



# 10 THINGS FOR INHOUSE COUNSEL TO KNOW ABOUT THE NLRA

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# Meet Brent Garrett

Brent is an experienced labor and employment lawyer with an emphasis on handling complex traditional labor matters. For over 20 years, Mr. Garrett has provided trusted counsel to companies across a variety of industries on sensitive matters of labor relations. He provides value to his clients by seamlessly integrating a thorough understanding of state and federal employment laws with his strategic labor representation, including collective bargaining, grievance handling, and unfair labor practices.

**Practice Areas:**

- Labor & Employment
- Litigation



# Goals of Presentation

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- For the general in-house attorney, understand the complexity and nuanced issues in federal labor law.
- Provide value to your organization by being able to “issue spot” and avoid potential labor law issues.

# Why Should I Care About Labor Law?

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- Labor activity is “having a moment”
- Shifting attitudes towards unions in the emerging workforce
- Traditional political lines on union support are blurring
- Unions are breaking out of “brick and mortar” business, including high-tech, retail, food service, etc.
- If a union drive emerges, it will instantly become the main focus of the C-Suite



# The NLRA Applies to Almost All Private Employers, Not Just Those with Union Issues.

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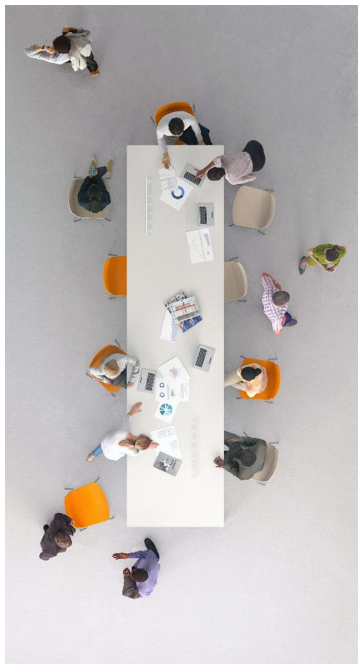
- NLRA jurisdiction is based on private employers engaged in “interstate commerce,” with a few niche carve-outs for certain industries, like agriculture.
- The threshold for being engaged in interstate commerce is quite low.





# The NLRA Covers a Wide Range of Activity Besides Union Organizing.

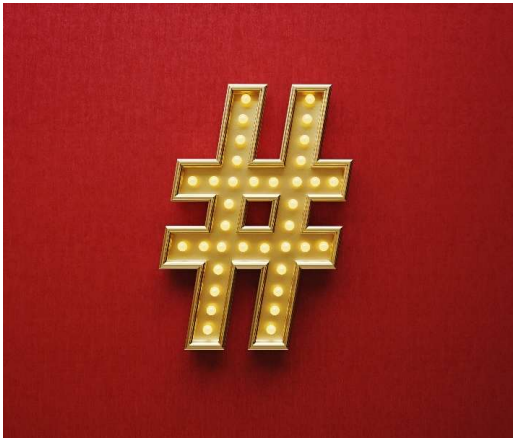
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- Section 7 of the NLRA broadly protects “concerted activity for mutual aid and protection.”
- “Concerted” = activity of a group nature, including employee outreaches and direct appeals to other employees or on behalf of other employees.
- “Mutual aid or protection” = relating to “wages, hours and working conditions”

## Common Examples of PCA

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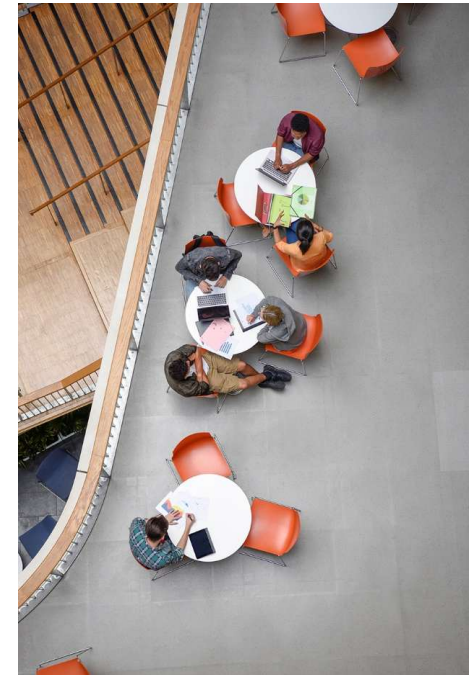
- Employees speaking up at company meetings
- Employees signing petitions
- Employees sending “Reply All” emails
- Social media posts
- Employee attire (buttons, slogans, etc.)



# The NLRA Protects Strikes for Non-Union Employees

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- The right to strike is expressly protected by the NLRA and not limited to union employees engaging in an economic strike.
- Non-union employees can strike over any matter pertaining to “wages, hours and working conditions.”
- Spontaneous walk-outs of non-union employees can be protected.
- Brief sit-down strikes can also be protected.
- Non-union employees have the right to strike over objectively reasonable concerns about safe working conditions.



# Yes, The NLRB Will Review Your Employee Handbook



- The NLRB's jurisdiction extends to reviewing employer policies that dissuade (or "chill") activity protected by Section 7 of the NLRA
- Under current NLRB law, a policy that a "reasonable employee" could interpret as dissuading Section 7 activity violates the NLRA

## Examples:

- Requiring employees have a "respectful," "civil," or "cordial" tone
- Prohibiting discussion of wages
- Requiring employee communications be "truthful"
- Prohibiting recording in the workplace
- Prohibiting employee contact with the media

# The *Cemex* Decision Has Dramatically Changed How Unions Organize

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- For 40+ years, an employer had no duty to recognize without an NLRB election
- Under *Cemex*, a union need only collect cards and demand recognition
- It is the employer's burden to file an election petition
- Must file within 2 weeks of union demand for recognition
- *Cemex* holds that any serious employer ULPs committed during the election result in a dismissal of the employer's petition, which results in union recognition



# The NLRB Enforces Strict Timelines in Organizing Petitions

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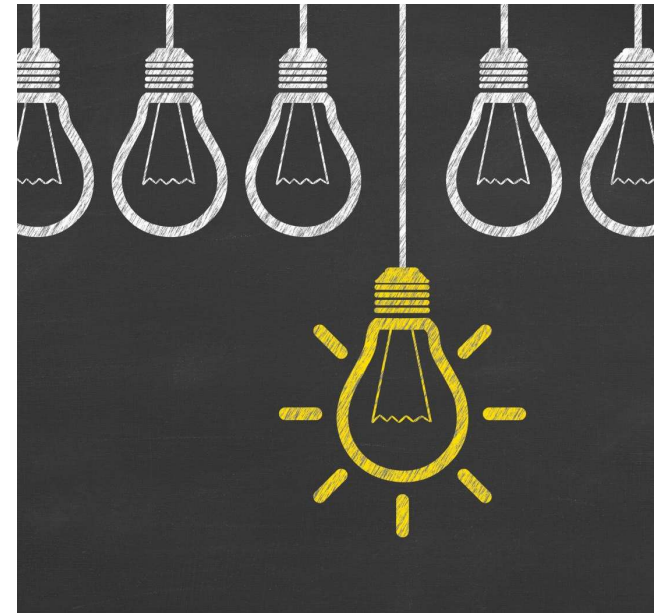


- Biden Board reinstituted the “quickie election” rules
- NLRB election petitions are processed at “warp speed”
  - Hearing is 8 days from petition
  - Employer Statement of Position (SOP) is 7 days from petition
  - Voter List is due within 2 business days
  - Elections are being held on 21 to 35 days from filing of petition
- Basically, the rules are intended to catch employers off guard, limiting decision-making and cutting into the employer’s campaign time and campaign strategy

# Understand the Basic Rules When Buying a Union Company

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- NLRB enforces a robust standard of “successorship”
  - Comes into play when buying/selling a union entity or union operation
  - If a buyer employs a majority of the predecessor’s union employees, there will be a duty to recognize the union
  - A buyer can typically set initial terms and conditions
  - Depending on the buyer’s conduct, the buyer may be deemed a “perfectly clear successor,” which requires the buyer to assume the union’s labor agreement





# What You Can Say, or Not Say, In a Union Campaign

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- NLRB strictly recognizes what can and cannot be said in a union election campaign
- Avoid the TIPS (Threats, Interrogate, Promise, Surveillance)
- Do the FOE (Speak from Facts, Opinion, Experiences)
- Good idea to understand these basic rules, conduct periodic training, as the “real world” questions are always time sensitive

# Have Your Game Plan Ready in The Event of A Union Campaign

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- What will be your company's position in a union drive?
- How attuned is your organization to potential union activity?
- What will be your position on the "appropriate bargaining unit"?
- Where will your company draw a line as to who is supervisory or non-supervisory?
- If you oppose the effort, how will you do your campaign?
  - Will you use consultants or have managers communicate?
  - Will you hold direct employee meetings?
  - What will be the role of executive management?
- What will be your main themes in encouraging employees to "vote no"?





# Day-To-Day Positive Employee Relations is The Best Approach

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- The older adage is “an employer gets the union it deserves,” which may or may not still be true.
- Regardless, there are keys to remaining non-union

## **Financial triggers:**

- Market-competitive comp and benefits

## **Emotional triggers:**

- Active and routine solicitation of employee concerns
- Multiple pathways to validate supervisory concerns by frontline employees

# Thank You

For questions or comments, please contact:

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