

DEPARTMENT OF ENERGY
CONTRACTOR ATTORNEYS'
ASSOCIATION

SPRING 2012 CONFERENCE
LABOR UPDATE

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NLRB: A Political Agency

- Party in power appoints majority on the NLRB and the General Counsel
- Historical swings in precedent from administration to administration
- Good example: Epilepsy Foundation of Northeast Ohio, 331 NLRB 676 (2000) v. IBM Corp., 341 NLRB 1288 (2004)
- Debate is whether current Board and Acting GC Solomon have stepped beyond this trend

NLRB: Current Board

- Chairman Mark Pearce (D)
 - Buffalo Union-side attorney
- Member Richard Griffin (D), Recess
 - In house IUOE
- Member Sharon Block (D), Recess
 - Senate HELP counsel to Sen. Kennedy
- Member Brian Hayes (R)
 - Senate HELP Republican Policy Director
- Member Terence Flynn (R), Recess
 - Management-side D.C. firm

The NLRB's Rule Making

- New Posting Rule
- Was effective April 30, 2012
- All Employers (contractors already subject, excluded)
 - Content of poster
 - Electronic Posting (J. Picini Flooring, 356 NLRB No. 9)
- Evidence of “animus”
- Constitutes an unfair labor practice
- Extends 6 month statute of limitations
- Under legal challenge
 - Enjoined April 17

The NLRB's Rule Making

- District of South Carolina strikes down rule April 13th.
- Inconsistent with statutory mandate
 - Plain meaning
 - Statutory framework
- District Court for District of Columbia upholds Rule, but...
- No automatic unfair labor practice liability
- No “tolling” of statute of limitations
- Absence of posting CAN be a basis for determining employer had “animus”

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Employee Rights Under the National Labor Relations Act

The National Labor Relations Act (NLRA) guarantees the right of employees to organize and bargain collectively with their employers, and to engage in other protected concerted activity or to refrain from engaging in any of the above activity. Employees covered by the NLRA are protected from certain types of employer and union misconduct. This notice gives you general information about your rights, and about the obligations of employers and unions under the NLRA. Contact the National Labor Relations Board (NLRB), the Federal agency that investigates and resolves complaints under the NLRA, using the contact information supplied below, if you have any questions about specific rights that may apply in your particular workplace.

Under the NLRA, you have the right to:

- Organize a union to negotiate with your employer concerning your wages, hours, and other terms and conditions of employment.
- Form, join or assist a union.
- Bargain collectively through representatives of employees' own choosing for a contract with your employer setting your wages, benefits, hours, and other working conditions.
- Discuss your wages and benefits and other terms and conditions of employment or union organizing with your co-workers or a union.
- Take action with one or more co-workers to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government agency, and seeking help from a union.
- Strike and picket, depending on the purpose or means of the strike or the picketing.
- Choose not to do any of these activities, including joining or remaining a member of a union.

Under the NLRA, it is illegal for your employer to:

- Prohibit you from talking about or soliciting for a union during non-work time, such as before or after work or during break times; or from distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms.
- Question you about your union support or activities in a manner that discourages you from engaging in that activity.
- Fire, demote, or transfer you, or reduce your hours or change your shift, or otherwise take adverse action against you, or threaten to take any of these actions, because you join or support a union, or because you engage in concerted activity for mutual aid and protection, or because you choose not to engage in any such activity.
- Threaten to close your workplace if workers choose a union to represent them.
- Promise or grant promotions, pay raises, or other benefits to discourage or encourage union support.
- Prohibit you from wearing union hats, buttons, t-shirts, and pins in the workplace except under special circumstances.
- Spy on or videotape peaceful union activities and gatherings or pretend to do so.

Under the NLRA, it is illegal for a union or for the union that represents you in bargaining with your employer to:

- Threaten or coerce you in order to gain your support for the union.
- Refuse to process a grievance because you have criticized union officials or because you are not a member of the union.
- Use or maintain discriminatory standards or procedures in making job referrals from a hiring hall.
- Cause or attempt to cause an employer to discriminate against you because of your union-related activity.
- Take adverse action against you because you have not joined or do not support the union.

If you and your co-workers select a union to act as your collective bargaining representative, your employer and the union are required to bargain in good faith in a genuine effort to reach a written, binding agreement setting your terms and conditions of employment. The union is required to fairly represent you in bargaining and enforcing the agreement.

Illegal conduct will not be permitted. If you believe your rights or the rights of others have been violated, you should contact the NLRB promptly to protect your rights, generally within six months of the unlawful activity. You may inquire about possible violations without your employer or anyone else being informed of the inquiry. Charges may be filed by any person and need not be filed by the employee directly affected by the violation. The NLRB may order an employer to rehire a worker fired in violation of the law and to pay lost wages and benefits, and may order an employer or union to cease violating the law. Employees should seek assistance from the nearest regional NLRB office, which can be found on the Agency's Web site: <http://www.nlr.gov>.

You can also contact the NLRB by calling toll-free: **1-866-667-NLRB (6672)** or **(TTY) 1-866-316-NLRB (1-866-316-6672)** for hearing impaired.

If you do not speak or understand English well, you may obtain a translation of this notice from the NLRB's Web site or by calling the toll-free numbers listed above.

*The National Labor Relations Act covers most private-sector employers. Excluded from coverage under the NLRA are public-sector employees, agricultural and domestic workers, independent contractors, workers employed by a parent or spouse, employees of air and rail carriers covered by the Railway Labor Act, and supervisors (although supervisors that have been discriminated against for refusing to violate the NLRA may be covered).

This is an official Government Notice and must not be defaced by anyone.

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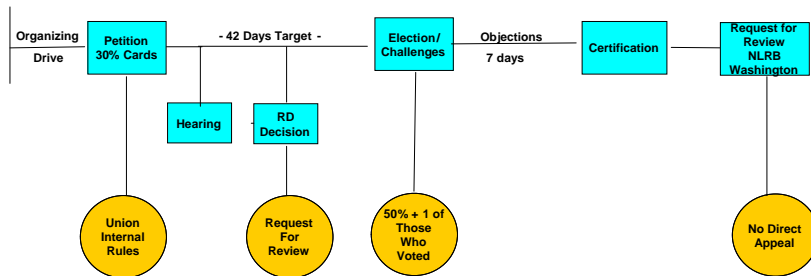
The NLRB's Rule Making

- Shorten Election Time Line
- Now 42 days, would be 15-21 days
- Statement of Position required within 7 days
- Designed to limit employer speech in campaign
- Designed to limit employer challenges to election process
- No pre-election appeals
- Purported rationale for rule
 - Alleged employer interference
 - Data used not from NLRB election re-runs

The NLRB's Rule Making

- Shorten Election Time Rule Revised November 30, 2011
- Still eliminates pre-election appeals
- Limits post-election appeals
- Limits issues that can be determined before election
- Limits speech by contracting time
- Under legal challenge

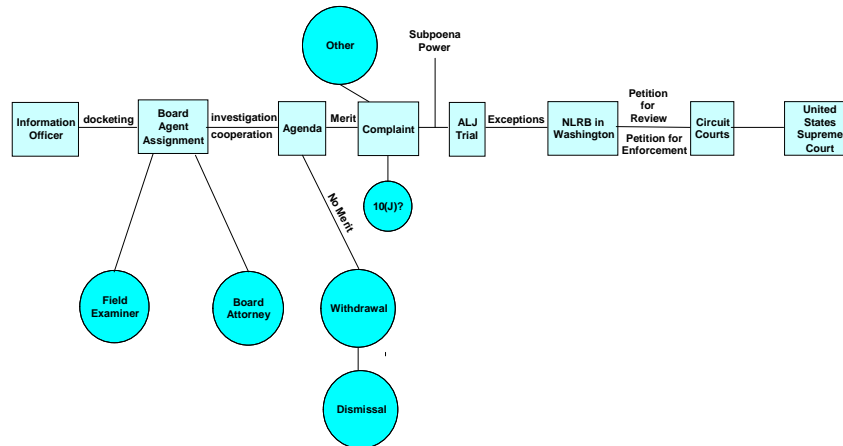
REPRESENTATION CASE PROCESSING AT NLRB



General Counsel Lafe Solomon

- Controversial figure, recess appointment
 - Reaction to Congressional subpoenas
- Social Media prosecutions
 - Meyers Industries, 281 NLRB 882 (1986)
 - Alleluia Cushion, 221 NLRB 999 (1975)
- Boeing maelstrom
 - Alleged transfer of work
 - Remedy sought
 - Provision in collective bargaining agreement
 - Effect on rights of S.C. employees
- Effectively revoking “deferral” policy
- Investigatory Subpoenas
- Extraordinary Remedies in ordinary cases

UNFAIR LABOR PRACTICE CASE PROCESSING AT NLRB



General Counsel Lafe Solomon

- Increase in 10(j) Litigation
- Garcia v. S&F Mkt. St. Healthcare, C.D. Cal., No. 12-cv-1773, 4/17/12
- Injunction against bad faith bargaining
- NLRB had previously dismissed charge
- Based on content of proposals only
- One clearly unlawful element, but other proposals arguably “hard bargaining”

RIGHTS OF EMPLOYEES

- National Labor Relations Act Spells Out Employees' Rights:

Section 7: All 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 of such activities

G.C. and Social Media

- First Facebook Complaint
 - **American Medical Response of Connecticut** (November 2010)
 - Alleged that the company committed an unfair labor practice by firing an emergency medical technician who had posted negative statements about her supervisor on Facebook.
 - What about having referred to supervisor as “scumbag”?
 - That’s okay.

The Case of the Hot Dogs

- A BMW dealership's salesperson was unhappy with the quality of food and beverages at the dealership's event.
- Posted pictures of food and comments.
- Board found that employee engaged in protected, concerted activity.

Not All Social Media Protected

- **JT's Porch Saloon & Eatery, LTD** – bartender had a conversation on Facebook with his stepsister.
- Bartender posted, among many other things, the following:
 - Customers were “rednecks”
 - Hoped customers “choked on glass as they drove home drunk.”

Not All Social Media Protected

Wal-mart – employee made comments about her manager on Facebook.

- Employee Posted “Wuck Fal-Mart.”
- Employee was disciplined and filed NLRB charge.
- NLRB Dismissed charge concluding that employee’s comments were only “individual gripes.” There was no effort to induce other employees to engage in group action.

NLRB Decision Making

- New Board Members have not issued many significant decisions yet...
- Question of quorum will likely persist.
- Initial indications negative for employers
- Example: Member Block’s lengthy dissent in Dish Network, 358 NLRB No. 29 (April 11, 2012), arguing Board should reconsider legality of pointing out to employees that they will not be able to deal with management individually if they become unionized. Member Block argued “it is a misrepresentation and, as such, should be considered a threat”
 - Contrary to nearly 30 years of precedent

NLRB Decisions

- D.R. Horton, 357 NLRB No. 184 (January 3, 2012).
 - Class waiver in mandatory arbitration agreement violates the NLRA
 - Effectively invalidates AT&T v. Concepcion, upholding class waivers in arbitration agreements
 - Stay tuned
- New York New York Hotel and Casino, 356 NLRB No. 119 (2011).
 - Off duty employees of contractor (i.e. non-employees)
 - Assault on Lechmere//private property rights

NLRB Decision Making

- Specialty Healthcare, 357 NLRB No. 83 (2011)
 - Non-acute health facilities no longer will have any particular rules for voting units— “community of interest standard” will govern
 - Presumption that petitioned-for unit is appropriate for voting.
- St. John’s Health Center, 357 NLRB No. 170 (2011)
 - Presumption that prohibition of buttons/pins in immediate patient care areas subject to attack if evidence of so-called “selective enforcement”

NLRB Decisions

- Fremont-Rideout Health Group, 357 NLRB No. 158 (2011)
 - Employer over-broadly counsels employee about “all union activities” during working time
 - **No talking v. lawful no solicitation rule**
- Virginia Mason Hospital, 357 NLRB No. 63 (2011)
 - Rule implementing flu-prevention policy is a unilateral change
 - Employer required to bargain, not core purpose

Other NLRB Decision Making

- Dana Corp., 356 NLRB No. 49 (2010)
 - Pre-recognition agreement on terms of employment with union not unlawful
 - Reversal on Majestic Weaving, 147 NLRB 859 (1964)?
- Parexel International LLC, 356 NLRB No. 82 (2011)
 - “Pre-emptive strike” discharge unlawful
 - No protected activity

The NLRB's Decision Making

- Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.), 355 NLRB No. 159 (2010) and Southwest Reg'l Council of Carpenters (New Star Gen. Contractors, Inc.), 356 NLRB No. 88 (2011).
 - Large 20 x 4 Foot “Shame” banners not picketing, not coercive
 - All forms of protest other than picketing?
 - Banners not subject to reserve gate defense on common access construction sites

The NLRB's Decision Making

- Jury's Boston Hotel, 356 NLRB No. 114 (2011)
 - Bad rule, bad election
 - Safeway, 338 NLRB 525 (2002) (citing prior cases)
- Stericycle, Inc., 357 NLRB No. 61 (2011)
 - Wage and hour case interfered with election
 - Pro-employer case???
- G & K Services, Inc., 357 NLRB No. 109 (2011)
 - Comparison of benefits, no promise, unlawful

What's Next?

- Who is an “employee” under NLRA
 - Independent contractor cases, student cases, etc.
- Revisit solicitation rules
 - Retail
 - Healthcare
- Revisit supervisor
 - Definition and interference (taint)
- More controversy!