Avoid getting lost in the labor laws

Are you committing unfair labor practices?

What we'll cover

- Provisions of the National Labor Relations Act
- What is an Unfair Labor Practice (ULP)?
- Decisions from the NLRB
- Why employees turn to unions
- How unions are formed
- Adopting policies and training supervisors

National Labor Relations Act

- Applies to union and non-union organizations
- Nearly every employer in the private sector
- Has an impact on:
 - Hiring (prior union members)
 - Salary confidentiality policies
 - Discipline (protected activity)



NLRA: Employee rights

- Section 7. Rights of Employees. To bargain collectively and to engage in other concerted activities for mutual aid or protection
- **Section 1.** disputes or differences as to wages, hours, or other working conditions
- Section 8. Employers cannot interfere with, restrain, or coerce employees in the exercise of the rights granted in Section 7

CASE: Bad haircut

- Spoke with other employees, took pictures
- Fired for taking pictures without permission
- Rule never enforced; first termination
- Testified she wanted support to confront management
- NLRB v. White Oak Manor, 4th Circuit, 10/28/11

CASE: Bad haircut

- A single employee's conversations with management about a condition of employment can be concerted activity even if a broader group of employees never appointed her spokesperson.
- Individual protests of a management decision may be concerted action if others who disagree with the decision considered that they had a grievance and decided, among themselves, that they would take it up with management.

Why employees turn to unions

- Believe that employer doesn't care or listen
- Disgruntled about wages, benefits, treatment
- Unsafe environment
- Belief that unionized workers have better pay and benefits



CASE: Hispanics United

- Lydia Cruz worked one day a week at Hispanics United of Buffalo (HUB)
- Regularly complained about her coworkers
- Told a coworker she was going to management
- Hispanics United of Buffalo, ALJ, 9/2/11



CASE: Hispanics United

- Facebook discussion ensued (Saturday)
- Employee Rivera made this post:
 - Lydia Cruz, a coworker, feels that we don't help our clients enough at HUB. I about had it! My fellow coworkers how do u feel?
- Cruz was on the list, "stop with your lies"
- Tuesday, five employees fired for bullying and harassment (even claimed heart attack)

CASE: Hispanics United

- Activities of a single employee enlisting the support of fellow employees is protected
- Taking the first step towards group action to defend themselves against the accusations Cruz was going to make to management
- Terminating multiple employees establishes that the employer viewed the five as a group and that their activity was concerted

What is protected?

- Is the activity concerted? Two or more acting together, but actions of one may be concerted.
- Does it seek to benefit other employees? Will improvements benefit more than the employee taking action? Or is it a personal gripe?
- Is protection lost? Malicious behavior, sabotage, threats, violence, or lies about a product may cause employees to lose protection.
- See nlrb.gov/concerted-activity

CASE: Sales promotion

- Car dealership employees complained about food at a sales promotion event
- Facebook posts continued that activity
- Also posted photos, sarcastic comments about a car accident next door
- Which activity was used to terminate?
- Knauz BMW v Becker, ALJ decision, 9/28/11

CASE: Clothing store

- Employees at a clothing store wrote a letter of complaint about their supervisor (Griffin)
- Also asked to close store at 7 pm, not 8 pm
- · Another manager gave approval to close
- Griffin called, no one answered the phone
- · Discussion on Facebook ensued
- Bettie Page v Morris, ALJ decision, 4/27/12

CASE: Clothing store

- Tomorrow I'm bringing a California Workers' Rights book to work. My mom works for a law firm that specializes in labor law and BOY will you be surprised by all the crap that's in violation. See you tomorrow!
- Employer credibility problems
- Multiple firings at one time, under policies that had never before been enforced



CASE: Clothing store

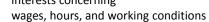
- The employer "cannot merely point to employee misconduct ... it must show that it would have terminated the employee based on the misconduct"
- Ironically, employees were in violation
 - Arriving late for work (or hung-over)
 - Using company computers to send applications
 - Eating in front of customers

How unionization occurs

- Secret ballot election
 - Requires 30% signed authorization cards
 - Unions want 70%, but only win 60% elections
 - Employer usually gives benefits of remaining union free
- Voluntary recognition
 - Agree a majority of employees signed cards (card check); could be unintentional

What is a bargaining unit?

- A group of two or more employees who share a "community of interest"
- Having the same or substantially similar interests concerning







Specialty Healthcare (8/26/11)

- CNA's wanted to form a union
- Employer argued for "community of interest"
- NRLB: Identifiable group based on job classification, department, function, work location, skill, or similar factors
- Employer to show overwhelming community
- Employers could face multiple, smaller unions
- Under legal challenge to the 6th Circuit

	 ,

Rule to shorten election time

- Elections typically occur after about 30 days
- Rule published December 2011 intended to shorten this to as little as 10 days
- Limits litigation before the election
- Union "win" rate goes from 58% to 87%
- Under legal challenge



Supervisor training

- Supervisors could create liability
 - Recognize a union through card check
 - Commit unfair labor practices



- Supervisors can also help
 - Watch for signs of organizing
 - Ensure fair and equal treatment

Signs of unionization

- Increase in questions about wages, benefits
- Employees ask to see their files, policies
- Employees meeting before or after work
- Stop talking when managers walk by
- Strangers in parking lot or on site
- Increase in knowledge of unions
- Questions about company's stance

_			
_	 	 	
-	 	 	
-	 	 	
_			
_	 	 	
-	 	 	
_			
_	 		
_	 		
_	 	 	
-			
_			
_	 		

Supervisor training on ULPs

Unfair Labor Practices (ULPs)

- Respecting Section 7 rights
- Even with inappropriate language
- Other conduct violations are still actionable
- Be clear on the reason in mixed cases
- Show not only that employee engaged in misconduct, but would have been fired for it

Supervisor training on TIPS

TIPS training:

- Threaten
- Interrogate
- Promise
- Spy (or Surveillance)





Supervisor training on relations

Positive employee relations:

- Safe work environment
- Avoid favoritism (consistency)
- Follow up on concerns (not inviting them to quit)
- Focus more on issues, less on manner of delivery



Policies to adopt and enforce

Policies you should have in place:

- Non-solicitation policy
- E-mail policy
- Use of facilities/ bulletin boards
- Social media policy



Policies to adopt and enforce

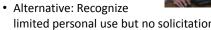
Non-solicitation policy

- Prohibit solicitation by non-employees
- No solicitation that disrupts work (caution: "during working hours")
- Enforce consistently
- Can allow defined charities
- Be certain supervisors understand solicitation

Policies to adopt and enforce

E-mail policy

- Concerns about solicitation
- Option: For business use only, no mass emails (challenge to enforce)



nforce		
ations		

Policies to adopt and enforce

Use of company facilities/bulletin boards policy

- Can ban all non-work gatherings
- Can limit personal notices on bulletin boards
- No third-party, business, political, religious



Social media policy

- Problems: no "disparaging" remarks or limit to "appropriate" discussions
- A savings clause may not be enough; give specific examples
 - Harassment, discrimination, threats, intimidation, or other violations of company policy
 - Disclosing trade secrets (examples)
 - Use of company images or logo

Management strategies

- Informing employees:
 - Many benefits unions fought for are now law
 - More flexibility (and resources) because there is no contract to modify (or negotiate)





Management strategies (before)

- · Emphasize the positive
- Remind them of their benefits (total benefits statements)
- · Consistency in discipline
- Effective complaint process
- Safe working environment



Management strategies (during)

In a union environment:

- Seniority-based rather than performance
- Employee may not have grievance heard
- A vote for a union is like a political vote



Management strategies (during)

- Employees pay union dues
 - Unions cannot collect dues until contract signed
- · Union may strike
 - No unemployment benefits (rely on savings)
 - Economic strikers can be permanently replaced
- Loss of flexibility in employee relations
- You want employees to understand all aspects and make an informed decision

Example: "Trying out" a contract



- A contract cannot be cancelled, and typically lasts three years
- You have a 30-day window to decertify (no less than 60 days, but no more than 90 days, before the contract expires)
- If contract renewed, another three years to wait

Summary of key points

- Understand what activity is protected
- · Know how (and why) unions form
- Train your supervisors on rights and TIPS
- Policies to adopt and enforce
- Management practices
- Educate employees about benefits and unions so they can make an informed decision

Questions?

Edwin Zalewski Editor – Human Resources J. J. Keller & Associates, Inc. www.jjkeller.com ezalewski@jjkeller.com

Laws, regulations, and best practices change. The observations and comments drawn today may not apply to laws, regulations, or best practices as they may be in the future.

J. J. Keller & Associates, Inc. does not assume responsibility for omissions, errors, or ambiguity contained in this presentation. Individuals needing legal or other professional advice should seek the assistance of a licensed professional in that field.

© 2012 J. J. Keller & Associates, Inc.®
