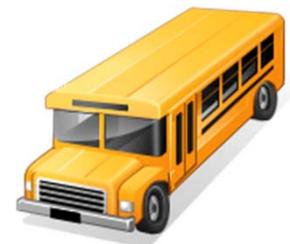
For Angry Employees, Legal Cover for Rants

1. Calling a supervisor a “scumbag”
2. Calling customers “rednecks”
3. Is there a social media policy that NLRB has found acceptable?



Five Star Transportation, Inc. **Case No.349-NLRB-42 (2007)**

Drivers' letters to school committee raising individual concerns over a change in bus contractors were logical out growth of concerns expressed at a group meeting.



Wal-Mart Case No. 17-CA-25030 (2011)

1. Information posted on Facebook
2. Asked for responses from co-workers

American Medical Response of Connecticut Case No. 34-CA-12576 (2010)

1. Employee posted several angry comments on Facebook
2. Supervisor forced her to prepare incident report without a union representative present

JTS Porch Saloon and Eatery, LTD

Case No. 13-CA-46689 (2011)

1. A bartender on Facebook with a relative complaining about tipping policies
2. Calling customers "rednecks"



Knauz BMW Case No. 13-CA-46452 (2011)

1. Facebook posts by luxury car sales person mocking food at an “ultimate driving event”
2. No responses to postings by co-workers



DIRECTV Case No. 21-CA-039835 (2011)

Although Field Supervisor Flores testified that management declined to issue only about 1 percent of the ECFs that he initiated, and Site Manager Schultz testified that, in an average week, the operations manager reject 3 to 5 of the 15 to 20 ECFs recommended by field supervisors, the record does not establish what weight, if any the various managers accord field supervisors' recommendations or the extent to which their approvals are based on their own independent analyses. Accordingly, this evidence demonstrates, at most, that the supervisors' recommendations are "ultimately followed" in the majority of instances, not that the recommended action is taken without independent investigation by the managers.

Camelot Terrace Case No. 33-CA-015792 (2009)

We also adopt, for the reasons discussed below, the judge's recommendation that the Respondents be required to reimburse the General Counsel and the Union for their costs and expenses incurred for the investigation, preparation and litigation in Cases 33-CA-15780 and 33-CA15781 before the judge and the Board.

New NLRB Ambush Election Procedures

- The pre-election hearing officer has the authority to exclude all evidence separate from “questions of representation” (e.g. as whether an individual (or group of individuals) is actually a supervisor)
- Post-hearing briefs are no longer a right and may only be filed at the discretion of the hearing officer
- No automatic right to appeal the pre-election hearing officer’s decision to NLRB. All challenges are now deferred to a post-election *request* to the board for discretionary review
- Elimination of the 25-day waiting period following the direction of an election. Elections will likely be held within 15-20 days
- NLRB review of post-election issues will not be *at the discretion of the board*