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NLRA

Unfair Labor Practices

THE NATIONAL LABOR RELATIONS ACT
UNFAIR LABOR PRACTICES

TABLE OF CONTENTS

OUTLINE OF THE ACT 1
- A. Covered Employers 2
- B. Covered Employees 2
- C. The Special Role Of Supervisors 2
- D. Special Classifications — Managerial And Confidential Employees 4

THE CORE OF THE ACT — SECTION 7 4
THE BARGAINING PROCESS 4
UNFAIR LABOR PRACTICES — SECTION 8 OF THE ACT 7
- A. Employer Unfair Labor Practices 7
  - 1. Section 8(a)(1) 7
  - 2. Section 8(a)(2) 8
  - 3. Section 8(a)(3) 9
  - 4. Section 8(a)(4) 9
  - 5. Section 8(a)(5) 9
- B. Union Unfair Labor Practices 10
  - 1. Section 8(b) 10
  - 2. Section 8(b)(2) 11
  - 3. Section 8(b)(3) 11
  - 4. Section 8(b)(4) 11
  - 5. Section 8(b)(5) 12
  - 6. Section 8(b)(6) 12
  - 7. Section 8(b)(7) 12
- C. Other Provisions of Section 8 12
  - 1. Section 8(c) — "Free Speech" Proviso 12
  - 2. Section 8(e) — Illegal "Hot Cargo" Agreements 12
  - 3. Section 8(f) — Special Provisions For The Construction Industry 13
  - 4. Sections 8(d) And (g) — Notice Requirements 13

CONCLUSION 14
APPENDIX A 15
APPENDIX B 16

This booklet should not be construed as legal advice or legal opinion on any specific facts or circumstances. You are urged to consult competent counsel concerning your particular situation and any specific legal questions you may have. Employers are specifically encouraged to consult an attorney to determine whether they are subject to state requirements that extend beyond the scope of this booklet.

This booklet is one of two designed to acquaint senior managers and human resources executives with the basic principles of the National Labor Relations Act (NLRA or "the Act"), the law that establishes the right of most private sector employees to join unions, to bargain collectively with their employers, and to strike.

In this booklet we will briefly explain what rights are provided by the NLRA, review some basic facts about the collective bargaining process, and illustrate the sorts of conduct which are forbidden or permitted under the Act.

A related booklet in this series explains how unions can acquire (and lose) the right to represent your employees. We will also discuss some of the techniques used by unions to organize employees and what management can and cannot do to show employees that union representation is not in their best interests.

OUTLINE OF THE ACT

The most important parts of the National Labor Relations Act are found in Sections 7, 8, 9 and 10. Section 7 establishes the basic rights of all covered employees; Section 8 defines *unfair labor practices* — conduct which Congress has determined to be violative of Section 7 rights; Section 9 describes how representation rights of unions are determined; and Section 10 sets out the procedures to be followed when either a union or an employer is accused of committing an unfair labor practice. This booklet is limited to a discussion of Sections 7 and 8.

The other sections of the Act are all ancillary to these core provisions; for example, one establishes the National Labor Relations Board (the "NLRB" or the "Board"), the government agency which administers the Act. Those details will not be gone into here. Instead, this booklet will concentrate on the nuts and bolts of the Act as it affects you and your employees.

A. Covered Employers

The NLRA covers most employers in the private sector, including not-for-profit organizations such as private schools and universities, hospitals or charities. It does not cover employers in the railroad or airline industries if those employers are subject to the Railway Labor Act, nor does it cover governmental agencies. In addition, the Board does not assert jurisdiction over a few highly specialized industries such as horse racing and dog racing, nor over companies that are very small. The jurisdictional standards used by the Board are set out in Appendix A.

B. Covered Employees

The Act excludes from coverage the following: domestic servants, agricultural employees, employees of employers subject to the Railway Labor Act, independent contractors, persons employed by their parents or spouses, or supervisors.

C. The Special Role Of Supervisors

The Act excludes from the definition of "employees" any person who is employed as a supervisor, an extraordinarily significant position. It also provides that no company is required to recognize any union as the collective bargaining representative of its supervisory employees.

As a general rule, you are legally responsible for anything a supervisor does, says, or knows. That is, if a supervisor has any knowledge which may have legal significance in unfair labor practice proceedings, the Board will automatically impute such knowledge to you (even if the supervisor did not share that knowledge) and may hold you responsible for any statements or actions by a supervisor (even if the statement was unauthorized or contrary to your policy).

For these reasons, you may legally forbid supervisors to belong to, or support, unions. Moreover, although you may not require a supervisor to commit an unfair labor practice, you may require supervisors to cooperate with your lawful labor relations policies — including taking an active role in your response to a union organizing drive. It is therefore very important for an employer to decide

carefully which employees are and are not going to be considered supervisors. Sometimes the line is unclear.

A supervisor within the meaning of the Act is anyone who has the authority, acting on behalf of the employer, to do any of the following:

> hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

It is important to note that 1) it is not necessary that the individual supervisors actually exercise the authority, only that they in fact *could do so*; 2) any one of the enumerated powers is sufficient to confer supervisory status; 3) an individual who can *effectively recommend* for promotion, discipline, etc. is a supervisor even if that individual cannot himself or herself take the action in question; and 4) the decisions made by the supervisor must involve the exercise of *independent judgment* and discretion.

In close cases (for example when there is a question whether independent judgment is used, or whether the individual "effectively" recommended certain action) the Board applies secondary criteria, which include: 1) ratio of supervisors to non-supervisory employees; 2) significant differences in compensation or benefits; 3) distinctive uniforms or other visible indicia of special status; and 4) attendance at management meetings. There are many others. A comprehensive list can be found in Appendix B.

D. Special Classifications — Managerial And Confidential Employees.

Certain employees who are not supervisors may not be represented for purposes of collective bargaining. *Managerial* employees are those non-supervisory employees who possess substantial discretion and authority to formulate general business policies of the employer; *confidential* employees are those who "assist and act in a

confidential capacity to persons who formulate, determine and effectuate management policies in the field of labor relations." It should be noted that the Board's position is that although confidential employees may not be included in collective bargaining units, they are entitled to protection from discrimination by the Act.

THE CORE OF THE ACT—SECTION 7

Section 7 of the Act sets forth the theoretical basis of the entire statute:

"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...."

You should be aware that these Section 7 rights protect any collective activity — not just union organizing. That is, non-union employees have the right to strike, or band together to seek changes in wages or other policies, or to protest alleged violations of other laws designed to protect their interests. For this reason, you should always consider counsel before disciplining or discharging an employee for a "bad attitude," "griping," or "being a troublemaker."

And it bears emphasizing that Section 7 sets forth bilateral rights. In addition to the right "to engage in ...concerted activities for the purpose of collective barganing," employees keep "the right to refrain from any or all such activities." Crossing a picket line is every bit as protected as honoring one.

THE BARGAINING PROCESS

The mere fact that a union represents employees does not entitle them to **any** benefits not enjoyed by unrepresented employees. Indeed, once a union becomes the representative of employees, the employer must maintain the *status quo* pending bargaining and may not

make any unilateral changes in wages, hour, or working conditions unless (a) the union consents to the change, b) the parties have agreed on a collective bargaining agreement and the change is permitted by the agreement, or c) the negotiations have reached an *impasse*, or deadlock, and the change is consistent with the employer's final offer.

The principal exception to this rule is found in cases where an employer's wage program includes "automatic" wage increases, or a program of predetermined performance evaluations and wage adjustments based on those evaluations. In such cases, the employer must continue those portions of the program which do not involve the exercise of discretion, and bargain with the union over those portions of the program which do require the exercise of discretion.

The Act requires both parties to meet and confer at reasonable times and places, to make a good faith effort to come to agreement, and to sign an agreement if one is negotiated. However, the Act specifically provides that neither party is under any legal obligation to agree with any proposal. That means you are not required to agree to any particular union demand, nor are you required to offer any specific improvements. Indeed, an employer is permitted to propose **reductions** in wages or benefits as long as it can demonstrate a legitimate business reason and that its proposal was not intended to punish employees or frustrate bargaining.

Some caution must be used in negotiating cuts in wages or benefits, however. If you attempt to justify an offer by claiming that you are financially **unable** to satisfy the union's demands, i.e. "we can't afford it," the union has the right to examine your financial records to satisfy itself that the explanation is true. On the other hand, if you simply state that you are **unwilling** to spend more for wages or benefits, you need not provide any supporting financial data.

If the parties are unable to reach agreement after bargaining in good faith for a reasonable period of time, it

may be that an *impasse* has been reached. In that event the employer is permitted to implement its final offer unilaterally.

Also during bargaining, either party is allowed to bring economic pressure to bear on the other. The principal means available to the employer to bring pressure on the union to accept its proposal is to lock out its employees, and to use temporary replacements, supervisory employees, or subcontractors to perform the work. The union's principal method of bringing pressure to bear is to call a strike, although the union may engage in other conduct as well, such as engaging in consumer picketing and boycotts or what has become known as "corporate campaigns." While lawful in most respects, corporate campaigns can be devastating not only to targeted businesses but to the employees of those businesses as well. Unfortunately, a full discussion of corporate campaigns is beyond the scope of this booklet.

In the event of a strike, a company has the right to continue operating by hiring temporary replacements or temporarily subcontracting the work or transferring it to other facilities. In addition, the employer is permitted to hire **permanent** replacements for "economic" strikers (an economic strike is a strike in support of a union's collective bargaining demands or in protest of an employer's lawful action) and at the end of the strike is not required to discharge those replacements to make room for strikers who want to return. A "replaced" striker is put on a preferential recall list and is not entitled to reinstatement unless and until there is a vacancy in a position for which the striker is qualified.

A strike called to protest unfair labor practices is quite different. In that case only temporary replacements may be used. Upon making an unconditional offer to return to work, an unfair labor practice striker has a right to return to his old job even if it means the replacement must be fired. Moreover, a strike that begins as a straightforward economic strike over an issue such as wages, can be "converted" into an unfair labor practice strike if the company commits violations that prolong the

work stoppage. Obviously then, it is important to understand the significance of, and to avoid committing, an unfair labor practice.

UNFAIR LABOR PRACTICES— SECTION 8 OF THE ACT

Section 8(a) of the Act defines employer conduct which is unlawful; Section 8(b) does the same for union conduct.

A. Employer Unfair Labor Practices

1. Section 8(a)(1) — The "Catch-all" Provision

An employer may not "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 [of the Act]";

All violations by an employer of any provision of Section 8(a) of the Act also automatically violate Section 8(a)(1). Independent violations of Section 8(a)(1) may occur if you discipline an employee for "protected" activity (even if it does not involve unions) or maintain a rule which has as its purpose or effect the prohibition of the exercise of Section 7 rights. Here are some examples of such violations, some of which may surprise you:

- a "no solicitation" policy that forbids solicitations by employees during non-working time (e.g. meal or break periods);
- forbidding "protected" solicitation — even during working time — if you permit "unprotected" solicitation (e.g. circulating sports pools, taking up collections for sick or injured fellow employees);
- denying off-duty employees access to parking lots or other non-working areas of the your property unless you can demonstrate real concerns with safety or housekeeping;
- denying union organizers access to employer property for the purpose of soliciting employees if you grant access to other non-employees for such purposes;
- prohibiting employees from discussing their salaries or wage rates;
- denying employees the right to post "protected" materials (e.g. favorable news stories about unions)

on company bulletin boards if you permit "unprotected" notices (e.g. get well cards, offers to sell or trade vehicles, etc.) under the same conditions;

- threatening employees with adverse consequences (e.g. loss of pay or benefits, plant closure or discipline) if they support unions or promising more favorable treatment if the employee or employees oppose the union.

Note that Section 8(c) of the Act offers some leeway to these restrictions. An employer is permitted to express its views concerning unionization even if they are expressed harshly, as long as the expression contains no threat of reprisal or promise of benefit. This right of "employer free speech" will be discussed more fully in a subsequent booklet in this series.

2. Section 8(a)(2) — Unlawful Support Of "Labor Organizations"

An employer may not "dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it...."

This provision was originally intended to forbid setting up "company unions," or encouraging or requiring employees to join one union in order to defeat an organizational effort by another union. Unfortunately, it has also been used to outlaw some management-employee committees — sometimes called "employee participation groups" or "workplace teams" — on the theory that such committees or teams are "labor organizations" as defined by the Act.

The term "labor organization" is defined very broadly as:

> any organization of any type..., in which employees participate, and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

In finding violations of Section 8(a)(2), the Board relies on the fact that the term "dealing with" is broader than "negotiating with." If you have established or are

contemplating such committees, groups or teams, you should consult with counsel to ensure that you do not inadvertently violate Section 8(a)(2).

3. Section 8(a)(3) — Discrimination On The Basis Of Union Activity.

Section 8(a)(3) forbids discriminating against employees because they favor or oppose a union, or because they have engaged in union activities such as a lawful strike.

While you may not forbid or require employees to join unions, this section permits employers and unions to agree that, during the term of any collective bargaining agreement, employees may be required to become union members, or at least pay union dues, on and after the 30th day of employment under the contract. But this provision is inapplicable in those 22 states which have enacted laws (called "right to work" laws) forbidding such "union security" provisions.

4. Section 8(a)(4) — Retaliation Against Participating In Board Proceedings

It is unlawful to discriminate against employees because they have filed unfair labor practice charges against you or have testified in Board proceedings. This section also forbids discrimination against **supervisors** who have filed charges or testified, even though as noted previously, supervisors are otherwise generally unprotected.

5. Section 8(a)(5) — Refusal To Bargain

This section requires employers and unions who are authorized representatives of employees to make a good faith effort to resolve their differences and come to an agreement, although it does not compel either party to agree to any specific demand.

It also requires that you give the union advance notice of any intended change in wages, hours or working conditions, and upon request by the union to bargain over that change, as well as any "effects" of that change on bargaining unit employees. For example, a unionized employer (unless the collective bargaining agreement contains a subcontracting clause) must bargain with the union over

the decision to subcontract, and over ways of mitigating the effects on employees, such as severance pay, retraining, extension of insurance benefits, and the like.

Over the years, the Board and the courts have interpreted Section 8(a)(5) as encompassing additional obligations necessary to the collective bargaining process, such as providing a union with requested information that is relevant to bargaining or handling grievances.

Although it is lawful to bring them up, neither party may bargain to impasse over so-called *permissive* subjects of bargaining (subjects other than wages, hours or working conditions which are referred to as *mandatory* subjects). Examples of permissive subjects include:

- inclusion of supervisors in the bargaining unit;
- changing the scope of the collective bargaining unit;
- bargaining during the term of an agreement over a subject which is expressly provided for in the agreement;
- benefits for persons who are already retired;
- each party's bargaining representatives, e.g. neither party may attempt to dictate to the other the composition of the other party's negotiating team.

Even where an employer scrupulously complies with every specific legal requirement governing bargaining, the Board may still find a violation of Section 8(a)(5) if it believes that the employer has engaged in "surface bargaining," i.e. simply going through the motions without any real intention of reaching an agreement.

B. Union Unfair Labor Practices

1. Section 8(b)

This section generally mirrors Section 8(a), but also contains special provisions restricting picketing.

Section 8(b)(1)(A) — Coercing Employees

This section prohibits unions from discriminating against or coercing employees because they do not

support the union. Even if the parties are in a non right-to-work state, unions must allow employees to refuse to be "full" union members as long as they agree to pay dues. An employee exercising this right may not be fined because his decision violates a provision of the union constitution or bylaws.

Section 8(b)(1)(B) — Coercing Employers In The Selection Of Representatives For Collective Bargaining Or Adjustment Of Grievances

In certain industries, some employers have elected to permit their supervisors to be members of unions. If a union attempts to discipline a supervisor because of the way he or she performs supervisory duties, and the supervisor has a role to play in the adjustment of grievances, the discipline violates Section 8(b)(1)(A).

2. Section 8(b)(2) — Causing Or Requesting An Employer To Violate Section 8(a)(3)

Cases under this section generally arise when a union requests or demands that an employer discharge an employee because the employee is not a union member, or has failed to pay dues, or has fallen into disfavor with union leadership.

3. Section 8(b)(3) — Refusal To Bargain

A union has the same basic obligation to bargain in good faith as an employer; that is, it must negotiate in good faith and provide requested information relevant to negotiations or grievance but because a union does not have the power to directly change working conditions, unions are rarely found to have made "unilateral" changes in working conditions without bargaining.

4. Section 8(b)(4)

This section prohibits unions from striking, picketing, or encouraging employees not to work or to handle products, where the purpose is to:

a. force an employer or self-employed person to join a union;

b. force any person to cease doing business with another person;

c. to force an employer to recognize one union as the representative of employees if another has been certified as the representative of those employees;

d. force an employer to assign disputed work to members of one union rather than to another group of employees.

5. Section 8(b)(5)

Excessive dues or initiation fees are prohibited (this is very rarely enforced).

6. Section 8(b)(6)

Unions may not force "featherbedding," or pay for work which is not necessary to be performed (also very rarely enforced).

7. Section 8(b)(7)

This sections makes picketing to force an employer to recognize a union unlawful where

a. the employer has already lawfully recognized another union and a new election is barred;

b. a valid NLRB election has been held in the past 12 months;

c. the picketing has gone on for 30 days and no petition for election has been filed — **note**: this section does not bar picketing which purports merely to protest failure to pay "area wages."

C. Other Provisions Of Section 8

1. Section 8(c) — "Free Speech" Proviso

As mentioned previously, this section provides that an employer does not commit an unfair labor practice by presenting anti-union opinions and arguments so long as those opinions and arguments do not contain any threat of reprisal or any promise of benefit.

2. Section 8(e) — Illegal "Hot Cargo" Agreements

Section 8(e) provides that it is an unfair labor practice for both employers **and** unions to agree that the employer will not do business with non-union employers or employers with whom the union has a labor dispute (this does not apply to employers in the construction industry or in segments of the apparel manufacturing industry).

3. Section 8(f) — Special Provisions For The Construction Industry

Section 8(f) contains special provisions for the construction industry, permitting employers and unions to enter into agreement *before* the union has demonstrated majority status, which would otherwise be a violation of Section 8(a)(2). This section also permits agreements that require union membership within 8 days of employment under the contract, rather than 30 days as in other industries.

4. Sections 8(d) And (g) — Notice Requirements

Section 8(d) requires that neither party to a collective bargaining agreement may unilaterally terminate the agreement or modify any of its terms until a) the agreement has expired, b) 60 days after giving the other party notice of intent to terminate or modify, or c) 30 days after the Federal Mediation and Conciliation Service has been given notice of the existence of a possible dispute, whichever is latest. Section 8(g) requires that unions give an additional 10 days written notice prior to striking a health care facility.

CONCLUSION

Although the National Labor Relations Act is a complicated statute, it is actually less restrictive than many other statutes and legal doctrines with which employers must deal. Generally, an employer can, by dotting its "i's" and crossing its "t's," accomplish all of its legitimate business objections while fully complying with the Act.

However, the Act is full of traps for the unwary, and unions are increasingly sophisticated in exploiting inadvertent technical errors by employers. While their membership and strength continue to decline, unions are far from extinct. Employers facing union organizing or dealing with unions are well advised to seek legal counsel.

For further information, contact any office of Fisher & Phillips LLP, or visit our website at www.laborlawyers.com

APPENDIX A

Jurisdictional Standards

Colleges or Universities — Any private college or university which has annual gross revenues from all sources (excluding only contributions which because of restrictions by the grantor are not available for general operations) of one million dollars or more.

Symphony Orchestras — Same as above.

Horse racing and dog racing industries — At present, the Board will not assert jurisdiction in cases involving the horse racing and dog racing industries.

Small Employers — The Board will generally not assert jurisdiction over very small organizations, i.e. those employers which do not purchase goods or ship goods with a value of at least $50,000 per year in interstate commerce.

Retail Operation and Residential Buildings — The Board will assert jurisdiction over an employer in these businesses if the business has $500,000 gross annual volume of sales or more.

General Non-Retail Standard — The Board will assert jurisdiction over non-retail businesses if the employer purchased or sold, directly or indirectly, goods or services valued in excess of $50,000 annually from points outside the state in which the business is located.

APPENDIX B

Secondary Indicia Of Supervisory Status

1. The individual is regarded as a supervisor by other employees, or by the individual himself.
2. The individual receives a higher wage or salary than other employees with which the individual works.
3. The individual attends management meetings.
4. The individual receives fringe benefits or privileges substantially different from those received by other employees.
5. The individual has his own office or desk, and employees with whom the individual works do not.
6. The individual's work clothing differs from that of other employees, e.g. the individual's uniform or hat is different from that of rank and file employees, or wears a necktie and others do not.
7. The ratio of rank and file employees to supervisors would be impracticably high if the individual were not a supervisor. Conversely, if treating all persons in the individual's classification as supervisors would create an unrealistically low ratio of rank and file employees to supervisors, the Board has held that this factor militates against a finding of supervisory status.

Note that in applying the statutory and non-statutory indicia, the Board sometimes seems to be "result oriented." That is, if finding the individual to be a supervisor is essential to finding that the employer committed an unfair labor practice by reason of something said, done or known by the individual, the Board tends to resolve close cases by finding supervisory status. Similarly, if the same individual with precisely the same indicia is discharged because of union activities, the Board is likely to find that the individual is a supervisor.

For this reason, many employers find it helpful to clearly identify those persons regarded as supervisors, to

ensure that they possess and exercise discretionary supervisory duties, and to stress to these individuals that they are supervisors, and that among their duties is the duty to comply with and effectuate the employer's labor relations policies, including the lawful opposition to unionization.

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Americans With Disabilities Act - Employment Aspects

Americans With Disabilities Act - Public Accommodations

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