



The National Labor Relations Act: Be Careful!

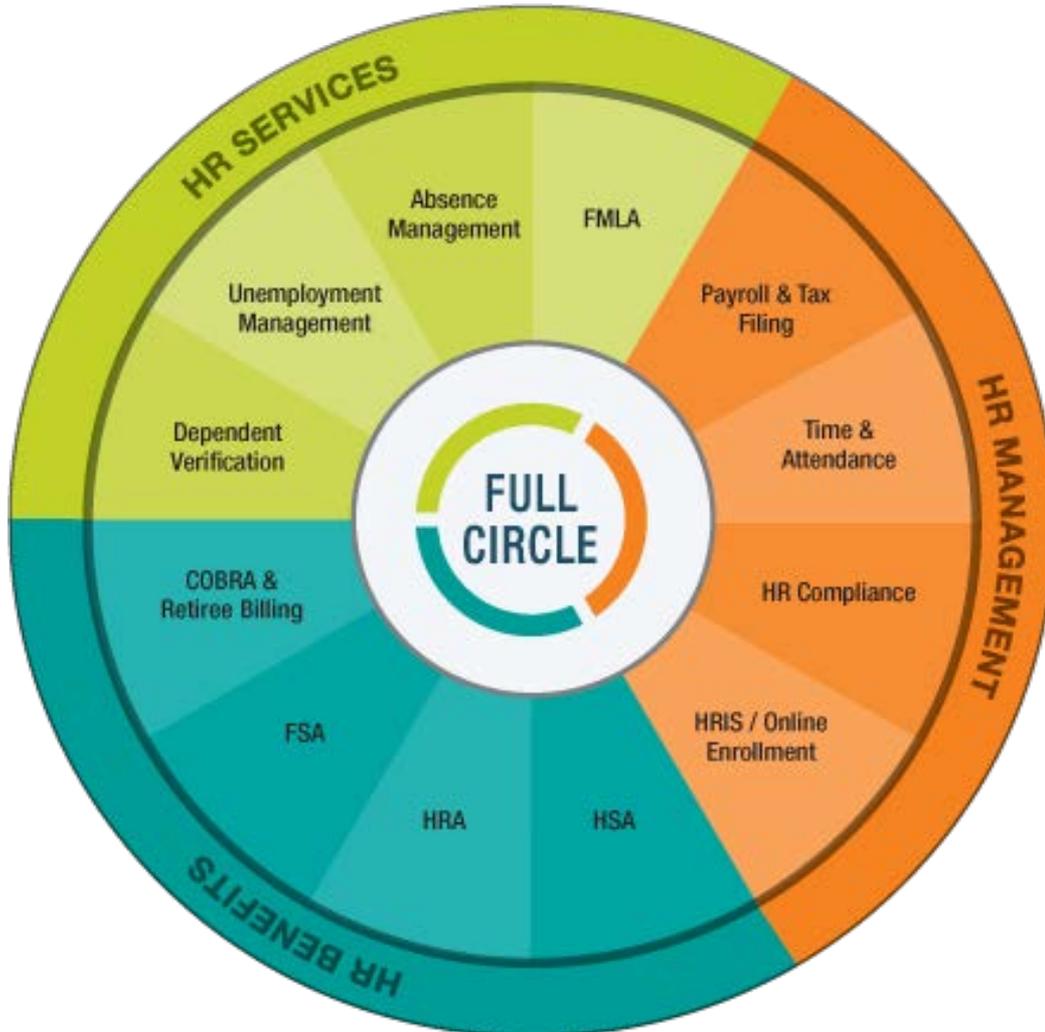
Presented by: Jeff Silence, Esq.



- HR Benefits
- HR Management
- HR Services

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HR Solutions Come Full Circle



HR solutions should be simple.
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BASIC's integrated HR solutions come full circle for employers nationwide. Consistently recognized as an Inc. 5,000 Fastest Growing Private Company, our expertise allows you to control costs, manage risks and improve staff focus and effectiveness.

Application



- Applies to nearly all private sector employers engaged in “interstate commerce” including
 - non-profits,
 - Employers without any union presence, and
 - employers in “right to work” states.
- Does not apply to state, federal, or local govts.

Interstate Commerce



- Accepting credit cards or checks drawn from out of state financial institutions.
- Buying or selling goods across state lines.
- Sending emails or making phone calls with vendors or customers across state lines.
- Conducting any business across state lines.

Revenue Requirement



- Employer must also have a minimum gross revenue.
- Minimum threshold is between \$50,000 and \$500,000 depending on the type of business.
 - <https://www.nlr.gov/rights-we-protect/jurisdictional-standards>

Section 7 “Concerted Activity”



- “Employees 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.”

So, What Does This Mean?



- Employees get to discuss their wages, hours, and working conditions.
- Activity is “concerted” when employee is discussing the wages, hours, or working conditions on behalf of at least two employees.
 - “We work too many hours.”
 - “We don’t get paid enough.”
 - “Employee # 1 and 2 are misclassified as I/Cs.”
 - “Employee # 1 and I believe the working conditions are unsafe.”

“Concerted Activity”



- Employee is not engaged in concerted activity if he or she is acting solely on behalf of him/herself.
- Protections are broadly constructed to include conduct that only has minimal impact on wages, hours, or working conditions.

“Concerted Activity”



- Contacting a govt agency about safety/working conditions.
- Complaining to news media or customers about wages, hours, working conditions.
- Complaining on company Facebook page.

Section 8 “Unfair Labor Practice”



- Unfair labor practice to discriminate against an employee for engaging in concerted activity, among other things.
- Any action that could reasonably deter employee from exercising their rights.
 - i.e., written warning, demotion, or transfer to less desirable job.

Enforcement



- National Labor Relations Board has exclusive jurisdiction to enforce NLRA.
- Employee must file complaint within 180 days.
- Regional Director determines whether charge should move forward.
- If so, issues complaint.

Enforcement



- Employer has 14 days to respond.
- Admin law judge holds trial and issues decision.
- 5-member Board may review decision if appeal filed.
- Circuit courts may overrule Board.
- U.S. Supreme Court has final say.

Plaza Auto Center, 360 NLRB No. 117



- Employee complains to other employees and managers about break policy and wages.
- Employee told to stop complaining, or he will be fired.
- Employee calls boss a “mother F%%%er,” a “f%%%ing crook,” and a “stupid A\$\$hole..”
- Employee also tells boss that nobody likes him and that everybody talks about him behind his back.

Protected speech?



- To determine whether an employee's conduct is so egregious as to lose the protection of the Act, NLRB analyzes:
 - (1) the place of the discussion,
 - (2) the subject matter of the discussion,
 - (3) the nature of the employee's outburst, and
 - (4) whether the outburst was, in any way, provoked by the employer's unfair labor practices.

Result?



- Held, employee's speech was protected even though he used obscene and denigrating language because
- (1) the speech took place at work in the supervisor's office,
- (2) the speech was related to the employee's wages and working conditions, and
- (3) although employee's comments were rude and offensive,
- (4) employer provoked the employee by threatening to fire him.

Handbooks Under attack



- Handbook policies violate the NLRA if the policy restricts rights of employees to engage in concerted activity or employee would “reasonably construe” the rule to prohibit them from engaging in concerted activity.
- Ambiguous policies are construed against the employer.

The “Hooters” Case

Case No. 21 CA104872



- Policy prohibits “the unauthorized dispersal of sensitive Company operating materials or information to any unauthorized person or party. This includes, but is not limited to, recipes, policies, procedures, financial information, manuals or any other information in part or in whole as contained in any Company records.”
- Policy further prohibits employees from discussing their tips with employees or guests.

Resolution of the “Hooters” case



- A reasonable employee would believe the policy prohibiting employees from discussing “financial information . . . or any other information in part or in whole as contained in any Company records” prohibits them from discussing their working conditions, in particular their wages. Absence of limiting language.
- Unlawful to prohibit an employee from discussing their tips with their fellow employees and guests. Tips are wages, and employees can discuss their wages with anyone, including guests.

Other Hooters' Policies



- Policy prohibiting any social media post that “negatively affects, or would tend to negatively affect, the employee’s ability to perform his or her job, the company’s reputation, or the smooth operation, goodwill or profitability of the Company’s business.”
- Cannot “post disparaging comments about coworkers and managers on social media.” Prohibited “insubordination to a manager or lack of respect and cooperation with fellow employees or guest.”
- Both policies held invalid because a reasonable employee would believe they prohibited employees from engaging in concerted activity.

Lily Transportation

Case CA-108618



- “Employees would be well advised to refrain from posting information or comments about the company, the company’s clients, the company’s employees or employees’ work that have not been approved by the company on the internet. The company will use every means available under the law to hold persons accountable for disparaging, negative, false or misleading information or comments involving the company or the company’s employees and associates on the internet.”
- Too broad, because it failed to specify the types of information employees were prohibited from posting and failed to provide examples of what constitutes “negative” or “disparaging” comments.

Durham School Services

360 NLRB No. 85



- Employees should “limit contact with parents or school officials, and keep all contact appropriate.”
- Employees are “required to keep communication with coworkers. . . professional and respectful, even outside of work hours.”
- Employees may be disciplined if they “publicly share unfavorable written, audio or video information related to the company or any of its employees or customers.”
- All too broad because they failed to specify the types of information employees were prohibited from posting and failed to provide examples of social media content the employer would consider “appropriate,” “professional,” and “respectful.”

“No Gossip Policy”

Laurus Technical Institute - 360 NLRB No. 133



- Policy prohibited “gossip about the company, an employee, or customer.”
- Policy defined “gossip” to include (a) “negative or untrue or disparaging comments” about others, (b) “repeating information that can injure a person,” and (c) “repeating a rumor about another person.”
- Too broad and ambiguous.

Use of Personal Computers

Professional Electrical Contractors - Case No. 34-CA-071532



- Policy “urged all employees not to post information regarding the Company, their jobs, or other employees which could lead to morale issues in the workplace or detrimentally affect the Company’s business.”
- Employee should “always think before they post, being civil to others and their opinions, and not posting personal information about others unless you have received their permission.”
- Ok, because employer was not trying to prohibit discussion of working conditions “but rather the manner in which the subject matter is articulated and debated among the employees.”

Restrictions on “disruptive behavior”

Professional Electrical Contractors - Case No. 34-CA-071532



- Policy prohibiting “boisterous or disruptive activity in the workplace.”
- Held, invalid because rules that do not define prohibited abusive or profane language could be construed as prohibiting discussion of working conditions.

Discourteous “Speech”

Professional Electrical Contractors - Case No. 34-CA-071532



- Prohibits “discourteous or inappropriate attitude or behavior to passengers, other employees, or members of the public” and “disorderly conduct during working hours.”
- Too ambiguous.

Profanity

Professional Electrical Contractors - Case No. 34-CA-071532



- Prohibits “profane or abusive language where the language used is uncivil, insulting, contemptuous, vicious, or malicious.”
- Valid because it included defining language such that the clear purpose of the rule was to prohibit only profane or abusive language and not protected activity.

Secret Tape Recording

T-Mobile USA, Inc. v. NLRB, Case No. 16-60284 (5th Cir. Jul. 25, 2017)



- “Employees may not secretly record anyone.”
- Held, unenforceable because it could be construed to deny rights under the NLRA.

*Georgia Auto Pawn, 365 NLRB
No. 26 (Feb.8,2017)*



1. “Employees may not spread malicious gossip or rumors, create general discord, or interfere with work of other employees.”
2. “Solicitation by Employees on Company property is prohibited. Distribution of literature by Employees is also prohibited.”
3. “The Company’s...email ... [is] part of the Company’s business equipment and should be used for Company purposes only.”

All unlawful.

*Georgia Auto Pawn, 365 NLRB
No. 26 (Feb.8,2017)*



4. “Social media should never be used in a way that:—defames or disparages the Company, its affiliates, officers, employees, customers, business partners, suppliers, vendors, etc.—harasses other employees or customers. You should not post any photographs of company property, interior or exterior.”

Also unlawful.

Class Action Arbitration Waivers



- U.S. Supreme Court heard oral arguments on October 2, 2017 in three cases to resolve circuit split over whether arbitration agreement that requires employee to waive right to participate in a class action violates the NLRA.
- DOJ argued that such agreements are valid.
- Invalid: 6th, 7th, and 9th Circuits.
- Valid: 2nd, 5th, 8th, and 11th Circuits.

Damages



- NLRB can order employer to revise unlawful any unlawful policy.
- If employees shows they were fired for engaging in “concerted activity,” ALJ can order reinstatement and payment of lost wages and benefits.

Damages



- Cannot recover attorney fees, damages for emotional distress, or punitive damages.
- No right to sue in court.



- 2 board members appointed by Obama.
- 3 appointed by Trump.
- 2 democratic board members' terms end in December 2018 and December 2019.
- Trump will likely appoint pro-business board members.

Takeaways



- Carefully scrutinize policies.
- Consider whether an employee could reasonably interpret the policy as prohibiting them from engaging in any concerted activity.
- Avoid subjective terms and standards.
- Include disclaimer.
 - i.e., “Nothing in this Handbook is intended to prohibit employees from exercising their rights under the NLRA.”

Takeaways



- Think about what it is you really want to prevent the employee from doing – prohibit that, only.
- When terminating employee, don't provide a reason.
- If reason must be given, don't cite any handbook policy as basis for decision.
- Instead, discipline employees for specific conduct (i.e., yelling or being disrespectful).

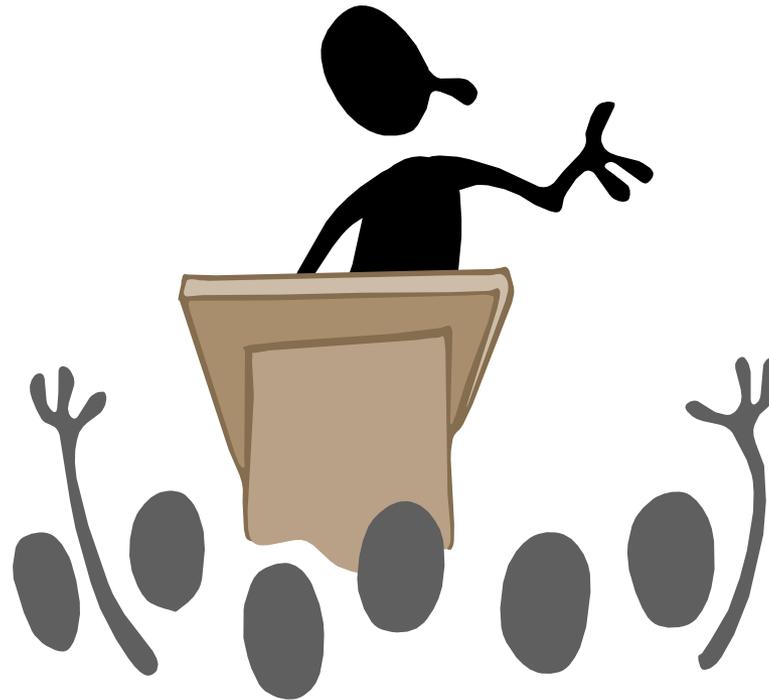
Takeaways



- Wait 90 days to terminate someone who has engaged in concerted activity.
- Document everything.
- Have an attorney review your handbook.
- Law is constantly changing. Pay attention.



Thanks





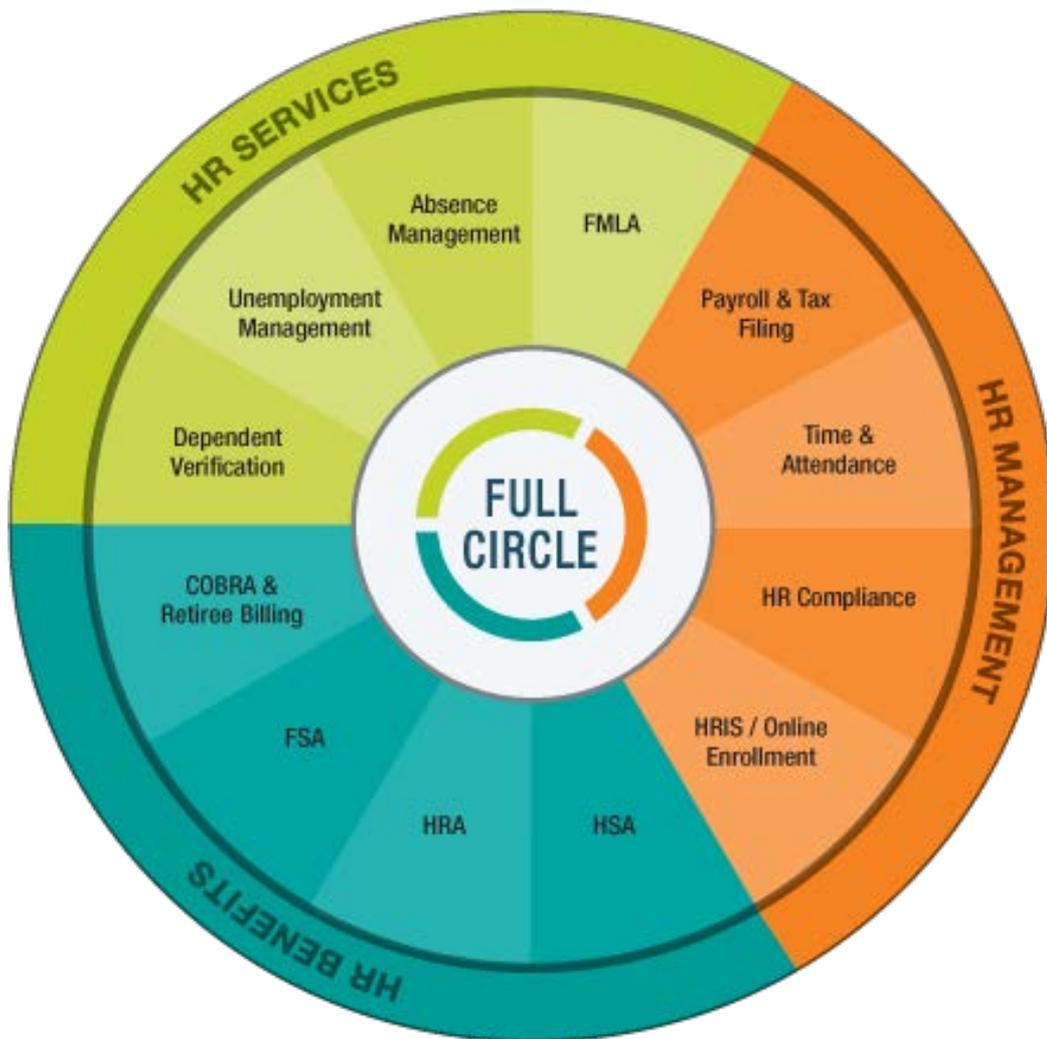
Questions



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