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LABOR RELATIONS GUIDE FOR THE 21ST CENTURY

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As we venture forward into this new millennium what can we expect to face in the way of labor relations issues? This presentation is designed to identify trends and new challenges in labor and employment law, as well as to provide some practical guidance.

I. EMPLOYEE HAND BILLING.

While most employers are anxiously waiting for President Bush to appoint new members of the National Labor Relations Board ("NLRB" or "Board") to balance the current liberal majority, the "Dashcle Democrats" in the Senate may have other plans. In the meantime, Members Liebman and Walsh, both Clinton appointees, continue to form a liberal majority on cases to which they are jointly assigned and issue very pro-labor decisions. Make no mistake, the Clinton Board is still in power.

One of the most significant labor developments is in the area of union organizing and employee hand billing. In a series of cases against Nevada employers, the National Labor Relations Board has taken the position that employers *cannot* legally prevent their employees or the employees of their lease holders, who are in a non-work status, from entering the company's private property and hand billing customers or employees in non-work areas without demonstrating an impairment of the employer's "legitimate management interests." *See New York New York Hotel, LLC* 334 N.L.R.B. No. 89 (2001); *New York New York Hotel, LLC* 334 N.L.R.B. No. 87 (2001) (companion case); *Santa Fe Hotel, Inc.* 331 N.L.R.B. No. 89 (2000).

Section 7 of the National Labor Relations Act ("NLRA") grants employees the right to organize and engage in other "protected concerted activity." From this right flows the right to handbill. At least from an employer's viewpoint, Section 7 creates tension between employees' statutory rights and employers' "property rights," especially when union representatives and employees seek to conduct organizational and other concerted activities on the employer's private property.

In 1992, the United States Supreme Court, in the case of *Lechmere, Inc. v. NLRB,* 502 U.S. 527 (1992), held that as a general rule, non-employees do *not* have the right to enter private property to solicit employees. The only exception to the general rule, which rarely occurs, is where no reasonable alternative means of communication is available. However, with respect to employee hand billing, the Supreme Court, in a 1945 case called *Republic Aviation*, 324 U.S. 793 (1945), recognized that employees have the presumptive right to use their workplace as a forum for circulating petitions or distributing literature, as long as they do it in non-work areas and during non-work times, and provided that the subject of their activity can fairly be said to bear a relationship to their interests as employees. The reason for this difference was explained by the NLRB in cases like *Automotive Plastic Technologies*, 313 N.L.R.B. 462 (1993), in which it held that employees are not "strangers" to an employer's property as compared to non-employees. Prior to the recent cases involving Nevada employers, the NLRB cases applying the Supreme Court's holdings provided that off-duty employees must be permitted access to parking lots, gates, and other outside non-working areas for the purposes of communicating and soliciting *co-workers* on other shifts. Now, however, the NLRB now recognizes the right of an employer's employees and those of an employer's lease holders to access the employer's property to handbill customers and encourage them not to support the employer.

In the *Santa Fe Hotel, Inc.* case, the NLRB concluded that the Hotel unlawfully enforced its no-distribution/no-solicitation rule to stop off-duty employee hand billing. In September 1994, security personnel stopped three off-duty employees from passing out union literature to patrons as they entered the Hotel through its "old bingo entrance." The leaflets requested patrons' support in the employees' struggle for a fair contract. The Culinary Union had been certified as the bargaining representative for certain of the Hotel's full and regular part-time employees the prior year. Later in February 1995, as part of a union-planned rally, the union sent off-duty employees onto company property to pass out leaflets to customers in front of the main entrance. Hotel security and the police were already on hand as 60-100 people gathered for the rally. As the employees approached the Hotel's entrance, they were met by security, read Nevada's trespass statute, and then issued a trespass citation by a police officer. The Board found that the Hotel violated the NLRA when it denied the off-duty employees the opportunity to handbill.

In doing so, the NLRB agreed that its past decisions clearly provide that the occurrence of non-work activity on part of an employer's property does not, by itself, allow an employer to declare its entire property to be a "working area" for the purpose of excluding employee solicitation activity. The NLRB observed that the main function of the Hotel was to lodge people and permit them to gamble. Thus, it determined that the work activity which the Hotel asserted occurs at the hand billed entrances outside its hotel-casino -- security, maintenance, and gardening -- was incidental to this main function.

Based on this reasoning, the NLRB also found that the New York New York Hotel violated the Section 7 rights of off-duty employees of restaurants located inside the casino when they distributed hand bills to customers in the porte-cochere (valet) area just outside the entrance to the casino. It also relied on prior precedent which provided that employees of a subcontractor of a property owner who work regularly and exclusively on the owner's property are rightfully on that property pursuant to the employment relationship, even when off duty. While the Hotel argued that barring the hand billers was necessary to ensure good service and to protect guests, employees, and its property, the NLRB determined that hand billing did not adversely affect either the customers' ability to enter or leave the facility or the Hotel's employees' ability to perform their customary work.

Even more disconcerting, in a companion case involving the New York New York Hotel, the NLRB held that the Hotel also committed unfair labor practices by prohibiting hand billing in certain non-work areas *inside* the Hotel in front of two casino restaurants. The Hotel argued that the areas in front of the two restaurants are work areas because its employees perform cleaning and maintenance functions there. Unfortunately, the NLRB found that the areas in front of the restaurants are passageways incidental to the Hotel's main purposes and that to hold that such passageways constitute work areas would effectively deny employees the right to engage in protected distribution anywhere on the Hotel's property.

While the new NLRB Chairman, Peter Hurtgen, concurred with his co-members' assessment of the entrance way and valet area hand billing, he dissented as to the interior walkway hand billing, concluding that such areas outside the restaurants are work areas because of their proximity to slot machines, a service bar, and public restrooms serviced by casino employees.

II. CONCERTED ACTIVITY.

Section 7 of the NLRA provides that "[e]mployees shall have 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* . . ." 29 U.S.C. § 157 (emphasis added). The NLRB has interpreted this section to protect employee conduct that is linked to group action or protection. The Board defines such conduct as concerted if it "encompasses those circumstances where individual employees seek to initiate or to induce or prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Meyers Industries, Inc. (Meyers II)*, 281 N.L.R.B. 882 (1986).

These principles apply to all employers, whether their employees belong to a union or not. That means when employees are disciplined for engaging in concerted activity (for example, several employees refusing to work because the employer's offices are too cold), the employer is violating the NLRA. Section 8(a)(1) of the NLRA makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 7." 29 U.S.C. § 158(a)(1). These rights may have nothing to do with unions, but are protected because they are concerted activity for "other mutual aid or protection."

Defining the scope of concerted activity is one area where the still-alive Clinton Board has been especially active. What sort of employee behavior constitutes "protected concerted activity" has been the subject of numerous NLRB decisions within the past eight years. The following cases demonstrate instances where employees have engaged in activities that the Board has found *protected* by the NLRA:

A. A dietary aide at a non-union health care clinic assisted workers with wage-related problems and concerns, despite all employees having received strict orders not to discuss paycheck or money issues with other employees. The Sixth Circuit upheld a Board decision that a rule prohibiting employees from discussing wage issues was a violation of the NLRA, even if the rule was unwritten. The Board's decision that the dietary aide was engaging in protected concerted activity when she assisted her co-workers with their overtime and wage concerns was also upheld by the Court. *NLRB v. Main Street Terrace Care Center*, 218 F.3d 531 (6th Cir. 2000).

B. Three bus drivers were subject to summer layoffs. One of the drivers had applied for unemployment benefits during past summers. The employer had unsuccessfully opposed the award of benefits. The driver encouraged the other two drivers to file for unemployment during the layoffs, which they did. The drivers met at the unemployment office and filled out the necessary forms. All three drivers were informed that they were no longer eligible for rehire. The NLRB held that the filing of applications for unemployment benefits was protected concerted activity under the NLRA and that the employer's actions were therefore unlawful. *Tri-County Transportation*, 331 N.L.R.B. No. 152 (2000).

C. Non-union employees of a cardiac cauterization laboratory in an acute care facility walked off the job after meetings with management regarding nursing support, patient scheduling procedures and work load levels. The employees were terminated for patient abandonment and endangering the lives of patients. (One doctor had to transfer a patient to another hospital for emergency care due to the walkout). The walkout was held to be protected concerted activity because of the subjects causing the walkout and because the Board found that the walkout did not create any risk of harm

to patients. *Bethany Medical Center*, 328 N.L.R.B. No. 161 (1999).

D. Employees who painted objects on a plastic line arrived at work to find that the temperature in the spray paint booths was between 107 and 110 degrees. The employees began to complain to one another about the heat, and one of the employees approached the foreman about leaving early. The employees believed they had permission to leave, but the employer insisted it had not given them permission. The employees were then fired for leaving the job without permission. The NLRB held that the discussion between the employees, along with the employee speaking to the foreman regarding their concerns, was protected concerted activity and thus the discharge of the employees was unlawful. The Board ordered reinstatement with back pay and benefits, and ordered the employer to cease its unlawful practices. *Magic Finishing Co.*, 323 N.L.R.B. No. 8 (1997).

E. Four employees, without discussion or protest, clocked out of work, ignoring a foreman's request that the employees work overtime. The employees were terminated for insubordination. The Board found that the activity was protected concerted activity, even though there had been no discussion or mutual decision. The Board held that because the employees previously had protested the implementation of a 36-hour work week, stating that the job could not be done in that time, the refusal to work overtime was a logical outgrowth of the prior protest and the activity was related to the terms and conditions of employment. The Ninth Circuit agreed and enforced the Board's order. *NLRB v. Mike Yurosek & Son, Inc.*, 53 F.3d 261 (9th Cir. 1995).

F. The Chief Operational Officer of a small company sent an e-mail proposing changes in the employer's vacation policy. One employee responded to the e-mail with harsh criticism of the proposed changes. To garner support for his criticism, the employee sent his reply to co-workers. When the employee refused to apologize, he was discharged. The Board found that the e-mail constituted protected concerted activity despite the fact that there was no indication of group action and that the e-mail used an arrogant, sarcastic tone. The Board held that contacting the other employees regarding a concern about benefits made the activity protected under the NLRA. *Timekeeping Systems*, 323 N.L.R.B. No. 30 (1997).

G. In a case being handled by Kamer Zucker & Abbott, an employer was conducting an investigation regarding the illegal acts of an employee. Employees who were interviewed during the investigation were given strict orders not to discuss the investigation with anyone. Two employees disregarded the order and discussed the investigation. Because the discussions of the two employees compromised the investigation, the employees were discharged for insubordination. An Administrative Law Judge found that discussion of the employer's investigation with other employees was protected concerted activity and that the discharge violated the NLRA. *Desert Palace*, ALJ Decision, August 25, 1998 (appeal to the NLRB pending).

III. EMPLOYEE INVOLVEMENT/PARTICIPATION COMMITTEES.

On July 20, 2001, the NLRB unanimously ruled that employers' use of employee participation committees are legal provided that they are designed to perform functions that would otherwise be performed by management. *Crown Cork & Seal*, 334 N.L.R.B. No. 92 (2001). Previous rulings by the Board, such as its decision in *Electromation, Inc.*, 309 N.L.R.B. 990 (1992), had cast substantial doubt on the legality of such committees and prompted Congress to pass legislation, the TEAM Act, which was eventually vetoed by President Clinton.

Both Republican and Democratic Boards had previously and routinely took the approach that employee groups which meet with management to address any matters that touch upon their "terms and conditions of employment," are illegal employer-dominated labor organizations under Section 8(a)(2) of the National Labor Relations Act. Section 8(a)(2) defines a labor organization as an entity that "exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." In past decisions, the NLRB explained that "*dealing with employers*" involves a bilateral mechanism where employee committees make recommendations about terms and conditions of employment and management responds by either accepting or rejecting the proposals.

Based on its reasoning in *Crown Cork & Seal*, the NLRB will exclude employee involvement groups from the definition of labor organization *if* they are performing a function that would otherwise be performed by management. The committees at Crown Cork & Seal exercised authority to operate the plant within set limitations. Since the plant's opening in 1984, the employer used a management system called the "socio-tech system," designed to delegate substantial authority to employees to operate the plant through service on permanent and temporary committees that reach decisions through joint discussion and consensus. The teams made and implemented decisions regarding production, quality, training, attendance, safety, maintenance, and various types of discipline. Decisions by these committees were reviewed by a management team and the plant manager, and were rarely overturned.

The NLRB rejected the argument that illegal "dealing" was occurring because the committees lacked final decision making authority. In doing so, it noted that few, if any, supervisors in a conventional plant possess authority that is final and absolute and observed that what was occurring at Crown Cork's plant was the familiar process of a managerial recommendation making its way up the chain of command.

IV. CYBER COMMUNICATIONS AND CAMPAIGNING.

Even the smallest of employers have recognized the utility of web sites and Internet access for marketing products and services. Not as many recognize the advantages of using a company web site as a means of communicating with its employees. Unfortunately, labor unions have realized the benefits of electronic employee communication. Almost every union, from the largest international labor organization to the smallest local union, have a web site designed to lure your employees. One union web site of particular interest is www.iww.org, maintained by the Industrial Workers of the World ("IWW"). It has detailed subsections on union organizing such as how to infiltrate and "salt" a company, how to "fire your boss," how to structure and run a strike, and even how to engage in sabotage! These union web sites provide "24/7" access to your employees and are often modified on a daily or weekly basis to direct propaganda at particular employers during organizing campaigns.

In addition to making sure that they have detailed computer, e-mail, and electronic media use policies in place, employers need to seriously examine modifying their web sites or creating new employee-oriented web sites, particularly for use during organizing campaigns. Companies such as Projections, Inc. offer password protected, customized, and interactive web sites that provide pro-company information as well as the true facts about unions. These types of web sites were used with success during the recent union campaigns conducted by the Transport Workers Union in Las Vegas to organize casino dealers.

V. WITHDRAWAL OF UNION RECOGNITION.

The NLRB has now made it even harder to get rid of a union that has lost majority support. Overturning fifty years worth of prior precedent, the NLRB on March 29, 2001 made it extremely difficult for an employer to remove a union that the employer believes is no longer supported by a majority of employees. In *Levitz Furniture Co. of the Pacific*, 333 NLRB No. 105 (2001), the NLRB ruled that employers can no longer withdraw recognition from a union after establishing a good faith and reasonable doubt that the union retains majority support. Now, an employer *must be able to prove that a union has actually lost the support of the majority of employees*. Effectively, the only way an employer can safely insure that it can meet this burden is by filing a petition seeking a "RM election" conducted by the NLRB. While the NLRB made it somewhat easier for employers to seek RM elections, allowing employers to obtain such elections by demonstrating good-faith reasonable uncertainty as to a union's continued majority support, the specific types of evidence that are probative of such uncertainty will be decided by the NLRB on a case-by-case basis.

In reaching its decision in *Levitz*, the NLRB also failed to appreciate that unions can slow down the processing of RM elections, often for years, by filing unfair labor practice charges ("ULPs") against the employer, which pursuant to the NLRB's regulations, "block" the election until the ULPs are finally resolved. Additionally, a union that loses a RM election can further delay the outcome by filing election objections or challenges.

The *Levitz* case illustrates how increasingly difficult it is to get rid of a union as opposed to the ease with which an employer can be compelled to recognize and bargain with a union. This case is another loud wake-up call for employers to step up their union avoidance training of managers and supervisors.

VI. TEMPORARY EMPLOYEES.

In M.B. Sturgis, Inc. and Jeffcoat Division, 331 N.L.R.B. No. 173 (2000), the Board overruled previous precedent regarding whether temporary employees should be included in the bargaining unit of regular employees for purposes of collective bargaining. Previously, it was well-established that a unit including employees of both a "user employer" and a temporary "supplier employer" was a multi-employer unit and could not be appropriate without the consent of all employers involved.

In reversing this precedent, the Board found that the user employer and the supplier employer were joint employers, sharing or co-determining matters governing the essential terms and conditions of employment, including hiring, firing, discipline, supervision and direction. The Board then concluded that a bargaining unit "composed of employees who are jointly employed by a user employer and a supplier employer, and employees who are solely employed by the user employer, is permissible "without the consent of both employers." The Board adopted a "community of interest" approach to determine whether the temporary employees and regular employees should be included in the same bargaining unit.

This decision could have drastic consequences for employers who use temporary employees, as many of these employees now have organizational rights and representation election voting rights. Indeed, the Democratic majority of the NLRB continues to push the envelope on implementing this decision. In June, the NLRB reversed a Regional Director's prior election determination and *included* a group of temporary staffing agency employees in a unit of production and maintenance employees. *See Outokumpu Copper Franklin, Inc.*, 334 N.L.R.B. No. 38 (2001). The Regional

Director had concluded that the temporary employees had dissimilar terms and conditions of employment which supported excluding them from the unit. The NLRB disagreed and found the temporary employees shared a community of interest with the regular employees.

VII. REPRESENTATION AT INVESTIGATORY MEETINGS.

By now almost everyone is familiar with *Epilepsy Foundation of Northeast Ohio*, 331 N.L.R.B. No. 92 (2000), the NLRB decision which gave non-union employees the right to have a co-worker present during investigatory meetings. Most supervisors working for unionized employers have come to learn how to deal with these investigatory meeting representatives as they investigate a disciplinary incident. However, based on the *Epilepsy* case, employers whose employees are not represented by a union must now learn about their responsibilities regarding employees' rights to co-worker representation during workplace investigations.

In a nutshell, an employee's right to representation only arises if he or she actually requests it. Employers are not obligated to advise employees of their right to representation. The employee must have a reasonable belief that the investigatory meeting may result in some disciplinary action. Investigatory meetings include, believe it or not, drug tests. If the meeting is to advise the employee of management's disciplinary action and no investigation is planned, then there is no right to representation. Employers can refuse to conduct an investigation in the presence of the employee's representative and proceed without the benefit of the meeting, but this is rarely a good idea. One alternative is to allow the employee to submit a written response to certain questions or facts.

There is still some hope for employers that the *Epilepsy* decision will not be enforced by the United States Court of Appeals for the District of Columbia. The case has been appealed and oral argument is currently scheduled for October 2, 2001. If the appeal is successful, however, the Board normally continues to enforce its prior decision in all federal circuits that have not expressly refused to do so. Therefore, Nevada employers would still be subject to the *Epilepsy* decision and would have to litigate the matter before the NLRB and appeal to either the D.C. Circuit Court or the United States Court of Appeals for the Ninth Circuit.

With respect to drug testing, the NLRB, in *Safeway Stores, Inc.* 303 N.L.R.B. 989 (1991), examined the case of an employee who was discharged for refusing to take a drug test based on the employee's excessive absenteeism. The employee sought union assistance, which the employer refused to allow. The NLRB found that because the drug test was part of an inquiry into the attendance record of the employee, there was an objective likelihood that the employee would seek out union assistance because of possible discipline for his absences. Therefore, the NLRB held that the employee's "*Weingarten* rights" had been violated and that the discharge was unlawful. However, the NLRB refused to state that *all* drug tests were investigatory interviews for *Weingarten* purposes. While there are no cases applying this rule of law in a non-union setting, because the *Epilepsy* decision is premised on the body of law that has been developed based on union employees' *Weingarten* rights, employers should be prepared to address this contingency in any situation where an employee's drug test result could lead to disciplinary action.

Generally, if there are no union representatives available, the employee cannot be compelled to participate in the investigation. *Williams Pipeline Co.*, 315 N.L.R.B. 1, 5 (1994). However, NLRB General Counsel has issued a non-binding advice memorandum regarding the necessity for promptness in drug and alcohol tests. In the situation examined by the General Counsel, an employer requested that an employee submit to a sobriety test. The employee demanded union representation, but no one was available. The General Counsel concluded that because the sobriety test had to be administered promptly, the employer was privileged to deny the request for a union representative at the plant prior to the administration of the sobriety test. This "privilege" exists only if: (1) there is a good faith need for a prompt test; and (2) the employer made a good faith effort to find a union representative. *Yellow Freight System, Inc.*, 17-CA-11531, NLRB General Counsel Advice Memo. (May 31, 1983). With respect to a non-union setting, it will be much harder to show that no other employee representative is available to be present.