THE LAW DOES NOT APPLY TO US BECAUSE WE DO NOT HAVE A UNION…OR DOES IT?

Why All Employment Lawyers Need to Understand the National Labor Relations Act

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AGENDA

I. Protected Concerted Activity
II. Employment Work Rules
III. Independent Contractor Status

I. Protected Concerted Activity

- Section 7 of the NLRA establishes the right "to engage in … concerted activities for the purpose of … mutual aid or protection."
- Section 8(a)(1) makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7".

I. Protected Concerted Activity

Question: When does employee conduct lose protection?

- *Lion Elastomers,* 372 NLRB No. 83 (May 1, 2023)
- Factual Background: Union committeeman, Colone, is called to a meeting to discuss the quantity of grievances filed on behalf of bargaining unit employees. In the course of the meeting, which gets heated, management representative tells him "you ain't gonna make it."
- This is followed by additional confrontational meetings over many months, eventually resulting in termination of Colone for violation of Company code of conduct.

I. Protected Concerted Activity

- Company argued that Colone’s conduct was not “concerted” and even if it was, he lost the protection of the Act because of his outbursts.
- ALJ and Board found to the contrary, applying *Atlantic Steel Co.,* 245 NLRB 814 (1979), where protection of concerted conduct was based on four factors:
  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 provoked by employer’s conduct.

I. Protected Concerted Activity

- Procedural History: While case was pending on appeal, the NLRB issued its decision in *General Motors LLC,* 369 NLRB No. 127 (2020) which overruled 1) the four factor test of *Atlantic Steel*, along with 2) the totality of circumstances test employed in social media cases involving this same issue, and 3) the standard for picket line misconduct enunciated in *Clear Pine Mouldings, Inc.* 268 NLRB 1044 (1984).
- Circuit court remanded the case to the Board for handling. However, in the meantime, the Board changed and used the opportunity to overrule *General Motors LLC* and return to four factor test of *Atlantic Steel.*

I. Protected Concerted Activity

Take Aways from *Lion Elastomers*:

- Four factor test of *Atlantic Steel* identifies the proper framework for analysis on protection, but all four factors need not be satisfied.
- The test is equally applicable to represented and non-represented workplaces.
- The key is that conduct occurring during the course of protected activity must be evaluated as part of that activity, not in a vacuum.
- The decision also reinstates the totality of circumstances standard applicable to social media cases.

I. Protected Concerted Activity

Question: What makes conduct "concerted"?

- *Miller Plastic Products, Inc.,* 372 NLRB No. 134 (August 25, 2023)
- Factual Background: Vincer, a fabricator in a non-union workplace was frequently cited for chatting and cell phone use while on duty.
- On March 16, 2020, the state announced a closure for nonessential businesses due to the COVID-19 Pandemic. The company took the position that they were an essential business and remained open.

I. Protected Concerted Activity

- At a Company meeting held that day, Vincer became very vocal about his opposition. He stated that the Company did not have the proper precautions in place, and employees should not be working. The company directed that employees keep working pending further clarification.
- Over the following days, Vincer had many conversations with co-workers about this issue.
- The following week, Vincer is observed texting on his phone. He is terminated for "poor attitude, talking, and lack of profit."

I. Protected Concerted Activity

- The company argued that Vincer’s conduct was mere individual griping and not “concerted” activity pursuant to the 2019 decision in *Alstate Maintenance, LLC (*367 NLRB No. 68). *Alstate* had clarified the 1984 *Meyers Industries* test for concerted activity, by holding that such activity must be a group complaint or could be inferred to be a group complaint based on five factors.
- The ALJ, however, held that even under the *Alstate Maintenance* standard, this was concerted activity and the termination violated the Act.

I. Protected Concerted Activity

- On exceptions to the Board, the General Counsel took the position that the result was correct, but *Alstate* should still be overruled because it improperly narrowed the *Meyers* holding on what constituted concerted activity.
- The Board agreed, holding that the "checklist of factors" in *Alstate* imposed a limitation while the "totality of record evidence" standard in *Meyers* should be the appropriate test.

I. Protected Concerted Activity

Take Aways from *Miller Plastic Products*

- Employee conduct can be concerted even in a non-represented workplace.
- An analysis of whether conduct is concerted, and thus subject to the protections of the Act, will consider the totality of circumstances surrounding the conduct.
- This can take place in individual communication, even with non-employees, or in sending emails or speaking out at meetings.
- This is equally applicable to social media cases.

II. Employment Work Rules

- Because Section 8(a)(1) disallows even a perceived threat of reprisal for engaging in Section 7 activity, an employer’s work rules can be facially unlawful even where it does not expressly restrict protected concerted activity.
- In making such a determination, the Board will interpret the work rule from the perspective of an employee subject to the rule and who contemplates engaging in protected concerted activity.

II. Employment Work Rules

Question: When is an employer’s work rule facially unlawful?

- *Stericycle, Inc.,*372 NLRB No. 113 (August 2, 2023)
- Procedural Background: For 20 years, the standard in this area was that set forth in *Lutheran Heritage Village-Livonia, 342 NLRB 646 (2004).*

II. Employment Work Rules

- The *Lutheran Heritage* analysis included:
  1. Does the rule explicitly restrict activities protected by Section 7.
  2. If it does not, the General Counsel must show one of the following:
     a. Employees would reasonably construe the rule to prohibit Section 7 activity;
     b. The rule was promulgated in response to Section 7 activity; or
     c. The rule has been applied to restrict the exercise of Section 7 activity.
- In the years thereafter, there was some degree of confusion and disagreement about the proper application of the rule.
- In 2017, the Board set out to re-write the standard, focusing on the employer’s justification for the employment work rule

II. Employment Work Rules

- In *Boeing Co.,* 365 NLRB No. 154, the 2017 Board found that the flaw of the *Lutheran Heritage* standard was that it did not permit the Board to consider an employer's legitimate business reasons for maintaining a rule.
- It wrote that when deciding the lawfulness of "facially neutral" work rules, it will evaluate two things:
  - (i) the nature and extent of potential impact on Section 7 rights, and
  - (ii) legitimate justifications associated with the rule.
- In *Boeing,* the Board created three categories of work rules.

II. Employment Work Rules

- Two years after *Boeing,* the Board decided *LA Specialty Produce Co.,* 368 NLRB No. 93 (2019), observing that *Boeing* needed to be buttressed with some points of clarification.
- One clarification was that it was not sufficient that a work rule *could* be interpreted as potentially limiting some Section 7 rights.
- Second clarification placed burden on General Counsel to prove that facially neutral policy *would* be interpreted by reasonable employee to interfere with Section 7 rights.

II. Employment Work Rules

- *Stericycle* case began in 2015, and in early 2022 the Board invited briefs from the parties and interested amici to consider whether the Board should adopt a new legal standard where facially neutral work rules were alleged to violate Section 8(a)(1).
- In August 2023, the Board issued its Decision and Order in *Stericycle,* overruling its earlier decisions in *Boeing Co.* and *LA Specialty Produce Co*. The Board returned to a modified version of the *Lutheran Heritage* standard.

II. Employment Work Rules

- *Stericycle* held that when evaluating the facial lawfulness of a work rule, the Board will interpret the rule from the perspective of an employee subject to the rule and who contemplates engaging in protected concerted activity.
- The General Counsel will have the initial burden of proving that a challenged rule has a reasonable tendency to chill Section 7 activity. In meeting that burden, there is a presumption of unlawfulness.
- The employer then will have opportunity to rebut the presumption by proving that the rule advances a legitimate and substantial business need that cannot be advanced by a more narrowly tailored rule.

II. Employment Work Rules

<u>Take Aways from *Stericycle*</u>

- The three categories of rules created by *Boeing* is gone; replaced by shifting burden analysis.
- Analysis of facially neutral work rules is always done from perspective of the employee considering protected concerted activity and recognizes the economic disparity of employee vs. employer.
- *Stericycle* modifies the prior *Lutheran Heritage* standard by giving employers the necessary leeway to maintain rules to advance business interests. Employers simply need to narrowly tailor such rules.

II. Employment Work Rules

Question: When can an employer restrict union insignia in the workplace?

- *Tesla, Inc.*, 371 NLRB No. 131 (August 29, 2022)
- Legal Background:
- As early as 1945, the U.S. Supreme Court affirmed that employees have a protected right to display union insignia under Section 7 of the Act.
- Thereafter, if an employer interfered with an employee’s right to display insignia, it had a burden to show that a “special circumstance” existed.

II. Employment Work Rules

- In 2010, the Board held that an employer cannot avoid the “special circumstances” test simply by requiring uniforms or other designated clothing. *Stabilius, Inc.* 355 NLRB 836 (2010).
- In 2019, however, the Board declined to apply the “special circumstances” test in allowing an employer’s dress code policy that restricted the display of union buttons and insignia. *Wal-Mart Stores, Inc.,* 368 NLRB No. 146.
- In 2021, in processing the *Tesla* case, the Board invited briefs from parties and amici on the question whether *Stabilus* was the proper standard.

II. Employment Work Rules

- Tesla's General Assembly facility in Fremont, CA had a "team-wear policy," which required either that the team-wear uniform be worn, or all black clothing.
- In a 2017 organizing campaign, employees began to wear UAW logos on their clothing or a black UAW shirt. The "team-wear policy" was enforced, and employees threatened with discipline.
- The ALJ applied *Republic Aviation* standard and found the employer's action to violate Section 8(a)(1).
- On exceptions, the Board overruled *Wal-Mart Stores* and reaffirmed that under *Republic Aviation* line of cases, when an employer interferes in any way with employees' right to display insignia, the employer must prove special circumstances.

II. Employment Work Rules

Tesla Take Aways

- For decades, the law has required that employees have a right to display union insignia in the workplace.
- This includes logos of the union or buttons or attire that raise collective issues.
- Any exception is narrow and is subject to “special circumstances” test.
- Tesla could show the need for cotton, black shirts, but could not show why those could not be cotton, black UAW shirts.

II. Employment Work Rules

Question: Can an employer violate the Act by making an offer?

- *McLaren Macomb*, 372 NLRB No. 58 (February 21, 2023)
- *Factual Background.* Because of COVID-19 limitations on certain procedures, McLaren Macomb reduced its workforce and offered severance agreements to 11 bargaining unit employees
- The draft severance agreements that were proffered to the 11 employees included a non-disparagement provision as well as a confidentiality provision. Both of these impacted Section 7 rights.

II. Employment Work Rules

- The severance agreement called for substantial monetary and injunctive sanctions against the employee in the event the agreement was accepted and those provisions violated.
- Legal Background: The Board had long held that agreements that included proscriptions of Section 7 rights were unlawful.
- However, in 2020, the Board reversed this long-settled precedent and replaced it with a test that did not focus on the potential Section 7 impact of such provisions. *Baylor University Medical Center,* 369 NLRB No. 43, and *IGT d/b/a International Game Technology,* 370 NLRB No. 50.

II. Employment Work Rules

- In the Board's 2023 decision in *McLaren Macomb*, it overruled *Baylor* and *IGT,* finding that terms in a severance agreement that impact Section 7 rights, such as non-disparagement and confidentiality, violate Section 8(a)(1) of the Act.
- In *McLaren Macomb,* the Board viewed the proffered severance agreement as a request for waiver of Section 7 rights. The Board pointed out that agreements between employers and employees that restrict employees from engaging in lawful activity under Section 7 have consistently been deemed to be unlawful.

II. Employment Work Rules

McLaren Macomb Take Aways

- Although non-disparagement and confidentiality provisions are common in severance agreements, they are not lawful when offered to employees.
- Even to offer such language is a violation of the Act. An employee's acceptance of the language is not a defense.
- This standard applies only to "employees" as defined in the Act and would not apply to managers or supervisors under the Act.
- It is equally unlawful to include release language in the severance package that would waive the right to file an NLRB charge.

III. Independent Contractor Status

Question: How does the NLRB view independent contractors?

- *The Atlanta Opera, Inc.,* 372 NLRB No. 95 (June 13, 2023)
- Independent contractor status has significance in many areas of employment law, including workers compensation, wage and hour regulations, and the right to organize or have Section 7 protections under the Act. Section 2(3) of the Act explicitly excludes independent contractors from the coverage of the Act.

III. Independent Contractor Status

- Legal Background: The question of whether workers are independent contractors or employees has a rocky history.
- In 2014, in *FedEx Home Delivery,* 361 NLRB 610, the Board refined its approach to assessing whether workers are employees or independent contractors. The Board there asserted that its inquiry would be guided by common law factors set forth in Restatement (Second) of Agency.
- In *FedEx Home Delivery,* the Board expressly rejected the notion that an entrepreneurial opportunity for gain or loss should constitute the "animating principle" of the test. This notion, however, had been endorsed by the U.S. Circuit Court in D.C.

III. Independent Contractor Status

- In 2019, the Board repudiated this approach, and purported to return the Board's independent contractor test to its common law roots. *SuperShuttle DFW, Inc.,* 367 NLRB No. 75. That decision held that "entrepreneurial opportunity has always been at the core of the common law test."
- In *SuperShuttle DFW,* the 2019 Board wrote that it was responding to the gig economy, where entrepreneurial opportunity was key.
- In *Atlanta Opera,* however, the current Board overruled *SuperShuttle DFW* and reinstated the rule of *FedEx Home Delivery,* which applied the common law Restatement of Agency test with multiple factors to be considered, and no one factor being decisive.

III. Independent Contractor Status

The factors to be considered under the common law test include:

- The extent of control which the master may exercise over the details of the work;
- Whether or not the provider is engaged in a distinct business;
- Whether in the locality such work is usually done by a specialist without supervision;
- The skill required in the particular occupation;
- Whether the employer supplies tools and the place of work;
- The length of time during which the individual is engaged;
- Whether payment is made by job or by time;
- Whether the parties believed the relationship to be master and servant;
- Whether the principal is in business.

III. Independent Contractor Status

Atlanta Opera Take Aways:

- In the context of the NLRA, independent contractor vs. employee status is going to impact Section 7 rights. The affected employees (makeup and hair stylists) sought to be represented by a Union.
- The difference in the two standards is quite subtle. In fact, the dissent in *Atlanta Opera* came to the same conclusion as the majority by applying the *SuperShuttle DFW* analysis in this case.
- If an employer chooses to challenge an attempt to organize by arguing that petitioners are not “employees” but rather “independent contractors” the burden is going to be on the employer.