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Legally EmpowHERed Podcast

Episode Nine

Featuring Partner Sahara Pynes with Kirsten White

Sahara Pynes: Welcome back to Legally EmpowHERed. I'm your host, **Sahara Pynes**, and I'm so excited to bring this podcast to you. As an attorney and former business owner myself, I'm passionate about drawing on my own experience and insight to set my female clients up for success. I know my guest today feels the same.

Today, I'm thrilled to welcome **Kirsten White** to Legally EmpowHERed. Kirsten serves as a strategic adviser to employers on a range of labor and employment issues, with a particular focus on collective bargaining and matters arising under the National Labor Relations Act and the Railway Labor Act.

Her clients rely on her for pragmatic, goal-oriented labor counseling, including with respect to managing and mitigating strikes and other labor disputes, union organizing campaigns, corporate transactions and all other aspects of labor management relations and collective bargaining agreement administration.

Kirsten also advises clients on compliance with a range of employment laws and counsels executive decision makers on the management and remediation of high stakes workplace issues. From 2009 to 2013, Kirsten served as Policy Director to then Second Lady Dr. Jill Biden and the Office of the Vice President of the United States.

Wow, what a resume. Welcome, Kirsten. So happy to have you.

Kirsten White: Well, thank you for having me. As you know, I'm a big fan of the podcast, and I'm thrilled to be joining you.

Sahara Pynes: Thank you so much. I think it's going to be a great discussion today.

When people hear the term labor law, I think a tune out and think that it just doesn't apply to them because they're a non-unionized workplace. So, tell me, why is that a mistake?

Kirsten White: Well, it's a great question, and a little bit of a sad but true observation for me as a genuine labor law dork, which I know sounds truly spoken from the mouth of a lawyer, but I do find the whole area really fascinating, as odd as that might sound.

But yes, it's a pretty broad misconception that "labor law," and specifically the National Labor Relations Act, only relates to or applies to employers that have union represented workforces. But the reality is quite the opposite. The NLRA actually applies to all private sector employers, with some limited exceptions that aren't really relevant for today's conversation. But that means everybody needs to comply with the National Labor Relations Act, whether or not their employees are union members. And I think what's really interesting is that federal labor policy really swings on a pendulum and is very heavily influenced by politics and who the occupant of the White House is, because that person is appointing the NLRB majority. And so, depending on the occupant of the White House, there typically are four or eight years of a series of union and employee-friendly decisions or very management friendly decisions. So, as we talk today, I may refer to the Biden-era NLRB or the Trump board, and that really is just to signal those moments in time where there's been a significant period of either employee-friendly/union-friendly or management-friendly decisions. We now are in a place where we have a new Biden-appointed majority on the board, so, I'll be talking a little bit about how that's going to affect upcoming changes to federal labor policies. Just wanted to point that out.

Sahara Pynes: So that's great, great context. And tell me, just in layman's terms, what is the NLRA, what is it covers – in a nutshell, we don't have that much time today – and the NLRB (National Labor Relations Board) and what its role is in the government.

Kirsten White: I think in its simplest explanation, the NLRA grants employees one basic, fundamental right. It can be boiled down to allowing employees and granting employees the right to engage in what's called protected concerted activity. This means that if an employee engages in protected concerted activity, their employer is prohibited from taking adverse employment action (typically a discharge or discipline) against that employee for having engaged in protected concerted activity. So, what are we talking about when we talk about protected concerted activity? It's conduct that really has two key elements. First, it's concerted. That means that it's carried out by more than one employee, or even by an individual employee if the employee is acting on behalf of more than one employee. And second…

Sahara Pynes: We'll come back to that.

Kirsten White: Yeah, we will. I got that a little bit jumbled. But you know, it's important to keep in mind that, really, this isn't conduct. The whole concept of employees forming and joining a union is that they can work together, join together and form a collective voice to bargain with

their employer or to advocate for improved working conditions. The idea of it being concerted, as a key element, the goal of the conduct has to be to advocate for improved group working conditions. So, it's an important element, and I think I described it a little bit too legalistic, but it really is just about conduct that is about and aimed at improving group employee working conditions. And again, that's the second element there – the reason it's protected is because of that aim. So, it's got to be aimed at improving group working conditions as opposed to an individual gripe kind of situation or a personality conflict between an individual employee and an individual supervisor. So, we're really talking about employee conduct that is aimed at taking a collective voice to change and improve working conditions for multiple employees.

Sahara Pynes: Super helpful. And so, is it fair to say then, that the National Labor Relations Board, the NLRB, is the government-appointed entity that enforces this law?

Kirsten White: Yes, the NLRB is, just as you said, the federal agency that administers and enforces the National Labor Relations Act. There's a five-member board that's really responsible for what I talked about a few minutes ago, changing precedent and making rules or changing the context or the scope of labor policy. The five-member board issues decisions that decide those issues. And then there are a number of regional offices around the country that investigate alleged violations of the National Labor Relations Act, primarily charged or filed by either an employee or union against an employer. And when we talk about protected concerted activity, and I think one of the reasons unions come to mind, is because forming and joining a labor union really is maybe the most obvious example of protected concerted activity. But there are countless other types of protected concerted activity that just happen in every workplace on a daily basis, whether it's a union or non-union workplace.

Sahara Pynes: Right, and so I think that is one of the major misnomers in labor law, which is that it is just there to protect union organizing and there's just so much more.

Kirsten White: Right, and if we think about some of the examples that are maybe the most common types of protected concerted activity, some of those would include discussions among employees in the workplace about wages. Frank discussions among two or more employees about their salaries, their benefits, their working conditions. Those conversations may include criticisms of the employees' employer, or specific managers or supervisors, to the extent they're complaining about how those people manage working conditions. It can also manifest as employees very directly complaining to their supervisor about various things, for example, how overtime opportunities arise. Who gets the first crack when there is an overtime opportunity? Schedule changes, shift premiums, any of those day-to-day working conditions. A direct complaint from an employee complaining on behalf of him or herself and at least one other, or a couple of employees coming and complaining.

The other things we see quite often – and in fact, we've seen a lot more of these examples over the past couple of years around COVID – are when employees may circulate a petition amongst a workforce to get signatures to advocate for something, maybe an improved benefit. Certainly, with respect to COVID, things like paid COVID leave, or who's an essential employee, or safer working conditions generally. Sometimes we've seen, in more urgent cases, protected concerted activity manifest in workplaces during the pandemic where it's really just been a number of employees participating in a concerted refusal to work because they believe their working conditions are unsafe. And so, the pandemic certainly has introduced a whole new set of circumstances for non-union employers that are having to sort of grapple with questions of protected concerted activity around health and safety for the first time.

Sahara Pynes: And what we're talking about here is really broad. Any complaints about wages, working conditions, benefits, criticisms about your supervisor, generalized working conditions. I had a client non-union workplace, sort of a millennial workforce, that walked out over the summer and refused to work because of the way they felt the company was handling Black Lives Matter. We had to figure out, well, is that covered as this protected concerted activity?

Kirsten White: Yeah, that's a really interesting recent example. Another example that I think tripped up a lot of employers – and you and I know this because of our employment counseling practices – typically we would advise employers that they don't need to permit or allow employees to talk about politics in the workplace. But there is an element of political discussion that can be protected. For example, I live in Boston, and a couple of years ago there was a ballot question, Question 1, and there were signs all over the state leading up to Election Day. The question was about establishing staffing ratios for nurses and hospitals. So, because that was an issue that directly relates to working conditions for a huge number of health care workers in the state, for those employers, that's a political question and a political discussion. But because it directly related to working conditions for people in the health care industry, that too was protected concerted activity under the LRA. So, depending on where we are at any moment in time, whether it's a cultural moment or a political moment, definitely new issues around assessing and evaluating what's protected under the NLRA come up.

Sahara Pynes: So just clarify for me. This is so changeable because this is not like the Supreme Court, the NLRB, where there's no lifetime appointments and there's not necessarily the same *stare decisis*. We're sort of all following the Supreme Court this term with all these important cases. But the same idea that you have to stick to precedent. Is that correct?

Kirsten White: You're exactly right, and that's one of the reasons this is such an interesting time for labor practitioners. As I mentioned, whether a series of board or labor policy decisions leans union-friendly or management-friendly really can change, depending on the board majority, every four or eight years. The definition of protected concerted activity is always going to be the

same, right? It's going to have those two elements. But with a new Biden-era board majority – President Biden has made no secret of his goal, his pledge, to be the most union-friendly president in American history – his appointments to the board certainly indicate what we anticipate to be an interpretation of protected concerted activity that's much broader than the one that we've gotten from the Trump-era board over the past four years or so.

So, we're going to start to see interpretations of workplace conduct that expand, really. More and more types of conduct fitting into this interpretation under a Biden-era board majority of what is protected concerted activity, and it shrinks and narrows. That definition is always going to be those two key elements. But the interpretation of what falls within that definition changes quite a bit, and we certainly expect this board to be doing a lot of that. And I think employers are really going to see that because there will be more scrutiny of discipline decisions in the workplace, right? And more challenges, claims, saying that a discipline decision or a termination was retaliatory, when in fact the employee was engaged in protected concerted activity. And again, we're going to have a larger kind of group of conduct that will fit into that definition.

Sahara Pynes: So, this is really an area that as the political times change, that employers need to keep on their radar.

Can we talk a little bit about things that happen outside of the workplace? There's a lot of social media components I see coming up in my practice, anyway. The marches, the protests… how does that all factor into protected concerted activity in the current climate?

Kirsten White: Great question, especially, as you mentioned, the evolving demographics of the current workforce and technology, social media and the prevalence of social media, and how employees and coworkers interact with one another outside the workplace. So, other things that would be considered protected concerted activity include things like employees totally outside the workplace going to the media and complaining about their employer, going to the government or to politicians to make those same complaints, as long as it's protected and concerted. But the biggest area that I think invited a whole new space and environment for employees to engage in protected conduct is social media. This new board has introduced or gone back to an idea of there being employee conduct that's inherently protected. So, something that might fall into that category, and it might fit the definition of concerted: if a single employee's Facebook post complains about the employer and says, "Now we want better X or Y benefit," and a coworker simply hits the like button under the post. Suddenly, it's concerted, right? Because it's two employees having a more futuristic conversation and concerted sort of engagement, well beyond what was ever initially intended when the NLRA was enacted almost 100 hundred years ago. But it's probably the largest area where we're really having to grapple with issues in this new space.

Sahara Pynes: Have you seen the difference, whether the post was publicly available versus privately available only to their "friends" or followers or whatever it is?

Kirsten White: So, that raises a couple of interesting NLRA issues. First of all, yes, if it's publicly available – or even if it's not publicly available but private, to the extent that only their "friends," or Facebook friends can access the content – if they have a manager or supervisor who is a friend who accesses the content or coworker who accesses the content, it doesn't take much more for an upper-level manager to become aware of the post. And if it has some problematic or troubling language in it also, chances are pretty good that an employer is going to want to take some action, especially if there's egregious language or defamatory comments about coworkers or supervisors. What's interesting is if it's a truly closed group, really, the NLRA prohibits employers from conducting what they call surveillance of protected concerted activity engaged in by employees. So, employers have to be careful if they become aware of a post like this, but they don't naturally have access. You also run the risk, demonstrating that you are aware of it, could also signal some unlawful surveillance of employee-protected conduct. I think it takes very little for these days for social media posts to become more broadly available. So, employers learn about it pretty quickly, but you got to be careful if there's no managerial access, that you're not addressing something posted online that's protected just because that, again, is unlawful.

Sahara Pynes: Oh, so that's really interesting. So, if, let's say, another employee screenshots it and sends it to a manager, you're saying that it would be unlawful surveillance for somebody, the manager or somebody, to create an account to then go follow the conversation.

Kirsten White: Right. So interestingly, to the first part of your scenario, if another employee who naturally can access that content proactively sends it to the employer, that's not surveillance, right? Someone has provided it so they can take action based only on what they were provided by another employee who can naturally access the content. But you're absolutely right, and this arises quite often in the context of union organizing campaigns. So, the employer becomes aware that there's a union-organizing effort among its employees. To find out what the messaging is between the union and the employees, it can be tempting to try to see what's happening on an employee Facebook group. Are they talking about their union meetings? Are they discussing their strategy for organizing at an election and things like that? In those contexts, it's very, very risky. And you certainly never want to create some dummy email account as an employer and do that kind of surveillance, right? That is clearly unlawful.

Sahara Pynes: OK, so walk me through a termination or a disciplinary action and how a non-unionized workforce is going to assess this. They see something, maybe they think it's adverse

to the company's values, or maybe they think it's a violation of the company harassment policy or otherwise offensive social media post. What does the company do then? What does that analysis look like?

Kirsten White: So, let's take that example. It's a social media post. We saw a number of these cases arise under the Obama-era board, convened in the 2014 to 2016 era, where employees would be naturally, like many do, complaining about something that happened at work and bringing in as part of that discussion some really inappropriate language. And in fact, there were a couple of cases where the language really was inappropriate enough that if it hadn't been accompanied by other comments aimed at improving working conditions, it certainly could be terminable, it was that offensive.

For example, in a case called Pier 60 in 2015, this rose in the context of a union- organizing drive. So, there was not yet a union that was the formal bargaining agent, but there was an effort to formally organize. There were some issues that happened with a particular supervisor in the workplace. An employee went home, and he posted a really vulgar and profanity-laced post on his Facebook that included calling his supervisor a number of profane names and accusing him of not knowing how to talk to people, being a bad supervisor and all of those things, calling him a loser. And then at the end of this Facebook post, it said, "Vote yes for the union" with five exclamation points. And the employer got wind of it, it was a public-facing post, so was no issue around surveillance. It honestly came to the employer in a lawful way, and they saw it as a very vulgar attack at one of its supervisors and terminated the employee. The employee filed the charge, challenged it as improper and unlawful termination because of the protected activity, which we claimed was just basically saying vote for the union. And the NLRB agreed and overturned his termination and said even though there were profanities, like the F-word and saying some pretty egregious things that could even approach threatening nature toward the supervisor, the fact that this included comments about improving working conditions rendered it protected. So, you can see how in a non-working condition-type context, that's something that pretty clearly would put an employee at risk of termination or very severe discipline. So, what does an employer do?

Sahara Pynes: Yeah, what do they do? Tell us, Kirsten, what do they do? That sounds terrible, but then they have to work with these people.

Kirsten White: So, the first thing to do is if there's any employee conduct that even approaches some of these red flag issues that I've described as an examples of protected concerted activity – if any employee conduct has got any of factors, walks like protected activity and quacks like protected activity – build in a pause before doing anything in response that could be an adverse employment action. Elevate it to HR. Again, if you're in a non-union workplace and because of this kind of perception that not all employers need to comply with the NLRA, not all managers

and supervisors can really readily identify protected activity. So, when they see this and it could fall into that category, and it may not, if it's even potentially in the gray area, build in a pause. Elevate to HR, have a conversation with legal, if necessary, to assess whether there's a protected element here. If there is, and here, clearly, some pretty egregious language was found to be protected. This is a really tough scenario, and frankly, we anticipate this new Biden-majority board going back to some of these holdings. But, if there is conduct that is truly actionable, potentially rising to a level much more egregious that could warrant discipline, you want to do what we do in any employment best practice situation when you're considering discipline. Which is, looking to make sure that you are uniformly, and in a non-disparate manner, enforcing your policies. Look at whether other employees, in a non-protected setting and a non-union organizing setting, who've engaged in similar misconduct have also been disciplined in a manner similar to what you're considering for this employee.

See, you want to have comparative evidence. You want to be able to demonstrate, that even if there was protected activity, if other employees have similarly faced consequences or been disciplined, you can demonstrate that they would have been even absent the protected activity. So, those are the kinds of analysis you want to make sure you're looking at. I always encourage my clients in those situations to conduct a comparative analysis. Find me examples of other employees in the past that have done the same thing where they were disciplined in the same manner. That's a great defense to an unfair labor practice charge, because even in the absence, it can show that your practice is to discipline in the same manner. So, that's really important, I think, especially because we're getting into a space where we're going to start to see these cases again. And, really making sure, there are a number of things employers can do to prepare themselves for this kind of pendulum swing back into a very union-friendly or employee-friendly labor policy environment. And I think number one is training your managers and supervisors to understand protected activity. It doesn't take a lot of time to run through examples that would really happen in your workplace and help employees understand, "OK, this might be protected." How to recognize it, knowing when to build in that pause, that's a really, really important element of preparation for this kind of new labor context we're entering.

Sahara Pynes: Right, just to think through it, to be able to say like, "Hey, wait a minute, there was this Facebook post, or there was this comment that this employee made. Let's get some advice on it."

Kirsten White: Exactly. If there's ever a tricky situation that a frontline supervisor or manager of a particular department is facing, I think the best advice is to elevate it to HR, because HR has visibility, broad visibility, into what's happening all over – whether it's a company or organization – what the employer's doing in all areas of the of the organization. And so, they're going to be able to look for those comparators a little more easily and efficiently. And again, individual

supervisors may not necessarily be very familiar with these sorts of quandaries, so elevating it is a really important step.

Sahara Pynes: What else can employers do to prepare for the wave that's about to come?

Kirsten White: Well, I always think of it – and I'm certain you encounter this and deal with this particular issue quite often in your own practice – but I always recommend to my clients, whether they're union or not, to regularly, periodically, conduct a thorough legal review of their employee handbook. It's so important right now because it is a prosecutorial priority for this this new Biden NLRB to actually require any employer that is accused of violating the National Labor Relations Act to provide its entire employee handbook to the investigating region for review for compliance with the NLRA. Now you can imagine, in some industries, your employee handbook may be 500 pages of things that are totally unrelated to the underlying allegations in the charge. But this is a pretty aggressive priority of this board majority, and so, they have a right to say, "Give me your full handbook." I've had cases where I've defended non-union employers that maybe had tens of thousands of employees in the U.S., none of whom were union members, but an individual employee maybe filed a charge saying they were unlawfully retaliated against for engaging in protected concerted activity. The region asked for the entire handbook, reviewed the entire handbook and because there hadn't been a recent legal review for NLRA compliance, more than 50 provisions of a handbook were found to potentially violate the National Labor Relations Act. Now, the underlying allegations went away. There was no merit. But this particular company ended up in years-long litigation, very expensive litigation, because they hadn't done a legal review for NLRA compliance of their handbook, which would have protected them in that instance.

Sahara Pynes: Just really quickly, what are the penalties under the NLRA? Let's say either for the handbook noncompliance or for terminating somebody who you shouldn't have terminated because they were engaged in protected concerted activity. Are we talking reinstatement, monetary penalties, jail time? What does this look like?

Kirsten White: Well, this is a really timely question because there's a lot of activity and new developments happening on this issue right now. Traditionally, the NLRA is a remedial statute as opposed to a punitive statute. So typically, if an employer has maintained an unlawful handbook policy or a workplace policy or work rule that's found to have been unlawful under the NLRA, the reason that would be is because the NLRB would interpret that provision as potentially restricting an employee's right to engage in protected activity. So, a very simple example of that would be a confidentiality policy. Under the NLRA, as I mentioned earlier, it's a protected employee right to be able to talk to coworkers openly and candidly about their benefits and their wage rates. And so, to the extent that an employers' confidentiality policy prohibits an employee from disclosing that kind of employee wage rate information, that would be an

unlawful handbook policy. In that instance, it would really be overturning the policy, right, making it compliant. But any employee who was disciplined or had some other adverse employment action, because the employer enforced an unlawful policy, that discipline would have to be reversed. So, any employee who realized an adverse employment action or negative consequence because a handbook policy was enforced against the employee and later found to be unlawful, that discipline would have to be removed from the employee's file. And if that involved termination, yes, reinstatement with that. Now, the interesting development is that a couple of weeks ago, the NLRB's newly appointed General Counsel announced a really unprecedented move, which is that employers that are found to have terminated an employee in violation of the NLRA, in addition to their standard kind of reinstatement with back pay, if there's merit found to the allegation, the NLRB is now going to pursue second and third order consequences, financial consequences that they believe could affect the employee by virtue of losing their jobs. Some of those things, believe it or not, are the monetization of an employee's decrease in their credit rating by virtue of losing their job.

So, NLRB has said, now we're going to quantify those things. If you missed car payments and that could be blamed on losing your job…NLRB is now looking at much more punitive financial penalties that are pretty severe by virtue of quantifying those kinds of second and third order effects that could financially impact an employee who was found to have been unlawfully terminated in violation of the NLRA. Interestingly, and to give you sort of a sense of this new labor world we're in, another one of the new penalties that the NLRB is going to be pursuing is actually a written apology from the employer to the employee. This is really unprecedented.

Sahara Pynes: Yeah, I saw that. That is so, so different than any of our other employment and labor laws out there.

Kirsten White: Right, because it's one thing to be told, "You are out of compliance with the federal statute. You need to get in compliance, and here's how you comply." And it's another to admit and acknowledge to that employee and apologize. It's a new wave of this labor environment that we're entering, and I think we're going to be surprised at a number of other ways as we move forward as well.

Sahara Pynes: I think the point is really well put that at some level, it's just going to be a risk analysis of employers feeling like they need to do what's right for their workplace culture and balancing the potential risk that a court will ultimately find that the termination or the discipline was in violation of the National Labor Relations Act. So, I think that we'll have to keep our eyes on the new NLRB appointments, and we will hopefully get to regroup with you, maybe on our next season of Legally EmpowHERed.

Kirsten White: That would be great. As you can tell, I have a lot of energy to talk about these sorts of things, and I'm really thrilled to have had the opportunity to have this discussion with you. So, definitely book me for next season.

Sahara Pynes: Kirsten, thank you so much for being here. Your insights are so helpful. I think you raise such an awareness of these issues, and this is really becoming an increasing focus, both culturally and in our court system. So, I thank you for being here.

Kirsten White: Thank you.