

## Avoid getting lost in the labor laws

Are you committing unfair labor practices?

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## 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

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## 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)



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## 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

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## 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*, 4<sup>th</sup> Circuit, 10/28/11



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## 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.

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## 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



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## 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*



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## 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)

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### 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

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### 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](http://nlrb.gov/concerted-activity)

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### 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

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### 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

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### 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



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### 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

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## 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

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## 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 wages, hours, and working conditions
  - Basic Guide to the National Labor Relations Act



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## *Specialty Healthcare (8/26/11)*

- CNA's wanted to form a union
- Employer argued for “community of interest”
- NLRB: 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 6<sup>th</sup> Circuit

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## 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



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## 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



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## 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

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## 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

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## Supervisor training on TIPS

TIPS training:

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



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## 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



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## 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



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## 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

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## Policies to adopt and enforce

E-mail policy

- Concerns about solicitation
- Option: For business use  
only, no mass emails  
(challenge to enforce)
- Alternative: Recognize  
limited personal use but no solicitations



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## 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



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## 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

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## 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)



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## Management strategies (before)

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



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## 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



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## 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**

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### 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

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### 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

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### Questions?

Edwin Zalewski  
Editor – Human Resources  
J. J. Keller & Associates, Inc.  
[www.jjkeller.com](http://www.jjkeller.com)  
[ezalewski@jjkeller.com](mailto:ezalewski@jjkeller.com)

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