Don't Ignore NLRA When Using Employee Resource Groups

By **Daniel Johns** (November 3, 2022)

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Employee affinity groups, also referred to as employee resource groups, or ERGs, have become one of the primary methods employers use to engage employees and increase morale in the workplace.

In their most common form, ERGs involve groups created by employers to further the interests of diverse employees, such as groups organized by race, disability, sexual orientation, veterans' status and other employee characteristics.

Generally, employers do not limit employee membership in ERGs on the basis of the specific characteristic for which the group was created, but instead allow all employees to participate while focusing on promoting the interests of employees with that characteristic. In the current tight labor market,[1] where employers have had great difficulty hiring employees, employers often tout ERGs as an important way to recruit and retain employees.[2]

While there has been much written on the potential legal risks surrounding the creation of ERGs, including the primary concerns of discrimination and harassment liability, less has been written about the potential labor law implications for employers that create and utilize ERGs.[3]

Although many employers would never associate the protections of the National Labor Relations Act[4] with ERGs, an employer that has adopted such committees should assess potential claims under the NLRA with respect to the employer's creation and administration of such employee committees.

For example, ERGs generally are created by employers as a method for engagement with employees. The NLRA, however, generally prohibits employer domination of — or interference with — labor organizations. The definition of a labor organization under the NLRA, however, is broader than just formal local and international unions. Instead, a labor organization may include other employee organizations or committees that are unaffiliated with formal unions.

Because employers often create, fund, organize, facilitate, compensate employees for participating in, and otherwise support ERGs, they run the risk of having committed an unfair labor practice for unlawful domination of a labor organization through the creation and use of ERGs.

Such concerns are often termed Electromation issues by traditional labor lawyers. This characterization is based upon a National Labor Relations Board decision from 1992, Electromation Inc.[5] The Electromation case involved consideration of whether employee action committees created by the employer were labor organizations within the meaning of the NLRA and, if so, whether the employer unlawfully dominated them.

The NLRB found that the action committees violated the NLRA for several reasons. The employer had created them, had representatives serve on them, determined their functions, and ensured that the subject matter of the committees concerned terms and conditions of employment for its employees. In essence, the employer had created and run a committee

that served as a quasi-union with respect to particular issues of concern to its employees.

Clearly, the creation and administration of ERGs by employers has the potential to implicate Electromation liability under the NLRA, particularly if the committees' work results in back-and-forth discussion with employees over issues affecting the terms and conditions of employment for the group's members. As many employers envision such discussion as the very purpose of their ERGs, employers should be careful to weigh the risks of unfair labor practice liability when treading in this area.

Another potential area of concern for ERGs relative to labor law is the NLRA's protections for certain types of employee protest behavior. Specifically, the NLRA gives employees the right to engage in protected concerted activity. These protections exist regardless of whether the workforce is unionized.

Employee action is protected if it relates to the workplace or employee terms and conditions of employment. Employee actions may be considered concerted if it is plausibly on behalf of any other employees. An example of interference with employee rights to engage in protected concerted activity in the context of workplace rules is the NLRB's decisions that prohibit employers from adopting rules that prevent employee discussions about salaries.

The idea behind such NLRB decisions is that employees are unable to engage in protected concerted activity concerning pay if they cannot discuss their respective salaries with other employees.

In that same vein, employer policies related to the adoption and administration of ERGs can implicate protected concerted activity under the NLRA. Because of the potential sensitivity of some issues discussed at ERG meetings — e.g., racial or gender discrimination — employers often attempt to restrict discussion of certain topics at ERG meetings.

However, under the NLRA, employee discussion of some topics and concerns at ERG meetings may be considered protected concerted activity under the NLRA. To the extent employers try to shape the discussion and control employee behavior at these meetings — often with the best of intentions to protect employees—they may run afoul of the NLRA's protections of employee protected concerted activity.

Yet another potential labor law pitfall for ERGs involves the concept of direct dealing. Direct dealing occurs when an employer attempts to circumvent its bargaining obligation with a union by dealing directly with employees about their terms and conditions of employment to the exclusion of the union.

In a unionized environment, the creation of an ERG implicates direct dealing because unions may claim that an ERG group is a vehicle by which the employer is engaging in collective bargaining with the members of the group to the exclusion of the union as the certified bargaining representative.

While likely not a complete roadblock to the creation of ERGs, employers should consider potential challenges under the NLRA when utilizing ERGs. To that end, employers should consider including in any policies relating to ERGs a disclaimer that they are not intended to infringe upon rights under the NLRA, nor are they intended to be a vehicle for bargaining with employees.

Additionally, employers should consider carefully the method of creating and/or recruiting members for ERGs to avoid allegations of domination or interference.

Finally, employers should be careful with respect to any restrictions placed on employee speech during ERG meetings.

Employers often celebrate the benefits of ERGs from an employee-relations standpoint. But ERGs are not without their pitfalls — employers would be wise not to ignore labor law when forming and administering ERGs.

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[1] The current labor market often has been referred to as the Great Resignation as a result of the large number of employees leaving their jobs and the difficulty that employers have had in filling open positions and retaining valued employees.

[2] See, e.g., https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/employee-resource-groups-create-a-sense-of-belonging.aspx.

[3] See, e.g., https://www.law360.com/articles/1180384/managing-the-risks-of-employee-affinity-groups-part-1.

[4] 29 U.S.C. Sec. 151 et seq.

[5] 309 N.L.R.B. 990 (1992).