Under Biden, Nonunion Employers Can't Ignore Labor Law

By **Daniel Johns** (August 4, 2021)

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There is a tendency for employers to divide themselves into two groups when considering employee rights under the National Labor Relations Act — those employers that have unionized employees and those that do not.

Employers with unionized employees often are hyperaware of the potential legal issues related to employee actions that may arise under the NLRA. Having experienced the National Labor Relations Board process for union organizing, such employers generally understand the potential for liability with respect to unfair labor practice charges filed by unions or employees.

Nonunion employers, on the other hand, often do not consider employee rights under the NLRA when thinking about legal issues that may arise in the workplace.

But given the Biden administration's focus on aggressive labor law enforcement, those nonunion employers ignore the NLRA at their peril.

Many of the rights that employees have under the act apply with equal or greater force in the context of the nonunion workplace as they do in the union workplace. And a board constituted by appointees from President Joe Biden is very likely to expand the reach of the statute into many nonunion areas.

What is the statutory basis for nonunion employer liability under the NLRA?

Section 7 of the NLRA provides employees with the following rights:

> 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.[1]

In practical terms, the statute protects employees who work together collectively or individually on behalf of themselves and others to improve the terms and conditions of their employment, regardless of whether a union is involved.

Employer concern about a Biden NLRB expanding the reach of employee concerted protected activity in the nonunion workplace is not theoretical.

In March, the NLRB's acting general counsel, Peter Sung Ohr — a Biden appointee — issued a memorandum that made clear that a Biden NLRB will be aggressive in enforcing the law in this area.

In fact, the title of the memo makes clear its intent: "Effectuation of the National Labor Relations Act Through Vigorous Enforcement of the Mutual Aid or Protection and Inherently Concerted Doctrines."

The memo then outlines employee rights in this area and indicates an intent to interpret

expansively the requirement that employee activities be concerted in order to be protected.

As stated by the acting general counsel in his memo:

> Employee discussions of certain "vital elements of employment" often raise concerns that are pivotal to their collective interests, which, in some circumstances, may spur organizational considerations. Concern about these crucial common issues may render group discussions inherently concerted, "even if group action is nascent or not yet contemplated."

There is no way to interpret the acting general counsel's statement here as anything other than a warning to employers about disciplining employees in the context of any attempt to address employee concerns in the workplace, whether collective or otherwise.

Stated simply, a Biden NLRB will likely attempt to expand employee protections in the nonunion workplace.

With that as backdrop, what are some areas that nonunion employers should be thinking about with respect to liability for unfair labor practices under the NLRA?

Workplace Investigations

In recent years, the NLRB has issued a number of decisions that implicate how employers conduct workplace investigations.

Most prominently, the NLRB under President Barack Obama issued several decisions limiting employers' rights to require confidentiality during workplace investigations.

The basic theory of these cases has been that blanket confidentiality requirements during workplace investigations limit employees' ability to engage in concerted activity to protect their jobs — that is, if employees cannot talk about what is happening in an investigation, then how can they collectively affect the results of that investigation?

The NLRB under President Donald Trump, recognizing the importance of confidentiality where employers investigate serious issues, such as sexual harassment in the workplace, allowed employers greater latitude in requiring confidentiality in workplace investigations.

Moving forward, employers should expect the NLRB legal pendulum to swing the other way under a Biden NLRB. So employers should think carefully about confidentiality issues during investigations or risk unfair labor practice charges under the NLRA.

Another issue pertaining to workplace investigations where the law has changed over the years is whether nonunion employees have the right to Weingarten representation during investigatory interviews.

Weingarten rights arose from the Supreme Court's 1975 decision in NLRB v. J. Weingarten Inc.,[2] which held that in the unionized context, an employee has the right to have a union representative present during an investigatory interview related to workplace misconduct.

The NLRB has previously held that such rights should be extended to the nonunion workplace. In those circumstances, rather than having a union representative present, employees instead seek out a co-worker to represent them during the interview.

Currently, nonunion employees do have Weingarten rights. Yet, as with confidentiality, this also may be an area where a newly constituted NLRB changes the law.

Employer Handbooks and Policies

Another area in the nonunion workplace where the NLRA was previously active in finding employer conduct unlawful is employer handbooks and policies.

In particular, the Obama NLRB was aggressive in striking down what many human resources professionals would regard as mainstream employer policies. Some examples include employer policies prohibiting employees from using company email systems for nonbusiness purposes and policies regulating employee use of social media platforms in the context of discussions about their employment.

There are many legitimate legal and business reasons why employers would regulate employee behavior in these settings. There also is no question that a Biden NLRB will become more aggressive in invalidating similar employer policies.

Indeed, many observers believe that the Biden board will quickly look for a case to overturn the NLRB's 2017 decision in The Boeing Co.[3] as soon as legally and practically possible.

The Boeing decision established a framework for balancing employer interests against employee rights under the NLRA in considering whether particular employer policies violate the law.

There is little question that a Biden board will view employer interests in this area as less important than the exercise of employee rights under the NLRA, and thus look to move away from any analysis that balances employer interests in this area.

Leaving the content of employer policies aside, the Obama NLRB also spent considerable time considering and addressing whether at-will disclaimers in employee handbooks impede the exercise of employee rights under the NLRA.

At-will employment is the default rule in most U.S. states, where employees generally may be discharged for any reason as long as it is not illegal or violative of a contract.

At-will disclaimers in employer handbooks make clear to employees the at-will status of their employment.

The potential theory of employer liability under the NLRA for maintaining an overly broad at-will disclaimer is that, depending on the wording of the disclaimer, employees might be led to believe that an at-will employment relationship cannot be altered by unionization and/or the adoption of a collective bargaining agreement.

Again, outside the unionized context, very few HR professionals would approve an employee handbook that did not contain a strong provision notifying employees that their relationship with an employer is at-will.

Employers should be aware that, with a newly constituted NLRB, there may again be questions raised about the legality of such disclaimers.

Employee Misconduct

One final area of potential concern for nonunion employers relates to discipline for employees who act inappropriately in the workplace.

The Obama NLRB often sanctioned and protected employee behavior that, in the nonunion workplace, would likely be viewed as fair game for discipline. For example, In Pier Sixty LLC,[4] the board in 2015 found that an employee's job was protected after he used vulgar profanity to rail against his supervisor on social media.

The end of the post read: "Vote YES for the UNION!!!!!!!"

In almost any context, disciplining an employee for cursing out his or her supervisor (and the supervisor's mother) would be viewed not only as appropriate, but entirely expected.

In the context of concerted activity for other mutual aid or protection under the NLRA, however, employers should scrutinize disciplinary decisions, particularly with a Biden NLRB in place.

Conclusion

As the time for turnover of the NLRB to Biden appointees draws near, nonunion employers should be cognizant of employee rights under the NLRA. It is likely that we are heading for a sustained period of expansion of employee rights in this area.

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[1] 29 U.S.C. Sec. 157.

[2] NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975).

[3] The Boeing Co. and Society of Professional Engineering Employees in Aerospace IFPTE Local 2001, 365 N.L.R.B. No. 154 (2017).

[4] Pier Sixty LLC and Hernan Perez and Evelyn Gonzalez, 362 N.L.R.B. 505 (2015).