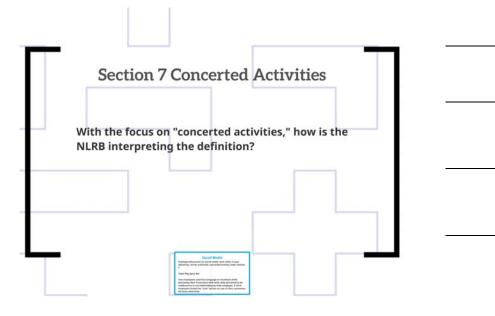


focusing only certain parts of this section lately, though... Section 7: "Employees shall have the right to selforganizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection..." This phrase has formed the crux of most of the recent NLRB decisions and interpretations Section 7: "Employees shall have the right to As union participation declines, the NLRB has engage in other focused heavily on this concerted activities for the purpose of particular wording to extend mutual aid protections to employees in or protection..." non-union environments. This phrase has formed the crux of most of the recent NLRB decisions and interpretations And naturally, interfering with rights afforded under Section 7 is impermissible: Section 8: "It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights

guaranteed in section 7"

The NLRB has been really



#### Social Media

Employee discussion on social media, even when it uses obscenity, can be protected, concerted activity under Section 7.

Triple Play Sport Bar:

Two employees used foul language on Facebook while discussing their frustration with what they perceived to be malfeasance in tax withholding by their employer. A third employee clicked the "Like" button on one of their comments. All three were fired.

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According to the NLRB, the employees were discussing the terms and conditions of employment, which has been interpreted to be protected concerted activity under Section 7.

Also, clicking the "Like" button is considered to be protected activity as well.

This interpretation was recently upheld by the Second Circuit.



Also at issue in the Triple Play case was the employer's internet and blogging policy, which stated: "engaging in inappropriate discussions about the company management, and/or co-workers, the employee may be violating the law and is subject to disciplinary action, up to and including termination of employment." The NLRB found that this policy could reasonably be seen to stifle Section 7 protected activity and was invalid. The Second Circuit also affirmed this holding. The bottom line: Employee social media activity is NOT protected if: 1. It is overly disparaging or defamatory towards the product or service provided by the employer 2. The employee threatens subordination or other malfeasance Employer social media policies cannot prevent employees from engaging in protected, concerted activity online. In other words: do not stifle employee speech off the clock. Employer social media policies cannot prevent employees from engaging in protected, concerted activity online. In other words: do not stifle employee speech off the clock. There are other workplace policies that can run afoul of Section 7, according to the NLRB, so employers now should carefully review

their...

EMPLOYEE HANDBOOKS	
The NLRB provided guidance on standard employee handbook policies, and the results are not pretty.	
The following items are prohibited, generally:	
- Confidencing profess for the search profess strategies on discoursing, publishing and great and discoursing, publishing and final profess part great and extension of peoply for action consequences when the profess of the confidence of the confidence to allowed a final profession of informations.	
I rivers the first confidence regarding profits and entirely reconstructed at entirely and entirely reconstructed at entirely and entirely reconstructed and entirely. In the confidence of the confidence of the confidence of the confidence of the of the confidence of the confidence of the desirable of the confidence of the confidence of the confidence of the confidence of the confidence of the confidence of the confidence of the confidence of the confidence of the co	
emisplant is his injuncted at maximum, unsupplant is so filter and injunction at set etc., to see a set of the set of t	
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Confidentiality policies that broadly	
prohibit employees from discussing, publishing or disclosing any type of	
information regarding fellow employees, unless the policy doesn't cause employees	
to believe that confidential information includes conditions of employment.	
<ul> <li>Policies that ban discussions regarding unionization, political matters, labor</li> </ul>	
policies and employer's treatment of employees. Policies can ban unlawfully	
harassing comments towards coworkers, though.	
though.	
though.	
Policies that prohibit disparagement of	
the company or management, including on social media. Policies that require	
employees to be respectful to customers, competitors or fellow employees are okay,	
however.	
Media policies that prohibit contact with	
third parties. A policy that makes clear that employees cannot speak on behalf of	
the company are acceptable.	
Bans on recording devices that could be	

Bans on recording devices that could be interpreted to prohibit use during nonwork attempts or attempts to document health and safety violations or unfair labor practices. A limited scope policy that bans news cameras but not personal cameras is acceptable.	
<ul> <li>A policy that regulates when employees may permissibly leave work that might be construed to prohibit strikes and walkouts. If such a policy clarifies that such actions are permissible by employees, the policy is probably acceptable.</li> </ul>	
<ul> <li>A policy that regulates when employees may permissibly leave work that might be construed to prohibit strikes and walkouts. If such a policy clarifies that such actions are permissible by employees, the policy is probably acceptable.</li> </ul>	
<ul> <li>A conflict-of-interest policy that could be construed as prohibiting protesting in front of the company, organizing a boycott or soliciting union support on non-work time.</li> </ul>	
The bottom line:	
Do not put in place policies that employees would reasonably believe would restrict them from discussing the terms and conditions of the workplace with coworkers or third parties, and don't restrict any activities that could reasonably construed as attempts to improve, expose, protest,	
boycott or otherwise shed light on the workplace environment.	

# What else is protected, concerted activity?

Discussing job security -

Sabo, Inc.

An employee was fired for telling a fellow vending machine delivery driver about a classified ad she saw from her company. This caused speculation that the company was about to fire someone and she was fired for stirring up trouble. NLRB says this is protected.

Filing a class-action lawsuit -

200 E. 81st Restaurant Corp.

An employee believed the restaurant he worked for was violating the Fair Labor Standards Act, so he filed a class-action lawsuit. The restaurant then fired him. The NLRB said this is protected, concerted activity, even though not a single other employee joined the suit.

# **Joint Employers** Browning-Ferris Industries of California, Inc. The NLRB also recently adopted a more liberal standard with regard to how it defines joint employers for purposes of NLRA liability. In Browning-Ferris, the NLRB rejected a decades-old rule that defined joint employers as having actual control of the employees of another. Under the new standard, two businesses that "share or codetermine those matters governing the essential terms and conditions of employment" are considered joint employers. The test begins with an analysis of whether a business has a common-law employment relationship with the employees of the other business. If so, the analysis then shifts to whether the business has a threshold level of control over the essential terms and conditions of employment

Under this new standard, parent companies could be more frequently held liable for labor violations of subsidiaries.



### **New Election Rules**

Possibly the most shocking development from the NLRB was the adoption of new union election rules that speed the election process up to as quick as 13 days.

Under the new rules, unions file electronically with the NLRB and simultaneously with the employer. A preelection hearing is held seven days later on issues only concerning the election.

The employer is now required to submit a list of prospective voters and other relevant info such as e-mail addresses and phone numbers of employees.

These rules allow for union elections within 13 to 22 days after filing of the notice by the union, signaling a significant departure from the old rules which incorporated an automatic 25-day waiting period following the direction of election and allowed employers 42 days to conduct informational campaigns.

Employers concerned about the new union election rules should adopt a policy of year-round campaigning, as well as adopting a strategy of how to counter ambush elections should they occur.

## Any questions?

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