Advising Private-Sector Clients

Don't Forget The NLRA

BY JON E. PETTIBONE

Recent case law developments under the National Labor Relations Act may surprise lawyers and their clients unaccustomed to analyzing employment issues with that statute in mind.

Nearly all private-sector employers, regardless of whether their employees are unionized, are subject to the NLRA.[1] Employers without unions are increasingly likely to run afoul of requirements and prohibitions under the ever-expanding application of the statute by the National Labor Relations Board (NLRB). The NLRA is just as applicable to private-sector employees who are not represented by unions as those who are in collective bargaining units.

Protected, Concerted Protests

Section 7 of the NLRA guarantees employees[2] the right to engage in protected, concerted activities for the purpose of either collective bargaining or "other mutual aid or protection."[3] The NLRB and the reviewing federal circuit courts have broadly construed that section to protect conduct pertaining to wages, hours, working conditions or other terms and conditions of the employment relationship.[4]

Perhaps the lead case from the U.S. Supreme Court on the concerted activity issue involved the ultimate employee protest—a strike. More than 40 years ago, in *NLRB v. Washington Aluminum Co.*,[5] the Supreme Court agreed with the NLRB that seven employees had been unlawfully discharged for walking off the job because they believed it was too cold in their working area. No union was involved. Today, the outcome in *Washington Aluminum* seems obvious. The employees acted as a group and engaged in a strike because of a working condition. The more difficult cases today involve conduct by a single employee.

The general rule is that an individual employee's conduct will be deemed concerted if the employee acts with another employee or on the authority of at least one other employee. An employee who acts strictly on his or her own behalf is not engaged in concerted activities.[6] Concerted activity is protected under the NLRA if it relates to terms or conditions of employment.[7]

The NLRB will even protect a single employee who acts alone when that employee is seeking to initiate group action on an employment relationship issue. In *Whittaker Corporation*,[8] for example, the company president called employees together to inform them that they would not be receiving their regular wage increases because of economic circumstances. One of the employees in the audience responded that the employees didn't receive bonuses in good economic times, they were being asked to bear the brunt of the economic downturn, and he didn't think it was necessary to withhold raises because he had not seen the employer's books. He was discharged the following day for insubordination.

The NLRB reasoned that the employee's remarks had been directed not only to the corporate president but also to his coworkers and that he had been eliciting their support against the announced change. The NLRB concluded that this was an attempt to initiate group action pertaining to wage rates and, therefore, was protected, concerted activity.[9]

A similar result was reached by the Second Circuit in 2001 in *NLRB v. Caval Tool Division*.[10] The employer's president had called a series of meetings on the subject of productivity. At one meeting, when the president announced a new break policy, which eliminated employees' freedom to leave their work areas to get coffee or attend to personal business, one employee said that the new policy seemed punitive and designed to take away a privilege. She pointed out that employees did not control the amount and timing of the work they received. The president and employee then engaged in an exchange during which the employee said that she would like all of the managers discharged. The president replied that he would direct that a severance package be prepared for the employee, who was suspended soon afterward.

The court, in enforcing the NLRB's decision against the employer, ruled that the employee's questions and comments were concerted, because they were made at an employee meeting and designed to initiate or induce group action. The court found that the comments were protected because they were directed at the new break policy.

Just because employees engage in a concerted protest pertaining to the employment relationship does not guarantee protection under the NLRA. If an employee engages in concerted activity in an abusive manner, he or she will lose protection under the statute.[11] On the theory that passions run high in employment matters, the NLRB allows employees a certain degree of impulsive behavior that it balances against the employer's right to maintain order and respect.[12] Employees also can lose their protection if they disparage an employer's product or services.[13]

Like beauty, however, abusive conduct is in the eye of the beholder.

In the *Caval* case, the employer argued that the employee had been disciplined for her disruptive conduct. The Second Circuit agreed with the NLRB that the employee's conduct had not exceeded the bounds of protected activity.[14] The Ninth Circuit, too, has enforced a similar NLRB decision that employees were protected in their joint letter to 50 advertisers with their employer's newspaper.[15] In the letter, the employees stated that they were underpaid and that the paper was "speeding downhill." Similarly, the Fourth Circuit held that two nurses had been engaged in protected, concerted activity when they had been interviewed on television concerning wages and staffing conditions at the hospital where

they worked.[16] On camera, the nurses had said that there were too few registered nurses on duty to cover the needs of the medical–surgical unit and that the hospital's inability to attract and retain a sufficient number of nurses was directly related to the salary and benefits paid by the hospital. The court agreed with the NLRB's holding that the hospital's discipline of one nurse and refusal to reemploy the other had been unlawful.

Therefore, with or without a union on the scene, an employer will typically violate the NLRA if it retaliates because two or more employees act together to protest compensation or working conditions. Even a lone employee who speaks out against a working condition will be considered protected if the context indicates that the employee was soliciting support from coworkers or acting on their behalf.

Concerted Activities and E-Mail

Application of these principles to e-mail leads to the conclusion that employee e-mail pertaining to compensation and working conditions may be protected under the NLRA. For example, in *Timekeeping Systems*,[17] the NLRB concluded that an employer had unlawfully discharged an employee for sending an e-mail to all employees critical of a newly announced vacation policy.

As with other forms of concerted activities, employees can lose protection if their e-mail goes too far. In *Electronic Data Systems Corp.*,[18] for example, an employee sent an e-mail to coworkers notifying them that a vendor's employees were going on strike. The NLRB concluded that the e-mail was concerted activity. The NLRB also ruled, however, that the employee had lost the protection of the statute when his e-mail went on to encourage coworkers to refrain from sending work to the vendor because that would be an unlawful, partial strike by the coworkers.

An employer arguably can seek to prevent the use of e-mail for nonbusiness purposes provided that it consistently enforces the prohibition. In *E.I. DuPont*,[19] the NLRB held that the employer had acted unlawfully when it inconsistently prohibited the exchange of union-related e-mail while it allowed employees to send to each other personal and nonbusiness e-mail on other subjects.

More recent developments from the NLRB's Division of Advice, essentially a prosecutorial adviser to the NLRB regional offices, have cast doubt on the lawfulness of blanket workplace prohibitions against personal or nonbusiness e-mail. The NLRB long has held that employers may not prohibit employees from soliciting one another for protected purposes during nonworking time, such as breaks and meal periods, or from distributing fliers or other literature on nonworking time in nonworking areas.[20] In a series of cases starting in 1998, the Division of Advice has applied these principles to employee e-mail and concluded that employers may not lawfully prohibit nonbusiness use of their e-mail systems because employees have a section 7 right to solicit and distribute literature during their nonworking time.[21]

In 2002, however, an NLRB administrative law judge (ALJ) concluded that employers may lawfully prohibit nonbusiness use of their computer systems, including e-mail applications, just as they may prohibit nonbusiness use of their telephones, copy machines or other equipment.[22] In another case, an ALJ opined that an employer's prohibition against nonbusiness e-mail was overly broad and interfered with the NLRB's election process.[23] The NLRB itself has not yet issued a decision on this important issue.

Employee Participation Committees

For more than a decade, it has been fashionable in corporate human resource circles to "empower" employees by involving them through the committee process in some management decisions that affect them. While touted as a productivity and employee morale booster, this trend is not without its legal complications.

Section 8(a)(2) of the NLRA provides that it is an unfair labor practice for an employer to dominate, interfere with or support "any labor organization."[24] The NLRB, with federal circuit court approval, has held that committees in which employees participate will constitute labor organizations if they "deal with" management concerning compensation or working conditions.[25] An employer deals with an in-house committee when the committee suggests or makes proposals to management and management responds by word or deed.[26] Therefore, employee committees that address topics such as absenteeism, smoking in the workplace, pay rates, bonuses, attendance and safety will be unlawful if they deal with management and if management sets up the committees and their agendas or otherwise controls their proceedings.

A recent application of these principles is found in *Grouse Mountain Associates II*[27] in which the NLRB found that an employee committee formed to consider such things as daycare, parking, holiday pay, lunches provided by the employer and smoking areas was a labor organization that dealt with management. Monthly meetings were open to all employees. A manager chaired the meetings, scheduled them and recorded minutes. Minutes were furnished to the employer's executive committee for consideration of employee suggestions and recommendations. The NLRB concluded that the employer had unlawfully assisted and supported the committee.

By contrast, an employee committee that actually makes decisions typically made by management, rather than simply making recommendations for management's consideration, does not "deal with" management and will not run afoul of the statute.[28]

Witnesses in Investigatory Interviews

When an employer summons an employee to an interview as part of the employer's investigation of conduct or performance issues, a request by the employee to be accompanied by a coworker or "witness" is not uncommon. In *NLRB v. Weingarten*, the Supreme Court upheld an NLRB decision that, in the union setting, an employee who is asked to submit to such an interview has the Section 7 right, upon request, to the presence of a union representative.[29] Since *Weingarten* was decided in 1975, the NLRB has wavered on the question of whether a similar employee right exists in the nonunion setting.[30]

In 2000, the NLRB again changed course and recognized this employee right

where there was no representative union.[31] The D.C. Circuit, in 2001, concurred that nonunion employers must allow employees to have witnesses present during investigative interviews in certain circumstances. In *Epilepsy Foundation of Northeast Ohio v. NLRB*,[32] two employees jointly authored two memoranda to management seeking the removal of their supervisor. When summoned to separate meetings, one employee refused to attend without the presence of the other. He was later discharged for gross insubordination.

The NLRB held that an employee has a right, upon request, to the presence of a coworker when the employee is interviewed by management, provided the employee reasonably believes that he or she could be subject to discipline as a result of the interview. The D.C. Circuit enforced the NLRB's order requiring reinstatement and back pay.

For the *Weingarten* right to attach, the interview must be investigatory in nature. A meeting called solely to issue discipline does not give rise to such a right.[33] Management has no obligation to negotiate with a coworker present at an investigatory interview. The coworker may not interfere with management's investigation but may ask questions and otherwise reasonably participate.[34] When an employee exercises this right and requests the presence of a coworker, the employer has no obligation under the NLRA to grant the employee's request. Management may elect to forego the interview and conclude its investigation without it.[35] In other forums, however, failure to interview the employee may evidence an incomplete and ineffective investigation.[36]

Employers Can't Prohibit Wage Discussions

Many employers, especially those in high technology or other emerging or expanding industries where compensation rates tend to be more dynamic, seek to avoid employee jealousies and morale problems by requiring that employees keep their own compensation rates confidential. The NLRB, however, has repeatedly held that employers may not adopt policies or practices that prohibit employees from discussing or comparing their compensation, benefits or other terms and conditions of employment. The rationale is that such discussions are classic examples of Section 7 conduct for "mutual aid or protection" and often a prelude to a union organizing effort. In 2002, the D.C. Circuit had occasion to review this principle and enforced the NLRB's order against a hospital that had maintained such a prohibition.[37]

Conclusion

Attorneys should not overlook rights and obligations under the NLRA when advising employers or employees, regardless of the presence or absence of a collective bargaining representative in the work force. Practitioners should remain alert to the continuing evolution of the law under the NLRA. Changes in interpretation and application of the statute are inevitable given the political nature of presidential appointments to the NLRB.

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endnotes

1. 29 U.S.C. § 151, *et seq.* "Employer" under the statute does not include the Federal Government, government corporations, states or their political subdivisions, any Federal Reserve Bank or an employer in the airline or railroad industries. *Id.* § 152(2).
2. Supervisors and other management representatives are not "employees" for purposes of the NLRA. *Id.* § 152(2).
3. *Id.* § 157.
4. Under § 10 of the NLRA, unfair labor practice decisions of the five-member NLRB appointed by the president are reviewable by the federal circuit courts. 29 U.S.C. § 160(e) and (f).
5. 370 U.S. 9 (1962).
6. *Meyers Industries (III)*, 281 NLRB 882, 885 (1986), *enf'd sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied sub nom. Meyers Industries v. NLRB*, 487 U.S. 1205 (1988).
7. *NLRB v. City Disposal Sys.*, 465 U.S. 822, 835 (1984).
8. 289 NLRB 933 (1988).
9. The typical NLRA remedy for unlawful discharge is reinstatement with back pay and

other make-whole relief. 29 U.S.C. § 160(c).
10. 262 F.3d 184 (2d Cir. 2001).
11. *City Disposal Sys.*, 465 U.S. at 835.
12. *Mast Advertising and Publishing, Inc.*, 304 NLRB 819 (1991).
13. *NLRB v. IBEW Local 1229 (Jefferson Standard Broadcasting)*, 346 U.S. 464 (1953).
14. 262 F.3d at 192.
15. *Sierra Pub. Co. v. NLRB*, 889 F.2d 291 (9th Cir. 1989).
16. *Community Hospital of Roanoke Valley v. NLRB*, 538 F.2d 607 (4th Cir. 1976).
17. 323 NLRB 244 (1997).
18. 331 NLRB No. 52 (2000).
19. 311 NLRB 893 (1993).
20. *See, e.g., Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962).
21. *See, e.g., Bureau of National Affairs*, 2000 WL 33941886; *TU Electric*, 1999 WL 337221182; *Pratt & Whitney*, 1998 WL 112978. These cases do not purport to decide whether an employer may lawfully prohibit nonbusiness e-mail sent en masse to large groups of co-workers. *Cf. TXU Electric*, 2001 WL 1792852 (rule limiting number of e-mail addressees to five was lawful); *Texas Utilities Company*, 2000 WL 1741877 (rule against "chain" or "bulk" e-mails unlawfully vague).
22. *The Guard Publishing Co.*, JD (SF)-15-02 (2002), 2002 WL 33963. *See also Adtranz, ABB Daimler-Transportation, N.A.*, 331 NLRB No. 40 (2000) (same result in ALJ decision from which no exception was taken).
23. *The Prudential Insurance Company of America*, JD(NY)-66-02 (2002), 2002 WL 31493320.
24. 29 U.S.C. § 158(a)(2).
25. *See, e.g., Electromation, Inc.*, 309 NLRB 990 (1992), *enf'd* 35 F.3d 1148 (7th Cir. 1994).
26. *See, e.g., E.I. DuPont*, 311 NLRB at 894.
27. 333 NLRB No. 157 (2001).
28. See, e.g., *Crown Cork & Seal Co.*, 334 NLRB No. 92 (2001).
29. *NLRB v. Weingarten*, 420 U.S. 251 (1975).
30. *See Materials Research Corp.*, 262 NLRB 1010 (1982) (right attaches in nonunion setting); *Sears, Roebuck & Co.*, 274 NLRB 230 (1985) (no right in nonunion setting); *E.I. DuPont (III)*, 289 NLRB 627 (1988) (no right; changed rationale).
31. *Epilepsy Found. of Northeast Ohio*, 331 NLRB No. 92 (2000).
32. 268 F.3d 1095 (D.C. Cir. 2001).
33. *San Antonio Portland Cement*, 277 NLRB 338 (1985).
34. *NLRB v. Weingarten, 420 U.S. at 259–260; Epilepsy Found. of Northeast* Ohio, 331 NLRB No. 92, slip op. 5.
35. *NLRB v. Weingarten*, 420 U.S. at 258-59; *Epilepsy Foundation of Northeast Ohio*, 331 NLRB No. 92, slip op. 5.
36. Consider, for example, how this would play before the Equal Employment Opportunity Commission when the employer seeks to defend against a sexual harassment charge based upon the employer's purportedly prompt and thorough investigation.
37. *Brockton Hospital v. NLRB*, 294 F.3d 100 (D.C. Cir. 2002).