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News & Types: Employment, Labor & Benefits Update

# Understanding the Process: A Guide to the National Labor Relations Act

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Practices: Employment, Labor & Benefits

**EXECUTIVE SUMMARY:**
More and more, the National Labor Relations Board is becoming an important government agency for companies whose employees are not represented by a union. The National Labor Relations Act applies to non-union employees who engage in concerted, protected activity, including supporting and forming unions. Companies need to know the process the National Labor Relations Board will follow when investigating and prosecuting cases against companies.

Employees in non-union companies have the right to talk with each other about their wages, benefits and working conditions and also to form a union to represent them when negotiating with a company. The National Labor Relations Act lists the types of actions that violate these rights. These actions are listed in Section 8. Section 8(a) lists the unlawful actions by companies. Section 8(a)(1) prohibits companies from drafting and implementing policies and supervisors from making statements and taking actions that coerce employees or interfere with their rights. Section 8(a)(3) prohibits companies from treating employees differently because they supported a union. A termination of an employee violates either Section 8(a)(1) or (3). For example, many companies have drafted social media policies stating that employees may not make statements that are disloyal to the company. Then, when employees make those statements in social media and other employees "like" them, the company will terminate both the sender and "like" employees. However, the Board may find that the company violated federal law by having included the policy in the employee handbook and terminated the employees.

The remedies for a violation of an unlawful discharge includes reinstatement, the pay the employee would have earned if he had not been terminated and other remedies to make the former employee whole. The remedy for a violation of Section 8(a)(1) includes the rescission of the policy and the posting of a Notice for 60 days. If there were a union election in the meantime, the remedy could include a rerun election. In the Notice, the company promises not to violate the Act. Unlike cases in court for discrimination, the company does not have to pay the attorneys' fees of the union's or government's lawyers and does not have to pay punitive damages.

**National Labor Relations Board**

The Board is an agency of the federal government that investigates, prosecutes and either dismisses cases or rules that a company violated the Act. The Regional Director makes the preliminary decisions and supervises the investigators and attorneys in the Regional Offices. The Board is divided into Regional Offices that

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investigate and prosecute cases. For example, the Chicago Regional Office has jurisdiction over Chicago, the Collar Counties and Northwest Indiana.

The Board's headquarters is in Washington, D.C. In Washington, the Board consists of a General Counsel who supervises the Regional Offices, Administrative Law Judges who hear the cases and recommend decisions, and five Board members who issue the final rulings on the cases. The President appoints the General Counsel and the five Board members with the advice and consent of the Senate.

**The Charge and Investigation**

Either a union, an individual employee or a group of employees may file a charge against a company. The charge lists the allegations of wrongdoing. The Regional Office's investigator will investigate those allegations as well as anything else that he uncovers. Usually, the Regional Office will investigate a case within 30 days. The investigator first interviews the witnesses against the company and takes sworn affidavits from the witnesses. Then the investigator requests cooperation from the company. The company may agree to submit its witnesses to questioning by the investigator. The company may or may not agree to allow the investigator to take sworn affidavits from the company's witnesses. The company may also file a "position statement" with the Regional Director, setting forth the facts and arguments why the Regional Director should dismiss the case. The strategy about how the company will cooperate with the investigator is an important, key decision, because everything stated in writing to the investigator becomes evidence against the company in a later trial.

The investigator prepares a "Final Investigative Report" with the facts, arguments and recommendation that the Regional Director should either dismiss the case or issue a complaint against the company. The Regional Director reviews the Report. If the Regional Director dismisses the charge, the union may appeal to the General Counsel in Washington, D.C. If the Regional Director issues a complaint, the Regional Director is deciding only that there is sufficient evidence to believe that the company may have violated the Act. The Regional Director is not deciding that the company violated the Act.

If the Regional Director decides to issue a complaint, the investigator will contact the company and ask if the company wants to settle the case. If the company settles the case, the company usually must sign a Settlement Agreement, provide remedies and post a Notice for 60 days. The company and Regional Director negotiate the settlement. When and how to negotiate is another key strategy for the company to consider and implement. If there is no settlement, the Regional Director usually issues the Complaint within 45 – 60 days after the charge was filed.

**The Complaint, Discovery and Trial**

The Complaint sets forth the alleged violations of the Act. In response, the company files an Answer to the Complaint, admitting or denying the allegations.

Unlike cases in state and federal court, there is no pre-trial discovery. Instead, about 10 days before the trial, the prosecuting attorney in the Regional Office issues a subpoena to the company. In the subpoena, the prosecuting attorney requests the attendance of witnesses at the trial and also requests the disclosure of company documents. The company may fight the subpoena or comply with the subpoena. The company can issue a subpoena on the union and its witnesses.

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The trial usually takes place within 3 – 5 months after the Regional Director issues a Complaint. The case is transferred to an Administrative Law Judge who will hear the case and issue a Recommended Decision and Order. However, prior to the trial, the Division of Administrative Law Judges attempts to settle the case. If the case does not settle, the trial takes place in front of an Administrative Law Judge. There is no jury. As in a regular court case, the witnesses are sworn under oath. A prosecuting attorney for the Board represents the government and the union. The union's lawyer will also be present and may ask questions. Companies are represented by their lawyers. The judge hears evidence, decides who is telling the truth, and issues a written decision, usually within 6 months of the trial. The loser may comply with the Judge's decision or appeal to the five-member Board in Washington. In some cases, the company and Board will agree to a settlement of the case after the Administrative Law Judge issues his opinion, or the company will comply with the decision.

**Appeal**

As mentioned, the company may appeal to the five Board Members located in Washington, D.C. Usually, the appeal is heard by a panel of three of the Board Members. The appeal is usually by documents and not with in-person presentations to the Board Members. The Board usually issues its Decision and Order within one year of the appeal. If the company loses, it may appeal to one of the federal court of appeals. If the company does not appeal, it must comply with the Board's Decision and Order.

**Injunction**

The General Counsel in Washington, D.C. has ordered all Regional Directors to recommend whether there should be injunctive relief against companies when unions file charges during a union organizing campaign. The purpose of an injunction is to impose an immediate remedy for the union and employees while the case is pending before the Administrative Law Judge and during appeals from the Administrative Law Judge's Recommended Decision and Order.

Therefore, during an organizing campaign, the investigator will investigate and recommend whether an injunctive relief is appropriate and the Regional Director will file a report with the General Counsel in Washington regarding the issue of injunctive relief. The General Counsel decides whether the Regional Director should seek injunctive relief. If the Regional Director seeks injunctive relief, he or she will file a complaint in the federal court. The federal court will hold a hearing and issue a decision either dismissing the injunction or issuing an injunction against the company. An injunction may issue within days or weeks, but the Administrative Law Judge and the Board may issue its decisions and orders in months and years.

**Action Plan**

The Board's process may be long and complicated. Although the Regional Offices decide cases within 30 days, the ultimate decision by the Administrative Law Judge and the Board's members in Washington may take years. Therefore, the company needs to analyze its options and create a strategy for fighting the charges brought by employees or unions.

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