

How the NLRA Applies to All Workplaces, Not Just Unionized Ones: Implications for Workplace Conduct Policies, Social Media Policies, and Employee Discipline (Including After the Supreme Court's Abortion Decision)

July 6, 2022 – *Dorsey Work Watch*

by Drew James

When the subject of the National Labor Relations Act (the “NLRA,” or, more succinctly, the “Act”) is broached, employment lawyers often hear a familiar refrain: “The Act doesn’t apply to me because my employees are not unionized.” This widespread belief is incorrect. In actuality, all employers in the United States are subject to the Act in an important way that carries even greater significance when political and polarized societal issues find their way into the workplace.

For those of you who may not have paid much attention to the NLRA before receiving this surprising news, Section 7 of the Act protects an employee’s right to self-organization, including to join a labor organization. Section 7 also shields an employee’s right “to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” Concerted activity (activity involving two or more employees or by one on behalf of others) that is for “mutual aid or protection” is interpreted broadly. It can range from an employee strike to potentially more nuanced instances, such as where employees post complaints on social media relating to their employment benefits, a conversation involving one speaker and one listener on a subject that relates to group action in the interest of employees, or even where multiple employees individually refuse to work overtime for the same reasons without group discussion, where their actions *imply* a common goal. In tandem with Section 7, it is an unfair labor practice under Section 8(a)(1) for an employer to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7” of the Act. In other words, an employer violates the Act if it interferes with an employee’s ability to exercise their Section 7 rights, even if that employee is not currently a member of a labor union.

But the question remains: What does it mean for an employer to impermissibly interfere with an employee’s Section 7 rights? The applicable legal standard is complicated and

Related Capabilities

- Labor & Employment

was formed in a long string of cases by the National Labor Relations Board (“NLRB”) dating back nearly two decades. Beginning in 2004, the NLRB applied the standard set forth in *Lutheran Heritage*, under which an employer’s policy is unlawful if an employee would “reasonably construe” the policy as restrictive of their Section 7 rights or if the policy would “reasonably tend to chill” Section 7’s protected activities. Examples of where an employer may infringe on protected activities include, but are not limited to, threatening employees if they support a union or engage in concerted activity enforcing work rules that reasonably tend to inhibit employees from exercising their rights under the Act, and retaliating or taking adverse actions against employees who engage in protected or concerted activities. In 2017, under the Trump Administration, the NLRB articulated a more employer-friendly standard in *Boeing Company*. The *Boeing Co.* standard requires not only assessing the legality under Section 7, but also evaluating the employer’s justification for the policy or conduct.

Now, the Biden Administration is poised to revert the NLRB to the pre-*Boeing Co.* standard. The NLRB’s General Counsel, Jennifer Abruzzo, issued a memorandum instructing regional offices to send cases to her office for consideration relating to certain issues, notably including cases addressing the *Boeing Co.* standard. And in early 2022, Abruzzo filed a brief in the *Stericycle, Inc.* case before the NLRB in which she advocated for a return to the *Lutheran Heritage* standard.

This issue often rears its head in two contexts. First, employers should be careful when drafting or enforcing policies or handbooks that constrain an employee’s ability to discuss the terms and conditions of their employment. For example, if an employer adopts a social media policy that contains content-based restrictions, or a policy that prohibits employees from making negative or disparaging statements about the company, those actions may be seen by the NLRB as prohibited by the Act.

Second, employers should take Section 8 of the Act into account when considering whether and how to discipline an employee for verbal comments, violation of the company dress code, or other conduct related to an employee’s exercise of Section 7 rights. Since workplaces have existed, employees have been making statements that cause offense or discomfort to other employees. It can be hard to distinguish between statements that may implicate Section 7 rights and those that do not. As a recent example, although an employee’s comment to a co-worker about their personal views on abortion or the recent Supreme Court decision in *Dobbs* may not raise Section 7 rights, that employee’s comment about the company’s policy related to reimbursement of abortion-related expenses post-*Dobbs* is likely protected. Other topics, such as co-worker pay, are so closely related to the terms and conditions of employment that any action by the employer to restrict discussion may be considered by the NLRB to reasonably tend to chill concerted activity.

If you are learning for the first time that you may be subject to the NLRA, or if you have policies in place that limit an employee’s speech or conduct in the office, now is the time to consult with your local Dorsey attorney. The NLRB has identified this as an enforcement priority, and employers would be wise to anticipate and fix any issues

before the NLRB becomes involved.