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Union Interference Lessons From 5th Circ. Apple Ruling

Law360 on **September 2, 2025**

In a closely watched decision on July 7 — and the latest of many federal appeals court decisions reviewing orders from the National Labor Relations Board — the U.S. Court of Appeals for the Fifth Circuit tackled employer actions during union organizing campaigns.

In Apple Inc. v. NLRB, the Fifth Circuit reversed an NLRB order and found that Apple did not violate the National Labor Relations Act for its actions during a union organizing drive at a Manhattan retail store.

The opinion provides fresh guidance on what does — and does not — constitute coercive interrogation under the act, and clarifies how consistently enforced workplace policies may be applied to union literature in order to remain in compliance with the NLRA.

Background: Apple Store Organizing Drive

The dispute stemmed from a unionization effort by Apple employees who were working with the Communication Workers of America.

An employee at Apple's World Trade Center store began discussing wage increases with colleagues in early 2021. Together with another co-worker, they helped assemble an organizing committee in coordination with the CWA.

On May 9, 2022, the store manager engaged one of the employees in a brief conversation on the sales floor, a public space where she routinely greeted employees at the start of her shift.

The conversation included questions about the employee speaking with human resources and co-workers about pay, how many co-workers were involved in those conversations, and what the employee thought about the ongoing organizing efforts.

The employee, who was hoping to keep the campaign under wraps, denied involvement with the union. The manager closed the exchange by saying that Apple would "do the right thing" and by affirming employees' rights to discuss union matters.

The manager testified that the employee — not herself — first raised the union topic, and that she expressly told him that such conversations were permissible.

The CWA organizing committee then went public with their campaign on May 15, 2022. Employees wore union bracelets, distributed flyers outside the store, and placed additional flyers on a break room table.

Apple managers removed the unattended flyers three times that day and on two subsequent days, citing an unwritten but long-standing housekeeping practice that required break room surfaces to be kept clear, as well as a written solicitation and distribution policy that barred employees from distributing materials in work areas or during work time, and prohibited third-party solicitation on Apple's property.

Managers also photographed the flyers and, in some instances, shredded them.

Union materials that were handed directly to employees or distributed outside of work areas and work times were permitted without interference.

An Apple manager spoke with one of the organizing employees about Apple's unwritten housekeeping practice, and its solicitation and distribution policy. Although the organizing employee disagreed that the flyers violated either policy, and mentioned that he had seen coupons left on the table on at least two occasions, he stopped leaving flyers in the break room.

NLRB Proceedings

On May 18, 2022, the CWA filed an unfair labor practice charge against Apple.

After a two-day hearing, an administrative law judge found that Apple had violated Section 8(a)(1) of the NLRA by coercively interrogating an employee about union activities and selectively removing union flyers from the break room.

In an order issued on May 6, 2024, the board adopted the ALJ's findings and ordered Apple to cease and desist, post a remedial notice, and rescind its policies or practices as applied.

Apple pushed back, arguing that its actions were routine, neutral and lawful. Apple petitioned for review to the Fifth Circuit, and the board cross-applied for enforcement.

The Fifth Circuit's Reversal

On review, the Fifth Circuit held that substantial evidence did not support either NLRA violation and granted Apple's petition for review, denying enforcement of the board's order. The court's key findings are as follows.

No Coercive Interrogation

The court applied its eight-factor "totality of the circumstances" test to scrutinize the manager's conversation with the employee who was involved in the organizing effort. The court found that a number of critical factors favored Apple's handling of the situation, including:

- The lack of hostility demonstrated toward the union;
- The public, routine nature of the conversation; and
- The manager's explicit reassurance of employees' rights to organize and engage in protected activity under the act.

The court concluded that the employee's evasive responses to the manager's questions were attributed to the CWA's campaign strategy — i.e., to keep things under wraps and wait to make the campaign public — not based on a fear of reprisal.

The court rejected the board's finding and held that Apple did not violate the act because casual, nonthreatening questions about workplace issues, including union issues, are not automatically coercive.

Lawful Removal of Union Flyers

Citing U.S. Supreme Court precedent, Beth Israel Hospital v. NLRB in 1978, the Fifth Circuit underscored that employees have a right to distribute union literature during nonwork time in nonwork areas, but that employers may enforce neutral rules to preclude such distribution when doing so is necessary to maintain production or discipline, so long as enforcement is evenhanded.

The court credited evidence that Apple consistently enforced its nonsolicitation and distribution policies by removing all types of unattended materials, such as coupons, party invitations, restaurant menus and other nonunion materials, including removing flyers for a going-away party just days before the union literature incident.

The court — citing earlier board precedent, e.g., North American Refractories Co. in 2000 — concluded that isolated lapses in Apple's enforcement of the policy, including occasional newspapers or coupons that were left out for days, which occurred only a handful of times over more than six years, were insufficient to show discriminatory enforcement.

The Fifth Circuit also declined to follow out-of-circuit precedent, e.g., Intertape Polymer Corp. v. NLRB in the U.S. Court of Appeals for the Fourth Circuit in 2015, that would categorically prohibit the removal of union materials in nonwork areas during nonwork times, reaffirming that only selective or targeted removal is unlawful within the circuit.

Practical Takeaways for Employers

Context matters when managers speak with employees.

Managers' or supervisors' questions to employees about wages, scheduling or even union activity are not per se unlawful.

Under the Fifth Circuit's analysis, the decisive issue is whether the conversation, when viewed objectively, would reasonably be perceived as coercive or threatening. The line here is not a bright one, however, which makes it difficult to apply this principle in practice.

The context of the communication is critical and not subjective to the supervisor — the employee and an objective fact-finder may view a conversation as coercive and threatening based on the totality of the circumstances, even if the supervisor does not.

Nevertheless, it is recommended that managers and supervisors refrain from initiating conversations regarding unionization to avoid any potential pitfalls. When these conversations arise due to employee initiation, it is best for managers to keep the conversation neutral.

Section 8(c) of the act permits employers, through their agents, such as managers and supervisors, to tell employees why they believe that unionization would not be in the company's best interest — e.g., due to the introduction of a third-party intermediary in conversations that could be had directly between the company and employees without a union.

However, it is best practice to arm managers with specific training on such communications, and require them to escalate sensitive questions to a point person, such as human resources or in-house legal counsel.

Specifically, managers should avoid prying into how individuals intend to vote on unionizing and shouldn't require disclosure of union sympathies. They should also refrain from implying reprisals or promising benefits, and should acknowledge employees' statutory rights without expressing hostility.

Adopt, document and consistently enforce neutral policies.

Restrictions on distributing union literature during nonwork time and in nonwork areas must be justified by special circumstances, such as when it is necessary to maintain production or discipline.

Employers that are seeking to adopt policies concerning solicitation, distribution or housekeeping should provide a clear and objective standard that can withstand scrutiny.

To ensure consistent enforcement of such policies, document their routine enforcement, such as by maintaining photographs or incident logs that can establish that nonunion materials are removed under the same rules.

Lastly, avoid introducing new policies or suddenly tightening enforcement once a union appears, as doing so creates an inference of an anti-union motive.

Maintain cleanliness standards without targeting union materials.

Employers may keep workspaces grand-opening ready, but they must ensure that all comparable items — union and nonunion alike — are treated the same.

If a rule is aimed at cleanliness, ensure that it is applied to newspapers, promotional flyers and personal items as diligently as it is applied to union literature.

Consider designating bulletin boards or digital channels as approved locations for employee postings in order to eliminate confusion about where materials can be left.

Employers that are operating in multiple jurisdictions should also be mindful of the board's doctrine of nonacquiescence, meaning the NLRB does not change precedent based on an appellate court decision, aside from a ruling by the Supreme Court.

Accordingly, the Fifth Circuit's decision only affects the parties in the Apple case and future cases within the circuit.

Employers should consider the extent to which other circuits have adopted differing views that could result in a different outcome if a case arises in another jurisdiction.

The Fifth Circuit ruling also comes amid a litany of other circuit holdings reviewing NLRB decisions this year, at a time when the board itself has operated without a quorum and has not been active.

With the nominations of two new NLRB members pending before the U.S. Senate, the board may soon obtain a quorum and begin clearing the backlog.

It bears watching the extent to which this decision could affect future board cases and the NLRB general counsel's policy agenda on these issues.

Conclusion

The Fifth Circuit's decision underscores a central theme in labor-management relations under the NLRA: consistency.

Employers need not remain silent during union campaigns, nor must they permit a free-for- all with workplace postings. What they must do is speak and act in a manner that is evenhanded, nonthreatening and faithful to established policy.

By adopting clear rules, training managers and documenting enforcement, employers can protect their operational interests, while respecting the statutory rights of their workforce, and minimize the risk of protracted litigation before the NLRB.

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