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NEWSFLASH: Labor Laws Apply to Non-Union Employers

By Warren E. Buliox

I am about to tell you something that may go against everything you have been led to believe: traditional labor laws apply to non-union employees and their employers. Not all labor laws, but enough to trip up any non-union employer who fails to make itself aware of and adhere to these traditional labor laws and the trends in their interpretation and application.

The National Labor Relations Act (the "Act") applies to virtually all employers and operates to protect most non-supervisory and non-managerial employees. As relevant for our purposes, some of the rights and protections afforded to all employees are outlined in Sections 7 and 8 of the Act. Section 7 provides in part that employees "shall have the right" to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 8 of the Act, in turn, makes it an unfair labor practice for any employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act." This means that employers cannot take adverse employment actions against or otherwise discourage employees from exercising rights under the Act.

Most non-union employers know that employees have the right to organize (or attempt to organize) unions in the workplace and that they cannot take adverse action against employees who endeavor to do so. But perhaps where most non-union employers get into trouble is in regard to the rights just mentioned in the previous paragraph.

Consider the following scenario: You are a non-union employer who has just conducted an internal investigation into a harassment complaint by an employee (let's call her Monica). To protect the integrity of the

investigation process and to help curb potential retaliation, your anti-harassment/discrimination policy, which also addresses internal investigations, instructs employees (including the employee making the complaint) to keep any information shared during the investigation strictly confidential. The policy also states that any breach of this confidentiality may lead to disciplinary action, up to and including termination. Upon concluding your investigation, you learn that Monica emailed, instant messaged, and talked to other employees during the investigation to share her story and to see if anyone else had a similar experience. You consider Monica's actions in these regards to be a violation of the confidentiality requirement, and, as a result, you issue her a written warning and place her on a three-day suspension. Some of the employees she talked to (all of whom are non-union employees) learn of her discipline, believe it is overly harsh and unfair, and, in protest, stage a three-day strike/walk-out to coincide with her three-day suspension. You fire those employees without hesitation.

Have you committed any unfair labor practices here? Probably so, and on a few different levels depending on which jurisdiction you are in.

Employees working for union and non-union employers alike have the right to engage in "concerted activity," so long as that activity is protected under the Act. "Concerted activities" generally require two or more employees working together toward a common goal but can also include a single employee working in the interest of other employees or working on issues that affect terms or conditions of employment that concern other employees.

Not all concerted activity is *protected* activity, however. Only those activities aimed at either collective bargaining or "mutual aid or protection" (of other employees or of terms and conditions of employment) qualify as protected activities. The phrase "mutual aid or protection" is broadly defined and includes just about any and all activity designed to improve a term or condition of employment. Significantly, the activity does not have to be union-related and can include activities ranging from raising safety concerns, making complaints about working conditions, or advocating for changes to an employment policy or practice to reporting complaints about a supervisor, aiding another employee with FMLA leave, or participating in an EEOC investigation. It can even include complaints or voiced concerns to a third party, such as customers, clients, or a complete stranger. The only exclusions are those activities that are either illegal, violent in nature, or a breach of contract.

In Monica's situation, her sharing her story with others in violation of the company's confidentiality requirement may not, by itself, qualify for protection under the Act, as her actions may not be considered concerted activity. If, however, Monica shared her story with others to identify a pattern of harassment in the workplace with the hope of exposing and eliminating that harassment, her actions would likely be both "concerted" and "protected" and would qualify for coverage under the Act. In that case,

the company's discipline of her could constitute an unfair labor practice.

The company's termination of the non-union employees who went on a three-day "strike" *may* also constitute an unfair labor practice. Arguably, these employees acted in "concert" in coming to the "mutual aid and protection" of another employee by protesting that employee's treatment and the application of an employment policy that had the effect of punishing employees for (or discouraging employees from) coming together to identify and address work-related issues. Unless the employer can apply one of the exclusions discussed above, it may be held liable under the Act for taking action against these striking employees.

Unfortunately, the problems for the company may not stop there. For instance, the confidentiality provision of the harassment policy may be a violation of the Act, as the National Labor Relations Board ("NLRB") has on occasion held that overly broad policies or practices that curtail an employee's ability to discuss work-related issues violates an employee's rights under Sections 7 and 8 of the Act.

The lesson is this: become familiar with labor laws and their potential effect on your employment practices, even if you have a non-union workforce. The interpretation and application of the law in this area is always evolving, sometimes changing as often as NLRB members change. Therefore, regardless of whether your workforce has been unionized, consult with a seasoned labor lawyer to go over your policies and employment practices to make sure you are operating within the confines of the law.