Get Your Acts Together, Act V: NLRA

Hi, Employer. It's me. I'm your non-union, private sector employee who works in my cubicle from 9-5 and has never heard of Norma Rae. I don't come to the mutual aid and protection of any fellow worker (my "To Do" list is long enough), and I have little interest in organizing more than my desk.

But the National Labor Relations Act applies to me. *Weird, right?* You see, the purpose of the NLRA is to do more than protect unions. The NLRA protects workers, and that includes me. Don't believe it? It's all there, in Section 7:

*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 except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].*

Is anyone excluded from the NLRA? Of course. Like any good Act, there are exceptions. The following categories of workers are not protected under the NLRA:

- Federal, state, or local government employees
- agricultural laborers
- domestic service employees of any person or family in a home
- employees of a parent or spouse
- independent contractors (be careful here, and watch for misclassification!)
- supervisors (supervisors who have been discriminated against for refusing to violate the NLRA may be covered)
- employees of employers subject to the Railway Labor Act, such as railroads and airlines
- employed by any other person who is not an employer as defined in the NLRA

Employers, Beware!

Unless you fall under one of the above exceptions, you must not interfere with your employees' Section 7 rights. To be blunt: do not attempt to control your employees' advocacy. If a policy is

not narrowly tailored, you risk the NLRB ordering you to cease and desist from enforcing your policies. In recent years, the NLRB has found employers overreaching in the following arenas.

- social media (employers should not attempt to prohibit any negative commentary about the company on Facebook, etc.)
- code of conduct (employers attempting to prohibit employees from saying anything rude or negative in the workplace)
- recording policies (employers attempting to ban all recording devices)

O.K., but that was then …

As the NLRB make up changed from the Obama to Trump administration, aforementioned prohibitions are now outdated. Over the summer, perhaps in a nod to hurricanes, NLRB General Counsel issued a memorandum describing a new way for employers to assess whether certain workplace rules violated employee rights: Categories!

Category 1 Rules are Lawful, and Include:

- Civility rules (such as "disparaging, or offensive language is prohibited");
- No-photography rules and no-recording rules;
- Rules against insubordination, non-cooperation, or on-the-job conduct that adversely affects operations;
- Disruptive behavior rules (such as "creating a disturbance on company premises or creating discord with clients or fellow employees is prohibited");
- Rules protecting confidential, proprietary, and customer information or documents;
- Rules against defamation or misrepresentation;
- Rules against using employer logos or intellectual property;
- Rules requiring authorization to speak for the company; and
- Rules banning disloyalty, nepotism, or self-enrichment.

Category 2 Rules are Case-by-Case and include:

- Broad conflict-of-interest rules that do not specifically target fraud and self-enrichment and do not restrict membership in, or voting for, a union;

- Confidentiality rules broadly encompassing “employer business” or “employee information” (as opposed to confidentiality rules regarding customer or proprietary information, or confidentiality rules more specifically directed at employee wages, terms of employment, or working conditions);
- Rules regarding disparagement or criticism of the employer (as opposed to civility rules regarding disparagement of employees);
- Rules regulating use of the employer’s name (as opposed to rules regulating use of the employer’s logo/trademark);
- Rules generally restricting speaking to the media or third parties (as opposed to rules restricting speaking to the media on the employer’s behalf);
- Rules banning off-duty conduct that might harm the employer (as opposed to rules banning insubordinate or disruptive conduct at work, or rules specifically banning participation in outside organizations); and
- Rules against making false or inaccurate statements (as opposed to rules against making defamatory statements).

Category 3 Rules are Unlawful and include:

- Confidentiality rules specifically regarding wages, benefits, or working conditions
- Rules against joining outside organizations or voting on matters concerning the employer