



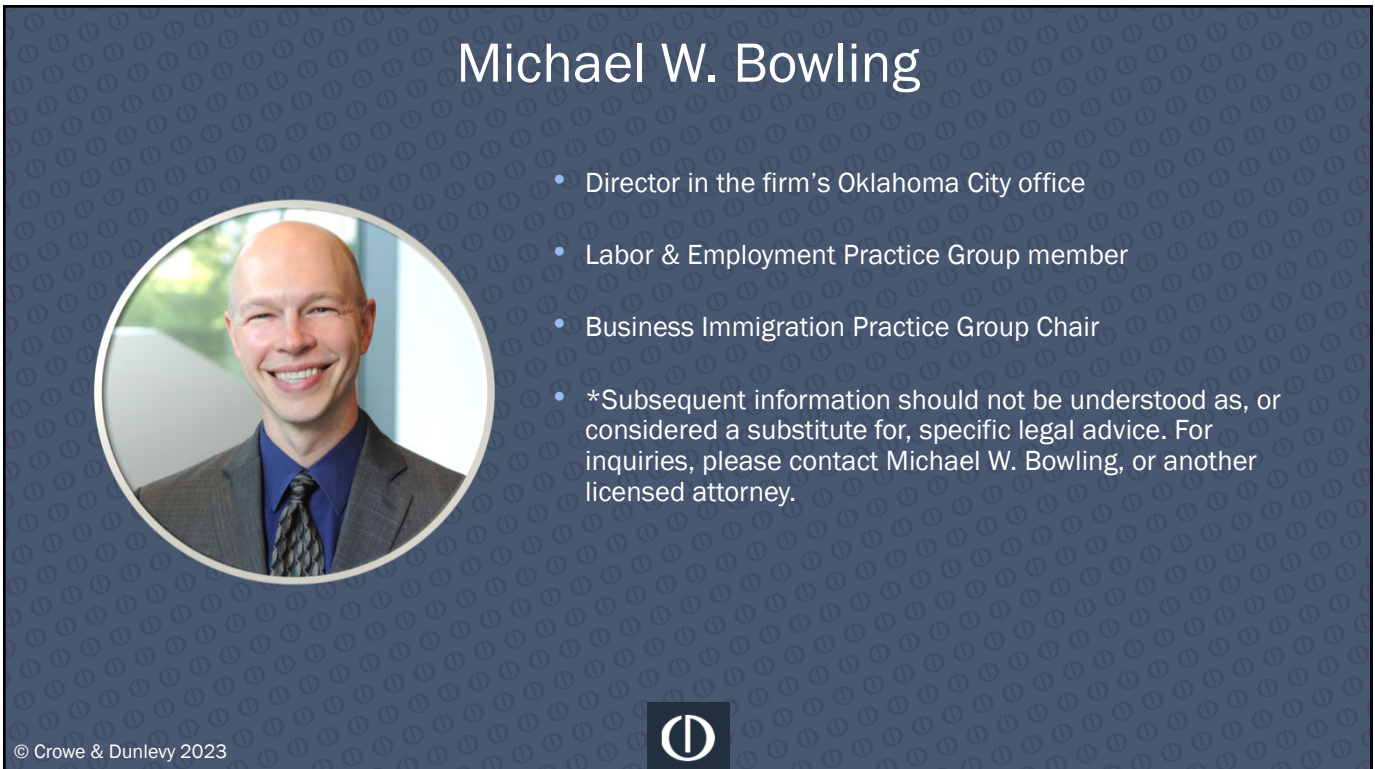

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ATTORNEYS AND
COUNSELORS AT LAW

**There Is a Monster in
Your Closet: Today's
Aggressive NLRB and Its
Impact upon the
Workplace**


Presented by: **Michael W. Bowling**

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World Ready


1



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- *Subsequent information should not be understood as, or considered a substitute for, specific legal advice. For inquiries, please contact Michael W. Bowling, or another licensed attorney.

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2

“I intend to be the most pro-union President leading the most pro-union administration in American history.

- President Joseph Biden

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3

Agenda template



NLRA Refresher



Disruptive Behavior



Handbooks and Policies



Union Recognition



And There's More

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4




5


Is the NLRA Relevant to You? (I)

Probably. National Labor Relations Act applies to most American workplaces.

Even if you do not have *any* unionized employees.



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A slide with a dark blue background featuring a repeating pattern of the NLRA logo. The text is in white. On the right side, there is a portrait of actor Robert Pattinson. At the bottom center, there is a white NLRA logo on a dark blue square background. A copyright notice "© Crowe & Dunlevy 2023" is in the bottom left corner.

6

Is the NLRA Relevant to You? (II)

Key Exceptions:

- Government employees
- Agricultural laborers
- Common carriers (like airlines and railways)
- Domestic servants
- Church workers involved in ministry activities
- Employed by a parent or spouse
- Independent contractors
- Supervisors

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7

**#\$%^ This \$@!*:
Disruptive
Behavior in the
Workplace**

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Q: Is This Okay in the Workplace?

- “f***ng mother f***cker,”
- “f***ing crook”
- “a**hole”
- “stupid”
- “NASTY MOTHER F***ER”
- “F** his mother and his entire f***ing family!!! What a LOSER!!!!”



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9

A: Probably Yes!

- NLRA protects employees in engaging in “concerted activity” or in attempting to engage in “concerted activity” – includes discussion and advocacy related to wages, benefits, and other terms and conditions of employment
- Board has created a wide umbrella of protection around “concerted activity” – including protection for disruptive activity

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Lion Elastomers, LLC (2023)

Conduct Toward Mgmt

- *Atlantic Steel* Test
- (1) location where the conduct occurred
- (2) subject matter of overall interaction
- (3) nature of employee's outburst
- (4) whether outburst was, in any way, provoked by unfair labor practice by employer

Social Media/Among EEs

- Totality-of-the-circumstances test

Picket Line Conduct

- *Clear Pine Mouldings* standard
- Consider whether, under all the circumstances, non-strikers reasonably would have been coerced or intimidated by the picket-line conduct

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11



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**Handbooks and
Policies**

12

Boeing Standard

- If workplace policy did not, on its face, impact ability of employees to engage in protected concerted activity, it was lawful unless it could be shown that the policy was actually used to infringe on employees' rights



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13

Stericycle Standard (I)

- Policy or provision violates NLRA if it has a “reasonable tendency” to dissuade workers from concerted activity
- “Reasonable tendency” judged “from the perspective of an employee who is subject to the rule and economically dependent on the employer, and who also contemplates engaging in protected concerted activity”



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14

Stericycle Standard (II)

- Employer can rebut presumption of illegality if it can show (1) policy advances legitimate and substantial business interest and (2) employer cannot advance that interest with narrower rule
- Rebutting pro-employee perspective may be uphill climb; Board cases from prior to *Boeing* show that Board has rarely accepted the employer's reasoning



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Policies to Be Reviewed

- Personal conduct
- Workplace recordings
- Conflicts of interest
- Confidentiality of harassment complaints
- Any policy that *might* impact employee behavior and terms and conditions of employment
- Example: one week after *Stericycle*, NLRB ALJ held that Starbucks' workplace civility policy - which asked employees to communicate with other employees and customers "in a professional and respectful manner at all times" and not "use ... vulgar or profane language" - was unlawful

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16



17

Cemex Standard (I)

- *Cemex* decision significantly reduced barriers to unionization
- If union claims to represent majority of workers – even if union does not present evidence that it actually has such majority support – employer has three avenues of response
 - (1) Recognize union and bargain
 - (2) File representation petition within 14 days of demand for recognition
 - (3) Be ready to prove to the NLRB that the union did not have majority support in appropriately defined bargaining unit



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18

Cemex Standard (II)

- Shortened consideration period ...
 - Little time for communication between employer and alleged bargaining representative
 - Difficult choice of whether to demand an election, even if union may not have majority support



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19

What to Do in Face of Cemex?

- Remain vigilant regarding demands for representation; move quickly in assessing best path forward
- Proactively solicit and address employee concerns
- Employers with any concerns about employee organizing activity might also consider supervisor training, union vulnerability audits, and other union-free workplace messaging

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20




21

And They're Coming for More ...

- Non-compete agreements
- Training cost repayment agreements
- Banning mandatory union education meetings (even if paid and on company time)
- Expanding employee rights to use company email and other electronic communication platforms
- Expanding union right to access company property


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22





23

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24