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# WHAT NON-UNION WORKFORCES NEED TO KNOW TO STAY COMPLIANT

APRIL 2025

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# PRESENTER

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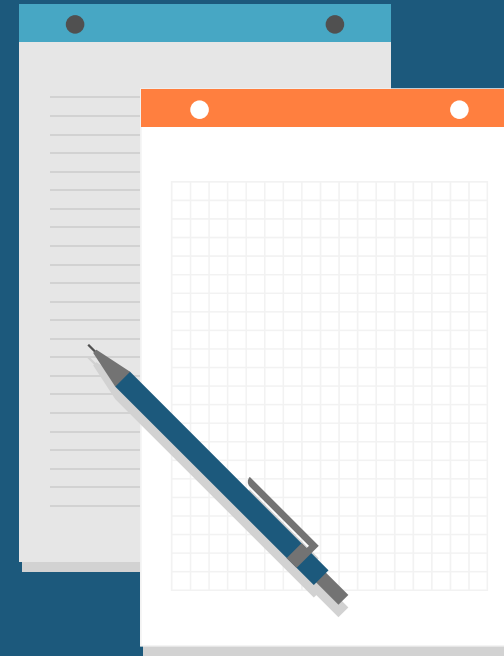
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# AGENDA

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- **NLRA**
- **Section 7**
- **Remedies for ULP**
- **Understanding the Board**
- **Protected Concerted Activity: Case Studies**



# WHAT IS THE NLRA?

**The National Labor Relations Act of 1935 applies to nearly all private employers and employees.**

**MYTH:** The NLRA only covers union workforces.

- **Truth:** The NLRA does not apply to supervisors and independent contractors.



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# WHAT IS THE NLRA?

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## **The NLRA has two purposes:**

1. Ensure employees can engage in concerted activity.
2. Regulate the process of how employers and unions negotiate collective bargaining agreements.

# CONCERTED ACTIVITY

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- Activity by a group of employees (two or more employees acting together) **attempting to improve wages, hours, and working conditions**, regardless of whether a union is present.
- Examples:
  - **Employees attempting to unionize workforce.**
  - **Striking for better pay.**
  - **Wearing buttons, t-shirts, and other clothing displaying slogans that protest the terms and conditions of employment.**

The NLRA prohibits employers from retaliating against employees for engaging in concerted activity.



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# SECTION 7 OF THE NLRA

## Employee activities protected under Section 7

- Organizing, forming, joining, or assisting labor organizations.
- Collectively bargaining for changes in wages and working conditions.
- Engaging in protected concerted activities (for example, picketing, striking, handbilling, and bannering).
- Refraining from any of these activities.

- Section 7 prohibits both union and non-union employers from interfering with employees' rights to engage in these activities or otherwise restraining or coercing employees in these activities

# SECTION 8 OF THE NLRA

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**Section 8** governs violations of employees' Section 7 rights.

- Unfair labor practices (ULPs).
- A ULP occurs when an employer's conduct, regardless of intent, **reasonably tends to interfere with the free exercise of employees' rights.**
- 6-month statute of limitations to bring charge.



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# EMPLOYEE REMEDIES FOR ULP

## “Make-Whole Remedy”

- Traditionally: back pay and reinstatement to position.
- New remedies: compensating employees “for all direct and foreseeable pecuniary harms suffered” due to the ULP.
  - Out-of-pocket medical expenses.
  - Credit card debt.
  - Other costs that are “direct and foreseeable.”

The new remedies may be unlawful:

- **3rd Circuit → Unlawful**
- **9th Circuit → Lawful**



# NATIONAL LABOR RELATIONS BOARD

5 Board members and 1  
General Counsel



The NLRB is responsible for enforcing the NLRA and remedying ULPs by employers.

## NLRB Currently Lacks a Quorum

- 2 vacancies and 1 firing
- New General Counsel

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# STERICYCLE (2023)

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## Policies in employee handbooks

- Confidentiality
- Work emails
- Personal phones
- Personal conduct
- Cameras and videos

❖ **New legal standard to determine if an employer's neutral policy violates employees' Section 7 Rights**



# STERICYCLE: LEGAL STANDARD

## New Legal Standard

- A policy is presumptively unlawful if it has a “**reasonable tendency to chill employees from exercising their Section 7 rights.**”
  - Board interprets rule from the perspective of an employee who is economically dependent on the employer.
    - *If an employee **could** (NOT would) reasonably interpret the policy to be coercive, then the policy is unlawful even if a non-coercive interpretation of the policy is reasonable.*

Employer may rebut unlawfulness by showing policy advances a (1) **legitimate** and (2) **substantial business interest** (3) **that is narrowly tailored.**



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# STERICYCLE: PROBLEMATIC POLICIES

## Electronic Communications Policy

- Policy stated that personal emails from work email should be infrequent and brief and **limited to urgent family matters**.
- ALJ concluded the policy restricted employees' Section 7 rights since the policy could **reasonably be interpreted to prevent employees from using their work email**, even on break time, to engage in activity protected by Section 7.

**Policy is likely still unlawful under Stericycle.**



# STERICYCLE: PROBLEMATIC POLICIES

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## Use of Personal Electronic Devices

- Policy limited the use of personal phones to break time, required phones be kept in lockers during worktime, and prohibited employees from entering hazardous work areas with their cell phones.
- ALJ concluded the policy did not violate employees' Section 7 rights because the ALJ found the employer's policy was narrowly tailored to prohibit the use of cellphones in hazardous work areas, which furthered a legitimate and substantial business interest.

**Policy may still be lawful under Stericycle.**



# STERICYCLE: PROBLEMATIC POLICIES

## Personal Conduct Policy

- Policy prohibited employee conduct **“that maliciously harms or intends to harm the business reputation”** of the company.
  - The example in the handbook stated, “behavior that is damaging to Stericycle's reputation” but there was **no exceptions for statements protected by Section 7.**
- ALJ concluded the policy was overbroad and violated employees’ Section 7 rights.

**Policy is still likely to be unlawful under Stericycle**



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# STERICYCLE: PROBLEMATIC POLICIES

## Camera and Video Policy

- Policy **prohibited** the use of cameras, video recordings, and audio recordings on company property without prior permission.
- Company argued the policy furthered its interest to protect its physical property and proprietary information.
- ALJ concluded the policy was **overly broad** and restricted employees' Section 7 rights.
  - *No distinguishment for working time and non-working time or for work areas and non-work areas.*
  - *Could reasonably interpret policy to prohibit employees from engaging in Section 7 protected activity, such as taking pictures of safety violations.*
  - *No evidence of the company's overriding propriety interest.*

**Policy is still likely to be unlawful under Stericycle**

# STERICYCLE - BEST PRACTICES

## **Include a savings clause in the policy.**

“This policy does not prohibit employees from engaging in rights protected by the National Labor Relations Act or any other applicable law.”

The Board in Stericycle did not address whether a savings clause is sufficient to avoid violating Section 7.

# STERICYCLE - BEST PRACTICES

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Review handbook policies to ensure they are **not overly broad or vague**.



## Evaluate what legitimate and substantial business interest a policy promotes

- Can the interest be alternatively promoted by a less restrictive policy?



# MCLAREN MACOMB (2023)

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## Severance Agreements



# MCLAREN MACOMB: FACTS



**Employer offered  
severance agreements  
to 11 permanently  
furloughed employees.  
All 11 signed the  
severance agreement.**

The severance agreement contained a **confidentiality** provision and a **non-disparagement** provision.



# MCLAREN MACOMB: FACTS

## Confidentiality Provision

The Employee acknowledges that the **terms** of this Agreement are confidential and agrees not to disclose them to **any third person**, other than a spouse, or as necessary to professional advisors for the purposes of obtaining legal counsel or tax advice, or unless legally compelled to do so by a court or administrative agency of competent jurisdiction.

# MCLAREN MACOMB: FACTS

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## Non-Disparagement Provision

At all times hereafter, the Employee agrees not to make statements to Employer's employees or to the general public which could disparage or harm the image of Employer, its parent and affiliated entities and their officers, directors, employees, agents and representatives.



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# MCLAREN MACOMB: HOLDING



**Held the non-disparagement and confidentiality provisions were overbroad and violated employees' Section 7 rights.**

- Merely **offering** such a severance agreement is unlawful, even if the employee does not accept the agreement.

**Legal Standard:** A severance agreement is unlawful if its terms have a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.

# MCLAREN MACOMB: HOLDING

## Confidentiality Provision

Held to be unlawful for violating employees' Section 7 rights.



Prohibited former employees from disclosing the **terms** of the agreement "to **any** third person."



Prohibited employees from reporting unlawful terms in the agreement, which may block ULP charges or cooperation with the NLRB.



Prohibited former employees from discussing severance terms with co-workers deciding whether to accept a severance agreement.



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# MCLAREN MACOMB: HOLDING

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## Non-Disparagement Provision



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Held to be unlawful for violating employees' Section 7 rights.



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# MCLAREN MACOMB: HOLDING

## Non-Disparagement Provision

- Public statements by employees about the workplace are central to the exercise of employees' Section 7 rights.
- **Problematic language:** "Employees are prohibited from making any statements to the Employer's employees or to the general public which could disparage or harm the image of the Employer."
  - Would prohibit statements asserting the company violated Section 7.
  - No definition of "**disparagement.**"
- Employees may critique the company pursuant to Section 7 if the communication is not **disloyal, reckless, or maliciously untrue.**
- No temporal limits - "**At all times hereafter.**"



# MCLAREN MACOMB: AFTERMATH

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**On March 22, 2023, General Counsel Abruzzo issued a memorandum to NLRB Regions to assist them in analyzing ULP charges under McLaren Macomb.**

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On **February 14, 2025**, General Counsel Cowen issued a memorandum rescinding Abruzzo's memorandum.



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# MCLAREN MACOMB: BEST PRACTICES

- **Review severance agreements for overbroad confidentiality and non-disparagement provisions**
- Determine if it is necessary to include a confidentiality or non-disparagement provisions in the severance agreement.
  - Limit to supervisor/upper management?
- Define “disparagement.”
- **Define “confidential information.”**
- Set temporal limit on non-disparagement provision.
- **Add a savings clause.**
- Add a severability clause.

# HOME DEPOT USA, INC. (2024)

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## Employee Insignia on Uniforms



# HOME DEPOT: FACTS

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**Morales (a Hispanic employee) worked at Home Depot in New Brighton, MN.**

**Morales wrote “BLM” on his apron shortly after being hired.**

**Morales and co-workers experienced racially discriminatory behavior from another co-worker, which they reported to management repeatedly.**



# HOME DEPOT: FACTS

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**Morales and co-workers displayed posters in the breakroom of prominent figures in Black history for Black History Month.**

Posters were repeatedly vandalized.

**Morales continue to display BLM initials on his apron.**

- Home Depot argued the BLM initials violated its policy banning causes or political messages unrelated to workplace matters.



## HOME DEPOT: FACTS

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**Morales could not work unless he removed the BLM initials from his apron...**

**Morales resigned.**



# HOME DEPOT: HOLDING

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Home Depot violated Section 7 by **demanding that Morales remove the BLM initials from his apron** and **prohibiting him from working unless doing so.**



# HOME DEPOT: HOLDING

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**Question: Did Morales engage in concerted activity?**

# HOME DEPOT: HOLDING

## The Board concluded - Yes

- Morales and co-workers **repeatedly reported racially discriminatory working conditions to management.**
- Morales insistence on continuing to wear the BLM marking to “show support for people of color or Black associates” stemmed from the employees’ prior concerted activities.



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# HOME DEPOT: HOLDING

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**Legal Standard:** An employer may not interfere with an employee's right to display insignia unless the interference is justified by a "special circumstance."

Home Depot argued special circumstances justified its ban on the BLM marking because the marking would:

- Interfere with its public image.
- Jeopardize employee safety.
- Exacerbate employee dissension.



# HOME DEPOT: HOLDING

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**The Board rejected all three arguments.**

# HOME DEPOT: HOLDING

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**Interfere with Public Image.** Home Depot encouraged employees to personalize their aprons by adding written messages and images (LGBTQ+ symbols, holidays, sport teams).



**Jeopardize Employee Safety.** There must be a concrete, imminent risk. No evidence that customers confronted employees wearing the BLM mark.



**Exacerbate employee dissension.** Rejected because few, if any messages, would be protected by Section 7 if an employer could show some employees disagree with a policy or message.



# HOME DEPOT: BEST PRACTICES

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- **Draft dress code policy tailored to public image.**
  - **Do not rely on generic dress code policies.**
- Enforce dress code policy uniformly to all violations.
- **Take action immediately upon violation.**
- Be able to justify bans on insignia (special circumstances).
- **Add a savings clause.**

# AMAZON (2024)

## Captive Audience Meetings

Captive audience meeting = meeting where employer expresses opinion about unionization.



# AMAZON

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- Illegal to require that employees—under threat of discipline—attend “captive audience” meetings.
- **Safe Harbor:** If an employer wishes to express its views on unionization to employees, an employer must “reasonably in advance” of the meeting assure employees that:
  - The employer intends to express its views on unionization;
  - Attendance is voluntary;
  - Employees will not suffer adverse employment action for not attending; and
  - The employer will not keep records of which employees attend, fail to attend, or leave the meeting.



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# WHAT EMPLOYERS SHOULD REMEMBER

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- Policies and practices must align with **Section 7** protections.
- Handbooks and work rules aren't "**set it and forget it.**"
- **Train managers and supervisors** on NLRA implications.
- **Proactive compliance= reduced legal risk.**



# QUESTIONS?



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