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# Avoid the Hot Seat: An Interview with the NLRB

**Written By Justin T. Hill** (jthill@wardandsmith.com) **and Devon D. Williams** (ddwilliams@wardandsmith.com)

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**At Ward and Smith's recent annual Employment Law Symposium, two attorneys from the firm's labor and employment group, Grant Osborne and Genesis Torres, interviewed Shannon Meares of the National Labor Relations Board ('NLRB' or the 'Board').**

She has worked for the Board for 24 years and was recently promoted to the position of Deputy Assistant General Counsel to the NLRB.

Ms. Meares offered guidance as to how employers can avoid sitting in the NLRB's hot seat. Subjects discussed included:

- Protected concerted activities in the form of social media posts,
- Non-disparagement clauses in severance agreements, and
- Problematic responses to employees' grievances.

Ms. Meares also offered an overview of the NLRB's jurisdiction, along with its structure, processes, and leadership. The NLRB is an independent federal agency that enforces the National Labor Relations Act ("NLRA"), which is a federal statute enacted to protect employees' rights to seek better working conditions and bargain collectively with employers.

The NLRB protects the right of employees to form unions and engage with one another to seek improved working conditions – such as by discussing compensation and non-wage benefits. The Board includes five members and employs a prosecutorial branch headed by the General Counsel.

The Board Members are political appointees who serve five-year terms, during which they decide litigated cases about the NLRA's reach and employees' related labor relations rights. The NLRB also employs large numbers of administrative law judges who adjudicate unfair labor practice charges filed by employees, unions, and employers.

During fiscal year 2023 (October 1, 2022, through September 30, 2023), the NLRB received about 19,800 unfair labor practice charges. There has been a noticeable increase during fiscal year 2024, with about 21,300 unfair labor practice charges filed.

### Unfair Labor Practices

Employees have the right to support or not support a labor union without coercion or interference from their employer. Any action that impedes that right is an unfair labor practice.

Ms. Meares noted a common misconception in the South regarding the role of the NLRB, with some businesses believing that they need not be concerned if their workplace isn't "unionized." However, Ms. Meares pointed out that every employer should be aware of the NLRB's function, especially when dealing with employee grievances, no matter how minor.

Ms. Meares also clarified that the term "union" can essentially be interchanged with "protected concerted activity," or "PCA," as it takes only two employees acting together to engage in PCA.

As to employees' union activities, Ms. Meares noted that the best practice for employers is to be consistent in the enforcement of workplace policies. For example, do not deviate from attendance or disciplinary procedures to retaliate against employees because of their union or protected concerted activities. For example, if a known union supporter does not show up for work and an employer has as a consistent practice of disciplining similarly-situated employees, the employer will be able to show that it disciplined the union supporter in accordance with its policies and practices. However, if other employees have engaged in similar conduct without consequences there is an inference that the union supporter was targeted and retaliated against for their protected union activities.

Timing is another important issue for a variety of reasons. Employees have six months to file an unfair labor practice charge with the NLRB. Similarly, employers should respond to communications from the NLRB in a timely fashion. She stressed the importance of employers being proactive and responsive, noting that delayed responses or a lack of necessary documentation can harm a company's case.

Maintaining thorough internal records and processes can help ensure that invalid claims are quickly dismissed. To ensure that invalid claims fizzle out, employers should document their internal processes and procedures thoroughly.

### Protected Concerted Activity

Osborne asked Ms. Meares whether employees can engage in protected concerted activities regardless of whether a union is involved. Ms. Meares affirmed that more than one person must participate for the activity to qualify as PCA, but an individual may still be protected if acting as a representative for a group seeking better working conditions.

She illustrated this with an example of employees being frustrated by an office manager's behavior, which they found rude and dismissive of their requests for schedule changes. Several employees decided to walk out during a shift in protest. Since their actions were clearly aimed at addressing the manager's conduct, the employer could not terminate them, as it was considered protected concerted activity.

Ms. Meares noted that certain activities, such as complaints about wages, scheduling, and job security, are inherently seen as concerted by the NLRB.

### Social Media

Torres then posed the question of how the post of one individual on a social media platform could be considered protected concerted activity. Key factors the Board looks at are prior knowledge of a group concern, whether the posting was a logical outgrowth of the concern, and whether other employees showed

support for or commented on the post.

Ms. Meares explained that if employees previously voiced employment concerns, then a subsequent employee's negative Facebook comment about those concerns could amount to PCA, as it would be considered a natural extension of prior complaints.

### Just the Facts

Ultimately, the facts are what matters most. In the matter of a Home Depot employee who wrote the initials "BLM" in reference to "Black Lives Matter" on his work apron, the NLRB found it to be protected concerted activity because he could connect his actions to what he and his co-workers perceived as the company's history of racial discrimination.

On the other hand, in an example involving a small restaurant in Birmingham, Alabama, a group of employees missed work to participate in a Black Lives Matter protest. The employer fired them, but the NLRB determined that the terminations were lawful because they did not tie their actions to racial discrimination or other conditions in the workplace.

"Along the same lines of fact-specific cases," asked Torres, "what if an employee posted a negative online review about their company during working hours?"

Ms. Meares emphasized the importance of consistent policy enforcement. If employers allow employees to post online during the workday, they can't be selective about the content (assuming the review touched on terms and conditions of employment); consistency in policy enforcement is key.

Costs associated with dealing with a complaint to the NLRB can quickly spiral. Aside from reputational damage and attorneys' fees, employers may be responsible for backpay, reimbursement of medical expenses, and other pecuniary damages.

"So, you encourage employers to settle?" Osborne asked.

Ms. Meares noted that settling cases is often a preferred route, with around 90 percent of cases resolving through settlement.

### Severance Agreements

Regardless of how advantageous it may seem to include a non-compete, non-disparagement, and/ or confidentiality clause in a severance agreement, employers should be aware that such clauses may be deemed unlawful by the current NLRB.

These provisions are closely scrutinized by and may be unenforceable in the view of the NLRB. For example, in a 2023 Board decision, *McLaren Macomb*, 372 NLRB No. 58 (Feb. 21, 2023), the Board concluded that the non-disparagement and confidentiality provisions in the examined severance agreement were unlawful because they "interfere[d] with, restrain[ed], or coerce[d] employees' exercise of Section 7 rights." Because the severance agreement conditioned the receipt of severance benefits on the employees' acceptance of *unlawful* provisions, the Board also deemed the severance agreement unlawful. In Memorandum GC 23-08, the NLRB's General Counsel stated her opinion that, "except in limited circumstances," non-compete provisions (whether in severance agreements or other types of employment agreements) violate the NLRA. Osborne pointed out that a federal court has yet to decide on the legality of such provisions as far as the NLRA is concerned. Skepticism under the NLRA about non-disparagement and confidentiality provisions "is not a law, but it is the opinion of the NLRB's General Counsel, so it is definitely worthy of consideration," Osborne

commented. So, non-disparagement, confidentiality, and non-compete provisions must be carefully drafted.

### Electronic Surveillance

As technology advances, electronic surveillance continues to remain a hot topic. Absent a legitimate business reason, the use of technology to discover and monitor employees' Section 7 activity is generally deemed unlawful by the NLRB. Surveillance can take many forms – use of employer-issued phones or wearable devices, GPS tracking devices/use of geolocation, webcam photos, radio-frequency identification badges, and video equipment in break rooms and other non-work areas.

Ms. Meares explained that such practices can lead to unfair labor practice claims. For instance, if an employee leaves union literature on a breakroom table when no one is present and is later confronted about his or her activity, then it would be reasonable for the employee to assume that a supervisor had reviewed surveillance footage from breakroom cameras. In these situations, the NLRB would likely consider surveillance in non-work areas, such as breakrooms, to be a form of coercion, as it could be used to monitor employees' protected activities, such as unionizing efforts.

In Memorandum GC 23-02, the NLRB's General Counsel issued her opinion on the use of new technology to surveil employees and the impact on employees' rights to engage in protected activity. She opines, "[c]lose, constant surveillance and management through electronic means threaten employees' basic ability to exercise their rights." Thus, employers must ensure that their use of technology to monitor and manage employees does not infringe on employees' rights under the NLRA.

### Potential Surprises

Employees sometimes apply for jobs for the purpose of securing employment with an employer and then trying to persuade co-workers to seek representation by a union. This tactic, known as "salting," is a small part of the multi-faceted unionization process. Employees who do so need not disclose their goal or affiliation with a union in the employment application and may lie about such affiliation if they choose, which many employers find surprising.

The response of an employer to union-organizing efforts is fraught with risk, said Ms. Meares, because if rumors were circulating about the formation of a union, then it may be unlawful for an employer to remedy poor workplace conditions in an attempt to dissuade employees from forming a union. The crux of the matter is motive and whether the employer had a history of non-responsiveness to employee complaints before suddenly becoming responsive in the face of employees' efforts to unionize. In sum, employers should not engage in conduct that seeks to coerce or interfere with employees’ rights to unionize.

To avoid the scrutiny of the NLRB, employers should ensure that their supervisors have adequate training, and that policies and procedures are enforced with consistency, concluded Ms. Meares.

More guidance from the NLRB may be found at www.nlrb.gov.

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