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Panel: NLRB 101: A Prima on National Labor Relations Board Procedures

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National Labor Relations Board

Independent Federal agency created in 1935 by Congress to administer the National Labor Relations Act, the basic law governing relations between labor unions and the employers whose operations affect interstate commerce.

National Labor Relations Board

- Guarantees the right of employees to organize and to bargain collectively with their employers or to refrain from all such activity.
- Protects employees engaged in union activity and protected, concerted activity
- Applies to all employers involved in interstate commerce—other than airlines, railroads, agriculture, and Government

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History and Enabling Legislation

- NLRA (or Wagner Act) enacted in 1935 to protect the rights of employees, to encourage collective bargaining, and to curtail certain private sector labor and management practices (Section 7 and 8(a)).
- Gave employees the right to organize, bargain collectively and engage in strikes, picketing and other concerted activities.

History and Enabling Legislation *(cont.)*

- Amended by the Labor Management Relations Act of 1947(Taft Hartley Act):
  - Allow employees to refrain from the activities protected by Section 7
  - Created 6 union unfair labor practices (Section 8(b)
  - Added Section 8(c) the “free speech proviso”—expressing views regarding unionization is not an unfair labor practice if there is no threat of reprisal or promise of benefit.

https://thekeep.eiu.edu/jcba/vol0/iss12/26
DOI: 10.58188/1941-8043.1679

History and Enabling Legislation *(cont.)*

- Amended in 1959 by the Labor Management Reporting and Disclosure Act of 1959 (Landrum Griffin Act)
- Added additional restrictions on union unfair labor practices, such as limits on recognitional picketing, secondary boycotts (pressuring neutral employers) and permitted pre-hire agreements in the construction industry).

Agency Functions

- To determine through secret ballot elections whether or not employees want to be represented by a union in dealing with their employer and, if so, by which union.
- To investigate, prevent or remedy unfair labor practices by either employers or unions.

https://thekeep.eiu.edu/jcba/vol0/iss12/26
DOI: 10.58188/1941-8043.1679

Agency Composition

- The **Board** has five Members and primarily acts as a quasi-judicial body in deciding cases on the basis of formal records in administrative proceedings. Board Members are appointed by the President to 5-year terms, with Senate consent, the term of one Member expiring each year.
  - The Board is currently composed of 3 members, Acting Chairman Phillip A. Miscimarra, Board Member Mark Gaston Pearce and Board Member Lauren McFerran.

Agency Composition *(cont.)*

- General Counsel, appointed by the President to a 4-year term with Senate consent.
- Independent from the Board and is responsible for the investigation and prosecution of unfair labor practice cases and for the general supervision of the 51 Regional, sub-Regional and Resident field offices in the processing of cases.
- General Counsel is Richard F. Griffin, Jr. confirmed by the Senate on November 4, 2013 to serve as General Counsel of the National Labor Relations Board (NLRB) for 4 years. His term expires on Oct 31. 2017.

https://thekeep.eiu.edu/jcba/vol0/iss12/26
DOI: 10.58188/1941-8043.1679

Agency Composition *(cont.)*

- Each Regional Office is headed by a Regional Director who is responsible for making the initial determination in cases arising within the geographical area served by that region.
- There are 26 Regional Offices in the United States with offices placed in various geographical areas of the country. For example,
- Region 1 in Boston covers New England
- Region 2 in Manhattan covers Manhattan, Bronx, Westchester, Rockland, Putnam, and Orange County
- Region 29 Brooklyn covers Brooklyn, Queens, Staten Island and Long Island

Unfair Labor Practice Charges

- Charge is docketed; assigned to an agent for investigation
- Agent takes affidavits from charging party and witnesses; solicits response from charged party
- Regional Director determines whether reasonable cause to believe that Act has been violated
- If charge lacks merit, charging party can withdraw the case or the charge will be dismissed; in the event that the charge is dismissed, the charging party has the right to file an appeal with the General Counsel's Office of Appeals in Washington, DC; the determination by the Office of Appeal s is final; on average over 90% of the Regional Director's dismissals are upheld

https://thekeep.eiu.edu/jcba/vol0/iss12/26
DOI: 10.58188/1941-8043.1679

Unfair Labor Practice Charges *(cont.)*

- If the Regional Director believes that a violation has occurred, the Region seeks voluntary settlement; otherwise a complaint issues and the case is set for hearing before an Administrative Law Judge; Either the General Counsel or the Respondent can appeal an ALJ decision to the Board for a final determination
- The Board’s decision is subject to review and enforcement by the US Courts of Appeal
- The Regional Director attempts to investigate and resolve high priority charges within 7 weeks of filing.
- Nationally, about 25,000 charges are investigated annually, approximately 1/3 are considered meritorious and 90% of those are settled.

Section 7 of the NLRA

- Section 7 is the core substantive right that protects employees' rights to self-organization, to form, join or assist unions, 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, or the right to refrain from said activities

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Protected Concerted Activity

- What is It?
- Two or more employees seeking to improve their working conditions.
- Must be protected conduct—i.e. related to terms and conditions of employment.
- Must be concerted—two or more employees acting together. However, a single employee seeking to initiate group action is engaged in concerted activity.

Employee Use of Social Media to discuss work place issues

- The NLRB has addressed the issue of employees' use of social media to engage in union or protected concerted activities with co-workers.
- Communicating by social media such as facebook, twitter, e-mail, instant messaging, texting and other devices has replaced the proverbial discussions "around the water cooler"

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When does an employee's message on social media lose protection?

- The Board has established a legal standard for determining when an Employer can discipline its employee for his or her negative comments posted on social media even though they relate to terms and conditions of employment.
- Several recent decisions have analyzed whether an employee's negative posts about its employer should be protected.

Pier Sixty, LLC, 362 NLRB No. 59 (March 31, 2015).

FACTS:

- Respondent operated a catering company and a Board election was scheduled to be conducted.
- 2 days prior to the election, an employee was working as a server and the Assistant Director of Banquets made comments to employees in a harsh tone of voice in front of customers. The employee told the head of the union's organizing effort that employees were sick and tired of the way that this manager talked to employees.

https://thekeep.eiu.edu/jcba/vol0/iss12/26
DOI: 10.58188/1941-8043.1679

Pier Sixty, LLC, 362 NLRB No. 59 (March 31, 2015).

- The employee then vented his frustration with the manager's treatment of servers by posting from his iPhone the following message on his personal Facebook page:

  "Bob is such a NASTY MOTHER F--KER don't know how to talk to people!!!!!! F--k his mother and his entire f--king family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!" [offending letters left out].

Pier Sixty, LLC, 362 NLRB No. 59 (March 31, 2015).

- The employee’s posting was visible to his Facebook “friends,” including some co-workers.
- The employee deleted the posting the day after the election.
- The Employer’s managers learned of the posting and then discharged the employee based on his Facebook comments.

https://thekeep.eiu.edu/jcba/vol0/iss12/26
DOI: 10.58188/1941-8043.1679

Protected Section 7 Activity or Not?

- The employee was discussing terms and conditions of employment-lack of respectful treatment by his supervisors.
- The employee was campaigning for the upcoming union election.
- Should the employee’s intemperate and crude comments cause him to lose the protection under Section 7 of the Act?

Pier Sixty, LLC, 362 NLRB No. 59 (March 31, 2015).

- The Board found that an Employer violated Section 8(a)(3) and (1) by discharging an employee because of his protected, concerted comments made in a posting on social media and applied a totality of the circumstances test to determine that the posting did not exceed the protections of the Act.
- This case has generated a lot of discussion among the labor bar

Pier Sixty, LLC, 362 NLRB No. 59 (March 31, 2015).

- The Board first concluded that the employee's Facebook posting was directed at a supervisors' mistreatment of employees and sought redress through the upcoming union election, and therefore constituted protected, concerted activity and union activity.
- The Board also conclude that the employee's comments were not so egregious as to exceed the Act's protection.

Pier Sixty, LLC, 362 NLRB No. 59 (March 31, 2015).

- The Board applied a totality of the circumstances test. The Board considered:
- (1) whether the record contained any evidence of the Respondent's antiunion hostility; (2) whether the Respondent provoked [the employee's] conduct; (3) whether [the employee's] conduct was impulsive or deliberate; (4) the location of [the employee's] Facebook post; [Continued on Next Slide].

DOI: 10.58188/1941-8043.1679

Pier Sixty, LLC, 362 NLRB No. 59 (March 31, 2015).

- (5) the subject matter of the post; (6) the nature of the post; (7) whether the Respondent considered language similar to that used by [the employee] to be offensive; (8) whether the employer maintained a specific rule prohibiting the language at issue; and (9) whether the discipline imposed upon [the employee] was typical of that imposed for similar violations or disproportionate to his offense." Id. at 2

Pier Sixty, LLC, 362 NLRB No. 59 (March 31, 2015).

- After weighing these factors, the Board concluded: "Although we do not condone [the employee's] use of obscene and vulgar language in his online statements about his manager, we agree with the judge that the particular facts and circumstances presented in this case weigh in favor of finding that [the employee's] conduct did not lose the Act's protection." Id. at 4.

https://thekeep.eiu.edu/jcba/vol0/iss12/26
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Pier Sixty, LLC, 362 NLRB No. 59 (March 31, 2015).

- Member Johnson dissented and would have dismissed the discharge allegation:

"In condoning [the employee's] offensive online rant, which was fraught with insulting and obscene vulgarities directed toward his manager and his manager's mother and family, my colleagues recast an outrageous, individualized griping episode as protected activity. I cannot join in concluding that such blatantly uncivil and opprobrious behavior is within the Act's protection." Id. at 5.

Pier Sixty is pending before the Second Circuit Court of Appeals

- The Court will determine whether or not the employee's comments went too far.
- Are there any ways to avoid this type of communication in the work place?
- Generally, employees are given a wider range of latitude when discussing workplace concerns.

https://thekeep.eiu.edu/jcba/vol0/iss12/26
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National Labor Relations Board

- Questions?

- www.nlrb.gov