

**AKRON BAR ASSOCIATION**  
**NEW LAWYER TRAINING**  
**EMPLOYMENT LAW BASICS**  
**APRIL 9, 2015**

**EMPLOYEE RIGHTS UNDER SECTION 7 OF THE**  
**NATIONAL LABOR RELATIONS ACT**

**KAREN D. ADINOLFI, ESQ.**  
**ROETZEL & ANDRESS**

I. Background

A. National Labor Relations Act, 29 U.S.C. § 151 *et seq.*

1. The Act defines the rights of employees to organize and to bargain collectively with their employers through representatives of their own choosing - - or not to do so.
2. One purpose: “to eliminate certain practices on the part of management that are harmful to the general welfare.”
3. Enforcement
  - a. The Act is administered and enforced principally by the National Labor Relations Board (“NLRB”) and its General Counsel acting through 52 regional and other field officers.
    - (1) The General Counsel and staff at the regional offices investigate and prosecute unfair labor practice cases and conduct elections to determine representatives of groups of employees.
    - (2) The NLRB decides cases involving charges of unfair labor practices and determines representation election questions that come to it from the regional offices.

B. The Rights of All Employees (“Section 7 Rights”)

1. Section 7 of the Act, 29 U.S.C. § 157

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 purposes of collective bargaining or other mutual aid or protection,

and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment...

#### KEY LANGUAGE

“...to engage in other concerted activities for the purpose of...other mutual aid or protection”

2. If such rights are violated, that violation can be challenged as an unfair labor practice:
  - a. Section 8(a)(i) of the Act provides that an employer may not “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7.]” 29 U.S.C. § 158(a)(i).
  - b. The NLRB has repeatedly stated that Section 7 contains a broad prohibition on employer interference.
3. Section 7 applies to both union and non-union employees. The NLRB has been focusing much of its recent attention on non-union workplaces in seeking to uphold rights guaranteed under Section 7.

## II. Real World Application of Section 7 Rights to Union and Non-Union Employees

### A. Prohibition on the discussion of wages

1. Employer may not prohibit employees from discussing their wages with each other.
2. Such discussion is allowed by Section 7.

### B. Arbitration Agreements – many arbitration agreements contain a provision waiving class action rights of employees as a condition of employment.

1. NLRB has held that such requirements violate Section 7. *D.R. Horton*, 357 NLRB No. 184 (2012).
  - a. In *D.R. Horton*, the NLRB invalidated a class action waiver in an arbitration agreement, finding that waiver violated Section 7.
  - b. The NLRB held that the filing of class action lawsuits is or can be concerted activity for the employees’ mutual aid and protection.
  - c. Fifth Circuit reversed, but NLRB recently re-affirmed its original decision. *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014).

C. At-Will Employment Disclaimers

1. Very common provisions in handbooks, employment applications, and employee policies.
2. The NLRB has carefully scrutinized such disclaimers to ensure that they do not violate Section 7 rights.
  - a. Factors to consider. *Lionbridge Technologies*, 19-CA-115285 (Apr. 18, 2014)
    - (1) Does the policy explicitly restrict Section 7 rights?
    - (2) Was the policy put in place in response to union activity?
    - (3) Was the policy applied unlawfully?
    - (4) Would employees reasonably construe the policy as prohibiting them from union organizing?
  - b. A mixed bag of results.

D. Confidentiality and Internal Investigations

1. The NLRB found that an employer violated Section 7 by instructing employees not to discuss an internal Human Resources investigation with co-workers while the investigation was ongoing. *Banner Health System*, 358 NLRB No. 93 (July 30, 2012).
  - a. Reasoning: Prohibiting employees from discussing subjects such as an internal investigation could have the effect of preventing employees from engaging in concerted activity.
  - b. to prohibit discussion of ongoing investigation - employer must show a “legitimate business justification,” such as:
    - (a) need to protect witnesses;
    - (b) need to protect/maintain evidence; and/or
    - (c) need to prevent a cover-up.
  - c. Blanket imposition of confidentiality was overbroad and illegal.

E. Disclosure of Company Information

1. The NLRB has found a prohibition on the disclosure of confidential information violates Section 7. *Quicken Loans, Inc.*, 359 NLRB No. 141 (June 21, 2013). Quicken Loans’ policy restricted the dissemination of

confidential and proprietary information, which definition included non-public personnel information.

2. Such prohibition would restrict employees' ability to obtain information to provide to a union or to discuss workplace issues amongst themselves.

F. Limiting Use of E-mail Systems

1. NLRB has created a right of employees to use corporate e-mail systems for union organizing purposes as well as for other concerted activity during non-work time. *Purple Communications, Inc.*, Case Nos. 21-CA-095151, 21-RC-091531, 21-RC-091584 (Dec. 11, 2014).
2. Far-reaching, applying to every employer subject to the NLRB.
3. NLRB will carefully scrutinize any work rule that has the effect of limiting employee use of company e-mail for Section 7 purposes.
4. NLRB announced rule will be applicable retroactively.

G. Off-Duty Access of Employer's Premises By Employees

1. The NLRB found that an employer violated Section 7 by limiting on off-duty employee's access to the employer's property. *JAW. Marriott Los Angeles at L.A. Live*, 359 NLRB No. 8 (Sept. 29, 2012).
  - a. Employees not permitted to access the interior areas of the hotel more than 15 minutes before or after their scheduled shift, unless the employee has permission from management.
  - b. Such a policy provides the employer with discretion to set the terms of off-duty employee access so that policy could be used to discriminatorily limit union activity.

H. Social Media Policy and Practices

1. Social media has been a focus of the NLRB since 2010.
2. Focused on employer policies that prohibited or disciplined employee social media activity.
3. NLRB will sanction overbroad social media policies that prohibit employees from posting anything about the company or its employees or

that requires “professional” or “appropriate” communication on social media. *Lily Transportation*, Case No. CA-108618 (Apr. 22, 2014); *Durham School Services*, 360 NLRB No. 85 (Apr. 25, 2014).

4. Cannot prohibit posts that “negatively affect” the employer. *Hoot Winc, LLC*, Case No. 31-CA-104872 (May 19, 2014).
5. Cannot prohibit “gossip” about the company, an employee, or a customer. *Laurus Tech. Inst.*, 360 NLRB No. 133 (June 3, 2014).
6. Law remains very fluid and depends largely on the specific language of the policy at issue.