Immersion Session

LABOR IMMERSION

THE FOUNDATION SERIES

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1. Introduction-Overview

As a general proposition, most issues related to unions, union organizing and collective bargaining for employees of private sector employers in the United States are controlled by a federal law called the National Labor Relations Act ("NLRA" or "the Act"). The NLRA, also known as the "Wagner Act" (after New York Senator Robert F. Wagner), was signed into law on July 5, 1935. Despite almost annual attempts to do so, the NLRA has been amended only twice in its more than eighty year history, first in 1947 by the Labor Management Relations Act, typically referred to as the “Taft-Hartley Act,” and in 1959 by the Labor Management Reporting and Disclosure Act, also known as the “LMRDA” or “Landrum-Griffin Act.”

A. Limits on Coverage

As noted above, the National Labor Relations Act applies to almost all private sector employers in the United States and there is no requirement that the employer have a minimum number of employees for the NLRA to apply (in other words, there is no requirement similar to Title VII of the Civil Rights Act which only applies to employers with 15 or more employees). The only private sector employer that might be shielded from coverage based on the number of employees, is an employer with only one employee since the NLRB will not certify a unit of 1 (you need 2 or more employees). In addition, one broad category of private sector employers excluded from coverage are U.S. airlines and railroads. Employers in those industries are regulated by the Railway Labor Act ("RLA") and the National Mediation Board ("NMB") and not the NLRA/NLRB.

One other major area of categorical exclusion are employees of governmental employers as distinct from private sector employers. For employees of federal, state, county and municipal governmental employers, their right to union representation, collective bargaining and to strike, etc., to the extent one exists, is defined either by another federal law (the Federal Service Labor – Management Relations Statute which is enforced by the Federal Labor Relations Authority or "FLRA") or by applicable state law. While the FLRA is similar to the NLRA, the laws at the state level vary widely with respect to the rights and protections that exist. For example, in many states, the right to organize, to engage in collective bargaining and even to participate in a strike is almost co-extensive with the NLRA. In many others, those rights are much more circumscribed, including some states which prohibit unionization all together, limit severely collective bargaining and even prohibit strikes. It should also be noted that employees of a governmental employer may have constitutionally protected free-speech rights (that potentially protect individual employee conduct as distinct from concerted conduct) and due-process rights in their job which employees of private sector employers do not have. Stated another way, employees of a private sector employer do not have constitutional free-speech rights vis-à-vis their private sector employers and only governmental actors may arguably violate an employee’s constitutionally protected speech rights.

B. State Right-to-Work Law

One other area worth discussion where state, not federal, law comes into play relates to the term “right-to-work.” Here is how that issue comes up. Under the National Labor Relations Act, when a bargaining unit of employees are represented by a union, the NLRA provides that the union is their “exclusive” collective bargaining representative. In other words, those employees have no control of their terms and conditions of employment and the union has the exclusive right to negotiate those terms and conditions and to codify those in a collective bargaining agreement ("CBA"). The employee must abide by the terms and conditions
negotiated by the union regardless of whether he/she becomes a union member. This requirement is created by the NLRA and a state’s right-to-work law cannot alter this condition.

Instead, the right-to-work law controls a related question: do I have to become a member of the union that represents me? In a state with a right-to-work law, the answer is “No.” A right-to-work law provides that no employee, even when represented by a union, can be compelled to become a member of, or to pay dues to, that union as a condition of continued employment. While the NLRA as originally enacted in 1935 was silent on this issue, the 1947 Taft-Hartley Amendments acknowledged the right of each state to pass a right-to-work law. Since that date, twenty-seven states have enacted right-to-work laws. Again, in those states, employees may be represented exclusively by a union-obligated to follow the terms of any collective bargaining agreement – but cannot be required to join or pay dues to that union.1

Contrast that treatment with the twenty-three states that do not have a right-to-work law. During collective bargaining in those states, unions are allowed to propose, and the employer is allowed to agree to, what is known as a “union security clause” in the collective bargaining agreement. It is this union security clause which makes union membership, or at a minimum, the payment of dues2 (actually full union dues less the portion not attributable to the representation) to the union as a condition of continued employment.

If the applicable collective bargaining agreement contains a union security clause, the union can force the employer to terminate the employment of any employee who refuses to comply. Depending on the precise terms of the union security provision, an employer’s failure to terminate an employee who does not meet this obligation can be a breach of the CBA by the employer.

Why would an employer ever agree to a union security provision? It is a great source of leverage in negotiations and unions will concede issues in order to obtain union security and dues checkoff.3 Likewise, it is hard to conceive of a situation in a non-right-to-work state in which a union would settle contract negotiations without agreement to union security.4

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1 Even though an employee has exercised his/her right not to join the union/pay dues, under federal law, the union has an obligation to fairly represent (also known as a “duty of fair representation” or “DFR”) both members and non-members alike. While the federal law creates that obligation, that obligation is often breached and employees who have exercised their “right-to-work” by not paying dues to the union, are often the focus of pressure, even harassment, to “join voluntarily.”

2 Even in a non-right-to-work state, represented employees cannot be required to become a formal member of the union, what was historically been known as a “union shop.” It is also the case under federal law that a full-union member has the right to resign his or her union membership at any time (for example, during a strike in order to be able to cross a picket line). See Pattern Makers, 473 U.S. 95 (1985). Resignation of union membership, however, may not relieve these employees of the obligation to continue paying dues depending on the language of the dues checkoff authorization (See FN 3).

3 Dues checkoff is a clause in the collective bargaining agreement obligating the employer to withhold dues, upon authorization of the employee, from an employee’s paycheck and to send those dues directly to the union. A dues checkoff authorization can be irrevocable for up to a year and the union must only allow an employee to revoke this authorization once a year during a small window that is complicated to understand and meet. Thus, an employee may have the legal right under the Pattern Makers decision to cancel union membership at any time but may still be obligated to continue paying dues under the language of the checkoff authorization.

4 In non-right-to-work states, nonmembers with certain religious objections to supporting unions have the right to have dues redirected to a charity.
C. NLRA 3 Major Concepts

While we will go into each of these concepts in greater detail below, the NLRA has three major impacts:

- It creates a process for employees who wish to be represented by a union to pursue and obtain that representation. As part of the right, the NLRA also creates a protected right for employees to “refrain” from supporting unionization. While the will of the majority ultimately controls the outcome, employees have legal protection to support or to oppose unionization;

- The NLRA defines what is legal and what is illegal for employees, employers and for unions, with respect to unions, unionization, collective bargaining and strikes. These are generally the rights that relate to alleged unfair labor practices or “ULPs;” and

- Finally, the NLRA establishes a federal administrative agency called the National Labor Relations Board or “NLRB” to administer and enforce the NLRA.

2. The National Labor Relations Acts: Protections for Employees

While there are many component parts of the National Labor Relations Act, the foundation of the Act is found at 29 U.S.C. § 157 which is generally referred to as Section 7 of the Act. Section 7 outlines the fundamental rights of employees under the NLRA. Specifically, every private sector employee of an employer covered by the Act has the following rights:

- To form or join a union – in essence to collectively seek to obtain formal union representation at work;

- To assist a labor organization (defined in Section 2(5)) in organizing employees at work which includes soliciting signatures on union authorization cards and distributing literature subject to certain time and place limitations;

- To bargain collectively through a union of the employees’ choosing; and

- To withhold their labor – strike – without being disciplined. In other words, employees have a right to withhold their labor collectively. That means a lawful striker cannot be disciplined or terminated for going on strike but, at the same time, the employer does not have to pay them while they strike. In addition, while an economic striker cannot be terminated, the employer has a technical right to replace that striker permanently which means the striker may not be able to return to work as long as the replacement worker decides to stay. Finally, a union can waive the employee’s right to strike through a No Strike Clause in the CBA. That clause will prohibit most strikes during the term of the CBA but will have no impact when most strikes occur, that is after the CBA expires.

These rights are often referred to as “Section 7 rights.” Section 7 protects the right of every employee to engage in these enumerated actions, but also protects equally the right of every employee to “refrain.” In other words, employees can support unionization or oppose unionization as they decide, with equal protection under the NLRA.
A. Protected Concerted Activity

While most employers understand that the NLRA protects the rights of employees to engage in pro-union activity, what is less well understood is that the Act provides an equal protection to employees’ concerted activity that may have absolutely nothing to do with unions. This protection is also found in Section 7 where it says that “employees shall have the right to . . . engage in other concerted activities for purposes of . . . other mutual aid or protection . . . .” This is what is generally known as “protected concerted activity” or “PCA.”

In evaluating potential PCA, the employer needs to ask two fundamental questions:

1. Is the conduct being evaluated “concerted activity;” and
2. If concerted, is there any aspect of the conduct which arguably results in the concerted conduct losing the protection of the Act?

In answering the first question, it is essential to ask whether the activity is “engaged in with or on the authority of other employees” or was it done “solely by and on behalf of the employee himself.” Simply put, group activity is protected and an employee’s “individual gripe” is not.\(^5\) Thus, the employer must determine whether there is:

- Group Activity – two employees raising an issue with management; or a
- Group of employees discussing shared concerns.

At the same time, some individual conduct can also be concerted conduct:

- Individual employee speaking on behalf of group;
- Individual activity that is a logical outgrowth of concerns expressed by employees collectively:
  - For example, a group of employees discuss an issue at work and one employee posts about it from home on Facebook; and
- Individual employee action seeking to initiate, induce or prepare for group action even if the effort is rejected.

Assuming the conduct is concerted, the employer must next evaluate whether the conduct is for “mutual aid or protection.” In short, does the conduct seek to improve the employees’ lot as employees which typically means it must involve wages, benefits or working conditions. This is often contrasted with concerted employee activity over political issues which is typically not PCA unless the political activity involves a workplace issue the employer can control.

Finally, if the conduct is concerted and for mutual aid and protection, the employer must then evaluate if any aspect of the conduct arguably results in loss of protection. While this can

\(^5\) Without suggesting whether doing so is a good idea, if an employee brings forward his/her own “individual gripe” (e.g., I don’t think my wage increase is fair), the conduct is not concerted and thus not protected by the Act. Again, not saying doing so is wise, but that employee may be terminated, in theory, for his individual gripe and the NLRA is not violated.
involve many different factual scenarios, the close issues often involve threats/violence/harassment, use of foul language and/or public comments that disparage the employer or the employer’s product. Such conduct loses protection only under the following scenarios:

1. **Conduct at Work** – if the conduct takes place at work, the NLRB applies the *Atlantic Steel* standard (254 NLRB 814), in order to determine if the conduct is “opprobrious” looking at:
   - The place of the discussion;
   - The subject matter of the discussion;
   - The nature of employee’s outburst; and
   - Whether the outburst was in any way provoked by the employer’s ULP.

   Suffice it to say that the Obama NLRB has established a high bar and simple foul language is not likely enough.

2. **Conduct Away from Work** – if the conduct is directed at the public (*e.g.*, a letter to editor, a demonstration at a customer location or a post on social media), the comment loses protection only if it is a “sharp, public disparaging attack on the quality of the company’s product or business, in a manner reasonably calculated to harm the company’s reputation and reduce its income (*Jefferson* standard).”

   While we may see some moderation of recent PCA decisions by the Trump NLRB, the Obama Board went to great extremes to find employee conduct to be both concerted and to maintain the protection of the Act even for highly offensive conduct (*like calling the owner of the company a “f_cking mother_ucker: and a “f_cking crook.”*). Likewise, the Obama NLRB has greatly increased employee knowledge about PCA and we see a much larger percentage of ULPs today filed by individuals asserting a PCA allegation.

**B. Solicitation and Distribution**

One other issue related to Section 7 protections that often comes up is the question of when and where employees can and cannot engage in union-related discussions and the distribution of union-related literature. This involves three basic concepts:

- **Solicitation** – a verbal request to take some action typically to sign a union authorization card or to attend a union meeting;
- **Talk** – solicitation must be distinguished from non-work related talk about the union that does not involve a solicitation; and
- **Distribution** – the passing out of union-related paper but note that passing out a union authorization card is a solicitation, not a distribution.

Employers should have a “Solicitation-Distribution Policy.” While it can take different forums, that policy should generally look something like this:

**No Solicitation/Distribution Rules**

- Solicitation and distribution of literature by non-employees on company property is prohibited;
• Solicitation by employees on company property is prohibited when the person soliciting or the person being solicited is on working time. Working time is the time employees are expected to be working and does not include rest, meal, or other authorized breaks;

• Distribution of literature by employees on company property in non-working areas during working time, as defined above, is prohibited; and

• Distribution of literature by employees on company property in working areas is prohibited.

Under the law (and at least the draft policy), employers have the following legal rights:

• **Working Time** – to prohibit both solicitation and distribution during working time, *i.e.*, defined as the time during which an employee has work tasks to perform as distinct from non-work time (paid or unpaid) during which the employee is free from work tasks;

• **Working Areas** – to prohibit distribution even during non-work time in a work area; and

• **Non-working Time** – but during non-working time (*i.e.*, before work, during an unpaid meal break, during a paid rest break, or after work) the employer must allow solicitation (as long as all employees involved are on non-work time) and must allow distribution (as long as the distribution takes place in a non-work area).

For each of the restrictions, however, consistent application of the rules is critical. That means these rules apply equally to pro-union and anti-union solicitation. Likewise, these rules apply to any non-work related solicitation/distribution (like the classic Girl Scouts cookies) and how we handle those issues may impact our application of this rule to union solicitation.

Finally, the issue of access rights for non-employee organizers often comes up. As a general proposition, an employer does not have to grant access to the union to the employer’s private property. Thus, the non-employee union organizer can only attempt to contact employees from the margins of the private property and any effort to enter that private property by the non-employee organizer is arguably an act of trespass. The non-employee access rule is also subject to consistent application, however, and if an employer allows regular non-employee access for purposes of solicitation/distribution, refusing to do so for the union could arguably be discrimination. Employers may, however, allow a limited number of exceptions for charitable solicitation without creating a discrimination problem.

C. **Employer Unfair Labor Practices**

These Section 7 rights are enforced through five general types of potential employer unfair labor practices which are set forth in Section 8(a) of the NLRA. These five possible ULPs are as follows:

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*Exceptions may exist in hospitals, retail, quasi-public work locations like malls and in California.*
• Section 8(a)(1) – makes it unlawful to “interfere with, restrain or coerce” employees in the exercise of Section 7. This is the broad catch all provision which can be violated independently or derivatively as part of a violation of the other provisions of Section 8(a);

• Section 8(a)(2) – makes it unlawful to “dominate or interfere” with a labor organization or contribute financial or other support to it. Where this often comes up is in the context of an employer established employee committee which is created by management and which the employer uses to discuss and resolve workplace issues with employees. Since the definition of labor organization under Section 2(5) of the NLRA is so broad, those committees may be challenged as sweetheart unions which undermine the ability to organize an arms-length union representation. This issue was most notoriously addressed in the Electromation case, 309 NLRB 990 (1992);

• Section 8(a)(3) – makes it unlawful to discriminate against an employee in hiring or working conditions, based on that employee’s Section 7 activity. This section prohibits anti-union retaliation to include termination, retaliation and refusal to hire;

• Section 8(a)(4) – which prohibits similar retaliation against an employee because he has filed an unfair labor practice charge or given testimony under the NLRA; and

• Section 8(a)(5) – finally, this section outlines the employer’s duty to bargain with a union that is the certified representative of a bargaining unit of employees.

While there are many nuances to what is an unfair labor practice committed by an employer, some potentially include:

• Threats of facility closure, loss of benefits or more difficult working conditions connected to the union;

• Promises of benefits to address an issue that has existed for some time when the goal is to influence an employee’s opinion about the union;

• This includes an implied promise of benefit created by soliciting complaints from employees in a fashion inconsistent with past practice;

• Actually conferring benefits on employees during a union organizing effort (particularly during what is called the “critical period” which is after the petition is filed until the election is held);

• Coercively questioning employees about their union sympathies but questions about a union are lawful if not coercive. What is and is not unlawful often depends on who asks, the question asked, how, where, when and under what circumstances. In general, if an employee is compelled by a supervisor’s question to reveal how they feel about the union or what level of union activity they are involved in, that is likely unlawful; and finally
• Spying on union activity – doing something out of the ordinary to observe employee union activity (often away from work). Observing open union activity in the workplace is not likely to be an act of surveillance. A comment creating the impression of surveillance is also potentially unlawful.7

3. Employer Rights Under the NLRA

While employers, and more importantly their management representatives, have many rights under the NLRA, the foundation of employer rights is found in Section 8(c). This section, known as the employer “free-speech” proviso, empowers employers (more importantly an employer’s statutory supervisors) to discuss the union with employees subject to certain limitations. In other words, employers have an absolute right to discuss unions with employees which includes the right to discourage employees from selecting union representation.

These employer speech rights are extremely broad and are subject to largely common-sense limitations. Specifically, an employer may discuss the union with employees as long as the employer does not threaten or promise benefits. Thus, employers have a legal right to share facts about unions, share opinions about the possible impact, describe experiences and explain the legal process: FOE or FLOW. The only areas where an employer must be careful is not to Threaten, Interrogate, Promise or Spy: TIPS. Otherwise, most supervisor communications are lawful.8

4. The National Labor Relations Board

The last topic we will discuss is the NLRB itself. The NLRA is administered and enforced by the National Labor Relations Board which is an independent federal government agency headquartered in Washington, D.C. The NLRB is governed by a five-member board and a General Counsel, all of whom are Article II appointees by the President subject to confirmation with “advice and consent” of the U.S. Senate. At full-strength (which is often not the case), the Board is made up of a five Board Members who serve five-year staggered terms such that typically only one Board Member’s term expires in any year. The NLRB’s General Counsel is also appointed by the President to a four-year term.

The General Counsel is the NLRB’s chief prosecutor and is responsible for investigating unfair labor practice allegations, prosecuting those found to have merit and ensuring violations of the NLRB are remedied. The General Counsel is also responsible for overseeing the regional offices as they process union certification and decertification elections. The G.C. also oversees four NLRB divisions:

- Division of Administration;
- Division of Advice;
- Division of Enforcement Litigation; and the
- Division of Operations Management

7 The NLRA also outlines what are the union unfair labor practices in Section 8(b) of the Act. While it is beyond the scope of this paper to discuss those in detail, those prohibitions include coercion, refusal to bargain in good faith and limits on strikes/picketing.
8 In evaluating these legal restrictions, it is always critical to be able to determine who is and who is not a statutory supervisor under Section 2(11) of the NLRA.
By contrast, the NLRB sits as a quasi-judicial body issuing decisions in election representation cases and unfair labor practice cases brought before the NLRB. Typically operating in 3-member panels, the Board issues case decisions. Since this is a political body subject to influence by political appointments, it is not unusual to have 2-1 decisions with one Board Member issuing a strong dissent. It has also been the practice of the NLRB not to reverse longstanding case precedent without the participation of all 5-members, a practice recently ignored under the Chairmanship of Mark Pearce.

While the NLRB is headquartered in Washington, D.C. (currently at 1015 Half St., S.E.), it operates through 26 regional, sub-regional and resident offices throughout the U.S. These regional offices operate in a highly independent fashion under the leadership of a Regional Director or RD and a Regional Attorney, typically career bureaucrats. As such, it is not unusual for these local offices to operate in a largely independent fashion and in particular without influence by what is often the political ideology of the Board majority. The RD and the Regional Attorney direct the work of subordinate attorneys and non-attorney agents who are also known as Board Attorneys (or counsel for the General Counsel in litigation) or Board Agents.

As a general proposition, the regional offices handle two main types of cases: Representation or Election cases and Unfair Labor Practice cases. The following is a brief summary of each:

A. Representation Cases

Union election cases are called representation cases or “R-cases” because of the case number designation as an “RC” – which is a case to vote on union representation – RD – which is a case to vote on the potential decertification of a union representing a unit of employees or RM – which is an election case filed by an employer based on a demand for recognition or a doubt about a union’s continuing majority support.

While this is not the exclusive means to union representation, most efforts to unionize (or to end union representation through a decertification) start with the filing of a “petition.” Once a petition is filed, the regional office will process that petition which involves evaluating the following issues:

- **Showing of Interest** – to be valid, a petition must be supported by an adequate showing of interest or support from the identified bargaining unit, a/k/a voting unit. The required showing of interest is 30%, in other words 30% or more, of the employees in the requested voting unit must have indicated support for the union representation;

- **Union Authorization Cards** – most petitions are supported by employee signatures on union authorization cards – to be valid a union authorization card must be signed by the employee, the signature must be dated (the date is required because the card must be current which typically requires that it have been signed in the last year) and must state something like “I authorize the union to represent me for purposes of collective bargaining with my employer;”

- **Bargaining Unit** – the petition will also identify a proposed voting or bargaining unit. The NLRB must determine that the unit proposed by the union is not “an” appropriate unit for collective bargaining; we emphasize the word “an” because the NLRA only requires that the unit be appropriate and not that it be “the most
appropriate unit.” There are often disputes between the union and the employer with respect to the voting unit and these disputes often involve the union’s effort to exclude some voters, the facilities involved (or not) and the supervisory status of proposed voters;

- **Representation Case Hearing** – if disputes over the voting unit (or under the Ambush rules, the date of the election) cannot be resolved through negotiations, they will be resolved through a hearing held by the regional office. While not always actually the case, this hearings is referred to as being “non-adversarial” where the main focus is to collect all facts relevant to deciding the issues in dispute. Under the Ambush election rules, these hearing are typically scheduled on the 8th day following the filing of a petition and are conducted by a Hearing Officer (which is simply an employee of the regional office appointed for the hearing) under the direction of the Regional Director. After the hearing, briefs may or more often will not be allowed. The Regional Director will then issue a “Decision and Direction of Election,” a/k/a “DD&E” resolving the disputed issue and setting the date, time and place for the election;

- **Stipulated Election Agreement** – while hearings happen from time-to-time, most petitions that result in an election are settled by agreement without a DD&E. In those cases, the parties agree on the voting unit and the time, place and location for the election in a “Stipulated Election Agreement” or STIP; and

- **Process after Election Set** – once an election is set, the employer will be required to post a Notice of Election (which under the Ambush rules replaces the Notice of Petition for Election). In addition, the employer has 2 days to generate a voter list which must be served on the parties and filed with the regional office. This Voter List (referred to as an Excelsior List prior to the Ambush election rules) must contain for each voter the:
  - Name;
  - Home address;
  - Available home phone;
  - Available mobile phone;
  - Available personal email address (but not work email);
  - Title;
  - Location; and
  - Shift.

B. **Unfair Labor Practice Cases or ULPs**

The second type of case handled by the NLRB are ULP cases. These are also known as “C” cases because the NLRB designates them by case number as CAs. ULPs may be filed by unions (or as is happening more often today also by employees) against employers or by employees against unions.

Once filed, the Regional Director assigns a Board Agent to investigate the ULP. This starts with the party who filed the Charge, the “Charging Party” who must support their charge by affidavit evidence and must establish a *prima facie* case. Assuming that requirement is met (which happens in most cases), the Board Agent will then ask the Charged Party for evidence in response. While that will typically include a request to interview witnesses and to take Board
affidavits from those witnesses, that is not required and most responsive evidence is provided by Statement of Position and submission of documentary evidence.

At the conclusion of that investigation, the Board Agent makes a recommendation to the Regional Director who does or does not find merit to some or all of the allegations. If no merit is found, the Charge will be dismissed if not withdrawn by the Charging Party. If the RD finds merit to any of the allegations, however, a Complaint will be issued and served on the Charged Party. Absent settlement (which happens in most cases), the Charged Party will file an Answer to the Complaint and a hearing will be held. That hearing will be before an Administrative Law Judge or ALJ (the NLRB has a Division of Judges so the ALJ is technically an employee of the NLRB), who will take evidence and issue a decision. That decision can then be appealed to the NLRB in D.C.
Labor Immersion:
The Foundation Series

Presenters
Ursula A. Kienbaum (Portland, OR), Jimmy F. Robinson, Jr. (Richmond), Mark M. Stubley (Greenville)

Moderator
Thomas M. Stanek (Phoenix)

- The Rules of the Road
- Authorization Cards & “R” Cases
- The ULP Process
- Fundamentals of Collective Bargaining
The Rules of the Road...

What is the NLRA?

A. The “Not Light Reading Act”
B. The “National Litigation Rights Association”
C. The “No Labor Relaxation Act”
D. The “National Labor Relations Act”
The National Labor Relations Act

- Federal law
  - Applies to most **private sector** employers/employees with few exceptions
  - **Not** airlines or railroads – Railway Labor Act (“RLA”)/National Mediation Board (“NMB”)
  - **Not** governmental employers (federal, state, county, municipal) – Federal Service Labor-Management Relations Act or state law
  - **State right-to-work laws**

Right-to-Work Laws

- 27 states with right-to-work laws
- Cannot make union membership or payment of union dues a condition of continued employment
  - Prohibits “union security clause” in CBAs
  - Non-members still subject to “exclusive representation” by union
  - Pressure to join “voluntarily”
Non-Right-to-Work States

- 23 states without RTW law
- Union security clauses are enforceable
  - Not a product of law but if CBA has union security obligation
  - Employees must join union or pay dues to union in order to keep job (cost of bargaining)
  - Failure to do so can result in termination
  - Why would employer agree: Leverage
The National Labor Relations Act

- Provides mechanism for employees to engage in PCA & unionize
- Defines what is lawful and unlawful conduct for EEs, ERs, and Unions
- Establishes the National Labor Relations Board (“NLRB”) to administer & enforce the Act

The National Labor Relations Board

- John Ring (Chairman)
- Lauren McFerran
- Marvin Kaplan
- William Emanuel

*Each has 5 year term (staggered)*
The General Counsel

- Appointed by President to 4-year term
- Independent from Board
- Investigates/prosecutes ULP cases
- Sworn in Nov. 17, 2017

Peter Robb

26 Regional Offices
Division of Judges

- Trial judges
- Decide ULP cases
- Offices in Washington, New York & San Francisco
- Assigned to case approx. 3 weeks before trial
- Issue written decision

Section 7: Employee Rights

**Section 7.** 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 7: Employee Rights

- To form or join a union – to engage in union activity
- To assist a union in organizing employees, including soliciting cards and distributing literature
- To bargain with the company through a union

Section 7: Employee Rights (Cont.)

- To strike without losing their jobs
  - Although strikers can lose pay and benefits, and
  - Economic strikers can be “permanently replaced”
  - Not in violation of a “no strike clause” in a CBA
- To engage in other concerted activities for mutual aid and protection (PCA)
- To refrain from such activity
Protected Concerted Activity (PCA)

- The NLRA protects *union* activity
- But it provides an equal protection for "*other concerted activities*" for the purpose of "*other mutual aid or protection*"
- *Wages, hours, and working conditions* – complaints against the Company or management (even “disparaging” complaints)

The Essence of PCA

- Whether the activity is “*engaged in with or on the authority of other employees,*” and not “*solely by and on behalf of the employee himself*”
  - Group activities vs. “individual gripe” (not concerted)
  - Employees discussing shared concerns
  - Individual activities that are the “logical outgrowth of concerns expressed by the employees collectively”
  - Individual action seeking to initiate/induce/prepare for group action (even if rejected)
The Boundaries of PCA

- Personal gripes
- Threats of violence
- Unlawful discrimination/harassment
- “Opprobrious” comments/actions (Atlantic Steel)
- “Sharp, public disparaging attack upon the quality of the company’s product and its business policies, in a manner reasonably calculated to harm the company’s reputation and reduce its income.” (Jefferson Standard)
- Sharing certain confidential information

Section 7: Common Issues & Recent Developments

- Employer Email Systems – Purple Communications
- Employee Handbooks and Policies – The Boeing Company
- Social Media – Chipotle Services
- Talk vs. solicitation during work time
Access/Solicitation/Distribution

- Employee rights (including off-duty employees)
- Solicitation – verbal request for action
  - *Distinct from pure talk*
- Distribution – passing out written material
- Working time (not “work hours”)
- Non-working time (paid or unpaid)
- Working area/non-working area

Employee Solicitation/Distribution

- **WORKING TIME** – no solicitation or distribution of literature by employees during WORKING TIME
- **WORKING AREAS** – no distribution of literature by employees at any time in WORKING AREAS
- **NON-WORKING TIME** – must allow solicitation during non-working time in all locations
  - *Must allow distribution during non-working time if in a non-working area*
- Consistent application key to legality
Can employers prevent off-duty employees from returning to company property?

A. Yes  
B. No  
C. Maybe  
D. I have no idea

Absent business justification, generally should not have rule prohibiting off-duty employee access to “parking lots, gates, and outside non-work areas”

If you have a rule limiting off-duty employee access, must:
- Limit access only to interior/other working areas;
- Must be “clearly disseminated to all employees”; and
- Must apply to access for all reasons and not just to those seeking access for union activity

Consistency again the key
Can employers prevent non-employee union organizers from accessing company property?

A. Yes  
B. No  
C. Maybe  
D. I have no idea

Access: Non- Employees

- May prohibit non-employee access to private property if:
  - Union has other means of access AND
  - Employer does not discriminate by allowing other forms of non-employee distribution/solicitation
  - Exception for “limited number” of “beneficent acts” (United Way and one or two others)
- Must have property rights to enforce. If lessee, may have to look to landlord to enforce trespass.
Two (2) Types of NLRB Cases

- **C-Case (ULP Charge)**
  - CA or CB
- **R-Case (Election Petition Cases)**
  - RC, RD, RM
  - 30% showing of interest (can ask for administrative check but cannot litigate in R-case)
  - Hearing and Decision and Direction of Election (DD&E)
  - Stipulated Election Agreement or STIP

Employer ULPs – Section 8(a)

1) To **interfere with, restrain, or coerce** employees in the exercise of their rights guaranteed in section 7;
2) To **dominate or interfere** with the formation or administration of any labor organization or contribute financial or other support to it – “8(a)(2) committees”;
3) By **discrimination in regard to hire or tenure** of employment or any term or condition of employment to encourage or discourage membership in any labor organization;
4) To **discharge or otherwise discriminate** against an employee because he has filed charges or given testimony under this Act; and
5) To **refuse to bargain** collectively with the representatives of his employees, subject to the provisions of section 9(a).
Union ULPs – Section 8(b)

- To restrain or coerce employees
- To refuse to bargain collectively
- Limits on union strikes, picketing, and other coercive union conduct

2(11) Supervisory Status

“Employees”

“Management”
2(11) Supervisory Status

- Authority for at least one (1) of the following
  1. Hire
  2. Transfer
  3. Suspend
  4. Lay off
  5. Recall
  6. Promote
  7. Discharge
  8. Assign
  9. Reward
  10. Discipline
  11. Adjust grievances
  12. Directs others
- Requires use of “Independent Judgment”
- Held accountable for subordinates’ actions
- Hourly/Salary – Does Not Matter!

Impact of Being a Supervisor

- Section 7 rights are employee rights
- 2(11) supervisors are **NOT** employees
  - Have no legal right to support unionization
  - In fact, it is illegal for supervisors to encourage employees to support unionization
  - Employer may require loyalty from supervisor in supporting position on unions
  - Supervisor may be disciplined for refusing to support employer’s position on unions
- Supervisors are agents of the employer – 24/7/365
- Bind Company with words or action
Employer Free Speech “Proviso”

Section 8(c). The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

Employer Free Speech “Proviso”

- Allows employer (including supervisors) to:
  - Give FACTS
  - Share OPINIONS
  - Describe EXPERIENCES
  - Explain the LAW
  - State company’s position on unions
- FOE or FLOE
Be Careful About TIPS

- Don’t Threaten
- Don’t Interrogate
- Don’t Promise
- Don’t Spy

Union Cards & Elections
What are these?

**RC Petition**

- Filed with NLRB Region
- Serves on employer with:
  - Form 4812 (Procedure)
  - Statement of Position form
  - Certificate of Service
  - Showing of interest (served only on the Region)
- Typically served via e-mail
What Does The Region Do Next?

- Confirm adequacy of showing of interest
- Assign case number
- Notify parties of responsible region designee
- Notice of petition employer
- Strict deadlines

Wait...There’s a Hearing?

- Notice of hearing sent with initial paperwork
- In “routine” cases, hearing set 8 days after the Region processes the RC Petition
- Regions rarely grant continuance (1-2 days if good cause shown)
- Statement of Position due by 12p local time day before the hearing
Statement of Position Includes:

- Commerce information
- Name
- Work location
- Shift
- Job classification for all proposed employees
- Election details
- Bargaining unit issues

If Dispute Exists, Must Provide:

- Same info. for all additional proposed employees
- Identify each employee sought to be excluded
- Employees List
  - Word (.doc) table format
  - Alphabetized by last name
  - Times New Roman 10 point font (or larger)
Typical Issues For Hearing

- Supervisory status
- Micro-unit petitions
- Any issue that can be “outcome determinative”

What Do Hearing Officers Do?

- Take Statement of Position into evidence
- Take parties’ position on issues raised
- Record evidence as the Regional Director deems necessary
- Any issue not raised in Statement of Position is ...
Regional Directors Issues DD&E

- Voter List due within 2 days of DD&E
- Request for review due within 14 days
- Union entitled to 10 days with Voter List
  - Optional
  - Typically waived
- Must submit timely (and accurate) Voter List

What happens if supervisor has information not reported on Voter List?

A. Nothing
B. Election may be set aside
C. Some employees may not get to vote
D. All of the above
E. None of the above
Imputed Knowledge

- Company responsible for all information in management’s possession (e.g., cell phones)

Community of Interest

- Same policies, practices, benefits, handbooks, rules, work conditions, and geography
- The group of employees would share a singular connection to the outcome of any vote
- Why does it matter?
What is a “Micro-Unit”? 

A. Where only one employee is represented by a union  
B. The latest technology unions use to organize employees  
C. A new organizing approach unions use by focusing on a small, subset of employees

“Micro” Bargaining Units

- Smaller groups are easier to organize  
- Unions view micro-units as easy entrée to larger unit of employees  
- More unlikely given current status of community interest analysis  
- *PCC Structurals* – Where are we now?
The ULP Process

Who are “Board Agents”?  

A. People who are “agents” of the five member NLRB  
B. Federal employees who investigate ULP Charges  
C. Neutrals who conduct RC & RD elections  
D. All of the above  
E. None of the above
The Anatomy of an NLRB Charge

- Anyone can file
- Initiates investigation
- Most common allegations include:
  - Retaliatory discharge
  - Unilateral changes
  - Information requests
  - Unlawful statements

What Happens Next?

- May contact Board Agent for background facts & additional info.
- More details available in “EAJA” letter
- Begin gathering information
How To Interact With Board Agent

- Different approaches based on experience level, personality and Region
- Understand the Agent’s internal deadlines
- Make the Agent’s job easier
- Recommendation: Mirroring

HELP ME HELP YOU

How Do They Get Their Info.?

- Charging Party Affidavits
- Sources of Charging Party Evidence
How Reliable Is Their Info.?

How Should Employers Respond?

- Response Request (EAJA) Letter
- No need to respond item-by-item
- Instead, just “tell your side of the story” in a position statement
- Extensions possible (but vary greatly by Region)
Should I Provide Witnesses for Interviews/Affidavits?

- Typically NO
- Very limited scenarios:
  - Complicated technical info. is relevant to investigation
  - Important allegation turns on credibility, and you can corroborate
  - You filed Charge against union

What About Legal Arguments?

- Commonly-used standards
  - *Wright Line* (Discipline/Retaliation Claims)
  - “Material & substantial” unilateral changes
- Widely-available free (or inexpensive) resources
  - NLRB Public Website
  - NLRB Manuals
  - CiteNet
  - The Developing Labor Law
Follow-Up & Subpoenas

- Follow-up requests are commonplace
- Investigative subpoenas for documents possible (but less common now)
- Investigative subpoenas for witness testimony (least common)

How Do They Decide Cases?

- “Final Investigative Report” or “Agenda Outline”
- Management Review
- Most Cases: Regional Director (or sometimes another manager) decides based on Report and supervisor comments
- Close Cases: Agenda Meeting of investigating agent, Regional Director, and other managers to discuss, debate, and decide
Scenario – Agenda Meeting

Allegation: ABC Co. fired Derek in retaliation for union organizing.
- Derek 10 year employee; never disciplined before.
- Two supervisors saw him asking another employee to sign something. He claims they could see it was a union card. They deny it.
- ABC Co.’s CEO, Daniel, has said: “We think the union is a bad idea.”
- ABC Co. has taken the position that it fired Derek for violating the Company’s workplace violence policy. When Supervisor Lisa corrected his work and told him to do better tomorrow, Derek told her to “bring her boxing gloves” because “it could get ugly.”
- Derek is 6’3” and weighs 235 lbs. Lisa is 5’5” and weighs 115 lbs.
- Previously, one employee was fired under the workplace violence policy for saying, “I have a gun and I know how to use it.” Another was given a written warning after being overheard saying, “sometimes I just want to strangle my boss!”

Agenda Results: RD Decision

A. Merit  
B. No Merit  
C. G.C.’s Division of Advice  
D. Seek additional information from parties
They Found “No Merit” ... Now What?

- Dismissal → Appeal
  - Long Form Dismissal Letter
  - Short Form Dismissal Letter
- Withdrawal → Case Closed

They Found “Merit” ... Now What?

- Settlement Negotiations
  - Restore “status quo”
  - Notice Posting
  - Reinstatement
  - Back pay
- Complaint
What Happens at NLRB Hearing?

- Less formal than jury trial, but more formal than arbitration/UI Hearing
- Testimony & Documentary Evidence
- ALJ Decision → Board Decision → Court of Appeals → SCOTUS

THE FUNDAMENTALS OF Collective Bargaining
Collective Bargaining = Good Faith

Duty to Bargain

- Basic legal framework
  - Meet at reasonable times and places
  - Negotiate in good faith with sincere intention of reaching agreement
  - Provide relevant information when requested by union
  - Union has same legal obligations to company management
Basic Legal Framework (Cont.)

- Don’t have to agree to anything specific
  - But failing to make concessions may be evidence of bad faith
- Bargain in good faith to agreement or impasse
- Maintain *status quo* during bargaining
  - Even after contract expires

Status Quo

- After contract expires:
  - Continue terms of CBA until agreement or impasse
- Exceptions:
  - No strike/lockout
  - Arbitration (still have to process grievances)
  - Other statutory waivers (e.g., management rights)
Scenario – Health Plan Changes

- Employer and union in bargaining for successor CBA; prior CBA expired
- Union-represented employees are under Company health plan “same as everyone else”
- Employer made annual minor adjustments to health plan for the past 12 years
- Union objects to upcoming changes in plan

Can the Employer make the health plan changes?

A. Yes, consistent with its past practice
B. No, the contractual waiver of bargaining expired with the CBA
C. Yes, it can bargain to single issue impasse over the changes
D. No, impasse is all or nothing

0% 0% 0% 0%
Scenario – Health Plan Changes

**ANSWER?**

*Raytheon Network Centric Systems,*

365 NLRB No. 161 (2017)

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**“Mandatory” vs. “Permissive”**

- Mandatory subjects of bargaining
  - Related to wages, hours, or working conditions:
    - Management rights
    - Drug testing
    - Union security
    - Contracting out
    - Seniority
    - Grievance/arbitration
    - Work rules
    - Vacation/time off
    - Benefits
    - Contract duration
“Mandatory” vs. “Permissive”

- **Permissive subjects of bargaining**
  - Unrelated to wages, hours, or working conditions
  - Parties may lawfully bargain, if BOTH agree
  - May not insist on permissive subjects

Examples of Permissive Subjects

- Scope of bargaining unit
- Neutrality
- Members of bargaining teams
- Internal union affairs
- “After retirement” benefits
- Job applicants
- Supervisors
Where to begin?

- Identify bargaining team
- Location of bargaining
- Note-taker(s)
- Format of proposals
- Section 8(d) notices
- Contingency planning

Preparation is Key!

- Identify management priorities
- Anticipate union demands
- Analyze leverage continuum
- Will Company go to impasse to achieve its goals?
- Communication strategy
Identify Management Priorities

- Compensation philosophy
- Health and welfare and retirement plans
  - Current v. anticipated cost
  - Flexibility;
  - Company-wide plans
- Employee concerns

More Management Priorities

- Anticipate upcoming business changes
- Identify past and anticipated legal changes
- Operating efficiency
- Management rights & flexibility
- Need to address recent grievances?
- Review and update no strike clause (Primary, Secondary, Sympathy)
Anticipate Union Proposals

- Grievances during term of contract?
- Other settlements in industry?
- Cost of living?
- Increasing cost of benefits?
- Company non-union operations?
- Prior bargaining agenda?

Bargaining Leverage

- Employer enters process with greater leverage
  - Right to implement, lockout, replace strikers
- Union seeks to diminish employer leverage
  - Disrupt operations
  - Picketing
  - Strikes
  - Publicity
  - ULP charges
### Leverage Continuum

<table>
<thead>
<tr>
<th>No disruption or discord</th>
<th>Ok with some internal discord within bargaining unit</th>
<th>Ok with internal discord but no external discord</th>
<th>Will respond to appeals to constituents, media, other employees</th>
<th>Picketing, handbilling, media coverage</th>
<th>All of above, including strike</th>
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### Scenario – Demonstration

- Union leads march of 30 employees to administration offices
- Carrying signs and milk cartons, and chanting “1% is for milk, not wages”
- Burst into CEO’s meeting, to present petition
- Presented petition and left without further disruption
Is the demonstration protected?

A. Yes
B. Yes, but only if the employees were off-the-clock
C. No, because they insubordinately interrupted the CEO’s meeting
D. No, because they marched on the Company’s private property without permission

Scenario – Demonstration

ANSWER?

- KHRG Employer, LLC d/b/a Hotel Burnham and Atwood Café, 366 NLRB No. 22 (2018)
Impasse – What Is It?

- Inability to reach agreement despite good faith bargaining
- No realistic possibility that continuing bargaining would be fruitful

Impasse – Why Does It Matter?

- Upon overall impasse
  - **Employer** has right to unilaterally implement **all or part** of final offer
  - **Union** agreement is not required
Decide at Outset If Impasse Likely

- Are you proposing concessions you’re willing to implement unilaterally?
- If you’re not looking for concessions, don’t need impasse
- Likely ULP upon unilateral implementation
- Handling information
- Contingency planning

The Union’s Playbook

- “Establishing an employer’s unfair labor practice is a critical strategic weapon in any contract campaign.”
  - David Rosenfeld, *Offensive Bargaining, Institute for the Study of Labor Organizations*
Diminishing Employer Bargaining Leverage

- ULP against employer impacts right to:
  - Declare impasse and implement
  - Hire permanent replacements for strikers
  - Lock out in support of bargaining position
  - Create significant risk unless managed correctly

Union Information Requests

- Broad, discovery-type standard of relevance
- Virtually all information about individual bargaining unit members is presumptively relevant
- Bargaining unit wages, hours, benefits, working conditions
Union Information Requests

- Unions use information requests to create ULPs, disrupt impasse, harass employers
- Employers still have to respond
- Failure to provide relevant information, upon request, may equal bad faith

Union Information Requests

- Information about non-bargaining unit employees or management is not typically relevant
- Special situations:
  - Employer financial information
  - Company-wide benefit plans
Scenario – Employer Financial Data

- During bargaining, Company said:
  - “We need cost reductions” & “a new line of credit”
  - “We are having a hard time,” “in financial trouble”
  - “Unable to remain competitive in marketplace”
  - Owner met directly with employees to explain
  - Union said “show me the money” in the form of an information request
  - Company refused – claimed “confidential”

Did the Company violate the NLRA?

A. No, because financial information is confidential
B. Yes, because the owner met with the employees directly
C. No, because the Company did not “plead poverty”
D. Yes, because the Company’s statements made its financial condition relevant to collective bargaining
Scenario – Employer Financial Data

**ANSWER?**

*Wayron, LLC,*
364 NLRB No. 60
(2016)

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**Enhancing Leverage**

- Be prepared for union tactics
- Don’t overreact
- Communicate, communicate, communicate
- Time typically helps the Company
- “What if” proposals
- A word about retro pay...
Communication Strategy

- Bargaining unit employees
- Non-bargaining unit employees
- Management team
- C-Suite
- Board
- Others?

Beware of “direct dealing”

- Lawful to communicate to bargaining unit employees about proposals already made in bargaining
- Unlawful to communicate before a proposal is made to a union
- Can’t ask what employees think about a proposal
Contingency Planning

- Leverage continuum
- Security
- Replacements
  - Temporary
  - Permanent

Contingency Planning

- Other company operations
- Related companies – secondary activities?
- Communication plans
  - Internal constituents
  - Customers
  - Media
Scenario – Strike

- Union and Company are engaged in difficult negotiations
- The contract has expired – discussions are ongoing, and some progress is being made
- The day after a particularly difficult day of bargaining, management shows up and finds the employees on strike

Scenario – Strike

- Employer operates facility with management and non-bargaining unit employees
- Union offers to return to work after four (4) days
- Employer refuses to allow employees back unless they sign “no strike” pledge
Did the Union violate the NLRA?

A. Yes, because the employees went on strike before impasse was reached
B. Yes, because the employees went on strike without first contacting FMCS
C. No, because the contract was expired
D. No, because they all went out at the same time

Did the Employer violate the NLRA?

A. Yes, because it performed bargaining unit work
B. Yes, because the employees could not return to work
C. Yes, because it conditioned return-to-work on a no-strike pledge
D. No, because it engaged in a lawful defensive lockout
Scenario – Strike (Cont.)

- During the strike, the union picketed another Company facility
- The union-represented employees at the other facility refused to cross the picket line

Did the Union violate the NLRA?

A. Yes, because the other facility wasn’t involved
B. Yes, because there is a no-strike clause at the other facility
C. No, because the union can picket the employer’s other facilities
Did the Employees at the other facility violate the NLRA?

A. No, because it is protected activity
B. Yes, because they weren’t involved in the labor dispute
C. Yes, because their contract contains a no-strike clause
D. Yes, because their contract prohibits sympathy strikes

Labor Immersion:
The Foundation Series

Presenters
Ursula A. Kienbaum (Portland, OR), Jimmy F. Robinson, Jr. (Richmond), Mark M. Stublely (Greenville)

Moderator
Thomas M. Stanek (Phoenix)