

RYBICKI & ASSOCIATES | P.C.

LABOR AND EMPLOYMENT ATTORNEYS

California Public Employer Labor Relations Association
44th Annual CalPELRA Training Conference

CAN THEY DO THAT?

Understanding The Rules Around Union
Access, Organizing, and Communication
in the Workplace

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PRESENTED BY:

PATRICK SUTTON, JUDICIAL COUNCIL of CALIFORNIA

RICHARD RYBICKI, RYBICKI & ASSOCIATES PC

AGENDA

- UNION ACCESS RIGHTS
- PROTECTED COMMUNICATIONS
- UNION BUTTONS AND INSIGNIA
- RIGHT TO REPRESENTATION

UNION ACCESS RIGHTS

- Physical access to workplace
- Access to means of communication to members

UNION ACCESS RIGHTS

- GENERAL RULE – Unions have the right to:
 - Access work areas
 - Use bulletin boards & mailboxes
 - Use facilities for meetings

UNION ACCESS RIGHTS

- Who has access rights granted to the union:
 - Non-employee representatives
 - Employee reps, i.e., stewards
 - Individual employees engaged in protected activities

UNION ACCESS RIGHTS

*NEW DEVELOPMENT

PERB recently held that reps from a non-incumbent union have the same access rights as the existing union.

County of San Bernardino (2019) PERB Dec. no. 2556-M

ACCESS TO WORK AREA

- Employer may establish “reasonable regulations” on access:
 - Necessary to efficient operations
 - Narrowly drawn to avoid infringement on protected rights

ACCESS TO EMAIL

*NEW DEVELOPMENT

Recent PERB decisions: unions & employees may use employer email for protected activities.

Napa CCD (2018) (2018) PERB Dec. no. 2563-E

Los Angeles USD (2018) PERB Dec. no. 2588-E

OTHER FORMS OF ACCESS

- Employee internal mailboxes
- Other means of communication
- New employee orientation
- Employee home addresses and phone numbers

REASONABLE REGULATIONS

- Employer bears burden
- Generally can limit access to non-working areas
 - Break rooms
 - Public areas

WORK TIME

- Employer may prohibit solicitation during the working time of either the employee doing the soliciting or the other employee

Fresno Sup. Ct. v. PERB (2018) 30 Cal.App.5th 138

Work Time is for Work?

*NEW DEVELOPMENT

Recent PERB decisions: employer cannot limit union access or activities if ANY non-work activities are allowed

UC (Irvine) (2018) PERB Dec. no. 2593-H

County of Orange (2018) PERB Dec. no. 2611-M

PUTTING IT TOGETHER

- Many employer policies allow “incidental” personal use of email.
- This means: same rule must apply to use of email for protected activities.

GROUP EMAIL LISTS

- Can employers restrict use of email distribution lists?
- Probably not – Napa CCD & Chula Vista decisions involved messages sent to all teachers



PROTECTED COMMUNICATIONS

What is Protected

- Union-related speech
- Discussing communal wages/hours/working conditions
- “Matters of general political, social or economic concern to employees”

PROTECTED SPEECH

- EXAMPLE: teacher sent email to all teachers asserting former union president breached fiduciary duty to union by taking job as HR director.

PROTECTED SPEECH

- EXAMPLE: teacher sent email to all teachers saying raises should be funded by “tak[ing] some money from the bloated Pentagon budget that funds death and destruction...”

What is NOT Protected

- Prior rule: speech loses protection if “found to be sufficiently opprobrious, flagrant, insulting, defamatory, insubordinate, or fraught with malice”

NLRB v. PERB Rule

- Recent federal labor relations law suggests movement in another direction, but California public employers should pay careful attention to current PERB standards and state-law employee expression rights

What is NOT Protected

*NEW DEVELOPMENT

Speech must be “maliciously untrue” to lose protection.

Chula Vista ESD (2018) PERB Dec. no. 2586-E



UNION BUTTONS AND INSIGNIA

RIGHT TO DISPLAY

- GENERAL RULE: employees have the right to wear or display union insignia at work
 - Buttons
 - Lanyards
 - Paraphernalia

RIGHT TO DISPLAY

- EXAMPLE: Firefighters bought uniform t-shirts and sweats which were printed with union's logo.

County of Sacramento (2014) PERB Dec. no. 2393-M

RIGHT TO DISPLAY

- EXAMPLE: Hospital nurses wore stickers saying “Management NEEDS TO LISTEN TO NURSES” in patient care areas.

UC (San Diego) (2018) PERB Dec. no. 2616-H

**Judicial appeal pending*

RIGHT TO DISPLAY

- PERB: “The right of employees to wear union insignia at work is a time-honored, legitimate form of union activity.”
- Serves “important purpose” of “allowing employees to demonstrate their union solidarity and pride.”

RIGHT TO DISPLAY

- “It also provides a conduit for employees and their organizations to send a message to the employer concerning workplace disputes.”

SPECIAL CIRCUMSTANCES

- Employer may restrict right to wear/display only when it can prove “special circumstances”

SPECIAL CIRCUMSTANCES

*NEW DEVELOPMENT

Trial court employer showed special circumstances to justify ban on insignia based on its need to maintain appearance of neutrality

Fresno Sup. Ct. v. PERB (2018) 30 Cal.App.5th 138



RIGHT TO UNION REPRESENTATION

WEINGARTEN

- Traditional rule: employee has right to union representation when being questioned on a matter that may lead to discipline

BEYOND WEINGARTEN

- Several PERB decisions establish broader right to representation:
- All matters involving wages, hours, and other terms & conditions of employment

BEYOND WEINGARTEN

- EXAMPLE: employee has a right to representation during interactive process meeting to discuss reasonable accommodations

Sonoma County Sup. Ct. (2015) PERB Dec. no. 2409-C

BEYOND WEINGARTEN

- Employer cannot characterize an investigation as a non “interview” by creative means such as requiring employee to write a statement.

BEYOND WEINGARTEN

*NEW DEVELOPMENT

Employee has right to representation when required to draft a written statement explaining his actions

San Bernardino CCD (2018) PERB Dec. no. 2599-E

BEYOND WEINGARTEN

*NEW DEVELOPMENT

Employee has right to representation
when required to write a memo giving
whereabouts

County of San Joaquin (2018) PERB Dec. no. 2619-M

BEYOND WEINGARTEN

*NEW DEVELOPMENT

Prison guard has right to representation
when subject to a physical search for
contraband

State of CA (CDCR) (2018) PERB Dec. no. 2598-S

**Judicial appeal pending*



CONCLUSIONS

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THANK YOU!

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