WARD AND SMITH, P.A.
ATTORNEYS AT LAW

Labor Unions and 'Protected Concerted Activity:' What Private Employers – Unionized or NOT – Need to Know in 2022

Written By **Grant B. Osborne** (gbo@wardandsmith.com)
August 19, 2022

Employers, it seems, can't catch a break these days.

They build businesses. They take risks. They face increasing supply costs, supply-chain problems, interest rates, and staff-shortages. Yet they create jobs and provide employees with livelihoods and opportunities. Surely, if you're an employer or help to operate or manage one, you might wonder, "Is it too much to ask, in exchange for all that, that our employees *not* trash how we operate in the local media?"

The answer to that question – as with much in the law – is frustrating but accurate: "That depends."

The MasTec Case

Just ask MasTec, which bills itself as "one of the largest and most diversified U.S. infrastructure services providers in the country" with about "25,000 employees in more than 500 locations across the United States." Its services include employing "service technicians" to DIRECTV to install satellite TV receivers. Its fields of "expertise," it says, include "Communications."

That's ironic, given what the National Labor Relations Board ("NLRB" or the "Board") has recently communicated to anyone with a smartphone about what MasTec allegedly did when its employees communicated in a way that the company didn't like.

The Board, on June 30, 2022, announced that the company had recently "agreed to pay 26 former employees $3.12 million in back pay, interest, and expenses," arising from a dispute that began in 2006. The saga, according to the NLRB's news release, started

> *when 26 service technicians employed by MasTec ... were fired after reaching out to a local television station and participating in an interview with a local reporter, which was broadcast in the Orlando, Florida area.*
>
> In the interview, the technicians voiced their frustration with the new pay structure implemented by their employer, which was based upon the technicians' ability to convince customers to agree to a particular installation option.
>
> The technicians expressed concern with their supervisors telling them to tell customers whatever

> it took to convince them to agree [with the option] and with [the technicians'] losing money if they did not convince customers.

The "installation option," according to FierceTelecom, an industry news website, was a "mandate that required DirecTV set-tops [to] be connected to copper landlines" that "provided the one-way satellite service with a coveted a way to know what its customers were watching."

So what had the company done wrong? Hadn't it merely told its employees how to do the jobs for which they were being paid, and justifiably exercised its right to end its relationship with the ungrateful lot who had embarrassed the company by airing their private gripes in the public square?

In a word: No.

One of the NLRB's 32 "regions" investigated the matter. A hearing was held before an administrative law judge. In 2011, the Board "determined that the employees' participation in the TV interview constituted *protected concerted activity*. Consequently, it found that "by causing the discharge of the technicians for their participation in the newscast and by discharging them, DIRECTV and MasTec committed unfair labor practices." *Note the conspicuous absence of any reference to a "union."*

In 2016 – more than five years later – the matter found its way to federal court. The U.S. Court of Appeals for the District of Columbia Circuit, according to the NLRB, "enforced the Board's order, including the requirement that DIRECTV and MasTec make the unlawfully discharged employees whole."

MasTec apparently balked at the court's order, which, last October, led the D.C. Circuit to hold MasTec in contempt of court. The court imposed, "among other things, costs, expenses, and substantial prospective fines for future violations."

Negotiations among the Board, MasTec, and DIRECTV followed, which resulted in the $3MM+ settlement. That's a drop in the bucket for the employer in this case, but the Board thought the episode significant enough to make a very public point.

Prudent employers will want to know what that point is, given what appears to be employees' renewed interest in representation by labor unions and their related rights.

Labor unions? Most employers are at least aware of the wide array of federal and state laws regulating the employment-relationship, such as those dealing with discrimination, wages, benefits, family and medical leave, and workers' compensation.

But unions? Relatively few private employers encounter them. According to the U.S. Bureau of Labor Statistics, the union-membership rate of *private-sector* workers last year, nationwide, was only **6.1%**. (The rate is much higher among public-sector workers.) In North Carolina, it's far less than that. Few employers in North Carolina, therefore, know much if anything about the National Labor Relations Act ("NLRA") – which has traditionally been associated with unions – even though it's been on the books for more than 85 years.

What should employers do?

Here are five points that MasTec's public experience has to teach almost all private employers (in North Carolina and elsewhere):

1. The NLRA probably applies to you regardless of whether a union has darkened your door.

Many "fair employment practice" laws do or don't apply to employers based on whether they have employed

a certain number of employees over a certain period of time. *E.g.,* the Family and Medical Leave Act of 1993 (applies to workplaces of more than 50+ employees); the Age Discrimination in Employment Act of 1967 (20+ employees); Title VII of the Civil Rights Act of 1964 (15+ employees); and the N.C. Persons with Disabilities Protection Act (15+ "full-time employees within the State").

But when it comes to the NLRA, employers can forget all that.

The Board's jurisdiction over employers, employees, and labor disputes hinges on numerous other factors, such as:

- The enterprise's annual gross revenues;
- In some cases, annual gross revenues from business transactions with the federal government; and
- The value of its annual purchases and sales in "interstate commerce."

The Board doesn't have jurisdiction over religious schools (or, oddly, horse or dog racing operations), but *does* have jurisdiction over retail enterprises with gross annual revenues of at least $500K and *all* non-retail enterprises so long as their effect on "interstate commerce" is not negligible.

The vast majority of private employers should therefore assume that they're covered by the NLRA and subject to the* jurisdiction of the NLRB*.

2. Your employees, because of the NLRA, have the right to engage in 'protected concerted activity.' You had better know what that is because you can't avoid violating it if you don't.

Government-speak is often incoherent or, if not, too biased to provide reliable legal guidance. But the Board's summary of employees' rights under the NLRA "to join together to improve their wages and working conditions, **with or without a union,**" is pretty good. To paraphrase it, almost all employees of a covered employer (except for supervisors and managers) have the right to:

- Form or try to form a union in your workplace;
- Join a union whether the union has been recognized by the employer or not;
- Help a union to organize his or her fellow employees;
- Engage in "concerted activity," which occurs when two or more employees take action for their mutual aid or protection regarding terms and conditions of employment, such as when two or more employees approach their employer about improving pay or meet to discuss *with each other* work-related issues *such as their pay* or safety concerns; and
- Engage in such activity *alone* if he or she is acting on the *authority* of other employees, such as by bringing group complaints to the employer's attention, trying to induce group action, or seeking to prepare for group action.

3. 'Protected concerted activity' includes the right to complain to third-parties – including media outlets – in efforts to try to improve terms and conditions of employment.

The NLRB in the MasTec report says that "[w]orkers have the right to speak out publicly about their pay and working conditions." This isn't new.

That an employee who speaks out to a group about workplace concerns is engaged in "protected concerted activity" has been settled for years, as has the principle that the right to engage in such activity includes the right of employees to use social media – or any media – to communicate with each other *and the public* for that purpose.

Personnel policies and NDAs that prohibit employees from disclosing some kinds of information are perfectly

lawful, but policies and agreements that go too far may be unenforceable *and* land the employer in hot water.

4. Such complaints can be protected by law even if they are false and unfair.

Hard to believe, but true. According to an opinion of one NLRB administrative law judge, "[t]he Board has long held that employees do not lose the protection of the Act by making false statements in the course of union or other protected concerted activity to improve their working conditions … . Thus, an employer may not discipline or discharge an employee for unintentional or merely negligent false, misleading, or inaccurate statements during the course of such protected activity."

Is there an exception? Sure. An employer, to get around that rule if accused (in an "unfair labor practice" charge before the Board) of disciplining or firing an employee because he or she, while engaged in protected concerted activity, made a damaging false statement, just needs to be able to *prove* that the statements were "maliciously" false, *i.e.,* that they "were made with knowledge of their falsity or reckless disregard for their truth or falsity." Good luck.

5. All of this matters more than it used to because employees appear to have a renewed interest in labor unions and related rights.

One of the NLRB's primary duties is to conduct secret-ballot elections among employees in designated "bargaining units" to determine whether employees in them wish to be represented by a union. Such elections are triggered by petitions filed with the NLRB, so it pays careful attention to the number filed.

The Board, within the last 30 days, announced that filed "union representation petitions … increased [by] 58%" during the period from October 1, 2021, to June 30, 2022, as compared to the same period ending in June of 2021; and that, by May 25 of this year, the Board's fiscal-year 2022 petitions exceeded the total number of petitions filed in all of FY2021.

The number of unfair labor practice charges has increased too. What's more, the U.S. Department of Justice, on July 26, 2022, announced that the DOJ and the NLRB have signed a "memorandum of understanding" to enhance coordination between the DOJ and the Board to "ensure that workers are able to freely exercise their rights under the labor laws."

Conclusion

Such laws and employees' interest in them, in other words, seem to be enjoying a genuine "moment." How long it will last is anybody's guess. But wise employers will pay attention, take measures to avoid even the appearance of adverse action against employees because of "protected concerted activity," and try to avoid the costly and possibly public attention of the NLRB.

--