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Solicitation and Distribution Rules and Their Enforcement Under Attack: NLRB Continues to Narrow Employer Limitations on Workplace Communications

By Dale Deitchler

The National Labor Relations Act's limitations on employer no-solicitation/no-distribution policies have been established for decades, right? Most labor relations practitioners and Human Resources specialists are familiar with "black letter law" that workplace solicitation can be restricted to non-work time and distribution can be restricted to non-work time and non-work areas. Simple, isn't it?

Under two recent NLRB cases, *Conagra Foods, Inc.*, 361 N.L.R.B. No. 113 (Nov. 21, 2014) and *Mercedes-Benz U.S. International, Inc.*, 361 N.L.R.B. No. 120 (Nov. 26, 2014), the rules turned out to not be so simple. In both cases, the NLRB continues to whittle away at employer limitations on workplace conduct claimed to interfere with federally protected rights to support or organize unions, complicating decades of easy-to-administer Board precedent.

Most significantly, the Board in *Conagra* split hairs about what is or is not "solicitation," leaving employers in any situation in which a union authorization card is not presented or requested to be signed to guess at whether discipline for work-time discussions under otherwise lawful policies can be administered.

"Solicitation" Is Not "Discussion": Enforcing Lawful No Solicitation Policies Just Got Harder

In *Conagra*, an employee who was an active and open union supporter, in the midst of a union organizing drive, engaged in a brief verbal exchange on a production floor in which she informed coworkers where they could find union authorization cards they had previously agreed to sign. One employee was waiting for a production line to start and the other, who was cleaning, stopped momentarily when the employee spoke to her. The employee who was pushing for the union did not ask or attempt to have her coworkers sign authorization cards, had no cards with her and the interaction lasted only a few seconds. She "merely informed her co-workers that she had done what she told them she would do, *i.e.*, leave cards in a locker." After a coworker reported the exchange to the employee's lead person, the employer issued a verbal warning for violation of its no-solicitation policy. The employer also posted a letter stating its solicitation policy covered union "discussions" and that those discussions were limited to non-working times.

Stressing that the lawfulness of the employer's no-solicitation policy was not at issue, the Board concluded that the employee's conduct did not constitute solicitation under Board law. According to the Board, mere *mention* of union authorization cards during working time is not solicitation. Usually, solicitation, said the Board, "means asking someone to join the union by signing his name to an authorization card." Asking for a signature, explained the Board, prompts an immediate response, and therefore presents greater potential for interference with productivity of employees who are supposed to be working. (In the extreme, the Board went so far as to suggest in *dicta* that even an invitation to a union meeting was more akin to a statement of fact, did not require an immediate response, and was not solicitation).

According to the Board, in the employees' brief interaction described above, there was no signature request and no cards presented. There was no request for action, no risk of interference with production and the providing of information only lasted a few seconds. As a result, the Board ruled, there was no solicitation and in turn no violation of the employer's solicitation policy. Absent solicitation and any policy violation, the employer's verbal warning was deemed to be an interference with the employee's right under the Act to engage in protected union activity.

The Board then similarly concluded that the employer's letter regarding its no solicitation policy was unlawful because employees could view it as barring all "discussions" during working time. "Some discussions about unions," said the Board, "indeed, most discussions about unions, are just that—discussions, not solicitations." The letter's expansive limitation of union-related discussions to non-working time was thus overbroad and unlawful under the Act.

In a strong dissent, Member Miscimarra observed that the Board majority effectively invalidated the employer's lawful no-solicitation policy by requiring an employee to display a union authorization card for an employee's conduct to constitute solicitation. Miscimarra lamented that the decision would make it impossible to know in advance whether and what type of solicitation is prohibited and that, "[t]his is an unfortunate development in an important area that, until now, has been governed by one of the clearest and most workable rules-of-the-road in the case law we administer." Finally, Miscimarra found the decision was not reasonable with respect to the employer's letter because it merely reminded "employees about a lawful no-solicitation rule."

Overbroad Solicitation Policy, Mixed-Use Work Area Distribution Ban Unlawful

Less than a week after *Conagra*, the Board issued its decision in *Mercedes-Benz* in which it affirmed an administrative law judge's ruling that several employer policies unlawfully limited protected union activity during an organizing drive at the automaker's Alabama plant. The decision struck down a no-solicitation policy that prohibited "solicitation and/or distribution of non-work related materials . . . during work time or in working areas." The policy was found to be ambiguously overbroad because employees "reasonably would understand" it "to prohibit solicitation, in work areas, by employees not on working time."

Acknowledging that the employer "generally allowed employees to discuss the union in the workplace," the Board nevertheless ordered rescission of the policy and required either distribution of a corrected copy of the handbook or distribution of a handbook insert advising of the rescission or containing a lawfully worded policy with adhesive backing that would cover the unlawful provision. "As long as the rule is 'on the books,' it continues to have potential to chill employees' exercise of their [NLRA] rights. Its existence requires a remedy," the ALJ reasoned. "Based on the entire record, I find that [the employer] truly sought to be neutral and did not intend its rule to be construed in a way which discouraged employees from engaging in protected activities. However, the . . . intent is not relevant."

The Board in *Mercedes* also limited employers' ability to restrict distribution of union literature in mixed-purpose areas of employer facilities. The facility had "team centers" that included a refrigerator, microwave oven and picnic table used by employees during their breaks, but also served as group leader offices with filing cabinets, computers, and related equipment. Supervisors and human resources representatives used the centers when they came to the production area to confer with employees. The employer prohibited distribution of union literature in one of these "team centers" under its no-solicitation/distribution policy.

Finding no disparate policy enforcement by the employer, the Board nevertheless found application of the policy to the team centers unlawful, as it enforced restrictions in a mixed work/non-work area, in which the Act gives off-duty employees the right to distribute literature to other off-duty employees. The Board rejected the employer's argument that the team center at issue, which was enclosed by seven- to eight-foot walls, was so close to the production floor that it should be considered only a "work" area, and concluded the employer had shown no "special circumstances" negating employees' distribution rights within the center, such as evidence that union flyer distribution in the walled team center interfered with work and equipment outside.

Key Policy Review and Enforcement Take-Aways

Employers should tread increasingly carefully when developing, implementing and administering any policy under which employees could reasonably conclude their right to engage in protected concerted activity—either with respect to common or representative activity concerning employment terms or relating to unions—is involved. Following *Conagra* and *Mercedes-Benz*, employers should consider the following actions:

- Review and correct any no-solicitation, no-distribution policy that does not clearly follow the applicable non-work time, and for distribution, non-work area Board limits. Any ambiguities should be eliminated, as vague or unclear language will be construed against employers and in employees'/unions' favor.
- Before administering any level of discipline for policy violations, evaluate each case on its facts to determine whether actual solicitation has occurred. Absent some direct request to sign a union membership card or presentation of a card, other discussions simply mentioning a union or even, possibly, an invitation to a union meeting likely would not rise to the level of lawfully disciplinable conduct under *Conagra*.
- Evaluate facility areas to determine if they are work areas, non-work areas or mixed use areas. If an area is a non-work or mixed-use area, under *Mercedes-Benz*, adverse action for distribution of literature will be unlawful, absent "special circumstances" indicating, e.g., some interference with production or work performance.

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