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THE MOVE TO UNIONIZE: A NEW LANDSCAPE OF CONCERTED ACTIVITY AND HOW LABOR LAW IMPACTS NON-UNION WORKPLACES

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Overview

- What is Protected Concerted Activity.
- Management Actions That Get Employers into Trouble as Violations of Protected Concerted Activity.
- What to Look Out For and How to Respond When Actions are Protected Concerted Activity.

EMPLOYEE ACTIONS ON THE RADAR

- Renewed interest in labor laws or do we?
- 58% adults surveyed perceived, “long-term decline of the share of workers represented by unions as a bad thing” for the county and working people. 61% say union decline bad for working people.
  - Pew Research, data collected February 18, 2022.
- 71% of Americans now approve of labor unions,
- 40% of union members say their membership is "extremely important,“
- Employee engagement higher among nonunion workers,
- Highest approval of labor unions since 1965,
  - Gallup poll, data collected Aug 1-23, 2022.

UNION PARTICIPATION NUMBERS 2022/2023

- Share of US Workers belonging to a Union has continued to decline since 1983,
- In 1983, 20% of US workers were Union members,
- 2021, 10.3% of US workers were Union members,
- 2022, 10.1% of US Workers were Union members.
  - PEW Research Center dated February 18, 2022 & US Department of Labor Stats released January 19, 2023.

PERCEIVED ACTIVITY AND THE STATS

- The number of wage and salary workers belonging to unions, at 14.3 million in 2022, increased by 273,000, or 1.9 percent, from 2021. However, the total number of wage and salary workers grew by 5.3 million (mostly among nonunion workers), or 3.9 percent. This disproportionately large increase in the number of total wage and salary employment compared with the increase in the number of union members led to a decrease in the union membership rate.

- The 2022 unionization rate (10.1 percent) is the lowest on record.

HIGHLIGHTS FROM THE 2022 DATA

- The union membership rate of public-sector workers (33.1 %) continued to be more than five times higher than the rate of private-sector workers (6.0 %).
- The highest unionization rates were among workers in protective service occupations (34.6 %) and in education, training, and library occupations (33.7 %).
  - Fastest growing union is SEIU; service sector union.
- Men continued to have a higher union membership rate (10.5 %) than women (9.6 %).
- The gap between union membership rates for men and women has narrowed considerably since 1983 (the earliest year for which comparable data are available), when rates for men and women were 24.7% and 14.6 %, respectively.
- Black workers remained more likely to be union members than White, Asian, or Hispanic workers.
- Nonunion workers had median weekly earnings that were 85 percent of earnings for workers who were union members ($1,029 versus $1,216).
- By age, workers ages 45 to 54 had the highest union membership rate in 2022, at 12.6 %. Younger workers—those ages 16 to 24—had the lowest union membership rate, at 4.4 %.

Bureau of Labor Statistics January 19, 2023

BUT STARBUCKS AND AMAZON ARE UNIONIZING…

- 2022 – Amazon warehouse on Staten Island voted to approve union. 8,300 person warehouse.
  - Not another single Amazon facility has voted to approve unionization.
- Since December 2021 – only 300 Starbuck stores have unionized; less then 3% of its US company stores.
  - NLRB has filed numerous unfair labor charges against Starbucks.
  - October 2022 – Starbucks filed 22 unfair labor practices against Worker's United (Union).
    - Recording contract negotiations.
    - Failing to meet in person.
    - Not to be "out done" NLRB issued 29 unfair labor charges against Starbucks in May of 2022. 29 charges included 200 alleged violations of the National Labor Relation Act.

QUESTION FOR CREDIT #1

Since 1983, Union Participation has:

A. Decreased from 20% to 10.1%,
B. Increased, but only in the private sector, or
C. None of the above.

Answer: A

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NATIONAL LABOR RELATIONS ACT

National Labor Relations Act governs relations between union employees and their employers but also protects some nonunion employee actions.

Applies to ALL" employees" EXCEPT supervisors, managerial employees, agricultural workers, individuals who work for their parents or spouse, rail road employees. Management includes employees who act in a capacity for persons who determine or administer policy. *There is one minor exception to this rule.

Guarantees all employees 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 concerted activities for purposes of collective bargaining or other mutual aid or protection." (Section 7 rights)

MY COMPANY IS NON-UNION WHAT RELEVANCE IS THIS?

- The National Labor Relations Act ("NLRA") applies to non-union employees too.
- If you terminate/discipline/restrict communication of your employees in violation of the NLRA, that is an unfair labor practice ("ULP").
- ULP's usually arise from protected concerted activity.
- Defending a charge from the NLRB.

WHAT IS CONCERTED ACTIVITY?

- What does this mean? Generally, “concerted activities” are when “employees act together to achieve a mutually desired end within the workplace.”
- Connected to work conditions or terms of employment.
- Protects complaints or protests against employers. This includes statements by employees that may be “unintentionally or negligently false or misleading statements.”
- So, does that mean an employer can’t terminate an employee who constantly complains?

EXAMPLES OF CONCERTED ACTIVITY – CONNECTED TO WORK CONDITIONS

- Shop furnace broke, one employee complained, foreman said if "they had guts, you all would go home." So, they left. This is Section 7 protected activity. Complaints about the cold, lack of employer response and no company complaint procedure.
- Black Friday walk outs by Walmart employees.
- Individual action is protected where that individual initiates or induces others to take a group action.
- Employees discussing wages amongst themselves.

SOCIAL MEDIA

- Employers cannot prohibit employees from being disrespectful or using language that injures the reputation or image of the employer.
- Facebook – employee posting pictures of employer event and ridiculing event. Not protected. Car Dealership event, employee made demeaning comments about set up of the event.
- Facebook --- employees objecting to management criticisms of their work. Protected.

HOW TO HAVE A LABOR VIOLATION ON TELEVISION

- In news, 26 nonunion employees who were fired in 2014 after giving an interview about their employer. The employees discussed the employer forcing them to sell an after market service as they installed Direct TV hardware/services.
  - The technicians expressed concern with their supervisors telling them to tell customers whatever it took to convince customers to agree to after market services. Technicians upset with losing money if they did not convince customers to purchase. One technician said they were just asking to be treated fairly.
  - On July 21, 2011, NLRB determined that the employees' participation in the TV interview constituted protected concerted activity.
  - NLRB issued award to 26 employees and against Direct TV $3.3 million dollars.
  - Award included back wages, costs, fees and substantial prospective fines for future violations,
  - No one in the organization realized this was concerted activity BEFORE the 26 employees were fired.
- Don't be Direct TV.

WHAT TO LOOK OUT FOR?

- When an employee complains about something in the workplace, try to resolve it; ex., furnace is not working – tell employees someone has been called and it will be fixed.
  - If you can't resolve, make a note, tell employees you will check out on ways to resolve.
  - This includes wages, work conditions, treatment in the work place.
- Handed a petition by employees concerning an issue in the work force – tell them management and HR will review this and respond timely and thank them for bringing the concern to your attention.
- Employees start posting on Facebook about the workplace, do not post or contribute. Print it out, give to HR.
- Fliers about unionizing being handing out by employees, this should get your radar up. Take a flier and give it to HR.

WHAT NOT TO DO

- Do not immediately terminate/discipline.
- Do not post/comment on Facebook/TikTok or other social media responsive to the “issue.”
  - Do not have employment manual that prohibits blanket comments on social media about the work place.
  - Do not have employment manual that prohibits blanket comments to third parties or co-employees.
- Do not engage or automatically tell employees they can’t do something – especially where you think it may be concerted activity.
  - As always, there are exceptions, unless the behavior by the employee is illegal.

QUESTION FOR CREDIT #2

Which of the following is NOT concerted protected activity:

A. Posting on social media that, “my employer makes me work through my lunch hour without pay.”

B. Meetings with employees where they are generating a list of workplace concerns that need to be addressed by management, such as toilets not working, locks need to be replaced, security concerns.

C. An employee posting Instagram photos of a supervisor with his family calling him disparaging names.

Answer: C

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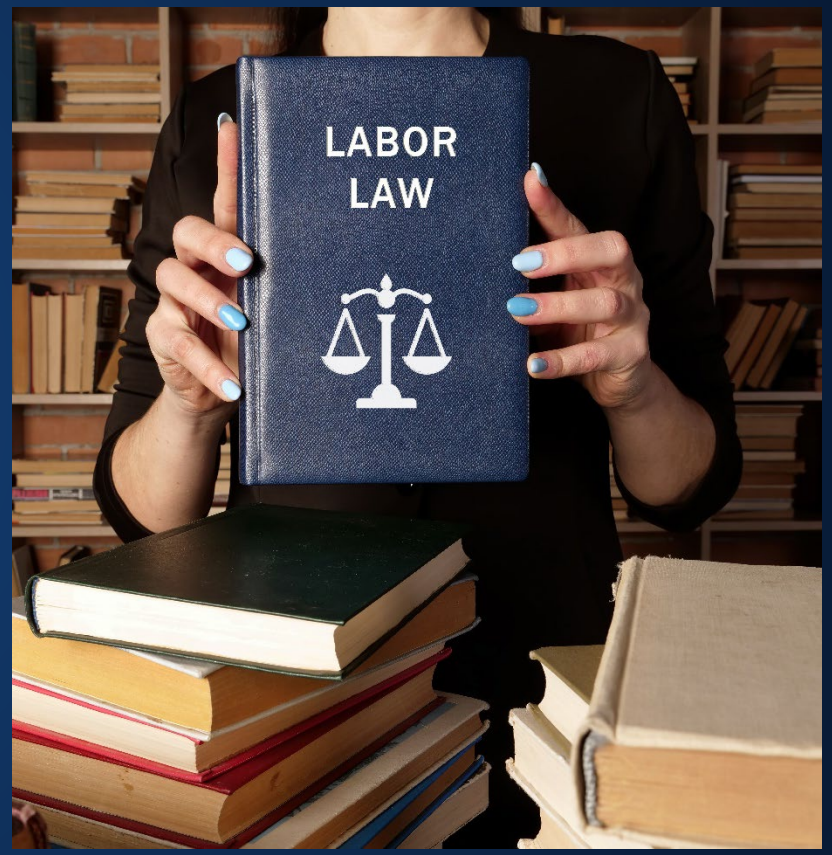
NLRB'S SEVERANCE AGREEMENT DECISION

- McLaren Macomb, 372 NLRB No 58, decision. Severance Agreements with broad restrictions may violate NLRA.
  - Violation of 8(a) because may interfere or restrain exercise of right under NLRA,
  - Broad non-disparagement and confidentiality clauses,
    - Employee prohibited from making statement that could "harm the image of the employer, officers, directors, employees…"
    - Agreement only to be disclosed to, "spouse, professional advisor, unless compelled by law to .." disclose terms to anyone else.



SEVERANCE AGREEMENTS ARE STILL OKAY BUT…..

NLRB determines violative where,

- “overbroad provisions” affecting rights of employees to engage with one another and to improve their lot as employees,
- Cannot restrict access to the NLRB, judicial/legislative forums, the media or various third parties,
- While supervisors are generally not protected by the Act, under Parker-Robb Chevrolet, 6 the Act does protect a supervisor who is retaliated against, such as being fired, because they are refusing to act on their employer’s behalf in committing an unfair labor practice against employees, in other words, they are refusing to violate the NLRA per their employer’s directives

BUT WAIT, THERE'S MORE…

- NLRB decisions can be applied retroactively.
- According to the Office of the General Counsel,
  - "Further, I believe that, while an unlawful proffer of a severance agreement may be subject to the six-month statute of limitation language under Section 10(b), maintaining and/or enforcing a previously entered severance agreement with unlawful provisions that restrict the exercise of Section 7 rights continues to be a violation and a charge alleging such beyond the Section 10(b) period would not be time-barred."
  - Resolve these claims by having employer advise employee that overbroad provisions are no longer applied.
  - "Relatedly, while it may not cure a technical violation of an unlawful proffer, employers should consider remedying such violations now by contacting employees subject to severance agreements with overly broad provisions and advising them that the provisions are null and void and that they will not seek to enforce the agreements or pursue any penalties, monetary or otherwise, for breaches of those unlawful provisions. That conduct could form the basis for consideration of a merit dismissal if a meritorious charge solely alleging an unlawful proffer is filed."

PREEMPLOYMENT COMMUNICATION

- Pre-employment offer letter language,
  - These too can be subject of a violation if you have language that may, “restrain, interfere with or coerce an employee’s exercise of Section 7 rights.”
    - Confidentiality clauses – considered to have a “chilling effect” by NLRB
    - DOES NOT INCLUDE – trade secret/proprietary information clauses

GET READY….

- Office of General Counsel opined the following provisions in severance agreements as “problematic”;
  - “I believe that some other provisions that are included in some severance agreements might interfere with employees’ exercise of Section 7 rights, such as: non compete clauses; no solicitation clauses; no poaching clauses; broad liability releases and covenants not to sue that may go beyond the employer and/or may go beyond employment claims and matters as of the effective date of the agreement; cooperation requirements involving any current or future investigation or proceeding involving the employer as that affects an employee’s right to refrain under Section 7, such as if the employee was asked to testify against co-workers that the employee assisted with filing a ULP charge.”

QUESTION FOR CREDIT #3

What term should NOT be in a Severance Agreement?

A. Protection of the Company's trade secrets,
B. Return of all company equipment and property,
C. Restriction of a non-supervisory employee to discuss terms to any other employees, NLRB or other third parties.

ANSWER: C

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RIGHT TO WORK UPDATE

- March 24th – Michigan's Right to work law was repealed. Takes effect March 30, 2024,
- Right to work – Gave Employees the following:
  - Refrain from or resign from membership in, affiliation with, or financial support of a labor organization.
  - Become or remain a member of a labor organization.
  - Pay any dues, fees, or other charges to a labor organization.
  - Pay a charitable organization or another third party an amount of money equivalent to dues, fees, or other charges that are required to be represented by a labor organization.
  - Been called a "free rider" provision because employee received benefits of union representation without paying union dues.
  - According to National Bureau of Economic Research, states with Right to Work laws have unionization rates that are 20% lower then states without said laws.
  - Right to Work legislation has been eliminated in its entirety.

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QUESTIONS

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