

# UNFAIR LABOR PRACTICE LAW AND PROCEDURE

## I. Statutory Overview

A. Section 7 of the NLRA (the Act) gives employees the right to engage in union or other concerted activities, and the right to refrain from such activities.

1. Meaning of “concerted.” *Meyers Industries*, 281 NLRB 882 (1986). Individual employees must act “with or on the authority of” their fellow workers and not solely on their own behalf in order to engage in concerted activity.
2. Balancing Section 7 rights and property rights. *NLRB v. Babcock & Wilcox*, 351 U.S. 105; *Lechmere, Inc v. NLRB*, 502 U.S. 527, 139 LRRM 2225 (1992); *Republic Aviation v. NLRB*, 324 U.S. 793. Quote from *Lechmere*: “In *Babcock*, as explained above, we held that the Act drew a distinction ‘of substance,’ 351 U.S., at 113, between the union activities of employees and nonemployees. In cases involving *employee* activities, we noted with approval, the Board ‘balanced the conflicting interests of employees to receive information on self-organization on the company’s property from fellow employees during nonworking time, with the employer’s right to control the use of his property.’ *Id.*, at 109-110. In cases involving *nonemployee* activities, (like those at issue in *Babcock* itself), however, the Board was not permitted to engage in that same balancing (and we reversed the Board for having done so). By reversing the Board’s interpretation of the statute for failing to distinguish between the organizing activities of employees and nonemployees, we were saying, in *Chevron* terms, that Section 7 speaks to the issue of nonemployee access to an employer’s property. *Babcock*’s teaching is straightforward: Section 7 simply does not protect non-employee union organizers *except* in the rare case where ‘the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels,’ 351 U.S., at 112.”

*Loehmann’s Plaza*, 316 NLRB 109 (1995). Non-employee union organizers were not entitled to access where General Counsel failed to prove that Respondent’s customers, the intended audience of the union’s handbilling and picketing, were accessible only through trespassory mean.

*Leslie Homes, Inc.*, 316 NLRB 123 (1995). Respondent did not violate Act by refusing to permit non-employee representatives of union to distribute leaflets to potential home buyers on Respondent’s premises where reasonable alternative means were available to union for communicating its area standards message to potential customers.

Four B. Corp., 325 NLRB 186, 1997) Jenfd. 163 F3d. 1177 (10th Cir. 1998). Respondent violated Section 8(a)(1) by prohibiting union from

soliciting off-duty employees while allowing nonunion groups to solicit customers.

*ITT Industries*, 341 NLRB No. 118 (2004). Off-duty employees from another facility are entitled to access to the exterior premises of the employer's facility to engage in organizing activities. See also. *Hillhaven*, 336 NLRB No. 646 (2001), *enforced First Healthcare Corp. v. NLRB*, 344 F.3d 523 (6th 2003).

3. No-solicitation and no-distribution rules. *Our Way*, 268 NLRB 394 (1983). In *Our Way*, the Board reaffirmed the view that rules prohibiting solicitation during working time are lawful because such rules imply that solicitation is permitted during nonworking time. However, bans on solicitation during "company time" remain presumptively invalid.

B. Section 8(a) of the Act - Employer ULPs.

1. Section 8(a)(1) prohibits employer from interfering, restraining or coercing employees with respect to their Section 7 rights.
  - (a) Examples of 8(a)(1) conduct:
    - (1) Interrogation. *Rossmore House*, 269 NLRB 1176 (1984). The Board test is: ". . . whether under all of the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act."
    - (2) Threats of reprisal. *NLRB v. Gissel Packing*, 395 U.S. 575, 618-619 (1969). "[a] prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control. . . . If there is an implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on representation and coercion, and as such without the protection of the First Amendment."
    - (3) Promise and grant of benefits. *NLRB v. Exchange Parts*, 375 U.S. 405 (1964). "The danger inherent in well-timed increases in benefits is the suggestion of a fist inside a velvet glove. The employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged."

2. Section 8(a)(2) prohibits employer interference with and domination of a labor organization.
  - (a) Examples of 8(a)(2) conduct:
    - (1) Recognition of minority union. *International Ladies' Garment Workers v. NLRB*, 366 U.S. 731 (1961). Good-faith belief that union had majority is no defense.
    - (2) Interference or domination of a labor organization. *NLRB v. Cabot Carbon*, 360 U.S. 203 (1959); *Electromation, Inc.*, 309 NLRB 990 (1992). Definition of labor organization: "The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." *Compare Polaroid Corp.*, 329 NLRB 424 (1999) (employer-dominated council was statutory labor organization) with *Crown Cork & Seal Co., Inc.*, 334 NLRB 699 (2001) (employee committee not a statutory labor organization).
3. Section 8(a)(3) prohibits employer discrimination against an employee because of his/her engaging in union activities or refraining from such activities.
  - (a) The "motive" test. *Wright Line*, 251 NLRB 1083 (1980). "First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct."
  - (b) Reinstatement of strikers. *Laidlaw Corp.*, 171 NLRB 1366; *Mastro Plastics v. NLRB*, 350 U.S. 270 (1956). Economic strikers can be permanently replaced. Unfair labor practice strikers cannot be so replaced.
  - (c) Refusal to hire. *FES*, 331 NLRB 9 (2000). It is unlawful to refuse to hire, or to consider an applicant for employment, due to anti-union animus. Whether the applicant would have been hired but for the discrimination against him must be litigated at the hearing on the merits.

4. Section 8(a)(4) prohibits employer discrimination against an employee because he/she resorted to, or cooperated with, the NLRB.
5. Section 8(a)(5) prohibits the employer from refusing to recognize and bargain in good faith with a union that is the exclusive representative of employees.
  - (a) Bad-faith bargaining. *Reichhold Chemicals*, 288 NLRB 69 (1988). “. . . we intend to adhere to the general proposition that the content of bargaining proposals will, in certain circumstances, be evidence of an intent to frustrate the collective-bargaining process.”
  - (b) Unilateral changes. *NLRB v. Katz*, 369 U.S. 736 (1962). Unilateral change prior to good-faith impasse is ordinarily unlawful.
  - (c) Withdrawal of recognition. *Chelsea Industries, Inc.*, 331 NLRB 1648 (2000) (an employer may not withdraw recognition from a union outside the certification year based on evidence received within the certification year); *Levitz Furniture Co.*, 333 NLRB 717 (2000); *Brooks v. NLRB*, 348 U.S. 96 (1954); *NLRB v. Curtin Matheson*, 494 U.S. 775 (1990). Employer can withdraw recognition if Employer can establish loss of majority support for union or good-faith objective doubt of union’s majority status.

C. Section 8(b) of the Act - Union ULPs.

1. Section 8(a)(1)(A) prohibits a union from restraining and coercing employees with respect to their Section 7 rights. Section 8(b)(1)(B) prohibits a union from coercing an employer in the selection of a representative.
  - (a) Violence and other physical misconduct.
  - (b) Internal discipline. *Scofield v. NLRB*, 394 U.S. 423 (1969). “Section 8(b)(1)(A) leaves a union free to enforce [1] a properly adopted rule which [2] reflects a legitimate union interest, [3] impairs no policy which Congress has imbedded in the labor laws, and [4] is reasonably enforced against union members who are free to leave the union and escape the rule.”
  - (c) Duty to represent fairly. *Vaca v. Sipes*, 386 U.S. 171 (1967). Incumbent union has not only a duty to bargain with the employer but also a duty to represent fairly the employees.
  - (d) Union conduct that does not affect the employment relationship. *Office Employees Local 251 (Sandia National Laboratories)*, 331 NLRB No. 193 (August 2000). Section 8(b)(1)(A)’s proper scope,

in union discipline cases, is to proscribe union conduct against union members that impacts on the employment relationship, impairs access to the Board's processes, pertains to unacceptable methods of union coercion, such as physical violence in organization or strike contexts, or otherwise impairs policies imbedded in the Act.

2. Section 8(b)(2) prohibits a union from causing an employer to commit a Section 8(a)(3) violation.

(a) Union-security clauses.

*NLRB v. General Motors*, 373 U.S. 734 (1963); *Beck v. CWA*, 487 U.S. 735 (1988). Union can only charge dues and fees, and, upon objection, employee need only pay for representational costs.

*California Saw & Knife Work*, 320 NLRB 224 (1995), enfd sub nom. *Machinists v. NLRB*, 133 F.3d 1012 (1998). When or before union seeks to obligate employee to pay fees and dues under union-security clause, union should inform employee that he has right to be or remain nonmember and that nonmembers have right (1) to object to paying for union activities not germane to union's duties as bargaining agent and to obtain reduction in fees for such activities; (2) to be given sufficient information to enable employee to intelligently decide whether to object; and (3) to be apprised of any internal union procedures for filing objections. If employee chooses to object, he must be apprised of percentage of reduction, basis for calculation, and right to challenge these figures.

*CWA Local 9403 (Pacific Bell)*, 322 NLRB 142 (1996), enfd sub nom. *Finerty v. NLRB*, 113 F.3d 1288, cert. 118 S.Ct. 558 (1997). International union representing about 2,400 different bargaining units nationwide in number of different industries did not violate Act when it charged objecting nonmembers uniform fee that did not vary according to objector's bargaining unit, industry, or employer.

*Rochester Manufacturing Co.*, 323 NLRB (1997). Employees who were represented by union during years they were deprived notices of *Beck* rights may come forward in compliance stage of Board proceeding and, with reasonable promptness, elect nonmember status. Those who did so may then file objections as to expenditures for each year of Section 10(b) period. Union then must process these objections as it would have if objections had been filed in accounting period in question. Union must then

reimburse those objectors for any dues and fees for nonrepresentational expenditures.

*Food & Commercial Workers Locals 951, 7, & 1036 (Meijer, Inc.), 329 NLRB 730, 736 (1999), enf. Den., 249 F.3d 1115, (9th Cir. 2001) Rehrig. En banc granted by 265 F.3d 1079 (9th Cir. Sep 14, 2001).* Represented employees, whether or not they are members of the union that represents them, under Beck may be charged their fair share of the union's organizing expenses.

3. Section 8(b)(3) prohibits a union from refusing to bargain in good faith with the employer.
4. Section 8(b)(4) prohibits, inter alia, secondary boycotts and coercion to resolve a jurisdictional dispute.
  - (a) *NLRB v. BCTC (Denver Bldg. Trades)*, 341 U.S. 675 (1951).  
Union can picket only the employer with whom it has a dispute.
5. Section 8(b)(5) prohibits a union from charging excessive or discriminatory initiation fees.
6. Section 8(b)(6) prohibits a union from causing an employer to pay for services that are not to be performed.
7. Section 8(b)(7) prohibits and/or limits a union from picketing an employer for recognitional or organizational purposes.
8. Section 8(e) prohibits "hot cargo" agreements between an employer and a union.

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