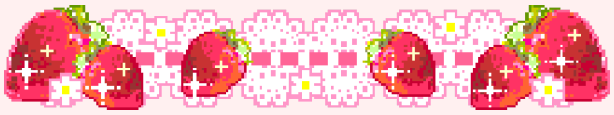
Labor Law Outline!

I. NLRA provisions

- **Section 2: definitions**
  - § 2(2): "Employer:"
    - **"<u>The term "employer" includes any person acting as an agent of an employer, directly or indirectly,</u>** but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [45 U.S.C. 151 et seq.], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."
    - Includes "agents of employer," like supervisors
    - Excludes Public Sector employers
      - Excluded from NLRA obligations
  - § 2(3): "Employee"
    - The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.
    - § 2(11): supervisors
      - "The term "supervisor" means any individual having authority, in the interest of the employer, **<u>to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action,</u>** if in

connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

- **Section 7: workers' rights**
  -
- **Section 8: unfair labor practices**
  - Section 8(a)(1)
  - Section 8(a)(4)
  - Section 8(a)(5)
- **Section 9: representative elections**
  - Section 9(a)
  - Section 9(b)
  - Section 9(c)
- **Section 14: limitations**
  - Section 14(c)(1)
    - Board can decline to exert jurisdiction if it thinks employer does not have substantial effect on interstate commerce
      - "(c) Power of Board to decline jurisdiction of labor disputes; assertion of jurisdiction by State and Territorial courts
      - (1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to subchapter II of chapter 5 ofLabor law outline - Google Docs title 5, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: Provided, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959."
    - Ex: teachers at religious institutions, track cleaners at horse races, etc

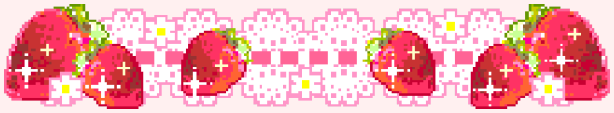


II. Defining Employees, Employers (and everyone in between)

Employees

Employers

Labor Organizations



Collective Action

- § 7 protects right to "engage in **concerted activity** for **mutual aid and protection"**
- Statute text:
    - "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."

"Concerted activity"

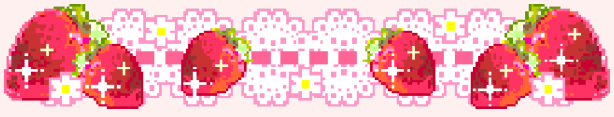
- Whether group activity is protected hinges on whether activity falls under definition of "concerted activity"
    - Definitions of concerted activity
        - (a) individuals working alone as part of a broader effort?
        - (b) many people working together concurrently?
- Theories of concerted activity
    - (a) Concerted activity as harmonious with individual rights
        - Well-being of one intertwined with well-being of the collective
        - Worker experience of solidarity – "one flesh, one family'
    - (b) Concerted activity as incompatible with individual rights
        - Case examples
            - *City Disposal Systems,* O'Conner (dissent)
- Note: conceited activity is "broad" – covers activities by unionized and non-unionized employees when they take the most direct route available to improve working conditions
- Scope of concerted activity
    - NLRB v Washington Aluminum Co
        - § 7 protects concerted of nonunion workers
    - NLRB v City Disposable Systems Inc (1984)
        - § 7 protected *individually* asserting a right in your collective bargaining agreement is

        - **Interboro doctrine:** actions taken by ind'v that is an assertion of a right grounded in collective bargaining is "concerted activity"

"Mutual Aid and Protection"

- What does it mean to engage in concerted activity *for* "mutual aid and protection?"
    - Big questions:
        - (a) To whom does "mutual aid or protection" refer?
            - Covers employees when they act on behalf of the group
            - Covers employees when they act on behalf of an individual employee (Weingarten)
- Identity
    - The identities of the parties involved work for or against a "concerted activity for mutual aid and protection" argument.
        -
    - NLRB v Weingarten
        - Q: Is an ind'v worker's request to have a union rep present at a meeting with a supervisor considered "concerted activity for mutual aid and protection?"
        - A: Yes
        - Reasoning:
            - The employee is seeking "aid and protection" against a perceived threat to employment security
            - The rep is both safeguarding the employees interest and the interests of the whole bargaining unit against unfair labor practices
        - Scope of Weingarten
            - Employee must request representation on the reasonable belief that the meeting could lead to disciplinary action
            - Meeting must pertain to statutory terms and conditions of employment
            - Experience of this right must not infer with the employers legitimate prerogatives
            - Does not apply in certain contexts
    - IBM Corp., 341 NLRB 1288 (2008)
        -
- Subject matter

Strikes!



Collective Representation

Exclusive Representation, Majority Rule, Regulation of Access

- § 9
    - = deals with the collective representation process

Pros of § 9	Cons of § 9
Establishes effective, employee-side countervailing bargaining power	Majority rule eliminates minority union rights (members-only bargaining)

- Relevant sections
    - § 9(a): "[R]epresentatives selected by a majority of employees in a bargaining unit shall be the exclusive representative, for purposes of collective bargaining of all employees in the bargaining unit."
    - § 9(b)-(e): standards and procedures determining whether a union is entitled special status as an exclusive representative
        - § 9(c): exclusive representation is established by a secret-ballot election or "any other suitable" means.
- Three kinds of access regulations affecting § 9 collective representation process
    - (1) access to coworkers
        - *Republic Aviation Corp:* union solicitations are legal during nonworking time unless they interfere with the employer's legitimate business interests or property. BUT "working time is for work"
    - (2) access to emails
        - Does not violate act by restricting non-business use of emails/IT stuff, absent proof that employees would be deprived communication without it
        - *Kroger:* Non-employee access
    - (3) non-employee access to employer property
        - Companies can restrict access to property from non-employees, but can't depart from established practice if they're already letting other orgs in ("we let the girl scouts in, why not SEIU?")
            - This is basically "discrimination" against unions – excluding one organization while letting all others in
        - When can a property owner exclude non-employees from property?
            - The *NY NY* test
                - (1) the activity significantly interferes with the employer's use of the property OR
                - (2) the exclusion is justified by another legit business reason (ex: production/discipline)

- The *Bexar I* test
    - (1) employee does not **regularly** and **exclusively** work on the property OR
    - Employer has a reasonable nontrespassory alternative means to communicate their message

Regulation of speech, Grant/Withdrawal of Benefits, Surveillance

- Employer speech
    - § 8(c)(1): gives employers the right to express opinions
    - Employers can make fear-inducing predictions about unionization, ONLY IF claims are grounded in evidence
        - How severe factual misrepresentation are treated depends on the political composition of the NLRB
            - Either “damages integrity of elections” or “is just an unfortunate part of the normal political process”
    - Captive audience meetings
        - Employees have a right under § 7 to receive union-related information
        - These anti-union captive audience meetings are usually legal but sometimes complicate the purpose of § 7
    - Use of employees in anti-union propaganda campaigns
        - How to distinguish voluntary v coercive employee participation in anti-union propaganda?
            - 5 factor test (*Allegheny*):
                - (1) solicitation is in the form of a general announcement that discloses purpose, assures that participation is voluntary, that participation won't result in rewards/benefits/punishments
                - (2) Employees not pressured to make decision in front of a supervisor
                - (3) No other coercive conduct connected to solicitation with threats of reprisal or promises of benefits
                - (4) Does not create a coercive atmosphere by engaging in serious or pervasive unfair labor practices or other comparable coercive conduct
                - (5) Does not exceed legit purposes of soliciting consent seeking info about union stuff or otherwise interfering with statutory rights of employees

- Grant and withdrawal of benefits
    - Prohibited when
        - (a) during election campaign’s “critical period”
            - Critical period = between the filing of an election petition and the election itself

        - (b) for the purposes of disrupting the election process
        - (c) with the intent to interfere with or discourage an employee's rights to organize, join, or support the union
    - 8(a)(1): explicitly prohibits employers from interfering with, restraining, or coercing employees in the exercise of their rights guaranteed under § 7 (which includes right to self-organization and collective bargaining)
    - **Granting or withdrawing benefits is a ULP**

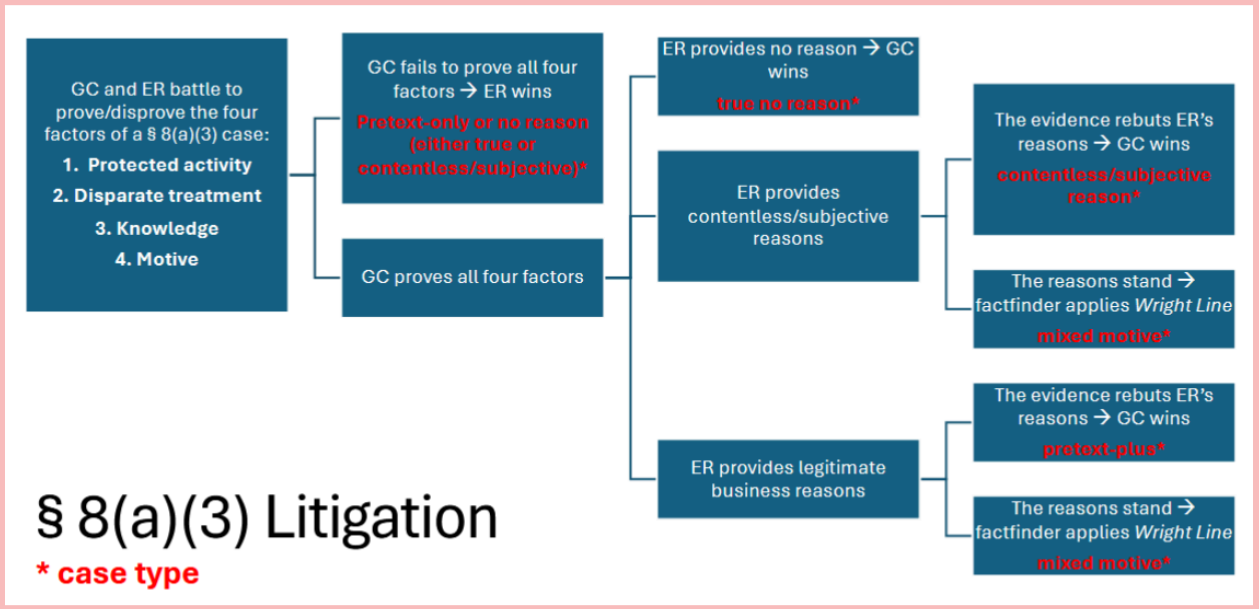
Protection against discrimination

- Individual workers are protected against anti-union discrimination under § 8(a)(3)
- The 8(a)(3) retaliation/discrimination case:
    - **Elements of prima facie case**
        - (1) worker engaged in union or § 7 activity
        - (2) the employer discriminates against the workers
        - (3) the employer has knowledge about the workers union or § 7 activity
        - (4) the employer has retaliatory, unlawful, or anti-union motive
    - **Burden of proof (§ 10(c))**
        - General counsel for union must prove by a preponderance of the evidence
        - In mixed motive/dual motive cases, burden also shifts to employer

- 8(a)(3) case types
    - **<u>“No reason” cases</u>**
        - Types of situations applicable:
            - When employer gives a contentless or vague subjective reason for terminating an employee (“she just didn't fit the company culture!”)
    - **<u>Pretext cases</u>**
        - **Pretext cases can be proven using the pretext or pretext-plus evidentiary standards.**
            - ***most courts use simple pretext standard
        - **(i) pretext cases**
            - = focuses solely on disproving employers stated reason
            - Types of situations applicable:
                - An employer has given a reason for termination, but that reason can be rebutted.
                - **not legit business reason for termination (no *Wright-Line* analysis)
        - **(ii) pretext-plus cases**
            - = focuses on disproving employers stated reason AND additional burden of proving extra evidence of discrimination
            - Types of situations applicable:

        - An employer has given a reason for termination, but that reason can be rebutted.
        - **not legit business reason for termination (no *Wright-Line* analysis)
    - **Dual or mixed-motive cases**
        - Types of situations were applicable
            - An employee did something that made them fireable, but also engaged in union activity
            - *** Apply *Wright-Line* burden-shifting framework
        - **Wright-Line framework**
            - (a) burden on general counsel to prove its prima facie case by showing by a preponderance of evidence that:
                - (1) worker engaged in union-related or § 7 protected activity
                - (2) employer discriminated against the worker
                - (3) employer knew of the worker activity
                - (4) employer had retaliatory or anti-union motive ("in part causation")
            - (b) burden shifts to employer to prove its affirmative defense by showing by a preponderance of evidence that it would have taken the same action regardless of union activity (ie: no "but for" causation)

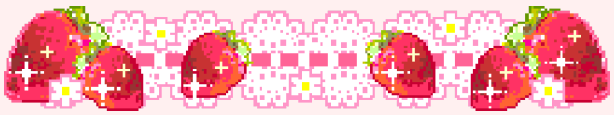
How § 8(a)(3) litigation works:



- **§ 8(a)(3) cases**
    - *Textile workers of america v darlington mfg co*
        - Partial closure test (for an employer who shuts down a business with retaliatory motive)

- (1) employer has an “interest” in another business and world benefit from discouraging § 7 activity there
- (2) employers “purpose” is to chill § 7 activity there; AND
- (3) employer has a “relationship” with that other business that makes it “realistically foreseeable” that the “effect” of the closure will chill § 7 activities

○ *NLRB v Transportation Mgmt corp*
○ *Town & County Electric v NLRB*



Strikes

- Striking is protected under the NLRA, but is also limited in some key ways:

Relevant statute	Key Text / Idea	Affect on protection
§ 7	Lists the fundamental rights of workers	• Workers have the fundamental right to engage in concerted activities for purposes of bargaining or mutual aid
§ 8(a)(1)		• Prohibits employers from interfering with employee’s right to strike
§ 8(a)(3)	Elements of § 8(a)(3) claim • (1) worker engaged in union or § 7 activity • (2) the employer discriminates against the workers • (3) the employer knows about the workers union or § 7 activity • (4) the employer has retaliatory, unlawful, or anti-union motive	• Employers can't use the fact that you are in a union as reason to fire/not hire you
§ 8(b)(4)	§ 8(b)(4)(b) ULP challenge GC must prove…	• “secondary boycott prohibition”

	• (1) respondent is labor org
	• (2) prove that org utilized forbidden tactic or forbidden pressure
	  ○ Ex: ceasing work or coercive pressure
	• (3) with a forbidden purpose
	  ○ With intent to put pressure on primary employer or neutral
	§ 8(b)(4)(c)
	• Cannot engage in picketing if th eunion has already been certified
		• basically makes it unfair to put pressure on your employer to stop doing business with another company
		• **hurts unions' ability to build multi-coalitional movements*

§ 9(c)(3)	• § 9(c): Striking workers eligible for rehire are the only eligible ones to vote in union elections • § 9(c)(3): Landrum-Griffin Act amendment	• Enable economic strikers who had been replaced by employer to vote in union election

§ 8(b)(7)	• Recognitional picketing is picketing that is conducted with the objective of forcing recognition (ie "signal picketing")
	• You can engage in signal picketing, but it's an ULP if you do it when:
	  ○ (a) employer already lawfully recognized another labor org
	  ○ (b) it is within 12 months of a valid election under § 9
	  ○ (c) such picketing has exceeded 30 days and union has not filed RC petition
		• Makes it harder for union to engage in legal recognitional picketing

§ 13	Nothing in this act shall be construed to "impede the right to strike"	

- Are strikes protected?
  - Statutory protections
    - § 7 right to concerted activity
      - *McLaughlin*
    - § 13

        - *Implied* "right to strike" inferred from the instruction not to "impede the right to strike"
    - 1st amendment speech protections
        - No – *Janus*

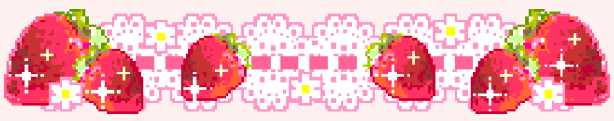
Pro-Strike position	Anti-Strike Position
Rationality argument: ● Strikes are not unique in being irrational– we live in an irrational society ● Workers exist in an adverse, war-like environment	Irrationality argument: ● "Net loss" to both partners in the contract (ie: no one's making money)
Strike help solve problems that are necessary for production to keep going ● Unsafe working conditions, broken equipment, too-cold factories etc etc	Strikes stop/slow down work production ● Bad for economy ● Bad for business ● Bad for society
Democracy! In action!	Free rider problem ● If strikes benefit all employees, then strikes are not efficient because only some workers put their bodies/livelihoods on the line

- When there is NOT a right to strike
    - (1) striking is unlawful
        - Trespassing, blocking easement rights, etc
    - (2) striking is violent
    - (3) striking constitutes a breach of contract
    - (4) other indefensible activity
        - *IPS*: Failure to take reasonable precautions

Type of strike	Case examples	protected?
Walk-off strike	***Washington Aluminum*** ● No heat in factory, workers leave work site in protest	**yes**
Sit-down strike	***Fanstell*** ● Workers had a sit-down strike in two key buildings of the company, halting production ● Would not vacate premise, despite court injunction	**No** ● Violates the employer's property rights (specifically "use" rights) ● Damages employer's property and impedes use

Slowdown	***Elk Lumber*** • New work methods made it easier to do more work– but workers don't want to do more work with this new payrate • Made it clear to employer that they would not increase production unless given corresponding increase in pay	**No** • Contract rights violation • Employees should comply in a reasonable manner to employers terms →To infer short of stopping completely (traditional strike) is to violate the contract
Intermittent strike	***OUR Walmart*** • Note: How do you know a strike is intermittent? • Short in duration • Frequent	**No** • Intermediate strikes intended to "harass" employer into a state of confusion
Strike “without reasonable precautions”/ designed to inflict max damages on employer	***IPS Inc*** • Security guards in federal buildings strike during high-profile event and bomb-threat season	**No** • Protections lost because strikers did not take reasonable precautions • Private law constraints – duty of reasonable care • Falls under “other indefensible activity”

Striking while also disparaging employer/product in a way not linked to labor dispute	***Jefferson Standard***
	• Employees distributed pamphlets disparaging companies tv programming without referencing labor dispute
	• The company fired 10 employees, citing disloyalty and harm to its business reputation.
		No
		• Disloyalty factors
		  ○ (1) Disparagement of employer or product not linked to union strike, protest
		  ○ (2)Knowingly untruthful product disparagement
		  ○ (3) Truly outrageous rudeness
		  ○ (4) Advocating consumer boycott notion context of labor dispute
		  ○ (5) Breaches of confidentiality



Boycotts

- Boycotts
  - = Both expressive speech AND coercive
  - Whether protected or not is largely up to court discretion
- How do courts determine the validity of a boycott?
  - (i) look at type of speech
    - If boycott has civil rights focus → more likely to be protected
  - (ii) look at influence on 3rd parties
    - If boycott harms 3rd party neutral → less likely to be protected
- The court examines the validity of a boycott either with (i) an NLRB § 8 (b)(4) analysis or a (ii) 1st amendment analysis.
  - (i) § 8(b)(4) analysis:
    -
  - (ii) 1st amendment analysis:
    - (1) is it speech?
    - (2) is there a legit purpose for restriction of such speech?
    - (3) Is there a compelling reason for the speech?

Secondary boycott analysis

- **§** 8(b)(4)(B) generally prohibits secondary boycotts (Allied International)
- Secondary boycott analysis
  - (1) determine if boycotters are labor organizations under § 2(5)
    - Yes → look for § 8(b)(4) issues
    - No → apply state and federal law (antitrust issues) SCTLA
  - (2) if violation of § 8(b)(4) or antitrust is found, 1st amendment defense may be brought. Ask: *did boycott amount to protected speech?*
    - If so → apply strict scrutiny (Clairbone Hardware)
    - If not → apply rational basis scrutiny (SCTLA)

case	Boycott purpose	Actions taken	Harm to neutral parties	Holding
Claiborne hardware	Promote racial justice (civil rights)	Protest and picketing	yes	We should protect free expression (1st amendment)
Allied International	Influence international policy (against Russia	Refusal of services	yes	We should prevent the coercion of neutral 3rd parties

	invading Afghanistan)			§ 8(b)(4)(B) generally prohibits secondary boycotts –no constitutional scrutiny analysis
FTC v SCTLA	Private /economic purpose	Protest, picketing, refusal of services	no	We should prevent anti-competition price-fixing (emphasis on Antitrust because lawyers are not a labor organization under 2(5)

Collective Bargaining

Modes of collective bargaining

- **NLRA model**
  - Most laissez faire model
  - “Let the market decide”
  - Never directs party to reach an agreement, and provides scant public mediation
  - Puts labor relations into the hands of employers and employees
    - Okay’s the use of economic weapons
    - Assumed that the contract reflects relative strength of bargaining parties involved (if contract favors employer, employer is strong. If faces union, union is strong)
- **Railways Labor Policy**
  - Somewhat interventionist
  - Transportation is too important to leave up to private market
  - Only requires on parties consent to bring in mediation
  - Economic warfare should be last resort
- **Public Sector**
  - Most interventionist

    - Most gov't jobs don't allow use of economic weapons – ie strikes
    - Public services are way too important to leave up to the market
-

Union Recognition

- How to certify a union
    - (1) representative elections (§ 9)
    - (2) bargaining orders (from NLRB)
    - (3) voluntary recognition from employer (& other methods)
- § 9 process
    - X
    - X
    - X
    - X

Appropriate Bargaining Units

- When is the underlying bargaining unit appropriate?
    - § 9(b): "The board shall decide in each case [...] the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof"
    - Three exceptions:
        - (1) combine professional with non-professional
        - (2) craft employees
        - (3) guards cant be combined with other employees
    - NLRB tends to side with unions in deciding what their bargaining unit should be
- NLRB has authority to create rules and regulations in this area
    - § 6: gives NLRB authority to make, amend, and rescind rules and regulations necessary to carry out the provisions of the NLRA
    - § 9(b): requires NLRB to determine appropriate bargaining unit in each case to ensure employees rights to self organization and collective bargaining
    - Usually determines whether a bargaining unit is appropriate on a case-by-case basis, BUT;
    - *American Hospital Ass'n v NLRB:* NLRB is allowed to make industry-wide rules regarding bargaining units
- *Friendly's Ice Cream*: an appropriate bargaining unity = the "best" bargaining unit
    - Community of interest test
        - Bargaining unit is appropriate if all bargaining members have same interests
            - (1) interchange between stores)
            - (2) geographic area
            - (3) degree of autonomy in a single store
            - (4) extent of union organization

        - (5) history of collective bargaining
        - (6) desires of affected employees
        - (7) employers own organizational framework
        - (8) similarly situated in hours work wages etc
- Current test for appropriate bargaining unit:
    - (1) friendly's community of interest test
    - (2) Dothe included employees in share an overwhelming community of interests with their excluded employees
        - Excluded employees must be virtually indistinguishable!

Economic Weapons

 **Lockouts**

 **Secondary activity**