The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2009

PHILADELPHIA, MONDAY, JULY 27, 2009 VOL 240 • NO. 19 An incisivemedia publication

EMPLOYMENT LAW

How the National Labor Relations Act Affects Non-union Employees

BY DEBORAH WEINSTEIN AND ROBERT J. HAURIN
Special to the Legal

For the last year, we have been bombarded with articles and information about the potential impact of the proposed Employee Free Choice Act, an amendment to the National Labor Relations Act. The EFCA, also known as the "card check" bill, certainly deserves our attention because its adoption would make it easier for unions to organize. But whether it's a business owner who is dubious of having a unionized workforce or labor leaders who decry employer tactics during union organizing campaigns, what is frequently lost in the ongoing debate over the EFCA is that the NLRA — amended or not — already applies to private sector employers and their employees.

Our experience has been that, while many non-union employers have heard of so-called "Weingarten Rights," most are unaware of just how profound an effect the NLRA has on their own workforces.

The NLRA may be triggered by everything from selling Girl Scout cookies or Mary Kay products at work to policies such as confidentiality and use of e-mail and other electronic communications for personal, commercial and union-related reasons.

As a result, private sector employers should consider not only whether their employee handbooks and policies comply with the NLRA but also whether the manner in which such policies are enforced implicates the NLRA. The National Labor Relations Board, the federal body that administers the NLRA and decides cases interpreting it, has made clear in several recent decisions just how important it can be for employee policies to comply with the NLRA. Not doing so may prove to be a very costly oversight.

WEINSTEIN **HAURIN**

DEBORAH WEINSTEIN *is president of The Weinstein Firm, a Philadelphia legal and consulting firm that focuses exclusively on employers' workforce issues. For the past 10 years, she also has taught employment law to undergraduates at The Wharton School. She can be reached at 215-636-0616 or at dweinstein@weinsteinfirm.com.*

ROBERT J. HAURIN *is a labor and employment attorney with the firm. He can be reached at 215-636-0616 or at rhaurin@weinsteinfirm.com.*

SECTION 7 RIGHTS

Section 7 of the NLRA, 29 U.S.C. § 157, provides: "Employees shall have the right to self-organization, to form, join, or assist a labor organization, 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 and protection."

In addition to being guaranteed the right to join a union and engage in union activity, Section 7 guarantees employees the right to engage in concerted activities for their mutual aid and protection. Section 7 rights are afforded equally to union and non-union employees. As a result, an employer who disciplines or otherwise interferes with an employee for engaging in Section 7 activity may be committing an unfair labor practice.

Over the last several years, the NLRB and courts enforcing its orders have invalidated several employment policies and disciplinary decisions that applied to non-union workers because the policies interfered with an employee's Section 7 rights. These decisions range from policies and practices involving discussions among employees about compensation levels to policies that required employees to lodge work-related complaints through an employer-provided complaint procedure or else face possible discipline.

A recent case decided by the U.S. Circuit Court of Appeals for the District of Columbia, enforcing a board order, illustrates the broad reach of the NLRA and its implications for non-union employers. In *Cintas Corp. v. NLRB*, the court enforced a board order invalidating an employer's ostensibly innocent confidentiality policy. The confidentiality policy at issue stated: "We honor confidentiality. We recognize and protect the confidentiality of any information concerning the company, its business plans, its partners, new business efforts, customers, accounting and financial matters."

The *Cintas* court found that this provision of the employee handbook violated the NLRA because employees could have reasonably determined that the policy prohibited them from discussing the terms and conditions of their employment with other employees or outside parties such as a labor organization. The board took issue with the use of the word "partners" in the policy as Cintas referred to its employees as partners. Thus, the policy, which was never enforced by the employer, was found to be unlawful because its maintenance might chill "Section 7 activity." Central to the board's inquiry in *Cintas* and other cases that have invalidated HR polices was whether the policy at issue could be construed by employees as being a prohibition on the exercise of their protected Section 7 rights.

WHAT ARE CONCERTED ACTIVITIES?

Non-union employees are entitled to the protections of the NLRA when they engage in "concerted activities." Typically, an employee must be engaged in activities with another employee or must be acting on the authority of other employees to be engaged in concerted activities. An employee, however, need not be designated as the representative of other employees. Rather, an employee who is acting merely with a purpose of furthering group goals is engaged in concerted activities.

Concerted activities include the right of employees to communicate with one another over the terms and conditions of employment, including matters related to compensation. Thus, a rule will run afoul of the NLRA where it prohibits employees from discussing their wages with one another. A confidentiality policy that prohibited employees from discussing, among other things, salary information and pay increases was found to violate the NLRA in *Double Eagle Hotel & Casino*. The board again focused on whether the policy could reasonably be interpreted by employees as restraining the exercise of their Section 7 rights.

Concerted activities could also involve an employee merely speaking on behalf of other employees. For example, in *NLRB v. Main Street Terrace Care Center*, the 6th U.S. Circuit Court of Appeals concluded that an employee was engaged in concerted activities when she talked with management about the wage-related problems of other employees. Additionally, protests by an employee on behalf of other employees concerning wages, hours and working conditions, as well as the presentation of job-related grievances, have been held to be concerted activities protected by the NLRA.

MUTUAL AID AND PROTECTION

In order for concerted activities to be protected under Section 7, it also must be for the "mutual aid and protection" of other employees. Activity for mutual aid and protection embraces the notion that employees are working for a common cause, and is often referred to as "protected concerted activity." The linchpin for determining whether activities are for the mutual aid and protection of other employees is to consider if others might be affected as a result of the activities in question.

Thirty-one years ago, the U.S. Supreme Court held that the mutual aid and protection clause extended beyond activities involved in the immediate employment relationship. (See *Eastex v. NLRB*.) The court then concluded that employees were engaged in protected concerted activity when they leafleted in support of a proposal that would increase the minimum wage.

INTERFERENCE WITH SECTION 7 RIGHTS

Section 8(a) of the NLRA, 29 U.S.C. § 158(a), describes what constitutes an "unfair labor practice." Section 8(a)(1) provides that a non-union or union employer commits an unfair labor practice when it interferes with, restrains or coerces employees in the exercise of their rights to organize, bargain collectively and engage in other concerted activities for their mutual aid and protection.

This section has been broadly applied to non-union workforces so as to encompass a myriad of actions by non-union employers. The board's interpretation of the meaning of an unfair labor practice reveals just how broad the sweep of the statute is and the profound impact the NLRA has even when employees are not members of a union.

The board has ruled that an employer commits an unfair labor practice by:

- Terminating a group of employees who walked off the job to complain about their supervisor.
- Disciplining an employee for questioning the president of a company who was discussing with employees a change in the company's break policy.
- Terminating an employee who placed a call to the Department of Labor to inquire about whether employees are entitled to holiday pay.
- Terminating a salesman for being an "outspoken critic" against special two-hour meetings where sales personnel were required to attend without compensation before a store opened.
- Disciplining a sales representative for complaining about a change in the commission plan presented by a vice president during a meeting with all sales representatives.
- Disciplining an employee who spoke to other employees about her compensation, in violation of the employer's written policy prohibiting such communications.

So what about selling Girl Scout cookies at work? Or Mary Kay cosmetics? It is entirely up to the employer. If, however, the employer allows solicitations such as the sale of Girl Scout cookies and Mary Kay cosmetics at work, then, pursuant to the NLRA, it may not deny a union the ability to solicit employees at work to join a union.

As to that familiar phrase, "Weingarten Rights," many employers have an outdated view of the law on this topic — understandably so because the NLRB has waffled on the issue of whether non-union employees enjoy these rights. Weingarten Rights got their name from a 1975 U.S. Supreme Court opinion holding that a union employee was entitled to have a union representative present during an investigatory interview with an employer when the employee had a reasonable belief that the interview might lead to discipline. (See *NLRB v. Weingarten*.) Thereafter, the board extended Weingarten Rights to all employees — union or not — but in 2004 reversed itself, concluding that non-union employees had no Weingarten Rights. (See *IBM Corp*.)

As a result, for now, non-union employees do not enjoy Weingarten Rights. Because the board's flip-flop on this coincides with changes in the administration, it would not be surprising for the pendulum to swing back during the current administration.

What is frequently lost in the ongoing debate over the EFCA is that the NLRA — amended or not — already applies to private sector employers and their employees. •