THE COLLEGE OF LABOR AND EMPLOYMENT LAWYERS
New York, Connecticut and Northern New Jersey

Tuesday, May 22, 2012
5.30 – 8.30 pm

Jones Day * 222 E. 41st St. * New York, NY

PROGRAM AGENDA

Regional Chair
Evan Spelfogel, Epstein Becker & Green, P.C.

Moderator
Willis Goldsmith, Jones Day

Panel 1

EQUAL OPPORTUNITY LAW & REGULATORY CHANGE

Disability Discrimination, Criminal Background Checks, and Other Recent Developments

Speakers
The Honorable Elizabeth Grossman, Regional Attorney, New York District, U.S. EEOC

Panelists
Zachery Fasman, Paul Hastings LLP (Management)
Adam Klein, Outten & Goldman LLP (Employees)

Panel 2

THE NATIONAL LABOR RELATIONS BOARD – CURRENT DEVELOPMENTS

Social Media, Proliferation of Small Bargaining Units, Pre-election Hearings and Expedited Elections, Class Action Waivers

Speakers
The Honorable Karen Fernbach, Regional Director, NLRB Region 2
The Honorable James Paulsen, Regional Director, NLRB Region 29

Panelists
Larry Cary, Cary Kane LLP (Unions)
Michael McGahan, Epstein Becker & Green, P.C. (Management)

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1

THE COLLEGE OF LABOR AND EMPLOYMENT LAWYERS, INC.

PRINCIPLES OF CIVILITY AND PROFESSIONALISM FOR ADVOCATES

Preamble

As a Fellow of The College of Labor and Employment Lawyers, I recognize that I have a special obligation to ensure that our system of justice works fairly and efficiently. In order to carry out that responsibility, not only will I comply with the letter and spirit of the disciplinary standards applicable to all practitioners, but I will also conduct myself in accordance with the following Principles of Civility and Professionalism as guidance for Fellows when dealing with clients, opposing parties, their counsel, the courts, other adjudicators, arbitrators, mediators and neutrals, and the general public.

A. With respect to client(s):

1. Fellows should be loyal and committed to their client's cause. Fellows should not permit that loyalty and commitment to interfere with their ability to provide clients wixth objective and independent advice.
2. Fellows should endeavor to accomplish their client's objectives in all matters as expeditiously and economically as possible.
3. Fellows should counsel their clients with respect to mediation, arbitration and other forms of alternative dispute resolution in appropriate cases.
4. Fellows should advise their clients against pursuing litigation (or any other course of action) that is without merit, and against insisting on tactics which are intended to unduly delay resolution of a matter or to harass or drain the financial resources of the opposing party.
5. Fellows should advise their clients, colleagues and co-workers, and demonstrate by example, that civility and courtesy are not to be equated with weakness.
6. Fellows should counsel their clients that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation, and should abide by the client's decisions concerning the objectives and strategies of the representation.

B. With respect to opposing parties and their counsel:

1. Fellows should be zealous advocates, but should treat opposing counsel, opposing parties, tribunals and tribunal staff with courtesy, civility, respect and dignity, conducting business in a professional manner at all times.
2. In litigation and other proceedings, Fellows should zealously advocate for their clients, consistent with their duties to the proper functioning of our judicial system.
3. Fellows should consult with opposing counsel before scheduling depositions, meetings and hearings, and be cooperative with opposing counsel when scheduling changes are requested.
4. Fellows should refrain from utilizing litigation or any other course of conduct to harass the opposing party.
5. Fellows should refrain from engaging in excessive or abusive discovery tactics.
6. Although delay may be necessary or appropriate in certain circumstances, Fellows should refrain from utilizing improper delaying tactics.
7. In depositions, proceedings and negotiations, Fellows should act with dignity, avoiding groundless objections and maintaining a courteous and respectful demeanor towards all other persons present.
8. Fellows should be guided by the clients' goals in completing a transaction. Pride of authorship, when matters of substance are not involved, only contributes to delay and cost in a transaction.
9. Fellows should clearly identify for other counsel or parties all changes that they have made in documents submitted to them for review.

C. With respect to the courts and other tribunals:

1. Fellows should recognize that the proper functioning of our system of justice is enhanced by both vigorous and zealous advocacy and civility and courtesy.
2. Where consistent with the clients' interests and instructions, Fellows should communicate with opposing counsel or parties in an effort to minimize or resolve litigation.
3. Fellows should voluntarily withdraw claims or defenses when it becomes apparent that they do not have merit.
4. Fellows should refrain from filing frivolous claims, motions or responses thereto.
5. Fellows should make reasonable efforts to agree with other counsel, as early as possible, on a voluntary exchange of information and on a plan for discovery.
6. Fellows should attempt to resolve by agreement objections to matters contained in the opponents' pleadings and discovery requests or responses.
7. Fellows should notify opposing counsel and, if appropriate, the court or other tribunal, as early as possible when scheduled hearings, meetings or depositions must be cancelled, postponed or rescheduled.
8. Fellows should verify the availability of known key participants and witnesses before dates for hearings or trials are set — or, if that is not feasible, immediately after such dates have been set — so that the court (or other tribunal) and opposing counsel or party can be promptly notified of any scheduling conflicts.
9. Fellows should be punctual in court proceedings, hearings, arbitrations, conferences, depositions and other meetings.
10. Fellows should approach all tribunals with candor, honesty, diligence and utmost respect.

D. With respect to the public and our system of justice:

1. Fellows should remember that, in addition to a commitment to their clients' causes, their responsibilities as lawyers and Fellows of the College include a devotion to the public good.
2. Fellows should endeavor to keep current in the areas of law in which they practice and, when necessary, to associate with, or refer clients to, others knowledgeable in a field of practice in which they do not have the requisite experience.
3. Fellows should conduct themselves in a manner that reflects acceptance of their obligations as Fellows of the College and as members of a self-regulating profession. Fellows should also encourage fellow lawyers to conduct themselves in accordance with the standards set forth in these Principles and other standards of civility and professionalism.
4. Fellows should be mindful of the need to conduct themselves in a way that will enhance the image of the legal profession in the eyes of the public, and should be so guided when considering methods and contents of advertising.
5. Fellows should conduct themselves in a manner that reflects acceptance of their obligation as attorneys to contribute to public service, to the improvement of the administration of justice and to the provision of uncompensated time and civic influence on behalf of those persons who do not have access to adequate legal assistance.

TAB

2

Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII

Elizabeth Grossman, Regional Attorney
New York District Office
Equal Employment Opportunity Commission

May 22, 2012

Summary of EEOC Guidance

- Criminal history not a protected characteristic under Title VII
- Employer's use of criminal history in making employment decisions may violate Title VII
- A policy or practice that excludes *everyone* with a criminal record from employment will not be job related and consistent with business necessity
- Exception – if required by federal law

Summary of EEOC Guidance

- Issued April 25, 2012
- Builds on longstanding position
- Significant increase in number of potential employees with contact with criminal justice system
- Employers have greatly expanded access to and use of criminal history information
- Commission meetings 11/08 and 7/11

Two Theories of Discrimination

Disparate Treatment involves intentional discrimination – e.g. asking only people of color about their criminal history

Disparate Impact involves neutral selection procedures that have the effect of discrimination

Disparate Treatment

Evidence typically used

- Biased statements
- Inconsistencies in the hiring process
- Comparator information
- Matched-pair testing
- Statistical evidence

Disparate Impact

- Employment practice has an adverse effect on a protected group
- Burden shifts to the employer to demonstrate the challenged practice is *job related and consistent with business necessity*
- Burden shifts back to challenger to demonstrate that there is a less discriminatory alternative that meets the employer's needs but that the employer refused to accept it

Arrest Record

- Fact of an arrest does not establish that criminal conduct has occurred
- Final disposition of the matter may be unreported
- Exclusion is not job related and consistent with business necessity
- Employer may make decision based on the conduct underlying arrest if conduct makes the individual unfit for the position

Conviction Record

- Conviction record usually sufficient evidence that an individual engaged in conduct
- Employer should not rely on conviction record alone
- Most employers use Private Consumer Reporting Agencies
  - databases not constantly updated
  - may not be aware of or comply with court orders to seal

Criminal Records May Be Inaccurate

- Records may lack unique information
- Data are inaccurate
- Information is not current
- Spelling errors
- Clerical errors
- Records should have been expunged
- Intentionally inaccurate information

National Data -Disparate Impact

- National data support that criminal records exclusions have a disparate impact
  - Race, African-American/Black
  - National Origin, Hispanic
- African-Americans and Hispanics are arrested at a rate 2-3 times their proportion in the population
- 1 in 17 white men will go to prison, compared to 1 in 6 Hispanic men and 1 in 3 African-American men

National Data

- National data provides EEOC basis to investigate
- Employer may present relevant evidence that there is no disparate impact
  - Regional or local data
  - Applicant data
- EEOC will assess relevant evidence such as applicant flow data, workforce data, background check data, demographic statistics, incarceration/conviction data, and/or labor market statistics

Green v. Missouri Pacific Railroad Company

- Policy refusing to consider person convicted of a crime other than a minor traffic offense;
- Violates Title VII because it operates to disqualify Black applicants at a substantially higher rate
- "We cannot conceive of any business necessity which would automatically place every individual convicted of any offense, except minor traffic violations, in the permanent ranks of the unemployed. This is particularly true for blacks who have suffered and still suffer from the burdens of discrimination in our society."

523 F.2d 1290 (8th Cir. 1975)

Green v. Missouri Pacific Railroad Company – Subsequent Decision

Employer must show it considered three factors

- Nature and gravity of the offense;
- Time that has passed since the conviction and/or completion of the sentence; and
- Nature of the job held or sought

549 F2d. 1158 (8th Cir. 1977)

Validation

- Guidelines issued by the EEOC and other federal agencies – the Uniform Guidelines on Employee Selection Procedures (UGESP), require employers to validate tests or other selection procedures having a disparate impact on the basis of race, sex or ethnicity
- A validated test or other selection procedure is one that has been shown to predict, significantly correlate with, or represent job performance
- Selection procedures must be valid for the job at issue

Validation Studies

- Performed by industrial psychologists, human resources consultants, or company managers
- Employers purchase commercial tests and rely on validation studies prepared by the company that produced the tests
- As jobs change over time, employers may need to conduct new validity studies
- Selection criteria need to be valid for how they were used in the selection decision

Job Related and Consistent with Business Necessity

An Employer may consistently meet this defense if it:

- Validates the exclusion for the position with data or analysis about criminal conduct as related to subsequent work performance or behaviors; or
- Develops a targeted screen considering Green factors
  - Best if policy provides an opportunity for individualized assessment, but individual assessment is not required

El v. Southeastern Pennsylvania Transportation Authority (SEPTA)

- Exclusion of individual with 40 year old homicide conviction from job as a paratransit driver for vulnerable adults job related and consistent with business necessity
- Employer must demonstrate business necessity by accurately but not perfectly ascertaining applicant's ability to successfully perform job in question
- Employer must show policy distinguishes between applicants that pose an unacceptable level of risk and those who do not
- Result might be different with expert testimony

479 F.3d 232 (3rd Cir. 2007)

Bottom Line Defense

- If employer engaged in a policy or practice resulting in disparate impact, prima facie case of discrimination is established
- Employer has engaged in discrimination even if "bottom line" result of the policy or practice is an appropriate racial balance

Connecticut v. Teal, 457 U.S. 440 (1982)

Deterred Applicants

- Employer's application process might not adequately reflect applicant pool as otherwise qualified people might be discouraged from applying due to knowledge of background check
- EEOC will consider relevant facts such as reputation, word of mouth hiring

Dothard v. Rawlinson, 457 U.S. 440, 442 (1982)

Federal Laws – Not Preempted by Title VII

- Federal law excludes individual who convicted in the previous ten years of specified crimes from working as a security screener or otherwise having unescorted access to the secure areas of an airport
- Similar Requirements for
  - federal law enforcement officers
  - child care workers in federal agencies or facilities
  - bank employees
  - port workers

Individualized Assessment

- Facts or circumstances surrounding conduct;
- Number of conviction and offenses;
- Older age at time of conviction or release from prison;
- Employment history before and after conduct;
- Rehabilitation efforts, e.g., education/training;
- Employment or character references and other information regarding fitness for the particular position; and
- Whether individual is bonded

Employer Best Practices

- Eliminate policies or practices that exclude people from employment based on any criminal record
- When asking questions about criminal records, limit inquiries to records for which exclusion would be job related and consistent with business necessity
- Keep information about applicants' and employees' criminal records confidential
- Encourage use of all available evidence
- Train managers, hiring officials, and decision-makers
- Develop a narrowly tailored written policy

Develop Policy and Procedure

- Identify essential job requirements and actual circumstances under which jobs are performed
- Determine offenses that may demonstrate unfitness
- Determine duration of exclusions for conduct
- Include an individualized assessment
- Provide opportunity for applicant to correct errors or explain;
- Record justification and support for policy and procedures

Questions?

THANK YOU!

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CLASS ARBITRATION AND CLASS ACTION WAIVERS

Zachary D. Fasman

College of Labor and Employment Lawyers

May 22, 2012

- ***Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010)**
  - An arbitration agreement that is silent concerning the arbitration of class actions implies that class claims cannot be arbitrated
  - Class actions are substantially different than individual disputes and mere silence about their arbitrability cannot be deemed assent to class arbitration
  - Parties in *Stolt* stipulated no meeting of the minds on the arbitration of class claims: absent meeting of the minds no consent to class arbitration

- ***Stolt* altered pre-existing law: many courts had presumed that silence could be deemed assent**
  - Arbitrators also had concluded that silence allowed class actions: this is now contrary to federal law
    - May a party still claim that a silent clause was actually intended to allow class arbitration?
    - What evidence of intent may be introduced?
    - Is discovery required/allowed?
    - What is the burden of proof?
    - *Jock v. Sterling Jewelers*: Second Circuit case sustaining silence as intent based upon limited judicial review of arbitration awards; *accord, Sutter v. Oxford Health Plans*, Third Circuit

- ***AT&T Mobility v. Concepcion, 131 S. Ct. 1740 (2011)***
  - Even more significant than *Stolt-Nielsen* on class arbitration
  - Question was whether a state – California – could by judicial decision find that arbitration agreements containing class action waivers were unconscionable and unenforceable
  - California's so-called *Discover Bank* rule provided that in any adhesion contract an arbitration clause, a provision precluding class arbitration is unenforceable
  - AT&T provision in that case provided that if plaintiff prevailed at arbitration in an amount greater than AT&T's final offer, plaintiff would get award plus $7500 plus legal fees

Class Arbitration and Class Action Waivers

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- 5-4 ruling written by Justice Scalia
  - California rule is preempted by the FAA
  - The *Discover Bank* rule is not arbitration-neutral, but actually disfavors arbitration by requiring that every arbitration clause allow class arbitration
  - Class arbitration is inconsistent with the essential premises of arbitration: speed and flexibility
  - Examples of a state rule providing that arbitration must be conducted under FRCP, or that cases must be decided by a 12 person jury; each is facially neutral but in fact disfavors the speed and informality of arbitration
  - Relies heavily upon *Stolt-Nielsen*'s conclusion that class arbitration is incompatible with normal arbitration principles
  - Ruling also depends on limited legal review of arbitral awards as reason not to allow class arbitration

Class Arbitration and Class Action Waivers

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- Justice Thomas (fifth vote) concurred and would have gone further
- Under FAA the only defenses available are those related to contract formation
- Unconscionability is not an available defense unless it goes to contract formation
- No room for arguments about procedure, vindication of rights
- Majority does not go so far and allows state law unconscionability arguments that are in fact arbitration neutral and do not undercut significant federal policies

Class Arbitration and Class Action Waivers

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- ***CompuCredit Corp. v. Greenwood,* 132 S. Ct. 665 (2012)**
  - *Concepcion* initially dismissed as a preemption case inapplicable to arbitration involving federal statutory claims: *CompuCredit* dispels this
  - The FAA "requires courts to enforce agreements to arbitrate according to their terms."
  - This is true even where the underlying statute states that a plaintiff has the "right to sue"; this right may be satisfied in arbitration
  - Majority (6): "That is the case even when the claims at issue are federal statutory claims, unless the FAA's mandate has been 'overridden by a contrary congressional command.'"
  - Concurrence (2): "Claims alleging a violation of a statute … are generally subject to valid arbitration agreements unless Congress evinces a contrary intent in the text, history or purpose of a statute.") (Sotomayor, J., concurring)

Summary from the Supreme Court Trilogy

- Class action waivers are consistent with the underlying premises of the FAA
- Class arbitration is not consistent with the premises of the FAA
- Class action waivers may be invalidated through normally applicable defenses to arbitration (failure to agree, claims outside the scope) and state unconscionability standards so long as those standards are neutral in application and consistent with federal arbitration policy
- The same general principles apply to federal statutory claims, per *Compucredit,* which concludes that absent express congressional interdiction, the FAA requires that federal statutory claims must be arbitrated

OPEN QUESTIONS

What is the scope of the "vindication of statutory rights" theory adopted by the Second Circuit in *AMEX III*?

- *Amex* is an antitrust claim brought by plaintiffs who sought to avoid a class action waiver by introducing extensive and unrebutted evidence that suing on an individual basis was cost-prohibitive
- Remanded twice by the Supreme Court for reevaluation; in *Amex III*, the Second Circuit adhered to its initial ruling:

  "[W]e do not conclude here that class action waivers in arbitration agreements are per se unenforceable. We also do not hold that they are per se unenforceable in the context of antitrust actions. Rather, we hold that each case which presents a question of the enforceability of a class action waiver in an arbitration agreement must be considered on its own merits, governed with a healthy regard for the fact that the FAA "is a congressional declaration of a liberal federal policy favoring arbitration agreements.'"

Class Arbitration and Class Action Waivers

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- The *Amex* line of cases is based on *Greentree v Randolph*, which requires that a plaintiff challenging an arbitration clause show that in her individual case, arbitration would make it impossible for her to contest her claim properly
- Can an employment law plaintiff show that it is too expensive to litigate in arbitration?
  - Negative value claims are not the usual employment case: claims generally are substantial (especially with compensatory and punitive damages) and plaintiff can recover attorneys' fees
  - *Karp v Cigna* rejects this argument in an employment case
- Can a plaintiff show that the arbitration procedure does not allow for a full statutory recovery?
  - Numerous cases involving a limitation on recovery or a shortened statute of limitations
  - Employers may waive these provisions; e.g., *Ragone v Atlantic Video*

OPEN QUESTIONS

Does *Concepcion* apply to Fair Labor Standards Act claims?

- Split among local courts: compare *D'Antuono v Service Road* with *Raniere v. Citibank* and *Sutherland v Ernst & Young*
- Question is whether Congress by implication decreed that collective actions are required for FLSA claims
- Pro: Section 216(b) collective actions are a prescribed statutory procedure and thus evidence a congressional command not to allow class action waivers
- Con: 216(b) is a procedural avenue created by and available in courts and there is no explicit congressional command disfavoring individual arbitration
- Many FLSA claims are joined to state claims which are litigated under Rule 23; are Rule 23 claims subject to arbitral waiver while federal claims are not?
- Are 216(b) and Rule 23 compatible at all?

OPEN QUESTIONS

- **Are some employment claims not subject to waiver because they require class adjudication?**
  - *Chen-Oster v. Goldman Sachs*: Magistrate Judge opinion affirmed without opinion: now in Second Circuit
  - Four step ruling: 1. Plaintiffs have a right to be free from an alleged pattern or practice of discrimination
  - 2. Judicial holdings in SDNY find that a pattern or practice may not be litigated in an individual Title VII action
  - 3. Assuming an arbitrator would follow these cases, remitting a potential class plaintiff to individual arbitration would prevent her from challenging a pattern or practice
  - 4. Therefore an arbitration agreement is not enforceable because its silent clause would bar class arbitration

Class Arbitration and Class Action Waivers

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- Court's holding raises multiple questions
  - Is there any evidence of a congressional command that individual "pattern or practice claims" are not be subject to arbitration?
    - The district court ruling excludes an entire category of Title VII cases from arbitration
    - Title VII encourages arbitration and contains no express recognition of individual pattern or practice actions
    - Nonetheless, numerous decisions refer to such actions
  - Is "freedom from pattern or practice of discrimination" a statutory right inconsistent with arbitration, or is pattern or practice simply a mode of proving discrimination available in federal courts?
  - Is it permissible to invalidate a class action waiver based upon a prediction about how an arbitrator might rule concerning evidence/burdens of proof?

OPEN QUESTIONS

- **If arbitration is ordered, who decides whether class arbitration is permissible: the court or an arbitrator?**
  - Several courts have held that absent an express class action waiver the availability of class arbitration is a question of procedural arbitrability for the arbitrator
  - This raises the possibility of an arbitrator construing a silent clause to allow class arbitration even though the Supreme Court held to the contrary in *Stolt-Nielsen*
  - *See Jock* and *Sutter* cases discussed above
  - Is it appropriate to reserve such questions for the courts, consistent with federal law? *See Hall St. v Mattel*

OPEN QUESTIONS

- **Is a class action waiver lawful under the National Labor Relations Act?**
  - In D.R. Horton, Inc., 357 N.L.R.B. No. 184 (2012), the employer required employees as a condition of employment to sign a Mutual Arbitration Agreement ("MAA"), which contained a class and collective action waiver
  - The Board found that employees have a § 7 right that forbids class action waivers, even where employees were not discharged or disciplined for filing a class action
  - Board held that the class action waiver in and of itself limited employees' ability to engage in protected concerted activity, which included the filing of class or collective actions
  - Analogy to "Yellow Dog" contracts whereby employees must give up legal rights to continue to work

Class Arbitration and Class Action Waivers

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- The Board found that the Supreme Court's decisions in *Stolt-Nielsen* and *Concepcion* were not controlling.
  - "Neither [case] involved the waiver of rights protected by the NLRA or even employment agreements."
  - Board also held that an arbitration agreement that did not carve out the right to file NLRA charges was unlawful
  - Two person panel decision issued just after January 1, 2012 (no vote by Republican member Brian Hays)
  - Two individuals included Member Becker, whose term expired on December 31, but who apparently was involved in the decision during his term

Class Arbitration and Class Action Waivers

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Board's own limitations on *D.R. Horton*

- Does not apply to exempt managerial or supervisory employees
- Does not reach individually negotiated waivers, as opposed to broad arbitration policy made a condition of employment
- Does not prevent arbitration of statutory claims, as long as arbitration may be had on a class or collective basis

- On appeal to the 5th Circuit
- Courts have uniformly refused to follow the case, *see LaVoice v. UBS* (Judge Jones, SDNY)

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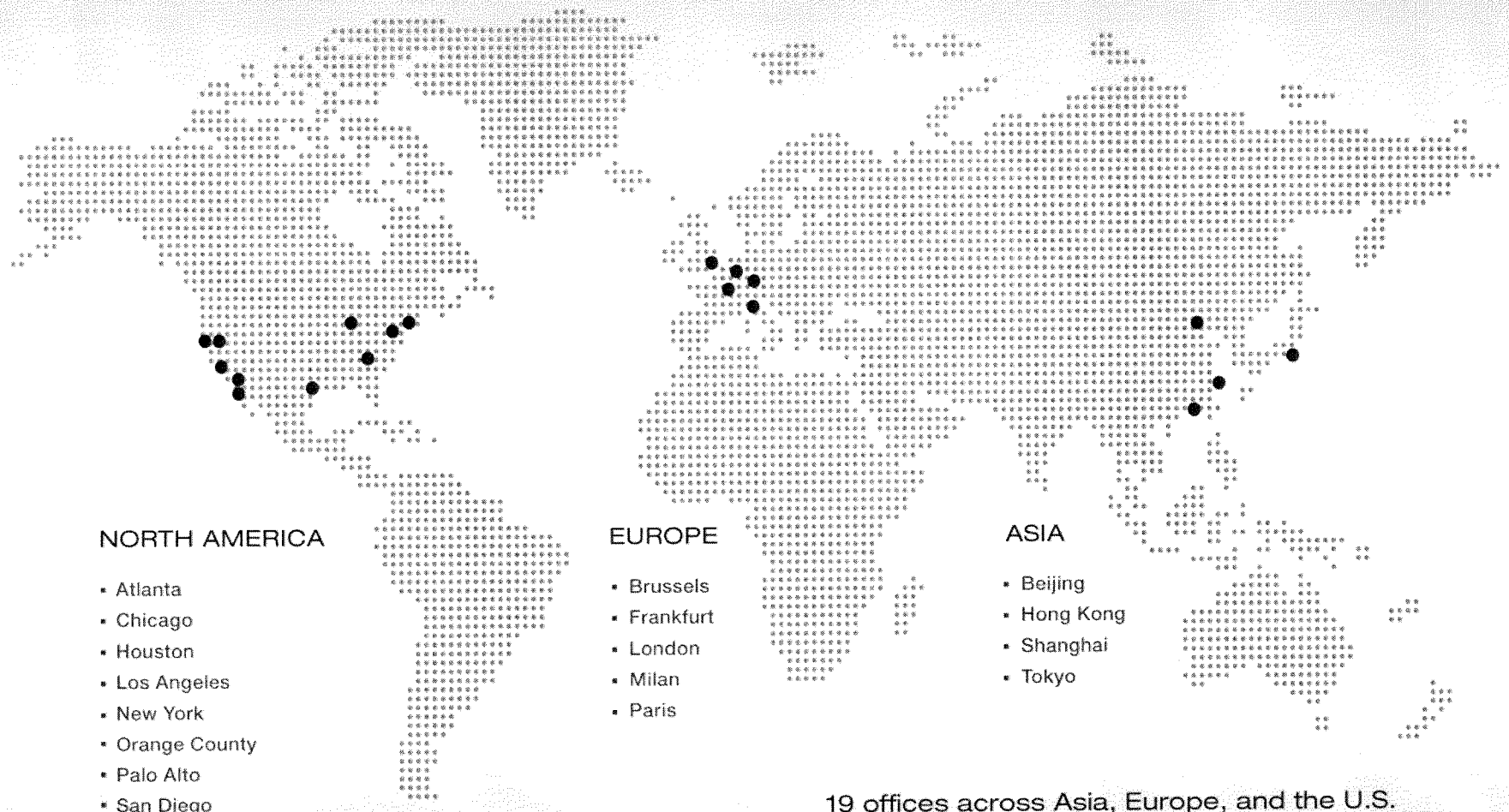

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TAB 3

Social Media and the NLRA

By Karen P. Fernbach,
Regional Director, NLRB Region 2

SOCIAL MEDIA

- OM 11-74 dated August 18, 2011
- Reviewed many cases involving all aspects of social media including Facebook, Twitter, etc.
- Existing standards concerning workplace rules will be applied.
- Will violate the law if it would "reasonably tend to chill employees in the exercise of Section 7 rights."
- Applies standard protected concerted activity analysis.

What is Protected Concerted Activity?

Protected Concerted Activity

Section 7 of the Act says:

> Employees shall have the right to self-organization, 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 have the right to refrain from any or all such activities.

What is Protected Activity?

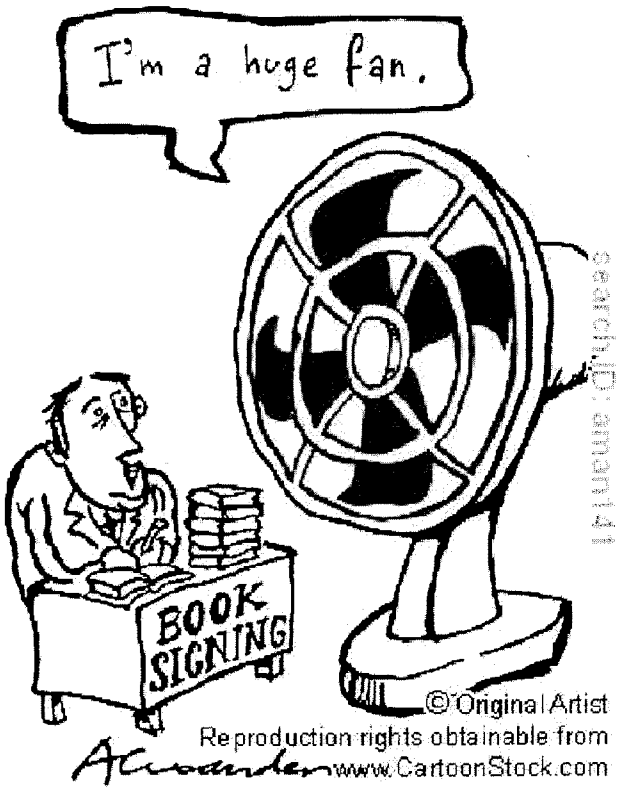
- What activities are “other mutual aid or protection?”
- What is mutual aid?
- What is mutual protection?

Mutual Aid

"We want a raise!"

Mutual Aid

"It's hot in here, we need a fan!"



Mutual Aid

"We want a lunch break!"

Mutual Protection

"We want the boss to stop bullying us!"

Protected *Concerted* Activity

Worldmark by Wyndham, 356 NLRB No. 104 (March 2, 2011)

In *Worldmark*, the employees didn't get together before the meeting to discuss any kind of plan. Their dissent was an ad hoc reaction to a change in the terms and conditions of their employment.

The Board, by a 2-1 majority, overturned the ALJ who found that the employees were not engaged in concerted activity.

Two or three were gathered; the action was concerted.

Protected *Concerted* Activity

Parexel, International, 356 NLRB No. 82 (2011)

The Board overturned the ALJ who found no violation in the employee's discharge. The employee was called in and questioned about her activities and complaints about wages and other favoritism. The Board held that the "pre-emptive strike" engaged in by the Employer to prevent her from engaging in activity protected by the Act was a violation.

Is the activity "protected?"

The Board considers four factors when determining whether an employee who is engaged in protected, concerted activity has by opprobrious conduct lost the protection of the Act:

(1) the place of the discussion;

(2) the subject matter of the discussion;

(3) the nature of the employee's outburst; and

(4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Atlantic Steel*, 245 NLRB at 816.

Protected Concerted Activity

AMR of Connecticut, out of Region 34, Hartford, Connecticut.

Otherwise known as the "Facebook" case.

Complaint alleged that employee's discharge violated 8(a)(1) because she was engaged in protected activity when she posted comments about her supervisor and responded to comments about her supervisor on Facebook.

The complaint also alleged an overly broad rule regarding blogging, internet posting and communications between employees. Employer agreed to revise its rules. The discharge was resolved through private agreement.

Protected Concerted Activity

***Hispanic United of Buffalo,* ALJD, 3-CA-27872 (September 2, 2011)**

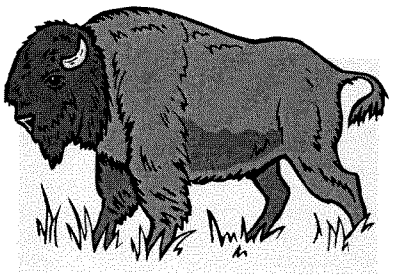
Group of employees used Facebook to discuss a coworker's complaints about the job. Coworker criticized other employees. Other employees responded. The employer fired the employees for bullying and violating the employers' anti-harassment policy.

Protected Concerted Activity

Hispanic United of Buffalo

Was this concerted activity?

Was it protected?



Protected Concerted Activity

Hispanic United of Buffalo

The Board found that the employees were engaging in group discussions of terms and conditions of employment.

The Board also found that they did not lose protection, despite some profanity.

Protected Concerted Activity

- **Three D, LLC d/b/a Triple Play Sports Bar and Grille**, JD(NY)-01-12 (January 3, 2012)
- ALJ found that an employee selecting the "Like" option as part of a Facebook conversation was concerted activity.
- ALJ found that Facebook comments that referred to the boss as an "asshole" did not lose protection of the Act.
- However, ALJ found Employer's Internet policy that cautioned against inappropriate discussion was not overly broad.

Social Media and the NLRA

- GC has issued some Guidance in OM Memorandum 12-31, dated January 24, 2012.
- Here are some examples:

Social Media Case #1

- Employer rule prohibited "making disparaging comments about the company through any media, including online blogs, other electronic media or through the media."

Social Media Case #1

- GC concluded that rule was unlawful because it could be reasonably construed to restrict Section 7 activity.

Social Media Case #1

- FACTS: Charging Party initiated a Facebook discussion with co-workers because the Employer transferred her to a less lucrative position. The discussion generated complaints about working conditions.

Social Media Case #1

- The Employer's termination of CP was unlawful because it was in response to her protected concerted activity
- In addition, the discharge was unlawful because it was pursuant to an overly broad non-disparagement rule.

Social Media Case #2

- CP was disciplined by her supervisor. At lunch break, CP posted on Facebook an expletive and the name of the Employer's store. A coworker later liked the posting. Several days later, CP posted again that the ER did not appreciate its employees. Coworkers who were friends on Facebook did not respond and this did not result in any work-related conversations. CP was discharged for her Facebook postings.

Social Media Case #2

- GC concluded that CP's Facebook postings were merely an expression of an individual gripe since there was no evidence that she was seeking to induce group activity.

Social Media Case #2

- However, GC found that the Employer social media policy violated the Act. The policy, which provided that in external social networking situations, employees should avoid identifying themselves as the Employer's employees unless discussing such terms in an "appropriate manner," was overly broad.

Social Media Case #2

- Appropriate or inappropriate manner means that employees could reasonable conclude that the rule prohibited protected activity, including criticism of the Employer's labor policies, treatment of employees and terms and conditions of employment

Social Media Case #3

- Bartender posted to Facebook that a coworker/bartender was a “cheater” who was screwing over customers. This was later explained that the bartender was using a mix instead of the premium alcohol to make a drink.

Social Media Case #3

- This was **not** protected because protests over the quality of service provided by employer have only a tangential relationship to employees terms and conditions. See, e.g., Five Star Transportation, Inc., 349 NLRB 42, 44 (2007), enfd. 522 F.3d 46 (1st Cir 2008).

Social Media Case #3

- However, in this case, Employer's policy, which prohibited "disrespectful conduct" and "inappropriate conversations," was overly broad because it could be construed to prohibit Section 7 activity.

Social Media Case #4

- The Employer's policy prohibited the use of social media to post or display comments about coworkers or supervisors of the Employer that are vulgar, obscene, threatening, intimidating, harassing or a violation of the Employer's workplace policies against discrimination, harassment, or hostility on account of age, race , religion, sex, ethnicity, nationality, disability or other protected class, status or characteristic.

Social Media Case #4

- The Board has found that a rule forbidding "statements which are slanderous or detrimental to the company" that appeared on a list of prohibited conduct including "sexual or racial harassment" and "sabotage" would not reasonably be understood to restrict Section 7 activity. Tradesmen International, 338 NLRB 460, 460-62 (2002).

Social Media Case #4

- GC found the rule here was lawful because it would not reasonably be construed to apply to Section 7 activity.

Social Media and the NLRA

WEBSITE: www.nlrb.gov

Questions?

Collyer Deferral Policy—Dealing with Serious Delay

By James G. Paulsen, Director
NLRB, Region 29, Brooklyn

Collyer Deferral Policy

- In GC Memorandum 12-01, Acting GC announced that he will be seeking to have the Board change existing policy and no longer routinely defer Section 8(a)(1) and (3) cases where arbitration will not be completed within a year.

Collyer Deferral Policy

- Determining whether deferral to an arbitration process is appropriate requires balancing Federal labor policies promoting collective bargaining and private dispute resolution with the Board's statutory duty to enforce the Act.

Collyer Deferral Policy

- If there is excessive delay, a charging party can be left without effective relief
- Witnesses may have disappeared, evidence is lost or memories have faded.
- Any eventual Board order may be rendered "pointless and obsolete." See e.g., ***NLRB v. Mountain Country Food Stores, Inc***., 931 F.2d 21, 23-24 (8th Cir. 1991).

Collyer Deferral Policy

New Procedures:

Prior to ***Collyer*** deferral, Regions must take affidavits from the charging party and from all witnesses in the charging party's control. GC Memorandum 11-05.

In Section 8(a)(1) and (3) cases, Regions must discover whether the grievance arbitration will be completed in less than a year. GC Memorandum 12-01

Collyer Deferral Policy

If arbitration is to be completed in less than a year

- ✓ Defer and conduct quarterly reviews
- ✓ After a charge is deferred for one year and no resolution, the Region should send a "show cause" letter to all parties, seeking an explanation why deferral should not be revoked and a full investigation made.
- ✓ If no reason to continue deferral and case has merit, submit to Advice.
- ✓ If case is non-meritorious, dismiss, absent withdrawal

Collyer Deferral Policy

If arbitration is not likely to be completed in less than a year:

- ✓ Regional Director should determine if deferral is appropriate, especially given the problems encountered by delay.
- ✓ If RD determines deferral would unduly disadvantage the CP or frustrate the Board's ability to enforce the Act, then the Region should complete investigation and reach a merit determination.
- ✓ If the RD determines the case is meritorious, submit the case to Advice.
- ✓ If deferral considered appropriate despite the delay, contact Advice.

Collyer Deferral Policy

GC Memorandum 11-05 provides:

The Board should not defer to a pre-arbitral grievance settlement unless the parties themselves intended the settlement to also resolve the unfair labor practice.

If so, the review would be under the Board's ***Independent Stave*** standards.

Collyer Deferral Policy

8(a)(5) Cases

- ✓ Make deferral decisions and conduct quarterly review
- ✓ If arbitration is not likely to be completed in a year and the case implicates individuals' statutory rights or involves serious economic harm, conduct full investigation and submit the case to Advice

Collyer Deferral Policy

Questions?

TAB

4

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E&Y Can't Force Arbitration Of OT Suit, 2nd Circ. Hears

By **Abigail Rubenstein**

Law360, New York (May 14, 2012, 4:33 PM ET) -- In a case that may impact the enforceability of class action waivers in employment arbitration agreements, the plaintiff in a proposed overtime class action against Ernst & Young LLP told the Second Circuit on Friday that forcing arbitration of her claims would thwart her statutory rights.

The accounting firm had asked the Second Circuit to overturn U.S. District Judge Kimba Wood's denial of its motion to compel arbitration of former employee Stephanie Sutherland's individual claim. Ernst & Young maintained the judge misapplied the appeals courts decision in In re: American Express Merchants' Litigation, which invalidated class waivers when plaintiffs had conclusively shown a class action was "the only economically feasible means" for them to prosecute their claims.

Sutherland's brief, however, contends that Ernst & Young's efforts to distinguish the case from the Amex case are unavailing, and that the only way to vindicate her rights under the Fair Labor Standards Act is by permitting her to proceed with her case in court on a classwide basis.

Sutherland — who claims Ernst & Young misclassified its accountants as exempt from overtime pay requirements — is only seeking to recover about $2,000 in unpaid overtime, but the costs and fees for individual arbitration are likely to exceed $200,000, the brief asserts.

The currently unemployed and debt-ridden Sutherland "simply could not afford to pay those costs," the brief said. Furthermore, the evidence also showed that Sutherland could not find an attorney on a contingency fee basis given the risk-reward profile of her case, but the availability of class action procedures made the case economically rational for counsel to undertake, the brief said.

The brief argues that enforcing the arbitration agreement that Ernst & Young has with its employees, which contains a class action waiver, would make it prohibitively expensive for Sutherland to bring her claims, so enforcing the agreement would keep her from exercising her rights under the FLSA.

"The objections that the defendant has raised to the decision of Judge Wood are all issues of settled law," said Max Folkenflik of Folkenflik & McGerity, who represents Sutherland. "The issues are resolved, and they can't really prevail on the basis of any of them."

According to Folkenflik, it is settled law in the Second Circuit that when the only economically viable way for a plaintiff to exercise her statutory rights is through a class action, then an arbitration agreement with a class action waiver should not be enforced,

and when another federal statute conflicts with the Federal Arbitration Act, the FAA must yield.

An attorney for Ernst & Young was not immediately available for comment Monday.

The accounting firm claims that the arbitration agreement should be enforced because Sutherland failed to produce the the significant evidentiary burden detailed in the Amex decision for showing that statutory rights cannot be vindicated through individual arbitration.

Sutherland's case is one of several in which the Second Circuit is being asked to consider arbitration agreements with class waivers in the employment context, in the wake of the U.S. Supreme Court's pro-arbitral decision last year in AT&T Mobility v. Concepcion.

The appeals court also has cases pending over whether arbitration should be compelled in an FLSA suit against Citigroup Inc. and in a gender discrimination suit against Goldman Sachs & Co.

Ernst & Young is represented by Katharine Jane Galston, Rex S. Heinke, Gregory William Knopp and Daniel L. Nash of Akin Gump Strauss Hauer & Feld LLP.

Sutherland is represented by Max Folkenflik of Folkenflik & McGerity as well as by H. Tim Hoffman, Arthur W. Lazear and Ross L. Libenson of Hoffman & Lazear.

The case is Sutherland v. Ernst & Young LLP, case number 12-304, in the U.S. Court of Appeals for the Second Circuit.

--Editing by Eydie Cubarrubia.

COMMITTEE ON EDUCATION
AND THE WORKFORCE
U.S. HOUSE OF REPRESENTATIVES
2181 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6100

May 9, 2012

Lafe E. Solomon
Acting General Counsel
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

Dear Acting General Counsel Solomon:

I respectfully request information, documents, and communications relating to the new National Labor Relations Board (NLRB) policy requiring that representational pre-election hearings be scheduled seven days from the date the Notice of Representation Hearing (NOH) is issued. The Workforce Democracy and Fairness Act, passed last year by the U.S. House of Representatives, required at least 14 days between the NOH and the pre-election hearing. The 14 days would provide employers with a fair opportunity to hire an attorney, identify issues, and prepare their case for the pre-election hearing and give parties an opportunity to compromise and agree on election issues. Ensuring a fair pre-election hearing, an opportunity for compromise and agreement, and the ability of employees to make an informed decision with respect to union representation continues to be a priority for the committee.

On June 22, 2011, the NLRB proposed a number of changes to the union representational election process, including requiring the pre-election hearing to be scheduled seven days after the issuance of the NOH absent special circumstances. Small employers were particularly concerned with this requirement, as many had no previous experience with union elections or NLRB procedures. On July 7, 2011, John Carew, President of Carew Concrete & Supply Company, stated before the House Committee on Education and the Workforce that "it frequently takes longer than seven days to find and hire a consultant to advise them on their rights, abilities, and the complexity of union election regulations."[1] By the close of the comment

[1] Rushing Union Elections: Protecting the Interests of Big Labor at the Expense of Workers' Free Choice, Hearing before the Education and the Workforce Committee, 112th Cong., 1st Sess. at 3 (2011) (written testimony of John Carew).

period, the Board had received more than 65,000 public submissions.[2] Many of the comments argued the proposal would significantly shorten the time between the petition and the election, thus limiting employer free speech and employee free choice.[3]

Six months after introduction of the proposed rules, on December 21, 2011, the NLRB issued a final rule implementing a portion of the proposed rule. The seven day pre-election hearing requirement was not among those adopted. In the final rule, the Board specifically "decided to take no action at this time ... in order to permit more time for deliberation."[4]

Despite this clear statement that further deliberation by the Board was necessary, on April 26, 2012, you implemented a similar seven day pre-hearing requirement. Specifically, the new guidance requires NLRB regional offices to schedule the pre-election hearing seven days from the date of issuance of the NOH.[5] Under the new guidance, a postponement of seven days or less "will not be granted unless good and sufficient grounds are shown," and a postponement of more than seven days will only be granted in "extraordinary circumstances."[6] This new requirement could impede a fair pre-election hearing, particularly for small employers; reduce opportunities for compromise and agreement; and undermine a worker's ability to make an informed decision.

To ensure the new seven day requirement does not impede fair pre-election hearings, opportunities for compromise and agreement, or employee free choice, and to better understand the basis for this new requirement, please provide the following no later than May 23, 2012:

1. Documents and communications relating to the seven day pre-election hearing requirement, including any communications between the General Counsel's office and Board members;

2. Identify each NLRB regional office in which, prior to this guidance, it was the policy that pre-election hearings were scheduled seven days after the issuance of the NOH, and include the date in which this policy was implemented;

3. Identify each NLRB regional office in which, prior to this guidance, it was not the policy that pre-election hearings were scheduled seven days after the issuance of the NOH;

4. List each case since January 1, 2000, in which the time between the notice and pre-election hearing was extended or a request to extend the time between the notice and pre-election hearing was denied, including grounds for the denial or granting of the extension, the region in which the case occurred, the number days granted, and the size of the unit;

---

[2] Regulations.gov, NLRB-2011-0002, RIN 3142-AA08, available at http://www.regulations.gov/#!docketDetail;dct=FR%252BPR%252BN%252BO%252BSR;rpp=10;po=0;D=NLRB-2011-0002 (last visited 10/27/11).
[3] 76 FR 80138, 80150 (December 22, 2011).
[4] *Id.* at 80162.
[5] Office of the NLRB General Counsel Memorandum GC 12-04, pg. 4 (April 26, 2012).
[6] *Id.* at 5.

5. The annual average and median time between the notice and pre-election hearing nationally and by region since 2000; and

6. Documents and communications relating to what qualifies as "good and sufficient grounds" for extension.

If you have any questions regarding this request, please contact Marvin Kaplan, House Committee on Education and the Workforce Committee, at (202) 225-7101.

Sincerely,

JOHN KLINE
Chairman
Committee on Education and the Workforce

cc: The Honorable George Miller, Senior Democratic Member, Committee on Education and the Workforce

Responding to Committee Document Requests

1. In complying with this request, you should produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.

2. In the event that any entity, organization or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.

3. The Committee's preference is to receive documents in electronic form (i. e., CD, memory stick, or thumb drive) in lieu of paper productions.

4. Documents produced in electronic format should also be organized, identified, and indexed electronically.

5. Electronic document productions should be prepared according to the following standards:

   (a) The production should consist of single page Tagged Image File ("TIF"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.

   (b) Document numbers in the load file should match document Bates numbers and TIF file names.

   (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.

6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one *CD*, hard drive, memory stick, thumb drive, box or folder is produced, each *CD*, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.

7. Documents produced in response to this request shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when they were requested.

8. When you produce documents, you should identify the paragraph in the Committee's request to which the documents respond.

9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.

10. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.

11. If compliance with the request cannot be made in full, compliance shall be made to the extent possible and shall include an explanation of why full compliance is not possible.

12. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.

13. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.

14. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you should produce all documents which would be responsive as if the date or other descriptive detail were correct.

15. The time period covered by this request is included in the attached request. To the extent a time period is not specified, produce relevant documents from January 1, 2009 to the present.

16. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.

17. All documents shall be Bates-stamped sequentially and produced sequentially.

18. Two sets of documents should be delivered, one set to the Majority Staff in Room 2181 of the Rayburn House Office Building and one set to the Minority Staff in Room 2101 of the Rayburn House Office Building.

19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following; memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.

2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email, regular mail, telexes, releases, or otherwise.

3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.

4. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.

5. The term "identify," when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.

6. The term "referring or relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflect s, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.

National Retail Federation®
The Voice of Retail Worldwide

May 9, 2012

The Honorable Ben Quayle
U.S. House of Representatives
1419 Longworth House Office Building
Washington, D.C. 20515

Dear Representative Quayle:

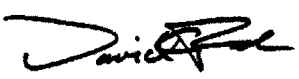
On behalf of the National Retail Federation (NRF), I am writing to urge your support for the amendment being offered by Congressman Quayle on, H.R. 5326, the Commerce, Justice, Science, Appropriations bill. This amendment would ensure no funds could be used to implement, administer, or enforce the recent guidance issued by the Equal Employment Opportunity Commission (EEOC) that would limit the use of background checks in employment decisions.

As the world's largest retail trade association and the voice of retail worldwide, NRF's global membership includes retailers of all sizes, formats and channels of distribution as well as chain restaurants and industry partners from the United States and more than 45 countries abroad. In the U.S., NRF represents an industry that includes more than 3.6 million establishments and which directly and indirectly accounts for 42 million jobs – one in four U.S. jobs. The total U.S. GDP impact of retail is $2.5 trillion annually, and retail is a daily barometer of the health of the nation's economy.

NRF strongly believes that hiring practices should be fair and equitable for both potential and existing employees. This is especially true during challenging economic times. At the same time, a background check is an important resource for employers who seek to provide a safe and stable work environment. NRF believes that the criminal background question on employment applications serves as a valuable screening tool and needs to remain on the employment application. The new guidance will make changes to this tool as well as other aspects of the background check process. We believe potential employers have the right and responsibility to know who they are putting into their workplace to represent their company. Removing a first line of defense, specifically the criminal background history question on an employment application, leaves retailers, shoppers and the entire business community nationwide at a disadvantage.

NRF urges your support of this amendment today. The retail industry wants to keep our workplaces safe. Criminal background checks are an important tool and by supporting this amendment Congress recognizes that employers are striving to create workplace policies in good faith and in a fair manner that balance with the real need of knowing who it is we are hiring.

Sincerely,



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Act Now Advisory: EEOC Propounds Guidance on Use of Arrest and Conviction Records in Employment Decisions

5/3/2012

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On April 25, 2012, the U.S. Equal Employment Opportunity Commission ("EEOC") issued an enforcement guidance document titled "Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et. seq." (the "Guidance"), with respect to employers' use of arrest and conviction information in connection with employment decisions.

Disparate Treatment v. Disparate Impact

Although Title VII of the Civil Rights Act of 1964 ("Title VII") does not prohibit employers' use of criminal background checks, the Guidance reaffirms the EEOC's longstanding position that employers may violate Title VII if they use criminal background information improperly. The Guidance, which updates and consolidates existing EEOC guidance documents on the subject that have previously been left unchanged since 1990, focuses on employment discrimination based on race and national origin.

According to the EEOC, there are two ways in which an employer's use of criminal history information may violate Title VII. First, Title VII prohibits employers from engaging in "disparate treatment" discrimination – that is, treating job applicants with the same criminal records differently because of their race, color, religion, sex, or national origin. Second, even where employers apply a criminal record exclusion under a neutral policy (e.g., uniformly excluding applicants based on certain criminal conduct), the exclusion may still operate to disproportionately and unjustifiably keep out people of a particular race or national origin. This is referred to as "disparate impact" discrimination. If the employer does not show that such an exclusion is "job related and consistent with business necessity" for the position in question, the exclusion is unlawful under Title VII.

Arrests v. Convictions

In addition to providing examples of disparate treatment and disparate impact discrimination, the Guidance discusses the differences between arrest and conviction records. It explains that an arrest does not establish that criminal conduct occurred. Further, arrest records may not report the final disposition of the arrest (e.g., not prosecuted, convicted, or acquitted), may be inaccurate, or may continue to be reported even if expunged or sealed. Therefore, according to the Guidance, excluding an applicant because of an arrest would not be lawful.[1] An employer, however, may make an employment decision based on *the conduct underlying the arrest* if the conduct makes the individual unfit for the position in question. For example, an elementary school may terminate the employment of its assistant principal when he or she is arrested for inappropriately touching young children if the school has a reasonable belief that the assistant principal actually engaged in the inappropriate behavior. In contrast, *a conviction record*

will usually serve as sufficient evidence that a person actually engaged in particular conduct. Even so, the Guidance warns that employers should not make adverse employment decisions based on convictions alone – any such exclusionary policy must be "job related and consistent with business necessity."

Analyzing the Nature of the Conviction

There are two circumstances in which the EEOC believes employers may consistently meet this "job related and consistent with business necessity" defense: (a) where the employer validates the criminal conduct exclusion for the position in question in light of the EEOC's Uniform Guidelines on Employee Selection Procedures (if there is data or analysis about the criminal conduct as related to subsequent work performance or behaviors), and (b) where the employer develops a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job, before it decides whether to exclude the applicant or employee.

To assess whether an exclusion is job-related for the position in question and consistent with business necessity, the Guidance points to the factors set forth in the 1975 decision by the U.S. Court of Appeals for the Eighth Circuit in *Green v. Missouri Pacific Railroad.* The *Green* factors are: (a) the nature and gravity of the offense or conduct; (b) the time passed since the offense, conduct, and/or completion of the sentence; and (c) the nature of the job held or sought. Employers should weigh these factors and provide an individualized assessment for those individuals excluded by the screen to determine whether the policy, as applied, is job related and consistent with business necessity. (Keep in mind that New York employers are subject to similar rules pursuant to Article 23-A of New York's Correction Law.[2])

The Impact of Other Laws

The Guidance states that federal laws and regulations that restrict or prohibit employing individuals with certain criminal records provide a defense to a Title VII claim. Examples include rules pertaining to certain industries (in particular, the securities industry) or the federal government, jobs that require security clearances, and occupational licensure statutes and regulations.

Importantly, however, the Guidance also indicates that state and local laws or regulations are preempted by Title VII, and therefore would not provide such a defense if they "purport[] to require or permit the doing of any act which would be an unlawful employment practice" under Title VII.[3]

What Employers Should Do Now

- Eliminate policies or practices that (a) exclude individuals from employment based on arrest records, or (b) contain blanket exclusions for any type of criminal record, without consideration of mitigating factors or job-relatedness.
- Train managers, hiring officials, human resource professionals (including recruiters), and decision makers about:
    - Title VII and its prohibition on employment discrimination, including both disparate treatment and disparate impact discrimination; and
    - How to utilize permissible factors to make non-discriminatory

hiring, promotion, and other employment decisions.

- Develop a narrowly tailored policy and procedure for screening applicants and employees for criminal conduct; ensure that exclusions pursuant to the policy are job related and consistent with business necessity.
- Document any consultations and/or research that had been considered in compiling the policy and procedures.
- When convictions are identified, ensure that various factors – such as the nature or gravity of the offense, the time elapsed since the conviction or completion of the sentence, and the nature of the job or position sought – are carefully weighed and considered. Further to this point, make individualized assessments with respect to whether a conviction will affect the employee's or applicant's ability to perform the job in question.
- Keep information about applicants' and employees' criminal records confidential; only use it for the purpose for which it was intended.
- Before utilizing a third party to obtain any background information on any employee or applicant, ensure compliance with the federal Fair Credit Reporting Act ("FCRA") and any applicable state counterparts.

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Teiko Shigezumi, an attorney licensed in Japan who is based in Epstein Becker Green's New York office, contributed significantly to the preparation of this Advisory.

ENDNOTES

[1] Significantly, New York law permits employers to make employment-related decisions based on "arrests pending adjudication" – i.e., those which have not yet been ruled upon. Most other jurisdictions do not make this distinction. Indeed, the Guidance does not address this distinction. Therefore, New York employers should be aware that they have greater latitude in connection with taking actions based on arrests pending adjudication

[2] Under New York's Correction Law, Article 23-A, Section 753, in connection with any employment-related decision based on a criminal history, employers must consider the following factors:

> a. The public policy of this state, as expressed in this act, to encourage the licensure and employment of persons previously convicted of one or more criminal offenses.
>
> b. The specific duties and responsibilities necessarily related to the license or employment sought.

c. The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities.

d. The time which has elapsed since the occurrence of the criminal offense or offenses.

e. The age of the person at the time of occurrence of the criminal offense or offenses.

f. The seriousness of the offense or offenses.

g. Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct.

h. The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.

[3] It should be noted that this may include a situation where a New York employer has taken an adverse employment action against an employee or applicant based on an arrest pending adjudication.

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ACT NOW ADVISORY

Court Strikes Down NLRB "Quickie Election" Rules

May 16, 2012

By James S. Frank, Steven M. Swirsky, Adam C. Abrahms, Donald S. Krueger, and D. Martin Stanberry

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In a sharp setback for the National Labor Relations Board (the "Board"), a federal district court in Washington, D.C. (the "Court"), struck down the Board's election rules, which took effect on April 30, 2012, on technical grounds, holding that the Board did not have a properly constituted quorum of three members when it voted to change its election rules and procedures. See *Chamber of Commerce v. NLRB*, No. 11-2262 (JEB), Slip Op., 2012 WL 1664028 (D.D.C. May 14, 2012). This decision comes less than a month after a federal appeals court struck down the Board's notice-posting rule that would have required employers to advise employees of their rights under the National Labor Relations Act, and less than two years after the Supreme Court of the United States in *New Process Steel LP v. NLRB*, 130 S. Ct. 2635, 560 US __ (2010), held that the Board, which is traditionally comprised of five members, must have a quorum of three members to lawfully issue its decisions.

The Court's decision arises from a lawsuit filed on December 20, 2011, by the U.S. Chamber of Commerce and the Coalition for a Democratic Workplace (collectively, the "Plaintiffs") arguing that the Board's amended election rules, which took effect on April 30, 2012, were unlawful in part because they deprived employers of their free speech rights to speak out against unions and because they were procedurally flawed. The Plaintiffs sought to enjoin the rules before they took effect and asked the Court to issue a temporary restraining order, which request the Court denied last month. The U.S. Senate rejected a joint resolution that would have blocked the rules.

U.S. District Court Judge James Boasberg, who was nominated by President Obama and appointed to the Court in 2011, held that the Board did not have a quorum when it voted on the amendments to the rules because Republican Board Member Brian Hayes did not participate in the final vote for the rules in December 2011. Although the final rules were sent to Board Member Hayes electronically, he declined to participate in the vote because he had previously expressed his opposition to the proposed rules at a public hearing. Despite choosing not to participate, Member Hayes wrote a dissent that accompanied the recent publication of the new rules in the *Code of Federal Regulations*. Yet despite Member Hayes's decision to submit an affidavit to the Court in which he acknowledged that because he had already expressed his opposition to the changes in the rules, he did not need to vote, a position shared by the Board, Judge

Boasberg concluded that those actions were insufficient to create the quorum required for a formal vote.

Overview of the Amended Rules

The Court's decision throws out the Board's new "quickie" election rules that went into effect on April 30, 2012. Under those rules, the Board eliminated several steps in the representation process, which was expected to shorten the time between the filing of a petition and the holding of an election. Among the principal modifications in the proposed rules were those:

1. ***Limiting the Scope of the Pre-Election Hearing.*** The amended rules explicitly stated that the purpose of a pre-election hearing is to determine whether a question of representation exists, and had amended Section 102.66(a) of the Board's Rules and Regulations to give the hearing officer the discretion to limit the hearing to relevant matters and eliminate the resolution of many issues traditionally addressed before an election.

2. ***Restricting Post-Hearing Briefs.*** The second principal change would have granted hearing officers the discretion to prohibit the filing of post-hearing briefs and to limit the subject matter and timing of their filing.

3. ***Consolidating Pre- and Post-Election Appeals***. The third proposed change would eliminate an employer's opportunity to file multiple appeals. Under the longstanding previous rules, parties could file an appeal to seek Board review of pre-election issues and a separate appeal to seek Board review of post-election issues, such as challenges to voter eligibility and objections to the conduct of the election.

4. ***Eliminating the 25-Day Waiting Period.*** The fourth rule change removed the 25-day waiting period for scheduling an election after a Regional Director's pre-election decision. The previous rules recommend that the Regional Director refrain from setting an election date sooner than 25 days after ordering an election to allow the Board sufficient time to consider any requests for review that may be filed.

5. ***Establishing a Standard for Interlocutory Appeals***. The amended rules made clear that the Board would grant interlocutory appeals of Regional Director decisions only under "extraordinary circumstances where it appears that the issue will otherwise evade review."

6. ***Establishing Standards for Post-Election Procedures***. This change would require parties to identify significant prejudicial error by the Regional Director or some other compelling reason for Board review, allowing the Board to devote its limited time to cases where its review is warranted.

What Does the Court's Decision Mean?

Since Judge Boasberg did not address the Plaintiffs' substantive arguments, namely, that the new rules fail "to assure employees the 'fullest freedom' in exercising their rights under the Act...," the decision does not prevent the Board from establishing a quorum of three members and voting for, and implementing, the same new, or other, rules. However, the waters are muddied a bit by the fact that three members of the Board are currently recess appointments (as opposed to appointees confirmed by the Senate). As such, several parties have challenged the legitimacy of these recess appointments on the ground that Congress was not in recess when the appointments occurred, and, therefore, President Obama did not have the authority to appoint those members. If a court agrees with this argument, then the recess appointments would be invalidated, the Board would be reduced to two members, and, as a result, would be incapable of constituting a quorum or voting on the rules.

Another interesting question is whether the Board will choose to appeal the decision. If not overturned, Judge Boasberg's decision could substantially impact how the Board conducts business in the future. Specifically, because Judge Boasberg's opinion is not expressly limited to the use of a quorum in the rulemaking process, theoretically, an obstinate member on a divided Board could create a barrier to decision-making simply by ignoring his or her colleagues' requests to decide unfair labor practice and representation matters. Judge Boasberg admitted as much himself, stating that "while the court need not decide whether a member of the Board could intentionally prevent the formation of a quorum, it is worth noting that such things happen all the time."[1]

What Employers Should Do Now

In response to the Court's decision, the Board has issued a press release indicating that it is considering its options. Acting General Counsel Lafe Solomon has withdrawn the guidance to the Regional Offices, which he issued prior to the implementation of the changes to the Board's representation case process. The Regional Offices have been told to apply the old election rules to pending cases, including those filed on or after April 30, 2012. Notwithstanding the Board's apparent acquiescence to the Court's decision, employers should expect the new rules to be voted upon and adopted by a quorum of the current Board.

Anticipating the disadvantage that quickie elections will present, employers should:

- check for and remedy issues that may make their organization vulnerable to a union organizing drive, such as wage and hour violations, or uncompetitive wages or benefits; and

- train managers and supervisors on how to:

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[1] *Chamber of Commerce v. NLRB,* No. 11-2262 (JEB), Slip Op., 2012 WL 1664028 (D.D.C. May 14, 2012), at *9.

- forestall interest in union organizing;
- spot the early warning signs of union organizing; and
- quickly and properly report such activities so that the employers can respond appropriately.

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ACT NOW ADVISORY

Class Action Arbitration Bans – the Obama NLRB Attempts to Trump the Federal Arbitration Act and the Supreme Court

February 10, 2012

By David D. Green; Frank C. Morris, Jr.; and Allen B. Roberts

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Two recent decisions on arbitration, one from the National Labor Relations Board ("NLRB" or "Board") and one from the Supreme Court of the United States, present an interesting question: Can employers limit employees from launching potentially costly class actions? Some employers have applicants or new employees sign a separate agreement, or include a clause in application forms or in the employee handbook (which employees acknowledge), requiring employees to bring future disputes to arbitration *and* to agree that the arbitration will be individual only – not a class or collective action. These companies apparently hope that arbitration, and the avoidance of a jury trial, will be less costly than defending a court action if a dispute arises. They also hope to eliminate the attraction and risk of class and collective actions, which often are seen as providing undue leverage and a larger total payday to claimants and their attorneys.

In a decision issued on January 3, 2012, in *D.R. Horton, Inc. and Michael Cuda* (Case 12-CA-25764), a two-member panel of the NLRB took the novel position that an employer violates the National Labor Relations Act ("NLRA") when it requires employees covered by the NLRA (*i.e.,* most non-supervisory and non-managerial employees of most private sector employers, *whether unionized or not*) to agree, as a condition of employment, to binding arbitration of any disputes or claims arising out of their employment if the arbitrator is restricted to hearing only an individual claim, not a class or collective action.

Then, in a decision dated January 10, 2012, in *CompuCredit Corp. v. Greenwood* (No. 10-948), 565 U.S. ___, 132 S. Ct. 665 (2012), the Supreme Court extended a line of cases favoring the referral of disputes to arbitration and confirmed an organization's ability to require arbitration, even where a governing statute specifically describes "actions" in "court." The Court held that where a federal statute (in this case the Credit Repair Organizations Act ("CROA")) does not show a specific "contrary congressional command" as to whether a claim can proceed in arbitration, the Federal Arbitration Act ("FAA") "requires the arbitration agreement to be enforced according to its terms." Thus, a clause in a credit card application to resolve any dispute arising from the applicant's account by binding arbitration was held to be enforceable.

For employers, the key question is whether the Supreme Court's decision affects the viability of *D.R. Horton*. The answer is a resounding "maybe," leading to a next level of inquiry as to whether *D.R. Horton* can withstand likely challenges.

The central holding of *D.R. Horton* is that the employer's arbitration clause, by barring any court action and restricting arbitration to individual proceedings, supposedly violated the employees' right to engage in "concerted" action for "mutual aid or protection," as guaranteed by Section 7 of the NLRA. The *D.R. Horton* panel, however, did not point to any specific provision in the NLRA regarding whether the enforcement of arbitration agreements is limited. Therefore, there is a substantial argument that there is no clear "contrary congressional command" and the FAA thus "requires the arbitration agreement to be enforced according to its terms," including a restriction on class and collective action proceedings. There are, however, a number of factors, some outlined by the NLRB and some inherent in the Supreme Court holding, that come into play and might lead to a different conclusion. For example:

- The Supreme Court only addressed whether an arbitration clause could be enforced to bar access to the courts, not whether class and collective actions could be barred as well. Thus, the Court did not address the NLRA issue directly.

- As noted in *D.R. Horton*, prior Supreme Court precedents upholding class and collective action bans have not dealt with employment matters, and the most recent (*AT&T Mobility v. Concepcion*, 563 U. S. ___, 131 S. Ct. 1740 (2011)) dealt with a conflicting state law, not a federal law. While *CompuCredit* does conclude that arbitration agreements are favored even when federal statutory claims are at issue, it still does not deal with employment matters or the NLRA.

- In a concurring opinion in *CompuCredit,* Justice Sotomayor argues that intent to bar enforcement of an arbitration agreement is determined not just from the text, but also from the history or purpose of the statute. *D.R. Horton* (which predates Justice Sotomayor's opinion) makes a similar argument that the central tenet of NLRA Section 7 is violated if the arbitration clause is "enforced according to its terms" to bar collective action, which, based on the text, history, and purpose of the statute, supposedly shows an intent by Congress to override the FAA in this instance. The history of the NLRA, however, shows no evidence that, when Congress chose to codify a right of some employees to engage in protected concerted activities, it was meant to bar limitations on class and collective arbitrations or lawsuits.

- *D.R. Horton* also argues that an FAA exception to enforcement of arbitration clauses on any grounds that would allow for the revocation of any other contract applies to the NLRA. Therefore, *D.R. Horton* asserts that "the [class action] waiver interferes with the substantive statutory rights under the NLRA, and the intent of the FAA was to leave substantive rights undisturbed." Further, although clearly not compelled by the explicit language of the NLRA, *D.R. Horton* urges that it is not in conflict with the FAA, but "accommodates the policies underlying both the NLRA and the FAA to the greatest extent possible."

- In *CompuCredit,* the Supreme Court was directly interpreting the CROA. In a substantially different context, a Circuit Court of Appeals would be faced with reviewing an NLRB decision interpreting the NLRA. Thus, the question arises as to what deference the appellate court would give to the NLRB's position in

deciding whether to enforce an arbitration clause, like the one in *D.R. Horton, Inc.* The NLRB, however, in interpreting the FAA, which is not a labor statute, should not be entitled to the level of deference given to government agencies that interpret statutes they administer (known as "Chevron deference" after the seminal case on point, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)).

Even absent the *CompuCredit* case, it is not clear that the NLRB decision in *D.R. Horton* will become settled law. In its decision, the *D.R. Horton* panel acknowledges some alternative interpretations of the NLRA but then seeks to counter these interpretations largely using principles, not actual precedents. For instance, it notes that several parties filed *amicus curiae* briefs in support of D.R. Horton, Inc., that contended that, despite the arbitration clause, employees could still act in concert, such as by filing similar or coordinated individual claims. The panel simply rejects this by saying that "if the Act makes it unlawful for employers to require employees to waive their right to engage in one form of activity, it is no defense that employees remain able to engage in other concerted activities." In another example, the *D.R. Horton* panel notes that a 2010 General Counsel memorandum found that an arbitration waiver was an individual matter outside the scope of Section 7 of the NLRA. The panel essentially argues that the former General Counsel's arguments were erroneous or at odds with the General Counsel's own conclusion. Also, because the possible conflict between the NLRA and the FAA is "an issue of first impression for the Board," any of these alternative views could be adopted on appeal or in a later proceeding.

It should be noted that the approach in *D.R. Horton* also might be jettisoned by a new Board majority if President Obama is not re-elected, but it could be reinforced if a new generation of Board members were to tilt more decidedly against waivers requiring arbitration. Even if electoral change does not undo *D.R. Horton*, it is quite possible that *CompuCredit* may foreshadow court decisions, finding that the NLRA lacks the necessary clear "congressional command" to override the FAA's requirement that arbitration agreements be enforced according to their terms.

How *D.R. Horton* Could Affect Employers

If upheld, *D.R. Horton* is certain to affect employers that have not considered themselves vulnerable to the NLRB's reach in at least three significant respects:

- **First**, the decision is not restricted to assessing "protected concerted activity" in terms purely within the NLRA. Rather, it transcends the NLRA to examine whether there has been interference with the exercise of employee rights under the Fair Labor Standards Act, a statute interpreted and vigorously enforced by the Department of Labor but not the NLRB.

- **Second**, it may presage even greater interest by the NLRB in matters that have been regarded as the exclusive province of other administrative agencies charged by Congress to interpret and/or enforce legislation, including the assertion of substantive rights and protections against retaliation.

- **Third**, as with recent decisions concerning employee use of social media, *D.R. Horton* stands to affect *all employers covered by the NLRA* – even if none of the employer's employees are represented by a union.

What Employers Should Consider Now

- Employers should note that the NLRB decision only affects employees covered by the NLRA (whether they are union-represented or not). While "covered employees" can include individuals in addition to members of a collective bargaining unit, the term, as we previously noted, does not cover supervisors or certain other employees in an organization. Thus, even if the *D.R. Horton* panel decision stands, employees who are who are not covered by the NLRA could still be required as a condition of employment to agree, in writing, to use only individual arbitration proceedings to pursue employment claims.

- While the above bullet discusses treating employees covered by the NLRA and those who are not differently, the following are some considerations for employers' covered employees:

    - As a precaution in the event of challenge to a mandatory individual arbitration policy, some employers may decide to include specific language in their arbitration agreements to allow individual binding arbitration to go forward under the terms of the agreements should a ban on class and collective arbitration be found unenforceable. Nevertheless, this position could be rejected by the NLRB unless there is a shift in its prevailing view.

    - Employers may wish to act in consonance with *D.R. Horton* but attempt to rewrite their arbitration agreements for covered employees to be as procedurally restrictive as possible, such as in defining the standards for a class. However, great caution and circumspection would be required, as such measures as shifting expenses for class and collective actions to the parties seeking class status, or adding damage restrictions that could minimize exposure to large awards, might contravene the procedural safeguards required by courts for enforcement of arbitration clauses covering statutory employment rights and remedies.

    - Employers may wish to bide their time, hoping for a reversal of *D.R. Horton* by a federal appellate court on a straightforward *CompuCredit* theory. Another theory for reversal is that the NLRB acted without authority in issuing *D.R. Horton* on January 3, 2012, when one of only three seated members (Hayes, the only Republican) recused himself and when the ability of another member (Becker) to validly participate in a decision at a time when the recess appointment by which he served may have expired. See *New Process Steel LP v NLRB,* 560 U.S.____, 130 S.Ct. 2635 (2010), where the Supreme Court held that the Board was without authority to decide cases when only two members were seated.

Epstein Becker Green will keep you updated on future developments in this area.

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Aftershocks from D.C.'s "Labor Law Earthquake" Likely to Be Felt by Nursing Homes and Other Non-Acute Health Care Facilities Throughout the U.S. Health Care Industry

September 9, 2011

By Kara M. Maciel and Mark M. Trapp

On August 23, 2011, the Washington, D.C., area experienced a 5.9 magnitude earthquake. A week later, a "labor law earthquake" of far greater magnitude had its epicenter in a federal agency in the District of Columbia. In the coming weeks and months, its aftershocks will be felt by unprepared employers, particularly those operating non-acute health care facilities.

In an opinion that America's largest private sector labor union called a "monumental victor[y] ... for unions,"[1] the National Labor Relations Board ("NLRB" or "Board") upended decades of precedent and placed virtually all non-acute health care providers at risk of organizing by so-called "micro unions." The decision, *Specialty Healthcare and Rehabilitation Center*, 357 NLRB No. 83 (Aug. 26, 2011), was made public on August 30, 2011. *The New York Times* reported that day that the NLRB had "released a decision that would make it easier to unionize nursing home workers,"[2] but the decision's ramifications are much broader.

At issue in the case was the appropriate standard to be applied in determining the scope of a bargaining unit that the United Steelworkers sought to represent. The union had petitioned the NLRB to represent a unit consisting solely of 53 certified nursing assistants ("CNAs") employed by a skilled nursing facility. The employer, on the other hand, asserted that the unit should include not only the CNAs, but all other nonprofessional service and maintenance employees at its skilled nursing facility.

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[1] "USW Remakes NLRB Law in Two Landmark Cases," United Steelworkers press release, dated Aug. 30, 2011 (available at http://www.usw.org/media_center/releases_advisories?id=0420) (last visited Sept. 7, 2011).

[2] *See* Steven Greenhouse, *At N.L.R.B., Flurry of Acts for Unions as Chief Exits*, N.Y. TIMES, Aug. 30, 2011 (available at http://www.nytimes.com/2011/08/31/business/economy/nlrb-eases-unionizing-at-nursing-homes.html?scp=1&sq=greenhouse%20specialty%20healthcare&st=cse) (last visited Sept. 7, 2011).

In 1974, Congress amended the National Labor Relations Act to extend coverage to nonprofit hospitals, which had previously been excluded. During the Congressional hearings over the amendment, some Members of Congress noted their concern that numerous small units in health care institutions might increase labor disputes and adversely affect patient care. Nevertheless, while noting with approval the trend toward broader units, Congress ultimately decided against limiting the Board's jurisdiction to determine appropriate bargaining units. After several of its adjudicatory approaches were subjected to severe criticism, in 1989, the NLRB issued regulations that set certain parameters for the number and composition of bargaining units at "acute care hospitals." The Board defined "acute care hospitals" as "either a short term care hospital in which the average length of patient stay is less than thirty days, or a short term care hospital in which over 50% of all patients are admitted to units where the average length of patient stay is less than thirty days." 29 C.F.R. 103.30(f)(2). The definition of "acute care hospitals" specifically excluded "facilities that are primarily nursing homes, primarily psychiatric hospitals, or primarily rehabilitation hospitals" and provided that the NLRB would "determine appropriate units in other health care facilities ... by adjudication." 29 C.F.R. 103.30(g).

Thus, the contours of an "appropriate bargaining unit" in "non-acute health care" facilities, such as nursing homes, remained subject to adjudication by the Board. Accordingly, the Board decided the case of *Park Manor Care Center, Inc.*, 305 NLRB 871 (1991), which involved the question of appropriate bargaining units in nursing homes. In *Park Manor*, the Board stated that "comparing and contrasting individual nursing home workforces with those in acute care hospitals would aid in determining appropriate units."[3] While the Board cited a number of factors to consider, as a general matter, it has been viewed as siding with the proposition that appropriate units at non-acute health care facilities should not differ largely from those at acute care facilities.

Following the pattern established by *Park Manor*, for the past 20 years, the Board consistently approved such facility-wide "service and maintenance units" consisting of nonprofessional service and maintenance employees at nursing homes. Indeed, as noted by dissenting Member Brian Hayes, in its history, the Board has directed elections in just four cases involving CNA-only units, and each of those elections was pursuant to a stipulated election agreement, rather than a direction of election. In other words, the Board had *never* previously directed an election in the type of unit it approved in *Specialty Healthcare*.

Nevertheless, casting aside its own 20-year-old precedent, in *Specialty Healthcare,* the Board majority overruled *Park Manor*, and, in the process, laid out a radical new standard that will allow unions to organize employees in groups as little as two individuals, even when those individuals share a community of interest with other (excluded) employees. Obviously, this will make it much easier for unions to organize employees, as they can selectively choose which groups, and, perhaps even which employees, they wish to represent.

[3] *Park Manor Care Center, Inc.*, 305 NLRB at 875.

Under the new standard, organized employees need only be "readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors)" and share a community of interest. Previously, a union bore the burden of showing that the unit it sought to represent had interests sufficiently distinct from other employees to exclude those other employees from the unit. Under the new standard, an employer bears the burden of showing that the excluded employees share an "overwhelming community of interest" with the employees in the petitioned-for unit – a burden which Member Hayes described as "virtually impossible."

It is a truism that a union normally does not petition to represent those employees it has been unsuccessful in organizing but will instead "propose the unit it has organized." *Laidlaw Waste Systems, Inc. v. NLRB*, 934 F.2d 898, 900 (7th Cir. 1991). In direct contrast to the command of the National Labor Relations Act that "the extent to which employees have organized shall not be controlling" in determining whether a unit is appropriate, *Specialty Healthcare* allows a union to pick and choose the employees it wishes to represent (*i.e.,* those it can persuade) and to organize them in small groups based only on negligible differences with other employees. Demonstrating the breadth of its holding, the Board majority left open the possibility of organizing among classifications of employees by shift or even by floor, stating only that such proposed units "might be" inappropriate.

While the effects of this landmark NLRB decision are likely to be felt by all businesses over time, the immediate impact will be realized by non-acute health care facilities, such as nursing homes. Under *Specialty Healthcare*, a union could potentially organize employees of non-acute health care facilities by classification, department, shift, or even location within the facility by floor or otherwise.

Plainly, as the dissent recognized, this case had nothing to do with employees' free choice, and everything to do with "reversing the decades-old decline in union density in the private American work force." Combined with the NLRB's recent mandate that employers post a notice informing their employees of the right to organize, and its proposed rule shortening the time frame in which employers may respond to union organizing, the intended result is clear. As Member Hayes noted, "the majority seeks to make it virtually impossible for an employer to oppose the organizing effort either by campaign persuasion or through Board litigation."

In its press release commenting on the decision,[4] the union that sought to represent the CNAs at issue in the case makes plain the anticipated impact of *Specialty Healthcare,* asserting that the ruling "remakes NLRB law." The union also asserted that it had "successfully prevailed upon the Board to permit *unions to more freely choose* the types of bargaining units they wish to organize."[5] These claims indicate how far the Board has shifted its policy towards unions, and away from employees. Instead of employees choosing as a group whether and how to be represented, the decision in *Specialty*

[4] "USW Remakes NLRB Law in Two Landmark Cases," United Steelworkers press release, dated Aug. 30, 2011 (available at http://www.usw.org/media_center/releases_advisories?id=0420) (last visited Sept. 7, 2011).
[5] *Id.*

Healthcare places the decision largely in the hands of unions, which may select only those employees who support the union in order to ensure victory.

Clearly, as a result of the *Specialty Healthcare* decision, non-acute health care facility employers face greater risk that unions will target small groups of employees, since, as noted by the dissent, under the announced standard, the NLRB's regional directors "will have little option but to find almost any petitioned-for unit appropriate." Once a union successfully gets its foot in the door, it will next seek to organize further small groups of sympathetic employees, while ignoring those employees who disagree with its message. Non-acute health care facility employers would be well served to carefully analyze their operations and take immediate steps to address any potential vulnerabilities.

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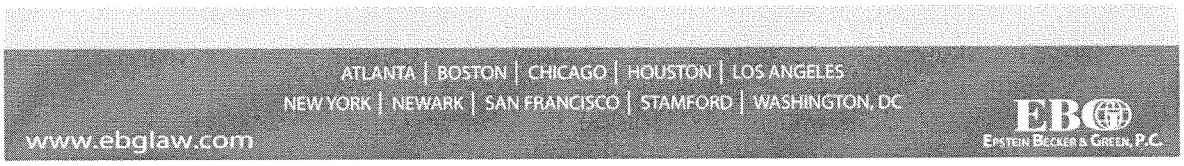

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ACT NOW ADVISORY

Helpful Guidance Summarizing the National Labor Relations Board's Position on Social Media Issues: Two Reports and One Decision

October 4, 2011

By Steven M. Swirsky and Michael F. McGahan

On Thursday, August 18, 2011, the Acting General Counsel of the National Labor Relations Board ("NLRB" or "Board") issued a report on the outcome of 14 cases involving employees' use of social media or social media policies in general.[1] This report follows a more expansive "Survey of Social Media Issues Before the NLRB" issued by the U.S. Chamber of Commerce on August 5, 2011, which addresses 129 cases involving social media reviewed by the NLRB at some level.[2] Further, after these reports were published, an NLRB administrative law judge ("ALJ") issued the first decision of its kind – finding that terminating employees for using social media to express concerns about the workplace violates the National Labor Relations Act ("NLRA" or "Act").

Read together, those two reports and that ALJ decision begin to give employers some guidance on reacting to the use of social media by their employees, and on developing social media policies. Most of the cases covered in the reports are at early stages of investigation or litigation, or were settled. Thus, the NLRB's position may evolve further as cases are decided on fully developed records.

Generally, the cases reported on fall into two categories: (1) claims that employees have been retaliated against in violation of the NLRA as a result of statements made about their employers or working conditions on or in any of the wide variety of social media channels available, such as Twitter, Facebook, YouTube, blogs, podcasts, and the like; and (2) claims that an employer's social media policy violates the NLRA because its prohibitions may "chill" employees in the exercise their rights under the Act.

Social Media Cases Before the NLRB Impact Both Union and Non-Union Employees

One of the most striking aspects of the two reports is that most of the cases reported on have nothing to do with union-represented workforces. The reports highlight the often overlooked fact that the rights protected under Section 7 of the NLRA, to "engage in ...

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[1] *See* Memorandum OM 11-74, which is available on the NLRB's website at http://mynlrb.nlrb.gov/link/document.aspx/09031d458056e743.

[2] "A Survey of Social Media Issues Before the NLRB," U.S. Chamber of Commerce, 2011, is available on the Chamber's website at http://www.uschamber.com/reports/survey-social-media-issues-nlrb.

concerted activities for the purpose of ... mutual aid or protection," extend to all employees, whether or not they are represented by a union or are seeking union representation.

Disciplinary Action for Use of Social Media

Many of the cases covered in the reports address charges filed with the NLRB by employees who have been terminated, suspended, or otherwise disciplined as a result of posts they made on social media sites. Almost all of these cases involve non-union employees. The issue in all these cases is whether the employee's[3] use of social media constitutes activity protected by the NLRA. In making this determination, the NLRB will rely on its traditional analyses to determine whether the post involved terms and conditions of employment. For example, did the posting concern such issues as:

- Wages, tipping arrangements, or commissions?
- Complaints about management in general or perhaps a specific supervisor?
- Failure to get raises, or complaints about annual reviews?

Next, the NLRB will look to whether the posting constitutes "concerted" activity. With respect to social media, the NLRB looks at various factors, such as whether the posting was:

- Engaged in with or on authority of other employees?
- Engaged in to solicit or induce group action?
- Engaged in to advance truly group complaints?

In applying these principles to social media cases, the NLRB examined such factors as whether, in the social media posting, the employee appealed to co-workers for assistance, whether co-workers responded to the posting, whether the posting involves shared concerns of a group of employees, or whether the employee discussed the posting with co-workers before or after the posting. Importantly, in a number of cases, the NLRB found that the use of social media to simply air individual gripes was *not* protected activity.

The NLRB also examined, under its traditional rules, whether employee posts on social media sites were so egregious as to lose the protection of the NLRA. The cases in the reports make clear that, in this regard, the NLRB views the use of social media to be outside the workplace. Thus, the Board is likely to find that a great deal of insulting, profane, or obscene language in social media postings will not cause statements that otherwise meet the definition of "protected activity" to lose that protection. In the NLRB's view, even untrue statements that are not "maliciously false" would not lose the protection of the Act. The NLRB does concede, however, that actual threats made through social media would cause an otherwise protected posting (and the employee who posted it) to lose the protection of the NLRA.

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[3] Employee" is a defined term under the NLRA. Excluded from the definition are "supervisors," a defined term that generally includes employees with authority to hire, fire, etc., 29 USA § 152(11), and managerial employees who are generally high-level employees who formulate and effectuate management policies. Policies covering, or disciplinary actions taken against, employees in these categories are not subject to review by the NLRB.

Subsequent to the publication of the Board's report, the first decision on discipline for the use of social media was issued. An NLRB ALJ held that an employer had violated the NLRA by terminating five employees for posting on Facebook complaints about a co-worker's criticism of job performance. The case arose in a non-union workplace. The ALJ found that the posting by an employee of her concern about the co-worker's criticism, in which she solicited other employees to comment (and four employees did), constituted protected concerted activity, and the employer's decision to terminate them for that posting, which the employer admitted was the sole reason for the termination, violated the Act. The ALJ recommended that the Board order reinstatement with full back pay for the terminated employees. The ALJ rejected the employer's defense that the Facebook posting violated the company's anti-harassment policy.

In several other cases involving the termination of employees for postings on social media sites, the NLRB reached settlements with the employers that involved "make whole" remedies, including back pay for the affected employees, and also reinstatement, in some cases.

Review of Employer Policies

The majority of the cases in which the NLRB reviewed social media and other policies likewise involved non-union workplaces. The focus of the NLRB's review is determining whether the language of the applicable policy either specifically prohibited employees from discussing among themselves or with third parties (*i.e.,* unions or news media) issues involving terms and conditions of employment, or whether the use of broad or vague and undefined terms could reasonably be read by employees to be such a restriction. The policies reviewed were generally either confidentiality, non-defamation, or media relations policies, or e-mail/Internet policies, including restrictions on the use of social media. In the NLRB's view, the mere existence of such language in a policy, whether actually enforced or not, violates the NLRA because of its "chilling" impact on employees' exercise of rights protected by the Act.

The cases in the reports give some guidance as to the types of phrases in employer policies that will raise a red flag. The NLRB will focus on broadly worded prohibitions, such as those that prohibit "rude or discourteous language," "inappropriate discussions about the company management, and/or co-workers," and statements that "lack truthfulness," or "might damage the reputation or goodwill of the company." The reported cases give a clear indication that the NLRB will find that such phrases, in the absence of defining or limiting language, or the use of accompanying examples that make clear that the company did not intend to limit protected speech, violate the NLRA.

In the reported cases on this subject, the NLRB also focuses on employer policies that prohibit the use of company names or logos in social media posts. With respect to these matters, the NLRB makes clear its view that such a prohibition, without express limiting language, would violate the NLRA because it could be read to prohibit posting pictures of picket signs or t-shirts worn in support of a collective action that bear the company's name.

What Employers Should Do Now

Employers, whether or not they have a union-represented workforce, should take immediate steps to protect themselves from adverse NLRB action. For example, employers should:

1. Review their policies to:

   (a) Ensure that they include no express prohibitions on employees discussing terms and conditions of employment (in social media or otherwise);

   (b) Confirm that they do not include broad or vague prohibitions on employees' use of social media that could be reasonably interpreted to prohibit discussion of terms and conditions of employment; the use of specific definitions, limiting language, and examples can be used to clarify the reach of the applicable policy; and

   (c) Consider including a broad disclaimer that such policies are not intended to limit any rights protected by federal or state law.

2. In deciding whether to terminate, discipline, or otherwise take adverse action against an employee for social media postings, carefully review, with counsel, whether the employee's activity may constitute conduct protected by the NLRA.

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ACT NOW ADVISORY

NLRB Acting General Counsel Issues Follow-Up Report on Social Media Cases

March 8, 2012

By Steven M. Swirsky and Michael F. McGahan

On January 25, 2012, the National Labor Relations Board's ("NLRB") Acting General Counsel ("AGC") Lafe Solomon issued a second report on unfair labor practice cases involving social media issues. We discussed his earlier report in our *Act Now* Advisory of October 4, 2011.

The new report covers an additional 14 cases, all of which fall into the same two categories as the cases discussed in the earlier report, namely: (1) termination of employees resulting from statements made in social media forums about their working conditions or their employers; and/or (2) claims that an employer's social media policy violates the National Labor Relations Act (the "Act") because its prohibitions may "chill" employees in the exercise of their rights under the Act to engage in concerted activity for their mutual aid and protection. Again, the report emphasizes that the Act's provisions apply to workplaces where the employees are not represented by a union and where there is no union activity, as well as to unionized employees.

All of the cases addressed in the report are at the earliest stages of litigation, and thus, represent only the view of the General Counsel's office on these issues. They do spotlight, however, the refinement of the AGC's views on social media and, because the AGC has the authority to determine whether a complaint will be issued, they offer employers additional guidance on how to approach both the drafting and the enforcement of their social media policies in order to avoid litigation.

All but one of the reported cases involve non-union workforces. This fact underscores the intent of the current NLRB to establish its relevance in non-union workplaces – and with the NLRB's requirement that all employers, whether union or non-union, post

Notices advising employees of their rights under the Act,[1] employers can expect the number of cases in this area to grow significantly.

Review of Social Media Policies

The AGC continues to take the position that broad prohibitions and restrictions on employees' use of social media forums violates the Act. Thus, in the reported cases, the AGC argues that a social media policy violates the Act if it includes any of the following, without use of specific limiting definitions or examples:

- Prohibitions on making disparaging comments about the company;
- Requirements that discussions about terms and conditions of employment be made in an "appropriate manner;"
- Prohibitions of disrespectful conduct or inappropriate conversation;
- Broad prohibitions on the disclosure of confidential, sensitive, or non-public information to anyone outside the company, without prior approval of the employer; or
- Prohibitions on unprofessional communications that could negatively impact the employer's reputation.

In a new twist, the AGC has taken the position that if an employer requires employees, in their use of social media, to obtain employer approval to identify themselves as employees of the company and further, to expressly state that their opinions are their own and not the company's, this will "significantly burden" the employee's exercise of their rights under the Act to discuss working conditions and criticize the company's employment policies and practices. Thus, the AGC maintains that such requirements constitute an unfair labor practice ("ULP") and violates the Act.

In the AGC's view, an otherwise "overbroad" prohibition can be remedied by including specific examples that make clear that the policy is not intended to limit the rights of employees to discuss with coworkers or outsiders (*e.g.,* unions) issues affecting their terms and conditions of employment. For example, the AGC found lawful a social media policy that prohibited the following conduct:

> The use of social media to post or display comments about coworkers or supervisors that are vulgar, obscene, threatening, intimidating, harassing or a violation of the Employer's workplace policies against discrimination, harassment, or hostility on account of age, race, religion, sex, ethnicity, nationality, disability or other protected class, status or characteristic.

[1] As of this time, employers will be required to post the Notice by April 30, 2012. The part of the Board's Final Rule requiring the posting has survived an initial challenge in federal court. *Nat'l Assn. of Mfrs. v. NLRB,* __F. Supp.2d__, 2012 WL 691535 (D.D.C. Mar. 2, 2012). As of this writing, no party has filed an appeal, but one is likely.

The AGC opined that because the rule includes specific examples of the types of plainly egregious conduct it was intended to prohibit, the policy could not reasonably be construed as potentially limiting or restricting conduct protected by the Act.

Similarly, the AGC took the position that an appropriate definition of confidential information that clearly identified the types of information the employer sought to protect would not be construed as unlawfully limiting protected activity. The rule in question prohibited employees from disclosing in social media:

> Confidential and/or proprietary information, including personal health information of customers or participants, or product launch and release dates and pending reorganizations.

Most troubling, however, is the AGC's position that a "savings clause," which provided that

> the policy could not be interpreted or applied so as to interfere with employees' rights to self-organize, form or assist labor organizations . . . . or to engage in other concerted activities for the purpose of . . . mutual aid and protection . . .

did not cure an overbroad policy that directed employees not to identify themselves as employees of the employer in their social media postings unless they described terms and conditions of employment in an "appropriate manner." The AGC concluded that employees could not reasonably be expected to know that the language of the savings clause encompasses discussions the employer deems inappropriate. The AGC's view, however, has not yet been tested before an Administrative Law Judge or considered by the NLRB itself.

Terminations in Response to Use of Social Media

The AGC continues to find that discussing terms and conditions of employment on social media sites may be protected activity, provided that a posting constitutes "concerted activity," and is not merely an individual gripe.

In making this distinction, the AGC considers such factors as: whether coworkers responded to the posting; whether the posting generated on-line discussions among employees about working conditions; whether the posting sought to initiate or induce coworkers into group action; and whether the posting was a continuation of earlier group action, such as a follow-up to a group grievance or complaint raised with management. In four of the cases discussed in the report, the AGC found that, in the absence of evidence of the concerted nature of the posting, the employees' comments were individual "gripes" or "venting" about coworkers or supervisors, and thus, were not protected by the Act.

The AGC articulated what appears to be a new test[2] to be used in determining whether an employee's posting on a social media site is so egregious as to be outside the protection of the Act. The new formulation is a modification of the NLRB's existing test under its Atlantic Steel ruling,[3] which is used to determine whether statements by employees made in the workplace have lost the protection of the Act. The new test looks at three factors:

1. The subject matter of the posting (was it otherwise protected activity?)

2. Was the comment provoked by the employer's unfair labor practices?

3. The impact of the posting on the employer's reputation and business.

The third factor considers the likelihood that the posting will be seen by third parties. Here, the General Counsel would turn to its traditional test to determine whether the statement is defamatory or disparaging of the employer's products or business policies. The NLRB's standard for determining whether an employee's statement is defamatory includes an examination of whether the statement was made with malice, *i.e.*, with knowledge of its falsity or in reckless disregard of its truth or falsity. The AGC acknowledged that the NLRB will find statements that disparage an employer to have lost the protection of the Act where

> *they constitute a sharp, public, disparaging attack upon the quality of the company's product and its business policies in a manner reasonably calculated to harm the company's reputation and reduce its income*

(emphasis added). In none of the cases reported on by the AGC was the posting at issue found to be defamatory, and thus, unprotected under this stringent standard.

In this "new" test, the AGC appears to discount the fourth factor in the Atlantic Steel test, whether the nature of the comment was disruptive of workplace discipline. The AGC bases this distinction on his contention that because social media postings are made outside the workplace, they are inherently not disruptive of workplace discipline unless they are accompanied by verbal or physical threats.

What Employers Should Do Now

All employers, especially non-union employers, must be concerned with the NLRB's new focus on broad enforcement of employees' rights under the NLRA. With regard to social media policies, employers are encouraged to:

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[2] Whether this test is appropriate has not yet been determined. Neither the NLRB nor any Administrative Law Judge has ruled on its application.

[3] 245 N.L.R.B. 814, 816-17 (1979).

1. Review their policies to:

    a. Ensure that they do not include any express prohibitions on employees discussing their terms and conditions of employment (in social media or otherwise);

    b. Confirm that their policies do not include broad or vague prohibitions on the use of social media by employees that could be reasonably interpreted to prohibit discussion of terms and conditions of employment; strongly consider use of specific definitions, limiting language, and examples to clarify the reach of the applicable policy; and

    c. If a disclaimer is included, consider using plain English that can easily be understood in explaining any exceptions to the specific prohibitions of such policy.

2. In deciding whether to discipline, terminate, or otherwise take adverse action against an employee for social media postings, carefully review with counsel whether the employee's actions may constitute concerted activity protected by the Act.

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About Epstein Becker Green

Epstein Becker & Green, P.C., founded in 1973, is a national law firm with approximately 300 lawyers practicing in 11 offices, in Atlanta, Boston, Chicago, Houston, Indianapolis, Los Angeles, New York, Newark, San Francisco, Stamford, and Washington, D.C. The Firm is uncompromising in its pursuit of legal excellence and client service in its areas of practice: Health Care and Life Sciences, Labor and Employment, Litigation, Corporate Services, and Employee Benefits. Epstein Becker Green was founded to serve the health care industry and has been at the forefront of health care legal developments since 1973. The Firm is also proud to be a trusted advisor to clients in the financial services and hospitality industries, among others, representing entities from startups to Fortune 100 companies. Our commitment to these practices and industries reflects the founders' belief in focused proficiency paired with seasoned experience. For more information, visit www.ebglaw.com.

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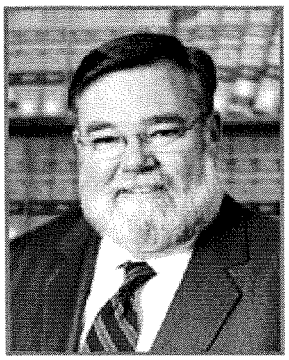

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- Brooklyn Law School, J.D., 1983
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- Association of the Bar of the City of New York
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Reported Cases:

- *Independent Chem. Corp v. Local Union 807, Int'l Bhd. of Teamsters*, No. 05 Civ. 1987, 2006 U.S. Dist. LEXIS 22137 (S.D.N.Y. April 21, 2006).
- *Acosta v. Potter*, 410 F. Supp. 2d 298 (S.D.N.Y. 2006).
- *Smith v. Local 819 IBT Pension Plan*, 291 F.3d 236 (2d Cir. 2002).
- *United States v. International Bhd. of Teamsters*, 266 F.3d 45 (2d Cir. 2001).
- *Morris v. Local 819, Int'l Bhd. of Teamsters*, 169 F.3d 782 (2d Cir. 1999).
- *Amalgamated Servs. & Allied Indus. Joint Bd. v. N.L.R.B.*, 815 F.2d 225 (2d Cir. 1987).
- *Steinhardt v. Potter*, 326 F. Supp. 2d 449 (S.D.N.Y. 2004).
- *Amalgamated Servs. & Allied Indus. Joint Bd. v. Supreme Hand Laundry, Inc.*, 182 F.R.D. 65 (S.D.N.Y. 1998).
- *Amalgamated Servs. & Allied Indus. Joint Bd. v. Supreme Hand Laundry, Inc.*, 12 I.E.R. Cas. (BNA) 255 (S.D.N.Y. 1996).
- *Peart v. Camelot Sample Group, Inc.*, No. 96 Civ. 3865, 1996 U.S. Dist. LEXIS 10002 (S.D.N.Y. July 16, 1996).
- *Metropolitan Jewish Geriatric Ctr. v. Local 144, Hotel, Hosp., Nursing Home & Allied Serv. Employees Union*, No. 92 Civ. 4892, 1992 U.S. Dist. LEXIS 13084 (S.D.N.Y. Aug. 13, 1992).
- *In re Ionosphere Clubs*, 108 B.R. 951 (S.D.N.Y. 1989).
- *Eastern Airlines v. International Ass'n of Machinists*, 108 B.R. 901 (S.D.N.Y. 1989).
- *Worldwide Flight Services, Inc.*, 31 N.M.B. No. 90 (2004).
- *Four Seasons Solar Prods. Corp.*, 332 N.L.R.B. 67 (2000).
- *In re United Public Serv. Employees Union, Local 424*, 28 PERB 3036 (1995).
- *Sony Corp. of Am.*, 313 N.L.R.B. 420 (1993).
- *REC Corp.*, 307 N.L.R.B. 330 (1992).
- *EDP Med. Computer Sys., Inc.*, 302 N.L.R.B. 54 (1991).
- *Mailing Servs., Inc.*, 293 N.L.R.B. 565 (1989).
- *Angelica Healthcare Servs. Group, Inc.*, 284 N.L.R.B. 844 (1987).

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- Listed, Top Rated Lawyers, Annual Guide to Labor and Employment Law, *The American Lawyer*, April 2012
- Recipient, 2011 John Commerford Labor Education Award, New York Labor History Association
- Fellow, American Bar Foundation
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- Listed *2010, 2011 and 2012 New York Super Lawyers, Metro Edition*
- "AV" rated by Martindale-Hubbell
- *Who's Who in American Law.* 10th, 14th and 15th editions
- Quoted, *United States v. Mason Tenders Dist. Council*, 205 F. Supp. 2d 183, 190-191 (S.D.N.Y. 2002).

Biography:

Larry Cary is a Founding Partner of Cary Kane LLP. He has practiced labor, employment and employee benefits law for over 25 years. He has been involved with the American labor movement for over 35 years. Prior to co-founding the firm, Mr. Cary was the senior partner in the labor department of Vladeck, Waldman, Elias & Engelhard, PC., where he represented unions and benefit plans for 17 years. He also previously served as in-house general counsel to the Amalgamated Service and Allied Industries Joint Board, ACTWU, and its benefit plans. Before attending law school, Mr. Cary was an organizer for Local 3, United Storeworkers, RWDSU, a research assistant in a multiemployer welfare plan, and the development specialist in charge of

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Mr. Cary was an Adjunct in the labor liberal arts extension certificate program of Cornell University, School of Industrial and Labor Relations, where he has taught labor, employment and employee benefits law for over 20 years. Previously, Mr. Cary was an Assistant Professor for Hofstra University where he taught labor law, union administration, contract administration, collective bargaining, political science and public administration. Mr. Cary also taught at the Labor College, Empire State, SUNY, in the Local 3, IBEW, electrical apprentice associates degree program.

For his entire career as an attorney, Mr. Cary has served as counsel or co-counsel to various multiemployer plans, including pension, annuity, profit sharing, welfare, vacation and legal services plans in the private sector. He has also served as counsel to union-administered welfare, legal services and education funds in the public sector in New York City. On behalf of unions, Mr. Cary negotiates collective bargaining agreements, arbitrates disciplinary and contract interpretation disputes, deals with internal union matters and advises on anti-corporate campaigns. He has handled matters before a wide variety of administrative agencies, including the NLRB, NMB, PERB, OCB, OATH, IRS, DOL, INS, EEOC, NYS Division of Human Rights and NYS Departments of Health, Education and Labor. He has represented or counseled clients in many industries, including: trucking, warehousing, municipal and voluntary hospitals, nursing home, the postal service, defense contracting, building service, newspaper, retail, manufacturing, clothing, laundry and linen supply, maritime, airline, private and public sector education, bakery, grocery and produce, over the road freight, and government. He serves as General Counsel to TWU, Local 100, the bus and subway workers in New York City.

He is licensed to practice law in the State of New York. He litigates in both New York and Federal courts and is admitted to the United States Supreme Court, the United States Court of Appeals for the Second and Seventh Circuits, and the United States District Courts for the Southern and Eastern Districts of New York.

Mr. Cary is active in a number of organizations. He has served since 1983 as a member of the advisory board of the Robert F. Wagner Labor Archives, which is an internationally-respected labor history archives. He is the Treasurer of the Workers Defense League, Inc., which provides free representation to claimants at unemployment compensation insurance hearings in New York City. He serves *pro bono* as counsel to the New York Committee for Occupational Safety and Health, which is the leading organization in New York City promoting safe and healthful workplaces. For ten years he was the President of the Cornell University Adjunct Faculty Federation, Local 4228, NYSUT, AFT, and a delegate to the New York City Central Labor Council. Mr. Cary served on the Executive Board of the New York Labor History Association for ten years and was its President in 1985-1986. As a result of his efforts, in 1986 Governor Mario M. Cuomo proclaimed May "Labor History Month" in New York State.

He is a member of the Association of the Bar of the City of New York, the American Bar Association, the AFL-CIO Lawyers Coordinating Committee, the Federal Bar Council, the International Foundation of Employee Benefit Plans and the Association of Benefit Administrators. He is a member of the Board of Directors of the Brooklyn Tech Alumni Foundation, having graduated from Brooklyn Technical High School, where he majored in chemistry. The Alumni Foundation is currently undertaking a $21 million fund raising campaign to support educational excellence at Tech. He graduated from Brooklyn College, with a major in history and a minor in economics. He received a Masters of Public Administration from New York University where his studies concentrated on health policy, planning and administration. He earned his law degree at Brooklyn Law School. More recently, he earned a Certificate in Employee Benefits Law from Georgetown University's Law Center.

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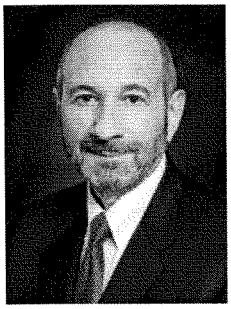

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Mr. Fasman is a member of the bars of New York, Illinois, and the District of Columbia, the United States Supreme Court, and seven federal circuit courts. He has tried and argued cases in every one of those jurisdictions, including two successful arguments before the United States Supreme Court. He has litigated cases ranging from nationwide class actions to jury trials of individual employment discrimination claims. In addition to his extensive employment litigation background, Mr. Fasman maintains a substantial traditional labor law practice representing employers in collective bargaining and before the National Labor Relations Board and in the federal courts.

Mr. Fasman is a Fellow of the College of Labor and Employment Lawyers; serves as a member of the Advisory Board of the New York University Law School's Center for Labor and Employment Law, and of the Board of Advisors for the St. John's School of Law Center for Labor and Employment Law; and is a member of the Labor Relations Committee of the U.S. Chamber of Commerce. He has been listed for many years in *Best Lawyers in America*, has been named one of America's Top 100 Employment Law attorneys by Lawdragon, and has repeatedly been named one of the "New York Area's Best Lawyers" by *New York Magazine* (2005-2011), and *New York's Super Lawyers* (2006-2011). He has been rated "AV Preeminent" for the past 20 years by Martindale-Hubbell.

Mr. Fasman has lectured on topics ranging from appellate advocacy to legal ethics at law schools throughout the country. He frequently lectures on employment law to members of the federal judiciary on behalf of the Federal Judicial Center and New York University Law School. He is the author of three books and numerous articles on employment and labor law. He served for many years on the District of Columbia Bar's Legal Ethics Committee, and was a member of its Taskforce on Civility in the Practice of Law. He is a member of the American Bar Foundation as well as the Labor Law Section of the American Bar Association; a current member of the Committee on the Development of the Law under the National Labor Relations Act and of the International Labor Law Committee; and has held leadership positions in the ABA's Equal Employment Law Committee and in its Section on Individual Rights and Responsibilities. He serves on the Board of Directors of the American Jewish Joint Distribution Committee and of the Myers-JDC-Brookdale Institute, and is a member of the Lawyers' Committee of the Anti-Defamation League.

Mr. Fasman received his J.D. degree, with honors, from the University of Michigan, where he was a member of the Order of the Coif, and his B.A. degree from Northwestern University.

Karen Fernbach, is the recently appointed Regional Director of Region 2, the Manhattan Region. As Regional Director, she is responsible for the enforcement of the nation's primary labor law covering private sector employees in the boroughs of Manhattan and the Bronx in New York City, and Orange, Putnam, Rockland, and Westchester counties in New York.

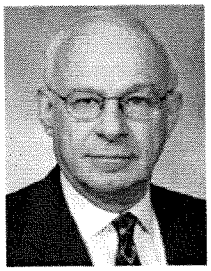
She graduated from SUNY Albany in 1973 with a BA degree where she majored in American History. She then attended St. John's University School of Law where she served as a member of the St. John's Law Review. Upon graduation in 1977, Karen began her career as a field attorney in the Manhattan Region of the NLRB until her promotion to the position of Supervisory Attorney in 1985. In 1988, she was promoted to the Regional Attorney position in Manhattan and became the Regional Director in January, 2012, with a combined total of almost 35 years employed at Region 2.

Karen is an active member of the Labor & Employment Section of the New York State Bar Association, a liaison member of the Labor & Employment Section of the NYC Bar Association and has appeared at many legal events speaking on behalf of the Board. Throughout her career, she has also served on many National Committees of the NLRB including the Quality Committee and Best Practices Committee. She is a member of the Federal Executive Board and a volunteer mediator for federal employee EEO work place disputes. She has also taught at numerous New Employee Training Conferences for the Agency, at the Cornell ILR Institute and is currently an Adjunct Professor at St. John's University School of Law where she teaches both Advanced Labor Law, and Labor & Employment Arbitration.

JONES DAY

Willis J. Goldsmith

Partner



Partner-in-Charge
New York

CONTACT

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(F) +1.212.755.7306

EDUCATION

New York University (J.D. 1972); Brown University (A.B. 1969)

BAR ADMISSIONS

New York; District of Columbia; U.S. Supreme Court; U.S. Courts of Appeals for the Second, Third, Fourth, Fifth, Sixth, Seventh, and D.C. Circuits; and U.S. District Courts for the Southern, Eastern, and Northern Districts of New York; District of Columbia; and District of Maryland

GOVERNMENT SERVICE

Office of the Solicitor, U.S. Department of Labor (1972-1974)

Profile

Willis Goldsmith represents management in labor and employment law matters including practice before state and federal trial and appellate courts in matters arising under the NLRA, Section 301 of Taft-Hartley, ERISA, Title VII of the Civil Rights Act, and OSHA; in injunction, breach of contract, and employment cases; and in collective bargaining and labor contract administration.

Among his noteworthy matters is *Chamber of Commerce, et al. v. Brown,* which Willis argued before the U.S. Supreme Court. The Court, reversing an *en banc* decision of the Ninth Circuit, held that a California statute that prevented employers from using state funds to lawfully deter union organizing was preempted by the NLRA, noting federal labor policy favoring employer speech regarding union organizing efforts.

Willis is Partner-in-Charge in New York; from 1991 to 2006, he chaired the Firm's Labor & Employment Practice. He has authored numerous articles and participated in many conferences focusing on labor and employment law issues. Willis is a Fellow of the College of Labor and Employment Lawyers, member of the Labor Law Advisory Committee of the U.S. Chamber of Commerce, United States Council for International Business (Executive Committee), the advisory board of the NYU School of Law Center for Labor and Employment Law, the Association of the Bar of the City of New York, and the Labor and Employment Law sections of the ABA and the New York State Bar Association (Co-Chair, Committee on Labor Arbitration). He is a member of the board of directors of the Legal Aid Society of New York City and a member of Appleseed's New York Advisory Council.

EXPERIENCE HIGHLIGHTS

Verizon Wireless obtains injunctive relief in action seeking to enforce non-disclosure, no-hire, and non-solicitation provisions against future competitor

New York Philharmonic (Philharmonic Symphony Society of New York, Inc.) engages in collective bargaining negotiations with Local 802, American Federation of Musicians

New York Produce Trade Association collective bargaining negotiations with Local 202, I.B.T.

AREAS OF FOCUS

Labor & Employment

Collective Bargaining, Contract Enforcement & Union Organizing

NLRB Proceedings & Appeals

Single & Multiple Plaintiff Employment Litigation

HONORS & DISTINCTIONS

Adviser, The American Law Institute, *Restatement of the Law Third, Employment Law*

The Best Lawyers in America, Labor and Employment Law

Chambers USA:

America's Leading Business Lawyers (Band 1)

2008 *PLC Which lawyer?* (Highly recommended)

Human Resource Executive Magazine: "The 100 Most Powerful Employment Attorneys in America"

ELIZABETH GROSSMAN

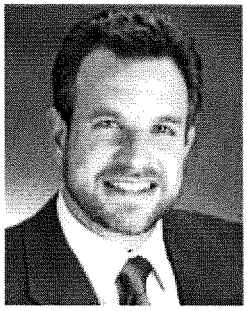
Regional Attorney
New York District Office
U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Elizabeth Grossman is Regional Attorney in the New York District Office of the United States Equal Employment Opportunity Commission, where she has worked, also as a Trial Attorney and Supervisory Trial Attorney, since 1993. Ms. Grossman served as Acting District Director from October, 2010 through April, 2011. As Regional Attorney, Ms. Grossman is responsible for the Commission's litigation in the New York District which includes New York, Northern New Jersey, Connecticut, Massachusetts, Rhode Island, Vermont, New Hampshire, and Maine. The litigation docket of the New York District Office is one of the largest in the country and includes some of the Commission's largest class cases. Ms. Grossman makes frequent presentations to bar associations, law schools, non-profit organizations and employers. She has also provided many interviews to national television, newspaper and radio press. Ms. Grossman has served as a volunteer community mediator with both the Institute for Mediation and Conflict Resolution and the Brooklyn Mediation Center, affiliated with Victim's Services Association. Ms. Grossman was named by the Wall Street Journal as one of fifty "Women to Watch" in 2004 and was awarded a 2005 Service to America Medal by the Partnership for Public Service and the Atlantic Media Company. Ms. Grossman attended the University of Michigan and the University of Michigan Law School.

Mission
Team
Wayne N. Outten
Anne Golden
Adam T. Klein
Laurence S. Moy
Kathleen Peratis
Justin M. Swartz
Jack A. Raisner
Wendi S. Lazar
Carmelyn P. Malalis
Tammy Marzigliano
René S. Roupinian
Allegra L. Fishel
Lewis M. Steel
Nantiya Ruan
Paul W. Mollica
Reena Arora
Delyanne Barros
Rachel M. Bien
Katherine Blostein
Molly A. Brooks
Cyrus E. Dugger
Cara E. Greene
Jennifer L. Liu
Ossai Miazad
Carmel Mushin
Melissa Pierre-Louis
Sandra Pullman
Michael J. Scimone
Dana Sussman
Juno Turner
Amber C. Trzinski
Elizabeth Wagoner
Practice Areas
Recognition
Career Opportunities
Directions
Contact Us

adam t. klein

Partner
Email: atk@outtengolden.com
Office: New York



ADAM T. KLEIN

LISTED IN Best Lawyers®

LINKING LAWYERS AND CLIENTS WORLDWIDE

ADAM T. KLEIN is a partner of Outten & Golden LLP and is the chair of the firm's class action practice group. His practice is limited to the prosecution of class action and impact litigation of employment discrimination and wage and hour claims.

Mr. Klein presently serves as lead or co-lead plaintiffs' counsel in numerous major class-action lawsuits involving statutory-discrimination claims in the financial services industry and challenges to the use of credit and criminal history records for employment. At present, Mr. Klein is co-lead plaintiffs' counsel in lawsuits challenging employment practices at Goldman Sachs, Bank of America/Merrill Lynch and the federal Census Bureau. The Census Bureau litigation was filed in affiliation with a consortium of civil-rights organizations challenging the use of arrest and criminal history records as a screen for employment for over 700,000 applicants. Mr. Klein also prosecutes wage and hour class/collective actions against numerous major corporations and was counsel in major settlements involving IBM, Whirlpool, JP Morgan Chase, and other Fortune 500 companies. In addition, Mr. Klein serves as co-lead plaintiffs' counsel in nationwide discrimination class action lawsuits against Smith Barney (gender - Amochaev v. Smith Barney) and Morgan Stanley (race - Jaffe v. Morgan Stanley). Both the Amochaev and Jaffe cases are now settled – each settlement provides class members with substantial monetary relief and systematic changes to company practices.* Mr. Klein also served as co-lead plaintiffs' class counsel in "glass ceiling" gender discrimination class action against MetLife, based on discrimination in promotions and compensation. The term of the MetLife settlement agreement has expired.

Mr. Klein has testified before the Equal Employment Opportunity Commission and Congress on issues relating to employment law. Mr. Klein is a frequent lecturer and has participated in programs relating to employment law sponsored by the American Constitutional Society, the Institute for Judicial Administration, the American Bar Association, Cornell University, Georgetown University Law School, New York University Law School, the Law and Education Institute, the Practicing Law Institute, the National Employment Lawyers Association, the Bar Association of the City of New York, the Impact Fund, the American Conference Institute, and Strafford Publications.

Mr. Klein was selected by his peers in Best Lawyers in America and New York's Super Lawyers – Manhattan Edition 2007, 2008, 2009, 2010, and 2011. In addition, he was selected as a finalist for Lawdragon 500 Leading Lawyers in America in 2010. Mr. Klein is a member of the National

Employment Lawyers Association (NELA), served on the Executive Board of its New York Affiliate (NELA/NY) from 2000 to 2006, and is the former co-chair

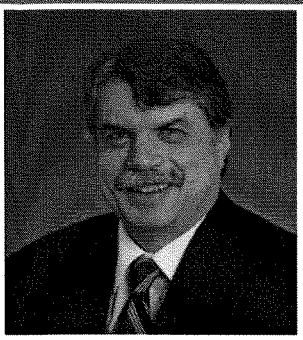
its New York Affiliate (NELA/NY) from 2000 to 2006, and is the former co-chair of the Class Action Committee of NELA. He served on the Executive Board of the Employee Rights Section of the American Trial Lawyers Association. Mr. Klein is a member of the American Bar Association, where he served as the Plaintiffs' Co-Chair of the Committee on Technology and Federal Law Clerks Training Program, and is a member of the Committees on Equal Employment Opportunity and Employee Rights and Responsibilities of the Section of Labor and Employment Law and the Class Action and Derivative Suits Committee of the Section of Litigation. Mr. Klein is the immediate past plaintiffs' co-chair of the largest Committee within the Labor and Employment Section – the Equal Employment Opportunity Committee. Mr. Klein is a Member of the Executive Board of the Lawyers' Committee for Civil Rights Under Law, and is also a member of the Federal Bar Council, a Fellow of the American Bar Foundation, a member of the Advisory Board of the Labor and Employment Law Program and Board of Directors of the Alumni Association of the School of Industrial and Labor Relations at Cornell University, and a member of the Advisory Board of the National Wage and Hour Clearinghouse.

Mr. Klein received his undergraduate degree from the School of Industrial and Labor Relations at Cornell University in 1987 and his law degree from Hofstra University in 1990. He was admitted to the New York bar in 1991.

Mr. Klein is admitted in New York and in the federal Second, Ninth, and Eleventh Circuits and the Southern, Eastern, and Western Districts of New York.

**Prior results do not guarantee a similar outcome.*

Speaking Engagements



Michael F. McGahan

Member of the Firm

mmcgahan@ebglaw.com

New York Office
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Fax: 212-661-0989
250 Park Avenue
New York, New York 10177-1211

MICHAEL F. MCGAHAN is a Member of the Firm in the Labor and Employment practice in the New York office, where he is a member of the firm's traditional labor team. He has over 35 years of experience representing employers in a wide range of industries including health care, insurance, hospitality and theater.

Mr. McGahan's experience includes representing employers in:

- Collective bargaining, mediation, and grievance arbitration
- Proceedings before the National Labor Relations Board, including representation and unfair labor practice hearings and appeals
- Counseling with regard to compliance with federal, state and local laws affecting employment including Title VII, ADEA, ADA, FMLA and NLRA
- Proceedings before administrative agencies, such as the EEOC and New York State Division of Human Rights
- Employment litigation in federal and state courts
- Preparation and review of employee handbooks, policies and forms.
- Comprehensive, company-wide review and advice and counsel on appropriate classification of employees as "exempt" or "non-exempt" under the Fair Labor Standards Act and state wage-hour laws.

PRACTICES

Labor and Employment
- ADA and Disability Law
- Employment Litigation
- Health Employment And Labor (HEAL) Group
- Labor Management Relations
- Social Media and the Workplace
- Wage and Hour, Individual and Collective Actions

EDUCATION

J.D., St. John's University School of Law
B.A., Fordham University

BAR ADMISSIONS

New York

COURT ADMISSIONS

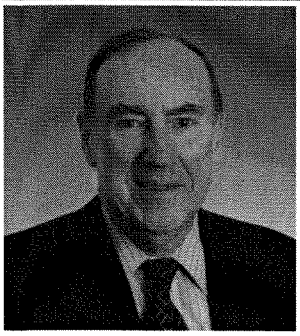
U.S. Court of Appeals for the District of Columbia Circuit
U.S. Court of Appeals for the Second Circuit
U.S. Court of Appeals for the Third Circuit
U.S. Court of Appeals for the Ninth Circuit
U.S. District Court, Eastern District of New York
U.S. District Court, Southern District of New York

MEMBERSHIPS

American Bar Association, Labor and Employment Law Section
New York State Bar Association, Labor and Employment Law Section

James G. Paulsen -- Mr. Paulsen is the Regional Director of the Brooklyn Regional Office (Region 29) of the National Labor Relations Board and was appointed to that position in January 2012. Prior to his appointment as Director, he served as an Assistant General Counsel, in Division of Operations-Management with oversight over eight Regional Offices. He is a member of Senior Executive Service since 1999. In Operations, he helped to coordinate General Counsel policy on utilization of Section 10(j) injunctive relief, chaired the Field Quality Committee and was a lead on the development of NxGen, the NLRB's case management system. In 2003, Mr. Paulsen received a Presidential Rank Award for distinguished service as a Senior Executive. For six months in 2002, Mr. Paulsen served as the Acting Regional Director of the New Orleans Regional Office (Region 15).

Mr. Paulsen began is career with the NLRB as an attorney in the Division of Advice in 1978, worked in the Manhattan (Region 2) and Brooklyn (Region 29) Regional Offices as a Field Attorney, was promoted in 1989 to a Supervisory Attorney in Region 2 and in 1996 to Deputy Assistant General Counsel in Operations–Management. Mr. Paulsen received his B.A. degree from Davidson College, Davidson, North Carolina in 1974, graduating cum laude, and his J.D. degree, with high honors, from the University of Florida Law School in Gainesville, Florida in 1976. During law school, he also served as the Editor-in-Chief of the University of Florida Law Review.



Evan J. Spelfogel

Member of the Firm

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New York, New York 10177-1211

EVAN J. SPELFOGEL is a Member of the Firm in the labor, employment and employee benefits practice groups in the New York office. He represents management and benefit providers in all areas of employment law, labor and employee relations.

Mr. Spelfogel's experience includes the following:

- Representing management on all aspects of employment law, including age, sex, race, religion, national origin and disability discrimination before the EEOC and deferral agencies, and in state and federal courts

- Counseling clients and litigating concerning FLSA and state wage and overtime, Davis-Bacon Act and prevailing rate matters; affirmative actions plans; human resource audits; employee handbooks and policies; drug and alcohol programs; wrongful discharge claims; breach of employment, confidentiality and noncompete contracts; National Labor Relations and Railway Labor Act matters; union avoidance strategies, organizational campaigns and decertification proceedings; strikes and picketing; union negotiations and arbitration; safety laws and regulations; workplace violence, negligent hiring and/or retention; independent contractor vs. employee issues; due diligence in acquisitions and mergers; and employee benefits/ERISA and MPPAA withdrawal liability matters

- Conducting grievance and arbitration hearings, advising on the creation and implementation of non-union alternative dispute resolution procedures (ADR) and the mediation and arbitration of statutory employment discrimination claims.

After graduating from Harvard College and the Columbia University Law School, Mr. Spelfogel served five years with the United States Department of Labor, Office of the Solicitor and the National Labor Relations Board in Washington, D.C., Boston, and New York.

Mr. Spelfogel has served as an adjunct professor at Baruch College of the City College of New York, and as a lecturer in labor law at St. John's University, and at annual labor and employment institutes of New York University, Southern Methodist University, Boston University, and the University of Washington. He has written, edited and published numerous articles, books and book chapters on a broad range of issues, including wage and hour collective actions, comparable worth and pay equity, employment discrimination, wrongful discharge, retiree health care, plant closings and reductions in work force, e-mail and workplace privacy, union picketing and handbilling on private property, NLRB representation and unfair labor practice proceedings, the interaction of

PRACTICES

Labor and Employment
- ADA and Disability Law
- Employee Benefits/ERISA-Related Litigation
- Employment Litigation
- Employment Training, Practices and Procedures
- Labor Management Relations
- Occupational Health and Safety (OSHA)
- Wage and Hour, Individual and Collective Actions

EDUCATION

J.D., Columbia University School of Law, 1959
A.B., Harvard University, 1956

BAR ADMISSIONS

Massachusetts
New York

COURT ADMISSIONS

U.S. Supreme Court
U.S. Court of Appeals for the First Circuit
U.S. Court of Appeals for the Second Circuit
U.S. Court of Appeals for the Fourth Circuit
U.S. Court of Appeals for the Ninth Circuit
U.S. District Court, District of Colorado
U.S. District Court, District of Massachusetts
U.S. District Court, District of Ohio
U.S. District Court, Eastern District of New York
U.S. District Court, Northern District of New York
U.S. District Court, Southern

Evan J. Spelfogel
District of New York

ERISA, the ADA and the NLRA, pregnancy disability, sexual harassment and alternative dispute resolution.

Mr. Spelfogel is a Former Chair of the New York State Bar Association's (NYSBA) Labor & Employment Law Section and continues to serve on its Executive Committee. He also was recently elected to the Executive Committee of the NYSBA's Dispute Resolution Section

Mr. Spelfogel is a fellow of the College of Labor & Employment Lawyers. He is currently listed in *The Best Lawyers in America; New York Super Lawyers - Metro Edition; Who's Who in America; Who's Who in American Education; Who's Who in Industry and Finance; The International Who's Who of Business Lawyers in Management Labour & Employment; and Who's Who in the World.*

MEMBERSHIPS

- American Arbitration Association, National Panel of Labor Arbitrators
- American Bar Association: Charter Member, Dispute Resolution Section
- American Bar Association: past Council Member, Section of Labor and Employment Law
- American Bar Association: Section Delegate, ABA House of Delegates
- New York City Bar Association, Labor and Employment, Employee Benefits and Enhance Diversity Committees
- New York State Bar Association: Charter Member, Dispute Resolution Section
- New York State Bar Association: Co-Founder, Past Chair, Section of Labor and Employment Law
- New York State Bar Association: Executive Committee Member, Section of Labor and Employment Law
- New York State Bar Association: Section Delegate to the NYSBA House of Delegates
- New York State Bar Association: Special Committee on the New York State Bar Examination