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The Employer Strikes Back

Battling the "Dark Side" of the Rising Employee Strike Culture

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Introduction

Employees' rights to engage in protected and concerted activity in the workplace have expanded in recent months. However, despite the National Labor Relations Board's attempts to limit employers' rights to take action, companies are not without recourse. This paper will examine the rights afforded employees under the National Labor Relations Act, including rights to engage in protected and concerted activity and the right to strike, and will also examine the limits on those rights and what companies can do to protect themselves while still championing a positive and productive workplace.

The National Labor Relations Act

The National Labor Relations Act ("NLRA"), enacted in 1935, protects the rights of employees to organize, bargain collectively, and engage in concerted activities for mutual aid or protection. Section 7 of the NLRA specifically guarantees employees the right to:

- Form, join, or assist labor organizations, meaning that employees can establish and become members of labor unions;
- Negotiate with their employers through representatives of their choice regarding wages, house, and other terms and conditions of employment;
- Engage in concerted activities, which include the right to strike, picket, and participate in other actions aimed at improving working conditions or addressing grievances; and
- Refrain from participation in the foregoing activities if an employee chooses to do so.[i]

These rights are intended to balance the power between employers and employees, allowing workers a collective voice in their workplace conditions. The NLRA established the National Labor Relations Board ("NLRB") to enforce these rights and address disputes between employers and employees.

"Protected activities" under the NLRA are intended to allow workers to collectively address and improve their working conditions. Examples of these activities include, but are not limited to:

- Forming, joining, or assisting labor unions;
- Negotiating terms and conditions of employment through chosen representatives;
- Participating in work stoppages or picketing to protest working conditions or employer practices;
- Complaining to an employer or filing charges with the NLRB regarding unfair labor practices.

"Concerted activities" involve actions taken by two or more employees (or one employee acting on behalf of others) to improve their working conditions or address issues with their employer. Such activities include, but are not limited to:

- Employees discussing wages, hours, or other working conditions among themselves;
- Employees collectively presenting grievances to management;
- Signing or distributing petitions regarding workplace issues;
- Discussing work-related issues on social media platforms, as long as it is done collectively.

All concerted activities must be for the mutual aid and protection of employees, meaning that the activities should be aimed at improving terms and conditions of employment, such as safety standards, compensation, or

job security.

While these rights are extensive, there are some limitations. For example, employees' actions must be conducted in a lawful manner, meaning the cannot involve violence, threats, or significant disruption to business operations. Additionally, supervisors and independent contractors may not be covered by these protections. In addition, public-sector employees, agricultural and domestic workers, independent contractors, workers employed by a parent or spouse, and employees of air and rail carriers covered by the Railway Labor Act are not covered.

Employees' Right to Strike – It's Not As Absolute As You Think

The NLRA protects employees' rights to strike. However, those right are limited to ensure that strikes are conducted lawfully and without causing undue harm. The key limitations on an employee's right to strike under the NLRA are explained below.

"Economic strikes" are strikes over economic issues such as wages, hours, and working conditions. Employees engaged in economic strikes can be permanently replaced by the employer. However, they are entitled to reinstatement if they make an unconditional offer to return to work and if their positions are still available or if replacement workers leave.

"Unfair Labor Practice Strikes" are those in protest of an employer's unfair labor practices. Employees striking in these cases have greater protection and cannot be permanently replaced. They are entitled to immediate reinstatement upon their offer to return to work.

The timing and conduct of strikes are important as well. If there is a no-strike clause in a collective bargaining agreement, employees may be prohibited from striking during the term of that agreement. For strikes involving national emergencies, the President of the United States can request at "cooling-off" period during which striking is prohibited. "Jurisdictional strikes" – or strikes aimed at forcing an employer to assign work to members of one union rather than another – are generally prohibited. Strikes that target neutral third parties instead of the direct employer (a.k.a. "Secondary Strikes") are generally prohibited.

Under no circumstances do employees have a right to participate in strikes that engage in violent or destructive behavior. Strikes must be conducted peacefully. Further, intimidating or threatening non-strikers or obstructing access to the employer's property can result in the loss of protection under the NLRA.

Finally, employees who engage in "partial strikes" such as refusing to work certain hours or perform certain tasks while still remaining on the job, may not be protected under the NLRA. Repeated short-term walkouts designed only to disrupt operations without a prolonged work stoppage may also not be protected and subjected to disciplinary action.

Employees' Right to Speak Freely in the Workplace is Expanding

On August 2, 2023, the National Labor Relations Board adopted a strict new legal standard for evaluating the validity of workplace rules under the NLRA. In *Stericycle, Inc.*, 372 NLRB No. 113 (2023), the Board majority overruled *The Boeing Co.*, 365 NLRB 154 (2017) which held that rules, policies, and handbook provisions were treated either as categorically lawful or as subject to a balancing test that weighed employee speech rights against the business needs justifying the policies.

After *Stericycle*, however, the Board returned to case-by-case review of rules and increased its scrutiny of policies. The Board now considers a policy or rule presumptively unlawful if it "could" be interpreted to limit an employee's rights. Policies may be invalidated even if there are alternative interpretations consistent with

enforcing employee rights. Additionally, no longer does the Board consider whether a rule limits protected activities from the standpoint of a "reasonable" employee. Now, a rule or policy will be scrutinized based on the perspective of someone who is "economically dependent" on the employer who created the policy or rule. As a result, rules that are appropriate under normal circumstances may be found improper by the NLRB in its view through the lens of a theoretical employee considering engaging in protected and concerted activities.

The burden will now be on an employer to justify its policy or show that the same result cannot be obtained through a more narrowly-defined policy or rule. In the event the NLRB finds a work rule unlawful under this new standard, the employer must timely remove, redact, or replace the unlawful language and distribute notice to employees acknowledging the violation and providing information about their rights under the NLRA.

Whether this trend of heightened scrutiny by the NLRA will continue remains to be seen. However, employers should review their existing policies and rules to ensure they do not unintentionally (or intentionally) infringe on an employee's rights to engage in protected and concerted activity.

When can an employer take action resulting from an employee's speech – and when *should* they?

In 2023, the NLRB reinstated specific standards for determining whether an employer's response to "abusive conduct" by an employee in the course of exercising Section 7 rights is lawful.[ii] In 1979, the Board set forth a four-part test to apply in cases where the issue is whether employee have been lawfully disciplined after making offensive statements in the course of otherwise-protected or concerted activity.[iii] The balancing test examined (1) the place of the discussion, (2) the subject matter of the discussion, (3) the nature of the employee's outburst, and (4) whether the outburst was, in any way, provoked by the employer's unfair labor practices.

In 2020, however, under the Trump Administration, the NLRB modified the standard.[iv] It held that employers could respond to abusive misconduct, such as making profane, discriminatory, harassing, or disparaging statements, assuming there was no evidence of an employer's discriminatory motive for the Section 7 activity. The NLRB reverted back to the 1979 four-part standard in 2023. As a result, it will now be more difficult for management to rely upon profanity or other abusive conduct as grounds for discharge when the employee's conduct was arguably in the context of Section 7 activity.

Employers may also be concerned about an employee's online or off-duty speech. However, such speech can also be considered protected. So, what can an employer do?

The first thing a company should do is ask the following questions: (1) does the employee's conduct relate in any way to the performance of their job? (2) does the employee's conduct place the company in an unfavorable light with the public? and (3) could the employee's conduct harm the business in any way. The answers to these questions can help guide the company's analysis and next steps in dealing with the situation.

Many employees mistake their "First Amendment" right to freedom of speech as free reign to act and state their opinions both at work and during their personal time. Notably, employees of public agencies have more rights to speak their mind than those in private companies. Private companies, however, have the right to take disciplinary action against individuals who say or do something that negatively affects the workplace or the company's reputation.

An employer can take action resulting from an employee's social media or off-duty speech if:

- the speech violates the employer's policies;

- is derogatory, harassing, or defamatory;
- the speech is likely to cause disruption that is not protected by law;
- the employee reveals trade secrets or confidential company information; or
- the speech is not protected activity under Section 7 of the National Labor Relations Act.

An employer *cannot* take action resulting from an employee's social media or off duty speech if:

- the speech is protected under Sections 7 and 8 of the National Labor Relations Act;
- the employer is not applying policies relating to the speech uniformly;
- the company only knows about the speech because it improperly or unlawfully accessed the individual's social media or password-protected devices.

Section 7 of the National Labor Relations Act guarantees employees "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," as well as the right "to refrain from any or all such activities."

Section 8(a)(1) of the National Labor Relations Act makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." For example, employers may not:

- threaten employees with adverse consequences, such as closing the workplace, loss of benefits, or more onerous working conditions, if they support a union, engage in union activity, or select a union to represent them;
- threaten employees with adverse consequences if they engage in protected, concerted activity;
- promise employee benefits if they reject the union;
- spy on employees or create the impression that they are being spied on for engaging in union activities.[v]

These are just a few examples of conduct that is prohibited under the National Relations Act. "Protected and concerted" activity includes talking with co-workers about wages, benefits and working conditions; circulating a petition asking for better hours; openly talking about pay and benefits; and joining with co-workers to talk directly to the employer, a government agency, or the media about problems in the workplace.[vi] Interfering with these rights can land an employer in hot water with not only that National Labor Relations Board but also the Equal Employment Opportunity Commission and other state and federal agencies.

However, when an employee engages in conduct *not* considered to be protected and which damages the company's reputation or bottom line, a company can take action to correct the message and discipline the employee. Ideally, companies would have time to investigate the alleged conduct, interview witnesses, and develop a game plan for taking action when they learn of an employee's off-duty comments. Sometimes, however, the incident becomes public quickly via social media and companies must manage their message and act swiftly to protect their reputation before undertaking action against the individual.

Companies can minimize the risk of employees engaging in problematic speech in the following ways. They can address known underlying issues between employees before they come to a head. If a company is aware that an employee is upset or is having problems with a co-worker or supervisor, addressing the problem early can prevent a later incident that may prove to be more serious. Companies must also have clear policies in place that address harassment, discrimination, and employee speech that employees are required to read and sign and should conduct training on these policies to ensure employees understand how they apply.

While not all employee "bad behavior" can be addressed before it happens, if companies keep a pulse on their organization and understand how employees are feeling and what problems they are facing they can often get out in front of potential problems within the workforce. When an incident of negative employee speech arises, the key is to act smartly – whether that requires immediate termination and managing the message to the public, or requires an investigation that takes more time. Developing a plan to deal with speech that damages a company's reputation is money well spent if it protects the company from negative public attention or litigation.

[i] 29 U.S.C. §§ 151-169.
[iiii] *Lion Elastomers LLC II*, 372 NLRB No. 83 (2023).
[iii] *Atlantic Steel*, 245 NLRB 814 (1979).
[iv] *General Motors LLC*, 369 NLRB No. 127 (2020).
[v v] https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/interfering-with-employee-rights-section-7-8a1
[vi] https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/employees/concerted-activity