THE COLLEGE OF LABOR AND EMPLOYMENT LAWYERS
New York, Connecticut, Northern New Jersey Semi Annual Meeting
(Co-sponsored by the American Bar Association Labor & Employment Law Section
NLRA Practice and Procedure Committee)

November 12, 2014

At Seyfarth Shaw LLP * 620 Eighth Avenue (between 40th and 41st streets) * New York, NY

5:30-8:30 P.M. Presentation, Panel Discussion and Question & Answer Period
(3.5 Hours CLE credit)

PROCEDURAL AND SUBSTANTIVE CURRENT/HOT ISSUES UNDER THE NATIONAL LABOR RELATIONS ACT

Regional Chair for the College and Program Moderator
Evan J. Spelfogel, Epstein Becker & Green, P.C.

Featured Speakers:

- Karen Fernbach
  NLRB Regional Director, Region 2, New York
- David E. Leach
  NLRB Regional Director, Region 22, Newark, NJ
- James G. Paulsen
  NLRB Regional Director, Region 29, Brooklyn

Panelists:

Marshall Babson, Seyfarth Shaw LLP (former Member, NLRB)

Linda R. Carlozzi, Jackson Lewis P.C. (Regional Management Co-chair P&P Committee)

Susan Davis, Cohen, Weiss & Simon, LLP (National Union Co-chair P&P Committee)

Jessica Drangel Ochs, Meyer Suozzi English & Klein, P.C. (Regional Union Co-chair P&P Committee)

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.

SEYFARTH SHAW

Table of Contents

EPSTEIN BECKER GREEN

Evan J. Spelfogel

Member of the Firm

espelfogel@ebglaw.com

New York
250 Park Avenue
New York, New York 10177-1211
Tel: 212-351-4539
Fax: 212-878-8600

EVAN J. SPELFOGEL is a Member of Epstein Becker & Green, P.C., in the labor, employment, and employee benefits practices. Based in the firm's 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 in 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 action 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/fiduciary 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 ERISA, the ADA and the NLRA, pregnancy disability, sexual harassment and alternative dispute resolution.

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

Mr. Spelfogel has been selected to receive the 2014 Samuel M. Kaynard Award for Excellence in the Fields of Labor & Employment Law, given annually in recognition of those who hold strong ideals, display keen legal acumen, and make outstanding contributions to the fields of labor and employment law. He has also been elected to the College of Labor and Employment Lawyers as a Fellow, the highest recognition by one's colleagues of sustained outstanding performance in the profession, exemplifying integrity, dedication, and excellence. Mr. Spelfogel is currently listed in *The Best Lawyers in America; New York Super Lawyers - Metro Edition; PLC Which Lawyer? Yearbook; Who's Who in America; Who's Who in American Education; Who's Who in Industry and Finance; Who's Who Legal: The International Who's Who of Management Labour & Employment Lawyers;* and *Who's Who in the World.*

Education

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

Bar Admissions

- Massachusetts
- New York

KAREN P. FERNBACH
REGIONAL DIRECTOR, REGION 2
NATIONAL LABOR RELATIONS BOARD

Karen P. Fernbach is the 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.

Ms. Fernbach attended St. John's University School of Law and was a member of the St. John's Law Review. In 1977, she began her career as a field attorney working in the Manhattan Region of the NLRB. At the Manhattan Region, she first served as a trial attorney, was promoted to supervisory attorney and then Regional Attorney until her top appointment as Regional Director in January, 2012.

Ms. Fernbach is also an Adjunct Professor at St. John's University School of Law where she teaches Labor Law, Advanced Labor Law, and Labor & Employment Arbitration. She has represented the Agency at many conferences and spoken about numerous topical issues relating to the practice of labor law. She 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, a faculty member of PLI, on the Executive Board of the Labor & Employment Center at St. John's, and on the Executive Boards of Cornell ILR, & the Labor & Employment Center of NYU School of Law.

DAVID E. LEACH III is the Regional Director of the National Labor Relations Board in its Newark Office. Since his hire in 1976, he has served as a Staff Attorney, a Trial Specialist, Supervisory Attorney, Deputy Regional Attorney, and Regional Attorney in the Board's New York Office. In his most recent position, Mr. Leach assists the General Counsel of the National Labor in administering the National Labor Relations Act in the Northern half of New Jersey, a position he assumed in July 2014.

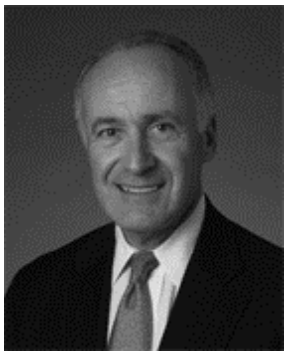
Mr. Leach is a 1971 graduate of Cathedral College, Douglaston, New York, the Seminary for the Diocese of Brooklyn. After graduation, he joined the staff of Mayor John Lindsay and worked on budget planning for the City's social service programs. He graduated from Brooklyn Law School in 1976, after which he commenced his career with the NLRB. Mr. Leach was an instructor at the Xavier Labor Institute from 1979 to 1985, where he taught employees and first line managers about employee rights under the National Labor Relations Act. He has been an adjunct professor at the Joseph L. Mailman School of Public Health at Columbia University since 1984 where he has taught graduate classes in collective bargaining in the health care industry. He is also an adjunct professor of law at Brooklyn Law School since 2001, where he teaches courses in labor law, advanced labor law and a seminar in collective bargaining. He has lectured before various international labor groups and US Army War College in Carlisle, Pa. on policy questions affecting labor and management.

James G. Paulsen was appointed Regional Director of the Brooklyn Regional Office (Region 29) in 2011 and has served in that position since that date. Mr. Paulsen began his career with the NLRB in the Agency's Division of Advice and then worked as a Field Attorney in the Manhattan (Region 2) and Brooklyn Region Offices (Region 29). He was appointed Supervisory Attorney in the Manhattan Regional Office. He was named Deputy Assistant General Counsel in the Division of Operations-Management in 1996. From 1999 to 2011, he served as an Assistant General Counsel, in the Division of Operations-Management, with oversight over eight Regional Offices. 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. Mr. Paulsen received a Presidential Rank Award for distinguished service as a Senior Executive. For six months in 2002, Mr. Paulsen also served as the Acting Regional Director of the New Orleans Regional Office (Region 15).

Mr. Paulsen graduated with honors from Davidson College in 1974. He was awarded his J.D. degree from the University of Florida Law School, where he graduated first in his class in 1976. During law school, he also served as the Editor-in-Chief of the University of Florida Law Review.

He is a member of Senior Executive Service since 1999.

Marshall B. Babson



New York Office
(212) 218-5559
mbabson@seyfarth.com

Areas of Practice

Labor & Employment
Labor & Employee Relations

Experience

Marshall Babson is counsel in the Labor & Employment Department in the New York and Washington offices of Seyfarth Shaw LLP. A former Member of the National Labor Relations Board (NLRB), Mr. Babson's practice focuses on all aspects of labor relations, including litigation, counseling and arbitration.

His labor experience includes:

- Proceedings before the NLRB, EEOC and U.S. Department of Labor;
- Strategic planning in mergers & acquisitions regarding union and non-union workforces;
- Collective bargaining agreements and negotiations, including strikes and lockouts;
- Labor arbitration;
- Wage and hour, OSHA disputes and personnel matters; and
- Title VII and employment-at-will litigation.

While serving as a member of the NLRB, Mr. Babson participated in many important cases, including *John Deklewa & Sons,* which set forth new rules for pre-hire agreements in the construction industry, *Indiana and Michigan Electric Co.,* which established guidelines regarding an employer's duty to arbitrate post-contract expiration grievances, and *Fairmont Hotel,* a union access case which involved clarifying the balance between private property rights and Section 7 rights under the National Labor Relations Act. He was also active in the initiation of rulemaking proceedings in the health care industry.

Mr. Babson was called upon to testify before President Clinton's Dunlop Commission regarding the status of U.S. labor laws and before Congress regarding proposed labor and employment legislation. He also has

served as counsel to the Trustee or Overseer in several RICO actions initiated by the U.S. Department of Justice, which required the monitoring and auditing of the enterprise during trusteeship.

More recently, Mr. Babson has been engaged in counseling employers regarding the acquisition, consolidation and reorganization of unionized and nonunionized businesses, the negotiation of international labor agreements, and the renegotiation of several industry collective bargaining agreements.

Mr. Babson is a member of the Board of Directors of the National Chamber Litigation Center, the U.S. Chamber of Commerce's public policy law firm, and also serves on the Litigation Center's Labor Law Advisory Committee. He is on the Board of Advisors of the Institute for Law and Economics at the University of Pennsylvania. Mr. Babson is a Founding Fellow of the College of Labor and Employment Lawyers, and *Chambers USA r*ecognizes him as a leader in labor and employment law, noting that he is "one of the deans of the traditional labor law bar" and "has an encyclopedic knowledge of labor law."

Mr. Babson is admitted to practice in New York, California, Connecticut, District of Columbia and Maryland.

Education

J.D., Columbia Law School (1975)

A.B., University of Pennsylvania (1968)
Dean's List

Admissions

New York

California

Connecticut

District of Columbia

Maryland

Courts

U.S. Supreme Court

Various U.S. Courts of Appeals and District Courts

Affiliations

American Bar Association (Labor and Employment Law Section, Practice and Procedure Committee)

National Chamber Litigation Center of the U.S. Chamber of Commerce (Board of Directors)

National Chamber Litigation Center's Labor Law Advisory Committee

College of Labor and Employment Lawyers (Founding Fellow)

Accolades

The Best Lawyers in America - Employment Law (Management) and Labor Law (Management) (2014)

2013 New York Metro Super Lawyers

Rated as a leading individual in the field of labor and employment by *Chambers USA* 2008-2012

Selected for the 2013 issue of the *Best Lawyers in Labor & Employment Law*

Named in the 2010 edition of *Who's Who Legal: Management Labor and Employment Lawyers*

Recognized in the 2009 issue of the *Guide to the World's Leading Labour & Employment Lawyers*

Included in the 2008 edition of *Who's Who Legal: The International Who's Who of Business Lawyers*

Identified by *Euromoney* in its *Guide to the World's Leading Labour & Employment Lawyers 2008*

Charter Fellow of the College of Labor and Employment Lawyers

Publications and Lectures

Co-Author, "Fifth Circuit Sets Aside NLRB Rule Prohibiting Class Action Waivers," *Management Alert,* Seyfarth Shaw LLP (December 3, 2013)

"NLRB Plurality Thumbs Its Nose at Private Arbitration Agreements for Non-Union and Union Employers," *One Minute Memo,* Seyfarth Shaw LLP (January 7, 2012)

"Demonstration of an Unfair Labor Practice Case, Parts I & II," a speech presented at the ABA Annual Section of Labor & Employment Law Conference (November 6, 2010)

"Pending Issues at the NLRB," a speech presented at the Annual Robert Fuchs Labor Law Conference at Suffolk University Law School (October 21, 2010)

"Class Arbitration Waivers and Section 7 Rights," a speech presented at the New York University Annual Conference on Labor (June 3, 2010)

"The Legacy and Future of the National Labor Relations Act," a panel discussion presented by the American Constitution Society for Law and Policy (May 17, 2010)

"Private Injuries, Public Policies: Adjusting the NLRB's Approach to Backpay Remedies," a speech presented at the Florida International University Labor Law Symposium (March 26, 2010)

"Perspectives on the Fight for Labor Law Reform and the Employee Free Choice Act," a speech presented at the Annual Meeting of the National Labor and Employment Relations Association (January 3, 2010)

"Upsetting a Delicate Balance," a paper presented at the American Bar Association, Labor Law Section in Chicago (May 11, 2009)

"Bargaining Before Recognition in a Global Market: How Much Will It Cost?" a paper presented at the Institute for Law and Economics, University of Pennsylvania (November 2005)

Developments Under the 1974 Health Care Amendments to the National Labor Relations Act (1984)

Linda R. Carlozzi
Shareholder, New York City Office
Jackson Lewis P.C.
(212) 545-4040
carlozzl@jacksonlewis.com

LINDA R. CARLOZZI is a Shareholder in the New York City office of Jackson Lewis P.C. She joined Jackson Lewis in 1997 and specializes in traditional labor law. Ms. Carlozzi counsels clients in the development and implementation of preventive labor and employee relations programs. She advises both unionized and union-free clients on a full range of labor and employee relations matters, with a focus on traditional labor law. She has represented numerous employers during arbitration proceedings and negotiations. Ms. Carlozzi also counsels employers during union organizing drives and in labor and employment law proceedings before the National Labor Relations Board, the Equal Employment Opportunity Commission and other federal, state and city administrative agencies. She regularly represents employers in collective bargaining, provides advice on a diverse range of work place issues, such as those relating to corporate transactions, best workplace practices and conducts management training on a broad range of topics.

She is a graduate of Fordham University (B.A., *cum laude*, 1985) and was awarded the degree of Juris Doctor by Catholic University, Columbus School of Law, Washington, D.C. in 1989. Ms. Carlozzi began her labor law career at the National Labor Relations Board, Office of Appeals in Washington D.C. in 1989. In 1991, she transferred to the Philadelphia Region of the National Labor Relations Board, where she was responsible for investigating all aspects of unfair labor practice cases and representation matters as well as handling trials before Administrative Law Judges on behalf of the General Counsel of the NLRB.

Ms. Carlozzi is a member of the American Bar Association, Labor & Employment Section and Entertainment Law Section and serves as the Labor and Employee Relations Chair for the "The Human Resources Association of New York," the largest member chapter of the Society for Human Resources Management (SHRM). Ms. Carlozzi is a member of The Broadway League, Actor's Fund, and several community organizations.

Jessica Drangel Ochs

Of Counsel

1350 Broadway
New York, New York 10018
(212) 763-7034
jochs@msek.com

Practice Areas

Labor Law

Education

University of Maryland School of Law
J. D.
with honors
Joseph Bernstein Prize for Best Work in Law recipient
Maryland Public Interest Law Project grant recipient

State University of New York at Binghamton
M.A.
B.A.

Memberships

American Bar Association, Labor and Employment Section

AFL-CIO, Lawyers Coordinating Committee

Peggy Browning Fund, Advisory Committee

ABA's Committee on Practice and Procedure before the NLRB, Regional Union Co-Chair

Admissions

New York State

U.S. Court of Appeals, Second Circuit

U.S. District Court, Eastern District of New York

U.S. District Court, Southern District of New York

U.S. Court of Appeals, District of Columbia

Jessica Drangel Ochs is Of Counsel to Meyer, Suozzi, English & Klein, P.C. and is part of the firm's Labor practice group. Ms. Ochs represents unions and individuals in the courts, arbitrations, and administrative hearings, appearing regularly before the National Labor Relations Board. She also advises unions on all aspects of labor law, including organizing campaigns. She is contributing editor to the ABA's *The Developing Labor Law*.

Notable experience includes:

- In 2012, won a New York State appellate court case enforcing an arbitration award on behalf of a law enforcement union in New Jersey.
- In 2012, successfully litigated unfair labor practices and objections against a national retailer, winning an ALJ order for a second election for the client.
- Successfully represented a client in achieving a 10(j) injunction from a NJ district court judge ordering reinstatement of an entire bargaining unit, following an employer's lockout of its employees.
- Key member of a team that assisted a Union client in successfully negotiating a collective bargaining agreement with a larger multimedia news and information corporation and resolving numerous unfair labor practice charges.

Prior to joining the firm in September 2009, Ms. Ochs held the position of Associate General Counsel at UNITE HERE for eight years. There, Ms. Ochs provided legal support for organizing campaigns and negotiated collective bargaining agreements and card check neutrality agreements. Ms. Ochs litigated before the NLRB on behalf of UNITE HERE and represented the Union in arbitrations. She also handled internal union governance matters, including Department of Labor investigations, and presented training seminars to union staff on various labor and employment topics. Before her association with UNITE HERE, Ms. Ochs was a Field Attorney for the National Labor Relations Board, Region 2, where she prosecuted unfair labor practice charges, handled election petitions, and served as hearing officer in representation proceedings.

COHEN WEISS AND SIMON LLP

Susan Davis
Partner
sdavis@cwsny.com
Tel: (212)356-0207
Fax: (646)473-8207
Bar Admissions: New York, New Jersey

Susan Davis joined the firm in 1982, and became a partner in 1992.

Ms. Davis specializes in the representation of national and local labor unions in all aspects of collective bargaining, mergers and affiliations, organizing, strategic planning and internal union governance.

Prior to joining Cohen, Weiss and Simon LLP, Ms. Davis was a clerk for the Honorable Constance Baker Motley in the U.S. District Court for the Southern District of New York.

Ms. Davis is a fellow of the College of Labor and Employment Lawyers, the national union co-chair of the American Bar Association's Section on Labor and Employment Law Committee on Practice and Procedure under the National Labor Relations Act (P & P Committee) and a member of the Executive Committee of the Board of Directors of the American Arbitration Association. Ms. Davis was named as a Super Lawyer for Employment and Labor Law on the New York Metro 2014 Annual List of *Super Lawyers* magazine.

She also serves on the AFL-CIO Lawyers Advisory Panel and is an Advisory Board Member of the Cornell University ILR School.

Ms. Davis has written and lectured extensively before bar association, attorney, and union meetings on a variety of issues facing unions and their members.

She graduated with honors from the University of California at Berkeley in 1976. She received a law degree with high honors from Rutgers University in 1981, winning the West Publishing Company's annual jurisprudence award, and leading the Rutgers moot court team to the American Bar Association's national moot court finals.

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 14- 02 March 26, 2014

TO: All Division Heads, Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Richard F. Griffin, Jr., General Counsel

SUBJECT: Report on the Midwinter Meeting of the ABA Practice and Procedure Committee of the Labor and Employment Law Section

In late February, I attended the Annual Midwinter meeting of the Practice and Procedure Committee (P & P Committee) of the ABA Labor and Employment Law Section together with several senior Agency managers. As in years past, a primary purpose of this meeting was to respond to and discuss Committee concerns and questions about Agency casehandling processes. As prior General Counsels have done, I am sharing the P & P Committee members' concerns and the Agency's responses with you so that you can have the benefit of this important exchange. While we did not have time to respond to every question raised at the meeting, we have included all the questions posed to me and my responses.

During my tenure as General Counsel, it is my intention to conduct the business of the Office of the General Counsel in a productive manner. Continuing a constructive, cooperative relationship with the organized Bar is an important element of this objective and one to which I am committed. At the Midwinter meeting, members of the Committee shared their appreciation of the constructive relationships enjoyed by members of many local P&P groups with individual Regional Directors. I encourage you to facilitate those exchanges where they do not exist and to continue and broaden those relationships where they do. Open communication with representatives of both management and labor who appear before us enhances the performance of our mission and benefits the public we serve.

Attachment
Release to the Public

cc: NLRBU
NLRBPA

I. Unfair Labor Practice Issues

A. Statistics

Please provide the number of ULP charges filed, the settlement rate, the number of complaints issued, the litigation win rate, the number of alleged instances of default under settlement language, the number and type of cases sent to the Division of Advice, and the average length of time a case remains in the Division of Advice.

In FY 2013, 21,394 ULP charges were filed, the settlement rate was 92.8%, 1272 complaints issued, and the litigation win rate was 85.7%. As to the cases sent to the Division of Advice in FY 2013, 559 were submitted with a median case-processing time of 21 days. The submitted cases involved novel/difficult legal issues, high-profile labor disputes, charges pending in multiple Regional Offices, or Section 10(j) authorization requests.

With regard to instances of default under a settlement, the Agency does not have data on the number of instances where a Region notified a charged party of an alleged default that was thereafter cured. However since January 2011, when GC 11-04 issued instructing regions to routinely include default language in all informal settlement agreements and all compliance settlement agreements, the Board has issued orders in 19 cases in which counsel for the General Counsel sought a default judgment because of failure to comply with an informal settlement agreement. In one case, the Board issued an order in a case where there was a failure to comply with a compliance agreement. Eight more cases are currently pending before the Board. Since January 2011, settlements have been approved in more than 3935 cases. Accordingly, counsel for the General Counsel has sought a default judgment in less than 1% of the cases in which a settlement was approved.

B. Section 10(j) Injunctions

1. **Please provide statistics concerning the number of 10(j) injunctions requested by the Regions, the number submitted to the Board, the number authorized by the Board, and the number granted by the courts.**

In FY 2013, 161 10(j) requests were received from Regional offices, both go and no go cases. The General Counsel submitted 43 cases to the Board requesting authorization for 10(j) proceedings, the Board authorized proceeding in 41 cases and the other two were withdrawn before Board consideration based on new case developments. Of those authorized by the Board, the Regions obtained settlements or adjustments in 15 cases. Of the 22 petitions filed in district court, 11 were litigated to conclusion by the end of the fiscal year. The Board won eight cases, one being a partial win, and lost three.

2. Are there any trends and/or novel issues presented in 10(j) cases this past year?

25 cases submitted involved first contract bargaining and 58 involved discharges during an organizing drive. See also response to Section IV.A. regarding litigation involving the Acting General Counsel's appointment, *Noel Canning*, and related issues.

C. Settlement Issues

1. What is the policy on negotiating settlement terms with a Charged Party prior to notifying the Charging Party about the specifics of a settlement? Is there a uniform policy on the Regions discussing settlement concepts with counsel for a Charging Party earlier in the process and prior to negotiating terms with the Charged Party?

NLRB Casehandling Manual Sections 10126 and 10128 provide guidance on the timing and techniques of settlement attempts. In the case of pre-determination settlement efforts, Section 10126.1 of the Manual provides that, "if it becomes apparent to the Regional Office, even as early as the initial contacts with the parties, that a settlement or non-Board adjustment might quickly be achieved, resolution should be explored, consistent with Regional Office policy." Regional Office policies include parameters regarding the scope of responsibility for individual Board agents. In cases where the Region has made a merit determination, Section 10126.2 of the Manual states that "the Board agent should pursue settlement before issuance of the complaint."

As to the manner in which settlement is pursued, Section 10128.5 of the Manual instructs that, "[a]bsent unusual circumstances, the initial settlement meeting should include only the charged party and its representatives." In this meeting, the Regional Office representative is to summarize the scope of meritorious allegations, describe the facts and law supporting the Regional Office's position, and explain the substance of the settlement, "noting that the elements of the proposal are based on standard Board policies with respect to the types of allegations found to be meritorious." Id. Section 10128.5 further instructs that the Regional Office representative should "listen carefully to the charged party's position and consider whether any accommodations can be made to address objections raised to the proposal. Id. Section 10128.7 of the Manual provides that the "Regional Office should keep the charging party apprised of the status of settlement efforts" and inform the "charging party of the advantages of settlement."

During the ABA meeting this February, this question was discussed in some detail. We believe it is the norm that Charging Parties are brought into the settlement discussions early in the process. However, in light of the comments made at the ABA meeting, we have reminded the Regional Directors of the importance of consulting with the Charging Parties early in the settlement discussions to ensure that the Regions are aware of the Charging Parties' positions on settlement issues, including what is an appropriate remedy in the case.

2. What is the policy on enforcing settlement agreement default language where there are different management officials and/or different factual circumstances?

The Agency does not have a specific policy regarding enforcement of default language in settlement agreements where different management officials or different factual circumstances are involved. A party could certainly argue that enforcement of the default language was inappropriate because the new conduct was sufficiently different from the conduct in the prior case or because the Charged Party's representatives were different from those in the prior case. Those arguments would be carefully considered. The decision on whether to seek a default judgment is left to the Regional Director's discretion, although oftentimes, the Regional Director will seek guidance from Headquarters.

At the ABA meeting, a question was raised with regard to the Regional flexibility when considering settlement agreement breaches where a rule that was modified in response to a merit finding is thereafter found to be violative in a subsequent case, particularly where the prior case was settled with default language. The Regional Directors have and use their own discretion to determine whether the settlement agreement has been breached and whether to proceed for a default judgment. Having said that, clearly a Charged Party's good faith attempt to re-write a rule previously found violative would weigh in favor of not pursuing default judgment.

3. Are there plans to post settlement agreements on line?

The Agency continues to increase transparency to the public through the posting of case pages with a docket that includes links to relevant documents. There is an ongoing effort to add more documents, such as settlement agreements, once they are appropriately redacted.

4. Is there a standard percentage used by the Regions in calculating front pay, such as the 80% standard for back pay?

At this time, there is not standard percentage used by the Regions in calculating front pay.

See: OM 99-79 *Remedial Initiatives* and 13-02 *Inclusion of Front Pay in Board Settlements* for further information about the Agency's approach to front pay.

5. When and why has default language been eliminated or limited in scope or duration? What if any policies or approvals are required for this?

Currently, Regional Directors have discretion to limit the default language in scope and duration, and to eliminate default language if the settlement agreement is entered into prior to the Region making any determination on the merits of the case. A

new guidance memo about default judgment parameters and procedures will issue shortly.

D. Deferral

1. Are there any new trends or policy changes with respect to deferring cases pre-arbitration and/or deferring to arbitration decisions?

At this time, the pre-arbitral and post-arbitral policies put forth by former Acting General Counsel Solomon related to both the Agency's handling of deferred cases involving lengthy delays in the grievance-arbitration procedures and its review of grievance settlements and arbitrator's awards in 8(a)(1) and (3) cases remain in effect.

3. Can you please provide statistics on deferrals including the number of cases deferred and the length of time pending?

There are currently between 1450 and 1500 cases in deferral status. Of the approximately 540 cases that have been in deferral status for over a year, only 223 and 110 have been in deferral status for over two years and three years, respectively.

3. Are there circumstances under which certain types of cases are not being deferred?

During the past year, the Agency has had the opportunity to apply the above described initiatives regarding both pre-arbitration and post-arbitration deferrals. With regard to delays in the arbitration process, in one case, it was determined that deferral was appropriate where the grievance procedure was slow moving but functional, all of the alleged violations were committed by a single supervisor, were directed at employees of one four-person department in a unit of approximately 1,200 and there were no unlawful discharges. In another case, it was found that deferral was not appropriate where the employer had demonstrated a pattern of denying employees' *Weingarten* requests and disciplining employees for exercising their *Weingarten* rights, the grievance procedure had become dysfunctional, the oldest grievance was over two years old, and none of the grievances had been submitted for arbitration. Similarly, in another case, it was found that continued deferral of a case involving the suspension of a union officer was not appropriate where the over two-year delay in reaching arbitration threatened to undermine his credibility and authority as bargaining representative.

As to a case involving post-arbitration review, the Agency evaluated whether deferral to an arbitrator's award was appropriate where it did not appear the arbitrator had correctly enunciated the statutory principle involved. In that case, it was determined that an arbitrator, in upholding the discharge of a union vice president, failed to correctly articulate the statutory principle involved when she found his actions in contesting the employer's assignment of overtime work was neither concerted nor protected. Her analysis concerning the complaints concerted nature was flawed as it did not correctly apply the Board's *Interboro* decision, and her finding that his conduct

was unprotected was flawed as she failed to consider the factors set forth in the Board's *Atlantic Steel* decision.

E. Investigative Subpoenas

1. Are there any new trends or policies with respect to the issuance or enforcement of investigative subpoenas?

There are no new trends or policies with respect to the issuance or enforcement of investigative subpoenas.

2. Can you please share statistics concerning the use of investigative subpoenas to obtain testimony and documents, the frequency of petitions to revoke and the success of such petitions?

The following table shows the number of investigative subpoenas issued, by Region and by type of subpoena, during FY 2013. The table also shows whether the Region reached a merit, non-merit or other (deferred, pending, withdrawn prior to merit determination) determination in the case.

Investigative subpoenas were issued in 740 cases, comprising 3.4% of the total intake of charges.

Please see the two charts below.

REGION	No. CASES	A/T	D/T	TOTAL	MERIT	NON MERIT	OTHER	PTN REVK.	ENF.
1	24	13	17	30	10	9	5	4	0
SR 34	6	1	6	7	3	3	0	3	0
2	39	43	35	78	14	13	12	4	0
3	6	10	0	10	3	3	0	0	0
4	16	22	8	30	6	7	3	1	2
5	30	47	11	58	17	8	5	2	0
6	28	29	8	37	13	10	5		
7	30	35	13	48	16	11	3		
8	11	15	6	21	6	1	4	0	1
9	49	131	38	169	31	17	1	3	1
10	18	37	9	46	9	5	4	0	0
SR 11	27	42	11	53	15	9	3	5	0
Nashville	5	3	4	7	3	2	0	3	0
12	24	37	12	49	10	11	3	1	0
SR 24	27	18	21	39	16	5	6	1	1
13	21	29	12	41	8	9	4		
14	3	9	0	9	2	1	0		
SR 17	4	6	1	7	1	3	0		
15	36	51	24	75	18	5	13	1	1

SR 26	19	21	13	34	12	5	2	1	0
16	43	90	11	101	16	19	8		
18	16	22	12	34	9	5	2		
SR 30	19	28	15	43	9	8	2		
19	32	22	28	50	22	10	0		
SR 36	4	3	5	8	3	1	0		
20	16	10	27	37	11	2	3		
SR 37	1	0	1	1	0	0	1		
21	30	36	24	60	13	11	6		
22	29	21	24	45	10	7	12	8	5
25	4	4	3	7	2	1	1		
SR 33	3	9	2	11	0	1	2		
27	5	6	2	8	3	2	0		
28	18	33	10	43	12	1	5		
29	21	14	22	36	8	10	3	3	1
31	29	19	21	40	10	13	6		
32	47	66	40	106	19	15	13		
Totals	740	982	496	1,478	360 (48.5%) (59.7%)	243 (32.8%) (40.3%)	137 (18.9%)		

There were 40 petitions to revoke investigative subpoenas that were denied by the Board and 34 petitions to revoke investigative subpoenas that were ultimately resolved. The Regions began enforcement proceedings in 18 matters. In four of those cases, the Agency prevailed, and, in the remaining 14 cases, the disputed issues were resolved.

3. Do you have any statistics on the impact of such petitions on the length of the investigation and the impact of such investigative subpoenas in making merit determinations?

The Agency does not have statistics on the impact of petitions to revoke on the length of investigations or the impact of investigative subpoenas in making merit determinations. However, the issuance of an investigative subpoena(s) and/or the filing of a petition to revoke typically lengthen the investigation. When making a decision regarding issuance of investigative subpoenas, the Agency weighs the potential delays against the potential for more informed decision making resulting from obtaining relevant testimony or documents.

4. Have you seen instances where the regions issued investigative subpoenas for the purpose of extending internal timelines? Is t here a policy about this?

We have not seen instances where the Regions issued investigative subpoenas to extend deadlines, nor have we seen instances where Regions have sought evidence through an investigative subpoena that was not relevant to the ultimate resolution of the matter. Our policy allows a Region additional time to subpoena and obtain necessary

and relevant information from an uncooperative party or third-party entity due to the inherent delays in completing the investigative process in those circumstances.

F. For some ULP cases, the website lists the case number and employer name only. A user must file a FOIA request to obtain additional information regarding the case. What is the basis for this practice? Are there plans to list more information, and eventually move to a system like PACER used by the federal courts.

After a recent review of our website case pages, a revision was made to the ULP case pages to ensure consistency with representation case pages such that all institutional entities are identified. The Agency plans to post more pre-hearing information on our website's case pages, similar to a court's on-line docket system, after appropriate redactions have been performed, and will continue its efforts to post unredacted post-hearing documents on-line.

G. Advice Memoranda

1. Are there plans for additional Advice Memoranda regarding employer work rules and handbooks?

The Board has issued a number of recent decisions involving employer work rules and handbooks that should provide valuable assistance to practitioners. There are no immediate plans to issue new guideline memoranda regarding work rules and handbooks, but to the extent that new issues in this area come to our attention, we will consider publishing additional guideline memoranda or reports.

2. Are there plans for additional Advice Memoranda in other areas?

There are no immediate plans for guideline memoranda regarding other issues, but there are a number of significant issues pending before the newly-confirmed Board and it is likely that there will be guidance provided to the Regional offices once decisions issue in those cases. Some of those issues include: the application of *Specialty Healthcare*, 357 NLRB No. 83 (2011) to retail store bargaining units (*Neiman Marcus Group*, 2-RC-76954, and *Macy's Inc.*, 1-RC-91163); the proper test for determining whether religiously-affiliated educational institutions are exempt from the Board's jurisdiction (*Pacific Lutheran University*, 19-RC-102521); the question of which factors identified in *NLRB v. Yeshiva University*, 444 U.S. 672, are most significant in making a finding regarding managerial status of university faculty members (*Pacific Lutheran University*, 19-RC-102521); and the question of whether unions may charge nonmember *Beck* objectors for various types of legislative expenses (*United Nurses & Allied Professionals (Kent Hospital)*, 1-CB-11135).

H. Case Processing Issues

1. What is the policy regarding counsel for a Charging Party being present while counsel for the General Counsel prepares a non-agent witness for an ALJ trial, where the Charging Party brought forward the witness during the investigation?

Pursuant to Section 10058.4(c) of the Unfair Labor Practice Casehandling Manual and OM-02-36, an attorney or other representative of a party, who does not represent a non-agent witness, will ordinarily not be permitted to be present at the interview of such a witness. The underlying policy is designed to avoid the potential that the non-agent witness would feel restrained or uncomfortable in providing information adverse to the party whose attorney or agent is present during the interview. This policy is no less significant, and in some cases is even more significant, after complaint issues and during the trial preparation phase of the case, during which time the representative may be prepped to provide his/her own untainted testimony and/or evidence may be uncovered that is adverse to the Charging Party. Indeed, pursuant to Section 10334 of the ULP Casehandling Manual, in preparing for trial, counsel for the General Counsel is commended to seek any additional evidence bearing upon the allegations of the complaint, and where revealed, bring such evidence to the Regional office's attention whether it supports those allegations or undermines them. The only exception to the above is if the non-agent witness confirms in writing that the counsel for the party is the witness' counsel as well.

2. What is the General Counsel's policy on authorizing complaints and placing before the Board theories of violations contained in dissenting opinions in prior cases?

The General Counsel continues the long tradition of former General Counsels, who have recognized that predictability through established precedent is helpful to parties in managing labor relations. However, in certain matters, after a thorough analysis of the facts and law, the General Counsel may conclude that the current Board should reconsider precedent and will bring those to the attention of the Board through litigation. The General Counsel has highlighted some areas of consideration in the most recent Memo on Mandatory Submissions to Advice. See GC 14-01.

3. Is there a policy concerning the kind and amount of information that should be contained in Regional Directors' long-form dismissal letters? Can more information be provided in dismissal letters?

Pursuant to Casehandling Manual Section 10122.1, it has long been Agency policy to issue a long-form dismissal letter containing a detailed explanation of the reasons for refusing to issue a complaint once a determination to dismiss has been made and the Charging Party elects not to withdraw. Charging Parties have the option of electing to omit the detailed explanation from the dismissal letter, in which case the Region will issue a short-form dismissal letter. Section 10122.2 of the Casehandling Manual provides that the long-form dismissal letter should provide a detailed summary

of the basis for the Regional Office's determination, and should be sufficient to permit the Charging Party to direct an appeal to the dispositive aspects of the dismissal. The Manual further guides Regions to include the particular reason(s) for the determination; the material element of the charge that was found unsupported; and, if there are multiple bases for the disposition, directs they all be listed. There is no provision for long-form dismissal letters to be supplemented with additional information after they are issued. However, if a Charging Party is confused about the rationale for the dismissal, Regional personnel will certainly attempt to clarify further.

4. Is there a policy regarding Regional offices dismissing charges without affording the Charging Party the opportunity to respond to a Respondent's evidence and/or position?

The policy with regard to all investigations is to gather the relevant information so that an informed decision can be made by the Regional Director. In some cases, Charging Parties will have addressed the factual evidence and legal arguments of the Charged Party early in the investigation, and if there is no dispute once the Charged Party's evidence is obtained, no further response from the Charging Party would be sought. However, in situations where the Charged Party presents factual evidence or legal arguments that the Charging Party has not addressed, the Regions will seek further information from the Charging Party. Section 10068.1 of the Unfair Labor Practice Casehandling Manual provides guidance to Board Agents to ensure that any given investigation is complete. Specifically, the Manual states that the case file should contain all relevant evidence including that bearing on material credibility conflicts and that, if additional evidence is required, it must be expeditiously obtained prior to presenting the case for determination.

5. Has the General Counsel's policy regarding travel in the field by Board agents in investigations changed due to budget pressures, staffing constraints, technology or otherwise?

The general policy regarding travel for investigations is set forth in ULP Casehandling Manual Sec. 10054.2(a):

> In Category II and III cases, the preferred method of obtaining affidavits is through a face to face meeting. *** On the other hand, in Category I cases where the issues are generally more straightforward, telephone affidavits may be appropriate.

This policy has been refined to allow for alternative investigative techniques, such as questionnaires and telephone affidavits, not only in Category I cases, but also in certain Category II cases, including those involving requests for information or duty of fair representation allegations. Moreover, Regional Directors have the discretion to use these techniques for other Category II and III cases, where appropriate. More specifically, where substantial travel will be necessary, alternative investigative techniques may be employed, particularly when the affidavit is a supplemental statement, corroborative evidence is being presented, or there is a very high probability that the case has no merit. See GC Memorandum 02-02.

OM Memo 13-37, Casehandling Cost Savings Instructions for Fiscal Year 2013, issued because the Agency was under a sequestration order that reduced our budget. In that memo, referring to the above policy, Regional Directors were advised to make full use, as appropriate, of alternative investigative techniques, including "questionnaires, telephone affidavits, videoconference interviews, where feasible, position statements and other techniques" that reduce or eliminate travel costs associated with travel outside the commuting area. Moreover, travel coordinators in each Region were advised to manage travel on a daily basis, including clustering travel assignments for Board agents. Interregional coordination of travel for investigations was encouraged so as to permit Board agents traveling in the outskirts of their Regions to assist in investigations (or elections) in the outskirts of a contiguous Region.

Notably, while our FY 2014 budget has allowed for more casehandling travel, the Agency still considers and implements cost savings measures, as appropriate.

6. What is the Board's policy concerning whether hearing officers should withdraw a subpoena after it becomes moot during the course of a hearing.

Normally, a hearing officer would not have the authority to "withdraw" a subpoena since that right belongs to the party that has issued the subpoena. A hearing officer should resolve subpoena issues before closing a hearing.

7. In the past, when a company's policies were found to be overbroad in violation of Section 7, some Regions would both seek a remedy setting aside the policies and, at the same time, work with the employer to craft a lawful substitute policy. Other Regions have stated that they will only seek rescission of the overbroad policy. Is there a uniform policy governing this issue?

Regions generally seek rescission of the unlawful rule, not modification. We would not specifically seek a "lawful modification" of the rule because the employer can choose not to have a rule on that subject at all if it cannot have the rule it wants. If an employer wants to settle a case by modifying a rule and seeks our approval of new language, a Region typically informs the employer that it cannot guarantee that a charge over a modified rule would be dismissed. If a case is litigated and the employer substitutes the unlawful rule with a modified one that is also unlawful, the Region would find that the employer has not complied with the order. If the modified rule appears to be lawful under existing Board law, the Region would find that the employer has complied with the order.

There are a number of excellent Advice memoranda addressing work rules that provide guidance in evaluating the legality of work rules.

8. Can you please provide information on Backpay Tech and whether it can be accessed by practitioners?

BackpayTec is a Microsoft Excel based program developed by Agency personnel to calculate backpay. Over the years, this program has been modified to calculate backpay as required by the Board. For example, the program was updated when the Board required the payment of daily compound interest in *Jackson Hospital Corporation d/b/a Kentucky River Medical Center.* Most recently, the program was updated to calculate the excess tax liability payments required in *Latino Express.* In order to facilitate changes to the interest and tax rates in the program, BackpayTec has been linked to several interest and tax tables which are kept current by Agency personnel. While BackpayTec is not available to the public, all Regional staff members have been trained on BackpayTec and will be happy to provide backpay calculations upon request.

9. Is there a policy or uniform practice concerning Board agents informally sharing with a Charged Party a summary of the Charging Party's factual and legal claims?

When communicating with the Charged Party representative to obtain evidence, Board agents are expected to relate the contentions advanced with regard to all violations alleged. (see CHM 10054.4), It has long been the Agency's policy that, unless the Charged Party is extending full and complete cooperation, the Board agent should send a letter to its representative detailing the Regional office's request for such cooperation, including a deadline for compliance. See OM-06-54. The degree of detail contained in such a letter depends upon the nature of the allegations at issue. For instance, if an unlawful statement is alleged, the letter should contain (a) a general description of the statement; (b) the name of the supervisor or agent who is alleged to have made the statement; (c) the approximate date the statement is alleged to have been made; and (d) the location of the alleged conversation. In other cases, such as a discharge or a bargaining case, Board agents often disclose specific additional information to ensure a complete investigation, while protecting the confidentiality of the witnesses. Where the case includes pivotal questions of law, Board agents are urged to candidly disclose the legal theories under consideration and invite a position statement or memorandum of law addressing such issues.

10. What is the policy on taking an affidavit from a person whose supervisory status is in dispute? What are the policies and procedures concerning determination of whether and when an interview can go forward?

The policy for taking affidavits from a person whose supervisory status is uncertain is found in Section 10058.2(c) of the ULP Casehandling Manual. Pursuant to that provision, a Board agent is permitted to conduct an initial interview in an attempt to determine the person's status before proceeding with a substantive interview. Thereafter, the Board agent should proceed as follows: If the initial inquiry establishes that the individual is a supervisor or party agent, the Board agent cannot proceed with a substantive interview without the consent of the party's attorney. If after the initial

inquiry there remains uncertainty concerning the individual's supervisory or agency status, the Board agent is to suspend the interview and seek guidance from the Regional Office. The Regional Office often contacts Special Ethics Counsel in this situation. Thereafter, if it is determined that:

> the individual is a supervisor or party agent, the Board agent may not resume the interview without the consent of the party's attorney. If, however, it is determined, based on the preliminary interview or thereafter, that the person is not a supervisor or party agent, the Board agent may conduct a substantive interview of the individual without informing or obtaining consent from the party's attorney.

11. Have the Regions noticed a trend whereby investigators rely more on email communications and less on telephone or in-person interactions with charged Parties, Charging Parties and witnesses?

There definitely has been an increase in the frequency of Board agents' use of email to communicate with parties and witnesses about logistical and procedural matters.

During the ABA conference in February, we learned that some Board agent e-mail communications with witnesses, parties, and representatives were focused on more substantive, as opposed to procedural, issues. We have addressed this issue with the Regions.

12. In light of changes to technology, does the Board still believe that in-person affidavits are preferable to telephone, Skype or other remote affidavits. And, if so, why?

We still believe that face to face affidavits are preferable. Our experience has been that the investigator is able to develop a better rapport with affiants if the communication is in person. In addition, this contact lends itself more to expanding the discussion with follow up questions relevant to a complete investigation. We have used videoconferencing from time to time to facilitate an investigation, yet our experiences have not been as satisfactory as face to face contact. However, we recognize that the growing availability of Skype and other technologies, as well as improvements in videoconferencing, may well lead us to re-evaluate our investigative techniques in the future.

II. Representation Cases

A. Statistics

1. Please provide statistics concerning the number of RC and RD petitions filed, he number of elections conducted in each category, and the union win rate.

In FY 2013, the number of RC and RD cases filed were 1986 and 472, respectively.

For cases that closed in FY 2013, the number of elections for RC cases was 1330 and for RD cases was 202. The union's win rate was 64.06% and 39.11%, respectively.

2. Please provide statistics concerning the median number of days from petition election, as well as statistics on cases that took longer than median.

The median number of days from petition to election in FY 2013 was 38 days. The Agency does not have statistics on the cases that exceeded the median.

B. Election Rules

1. Can you comment on the status of new election rules?

The NLRB is proposing to amend its rules and regulations governing the filing and processing of petitions relating to the representation of employees for purposes of collective bargaining with their employer. The Board explained when issuing the proposed amendments that these modifications would simplify representation-case procedures and render them more transparent and uniform across regions, eliminate unnecessary litigation, and consolidate requests for Board review of Regional Directors' pre- and post-election determinations into a single, post-election request. The proposed amendments would allow the Board to more promptly determine if there is a question concerning representation and, if so, to resolve it by conducting a secret ballot election.

The Board first made these proposals on June 22, 2011. 76 FR 36812. Although the Board issued a final rule on December 22, 2011 that adopted a number of the proposed amendments (and that deferred others for further consideration) 76 FR 80138, that final rule was set aside by the U.S. District Court for the District of Columbia on May 14, 2012, on procedural grounds relating to the voting process used by the Board for that rule. On January 22, 2014, the Board issued a final rule rescinding the amendments adopted by the December 22, 2011 final rule. 79 FR 3483. The present proposal is, in essence, a reissuance of the proposed rule of June 22, 2011.

Timeline for the Board's representation rulemaking:

Rulemaking Action Description	Action Date	Federal Register
Notice of Proposed Rulemaking (NPRM)	6/22/2011	76 FR 36812
NPRM Comment Period End	9/6/2011	
Final Rule (Selected Provisions)	12/22/2011	76 FR 80138
Final Rule Effective (Selected Provisions)	4/30/2012	
Final Rule Rescinding December 22, 2011 Amendments (Selected Provisions)	1/22/2014	79 FR 3483
NPRM	2/6/2014	79 FR 7317
NPRM Comment Period End	4/7/2014	
NPRM Reply to Comment Period End	4/14/2014	
Hearings on NPRM	4/10 & 11/2014	

2. Are there any other rules being considered or drafted?

Not at this time.

C. Election Procedures

1. Is there a uniform policy regarding the time for scheduling a hearing after the receipt of a petition?

The Agency has a number of policies that impact the time for scheduling a hearing after the receipt of a petition. Section 11082.3 of the Casehandling Manual for Representation Cases states that a Regional Director should set an early date for the hearing, consistent with the Agency's goals of expeditious processing. Under the Board's holding in *Croft Metals, Inc.*, 337 NLRB 688 (2002), the notice of hearing must issue no less than five (5) working days prior to the date of the hearing, absent a clear waiver from the parties. Consistent with the requirements set forth in Form NLRB-4338 (Notice Regarding Representation Case Hearings), a postponement request will not be granted unless good and sufficient grounds are shown and a request for postponement to a date more than 14 days after the filing of the petition will normally not be granted absent extraordinary circumstances.

2. What qualifies as "good cause shown" for granting an extension for the hearing date?

Good cause is a relative term that depends upon all the circumstances of each case.

D. Mail Ballots and Off-site Elections

1. What is the current policy regarding mail ballot elections in both multi and single facility locations? Is there a new policy regarding mail ballots for government contractors whose employees are in government-controlled facilities?

Board policy regarding mail ballot elections, whether in a single- or multi-facility location unit, was articulated in *San Diego Gas and Electric*, 325 NLRB 1143 (1998). In that case, the Board stated that a Regional Director should use his/her discretion in deciding which type of election to conduct, taking into consideration at least the following situations that normally suggest the propriety of using mail ballots:

(a) Where eligible voters are "scattered" because of their job duties over a wide geographic area;
(b) Where eligible voters are "scattered" in the sense that their work schedules vary significantly, such that they are not present at a common location at common times; and
(c) Where there is a strike, lockout or picketing.

If any of the foregoing situations exist, the Regional Director should also consider the desires of the parties, the likely ability of voters to read and understand mail ballots, the availability of addresses for employees, and, finally, what constitutes the efficient use of Board resources. The Board further noted that there may be other relevant circumstances that a Regional Director may consider in deciding whether to conduct a mail ballot election.

There is no new Board policy regarding mail ballots for government contractors whose employees are in government-controlled facilities.

2. What is the current policy for conducting off-premises elections?

The Board has accorded Regional Directors wide discretion on when and where to hold an election. However, it is the Agency's view "...the best place to hold an election, from the standpoint of accessibility to voters, is somewhere on the employer's premises. In the absence of good cause to the contrary, the election should be held there." (See Section 11130.2 CHM).

However, there are some circumstances, such as when conducting a re-run election, which may cause the Regional Director to determine that an off-site election is warranted, e.g., when there are egregious or pervasive employer unfair labor practices that may compromise voter free choice if the election were to be held on the employer's premises. In making a determination about the election location, a Regional Director should consider the following factors: 1) the preferences of all the parties; 2) the extent and nature of prior unlawful or objectionable conduct and whether the election is being held pursuant to a request to proceed; 3) the advantages that may accrue to the employer over other parties if the election is conducted on employer-owned or

employer-controlled premises; and 4) the suitability of alternative sites, including sites proposed by the petitioner. See OM 12-50. In addition, when there is a dispute among the parties about the location of the election, a Regional Director should issue to the parties a written explanation of the Region's determination regarding the location of the election.

3. Please provide statistics concerning the use of mail ballots and the holding of off-site elections.

During FY 2013, the Agency conducted a total of 1,620 elections, with 172 mail ballot elections and 14 mixed manual/mail ballot elections. The Agency does not maintain statistics on the holding of off-site elections.

III. Budgetary and Operational Issues

A. Are budgetary limitations preventing the replacement of retiring employees and/or employees on long-term leave?

In FY 2013, due to budgetary constraints compounded by the sequester order, we were forced to engage in significant and substantial cost cutting measures, including very limited hiring wherein we only filled vacant positions that were deemed critical at the time. We are currently assessing our FY 2014 budget allocation and anticipate that we will continue our system of filling only those vacant positions deemed critical.

B. Discuss the impact on the NLRB of challenges in 2013, such as sequestration, staffing and the government shutdown.

As noted above, the impact of sequestration caused the Agency to engage in very limited hiring in the field and headquarters, and to reduce funding for or completely curtail other significant programs and measures, such as training, awards, travel, and IT expenditures, to name a few. This, of course, affects operational efficiencies, professional development, and employee morale, and causes inconvenience to the public. As to the government shutdown, while we take great pride in the fact that we were able to handle urgent matters with a skeleton crew in order to ameliorate significant workplace disputes, such as a 10(l) case in Region 19 and a 10(j)/contempt case in Region 34, the shutdown obviously caused delays in the casehandling of a number of matters from the investigative through the litigation stage as we were required to postpone affidavits, hearings, and oral arguments.

IV. Miscellaneous

A. Please provide an update on litigation concerning the Acting General Counsel's appointment, *Noel Canning* and related issues.

The Supreme Court held oral argument in *Noel Canning* on January 13, and a decision is expected by the end of its term (June 30, 2014). In addition to addressing the issues decided by the D.C. Circuit, i.e., (1) whether the President's recess-appointment power may be exercised during a recess that occurs within a session of

the Senate, or is instead limited to recesses that occur between sessions of the Senate, and (2) whether the President's recess-appointment power may be exercised to fill vacancies that exist during a recess, or is instead limited to vacancies that first arose during that recess, the Court asked the parties to brief and argue the question of whether the President's recess-appointment power may be exercised when the Senate is convening every three days in pro-forma sessions.

There are approximately 107 pending cases in the courts of appeals in which a party or the court has raised a question as to the validity of the recess appointments of Members Griffin, Block, or Flynn, and another 35 questioning the validity of Member Becker's appointment. There is one outstanding district court case (S.D. OH) that has been stayed since last July awaiting *Noel Canning*. It was filed by National Right to Work on behalf of an individual seeking declaratory and injunctive relief that the Board's order dismissing his certification petition was *ultra vires*.

These issues also continued to affect our 10(j) litigation program. Although the validity of President Obama's appointment of three members to the Board on January 4, 2013, was challenged in some district courts in response to 10(j) petitions, respondents primarily challenged the Board's 2011 delegation to the General Counsel of the authority to initiate 10(j) proceedings, either at its inception or that it lapsed when the Board fell below a quorum. After *Noel Canning* and some of the other circuit court enforcement cases, respondents challenged the 2001 and 2002 Board delegations, as well as continuing to challenge the validity of the 2011 delegation. This defense was raised in response to 14 10(j) petitions in FY 2013. Every court that addressed the issue upheld the validity of the Board's delegations of the General Counsel's authority to initiate 10(j) proceedings, avoiding the constitutional issue of the validity of the recess appointments. For the first time, respondents also raised challenges this year to Regional Directors that had been appointed by the recess Board, and President Obama's designation of Acting General Counsel Lafe Solomon. The district court in the Western District of Washington dismissed a 10(j) petition on the basis that former Acting General Counsel Solomon's designation was invalid under the Federal Vacancies Reform Act (FVRA). That case is now on appeal in the 9th Circuit. On the other hand, the district court in the District of Alaska denied a motion to dismiss and granted injunctive relief after considering the FVRA and determining that the employer brought an impermissible collateral attack or a direct attack that failed pursuant to the *de facto* officer doctrine. Similar challenges were litigated in three other cases, one of which is still pending in district court and two of which were rejected with one being appealed to the 2nd Circuit.

B. Please provide an update on the General Counsel and Mexico signing a cooperation agreement concerning outreach to workers.

On July 23, 2013, nearly all of the NLRB field offices invited Mexican consular officials to witness, over closed-circuit television, the signing ceremony of the Letter of Agreement (LOA) between former Acting General Counsel Solomon and Mexican Ambassador Medina Mora. Upon the conclusion of the signing ceremony, NLRB staff at each of those offices conducted an outreach session designed to introduce consular officials to the Board's jurisdiction, protections afforded by the NLRA, and NLRB procedures. Since that date, approximately 32 NLRB field offices have conducted additional outreach and training sessions with Mexican nationals under the terms of the LOA. In addition, six NLRB field offices have entered into local LOAs with the Mexican consulate in their jurisdiction, embodying similar provisions to that of the national agreement.

C. Please provide information on the Regions seeking and obtaining U-Visas for undocumented workers whose testimony is necessary in an unfair labor practice case.

In FY 2013, two Regional offices forwarded requests from advocates that former Acting General Counsel Solomon certify employees' U-visa applications for their submission to US Customs and Immigration Service (USCIS). The Acting General Counsel approved these requests. He signed certifications on behalf of 18 individuals who have been helpful to NLRB investigations, and returned the applications to the employees' advocates. The current General Counsel has also approved a request to certify employees' U-Visa applications on a new basis in one of the cases previously certified by former Acting General Counsel Solomon. The applications remain pending with USCIS.

D. Please provide an update on the NLRB's agreement with the Justice Department in collaborating in certain employment cases.

Since the NLRB and the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) entered into a Memorandum of Understanding (MOU) on July 8, 2013, there have been no instances in which the MOU has formally been invoked. Both in-person and web-based training efforts for staff at NLRB Regional offices and OSC headquarters in Washington, DC is ongoing.

E. Please provide an update on the mediation program with the FMCS

The Board has maintained its inter-agency agreement with the FMCS to provide mediators for the Board's Alternate Dispute Resolution program and continues to refer ADR cases to FMCS commissioners for mediation. After the ABA conference, the Agency and FMCS engaged in productive discussions aimed at developing a more robust ADR program both internally and externally.

Website: www.nlrb.gov

Click on **Reports & Guidance** and choose either **General Counsel Memos** or **Operations-Management Memos**

General Counsel Guidance on Social Media Cases:

- **OM Memorandum 11-74, "Report of the Acting General Counsel Concerning Social Media Cases," dated August 18, 2011;**
- **OM Memorandum 12-31, "Report of the Acting General Counsel Concerning Social Media Cases," dated January 24, 2012;** and
- **OM Memorandum 12-59, "Report of the Acting General Counsel Concerning Social Media Cases," dated May 30, 2012**.

10(j) Program:

- **GC Memorandum 14-03, "Affirmation of 10(j) Program," dated April 30, 2014.**

Mandatory Submissions to Advice under General Counsel Richard F. Griffin, Jr.:

- **GC Memorandum, "Mandatory Submissions to Advice," dated February 25, 2014.**

Settlement Issues:

- **GC Memorandum 13-02, "Inclusion of Front Pay in Board Settlements," dated January 9, 2013.**

Collyer Deferral:

- **GC Memorandum 12-01, "Guideline Memorandum Concerning *Collyer* Deferral Where Grievance-Resolution Process is Subject to Serious Delay," dated January 20, 2012.**

Labor Board Rejects Micro-Unit at Retailer

Published: September 4, 2014

jackson lewis
All we do is work.®

In a long-awaited decision, the National Labor Relations Board has held that a petitioned-for "micro" bargaining unit consisting of women's shoe sales associates working in two areas within a store, which followed no administrative or operational lines set by the store, was inappropriate under *Specialty Healthcare*, 357 NLRB No. 83 (2011), where the Board seemingly had green-lighted such "micro-units" as appropriate for collective bargaining. *The Neiman Marcus Group, Inc. d/b/a Bergdorf Goodman*, 361 NLRB No. 11 (2014).

Manhattan luxury retailer Bergdorf Goodman operates a Women's store on Fifth Avenue. The petitioned-for unit consisted of women's shoes sales associates who were located in separate departments within the store — a department called "Salon shoes," located on the second floor and is its own department, and "Contemporary shoes," located on the fifth floor and is part of a larger department. Although employees in the two departments shared the same terms and conditions of employment, they were supervised by different floor and department managers, transfers between the departments were few, and sales associates did not substitute for one another or otherwise interchange.

In *Specialty Healthcare*, the NLRB instructed that in cases in which a party contends that the smallest appropriate bargaining unit must include additional employees (or job classifications) beyond those in the petitioned-for unit, the Board first reviews whether the unit is an appropriate bargaining unit: the "employees in the petitioned-for unit must be readily identifiable as a group and the Board must find that they share a community of interest using the traditional criteria[.]" If the petitioned-for unit satisfies this standard, the burden is on the proponent (here, BG) of a larger unit to demonstrate that the additional employees it seeks to include share an "overwhelming community of interest" with the petitioned-for employees.

The employer argued that the petitioned-for unit was not appropriate and that the petitioned-for employees shared an overwhelming community of interest with other selling employees so that an appropriate unit had to include, at a minimum, all selling employees, including not only all sales associates, but also personal shoppers and sales assistants. Alternatively, the employer asserted that a storewide unit was appropriate.

Based on *Specialty Healthcare* the Board dismissed the petition. It explained that, in making its determination, it must weigh "various community-of-interest factors, including whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work; are functionally integrated with the Employer's other employees; have frequent contacts with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised." Although the Board found the petitioned-for employees were "readily identifiable as a group by virtue of their function[,]" the sales associates in Salon shoes and Contemporary shoes did not meet *Specialty Healthcare's* first prong: they lacked a community of interest. The petitioned-for employees had a common purpose, *i.e.* selling women's shoes, and shared the same pay structure, hiring criteria, appraisal process and were subject to the same employee handbook. However, the Board found that "the balance of the community-of-interest factors weigh[ed] against finding that the petitioned-for unit was appropriate" because "the petitioned-for unit d[id] not resemble any administrative or operational lines drawn by the Employer." Instead, the petitioned-for unit consisted of the entire Salon shoe department and only a select portion of employees out of a second department. Thus, unlike the petitioned-for unit in *Macy's, Inc.*, 361 NLRB

No. 4 (2014), which "conformed to the departmental lines established by the employer[,]" this unit was inconsistent with how the employer chose to structure its workplace.

Bergdorf shows that the Board will give some deference to how an employer structures its operations in evaluating whether employees share a community of interest. However, this is not always the case. The Board cautioned that a petitioned-for unit that departs from an employer's departmental lines may be appropriate where the other community-of-interest factors weigh in favor of appropriateness of the petitioned-for unit, such as when there exists common supervision despite the employees working in different departments, or when there is a significant interchange of employees between departments.

Phillip Rosen, Shareholder | Linda Carlozzi, Shareholder
Jackson Lewis P.C. | 666 Third Avenue, New York, NY 10017 | 212.545.4000 | www.jacksonlewis.com

NLRB Begins Public Hearings on Proposed New Election Rules

Published: April 11, 2014

jackson lewis
All we do is work.®

The National Labor Relations Board yesterday began public hearings on proposed changes to its rules governing representation elections. The proposed rules were published in the Federal Register on February 6, 2014. *See* Notice of Proposed Rulemaking Representation-Case Procedures.

The deadline for initial public comments on the rules ended on April 7; reply comments are due on April 14. The proposed rules, commonly referred to as the "quickie" or "ambush" election rules, because they seek, among other things, to significantly shorten the period between the date a union files a representation petition and the date of the election, essentially are the same rules that were proposed by the NLRB in June, 2011. Those rules were modified, and made final in December that year. The rules were struck down by a federal district court in July 2012 on the ground the Board lacked a quorum when they were issued. *See* Chamber of Commerce of the U.S. v. NLRB, Civil Action No. 11-2262 (2012). The Board's appeal of that ruling was dismissed, pursuant to a joint stipulation, on December 9, 2013.

Thursday's public hearing in Washington was streamed live on the internet and featured a full day of testimony. According to the speakers schedule for the "Public Meeting: R-Case Procedures," seven topics were addressed by representatives of business groups, labor organizations and law firms. These topics included: (1) whether electronic signatures should be permitted to satisfy the showing of interest requirement; (2) the setting of a pre-election hearing within seven days after the petition is filed, absent special circumstances; (3) the requirement of a written statement of position; (4) the types of issues that should be litigated at the pre-election hearing; (5) issues related to concluding statements, arguments and briefs following the pre-election hearing, as well as the issuance of a Direction of Election before the pre-election hearing decision is issued; (6) changes to the process of NLRB review of the Decision and Direction of Election and changes to post-election Board review procedures; and (7) the NLRB's "blocking charge" policy causing elections to be held in abeyance until unfair labor practice charges are resolved.

Business groups and labor organizations represented at Thursday's hearing included the SEIU, Associated Builders & Contractors, Coalition for a Democratic Workplace, United Nurses Association of California, AFL-CIO, U.S. Chamber of Commerce, IUOE Local 150, IBB, National Grocers Association, Council on Labor Law Equality, Universal Health Systems, Inc., UFCW, NFIB, IBEW, Tennessee Chamber of Commerce, Retail Industry Leaders Association, International Franchise Association, CWA, SHRM, and LIUNA.

The second day of public hearings began at 9:30 a.m. on April 11 and also is being streamed live on the internet. According to the speakers schedule, the NLRB will hear testimony on several additional topics, including: (1) the standards for setting an election date; (2) whether the proposed rules adequately protect free speech interests; (3) whether or how the rules should address voter lists; (4) whether or how the Board can assist unrepresented local unions and small employers in complying with election procedures; and (5) whether the Board's rule making procedures demonstrates that the Board values the comments of the public.

Phillip Rosen, Shareholder | Linda Carlozzi, Shareholder
Jackson Lewis P.C. | 666 Third Avenue, New York, NY 10017 | 212.545.4000 | www.jacksonlewis.com

NLRB Considers Allowing Employees to Use Employers' Electronic Communications Systems for Protected Activity

Published: May 3, 2014

jackson lewis
All we do is work.®

Employers often forbid employees from using company e-mail and other electronic communications systems for all non-business purposes. Under current National Labor Relations Board decisions, such a blanket prohibition, which includes a prohibition on using these systems for Section 7 (i.e., union and other protected concerted activity) purposes is lawful as "employees have no statutory right to use the[ir] Employer's e-mail system for Section 7 purposes." Register Guard, 351 NLRB 1110 (2007), enfd. in relevant part and remanded sub nom. Guard Publishing v. NLRB, 571 F.3d 53 (D.C. Cir. 2009). However, the NLRB's General Counsel and the Communications Workers of America, AFL-CIO ("CWA") argue such limitations should be held unlawful. They are asking the NLRB to overturn Register Guard and grant employees the right to use company e-mail to engage in union and other protected concerted activities, such as trying to drum up support for a union or encourage employees to protest certain working conditions.

Purple Communications, Inc., JD-75-13 (Bogas, ALJ, Oct. 24, 2013), is the case providing them with the vehicle for this move. There, the CWA alleged the employer's rule prohibiting employees from using its equipment for non-business purposes unlawfully interfered with employees' rights. Without referring expressly to Register Guard, the Administrative Law Judge summarily dismissed the allegation, stating such a rule "is not, under current Board law, considered an improper infringement on Section 7 rights."

The GC and CWA have excepted to the Judge's ruling and have asked the Board to overrule Register Guard. The GC has further requested the Board to adopt a new standard under which "employees who are permitted to use their employer's e-mail for work purposes [would] have the right to use it for Section 7 activity, subject only to the need to maintain production and discipline."

The General Counsel broadly asserts that a rule that "prohibit[s] employees from using Respondent's equipment to engage in Section 7 activities such as organizing support for, or opposition to, a labor organization; or discussing, or attempting to discuss, workplace concerns with fellow workers" violates the NLRA. In support of his position, the GC argues that technology has made "email . . . analogous to the water cooler" of years ago, around which employees would gather to talk about their personal and work issues:

Employees have a Section 7 right to communicate at work, and, in technological workplaces, email is the present day water cooler. In the last 10-plus years, the emergence and widespread use of email has transformed the manner in which many employees interact in the workplace. In many workplaces, technology has replaced face-to-face communication in a break room, cafeteria, or other traditional gathering places as the preferred method of communication. As employees increasingly use email as a primary mode of communication, email has, thus, become the "natural gathering place" for non-work-related communication.

The NLRB is considering the GC's exceptions and proposed rule, and, in a move that many say signals the Board likely will be making a major policy shift, has invited briefs from the parties and interested *amici* on five questions: whether the Board should reconsider and overrule Register Guard, what standard(s) of employee access to employer systems should be established and what restrictions on access should be put in place; whether the impact on an employer's communications systems by employees' use of the systems should be considered; whether the existence of

employees' personal electronic devices and personal email and social media accounts should be considered by the Board; and whether any other relevant technological issues exist which should be taken into account by the Board.

The Board's ruling in this case could affect dramatically all employers utilizing electronic communications systems (and a great many do, regardless of whether their employees are unionized or not.) If the Union's and the GC's position in Purple Communications is adopted, it is likely many employers will have to revise handbook rules and other policies that prohibit employees from using electronic communications systems for non-business purposes to allow for access. Furthermore, employers probably would not be able to stop employees from using employer electronic communications systems to engage in Section 7 activities while on non-work time, unless such use interfered with the "need to maintain production and discipline", which the employer would have the burden – likely a heavy one — of proving.

Phillip Rosen, Shareholder | Linda Carlozzi, Shareholder
Jackson Lewis P.C. | 666 Third Avenue, New York, NY 10017 | 212.545.4000 | www.jacksonlewis.com

NLRB Precedent Not Binding after Noel Canning, Labor Board Judge Declares, Rejecting Claimed Dues Deduction Violation

Published: August 14, 2014

jackson lewis
All we do is work.®

In an unusual move, an NLRB administrative law judge has disregarded Board law and held that an employer that stopped dues deductions after the expiration of its collective bargaining agreement did not commit an unfair labor practice, dismissing an unfair labor practice complaint. *Lincoln Lutheran of Racine*, 30-CA-11099 (JD-49-14 August 11, 2014) Relying on the United States Supreme Court's decision in *NLRB v. Noel Canning*, which held the Board lacked the quorum necessary for the issuance of decisions from January 4, 2012 through August 4, 2013, the judge concluded he could not follow the Board's precedent-setting dues check-off decision in *WKYC-TV*, 359 NLRB No. 30 (issued in December 2012), and instead should rely on Board law as it existed previously.

While NLRB administrative law judges normally must adhere to existing Board law, the Judge in Lincoln Lutheran of Racine refused to apply *WKYC-TV*. In that case, the Board found that "an employer's obligation to check-off union dues continues after expiration of a collective bargaining agreement that establishes such an arrangement." However, since *WKYC-TV* was issued during the quorum-less period, when the NLRB was without authority to render decisions under *Noel Canning*, the Judge decided the decision was not "valid precedent." Instead, the Judge applied *Bethlehem Steel*, the decision that *WKYC-TV* overruled. *Bethlehem Steel* held that an employer does not violate the NLRA by ceasing to follow the dues check-off provision after expiration of the collective bargaining agreement. *Bethlehem Steel*, 136 NLRB 1500 (1962). Accordingly, the Judge dismissed the complaint.

It remains to be seen whether other ALJs will follow suit when faced with the question of whether or not to follow Board decisions invalidated by *Noel Canning*.

Phillip Rosen, Shareholder | Linda Carlozzi, Shareholder
Jackson Lewis P.C. | 666 Third Avenue, New York, NY 10017 | 212.545.4000 | www.jacksonlewis.com

Summaries of Significant NLRB and Court Decisions and NLRB Proposed Rules

September 1, 2013 through September 20, 2014

Prepared for

ABA Eighth Annual Labor & Employment Law Conference
Panel Presentation
National Labor Relations Board Update
November 6, 2014

James W. Bucking*
FOLEY HOAG LLP
155 Seaport Boulevard
Boston, MA 02210
jbucking@foleyhoag.com
www.foleyhoag.com

Susan Davis*
COHEN, WEISS AND SIMON LLP
330 West 42nd Street
New York NY 10036
sdavis@cwsny.com
www.cwsny.com

*Special thanks to
Allison Anderson, Foley Hoag LLP and
Wendy LaManque, Cohen Weiss and Simon LLP
for their assistance in preparing this paper.

Table Of Contents

I. Organizing and Elections

A. Employer Objectionable Conduct

1. *United Maintenance Company, Inc.* (13-RC-106926) (2013)

The Board (Chairman Pearce and Members Miscimarra and Hirozawa) denied the employer's request for review of the Regional Director's decision and direction of election. The Board panel majority found that the Regional Director's determination that Teamsters' Local 727's collective-bargaining agreement with the employer does not operate as a bar to Petitioner SEIU Local 1's representation petition, because Local 727 effectively disclaimed interest in representing the employer's employees, is consistent with applicable precedent. In addition, the Board panel majority granted the employer's special permission to appeal from the Regional Director's determination to conduct the election by mail ballot, but denied the appeal on the merits. The majority found that the Regional Director did not abuse his discretion in deciding to conduct the election by mail ballot, and that he appropriately applied the test set forth in *San Diego Gas & Electric*, 325 NLRB 1143 (1998*).*

2. *FJC Security Services, Inc.*, 360 NLRB No. 6 (2013)

The Board (Chairman Pearce and Members Hirozawa and Johnson) adopted the Administrative Law Judge's findings that the Employer did not violate the Act by warning employees that approval of their benefit requests was contingent on their support for decertification of the Union, and adopted the ALJ's recommendation that the Charging Party/Intervenor's related objection to the election be rejected and a certification of results of election be issued. The Board reaffirmed the rule that an employer may make statements of opinion regarding one union over another, as long as the statements do not contain any sort of threats or promises that would rise to the level of interference, restraint, or coercion that would violate Section 8(a)(1) of the NLRA.

3. *Intertape Polymer Corp.*, 360 NLRB No. 114 (2014)

The Board (Members Hirozawa and Schiffer) adopted the Administrative Law Judge's findings that the Respondent violated Section 8(a)(1) of the Act by interrogating an employee regarding his union sentiments, confiscating union literature from employees' break room, and engaging in surveillance of employees' union activities. The majority ordered a new election based on these violations. Member Miscimarra would not have ordered a new election because he found that the Respondent's conduct was so minimal that it could not have affected the election results.

4. *UniFirst Corporation*, 361 NLRB No. 1 (2014)

The Board (Chairman Pearce and Member Hirozawa) adopted the hearing officer's findings and recommendations to sustain objections to an election, which alleged that the Employer engaged in objectionable conduct by promising employees 401(k) and profit-sharing plans if they decertified the Union. The hearing officer, without waiting for the resolution of a determinative number of challenged ballots, recommended setting aside the election and holding a second election on a date after the resolution of the issues underlying the

challenged ballots. Contrary to the hearing officer, the Board majority stated that the proper procedure is to resolve the status of the challenged ballots before determining whether the election should be set aside. The Board, therefore, remanded the case to the Regional Director for further appropriate action.

5. *Allied Medical Transport, Inc.*, 360 NLRB No. 142 (2014).

The Board (Chairman Pearce and Members Miscimarra and Hirozawa) affirmed the Administrative Law Judge's findings that the Respondent committed multiple violations of Section 8(a)(1) during a union organizing campaign by (1) creating the impression among employees that it was engaging in surveillance of their union or other protected concerted activities; (2) engaging in surveillance of employees' union or other protected concerted activities; (3) telling employees that it would be futile for them to select the Union as their collective-bargaining representative; (4) interrogating employees about their union or other protected concerted activities; (5) soliciting and impliedly promising to remedy employees' grievances in order to discourage them from selecting the Union as their collective-bargaining representative; (6) soliciting employees to campaign against the Union; (7) expressly promising employees benefits in order to discourage them from selecting the Union as their collective-bargaining representative; (8) impliedly promising employees unspecified benefits in order to discourage them from selecting the Union as their collective-bargaining representative; and (9) threatening to replace employees with part-time drivers if they selected the Union as their collective-bargaining representative.

In addition, the Board rejected the General Counsel's contention that the suspension of two employees pending an investigation was a unilateral change in violation of Section 8(a)(5). However, the Board found that the Respondent violated Section 8(a)(3) of the Act by suspending and discharging those two employees under *Wright Line*, 251 NLRB 1083 (1980), because the Respondent did not satisfy its rebuttal burden, *i.e.*, it failed to prove that it acted on a reasonable belief that the two employees were, in fact, guilty of the transgression for which the Respondent purportedly suspended and discharged them, and also treated them differently than two other employees. As part of the remedy the Board adopted the judge's recommendation for a broad cease-and-desist order and a reading of the notice to employees.

B. Union Objectionable Conduct

1. *Standard Drywall, Inc. v. N.L.R.B.*, 12-70047, 2013 WL 5511186 (9th Cir. Oct. 7, 2013)

The Ninth Circuit upheld a broad cease and desist order issued by the Board in response to the Operative Plasterers and Cement Masons Local 200's continued pursuit of work which the Board previously awarded to another Union. After Local 200 had asserted a claim for work covered by an agreement between Standard Drywall, Inc. ("SDI") and the Southwest Regional Council of Carpenters, the Carpenters threatened to strike if the work was reassigned to Local 200. SDI filed a charge against the Carpenters, the Board held a 10(k) jurisdictional-dispute proceeding, and the work was awarded to the Carpenters. However, Local 200 continued to demand work, the Carpenters once again threatened to strike, and SDI filed a second charge

with the Board. At the Board's second 10(k) hearing, the Board (Chairman Pearce and Members Becker and Hayes) issued a broad award of work to the Carpenters, and SDI withdrew its 8(b)(4)(ii)(D) charges.

Local 200 continued to demand work and pursued lawsuits against the parties. The Board found that that Local 200's continued pursuit of the work in the face of the Board's 10(k) awards to the Carpenters violated Section 8(b)(4)(ii)(D), noting the well-settled law that a union's pursuit of a lawsuit or arbitration to obtain work awarded by the Board to another union under Section 10(k) has an illegal objective under the Act.

2. *UNITE HERE Local 1* (Stefani's Pier Front, Inc. d/b/a Crystal Garden) 360 NLRB No. 42 (2014)

The Board (Chairman Pearce and Members Hirozawa and Schiffer) adopted an ALJ's findings that the Respondent Union did not violate Sec. 8(b)(2) by causing the employer to discharge an employee without previously advising her about the consequences of nonpayment of the monetary amount in arrears of her periodic dues, the total amount that she owed, a monthly breakdown of the amount owed, and how the amount was calculated. The Board found that the Respondent satisfied the requirements of *Philadelphia Sheraton Corp.,* 136 NLRB 888 (1962), *enfd. sub nom. NLRB v. Hotel Employees Local 568,* 320 F.2d 254 (3d Cir. 1963), and that the Charging Party willfully and deliberately determined not to satisfy her dues obligations to the Union. The Board noted that this conduct would have excused any failure by the Union to comply fully with the *Philadelphia Sheraton* requirements.

3. *Structural Concrete Products, LLC,* 05-RC-116939 (NLRB 2014)

The Board (Chairman Pearce and Members Johnson and Schiffer) adopted the Regional Director's recommendation to overrule the Employer's objections alleging, *inter alia,* that the Union threatened employees about voting against the Union; that Union agents sat in a parked car in view of employees entering the facility to vote, and that the actions or inactions by the parties or the Board Agent violated the rights of the Employer and of employees to choose freely and fairly whether to be represented by the Union. Specifically with respect to the Employer's objection alleging that the Union's representatives remained in a car parked on the Employer's lot within view of employees entering the facility to vote, the panel agreed with the Regional Director in finding the conduct not to be objectionable, and noted the absence of any evidence that the Union agents spoke to voters while at that location or that they were at any time present in the polling location itself or in any designated non-electioneering area. With respect to the conduct of the Board agent in connection with advising an employee of his voting rights, the panel agreed with the Regional Director and also noted the absence of any evidence that the agent expressed any personal opinions that would tend to undermine confidence in the Board's election process or that would reasonably be interpreted as impairing the Board's election standards .

4. *ManorCare of Kingston PA, LLC,* 360 NLRB No. 93 (2014).

The Board (Chairman Pearce and Member Schiffer) reversed the hearing officer's recommendation to sustain the Employer's election objection, which alleged that certain pro-

union employees, who were not union agents but third parties to the election, made election-related threats to employees and their property that interfered with the election. The statements were disseminated by other employees not in the presence of the speakers who actually made the comments and apparently were characterized out of context. The Board found that, in the circumstances of this case, statements which were not threats when made did not, through the repetition by others, become transformed into objectionable conduct. Member Johnson, dissenting, stated that although this was a close case, the statements, as disseminated to other eligible voters who did not actually hear the alleged threats being made, were threats to person and property. He further found that there were no countervailing circumstances that would lead an objective observer to believe these comments were exaggerated or were intended in a joking manner, and a significant number of employees were exposed to these threatening statements.

5. *Laborers' International Union of North America Local 310 (KMU Trucking & Excavating, Inc.),* 361 NLRB No. 37 (2014)

In this jurisdictional dispute between Operating Engineers Local 18 and Laborers Local 310, the Board (Chairman Pearce and Members Hirozawa and Johnson), under Section 10(k) of the Act, awarded the work in dispute to employees represented by Local 310, based on the factors of employer preference and past practice, area and industry practice, and economy and efficiency of operations. In a prior case, Operating Engineers Local 18 (Donley's, Inc.), 360 NLRB No. 113 (2014), the Board granted a broad area-wide award to employees represented by the Laborers for work of the kind involved in this dispute. The award in these cases restated and applied that area-wide order.

C. Decertification Petitions

1. *AEG Brooklyn Management, LLC* (29-UD-097113, 2013 WL 4855387) (2013)

The Board (Chairman Pearce and Members Miscimarra and Hirozawa) adopted the Acting Regional Director's overruling of objections to a de-authorization election, and accordingly certified that a majority of the employees eligible to vote had not voted to withdraw the authority of Local 32BJ Service Employees International Union to require, under its agreement with the employer, that employees make certain lawful payments to that Union in order to retain their jobs in conformity with Section 8(a)(3) of the Act. The Board found that a certification of election results should be issued.

2. *Labriola Baking Company*, 361 NLRB No. 41 (2014)

The Board (Chairman Pearce and Members Miscimarra, Hirozawa, Johnson, and Schiffer) found merit to the Union's objection to the decertification election. The objection involved a statement made one week before the election by the Chief Operating Officer ("COO") to employees at a captive audience speech, and the translation of that statement to the predominately Spanish-speaking audience. The COO stated in scripted remarks: "If you chose Union Representation, we believe the Union will push you toward a strike. Should this occurs [sic], we will exercise our legal right to hire replacement workers for the drivers who strike." The hearing officer found that the translated version ended with the statement that the Employer

would replace the workers with "legal workers" or a "legal workforce." The hearing officer held that the evidence was insufficient to sustain the objection because the translated version did not threaten that the Employer would report employees to immigration authorities if they supported the Union. The majority held that the hearing officer erred by analyzing the objection only in terms of whether the COO's translated statement threatened to report employees to immigration authorities. The Board found that it was not precluded from considering whether the statement amounted to a more generalized threat. The majority found that the translation was objectionable and highly coercive because the import of the reference in the translation to "legal workers" was that the Employer would use immigration, i.e., "legal" status, to take action against employees in the event of the strike that the Employer claimed the Union all but inevitably would cause. Thus, the majority held the threat interfered with the employees' freedom of choice, and warranted setting aside the election and holding a second election.

D. Appropriate Bargaining Units

1. *The Pepsi-Cola Bottling Company of Winchester, Kentucky, A Division of G&J Pepsi-Cola Bottlers, Inc.* (09-RC-110313) (2013)

The Board (Chairman Pearce and Members Miscimarra and Hirozawa) denied the employer's request for review of the Regional Director's decision and direction of election. Member Miscimarra did not reach the applicability of *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), *enfd. sub nom. Kindred Nursing Centers East v. NLRB*, 727 F.3d 552, 2013 WL 4105632 (6th Cir. Aug. 15, 2013), because, in this case, the Employer did not challenge its applicability, and even under the Board's pre–Specialty Healthcare traditional community-of-interest analysis, he would find that the petitioned-for unit of drivers is an appropriate unit, even though a unit including the excluded merchandisers would also be appropriate.

2. *The Neiman Marcus Grp., Inc., d/b/a Bergdorf Goodman*, 02-RC-076954 (2014)

The Board (Chairman Pearce and Members Miscimarra, Hirozawa, Johnson and Schiffer) in this decision, found that a petitioned-for bargaining unit of certain women's shoe sales associates at the Employer's retail store was not appropriate under *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011).

The Employer filed a request for review of the Regional Director's decision that the petitioned-for unit of women's shoe sales associates was appropriate. The Employer argued that the petitioned-for unit was not appropriate under established law and, moreover, that the petitioned-for employees share an overwhelming community of interest with other selling employees. As a result, the Employer contended that an appropriate unit must include, at a minimum, all selling employees, including not only all sales associates, but also personal shoppers and sales assistants. Alternatively, the Employer asserted that a storewide unit was appropriate. The Board granted the Employer's request for review. An election was held on June 1, 2012, and the ballots were impounded.

The Board analyzed the unit under the *Specialty Healthcare* standard and found that, while some factors weighed in favor of finding a community of interest within the petitioned-for unit, those factors were ultimately outweighed "by the lack of any relationship between the contours of the proposed unit and any of the administrative or operational lines drawn by the Employer," along with the absence of any mitigating or off-setting factors. The Board accordingly found that the petitioned-for unit was not appropriate and that it was therefore unnecessary to examine the unit proposed by the employer. The June 1, 2012 election was vacated and the case remanded to the Regional Director for further appropriate action.

3. *Macy's, Inc.*, 361 NLRB No. 4 (2014)

The Board (Chairman Pearce and Members Hirozawa and Schiffer) in this decision, adopted the Acting Regional Director's Decision and Direction of Election finding that, under *Specialty Healthcare*, the petitioned-for unit of cosmetics and fragrances employees at the Employer's Saugus retail department store constituted an appropriate unit for bargaining. The Board majority first found that the cosmetics and fragrances employees are readily identifiable as a group, share a community of interest, and that any differences among these petitioned-for employees are insignificant compared to the strong evidence of a shared community of interest. Next, the Board majority found that the Employer had not established that the cosmetics and fragrances employees share an overwhelming community of interest with the other employees at the Saugus store. In so finding, the majority emphasized that there was virtually no record evidence concerning the non-selling employees and, although there are similarities between the cosmetics and fragrances employees and other selling employees, there also are clear distinctions between the two groups. The Board found particularly significant the fact that the unit conformed to the departmental lines established by the employer with regard to the sales employees in the cosmetics and fragrances department.

4. *Value City Furniture*, 08-RC-120674 (2014)

The Board (Members Hirozawa and Schiffer) agreed with the Acting Regional Director's finding that the petitioned-for unit of home furnishing consultants was appropriate under *Specialty Healthcare*, because the home furnishing consultants were readily identifiable as a group and shared a community of interest, and the Employer did not establish that the home furnishing consultants shared an overwhelming community of interest with the other employees at the store. Member Johnson found no need to express a view on whether *Specialty Healthcare* was correctly decided or should be applied to this case, but he agreed that the petitioned-for unit was appropriate because under prior precedent, units of furniture store selling positions—such as the home furnishing consultants here—have been found to be appropriate, and the Employer had failed to present sufficient evidence for distinguishing this case from *Wickes Furniture*, 231 NLRB 154 (1977).

5. *Exposition Storage Services, LLC*, 28-RC-109730 (NLRB 2014)

The Board (Chairman Pearce and Member Hirozawa) adopted the hearing officer's findings and recommendations to sustain the challenges to four ballots cast in a representation election. The Board adopted the hearing officer's findings that the individuals who cast the challenged ballots were not seasonal employees. The panel majority stated that,

absent special circumstances, the question of whether those individuals would be considered to be casual employees under the standard set out in *Davison-Paxon Co*., 185 NLRB 21 (1970). The panel majority found that none of the voters in question were eligible under that formula, and that the Employer had shown no special circumstance that would warrant deviating from the formula. Accordingly, the panel majority certified the union as the exclusive collective-bargaining representative of the employees in the appropriate unit. Member Miscimarra stated that he would apply a modified version of the *Davison-Paxon* test, and would remand to the Region for a determination of whether two of the individuals who cast challenged ballots were eligible under that modified test.

6. *Hall Chevrolet, LLC*, 05-RC-126386 (NLRB 2014).

The Board (Chairman Pearce and Member Schiffer) agreed with the Regional Director's factual findings that the body shop unit sought by the Petitioner was appropriate for bargaining under *Specialty Healthcare.* The majority found that the body shop employees are readily identifiable as a group and share a community of interest. They work in a physically separate department, share some common terms and conditions of employment, and are separately supervised by their department manager. They are not interchanged with the employees in the Employer's service or parts departments, and they also possess skills, training, and job functions distinct from the other two departments. The majority found that, while there is significant functional integration, contact, and some common terms and conditions of employment among the three departments, the work of one department is not dependent on the others and these features do not create an "overwhelming community of interest" whose factors "overlap almost completely," such that there is "no legitimate basis" for excluding the other two departments from the unit. *Id*., slip op. at 11-13 and fn. 28.

II. Bargaining and Representation

A. Withdrawal of Recognition

1. *Heartland Human Services*, 359 N.L.R.B. No. 76 (2013), *enf'd Heartland Human Servs. v. N.L.R.B.*, 746 F.3d 802 (7th Cir. 2014)

The Board (Chairman Pearce and Members Griffin and Block) had granted the Acting General Counsel's motion for summary judgment for refusal to bargain on the grounds that the Respondent admitted the central factual allegations of the complaint and based its defense solely on the Union's loss of a decertification election and its assertion that the Board erred in ordering a re-run election. The Board found that the Union's majority status did not present a genuine issue of fact because no final certification had issued in the decertification case. The Board found that the Respondent had litigated the issue of the Board's order to re-run the election, and did not allege any special circumstances that would warrant further litigation of the issue in the unfair labor practice proceeding. The Board ordered the Respondent to cease and desist from advising unit employees that it would not recognize the Union due to the results of the decertification election. The Board also ordered the Respondent to recognize and bargain with the Union, attend a scheduled labor-management meeting on request, schedule dates to bargain with the Union on request, and give the Union information requested for bargaining.

The Seventh Circuit enforced the Board's order finding that the employer unlawfully repudiated its bargaining relationship with the union before the Board ruled on pending challenges and objections in the decertification election. It also held that it had no jurisdiction to review a Board decision directing a second election.

B. Bad Faith Bargaining/ Remedies

1. *Corbel Installations, Inc. & Commc'ns Workers of Am., Afl-Cio & Local 1430, Int'l Bhd. of Elec. Workers, Afl-Cio, Party to the Contract*, 360 NLRB No. 3 (2013)

The Board (Chairman Pearce and Members Hirozawa and Johnson) granted the Union's request to extend the certification year by 10-months. The Respondent acquired Falcon Data Com, Inc., the predecessor employer, in September 2012, less than 2 months after the Board's July 31, 2012 certification of the Union as the exclusive bargaining representative for a unit of Falcon's employees. As the successor, the Respondent was obligated to recognize and bargain with the Union. Instead, the Respondent refused to bargain with the Union, unlawfully recognized and entered into a contract with a different union, and attempted to coerce employees into accepting the other union. It was not until 2-1/2 months before the initial certification year would expire--that the Respondent finally began to bargain in good faith with the Union. The Respondent's prior unlawful conduct, however, prevented bargaining and undermined the Union until almost 10 months into the certification year. The Board found that a 10-month extension, measured from the end of the original certification year, would allow the Union the 1-year period of good-faith bargaining to which it is entitled.

2. *New Jersey State Opera*, 360 NLRB No. 5 (September 30, 2013)

The Board (Chairman Pearce and Members Miscimarra and Hirozawa) granted the Acting General Counsel's Motion for Default Judgment pursuant to the noncompliance provisions of a settlement agreement. The Board found that the Respondent failed to comply with the terms of the settlement agreement by refusing to fully remit back wages owed to its unit employees and refusing to remit dues on behalf of its unit employees to the Union in violation of Section 8(a)(5) and (1). The Board ordered the Respondent to honor and comply with the terms and conditions of the collective-bargaining agreement with the Union by paying unit employees the unpaid contractual wages and to make the unit employees whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful conduct. In addition the Board ordered the Respondent to reimburse the unit employees in an amount equal to the differences in taxes owed upon receipt of a lump-sum backpay payment and taxes that would have been owed had there been no discrimination against them, and to submit the appropriate documentation to the Social Security Administration so that when backpay is paid, it will be allocated to the appropriate periods. Further, the Board ordered the Respondent to remit contractual dues on behalf of its unit employees to the Union.

3. *Council 30, United Catering, Cafeteria and Vending Workers, RWDSU/UFCW (Awrey Bakeries, LLC)*, 360 NLRB No. 11 (2013)

The Board (Chairman Pearce and Members Hirozawa and Johnson) adopted the Administrative Law Judge's finding that the Respondent violated Section 8(b)(1)(B) of the Act by restraining or coercing the Employer in the selection of its representatives by conditioning the grant of concessions in bargaining on the Employer's discharge of its director of human resources. The Board amended the judge's recommended remedy to remove the requirement that the Respondent file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters, and to specify that the backpay period ended 5 days after the date the Respondent sent a letter to the Employer withdrawing its objections to the employment of the discharged director of human resources.

4. *Kephart Trucking Co.*, 360 NLRB No. 22 (2014)

The Board (Chairman Pearce and Members Johnson and Schiffer) granted the General Counsel's motion for a default judgment and found that the Respondent had violated Sections 8(a)(5) and (1) of the Act by failing and refusing to bargain with the Union about the effects of the Employer's closing its facility. The Board ordered the Respondent to bargain with the Union about the effects of that decision and, finding that a bargaining order alone was not an adequate remedy, also ordered the Respondent to pay backpay to unit employees in a manner similar to that required in *Transmarine Navigation Corp*., 170 NLRB 389 (1968).

5. *Hospital of Barstow, Inc. d/b/a Barstow Community Hospital and California Nurses Association/National Nurses Organizing Committee (CNA/NNOC), AFL-CIO*, 361 NLRB No. 34 (2014)

The Board (Chairman Pearce and Members Hirozawa and Johnson) found that the Respondent violated Section 8(a)(5) and (1) by refusing to offer proposals or counterproposals until the Union offered a full contract proposal, and by prematurely declaring impasse and refusing to bargain unless the Union directed employees to stop using a Union-provided "Assignment Despite Objection" form. Member Johnson concurred with the majority, but disagreed that the Respondent's request for a full set of proposals from the Union during bargaining itself was an unlawful refusal to bargain. The Respondent violated 8(a)(5) and (1) by unilaterally replacing its onsite, instructor-led classroom training with the online training program, which capped the number of training hours for which employees would be paid. The same Board majority affirmed the judge's recommendation for a full 1-year extension of the certification year, and ordered reimbursement of the Union's negotiating expenses. Member Johnson, dissenting, found that an award of negotiation expenses was not warranted and he would only extend the certification year by 6 months.

C. Unilateral Changes/ Mandatory Subjects of Bargaining

1. *Heartland Human Servs. & Am. Fed'n of State, Cnty. & Mun. Employees*, 360 NLRB No. 8 (2013)

The Board (Chairman Pearce and Members Miscimarra and Hirozawa) granted the Acting General Counsel's motion for summary judgment, finding the Respondent violated Section 8(a)(5) and (1) of the Act by ceasing to give employees raises on their anniversary dates as required by its collective-bargaining agreement with the Union; changing its 401(k) plan and

provider; and increasing the premium for family and dependent health insurance benefits, all without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct. The Respondent claimed that its admitted conduct is not unlawful because of its reasonable belief that the Union did not enjoy the majority support of the employees in the collective-bargaining unit, based exclusively on the Union's loss of the June 4, 2012 representation election and the Board's erroneous direction to conduct a rerun election in Case 14-RD-063069.

Because the Respondent admitted the crucial factual allegations, the Board found no issues warranting a hearing, and the motion for summary judgment was granted.

2. *Mike-Sell's Potato Chip Co.*, 360 NLRB No. 28 (2014)

The Board (Members Miscimarra, Hirozawa, and Schiffer) adopted the Administrative Law Judge's finding that the Respondent violated Sections 8(a)(5) and (1) of the Act by unilaterally implementing the terms of its final offers to two bargaining units without first bargaining with the Union to impasse. The Board noted that it would have reached the same result even if it had not relied on the judge's finding that the Respondent set an arbitrary deadline for reaching a new agreement or on consideration of bargaining concessions offered by the Union after the Respondent's unilateral implementation of its final offer.

3. *Mi Pueblo Foods*, 360 NLRB No. 116 (2014)

The Board (Chairman Pearce and Member Hirozawa) found that under *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964), the Respondent violated Section 8(a)(5) of the Act by unilaterally implementing route and schedule changes, reducing the frequency or number of deliveries made by unit drivers from its distribution center to retail stores, eliminating or restricting backhauls and pick-ups of products and subcontracting that work, and laying off six unit drivers. The same panel majority, contrary to the Administrative Law Judge, also found that the Respondent violated Section 8(a)(5) by failing to bargain over its decision to eliminate the cross-docking of certain of its products and the effects of that decision. In so finding, the majority explained that an employer is required to bargain over a decision to assign work previously performed by unit drivers to a subcontractor, and rejected the Respondent's argument that it was not required to bargain because the unit experienced no overall loss of work.

4. *Columbia College Chicago*, 360 NLRB No. 122 (2014)

The Board (Members Johnson, Hirozawa and Schiffer) affirmed the Administrative Law Judge's findings that the Respondent violated Section 8(a)(5) of the Act by changing its method of assigning courses to part-time faculty members without bargaining over the effects of that change with the Union, and that the broad management rights clause in the collective-bargaining agreement did not act as a waiver of effects bargaining rights by the Union. The Board also affirmed the judge's finding that the Respondent violated Section 8(a)(5) by failing to adequately respond to the Union's information request.

5. *Salem Hospital Corporation*, 60 NLRB No. 95 (2014)

The Board (Chairman Pearce and Members Hirozawa and Schiffer) affirmed the Administrative Law Judge's finding that Respondent violated Section 8(a)(5) and (1) by failing and refusing to provide the Union with information it requested, and by unilaterally changing its dress code policy. The new dress code policy differed materially, substantially, and significantly from Respondent's established handbook provisions. The Board found that these changes had a significant financial impact on unit employees. In addition to imposing changed attire requirements, the revised dress code imposed a new disciplinary process for dress code violations. The Board found that unit employees faced a heightened prospect of discipline under the new policy because it imposed more stringent discipline and contained more restrictions than the past dress code.

6. *Mike-Sell's Potato Chip Co.*, 361 NLRB No. 23 (2014)

The Board adopted the Administrative Law Judge's finding that the Respondent violated the Act by making midterm modifications to the health and welfare provisions of its collective-bargaining agreement with the union. The Board ordered the Respondent to make whole the employees for all losses suffered as a result of the unlawful modifications, including depositing into the employees' health saving accounts the amounts it failed to contribute.

D. Failure to Furnish Information

1. *Bristol Manor Health Center*, 360 NLRB No. 7 (2013)

The Board (Members Miscimarra, Hirozawa and Schiffer) granted the Acting General Counsel's Motion for a Default Judgment pursuant to the noncompliance provisions of an informal settlement agreement. The Board noted that the Respondent's contentions that the information it had provided was "responsive" to the Union's request and that this information demonstrated its compliance with the collective-bargaining agreement failed to establish that it had fully complied with the settlement agreement and failed to raise any genuine issue of material fact warranting a hearing. The Board ordered the Respondent to cease and desist from failing to bargain in good faith by refusing to furnish the Union with requested information, and affirmatively ordered the Respondent to furnish the Union with the information it requested.

2. *Chapin Hill at Red Bank*, 360 NLRB No. 27 (2014)

The Board (Members Miscimarra, Hirozawa, and Schiffer) affirmed the Administrative Law Judge's conclusion that the Respondent violated Sections 8(a)(5) and (1) of the Act by refusing to furnish the Union with requested information. The Board agreed with the judge's finding that the Union's request was not rendered moot by the resolution of a grievance the Union has filed on behalf of a unit employee. The Board found that the requested information has present and continuing relevance for the Union to administer the parties' collective-bargaining agreement. Citing longstanding precedent, the Board also affirmed the judge's finding that deferral to arbitration was inappropriate. Member Miscimarra found it unnecessary to decide whether it would be appropriate to defer to arbitration of a dispute about information requested solely in connection with a pending grievance.

3. *Endo Painting Service, Inc.*, 360 NLRB No. 61 (2014)

The Board (Members Miscimarra, Hirozawa, and Schiffer) adopted an ALJ's findings that the Respondent violated Sections 8(a)(5) and (1) by failing and refusing to provide relevant information requested by the Union to aid its investigation of a pending grievance. The Board rejected the Respondent's argument that it was not required to provide the requested information because the pending grievance was not permitted under the parties' agreement, finding that it is well established that an employer is required to provide relevant requested information regardless of the potential merits of the grievance. The Board also adopted the judge's finding that the Respondent violated Sections 8(a)(5) and (1) by unreasonably delaying (for nearly three months) informing the Union that a requested organizational chart did not exist.

4. *United States Postal Service*, 361 NLRB No. 6 (2014)

The Board unanimously adopted the Administrative Law Judge's finding that the Respondent violated Section 8(a)(5) by stating, in response to a union information request for lists of applicants to certain open positions, that such lists did not exist and the Respondent was not required to create such documents. The Board found that, if any unit employees had applied for the open positions, such information would be presumptively relevant to the Union's status as bargaining agent, and the Respondent was required to, at a minimum, tell the Union if any unit employees had applied for the positions.

E. Representative Access

1. *Wellington Industries, Inc.*, 360 NLRB No. 14 (2013)

The Board (Chairman Pearce and Members Miscimarra and Johnson) adopted the Administrative Law Judge's finding that the employer violated Sections 8(a)(5) and (1) of the Act by refusing to accept one union's officer as a representative of an independent union in a grievance-arbitration proceeding. The certified representative of the bargaining unit, a small union with limited means, sought help in the grievance process from an officer of a larger union with greater resources. The Board concluded that the independent union had a statutory right to designate an officer of another union as its representative. The Board reversed the ALJ's award of attorneys' fees and other litigation expenses to the General Counsel and independent union. In doing so, Members Miscimarra and Johnson did not reach whether the Board has the authority to grant such fees and expenses.

2. *YRC Inc.*, 360 NLRB No. 90 (2014)

The Board (Members Miscimarra and Johnson) adopted the Administrative Law Judge's finding that the Respondent did not violate the Act by denying an employee's request for a *Weingarten* representative and then discontinuing the interview after the Employer asked an employee to explain his lateness. The Board also affirmed the Judge's finding that the Respondent did not violate the Act in later issuing discipline, while Member Schiffer, dissenting, found that the Respondent's issuance of discipline violated the Act because it was motivated by the employee's request for a representative. The Board majority agreed with the ALJ that the Employer gave the employee an opportunity to explain his delay before issuing the discipline and, absent other evidence of retaliatory motivation, the employer had the right to warn the employee for his conduct that, absent explanation, warranted discipline.

F. Duty of Fair Representation

1. *Amalgamated Transit Union Local No. 1498*, 360 NLRB No. 96 (2014)

The Board (Chairman Pearce and Member Hirozawa) reversed the Administrative Law Judge's finding that the Union violated its duty of fair representation by failing to timely request arbitration of the Charging Party's grievance, resulting in the forfeiture of his arbitral claim. The majority determined that because the Union neither ignored the grievance nor processed it in a perfunctory manner, but simply failed through mere negligence to timely file for arbitration, the evidence did not establish that it acted arbitrarily in breach of its duty of fair representation. The majority further observed that the Union's error in informing the Charging Party that the grievance was scheduled for arbitration was the product of its good-faith but mistaken belief that arbitration had been properly scheduled, rather than any deliberate misrepresentation. Dissenting, Member Miscimarra found that the Union had engaged in multiple cumulative lapses that, when viewed together, constituted gross negligence warranting a finding of a fair representation violation. He found that the Union repeatedly failed to undertake any reasonable steps over a lengthy period to confirm that arbitration was being pursued, where further inquiries could have resulted in further action by the Union.

III. Protected Concerted Activities

A. Discrimination/Discharge for Engaging in Protected Concerted Activities

1. *Encino Hospital Medical Center*, 360 NLRB No. 52 (2014)

The Board (Chairman Pearce and Members Miscimarra and Schiffer) unanimously adopted an ALJ's finding that Respondent Employer did not violate Sections 8(a)(3) and (1) of the Act by discharging an employee who had made false statements to a human resources representative. The Board found that the discharged employee's deliberately deceptive conduct was not protected, even assuming that certain related conduct was protected union activity, because the deceptive conduct was neither an integral nor a necessary part of the putative protected activity. The Board affirmed its rule that, in certain circumstances, an employee may lose the protections of the Act by engaging in conduct that is deliberately deceptive or maliciously false where there is no necessary link between the deception or falsification and the protected conduct.

2. *SFTC, LLC d/b/a Santa Fe Tortilla Co*., 360 NLRB No. 130 (2014)

The Board (Members Miscimarra, Hirozawa and Schiffer) adopted the Administrative Law Judge's findings that the Respondent violated Section 8(a)(3) of the Act by discharging two employees and transferring two other employees from its flour tortilla line to its corn tortilla line. They also found that the Respondent's plant manager violated Section 8(a)(1) by threatening an employee with unspecified reprisals for her protected activity when he told her she "should not stick her neck out for anyone because no one would stick their neck out for her," and by interrogating another employee by telling her that "somebody" had told him she was collecting signatures to get him fired. The Board found that other comments and questions from the plant manager were lawful because they were directly responsive to employees' complaints about working conditions and did not address their Section 7 activity.

3. *Fresh& Easy Neighborhood Market, Inc.*, 361 NLRB No. 12 (2014)

The Board (Chairman Pearce and Members Miscimarra, Hirozawa, Johnson, and Schiffer) found an employee was engaged in "concerted activity" for the purpose of "mutual aid or protection" within the meaning of the NLRA when she sought help from coworkers in raising a sexual harassment complaint to her employer. Noting that an employee's subjective motive for taking action is not relevant to whether that action was "concerted," or "for mutual aid or protection," the majority stated that the proper focus is "whether there is a link between the activity and matters concerning the workplace or employees' interests as employees."

Here, the employee sought assistance from her coworkers in raising a sexual harassment complaint. Even though she did not intend to pursue a joint complaint, she wanted her workers to be witnesses to the incident, and two of those coworkers stated they were aware of her intent to report it to management. This initial call to group action was enough to establish concerted activity; the employee need not have engaged in any further activity, they held.

Acknowledging that its holding was in conflict with *Holling Press*, the majority's solution was to overturn the Board's divided decision in that 2004 case, which "lies far outside the mainstream of Board precedent." Concluding this "outlier" ruling itself could not be reconciled with the body of established Board law (and Supreme Court precedent) that came before it, the Board overruled *Holling Press* to the extent it was inconsistent with its holding here.

However, the full five-member panel agreed that the employer did not violate Section 8(a)(1) when it questioned the employee about why she obtained witness statements from her coworkers and also when it instructed her not to obtain additional statements. Nor did the employer violate Section 8(a)(1) when the HR manager questioned the employee as to why she felt the need to obtain her coworkers' signatures on the document showing the reproduced whiteboard message. The questioning was narrowly tailored to enabling the employer to investigate both the employee's complaint, and her coworkers' complaints against her, and the HR manager legitimately believed the line of inquiry was important to the investigation. Moreover, there was no evidence the questioning delved any further than this narrowly tailored purpose, so a reasonable employee would perceive the questioning as part of a legitimate attempt "to gain a full picture of the events as part of her investigation."

4. *Hitachi Capital America Corp.*, 361 NLRB No. 19 (2014)

The Board (Members Hirozawa and Schiffer) affirmed the Administrative Law Judge's finding under *Wright Line* that the Respondent violated Section 8(a)(1) when it discharged an employee. The majority held that the employee engaged in protected concerted activity when she sent several emails to the Respondent's supervisors questioning the Respondent's new Inclement Weather Day policy, that the Respondent knew that the employee was raising a group complaint, and that the Respondent demonstrated animus towards the employee's activity by giving her a warning regarding the emails.

The same Board Panel majority also affirmed the judge's finding that the Respondent's rule prohibiting "inappropriate behavior while on company property" was unlawful. The majority found it unnecessary to determine whether the rule was facially

overbroad because the Respondent applied the rule to restrict the employee's exercise of her Section 7 rights. The majority also found it unnecessary to pass on the judge's finding that the employee was discharged pursuant to the rule.

5. *Murtis Taylor Human Services Systems*, 360 NLRB No. 66 (2014)

The Board (Chairman Pearce and Members Hirozawa and Johnson) adopted the judge's findings that the Respondent violated Section 8(a)(1) of the Act by investigating an employee for Medicaid fraud, requiring him to provide documentation confirming his immigration status and the declarations page for his automobile insurance, and restricting him from entering any of its facilities other than the facility where his workstation was located. The Board also found that the Respondent violated Section 8(a)(3) and (1) by suspending and warning the employee for his conduct in representing a fellow employee. In addition, the Board found that the Respondent violated Section 8(a)(5) and (1) by adopting a requirement that employees sign its notes of investigative interviews and attest to the veracity of those notes. Finally, the Board found that the Respondent violated Sections 8(a)(5), (3), and (1) by discharging another employee for refusing to sign the notes of his investigative interview.

6. *California Institute of Technology Jet Propulsion Laboratory*, 360 NLRB No. 63 (2014)

The Board (Chairman Pearce and Members Miscimarra and Hirozawa) unanimously affirmed the Administrative Law Judge's findings that the Respondent violated Section 8(a)(1) of the Act by discriminatorily issuing written warnings to five employees who used the Respondent's email system to communicate with their coworkers about a new background check requirement while permitting employees to use its email system for nonwork-related activities. The Board also unanimously affirmed the ALJ's findings that the Respondent did not violate Section 8(a)(1) of the Act by maintaining a rule requiring employees to "avoid any actions that could reasonably be expected to . . . discredit the [Respondent]" or disciplining employees pursuant to that rule.

7. *United States Postal Service*, 360 NLRB No. 79 (2014)

The Board (Chairman Pearce and Members Miscimarra and Hirozawa) unanimously reversed the Administrative Law Judge's finding that the Respondent violated Sec. 8(a)(1) by continuing to question an employee after he asserted his *Weingarten* right to union representation at an investigatory interview. There was no evidence that the second supervisor who spoke to the employee knew of the employee's previous request for union representation, and the second supervisor discontinued the conversation when the employee reiterated his request for representation. Member Miscimarra would also find that the second supervisor's sole question to the employee was not a further investigatory question that could have infringed on the employee's *Weingarten* rights. The Board also unanimously adopted the judge's finding that the Respondent violated Section 8(a)(1) by refusing to inform employees of the nature of an investigatory interview, and the judge's dismissal of an allegation that the Respondent violated Sec. 8(a)(3) and (4) by revoking an employee's previously-scheduled leave.

8. *Metro-West Ambulance Service, Inc.*, 360 NLRB No. 124 (2014)

The Board (Members Miscimarra, Johnson and Schiffer) adopted the ALJ's findings that the Respondent unlawfully took several adverse actions up to and including the discharge of the lead union activist among its employees. Specifically, the Respondent violated Sec. 8(a)(3) and (1) of the Act by suspending, demoting, and issuing a corrective action plan to the discriminatee based on perceived sarcastic comments he made to a supervisor (in the presence of a trainee) about the need for a union. The Board adopted the judge's findings that the Respondent violated Sec. 8(a)(1) of the Act by engaging in surveillance of employees in order to determine their union activities; enforcing rules prohibiting employees from wearing union pins and remaining on the property after their shifts; interrogating employees about their union activities and threatening an employee about his future prospects with the company because of his support for the union.

9. *Flex Frac Logistics, LLC and Silver Eagle Logistics, LLC, Joint Employers*, 360 NLRB No. 120 (2014)

The Board (Members Miscimarra, Hirozawa and Schiffer) affirmed the judge's finding on remand from the Board that the Respondent lawfully discharged an employee even though it was pursuant to an overbroad work rule. Applying *Continental Group*, 358 NLRB No. 39 (2011), the Board reasoned that although the employee's conduct arguably implicated the concerns underlying Section 7 of the Act, any chilling effect on employees would be minimal because the Respondent plainly discharged her for her gross misconduct of deliberately betraying the Respondent's clear confidentiality interests and harming the company. Member Miscimarra, agreeing with the outcome, would not have applied *Continental Group* because, in his view, the unprotected nature of the employee's conduct rendered her discharge lawful, whether or not the Respondent applied an overbroad rule.

10. *Inova Health System*, 360 NLRB No. 135 (2014)

The Board (Chairman Pearce and Members Miscimarra and Hirozawa) affirmed the Administrative Law Judge's findings that the Respondent violated the Act by suspending and then terminating an employee because she sent an email to management on behalf of herself and other nurses, telling the same employee that she could not discuss her discipline with anyone, suspending and then giving a final written warning to a second employee because she and other nurses concertedly protested the first employee's discharge, and failing to promote a third employee because she told a nursing colleague that she should not have voluntarily stayed late to work on an unscheduled surgery.

11. *Nichols Aluminum, LLC*, 361 NLRB No. 22 (2014)

Reversing the judge, the Board (Chairman Pearce and Members Hirozawa and Johnson) majority found that the Respondent violated Section 8(a)(3) by discharging an employee for making a "cut throat" gesture towards a coworker. The majority found that the Respondent expressed animus towards a recent strike by the timing of the employee's discharge and by conditioning the rehiring of returning strikers on a promise to not engage in a strike over the same dispute. The majority further found that the Respondent did not reasonably construe the employee's gesture as a threat of imminent harm that would justify discharge under its zero

tolerance policy, and that Respondent inconsistently enforced this policy and generally resolved verbal conflicts between employees through lesser means.

12. *Three D, LLC d/b/a Triple Play Sports Bar and Grille*, 361 NLRB No. 31 (2014)

The Board (Members Hirozawa, Schiffer, and Miscimarra) unanimously found that the Respondent violated Section 8(a)(1) of the Act by unlawfully discharging two employees for their protected, concerted participation in a Facebook discussion in which they complained about perceived errors in the employer's tax withholding calculations. One of the discharged employees was terminated for selecting the "like" option in responding to a Facebook posting. The other referred to the company's co-owner with an expletive. Furthermore, Respondent unlawfully threatened employees with discharge, interrogated them about their Facebook activity, and threatened one of the discharged employees with legal action because of his protected post. The Board stated that the test set out in *Atlantic Steel* is not well-suited to address statements involving employees' off-duty, off-site use of social media to communicate with other employees or with third parties. Rather, the Board concluded that the statements were neither disloyal nor defamatory under those standards and did not lose the Act's protection. The Board additionally found that the Respondent unlawfully informed the employees that they were being discharged because of their Facebook activity, that the Respondent unlawfully maintained a vague "Internet/Blogging" policy in its employee handbook, and that employees would reasonably read it to prohibit discussions relating to their terms and conditions of employment, especially in light of the unlawful discharges. Member Miscimarra dissented, finding that this was part of the *res gestae* of the unlawful termination and not a separate violation. He further found that the majority erroneously used the unlawful discharges to find the unrelated handbook policy unlawful.

B. Employer Interference or Coercion

1. *International Foam Packaging, LLC*, 360 NLRB No. 9 (2013)

The Board (Chairman Pearce and Members Miscimarra and Hirozawa) granted the Acting General Counsel's Motion for Default Judgment on the ground that the Respondent has withdrawn its answer to the complaint. Accordingly, the Board found that the Respondent violated Section 8(a)(1) of the Act by discharging two employees, requiring them to reapply for their former positions, and refusing to reinstate one of the employees, due to the employees' protected concerted activities.

2. *N.L.R.B. v. Allied Mech. Servs., Inc.*, 734 F.3d 486 (6th Cir. 2013)

The Sixth Circuit overturned a decision by the Board and held that an Employer's lawsuit against the Union was not filed to retaliate against the Union. This case arose out of a federal district court lawsuit that Allied Mechanical filed claiming, among other things, that Local 357 of the Plumbers & Pipefitters and its international union engaged in unlawful secondary action. The federal district court dismissed Allied's complaint, and the Sixth Circuit affirmed. The union then filed unfair labor practice charges, asserting that Allied's suit constituted unlawful retaliation under Section 8(a)(1) of the Act.

The Board applied a test for retaliatory litigation as explained by the Supreme Court in *BE&K Construction v. NLRB*, 536 U.S. 516 (2002). The Board finds a violation "only when the challenged legal action was (1) objectively baseless, and (2) subjectively baseless, (meaning that it was intended to retaliate against the union for its protected activity). The Board (Chairman Pearce and Member Beck, Member Hayes dissenting), applying this test, concluded that Allied's lawsuit was retaliatory.

Refusing to give the Board its ordinary deference since the First Amendment is an area outside the Board's expertise, the court held that under the circumstances, Allied could have reasonably believed it would win on the merits and there was no evidence "that Allied's motive was specifically to punish the unions through litigation costs. Rather, the record indicates that the retaliatory motive, if any, related to the 'ill will [that] is not uncommon in litigation.'"

3. *D.R. Horton, Inc. v. N.L.R.B.*, 737 F.3d 344, 349 (5th Cir. 2013)

The Board (Chairman Pearce and Members Becker and Hayes) found that by requiring only individual arbitration of employment-related claims and excluding access to any forum for collective claims, the employer interfered with employees' Section 7 right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." The Board found the employer's mandatory arbitration agreement unlawful because it contained an explicit restriction on protected activity, and because employees could reasonably construe it to prohibit filing charges with the Board. Furthermore, the Board found that this did not present a conflict between the NLRA and the Federal Arbitration Act's ("FAA") policy favoring the enforcement of arbitration agreements because the FAA was not intended to disturb substantive rights.

The Fifth Circuit, in a 2-1 decision, denied enforcement of the Board's decision, holding that under the FAA, arbitration agreements must be enforced as written unless they would be void under grounds sufficient to void any other contract, or if Congress has issued a "contrary congressional command." Agreeing with three other Circuit courts that had refused to defer to the Board's decision in *D.R. Horton* (*Richards v. Ernst & Young, LLP* (9th Cir.), *Sutherland v. Ernst & Young LLP* (2d Cir.), and *Owen v. Bristol Care, Inc*. (8th Cir.), the court rejected the argument that class action waivers in employment arbitration agreements violate the NLRA. Further, the court found that there is no Congressional command, either in the NLRA's text or legislative history, against the application of the FAA to employment disputes, and that no Congressional command can be inferred from an inherent conflict between the FAA's and the NLRA's purpose, particularly because the statutes have worked in tandem in the past.

The Fifth Circuit subsequently granted the Board's unopposed motion to recall the mandate, and agreed to afford the Board 45 days to decide whether to petition for a rehearing of the court's ruling. On March 13, 2014, the Board filed a petition for rehearing en banc.

4. *Pittsburgh Athletic Association*, 360 NLRB No. 18 (2013)

The Board (Chairman Pearce and Members Johnson and Schiffer) granted the General Counsel's motion for a default judgment in the absence of an answer to the consolidated complaint, and granted his motion to correct the motion for a default judgment.

The Board found that the Respondent violated Sections 8(a)(5) and (1) of the Act by failing to continue in effect the terms and conditions of the collective bargaining agreement, failing to remit to the Union dues and fees that had been deducted from the employees' wages, and unreasonably delaying furnishing the Union with the information it had requested. The Board ordered the Respondent to remit to the Union all withheld dues and fees that were deducted from the employees' wages, with interest.

5. *Phillips 66*, 360 NLRB No. 26 (2014)

The Board (Members Miscimarra, Hirozawa, and Schiffer) adopted the Administrative Law Judge's findings that the Respondent violated Section 8(a)(1) of the Act when a supervisor: (1) unlawfully threatened a lead operator by telling him that the Respondent probably would make the lead position salaried, effectively curtailing his and other leads' pay if the Union came in; (2) unlawfully asked an employee: "[w]hat's your opinion of this union thing?" and (3) unlawfully denied the Union use of the Respondent's property to hold an organizing event. With respect to the unlawful denial of access, the ALJ and the Board found that the Respondent had routinely permitted the Union, which represented a small unit of crane operators, and at least four other "in-house" unions that represented existing units, to hold their monthly membership meetings in a building on the Respondent's property. The Respondent objected only when the Union sought to use the property for an organizing event for some of the Respondent's unrepresented employees.

6. *K-Air Corporation*, 360 NLRB No. 30 (2014)

The Board (Members Miscimarra, Hirozawa, and Schiffer) adopted the Administrative Law Judge's findings that the Respondent's president violated Section 8(a)(1) of the Act by interrogating employees on whether they were union members, and violated Section 8(a)(3) by discharging an employee for his former union membership. In addition, the Board found that the Respondent's president unlawfully threatened employees who were union members in violation of Section 8(a)(1) by telling them that he "had no interest in having" or "did not want" union members as employees. The Board deferred to the compliance stage whether the unlawfully discharged employee was disqualified from reinstatement due to an alleged prior conviction and related misrepresentation on his employment application, and whether his remedial backpay period was tolled as of the date the Respondent completed the project on which the employee was hired.

7. *Edifice Restoration Contractors, Inc.*, 360 NLRB No. 29 (2014)

The Board (Chairman Pearce and Members Johnson and Schiffer) adopted the Administrative Law Judge's finding that the Respondent violated Section 8(a)(1) of the Act by unlawfully directing the Charging Party not to discuss his pay rate, and agreed with the judge that it was unnecessary to reach two additional allegations of pay-related comments. The Board also adopted the judge's dismissal of the allegation that the Respondent unlawfully discharged the Charging Party, but did not rely on the judge's discussion of the test to be applied under *Wright Line*, reasoning that, even assuming the Acting General Counsel met his initial burden of proving discriminatory motivation, the Respondent successfully rebutted it by establishing that it would have discharged the Charging Party in the absence of his protected activity.

8. *William Beaumont Hospital* (07-CA-093885) (2014)

An Administrative Law Judge held that that two work rules contained the Hospital's Code of Conduct were overbroad and could "reasonably chill" the exercise of workers' rights under Section 7 of the Act. The judge held that rules that banned comments or gestures "that exceed the bounds of fair criticism," or that forbid behavior "counter to promoting teamwork" could reasonably be interpreted as prohibiting lawful discussions or complaints that are protected by Section 7 of the Act. Despite finding the rule to be unlawful, the judge declined to accept the General Counsel's challenge to the discipline of employees who were allegedly discharged as a result of the rules. The judge noted that both workers' behavior would have led to their termination regardless of the Code.

9. *Unite Here Local 355 v. Mulhall*, 133 S.Ct. 970 (2013)

A two-judge majority of the Eleventh Circuit ruled that while employers and Unions may set "ground rules" for an organizing campaign through a neutrality agreement, some agreements could violate §302 of the LMRA. The court held that while "innocuous ground rules can become illegal payments if used as valuable consideration in a scheme to corrupt a union or to extort a benefit from an employer[,] . . . . an employer's decision to remain neutral or cooperate during an organizing campaign does not constitute a § 302 violation unless the assistance is an improper payment."

The Eleventh Circuit majority remanded the case to determine whether the memorandum of understanding between the employer and the union had a corrupting intent. Local 355 petitioned the Supreme Court for certiorari, which the Court granted in June 2013. On December 13, 2013, the Supreme Court dismissed the writ of certiorari as "improvidently granted." On January 31, 2014, Local 355 voluntarily dismissed its suit to compel arbitration, and Mulhall voluntarily dismissed his suit.

10. *Ralphs Grocery Company and United Food and Commercial Workers Union, Local 324*, 361 NLRB No. 9 (2014)

The Board (Chairman Pearce and Members Johnson and Schiffer) adopted the Administrative Law Judge's findings that the Respondent violated the Act by requiring an employee to submit to a drug and alcohol test notwithstanding his request for representation, and by suspending and discharging the employee for his refusal to take the test without representation. The Board determined that the reason for employee's suspension and discharge was inextricably linked to his assertion of his *Weingarten* rights.

11. *Laurus Technical Institute*, 360 NLRB No. 133 (2014)

The Board (Chairman Pearce, and Members Miscimarra and Hirozawa) affirmed the Administrative Law Judge's finding that the Respondent violated Section 8(a)(1) of the Act by discharging an employee for her protected concerted activity, including repeated discussions with her coworkers about work-related issues. Concurring in finding the violation, Member Miscimarra found this to be a dual-motive case in which the Respondent failed to carry its burden under *Wright Line*, 251 NLRB 1083 (1980). The Board also adopted the judge's finding that the Respondent violated Section 8(a)(1) by maintaining an overly broad no-gossip policy.

12. *Hills and Dales General Hospital*, 360 NLRB No. 70 (2014)

The Board (Chairman Pearce and Members Schiffer and Johnson) adopted the Administrative Law Judge's findings that the Respondent violated Section 8(a)(1) by maintaining a policy requiring employees "not [to] make negative comments about fellow team members (which included coworkers and managers)" and stating that employees will "not engage in or listen to negativity or gossip." The Board rejected the argument that the judge erred in finding these rules overbroad and ambiguous by their own terms. Additionally, the Board reversed the Administrative Law Judge's finding that the Respondent had violated Section 8(a)(1) by stating in the policy that employees will "represent [the Respondent] in the community in a positive and professional manner in every opportunity."

13. *Greater Omaha Packing Co., Inc.*, 360 NLRB No. 62 (2014)

The Board (Chairman Pearce and Members Hirozawa and Johnson) adopted the ALJ's finding that the Respondent violated Section 8(a)(1) by discharging three employees for organizing a work stoppage to protest certain terms and conditions of employment. The Board further found, contrary to the judge, that separate Section 8(a)(1) allegations concerning statements made during the meetings in which the Respondent discharged these employees were not duplicative of the discharge violations and thus warranted separate consideration on the merits. The Board found that rhetorical questions coercively conveying the Respondent's displeasure with an employee's protected activity violated Section 8(a)(1). The Board also found that the Respondent unlawfully created the impression that it was monitoring employees' protected concerted activity when its managers told two employees that they were aware of the employees' role in organizing the work stoppage. Member Johnson, noting that employees often worked in close proximity to their supervisors and openly discussed the walkout at the workplace, found that employees would not reasonably infer from the Respondent's statements that knowledge or suspicion of the employees' roles in protected activity resulted from managerial surveillance.

14. *American Baptist Homes of the West d/b/a Piedmont Gardens*, 360 NLRB No. 100 (2014)

The Board (Members Miscimarra, Johnson and Schiffer) unanimously adopted the Administrative Law Judge's finding that the Respondent violated Section 8(a)(1) by posting a sign in an employee break room prohibiting union meetings there, where the union had a right to hold meetings under the terms of an expired collective-bargaining agreement. Members Johnson and Schiffer adopted the judge's finding that the Respondent also violated Section 8(a)(1) by maintaining a facially invalid off-duty access rule in its employee handbook. Members Johnson and Schiffer further found that the Respondent violated Section 8(a)(1) by enforcing that rule against two off-duty employees who sought to attend a scheduled meeting during which employees, in the presence of a union agent, were to communicate their complaints to management. Member Miscimarra agreed with his colleagues that the Respondent unlawfully enforced the access rule against the two employees, but disagreed with their conclusion that the rule was facially unlawful.

15. *Healthbridge Management, LLC*, 360 NLRB No. 118 (2014)

The Board (Members Miscimarra, Hirozawa and Schiffer) affirmed the Administrative Law Judge's finding that, under *Bethlehem Steel Co.*, 136 NLRB 1500 (1962), the Respondent did not violate Section 8(a)(1) and (5) by ceasing to honor employees' dues-checkoff authorizations after the expiration of the parties' collective-bargaining agreements. Although the Board overruled *Bethlehem Steel* in *WKYC-TV*, 359 NLRB No. 30 (2012), the Board decided only to apply the new rule prospectively. The Board also unanimously affirmed the Judge's finding that the Respondent violated Section 8(a)(1) by removing from a union bulletin board flyers stating that the Respondent had been "Busted" by the NLRB and by prohibiting employees at certain facilities from wearing stickers bearing the same "Busted" message in all areas of the facility. Members Hirozawa and Schiffer adopted the Judge's finding that the Respondent also violated Section 8(a)(1) by prohibiting employees at additional facilities from wearing the "Busted" sticker in immediate patient care areas. The majority stated that although bans limited to immediate patient care areas ordinarily enjoy a presumption of validity, under *Saint John's Health Center*, 357 NLRB No. 170 (2011), an employer must demonstrate the existence of "special circumstances" to justify a selective ban on only some nonofficial insignia. The Board majority found that the Respondent had not met that burden.

16. *Auto Nation, Inc. and Village Motors, LLC, d/b/a Libertyville Toyota*, 360 NLRB No. 141 (2014)

The Board (Members Miscimarra, Hirozawa and Schiffer) adopted the Administrative Law Judge's findings that the Respondent committed numerous violations of Section 8(a)(1) through statements made at a meeting with employees, including implicit threats that it would be futile to select the Union as the bargaining representative and threats that employees would be blacklisted and demoted if they supported the Union. Members Hirozawa and Schiffer also adopted the Judge's finding that the Respondent made an implied promise of pay raises if employees rejected the Union. The Board affirmed the Judge's finding that the Respondent did not violate Section 8(a)(3) when it suspended an employee because the Respondent had met its *Wright Line* burden of showing that it would have suspended the employee even absent his union activity, Members Hirozawa and Schiffer, however, reversed the Judge's finding that the Respondent did not violate Section 8(a)(3) by discharging the employee. Applying *Wright Line*, the Board found that the Respondent's claim that it fired the employee for job abandonment was pretextual.

17. *Modern Management Services, LLC d/b/a The Modern Honolulu*, 361 NLRB No. 24 (2014)

The Board (Chairman Pearce and Members Hirozawa and Johnson) adopted the Administrative Law Judge's finding that the Respondent violated Section 8(a)(1) by interrogating employees about their union activity and by refusing an employee's request for representation during an investigatory interview. Further, the Board found that the Respondent violated Section 8(a)(5) and (1) by denying a former employee access to the Respondent's facility in her capacity as an agent of the Union. Respondent violated Section 8(a)(1) by surveilling employees' union activity, creating the impression that it was monitoring such activity, and discharging an employee for engaging in protected concerted activity. The majority found that the judge's finding of the unalleged impression of surveillance violation did not deprive the Respondent of due process because the facts that formed the basis for the violation

were fully litigated by the parties and the issue was closely connected to the surveillance and impression of surveillance allegations.

18. *UNF West, Inc. (United Natural Foods, Inc.),* 361 NLRB No. 42 (2014)

The Board (Chairman Pearce and Members Hirozawa and Johnson) adopted the judge's findings that the Employer violated the Act by: (a) coercively questioning employees about their union activities; (b) threatening employees by telling them that it would be futile to select union representation; (c) threatening employees with the loss of their 401(k) and other benefits if they selected the Union to represent them; (d) threatening employees who engaged in union activities by telling them that management was looking for a way to fire them; and (e) threatening employees by telling them that their working conditions would not improve until they quit complaining to the Union and the Board.

19. *Durham School Services, L.P.*, 361 NLRB No. 44 (2014)

The Board (Members Miscimarra, Johnson, and Schiffer) adopted the judge's finding that the employer violated Section 8(a)(1) by creating the impression of surveillance and engaging in surveillance when a supervisor stood in front of the facility and took notes while the Union was distributing literature, which activity was unusual for her and unrelated to her normal duties, and was observed doing so by employees.

C. Union Interference/Coercion

1. *Newspaper and Mail Deliverers' Union of New York and Vicinity (NYP Holdings, Inc., d/b/a New York Post),* 361 NLRB No. 26 (2014)

The Board unanimously held that Respondent Union violated Section 8(b)(1)(A) and (2) of the Act by entering into and enforcing separate agreements with the New York Post (the Post) and the New York Times (the Times) which gave the bargaining unit employees of City and Suburban Wholesalers (C&S), a wholly owned subsidiary of the Times, preference in transfers to the Post and the Times when C&S closed in early 2009. The Union's use of "industry-wide priority numbers" to set the priority of former C&S employee transfers to the Post and the Times was unlawful because it gave priority to certain former C&S employees based on their union membership and/or their seniority arising from their work for union signatory employers over other employees (whether of the Post or C&S), whose seniority was based solely on their seniority within their own bargaining units. The Union also violated the Act because the agreement also gave some former C&S unit employees preference in opting for buyouts over other C&S unit employees based on union rather than unit seniority.

As to the Post case, the Board held that the Union violated Section 8(b)(1)(A) and (2) by: (a) maintaining and enforcing a provision of the parties' collective-bargaining agreement that gave certain employees of other union-signatory employers automatic preference in hiring on a daily basis at the Post based on their industry-wide priority numbers over certain Post employees who were not union members; and (b) placing a "freeze" on the promotion of the Post's own employees who were not union members so that former C&S employees could transfer to positions at the Post based on their union seniority, positions that, but for the freeze, the Post's own employees would have filled. The Union violated Section 8(b)(1)(A) by (1)

failing to inform Post employees whom it sought to obligate to pay dues of their right to be and remain nonmembers, and the rights of nonmembers to object to paying, and to obtain a reduction for, union activities not germane to the Union's duties as a bargaining agent; and (2) threatening to bar a former C&S employee from employment because of an alleged dues arrearage since the Union did not establish that the employee actually incurred the purported dues arrearage at issue, and regardless, the threat was unlawful as it precluded the employee from employment at "any employer" whose employees were covered by a union contract in a bargaining unit separate from the C&S unit.

IV. Miscellaneous

A. Beck Issues

1. *International Brotherhood of Teamsters, Local Union No. 89 (United Parcel Service, Inc.)*, 361 NLRB No. 5 (2014)

The Board (Chairman Pearce and Members Miscimarra and Hirozawa) found that the Respondent Union did not violate Section 8(b)(1)(A) by collecting or seeking continued payment of *Beck* financial core fees from a former member whom it had lawfully expelled for disloyal misconduct; by failing to inform the former member that he had no dues obligation after his expulsion; or by threatening to sue the former member for unpaid dues in state court. The Board found that *Johnson Controls World Services*, 326 NLRB 8 (1998), the sole authority on which the General Counsel relied, was inapplicable because the Union did not threaten the employee's discharge.

2. *United Food & Commercial Workers International Union, Local 700 (Kroger Limited Partnership*), 361 NLRB No. 39 (2014)

The full Board (Chairman Pearce and Members Hirozawa, Miscimarra, Johnson, and Schiffer) revisited the appropriate timing of a union's notification to employees (subject to a union-security clause) of the specific amount of reduced fees and dues they would pay if they became non-members objectors. A Board majority found that a union is not required to calculate and provide such detailed information until an employee elects nonmember status and then takes the additional step of objecting to paying for nonrepresentational expenses. The majority held that the Union properly relied on that precedent when it advised the Charging Party of the specific amount of the reduced dues and fees applicable to nonmember objectors only after she resigned her membership and requested objector status. The General Counsel urged the Board to hold that the duty of fair representation requires every union to provide each one of its represented employees with specific reduced payment information when the union first informs the employee of her obligations to pay dues under a union-security clause, even in the absence of an employee's request for information about or objection to the union's regular fees and dues. The majority held, however, that the Board's established rule strikes the most reasonable balance between the competing interests at stake.

B. Remedies

1. *N.L.R.B. v. Atl. Veal & Lamb, Inc.*, 12-3485-AG, 2013 WL 6439356 (2d Cir. Dec. 10, 2013)

The Board (Chairman Pearce and Members Griffin and Hayes) found that the employer unlawfully discharged a 14-year employee for engaging in protected union activity and ordered the employer to reinstate the employee with backpay. The employer disputed the Region's backpay calculations, and a compliance proceeding ensued. After a hearing and decision before an Administrative Law Judge, the Board issued two orders. In the first Supplemental Decision and Order, it directed the employer to pay the employee a specific amount of backpay. In the second, the Board concluded that the employee diligently searched for work and rejected the employer's argument that the employee was not entitled to backpay because he willfully concealed earnings from the Board.

The Second Circuit enforced the Board's first supplemental decision and order, which was not challenged. As to the second supplemental decision and order, the court agreed that the employee diligently searched for work during the period in question. The court applied Board law holding that, "'the backpay claimant should receive the benefit of any doubt rather than the [respondent], the wrongdoer'" and enforced that portion of the Board's order. The court disagreed with the Board, however, on whether the employee willfully concealed earnings and refused to award backpay during the disputed quarters.

2. *California Nurses Association, National Nurses Organizing Committee (Henry Mayo Newhall Memorial Hospital)*, 360 NLRB No. 21 (2014)

The Board (Chairman Pearce and Members Hirozawa and Schiffer) granted the Respondent Union's motion for reconsideration of its July 2, 2013 Decision and Order, 359 NLRB No. 150, to remove the "like or related manner" language from its Order in light of the Board's finding that the respondent only violated Section 8(b)(3), and did not violate Section 8(b)(1)(A). The Board granted the motion because the Board's general injunctive language for Section 8(b)(1)(A) violations--ordering a party to cease and desist from "[i]n any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act"--is not appropriate where a party has only violated Section 8(b)(3).

3. *Interstate Bakeries Corp.* 360 NLRB No. 23 (2014)

The Board (Chairman Pearce and Members Miscimarra and Hirozawa) issued a supplemental decision and order in this compliance proceeding, directing the Respondent Employer and Union to, jointly and severally, make whole a discriminatee by paying him $46,360.45 plus interest, minus tax withholdings required by Federal and State laws. The majority reversed the Administrative Law Judge's requirement that the Respondents pay the discriminatee for the prepaid mortgage interest and hazard insurance incurred by him in the purchase of a new home.

4. *Tortillas Don Chavas*, 361 NLRB No. 10 (2014)

A unanimous Board (Chairman Pearce and Members Johnson and Schiffer) adopted the Administrative Law Judge's findings that the Respondent violated Section 8(a)(1) by transferring an employee from the morning shift to the night shift because she engaged in protected activity by protesting a supervisor's sexual harassment of female employees; constructively discharging the employee through this shift transfer because the night shift

conflicted with her childcare responsibilities; and threatening and discharging two other employees for engaging in a work stoppage to protest poor working conditions. The Board also reversed the judge's dismissal of the allegation that the Respondent violated Section 8(a)(1) by transferring one of the employees to the night shift because of her prior protected activity after she returned from her first unlawful discharge.

In light of the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), the Board also considered de novo the rationale for the tax compensation and Social Security reporting remedies that the Board announced in *Latino Express, Inc.*, 359 NLRB No. 44 (2012). The Board found that, in this case and in all pending and future cases in which the Board finds a violation of the Act that results in make-whole relief, the Board will continue routinely to require the respondent to (1) submit the appropriate documentation to the Social Security Administration (SSA) so that when backpay is paid, it will be allocated to the appropriate calendar quarters, and/or (2) reimburse the discriminatee(s) for any additional Federal and State income taxes discriminatee(s) may owe as a consequence of receiving a lump-sum backpay award in a calendar year rather than in the year in which the income would have been earned had the Act not been violated.

5. *Durham School Services, L.P.*, 360 NLRB No. 85 (2014)

The full Board adopted the Administrative Law Judge's finding that the employer violated Section 8(a)(3) and (1) of the Act by discharging an employee shortly before a representation election. In so ruling, the Board adopted the judge's finding that the employee was terminated because of her union activities in order to discourage her from voting in the election. In addition to upholding the violation, the Board adopted the judge's finding that the election results should be set aside because of the employee's discharge and the Employer's objectionable off-duty access and social networking policies. Members Miscimarra and Johnson relied solely on the unlawful discharge in overturning the election. The Board directed a new election.

The remedial order included a new form of notice to employees. The revised notice contained a hyperlink to the Board's decision and order on the Agency's website, an electronic address where employees may obtain a copy of the decision, and an address and telephone number that employees may use to obtain a hard copy of the decision.

6. *Dentz Painting, Inc.*, 08-CA-083055, 361 NLRB No. 40 (2014)

The Board (Members Miscimarra, Hirozawa, and Johnson) granted the General Counsel's motion for a default judgment based on the Respondents' failure to file an answer to the complaint. Respondents violated Section 8(a)(3) and (1) by failing and refusing to continue to employ the unit employees of Respondent Dentz because they engaged in protected activities. In addition, Respondents violated Section 8(a)(5) and (1) of the Act by failing to continue in effect all terms and conditions of their collective-bargaining agreement with the Charging Party Union, bypassing the Union and dealing directly with employees with respect to wages and other terms and conditions of employment by discussing and negotiating individual pay rates and benefits, and failing to furnish the Union with necessary and relevant information that it had requested. The Board ordered the Respondents to make the unit employees whole for any loss of earnings or other benefits they may have suffered as a result of the Respondents' unlawful

conduct, with interest, to reinstate the employees, and to remove from their files all references to the unlawful failure to continue to employ the unit employees. Respondents were also ordered to bargain with the Union on request, continue in effect all of the terms and conditions of employment contained in their agreements with the Union, rescind unilateral changes on request, and furnish the Union with the information it requested.

C. Supervisory Status

1. *Community Education Centers, Inc.*, 360 NLRB No. 17 (2014)

The Board (Chairman Pearce and Members Hirozawa and Miscimarra) granted the Employer's request for review as to whether Acting Regional Director correctly found that the Shift and Unit Supervisors ("Supervisors") working at the Employer's Logan Hall facility did not possess the authority to "responsibly direct" the Employer's Operations and Unit Counselors ("Counselors"), and therefore should not be excluded from voting. The Board majority (Chairman Pearce and Member Hirozawa) found that, contrary to the Acting Regional Director, the Supervisors did possess the authority to take corrective action regarding a Counselor's deficient performance. The majority, however, affirmed the Acting Regional Director's overall finding that the Supervisors did not "responsibly direct" the Counselors because the Employer did not satisfy its burden of demonstrating that the Supervisors exercised this authority utilizing independent judgment. Accordingly, the majority found the employees were not statutory supervisors.

2. *Beth Israel Medical Center*, 02-RC-121992 (2014)

The Board (Chairman Pearce and Member Schiffer) denied the Employer's request for review of the Regional Director's Decision and Direction of Election. The Regional Director found that the Employer's medical interns, residents, chief residents, and fellows were statutory employees based on a factual analysis that applied the standards set forth in *Boston Medical Center Corp.*, 330 NLRB 152 (1999) and *St. Barnabas Hospital*, 355 NLRB 233 (2010). The Board majority found that the Employer's reliance on *Brown University*, 342 NLRB 483 (2004), was misplaced because, for the reasons stated in *St. Barnabas Hospital*, Brown was not controlling in this case. The Board noted that the Employer had not asked it to revisit or overrule *Boston Medical Center Corp*., but instead argued that the present case was factually distinguishable from that case and *St. Barnabas*. The panel majority stated that, although the Employer had identified certain factual differences, these differences did not significantly implicate the considerations analyzed by and relied upon by the Board in those decisions.

3. *The Republican Company*, 361 NLRB No. 15 (2014)

The Board (Chairman Pearce and Members Miscimarra and Hirozawa) unanimously reversed the Regional Director and found that an Editorial Page Editor should be excluded from the unit as a managerial employee. The Board also unanimously affirmed the Regional Director's findings that an Assistant Classified Manager was not a statutory supervisor. A Board panel majority consisting of Chairman Pearce and Member Hirozawa further affirmed the Regional Director's finding that an Electrical Manager was not a statutory supervisor. The Board found that the Editorial Page Editor was a managerial employee based on his role in

formulating, determining, and effectuating the newspaper's editorial policies. The Board found that the Employer had failed to meet its burden to establish that the Assistant Classified Manager hired or effectively recommended the hiring of employees. The Board concluded that the classified manager's direct participation in the hiring process supported a conclusion that he did not effectively recommend hiring. Similarly, a panel majority of Chairman Pearce and Member Hirozawa found that the Employer failed to meet its burden of demonstrating that the Electrical Manager effectively recommended hiring.

D. Board Quorum and Authority

1. *Gestamp S. Carolina, L.L.C. v. N.L.R.B.*, 11-2362, 2013 WL 5630054 (4th Cir. Oct. 16, 2013) (Petition for Certiorari Filed March 13, 2014)

In an unpublished decision, the Court of Appeals for the Fourth Circuit denied enforcement of a Board decision and held that the President's recess appointment of Board Member Becker was constitutionally invalid. In December 2011, the Board (Chairman Pearce and Members Becker and Hayes) found that the employer unlawfully threatened, disciplined and discharged two employees who attempted to organize a union. The employer filed a petition for review, raising substantial evidence challenges to the Board's order.

Following argument, the employer submitted a series of letters contending for the first time that the Board's order was invalid because Member Becker's appointment was infirm. It relied on the D.C. Circuit's opinion in *Noel Canning, Inc. v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), cert. granted, 133 S. Ct. 2861 (Jun. 24, 2013), and the Fourth's Circuit's subsequent decision in *NLRB v. Enterprise Leasing S.E.*, 722 F.3d 609 (4th Cir. 2013). The Board argued that the employer's arguments had been waived. The court, without explicitly addressing the waiver argument, concluded that Board Member Becker's appointment was invalid and the Board lacked a quorum when it issued its decision in this case, and remanded the case to the Board for further proceedings.

2. *Ambassador Servs., Inc. v. N.L.R.B.*, 12-15124, 2013 WL 6037134 (11th Cir. Nov. 15, 2013) *cert. granted, Ambassador Servs., Inc. v. N.L.R.B.*, 134 S. Ct. 2901 (2014)

An Administrative Law Judge previously found that the employer had violated the Act by maintaining an unlawfully broad no-solicitation rule and by failing and refusing to recognize and bargain with the Union. In a 2012 Decision and Order, the Board affirmed the ALJ's findings, and found additional violations of the Act.

On appeal to the Eleventh Circuit, the employer asserted that the Board lacked a quorum and the authority to issue its order. The court rejected the employer's argument based on its prior decision in *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), in which the court upheld President George W. Bush's intra-session appointment of a judge to the Eleventh Circuit based on the Constitution's Recess Appointments Clause. The court also found that there was substantial evidence to support the Board's determinations as to the employer's commission of various unfair labor practices. Based upon its findings, the Eleventh Circuit denied the

employer's petition for review and granted the Board's cross-petition for enforcement of its order in full.

The Employer petitioned for writ of certiorari, which was granted. On July 1, 2014, the Supreme Court vacated the judgment and remanded the case to the Eleventh Circuit for further consideration in light of *Noel Canning*.

3. *Teamsters Local Union No. 455 v. NLRB (Harborlite Corp.),* 357 NLRB No. 151, *petition for review denied in* 2014 WL 4214920 (10th Cir. Aug. 27, 2014)

The Board (Chairman Pearce and Members Becker and Hayes) found that the employer violated Section 8(a)(1) by threatening to lock out and permanently replace unit employees unless the union agreed to its bargaining demands. The Board, however, dismissed the second allegation, that the employer violated Section 8(a)(3) and (1) by locking out unit employees while informing them that they would be permanently replaced. The Union petitioned for review.

On an appeal heard after the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (June 26, 2014), the 10th Circuit Court of Appeals held that because Member Becker "was appointed during an intra-session recess exceeding two weeks…there seems little reason to doubt the validity of [his] appointment." The Court suggested that *Noel Canning* might establish only a presumption, not a categorical rule, that recesses of 10 days or more are long enough to trigger the President's authority under the Recess Appointments Clause. The Court also held that even where a Board order was "invalid and issued without authority, . . . none of that would destroy our jurisdiction to hear the case." Finally, the Court rejected the union's contention that a previously lawful lockout becomes unlawful when an employer "threatens to hire not temporary workers but permanent ones." Rather, there was no record evidence that "the hastily made and quickly withdrawn threat did anything to harm the parties' collective bargaining efforts or impeded resolution of the labor dispute."

4. *Noel Canning v. N.L.R.B.*, 705 F.3d 490, 506 (D.C. Cir. 2013) *cert. granted*, 133 S. Ct. 2861 (U.S. 2013)

The Court of Appeals for the D.C. Circuit held that the National Labor Relations Board did not have authority to act due to lack of a valid quorum, as three members of the five-member Board were never validly appointed under the Recess Appointments Clause of the Constitution.

Petitioner asserted that the Board lacked authority to act for want of a quorum because three members of the five-member Board took office when the Senate was not in recess. The Board contended that the President validly made the appointments under the "Recess Appointments Clause," which provides that "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." The court held that a valid "Recess" appointment could only be made during intersession recesses, and found that the President made his appointments to the Board on January 3, 2012, after Congress had begun a new session,

rendering the appointments invalid. Because the Board must have a quorum in order to lawfully take action, the court held that the Board lacked the authority to act when it issued its earlier decision, and vacated the Board's order in the underlying unfair labor practice charge.

The NLRB petitioned for a writ of certiorari, which the U.S. Supreme Court granted on June 24, 2013. Oral arguments were heard on January 13, 2014. The Court addressed the three questions on which it granted certiorari: (1) Whether the President's recess-appointment power may be exercised during a recess that occurs within a session of the Senate, or is instead limited to recesses that occur between enumerated sessions of the Senate; (2) whether the President's recess-appointment power may be exercised to fill vacancies that exist during a recess, or is instead limited to vacancies that first arose during that recess; and (3) whether the President's recess-appointment power may be exercised when the Senate is convening every three days in pro-forma sessions.

Addressing the first question, the Supreme Court held that the phrase "the recess of the Senate" was ambiguous and that the scope of the phrase must be interpreted broadly to include both inter-session and intra-session recesses. On the second question, the Supreme Court held that the Clause's phrase "vacancies that may happen during the recess of the Senate" applies to vacancies that first come into existence during a recess and to vacancies that initially occur before a recess but continue to exist during the recess.

Regarding the third question, the Supreme Court stated that for purposes of the Recess Appointments Clause, the Senate is in session when it says that it is in session, provided that, under its own rules, it retains the capacity to transact Senate business. The Court then held that here the Senate was in session during the *pro forma* sessions because the Senate said it was in session and had retained the power to conduct business. The Court noted that the Senate did in fact conduct business during a pro forma session in late December when it passed a bill by unanimous consent. The President, the Court therefore concluded, lacked the authority to make the January 2012 recess appointments during the three-day periods between the pro forma sessions because those three-day periods were too short to constitute a recess.

The Impact of *Noel Canning* on NLRB Decisions

The Supreme Court's decision in *Noel Canning* affected more than 700 hundred Board cases decided from January 4, 2012 to August 5, 2013. The full impact of *Noel Canning* remains to be seen.

The Board responded immediately to *Noel Canning*, with Chairman Pearce issuing a statement the day the decision was published: "We are analyzing the impact that the Court's decision has on Board cases in which the January 2012 recess appointees participated. Today, the National Labor Relations Board has a full contingent of five Senate-confirmed members who are prepared to fulfill our responsibility to enforce the National Labor Relations Act. The Agency is committed to resolving any cases affected by today's decision as expeditiously as possible." Since making this statement, the Board has begun to address the cases affected by the *Noel Canning* decision.

On July 9, 2014, General Counsel Griffin discussed during an American Bar Association webinar the steps being taken by the Board in light of *Noel Canning.* At that time, there were 98 cases on appeal in the federal courts that had been decided by the recess appointees. As the Board had not yet filed the record in 43 of the cases, it set aside the orders in these cases, thus obviating the need for further court review. In the 55 remaining cases, the Board filed motions asking the court to vacate and remand the cases to the Board.

There are several significant and/or controversial cases that were decided during the recess-appointee period that will be considered. A few of the relevant cases include:

- *Piedmont Gardens*, 359 N.L.R.B. No. 46 (2013): The Board adopted a balancing test, rather than a "categorical exemption," to determine whether a company must furnish to a union witness statements taken in connection with employee disciplinary actions.
- *Alan Ritchey, Inc.* 359 N.L.R.B. No 40 (2012): The Board held that an employer must bargain with a newly-certified union before imposing discretionary discipline during the period before the collective bargaining agreement is negotiated.
- *Costco Wholesale Corp.*, 358 N.L.R.B. No. 106 (2012): The Board held that a company rule prohibiting employees from posting on social media statements that could damage the company's or any person's reputation violated Section 7 of the Act.
- *Hispanics United Buffalo, Inc.*, 359 N.L.R.B. No. 37 (2012): In another social media case, the Board held that an employer that discharged 5 employees who had posted on Facebook responses to a co-worker's criticism of their work performance interfered with the workers' Section 7 rights.
- *Flex Frac Logistics*, 358 N.L.R.B. No. 127 (2012): The Board held unlawful a company's policy prohibiting employees from disclosing "personnel information and documents" to anyone outside of the company because the policy could reasonably be read as prohibiting wage discussions with other employees.

In addition to its impact on previously decided cases, *Noel Canning* potentially affected the appointment of Regional Directors, Administrative Law Judges and the restructuring of regional and headquarters offices. In a notice issued by the NLRB in August 2014, the Board "unanimously ratified all administrative, personnel and procurement matters taken by the Board from January 4, 2012 to August 5, 2013" so as to "remove any question concerning the validity of action undertaken during that period."

E. Procedure

1. *Random Acquisitions, LLC*, (07-CA-052473) (2013)

The Board (Chairman Pearce and Members Miscimarra and Hirozawa) denied the Acting General Counsel's motion for a default judgment despite the Respondent's failure to file

an answer to the amended compliance specification. While Section 102.56(c) of the Board's Rules and Regulations grants the Board the authority to grant motions for default judgment when the Respondent fails to file an answer to a specification within the prescribed 21 day time frame, the Board, applying the *Kolin Plumbing Corp.*, 337 NLRB 234, 235 (2001) reasoning, excused the Respondent from filing an amended answer when its answer would have been unchanged from its initial answer.

2. *The Pennsylvania Cyber Charter School*, 06-RC-120811 (2014)

The Board (Members Hirozawa and Schiffer) denied review of the Regional Director's finding that the Employer was not an exempt political subdivision under Section 2(2) of the Act. The Board followed its decision in *Chicago Mathematics & Science Academy*, 359 NLRB No. 41 (2012), in which it found that a charter school established and operated under Illinois law was not an exempt political subdivision. In dissent, Member Johnson stated that the Board should reconsider its interpretation of the test for determining whether a public charter school is an exempt political subdivision pursuant to *NLRB v. National Gas Utility District of Hawkins County*, 402 U.S. 600 (1971).

3. *H&M International Transportation, Inc.,* 22-CA-089596 (2014)

The Board (Members Hirozawa, Johnson, and Schiffer) denied the General Counsel's request for special permission to appeal from an administrative law judge's ruling that the cell phone memory card of a witness must be produced at the hearing for reliability purposes. The Board agreed with the judge and the General Counsel that the witness's testimony was likely sufficient to authenticate the recording that the witness made with his phone for admissibility purposes. However, the Board found that the General Counsel failed to establish that the judge abused her discretion in ordering production of the memory card for reliability purposes. The Board additionally found that production of the memory card should be subject to a protective order agreed upon by the parties or formulated by the judge.

4. *FJC Security Services Inc.*, 360 NLRB No. 115 (2014)

The Board (Chairman Pearce and Members Miscimarra and Schiffer) denied the Employer's Request for Review of the Regional Director's Decision and Direction of Election. In denying review, the Board stated that it did not rely on the Regional Director's finding that *UGL-UNICCO Service Co.*, 357 NLRB No. 76 (2011), and *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001), were inapplicable because the Employer and Intervenor had reached an agreement prior to the filing of the petition. Instead, the Board concluded that there was no successor bar at the time the petition was filed because a "reasonable period for bargaining" had elapsed. The Board noted that no party argued that the Board should modify or overrule *UGL-UNICCO*. Member Miscimarra concurred, but stated his view that *UGL-UNICCO* was inappropriate and inconsistent with the Act.

5. *Volkswagen Group of America, Inc.*, 10-RM-121704 (2014)

The Board (Members Miscimarra, Hirozawa, and Johnson) found that, in the unique circumstances of this case, the Acting Regional Director did not abuse her discretion in permitting seven of the Employer-Petitioner's employees and a corporation of which one of the

employees was a director to participate in the hearing on the Union's objections to conduct affecting the results of the election, for the limited purposes of (1) offering evidence in opposition to the objections, (2) cross-examining witnesses, and (3) filing briefs.

F. Proposed Regulations Regarding NLRB Election Procedures

On December 22, 2011, the National Labor Relations Board adopted a Final Rule on Election Procedures, which took effect on April 30, 2012. Two weeks after the Rules' effective date, the U.S. District Court for the District of Columbia temporarily suspended their implementation in *Chamber of Commerce v. NLRB* (11-cv-2262). While not ruling on the merits of the substantive arguments that were raised, the court held that because Member Hayes had not participated in the final vote on the Rules, the Board lacked a quorum when it approved them.

On February 6, 2014, The Board again proposed to amend its rules governing representation case procedures. These proposed procedures are identical to those that were originally proposed by the Board in June 2011.

The Board invited comments on the proposed rules in April 2014. The main changes embodied in the Rules are as follows:

Current procedures	**Proposed procedures**
Parties or the Board cannot electronically file or transmit representation case documents, including election petitions.	Election petitions, election notices, and voter lists may be transmitted electronically. NLRB regional offices can deliver notices and documents electronically rather than by mail, and may directly notify employees by email when email addresses are available.
	Along with a copy of the petition, parties would receive a description of NLRB representation case procedures, with rights and obligations, as well as a 'statement of position form' for parties to identify the issues they may want to raise at the pre-election hearing.
Practices regarding pre- and post-election hearings vary by Region.	The Regional Director would set a pre-election hearing to begin seven days after a hearing notice is served (absent special circumstances) and a post-election hearing fourteen days after the tally of ballots (or as soon thereafter as practicable).
	The parties would be required to state their positions no later than the start of the hearing, before any other evidence is accepted.
Allow pre-election litigation over voter-eligibility issues that may not affect the outcome of the election.	Litigation of eligibility issues involving less than twenty per cent of the bargaining unit would be deferred until after the election.

A list of voters is not provided until after an election has been directed.	The non-petitioning party would produce a preliminary voter list, including names, work location, shift, and classification, by the opening of the pre-election hearing.
The parties may request Board review of the Regional Director's pre-election rulings before the election, and they waive their right to seek review if they do not do so.	The parties would be permitted to seek review of all Regional Director rulings through a single, post-election request.
Under current procedures parties may seek Board review of Regional Director rulings.	The pre-election request for review would be eliminated.
The Board decides most post-election disputes.	The Board would have discretion to deny review of post-election rulings permitting Regional Directors to make final decisions in most cases.
The final voter list contains only names and home addresses.	Phone numbers and email addresses (when available) would be included on the final voter list.
Employers are given seven days after the direction of election to prepare and file a list of eligible voters.	The final voter list would be produced in electronic form, when possible, and the deadline would be shortened to two work days.
Representation case procedures are described in three different parts of the regulations.	Representation case procedures are consolidated into a single part of the regulations.

Source: http://www.nlrb.gov/news-outreach/fact-sheets/amendments-nlrb-election-rules-and-regulations-fact-sheet

G. General Counsel Initiatives:

General Counsel Richard Griffin issued two memoranda in 2014, GC 14-01 and GC 14-03, identifying his initiatives and policy objectives. In GC 14-01, the General Counsel summarized the types of cases that warrant further review from the Division of Advice, many of which include reconsidering significant labor law doctrines. In GC 14-03, titled "Affirmation of 10(j) Program," the General Counsel encourages Regional Directors in meritorious cases to aggressively seek injunctive relief. The following is a summary of the General Counsel's initiatives:

1. Perfectly Clear Successor Doctrine

Under existing precedent, as enunciated in *Spruce Up*, 209 NLRB 194 (1974), a successor employer in most instances is free to set initial terms and conditions of employment. However, when it is perfectly clear that the successor intends to hire all of the predecessor's employees in a bargaining unit, the successor employer must bargain with the incumbent union before establishing terms and conditions of employment. The General Counsel intends to

examine whether the circumstances that trigger the duty to bargain under the perfectly clear successor doctrine should be expanded. He has directed Regional Directors to submit all cases relating to this topic to the Division of Advice for further review.

2. Section 7 Right to Use an Employer's Email System

The General Counsel has urged the Board to overturn *Register Guard*, 351 NLRB 1110 (2007), to the extent it holds that employees have no statutory right to use their employer's email for Section 7 purposes. In April 2014, the Board invited the filing of briefs in *Purple Communications, Inc.* (Case No. 21-CA-095151), a case applying the *Register Guard* standard. In this case, the Administrative Law Judge found no Section 8(a)(1) violation where an employer prohibited the use of its email system for activity unrelated to the employer's business. The General Counsel submitted a brief asking the Board to overturn *Register Guard* and adopt a new rule permitting employees to use their employer's email for Section 7 activity, limited only by the need to maintain production and discipline. The General Counsel argued that electronic communication is the primary means of discourse in many workplaces and thus, "bans on all personal email abridge employees' fundamental right to engage in Section 7 workplace discourse during nonwork time and are presumptively unlawful." A decision from the Board is pending.

3. Duty to Furnish Financial Information in Bargaining

The General Counsel is revisiting the "inability to pay" doctrine. Under this doctrine, if an employer asserts during bargaining that it is unable financially to meet a union's demands, the union may request the employer's financial records. Over the years, many cases have dealt with whether an employer must use the magic words "unable to pay" during bargaining in order for the duty to furnish information to be triggered. In similar cases, the issue has concerned whether an employer has asserted an "inability" versus an "unwillingness" to pay, with only the former triggering the duty to turn over financial information. The General Counsel suggested, in its brief submitted in the case *Coupled Products*, 359 N.L.R.B. No. 152 (2013), that judges place too much reliance on the exact words used to plead poverty. This reliance is a distraction from the question of whether an employer is actually claiming, based on the facts of a case, an inability to pay.

4. Weingarten Rights in Non-Unionized Workplaces

The Supreme Court in *NLRB v. J. Weingarten*, 420 U.S. 251 (1975), held that unionized employees have the right to request that a union representative be present during investigatory interviews if the employee reasonably believes discipline could result from the interview. The Board has changed course over the years in deciding whether these rights extend to non-unionized workers as well. Most recently, in *IBM Corp.*, 341 N.L.R.B. No. 148 (2004), the Board held they do not. The General Counsel wants to further review cases concerning the representation rights of non-unionized workers.

5. Specialty Healthcare - Appropriate Units for Bargaining

In 2011, the Board in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 N.L.R.B. No. 83 (2011), adopted a new test for determining appropriate units for bargaining in union representation elections. Historically, the Board used the "community of interest"

standard, where it asked whether the community of interest of employees the employer sought to include in the petitioned-for unit was sufficiently distinct from those other employees to justify excluding them from the bargaining unit. The Board in *Specialty Healthcare* adopted the "overwhelming community of interest standard," which places the burden on the party challenging the proposed unit. The Sixth Circuit upheld the Board's decision in *Kindred Nursing Ctrs. E., LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013), finding the Board acted within its statutory discretion in defining a standard for appropriate collective bargaining units. The General Counsel has indicated that a guidance memorandum on this issue is forthcoming.

6. Deferral to Arbitration Awards

Under the existing deferral standard from *Spielberg Mgf. Co.,* 112 NLRB 1080 (1955) and *Olin Corp.*, 268 NLRB 573 (1984) deferral is appropriate where: (1) The arbitration proceedings are fair and regular; (2) all parties agree to be bound; and (3) the award is not repugnant to the purposes and polices of the Act. Additionally, the arbitral forum must also adequately consider the unfair labor practice issue in order for deferral to be proper. The Board is considering revising this criteria and invited briefs in March 2014 in connection with its case *Babcock & Wilcox Construction Inc.*, (Case 28-CA-022625). The General Counsel has proposed amending the existing standards in cases where allegations involve Section 8(a)(1) and 8(a)(3) violations. Under his proposal, the party urging deferral would bear the burden to prove: (1) the collective bargaining agreement incorporates the statutory right, or the statutory issue was presented to the arbitrator; and (2) the arbitrator correctly enunciated the applicable statutory principles and applied them in deciding the issue. If the first two steps are satisfied, the Board should defer so long as doing so is not repugnant to the Act.

7. Joint-Employer Doctrine

The Board in May, 2014 solicited briefs in connection with *Browning-Ferris Industries of California, Inc.* (Case No. 32-RC-109684) asking whether it should amend its current joint-employer standard. The current standard provides that two entities are joint employers if they have direct and immediate control over employees' terms and conditions of employment. The General Counsel, in an amicus brief, has urged the NLRB to replace the current standard and instead find joint-employer status where, "under the totality of circumstances, including the way the separate entities have structured their commercial relationship, the putative joint employer wields sufficient influence over the working conditions of the other's entity's employees such that meaningful bargaining could not occur in its absence." Under this broader approach the Board would consider the "industrial realities," which includes direct, indirect *and* potential control over working conditions to determine whether joint-employer status applies. A decision from the Board is pending.

(a) McDonald's

Within the past 21 months, McDonald's workers have brought 181 charges before the National Labor Relations Board. The General Counsel has indicated that McDonald's will be treated as a joint-employer Respondent with the franchisees running the stores. The NLRB Office of Public Affairs issued the following statement on July 29, 2014:

> The National Labor Relations Board Office of the General Counsel has investigated charges alleging McDonald's franchisees and their franchisor, McDonald's, USA, LLC, violated the rights of employees as a result of activities surrounding employee protests. The Office of the General Counsel found merit in some of the charges and no merit in others. The Office of the General Counsel has authorized complaints on alleged violations of the National Labor Relations Act. If the parties cannot reach settlement in these cases, complaints will issue and McDonald's, USA, LLC will be named as a joint employer respondent.
>
> The National Labor Relations Board Office of the General Counsel has had 181 cases involving McDonald's filed since November 2012. Of those cases, 68 were found to have no merit. 64 cases are currently pending investigation and 43 cases have been found to have merit. In the 43 cases where complaint has been authorized, McDonald's franchisees and/or McDonald's, USA, LLC will be named as a respondent if parties are unable to reach settlement.[1]

8. 10(j) Remedies

General Counsel published a subsequent Memorandum, GC 14-03, in April 2014 stating that he intends to aggressively seek Section 10(j) relief where appropriate: "An important priority of mine is to ensure that we continue our efforts to obtain immediate relief in those unfair labor practice cases that present a significant risk of remedial failure. Section 10(j) of the Act provides the tool to ensure that employees' Section 7 rights will be adequately protected from such failure." The Memorandum identifies two categories of cases where Regional Directors should seek authorization for 10(j) relief including: (1) cases involving discharge during an organizing campaign or during negotiations for a first contract, and (2) cases involving a successor's refusal to bargain and/or a successor's refusal to hire. The first category was endorsed by General Counsel's predecessors and was listed as a reiteration of continuing goals.

9. Other Policy Initiatives

In addition, the General Counsel, in GC 14-01, listed the following initiatives:

- Cases involving an allegation that the employer's permanent replacement of economic strikers had an unlawful motive under *Hot Shoppes*, 146 NLRB 802 (1964).

[1] Available here: http://www.nlrb.gov/news-outreach/news-story/nlrb-office-general-counsel-authorizes-complaints-against-mcdonalds.

- Cases involving make-whole remedies for construction industry applicants or employees who sought or obtained employment as part of an organizing effort as enunciated in *Oil Capitol Sheet Metal, Inc.*, 349 NLRB 1348 (2007).

- Cases involving a refusal to furnish information related to a relocation or other decision subject to a *Dubuque Packing* analysis (see Liebman dissent in *Embarq Corp.*, 356 NLRB No. 125 (2011) and OM 11-58).

- Cases where *Collyer* deferral may not be appropriate because an arbitration has not/will not be conducted within a year (see GC 12-01 and *Collyer* deferral chart on Advice/Operations webpages).

- Cases covered by GC Memorandum 11-01 (Effective Remedies in Organization Campaigns) where the following remedies might be appropriate: (1) access to employer electronic communications systems, (2) access to nonwork areas, and (3) equal time to respond to captive audience speeches.

- Cases covered by GC Memorandum 11-06 (First Contract Bargaining Cases: Regional Authorization to Seek Additional Remedies and Submissions to Division of Advice) where reimbursement of bargaining expenses or of litigation expenses might be appropriate.

EPSTEIN BECKER GREEN

Take 5 VIEWS YOU CAN USE

LABOR AND EMPLOYMENT

The July 2014 issue of *Take 5,* "Five Labor and Employment Issues Faced by Health Care Employers," was written by **Michael F. McGahan,** a Member of the Firm, and Associates **D. Martin Stanberry** and **Daniel J. Green.**

Michael F. McGahan
Member of the Firm
New York
mmcgahan@ebglaw.com
212-351-3768

D. Martin Stanberry
Associate
New York
mstanberry@ebglaw.com
212-351-4579

Daniel J. Green
Associate
New York
djgreen@ebglaw.com
212-351-3752

As the Affordable Care Act and the challenges of reimbursement and funding for health care services drive changes in the health care delivery system and employment in the industry, new issues in labor and employment law are arising. This month's *Take 5* addresses five of these new and important issues as they impact employers in the health care industry.

1. NLRB's Proposed Changes to Its Union Election Rules and Approval of Micro-Bargaining Units Increase Health Care Facilities' Risk of Union Organizing

Pending changes to the National Labor Relations Board ("NLRB") union election procedures and a number of union-friendly decisions issued by the NLRB have health care providers at a greater risk of union organizing today than in years past.

In February 2014, the NLRB proposed a number of significant revisions to its current union election procedures. The bottom line is that these proposals, if adopted, would expedite union representation elections to the detriment of employers. Under the current procedures, safeguards guarantee employers an opportunity to dispute important issues about a proposed bargaining unit before the election. The revised procedures would substantially inhibit that opportunity by: (1) shortening the length of time between the

filing of the petition and the hearing, (2) requiring employers to file a detailed statement of position on all applicable issues before the hearing begins (failure to raise an issue will result in waiver), and (3) granting hearing officers the authority to limit the issues presented at the hearing, thereby depriving employers of the opportunity to litigate valid questions prior to the election. Further, the NLRB has proposed amendments that would, after rushing the employer through the pre-election hearing, require the employer to provide the union with the phone numbers, email addresses, work location, shift, and job classification of all eligible voters two days after close of the hearing.

The proposed shortened time frames for elections would also give employers less time to communicate with their employees and to educate their employees about the disadvantages of union representation.

While there is no guarantee that the NLRB will adopt all of these proposals in its final rulemaking, employers should have no expectation that this union-friendly NLRB will heed their concerns. Several of these proposals were previously finalized by the NLRB and subsequently invalidated by the U.S. Court of Appeals for the D.C. Circuit because of a lack of quorum at the NLRB. Now that the NLRB is fully and properly appointed, the procedural barriers have been lifted, and the NLRB will likely finalize some or all of the proposals in short order.

These changes, in conjunction with the NLRB's 2011 ruling in *Specialty Healthcare*, 357 NLRB No. 83, which opens the door to "micro-bargaining" units in non-acute health care facilities, will make it easier for unions to organize by permitting unions to target small groups of employees and then move quickly to an election.

Under *Specialty Healthcare*, the NLRB will certify *any* proposed unit of employees that it deems a "discrete group," even one covering a single job classification. Only if an employer is able to convince the NLRB that other employees who have been left out of the proposed bargaining unit share an "overwhelming community of interest" with the targeted group will the NLRB include them—this is a high burden that is rarely established. For example, in *Specialty Healthcare,* the NLRB found a unit limited to certified nursing assistants to be appropriate, leaving out other non-professional service and maintenance employees at the employer's facility who would have been included in the bargaining unit under previous rulings by the NLRB. *Specialty Healthcare* allows unions to focus organizing efforts on relatively small groups of employees.

Because these changes both expedite the election process and open the door to the organization of micro-bargaining units that are easier for unions to target, employers must be prepared, in advance, to counter a union campaign. Employers should maintain their efforts to avoid unionization by:

- performing ongoing self-audits to ensure compliance with all laws governing the workplace, especially the Fair Labor Standards Act ("FLSA") and Occupational Safety and Health Act ("OSH Act"), so as not to give unions an easy target;

- making sure wages and benefits are competitive;
- ensuring that workplace policies are fair and enforced in an even-handed manner; and
- establishing an internal grievance procedure for employees.

2. Concerns Arise as Physicians Become Employees

As health care systems acquire medical practices and physician groups continue to consolidate, more and more physicians will become "employees," as that term is used for purposes of federal and state law—a development that may cause new human resources challenges for health care industry employers. As employees, physicians are subject to the same workplace policies and protected by many of the same workplace laws as other employees. For instance, physician employees are permitted to take leave in accordance with the Family and Medical Leave Act ("FMLA") and are protected from termination or discipline because of their age pursuant to the Age Discrimination in Employment Act ("ADEA") and from discrimination based on such factors as race, religion, disability, sex, national origin, and all the categories protected by status. Employee physicians have the right to participate in employer-benefit plans under the Employee Retirement Income Security Act. Practicing physicians are, however, exempt employees under the FLSA and, thus, not entitled to overtime compensation.

As a result, employers must use the same care and scrutiny in making employment decisions involving employed physicians as they do for all their employees. Workplace rules and policies need to be carefully drafted to ensure productivity and workplace discipline, while affording physicians the discretion that they require to perform their jobs. Employers expecting an influx of physician employees should review their workplace policies and procedures to ensure that they adequately address their needs in managing a physician workforce.

3. Physicians in Unions? Not as Implausible as You May Think

As physicians become employees of health care systems and large medical practices, they secure rights under Section 7 of the National Labor Relations Act ("NLRA"). Among these protected rights is the right to form or join labor unions and to act collectively, even in the absence of a union. Significantly, the NLRB has long found that interns and residents are employees with the protected right to be represented by a union. See *Boston Medical Center*, 330 NLRB 152 (1999).

In many areas, unions already represent physicians in government-run hospitals. These unions may seek to expand by organizing bargaining units in private hospitals. Different unions are powerful in different regions. In California, the Union of American Physicians and Dentists AFSCME Local 206 is dominant. In Florida, the major player is the Federation of Physicians and Dentists. In New York, the largest physicians union is Doctors Council SEIU. Doctors Council SEIU is poised to expand in health care

workplaces, many of which already have bargaining units represented by 1199 SEIU and the Committee of Interns and Residents SEIU.

The Committee of Interns and Residents SEIU may serve as a particularly effective organizing tool. As many young physicians who were represented by the Committee of Interns and Residents SEIU in their internships and residencies become employed as staff physicians, they may seek continued union representation.

Regulations promulgated by the NLRB in the late 1980s governing union organizing in acute care hospitals specifically identify an all-physicians unit as one of the eight types of bargaining units appropriate for union organizing. In the non-acute care context, the threat of physician organizing has grown due to *Specialty Healthcare*, discussed above, which permits the establishment of micro-bargaining units in non-acute care facilities. As a consequence, non-acute care providers may potentially see union organizing drives aimed at doctors who specialize in a certain area of care, as opposed to a unit of all the doctors employed at the facility, as would be required if they worked in an acute care institution.

Some employed physicians will be excluded from any union organizing. "Employee" is a defined term under the NLRA, and there are a number of exclusions from that definition. Physicians are excluded from protection under Section 7 and, thus, do not have the protected right to form or join unions or engage in collective action with non-union colleagues if they: (1) have an ownership interest in the employing practice; or (2) are supervisors with authority to, among other things, hire, transfer, suspend, discharge, or reward employees; or (3) work at a managerial level because they formulate or effectuate policies for the employer; or (4) are working as independent contractors.

The NLRB's proposed revisions to the representation election procedures will also disadvantage employers faced with physicians interested in unionizing. As mentioned above, because of the impact of the pending regulations on the length of the campaign period, employers should preemptively self-audit wages and benefits and engage physicians about the disadvantages of unionization before the threat of an election is imminent.

4. Growing Medical Practices Should Be Mindful That the Next Employee They Hire May Be the One Who Subjects Them to Federal Laws

As reimbursement payments shrink and regulation of the delivery of health care tightens, doctors are joining together in larger and larger practice groups. As these groups grow, they must be mindful that hiring more employees may result in their practice becoming subject to the jurisdiction of an increasing number of federal labor and employment laws.

Many federal laws governing the employment relationship will be triggered by the number of employees of the practice group. For example, employers are subject to Title VII of the Civil Rights Act of 1964 ("Title VII"), the Americans with Disabilities Act

("ADA"), and the Genetic Information Nondiscrimination Act if they have 15 (or more) employees. Employers with 20 or more employees are also subject to the ADEA. Employers with 50 or more employees are subject to the FMLA. Multiple employers with fewer than 50 employees may also become subject to these laws if their operations are integrated to such an extent that two or more separate entities are determined to be a single integrated employer.

Jurisdiction under certain other federal employment and labor laws is based upon participation in interstate commerce. For example, the FLSA, Polygraph Protection Act, and OSH Act apply to all employers engaged in "commerce," as that word is defined under the respective laws. Others, such as the NLRA, establish jurisdiction over employers that are engaged in interstate commerce (i.e., purchase goods and services from outside the state in which they do business) based upon economic thresholds that occur on a sliding scale differing from industry to industry. For example, jurisdiction is established over hospitals, dental offices, and residential care centers that have a gross annual volume of $250,000. Jurisdiction is established over nursing homes and visiting nurses associations with a minimum gross annual volume of $100,000.

As medical practices grow to the point at which federal laws apply, they must understand that certain of these federal laws impose notice posting, recordkeeping, and other affirmative obligations on employers. For example, many federal laws, including Title VII, the FLSA, and the FMLA, require employers to post notices in the workplace that inform employees of their rights under the respective laws. Certain laws, such as the FMLA, also require employers to promulgate policies and forms that facilitate compliance with the substantive provisions of the laws and maintain records for a number of years that demonstrate compliance. Similarly, employers subject to the ADA must promulgate workplace policies regarding, and under certain circumstances engage in, an interactive process with employees who have requested an accommodation for covered disabilities.

5. NLRB Continues Its Efforts to Regulate Employers' Policies Concerning Communications in the Workplace

With the decline in union membership nationwide, the NLRB has sought to enhance its role in non-union workplaces. Lest employers forget, Section 7 of the NLRA protects the rights of all employees, union or non-union, to discuss amongst themselves or with third parties, their wages, benefits, and other terms and conditions of employment, and it is the NLRB's responsibility to decide whether employers have violated those rights.

Under Chairman Pearce's direction, the NLRB has assumed a particularly active role in cases involving non-union workplaces. Specifically, the NLRB has issued a number of decisions holding non-unionized employers' social media, confidentiality, and "values and standards" employment policies unlawful on the grounds that a "reasonable" employee would construe them to restrict their participation in discussing terms and conditions of employment with co-workers or unions (i.e., activity protected under the NLRA).

As an example of the extent of these efforts, in April 2014, the NLRB issued a decision in *Hills and Dales General Hospital*, 360 NLRB No. 70 (2014), holding that the employer's policy that provided that employees "will not make negative comments about [their] fellow team members and ... will take every opportunity to speak well of each other" violated the NLRA because it was "overbroad and ambiguous" and may confuse a "reasonable" employee about whether it restricted his or her right to participate in protected activity, such as discussing the terms and conditions of his or her employment. In addition to requiring employers to revoke those policies on the grounds that they would interfere with a reasonable employee's efforts to discuss and disseminate information about wage and terms and conditions of employment (even if those policies had never been enforced), if an employee was terminated for violating such rules, the NLRB would also order reinstatement and back pay.

More recently, in *Purple Communications*, 21-CA-095151, the NLRB has set in motion a course to review and possibly overturn its 2007 decision in *Register Guard*, 351 NLRB 1110, which established that an employer can prohibit employees from using company email or company technology (smartphones, computers, etc.) to solicit support for unions if the employer also prohibited employees from using such resources to solicit for other outside organizations. Conversely, if an employer permitted the use of employer-provided technology to make non-business solicitations on behalf of other outside organizations, *Register Guard* held that the employer could not discriminate against an employee for using such technologies to enlist his or her co-workers' support of a union.

In reviewing the propriety of this holding, the NLRB has asked that interested third parties submit briefs regarding whether it should reconsider *Register Guard's* holding that employees do not have a statutory right to use their employer's email system for participation in activities protected under the NLRA. We will be providing updates as to the outcome of this case.

In light of the NLRB's recent focus on handbook policies and its ongoing efforts to expand its sphere of influence into non-unionized workplaces, employers should:

- be mindful that any attempt to restrict employee use of social media (on non-work devices and systems) to express views on terms and conditions of employment or from discussing ongoing internal investigations amongst themselves or outside of work may result in an employee filing a charge with the NLRB;

- self-audit their policies and procedures to assess the potential for an NLRB charge, based on overbroad, inappropriately worded policies; and

- assess the practical application of email and other electronic communications policies to ensure that they are not permitting solicitations by employees for personal reasons that might open the door to an NLRB-

enforced requirement to let employees use such resources for the purposes of union organizing.

About Epstein Becker Green

Epstein Becker & Green, P.C., founded in 1973, is a national law firm with approximately 250 lawyers practicing in 10 offices, in Baltimore, Boston, Chicago, Houston, 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, retail, 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. Visit www.ebglaw.com

LinkedIn @ebglaw RSS — Follow Epstein Becker Green

Management Memo
MANAGEMENT'S INSIDE GUIDE TO LABOR RELATIONS

EPSTEIN
BECKER
GREEN

Posted on August 6th, 2013 by Adam C. Abrahms

Bad Faith Bargaining or Just Bad Bargaining: President Obama Names Unconstitutionally Appointed Griffin as NLRB GC

On August 1st President Obama made a bold statement by appointing Richard Griffin to serve as the NLRB's General Counsel only three days after the former union lawyer vacated his unconstitutional recess appointment as a NLRB Board Member. The President statement by appointment made at least two things clear -

1. The President wants an aggressive pro-labor General Counsel and NLRB, and
2. The President values advancing the labor agenda over cooperation with the US Senate.

As we discussed here on July 30th the Senate confirmed a full Board for the first time in a decade as a result of a "deal" in which Senate Republicans capitulated to a threat from Senate Democrats to change the rules on filibusters. We noted last week that this deal was likely not a good deal at all for employers as it resulted in three former union lawyers appointed as the controlling majority of the Board.

For employers, one of the only concessions of the "deal" was that it resulted in the withdrawal of the pending nominations of Griffin and Sharon Block to the Board. Griffin and Block of course had served as unconstitutionally appointed recess appointments since January 2012. During their period on the Board they issued a number of controversial pro-labor decisions and were generally viewed as activist Board members. To the chagrin of employers and Congressional Republicans they also continued to issue decisions even after multiple Courts of Appeals ruled they were unconstitutionally appointed and had no authority to act. In May Senator Lamar Alexander (R-Tenn.) encapsulated the view of many noting:

> My problem is that they continued to decide cases after the federal appellate court unanimously decided they were unconstitutionally appointed. Not only has the President shown a lack of respect for the Constitutional role of the separation of powers… but I believe [Griffin and Block] have as well.

The President's withdrawal of their nominations was a symbolic, if not substantive victory.

By nominating Griffin to serve as the agency's top lawyer and prosecutor, the President has both symbolically and substantively thumbed his nose at the Senate Republicans and employers.

In fact, rather than removing Griffin's influence from the Board by the deal, it seems that the President may have actually enhanced that influence. As the General Counsel Griffin will serve an important policy role in deciding where the prosecutorial direction of the Board. The General Counsel has the final say in whether the Board pursues cases which reverse existing Board precedent, continue recent expansions of Section 7 rights or create entire new theories of employer liability. The recent Boeing controversy as well as the assault on "at-will" agreements, social media policies and similar common sense employer policies are all the result of an aggressive NLRB General Counsel flexing his muscles.

With Griffin's appointment to such an important position, employers have reason for concern. As if not borne out by the decisions of the Board since he was appointed, Griffin has a long history as a union advocate. For nearly twenty years prior to his 2012 recess appointment to Griffin was employed by the International Union of Operating Engineers as its counsel, rising to serve as the union's General Counsel and to serve as on the board of directors of the AFL-CIO Lawyers Coordinating Committee. Griffin will now serve as the top prosecutor bringing cases before a Board, the majority of which is comprised of his former union lawyer colleagues.

While Griffin technically needs to be confirmed by the Senate to be General Counsel, in the absence of a confirmation, the Act permits the President to appoint Griffin as Acting General Counsel at any time, and to serve in that role the full powers of a confirmed General Counsel. In fact, Lafe Solomon, the current Acting General Counsel, has been serving in that capacity sine June 2010 without confirmation. So in essence, as soon as the President wants Solomon to pass the baton to Griffin, Griffin will start serving in his new role.

Management Missives

- Employers should not expect a reversal of course for the Office of the General Counsel as Griffin is likely to continue, if not expand the efforts of Solomon to broaden the Board's role in non-union workplaces.
- Union-free employers should dust off their union avoidance programs and redouble their efforts.
- Unionized employers should be prepared for more strident and aggressive unions.
- All employers should review their policies and procedures to ensure they are not susceptible to challenge under the Board's recent pronouncements.

Tags: Adam Abrahms, Adam C. Abrahms, at-will agreement, employment policy, Lafe Solomon, National Labor Relations Board, Recess Appointments, Richard Griffin, union free, union organizing

Epstein Becker Green
Epstein Becker & Green, P.C.

Baltimore
7000 Security Boulevard
Suite 300
Baltimore, MD 21244

Boston
99 Summer Street
Suite 1600
Boston, MA 02110

Chicago
150 N. Michigan Ave.
35th Floor
Chicago, IL 60601-7553

Houston
Two Houston Center
909 Fannin
Suite 3838
Houston, TX 77010

Los Angeles
1925 Century Park East
Suite 500
Los Angeles, CA 90067-2506

New York
250 Park Avenue
New York, NY 10177-1211

Newark
One Gateway Center
Newark, NJ 07102-5311

San Francisco
655 Montgomery Street
Suite 1150
San Francisco, CA 94111

Stamford
One Landmark Square
Suite 1800
Stamford, CT 06901-2681

Washington, DC
1227 25th Street, NW
Suite 700
Washington, DC 20037-1175

EPSTEIN BECKER GREEN | TAKE 5 VIEWS YOU CAN USE

LABOR AND EMPLOYMENT

This issue of Take 5 was written by Allen B. Roberts, a Member of the Firm in the New York office.

Allen B. Roberts
Member of the Firm
New York Office
aroberts@ebglaw.com
212/351-3780

This month's *Take 5* selects topics likely to impact employers in 2013 and beyond and offers an alternative, if not contrarian, view for each.

1. **Affordable Care Act—Will Incentives and Disincentives Change Employer Patterns of Health Insurance Payments for Family Members?**

By popular account, the Affordable Care Act ("ACA") would preserve the base of insureds and extend health insurance coverage to as many as another 32 million Americans. That estimate could be wrong if ACA disrupts patterns and experience of spouse and dependent coverage on employer-paid policies. Much of the political and media comment has focused on mandates, exchanges, and reasons that employers may maneuver to satisfy requirements concerning employee coverage, or drop it completely. Left out of the discussion has been the cost of covering family members of employees and the opportunity to shift employer dollars away from spouse and dependent premiums and place more dollars in premiums for individual employees. If that happens, spouses and dependent children will receive insurance coverage under employer-provided plans only if their premiums are paid by the employee, a household member, or some third party. Otherwise, those family members must obtain insurance elsewhere or join the ranks of the uninsured, something that might have been unimaginable for many of them—and perhaps for advocates of ACA who have considered it a move towards universal health care coverage.

Proposed regulations issued by the Internal Revenue Service ("IRS") establish that dependent children up to age 26 must be *offered* insurance coverage under plans that an employer provides to its employees, but there is no similar requirement for spouses because—intentionally or not—ACA does not include them. If spouses of employees

obtain coverage under employer plans, it will not be because federal law requires it. ACA is silent, also, with regard to the source of payment for dependent premiums, and employers may reallocate dollars from voluntarily subsidizing spouse and/or dependent coverage in the pre-ACA era to paying premiums for employee-only coverage now that legal obligations and penalties are being clarified.

Whether total employer costs will rise, fall, or be managed differently to assure ACA compliance and avoid penalties remains to be seen as large and small employers reexamine the realities of attracting and maintaining workforces, while managing total compensation and corporate objectives of employee satisfaction. Total costs will matter as employers decide how to allocate dollars to health care premiums. However, it is not likely that employers will disregard altogether the complexities of important decisions affecting valued employees accustomed to receiving spouse and dependent coverage as part of a comprehensive compensation and benefit package. Corporate philosophy and policy, combined with the practicalities of employee experience and expectations, competitive factors, and a possible trigger to union organizing, are likely to influence how employers respond to ACA's provisions and interpretations concerning spouse and dependent coverage—and payment for it.

The IRS interpretation of dependent coverage also may present an occasion for employers to equalize their costs of employing individuals and those with families and to remove benefit disparities, perhaps by presenting a menu of available benefits and a schedule of costs from which employees register their priorities within the array of selections. If employees with families qualify for the same compensation and paid time off for vacations, sick and personal days, and holidays as single employees, is it irrational for employers to allocate the same amount for medical coverage or invite tradeoffs? It may not be too farfetched for employers to designate the additional cost of health insurance for family members as a cafeteria item of available benefits, paid by the employer until a finite purse is exhausted and then available at the employee's cost. Family health coverage under ACA possibly could trigger a wholesale employer examination of the totality of employee benefits and related costs and conduce a restructuring—from paid time off to medical insurance—that makes employees active stakeholders, as well as beneficiaries.

2. Multiemployer Pension Plans—An Imperative to Define the Benefit

It is commonplace for unions to promote the message that the multiemployer defined benefit pension plans included in the contracts that they negotiate provide comfortable retirement security—touted as "superior" to that offered by employer or individual retirement programs—for those they represent and those they wish to organize. That postulate may not withstand current scrutiny or the test of time for several reasons.

Multiemployer defined benefit pension plans are designed to provide a defined monthly benefit at retirement based on a formula taking account of years of employer contributions and employee service. Since enactment of the Pension Protection Act of 2006, annual certifications are required based on standardized funding and liquidity measures for determining the financial health of those plans. According to a January 2013 report to Congress by the Pension Benefit Guaranty Corporation ("PBGC"), data available through late 2012 indicate that 52 percent of participants are in moderately or severely distressed plans. The report identifies . . .

several triggers for "critical" status, including a funded percentage of less than 65% and projected insolvency during the next 7 years, or a projected accumulated funding deficiency or insolvency within 4 years. Plans with a funded percentage of less than 80% or with a projected funding deficiency within the next 7 years are in "endangered" status; plans that have both are "seriously endangered." Plans that are in neither endangered nor critical status are in [non-distressed] "green" status.

The PBGC report shows that legislation has allowed some plans to:

- defer actions that their status should require;
- extend the time for demonstrating progress under their funding improvement or rehabilitation plans, amortizing investment losses incurred in the 2008 market crisis over a period nearly twice as long as otherwise required; and
- lessen the impact of investment losses on the actuarial value of plan assets used to determine their future funding requirements and funding status.

While economic performance may have deteriorated, the optics could indicate that funds are performing acceptably relative to previously set goals. There is nothing insidious in a grace period to recover from financial market turmoil. But reliance on a legislated window should not mask fundamental problems of importance to stakeholders.

Funds will fulfill their promise—and participant expectations—only through a combination of positive portfolio performance relative to assumptions made by fund trustees, guided by actuaries they engage, and a contribution base nourished by new entrants into the plans. Dollars contributed for employees support amounts currently unfunded as well as the credits active participants earn during their own employment. But, for many plans, the realities of investment experience and revenue from new participants fall short of funding needs.

In the optimal pyramidal model, retirees would be supported by a broad base of new and younger employees who continue as plan participants until reaching their own retirement or who depart, leaving contributions made for them to accumulate for any benefit in which they have vested and a surplus to be shared by others. If employer expansion or union organizing does not add new bargaining unit members as participants, the pyramid is likely to become re-contoured to silo or inversion, and there may be no refreshing supply of contributions to fulfill actuarial expectations and assumptions on which current and future commitments and benefit levels are set.

The current circumstances of multiemployer defined benefit pension plans pose issues for current stakeholders as well as employers and employees who are not subject to collective bargaining agreements requiring contributions. For employers and employees operating outside the sphere of multiemployer defined benefit pension plans, union enticements and the merit of entry should be assessed thoughtfully. Circumstances of even currently stable funds in stable industries can change. Conditions in business sectors that are predominantly unionized may change because of technology, new competitors in a market, geographic relocations, outsourcing, or imports. Furthermore, outside the control of an employer contributing to a healthy fund,

mergers with currently or prospectively weaker funds, or funds having less favorable demographics or characteristics, can alter financial soundness.

An employer contributing to a multiemployer plan also must assess the value of its total benefit package absolutely and relative to the needs and expectations of its own unionized workforce in the context of overall compensation and benefits, weighing its philosophy with respect to a menu and array of benefits and experience with transfers and promotions to positions outside of bargaining units, as well as normal attrition and turnover. Those considerations are further impacted by the complexities of a withdrawal liability that could be assessed for the employer's proportionate share of a plan's unfunded liability when its contributions cease.

Employees also may have their own preferences for retirement benefits that are different from those available in the context of a multiemployer defined benefit pension plan. Young employees may have financial priorities and an interest in controlling retirement investment in a way that matches their own career ambitions and mobility and is portable as employment and other circumstances change—a view sometimes criticized as not sufficiently objective and thoughtful. Such individuals also may be concerned that contributions on their behalf would do less to secure a benefit for themselves than pay off the unfunded liability attributable to current retirees and long-term participants, possibly because of a credit formula giving less than full value for their employer's contributions for current service and considered disadvantageous to new participants.

The landscape for multiemployer defined benefit pension plans has its share of obstructions and craters to be navigated. For employers committed by collective bargaining relationships with unions, options may be explored to find a negotiated course that realizes the best value for the good of the current and anticipated workforce and for the future of the enterprise. For employees, it is important that realistic preferences and needs be considered in the bargaining that is conducted between their employers and the union representing them. A large group of employers not yet committed to such funds may opt to circumnavigate the multiemployer defined benefit pension plan road altogether.

3. The NLRB—Organizing by Pop-Up Unions in Break-Out Units

Despite some perceptions of cohesiveness and political acumen, influence and wherewithal following the 2012 election cycle, labor unions represent only about 7.3 percent of the private sector workforce in the United States, and only 6.6 percent of workers are actually union members. When concentrations in certain industries and geographic areas are factored, that leaves entire swaths entirely union-free, or substantially so.

Foreseeably for the next four years, unions will continue to benefit from a National Labor Relations Board ("NLRB") that has innovated changes in substantive law and introduced procedures during the past four years that facilitate organizing and restrict the time for responsive employer communications. That advantage has not yet translated into material membership gains by "Big Labor"—although it may still.

However, together with other breakthroughs by way of social media and electronic and physical access to employer premises and communications systems, expanded

interpretations of protected concerted activity, and such movements as Occupy Wall Street and grass roots organizations, conventional unions may be eclipsed, if not displaced, by one-off, special purpose organizations formed solely to serve discrete affinity groupings of employees in new bargaining units. If this occurs, it will be enabled by two bedrock principles of the National Labor Relations Act ("NLRA"), aided by a recent interpretation in case law.

First, notwithstanding the attention given by supporters and critics alike to large, well-financed conventional unions with institutionalized structures and processes, the NLRA defines a "labor organization," capable of winning certification as the exclusive representative of employees, to mean any body that exists, in whole or in part, for the purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. This means that an outside force, planning and funding offsite meetings and campaigns, is not necessary; something as simple as a homegrown pairing or grouping of workers having common interests or worries could qualify as a labor organization.

Second, with respect to the NLRB's formulation of a unit appropriate for collective bargaining purposes, it is not necessary that the unit be the most appropriate or that it conform to management's organizational structure. Historically, the NLRB has been mindful of its authority to make determinations of the unit appropriate for purposes of collective bargaining, consistent with legislative policy assuring that employees have the "fullest freedom" in exercising statutory rights to organize. If it survives Circuit Court of Appeals challenge on review, an NLRB standard adopted in 2011 could lead to a proliferation of small, fractionated bargaining units; it would place the burden on an employer contesting the appropriateness of a labor organization's preferred bargaining unit to show that employees excluded from the unit sought by the petitioning labor organization share an "overwhelming community of interest" with another readily identifiable group. If a readily identifiable group exists based on such factors as job classification, department, function, work location, and skills, and the NLRB finds that the employees in the group share a community of interest, the petitioned-for unit will be an appropriate unit, despite an employer's contention that employees in the unit could be placed in a larger unit that also would be appropriate—or even more appropriate.

Much as the NLRB's approach has been perceived to benefit large, established unions, it may not be surprising if employee groups, newly aware of the NLRB's outreach and enlargement of rights to engage in protected concerted activity through social media and other means, realize also that they are capable of becoming homegrown, single-purpose labor organizations with authorization from the NLRB to define a bargaining unit by its lowest common denominator—or to invade and fractionate existing bargaining units currently represented by Big Labor.

4. Independent Contractors—A Convenient Classification Until Challenged by Personal Interest or Government Audit

For reasons of economic and/or lifestyle choices, a significant segment of the U.S. population has elected to earn a living classified as independent contractors. No single legal definition of the term "independent contractor" exists within various federal tax and labor laws, their state law counterparts, or workers' compensation and unemployment insurance laws and regulations. Nevertheless, the report currently available from the Bureau of Labor Statistics indicates that 10.3 million individuals were considered

independent contractors, having no direct employer as of 2005. By way of comparison, there were 7.85 million union-represented workers in the private sector in 2012 and approximately 12.3 million classified as unemployed as of January 2013.

In a truest form, an independent contractor arrangement enables an individual to control personal activity and profit or loss in arrangements with one or more businesses. Companies engaging independent contractors typically are not responsible for withholding taxes from payments or deducting and making their own contributions for such employment-related items as Social Security, Medicare, or unemployment insurance or for providing workers' compensation insurance. Independent contractors are not considered employees for purposes of inclusion in the medical or pension plans that employers provide.

When properly structured and implemented, independent contractor status can afford freedom, flexibility, opportunities, and incentives for the mutual benefit of individuals and businesses engaging their services. A breakdown can come when an independent contractor feels disadvantaged relative to employees of the business or when the relationship ends, especially if the termination is initiated by the business. At that point, the individual may claim a regular or overtime wage entitlement or benefits that the business makes available to its employees, or unemployment, disability, or workers' compensation insurance benefits. Alternatively, a federal or state enforcement agency may conduct a general audit or a specific, targeted audit that is initiated by an individual during the time that services are performed or after the termination of a relationship.

Even a limited government audit may be expanded to additional individuals, arrangements, and facilities. Also, formal and informal programs and protocols for governmental agencies or enforcement authorities to share information can expose businesses to a comprehensive review of the practice of classifying individuals as independent contractors. When such audits determine that independent contractors have been misclassified, the outcome may subject businesses to remediation for the full term of the applicable statute of limitations—in some states, six years from the date of an initial claim or audit.

The increased scrutiny of independent contractor status and the risks of misclassification warrant self-assessment to assure compliance and minimize exposure to claims.

5. Will "Unemployment Status" Become the Next Employment Protection?

The list of protections against discrimination will grow to include those who have been unemployed if a bill (Intro 814-A), which was passed by New York's City Council, survives mayoral veto and gains traction elsewhere. The bill amends New York City's Human Rights Law to prohibit an employer or employment agency, or an agent of either, from:

- basing an employment decision with regard to hiring, termination, promotion, demotion, discipline, or compensation or the terms, conditions, or privileges of employment on the "unemployment status" of the applicant or employee without a bona fide reason that is substantially job-related; or

- publishing or posting an advertisement for a job vacancy in New York City

stating or indicating that current employment is a job qualification or requirement or that unemployed applicants will not be considered for employment.

Individuals alleging discrimination would be allowed to pursue claims by filing a complaint with the New York City Commission on Human Rights or bringing an action in court. The remedy available for meritorious claims could include conventional make-whole relief, compensatory damages, and penalties, in addition to injunctive relief.

The applicant will have little difficulty showing that he or she was unemployed—with the term "unemployment status" defined to mean "an individual's current or recent unemployment." Most résumés and completed application forms are likely to reveal periods of unemployment. An employer should be able to defend a discrimination claim by showing that its denial of an employment opportunity was not based on unemployment status or that its reasons were bona fide and "substantially job-related." Examples of permissible reasons that employers could consider are suggested in a City Council press release: "whether an applicant has a current or valid professional license; a certificate, permit, or other credential; or a minimum level of education or training."

The bill does not indicate whether an inquiry into reasons for prior denials of employment would be permissible, but it is permissible to inquire into circumstances of a previous employment termination or demotion and the basis for it. However, as a matter of policy, many employers decline to provide detailed responses to inquiries from prospective employers. Also, an applicant may not share—or even know—all the reasons for a prior adverse employment action or denial of opportunity.

Under a New York City law enacted over mayoral veto—or others modeled on it—employers would have to address the extent to which previous unemployment or a history or pattern of unemployment may be considered with respect to decisions to hire applicants or change the status of current employees. Expansion of discrimination laws to protect those who have been unemployed would occasion review of interview and selection criteria that could indicate impermissible considerations and expose employers to new claims.

****

For more insights on labor and employment law, read the Epstein Becker Green Blogs.

If you would like to be added to our mailing list(s), please click here.

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, retail, 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.

EPSTEIN
BECKER
GREEN

PUBLICATIONS

Act Now Advisory: The NLRB Is Looking at Confidentiality, Non-Disclosure, and Non-Disparagement Provisions in Your Agreements

January 17, 2013

labor and employment practice

Another decision has been issued by a National Labor Relations Board ("NLRB" or "Board") administrative law judge ("ALJ") striking down a non-union employer's confidentiality and proprietary information and non-disparagement provisions. While there is nothing new about the Board extending its reach into the world of non-unionized workplaces, this case demonstrates that the Board's Acting General Counsel ("AGC") continues to expand his view, with the Board's continuing agreement, as to what types of traditionally lawful and routine policies, practices, and agreements "reasonable employees" would believe interfere with their exercise of their right to engage in concerted action with respect to the terms and conditions of their employment. This decision, Quicken Loans, Inc., Case No. 28-CA-75857 (Jan. 8, 2013), represents yet another expansion of the Board's view as to the types of provisions that the NLRB is likely to find overbroad and unlawful when it comes to confidentiality, the protection of proprietary information, and the protection of a company's business and reputation through the use and enforcement of non-disparagement provisions.

In recent years, the Board and its General Counsel have made it clear that, despite whether a workplace is unionized or non-unionized, the NLRB is prepared to review employers' policies and procedures to ensure that they do not contain any provisions that could impinge or hinder employees' exercise of their rights under Section 7 of the National Labor Relations Act ("Act"). These cases are being brought before the Board by the AGC, who investigates unfair labor practices and decides which ones he believes have merit and should be brought to trial before an ALJ and, ultimately, to the Board and the federal courts for enforcement. What is new is that the Board is not simply looking at provisions in handbooks or other policies; it is also reviewing employment agreements of highly compensated individuals.

The Quicken Loans Decision

In the Quicken Loans decision, ALJ Joel Biblowitz found that Quicken Loans, Inc. ("Quicken"), violated the Act by maintaining "overly broad and discriminatory rules" in its Mortgage Banker Employment Agreement ("Agreement"). According to testimony adduced at an unfair labor practice hearing by the Board's General Counsel, all employees employed as mortgage brokers in the relevant location were required to sign the Agreement as a condition of employment.

The Unfair Labor Practice Charge Was Filed in Response to a Raiding Lawsuit

The decision arose out of an unfair labor practice charge filed by Lydia Garza. Ms. Garza, a non-union employee who had been employed by Quicken as a mortgage banker until she resigned, filed the unfair labor practice charge only after Quicken took action to enforce certain contractual restrictive covenants against her.

After Ms. Garza left Quicken, the company notified her of continuing obligations pursuant to the Agreement, including those based on the confidentiality, non-competition, and employee and client no-contact/no-solicitation provisions. Subsequently, Quicken filed a lawsuit against Ms. Garza and five other former employees. The lawsuit alleged that they had violated the Agreement's no-contact/no-solicitation and non-compete provisions.

After investigating the unfair labor practice charge filed by Ms. Garza, the AGC issued a complaint and the case proceeded to a hearing before ALJ Biblowitz.

The ALJ's Findings

Associated People

Lauri F. Rasnick

Steven M. Swirsky

Associated Practices

Labor Management Relations

Employment Training, Practices, and Procedures

Social Media and the Workplace

In his decision, ALJ Biblowitz considered the lawfulness of two provisions contained in the Agreement entitled (i) "Proprietary/Confidential Information," and (ii) "Non-Disparagement." The Agreement's Proprietary/Confidential Information provision required an employee to "hold and maintain all Proprietary/Confidential Information in the strictest of confidence" and further provided that an employee "shall not disclose, reveal or expose any Proprietary/Confidential Information to any person, business or entity." The Agreement contained a definition of "Proprietary/Confidential Information," which included any "non-public information relating to or regarding the Company's . . . personnel," including "personal information of co-workers . . . such as home phone numbers, cell phone numbers, addresses, and email addresses." The Agreement's Non-Disparagement clause prohibited employees from publicly criticizing, ridiculing, disparaging, or defaming Quicken or its products, services, policies, directors, officers, shareholders, or employees, with or through any written or oral communication or image.

While acknowledging that there is a thin line between lawful and unlawful restrictions, the ALJ found that the two provisions in the Agreement violated the Act because they "would reasonably tend to chill employees in the exercise of their Section 7 rights." In reaching this conclusion, the ALJ reasoned that an employee, in complying with the restrictions of the Proprietary/Confidential Information section, would believe that he or she was prohibited from discussing his or her own wages and benefits, or the names, wages, benefits, addresses, or telephone numbers of his or her co-workers, with fellow employees or union representatives. For this reason, the ALJ concluded that the terms of the Agreement would substantially restrain employees from engaging in concerted activities permitted under the Act. The ALJ further reasoned that the Non-Disparagement provision could reasonably be read by an employee to restrict his or her right to engage in protected activities because "employees are allowed to criticize their employer and its products as part of their Section 7 rights, and employees sometimes do so in appealing to the public, or to their fellow employees, in order to gain their support."

History of Non-Enforcement Was Inconsequential

The evidence produced to the ALJ was that no Quicken employee had been disciplined for violating the provisions at issue. This fact was of no consequence to the ALJ who reasoned that, based on Board cases, maintaining rules that are likely to have a chilling effect on Section 7 rights may be an unfair labor practice even in the absence of any enforcement action. It also did not matter that the enforcement of the rules in the case at hand was with respect to former, as opposed to current, employees.

The Remedy

The ALJ ordered that Quicken cease and desist from maintaining the "overly broad rules" and notify all mortgage bankers that the Proprietary/Confidential Information and Non-Disparagement provisions would be rescinded and not enforced. As of this date, Quicken's time to file "exceptions" to the ALJ's decision to request a review of the decision and the proposed remedy has not yet run.

The NLRB's Focus on Broad Enforcement of All Employees' Section 7 Rights

The Quicken Loans decision must be seen in the context of several other recent Board decisions and actions, such as the Board's adoption of its NLRB Notice Posting Rule, which is currently the subject of federal litigation in the District of Columbia and District of South Carolina; the Board's controversial social media cases; and the Board's stance against class and collective action waivers. NLRB Chairman Mark Gaston Pearce has stated that the Board's initiatives are intended to "bring the Board out of the attic and into the kitchen" and are aimed at reaching all employees, including those working in non-unionized workplaces.

What Employers Should Do Now

Employers must take notice of the NLRB's focus on broad enforcement of employees' rights under the Act, particularly in non-unionized workplaces. We previously advised employers to review their policies and potential actions to apply such policies, in accordance with NLRB decisions and guidance. See NLRB Acting General Counsel Issues Follow-Up Report on Social Media Cases and NLRB's Scrutiny of Employment-at-Will Disclaimers Signals a Trend to Employers. In light of this recent ALJ decision and in addition to reviewing their written policies, whether stand-alone or contained in employment handbooks, employers are encouraged to:

- **Review agreements**. Review offer letters, employment agreements, confidentiality provisions, and restrictive covenants to ensure that they do not include:
  - any express or implied prohibitions on employees discussing their terms and conditions of employment, including prohibitions on discussing wages and benefits, or the names, wages, benefits, or contact information of their co-workers, which the Board believes would infringe on employees' rights to act collectively; or

broad or vague prohibitions against employee conduct, including the use of social media or other public channels of communication, that could be reasonably interpreted to prohibit discussion of terms and conditions of employment.

- **Consider including disclaimers and examples.** Employers may want to add appropriate disclaimers to employment agreements. Any disclaimer should be in plain English and clearly explain any exceptions to the specific prohibitions of confidentiality, non-disparagement, and social media provisions. However, in the area of social media policies, the AGC has firmly stated that disclaimers will not in and of themselves cure policies and practices that he and the Board would otherwise find chilling and coercive. Rather, in the AGC's view, such language should be tempered with specific examples, limiting language, and explanations of the interests that an employer is legitimately trying to protect. By such examples, the AGC has indicated that an employer can educate employees in a way that makes clear that it will not interfere with their right to engage in concerted protected activity.

- **Think before suing.** The charge against Quicken was filed after the company filed a lawsuit against former employees for violating the no-contact/no-solicitation and non-compete provisions in their employment agreements. Prior to bringing a claim to enforce restrictive covenants or confidentiality provisions, employers should review their own provisions to assess whether their agreements will hold up if scrutinized by the NLRB.

*****

For more information about this Advisory, please contact:

Steven M. Swirsky
New York
212/351-4640
sswirsky@ebglaw.com

Lauri F. Rasnick
New York
212/351-4854
lrasnick@ebglaw.com

For more insights on labor and employment, read the Epstein Becker Green Blogs.

To help us be more responsive to your labor and employment concerns, please take a few moments to answer the following questions. **Click here.**

To be added to our mailing list(s), please **click here**.

Resources

- 54495_Act-Now-Advisory-NLRB-Is-Looking-at-Confidentiality-Non-Disclosure-Provisions-in-Your-Agreements.pdf

Management Memo
MANAGEMENT'S INSIDE GUIDE TO LABOR RELATIONS

EPSTEIN
BECKER
GREEN

Posted on March 4th, 2013 by Steven M. Swirsky and D. Martin Stanberry

Home Healthcare Workers' Misrepresentation about Anticipated Absences During a Strike Results in Loss of Protected Status under the NLRA, Second Circuit Rules

by: James S. Frank, Steven M. Swirsky, and D. Martin Stanberry

The Second Circuit Court of Appeals ruled on Wednesday February 27th, in *NLRB v. Special Touch Home Care Servs. Inc., 11-3147 (2d.Cir., Feb. 27, 2013)* (PDF) that the NLRB erred when finding that 48 home health aides were protected by the National Labor Relations Act ("Act") when they participated in a strike after affirmatively telling their employer that they would be present for their shifts at their respective patients' homes during the week of the strike.

While the NLRB had held that the workers actions were protected activity under the Act and that they had no obligation to the patients since the union had provided a statutory 10-day notice of the strike to their employer, the Court disagreed. The Second Circuit's decision was a significant repudiation of the Board's conclusion that the patients were not in imminent danger because: (1) many of the aides provided individual notice to the patients that they would not be coming to work; (2) the aides were not licensed to perform life-saving medical services; and (3) no actual harm came to any of the patients.

In 2004, 1199SEIU, the union representing Special Touch's home health aides, served a statutorily required 10-day notice of the union's intent to conduct a two-day strike. In preparation for the strike, Special Touch contacted the home health aides scheduled to work that week and asked whether they intended to take time off during the week of the strike (importantly, they did not ask whether they would be participating in the strike and were not obligated to answer). Of the 1,400 employees, 75 indicated that they would be taking time off. When the strike commenced, 48 additional employees who had affirmatively denied such an intent, were absent without notice.

Unsurprisingly, Special Touch had to scramble to make alternate arrangements to serve its patients once it learned the additional 48 aides had not reported to the homes of the patients for whom who they were assigned to care. As the day progressed, Special Touch was able to

arrange alternate coverage for all but five of the 48 home health aides. Fortunately, no harm came to any of the 48 patients that received reduced or no care during the day.

When the strike ended two days later, Special Touch immediately reinstated the 75 employees that had provided notice that they would be absent on the days that the union struck. The 48 aides who had been out even though they had said they would work were directed not to report until further notice. Over the next few months, all 48 were given new assignments. None were terminated because of their absence.

The union then filed charges with the NLRB over the employer's decision not to immediately reinstate the 48 employees who had participated in the strike after telling the employer that they would be reporting to work and taking care of their assigned patients. The union argued that the decision not to correct their misstatements was not protected activity under the Act and had not lost the protection because there had not been any imminent danger to their assigned patients as a result of their participation. The Board's Acting General Counsel agreed with the union and issued a complaint. The employer did not agree and a hearing was held before an Administrative Law Judge who agreed with the AGC that the employees' participation in the strike was protected even though they had told the employer that they would not be participating and would be going to their patients' home to provide care as assigned. The Board agreed with the ALJ and upheld his decision after the employer appealed.

Fortunately for patients and employers alike, the Court held that there was no reasonable basis for the Board to conclude that the 48 home health aides had not placed their patients in imminent danger, and consequently, lost the protection of the Act.

The Court based this conclusion on a reasoned examination of the applicable facts and law, finding that individual notice provided to patients by their aides did not significantly mitigate the risk of danger because many patients that receive home healthcare services "do not appreciate the degree of care that their conditions require." The Court also emphasized the fact that the non-performance of even general or menial tasks such as cleaning, shopping and bathing the patient creates a risk of imminent danger. Other duties, such as "reminding customers to take their medication, and observing customers for signs of immediate distress" are surely intended to mitigate the risk of danger.

This decision by the Court does not require employees to tell their employer whether they intend to participate in a strike. Nor does it require the employee even respond to the employer's query. In fact, the employees would not have lost the protection of the Act if they had simply not answered the employer's inquiries about whether they planned to report on those days, because the 10-day notice from the union serves to put the employer on notice of their intent to strike. In fact, "[h]ad Special Touch not reached out to their aides in advance of the strike in an attempt to plan ahead… the aides would not have been required to call in."

It is only when the employee controverts the intent of the 10-day notice that they lose the protection of the Act. As the Court concisely explained, "[w]hat employees cannot do is

mislead their employer into expecting their presence when the lack thereof will result in foreseeable imminent danger."

Tags: D. Martin Stanberry, Home Health Care, James S. Frank, NLRB, Steven M. Swirsky

Epstein Becker Green
Epstein Becker & Green, P.C.

Baltimore
7000 Security Boulevard
Suite 300
Baltimore, MD 21244

Boston
99 Summer Street
Suite 1600
Boston, MA 02110

Chicago
150 N. Michigan Ave.
35th Floor
Chicago, IL 60601-7553

Houston
Two Houston Center
909 Fannin
Suite 3838
Houston, TX 77010

Los Angeles
1925 Century Park East
Suite 500
Los Angeles, CA 90067-2506

New York
250 Park Avenue
New York, NY 10177-1211

Newark
One Gateway Center
Newark, NJ 07102-5311

San Francisco
655 Montgomery Street
Suite 1150
San Francisco, CA 94111

Stamford
One Landmark Square
Suite 1800
Stamford, CT 06901-2681

Washington, DC
1227 25th Street, NW
Suite 700
Washington, DC 20037-1175

EPSTEIN BECKER GREEN | LABOR AND EMPLOYMENT PRACTICE

ACT NOW ADVISORY

January 25, 2013

NLRB Recess Appointments "Invalid From Their Inception" and "Void" for Lack of Constitutional Authority Rules the D.C. Circuit

by Adam C. Abrahms, Kara M. Maciel, Evan J. Spelfogel, and Steven M. Swirsky

---

In a time when employers do not receive much good news out of Washington D.C., the U.S. Court of Appeals for the D.C. Circuit may have given some very welcome relief to employers facing issues before the National Labor Relations Board ("NLRB" or "the Board") in light of recent precedent reversing NLRB decisions. Quoting from early Constitutional authority including *The Federalist Papers* and *Marbury v. Madison*, the D.C. Circuit ruled today that President Obama's "Recess Appointments" of three new NLRB members in January 2012 were unconstitutional and as a result the Board lacked any constitutional authority to act since that time. *Noel Canning v. NLRB*

In a unanimous panel decision written by Chief Judge Sentelle that The New York Times called "an embarrassing setback for the President," the Court analyzed two constitutional questions, both focusing on whether the Board lacked authority to act because three Board members were never validly appointed. The first issue examined whether the Senate was "in Recess" when the appointments were made, and the second whether the vacancies these three members purportedly filled "happen[ed] during the Recess of the Senate," as required for recess appointments under the Constitution.

As to the first issue, after dissecting the Board's arguments, the Court ruled that "the Recess" referred to in the Constitution to permit a presidential recess appointment is limited to the Recess between Sessions of the Senate and does not include brief adjournments or other intrasession recesses. Likewise, the Court ruled that the power to appoint during the Recess was limited and could only be issued if the vacancy both first arises (i.e., "happened") during the Recess and also was filled during that Recess.

Noting that the Board conceded on appeal that the appointments at issue were not made during the intersession Recess because the President made them on January 4, 2012, after Congress began a new Session on January 3, 2012 and while that new Session continued, the Court held that "[c]onsidering the text, history and structure of the Constitution, these appointments were invalid from their inception."

The Court also found, and the parties did not dispute, that based on the Supreme Court's ruling in *New Process Steel, L.P. v. NLRB*, if the vacancies were not properly and lawfully filled, the Board would only be left with two valid members and would therefore be left without a quorum to act. Consequently, the Court ruled conclusively

that the Board's order in the underlying case was "outside the orbit of the authority of the Board because the Board had no authority to issue any order [because] it had no quorum," stating that the "lack of quorum raise questions that go to the very power of the Board to act and implicate[s] fundamental separation of powers concerns."

The Court further rejected any argument that its ruling otherwise would make government inefficient through an ineffectual federal agency, stating: "The power of a written constitution lies in its words. It is those words that were adopted by the people. When those words speak clearly, it is not up to us to depart from their meaning in favor of our own concept of efficiency, convenience, or facilitation of the functions of government."

In short, the Court vacated the Board's order, finding that the company's "understanding of the constitutional provision is correct, and the Board's is wrong. The Board had no quorum, and its order is void."

This decision, which certainly will be appealed to the U.S. Supreme Court, provides much anticipated relief to business groups and employers who have been struggling with the aggressive, pro-labor agenda of the current Board. It also leaves the Board with only one validly appointed member, Chairman Mark Pearce, whose term is set to expire in August 2013, effectively shutting the Board down with respect to any ongoing activity. That's good news for employers who were anticipating new regulations on the speedy election rule or the notice posting requirement. In addition, for those Board rulings that have been issued since January 4, 2012, there is a strong argument that those decisions are similarly invalid, certainly if those cases are pending within the jurisdiction of the D.C. Circuit.

What Employers Should Do Now

All employers with cases pending before the Board or on appeal should review this decision closely with legal counsel to examine its impact on current cases and potentially cases recently decided but yet appealed. NLRB Chairman Mark Pearce issued a statement today in response to and disagreeing with the Court's decision, "the Board will continue to perform our statutory duties and issue decisions."

Epstein Becker Green will follow future developments. For more information about this Advisory, please contact:

Adam C. Abrahms
Los Angeles
310.557.9559
AAbrahms@ebglaw.com

Kara M. Maciel
Washington, DC
202.861.5328
KMaciel@ebglaw.com

Evan J. Spelfogel
New York
212.351.4539
ESpelfogel@ebglaw.com

Steven M. Swirsky
New York
212.351.4640
SSwirsky@ebglaw.com

This Advisory has been provided for informational purposes only and is not intended and should not be construed to constitute legal advice.

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.

EPSTEIN BECKER GREEN | LABOR AND EMPLOYMENT PRACTICE

ACT NOW ADVISORY

Requiring Confidentiality During HR Investigations May Violate National Labor Relations Act

August 28, 2012

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

---

In another foray by the National Labor Relations Board ("NLRB" or the "Board") into new territory affecting non-union workplaces, a divided three-member Board panel found that an employer's direction that employees not discuss matters under investigation with their co-workers violated Section 8(a)(1) of the National Labor Relations Act (the "Act") because it "had a reasonable tendency to coerce employees in the exercise of their rights" under the Act. *Banner Health System*, 358 NLRB No. 93 (July 30, 2012).

In concluding that the request for confidentiality "had a reasonable tendency to coerce employees," the majority gave no weight to the fact that the request was not tied to a threat of discipline. Instead, without offering any explanation, the Board held that "[t]he law… does not require that a rule contain a direct or specific threat of discipline in order to be found unlawful."

The Board also brushed aside what it called the employer's "generalized concern with protecting the integrity of the investigation" as insufficient to justify the employer's call for confidentiality. However, the Board did suggest that an employer may lawfully require that an investigation be treated as confidential if the employer could demonstrate the request is based upon:

(1) the need to protect witnesses;

(2) a likelihood that evidence may otherwise be destroyed;

(3) the threat that subsequent testimony would be fabricated; or

(4) the need to prevent a cover-up.

Unfortunately, the Board offered no guidance as to what type of proof -- general or specific, subjective or objective -- will be required to satisfy this burden.

Practical Implications of the Board's Ruling

The Board's decision applies to both unionized and non-unionized workplaces. Thus, all employers, not just those with unionized operations or facing organizing drives, may face unfair labor practice charges alleging that their policies calling for confidentiality concerning investigations unlawfully coerce employees. In this vein, the decision is similar to recent cases regarding social media and at-will employment, in that it seeks to expand the Board's oversight of non-unionized workplaces where employers are perceived by the current Board to be more likely to infringe upon employees' Section 7 rights (*i.e.*, the right to organize, participate in concerted activities and collectively bargain).

The most significant issue the decision raises is its potential impact on workplace safety, privacy, and discrimination laws that generally encourage employers to investigate sensitive allegations or issues that call for at least some degree of confidentiality. As a practical matter, limitations on an employer's ability to ensure confidentiality may dissuade employees from bringing concerns to management's attention, as well as from participating in investigations. Such reluctance may unreasonably expose employers to liability because of the increased difficulty with recognizing and remedying improper or unlawful actions.

Despite its broad impact on investigations involving employees, the import of the decision does not extend to supervisors and managerial employees. Thus, an employer is free to require that supervisors and managers maintain confidentiality in connection with any investigation, regardless of whether the employer can articulate an explanation for its actions that would satisfy one of the exceptions referred to in *Banner Health*. Of course, the determination of who is a supervisor and who is an employee under the Act is a question that may require independent consideration.

What Employers Should Do Now

Employers should proceed cautiously given the absence of substantive guidance from the Board concerning the exceptions. Reasonable first steps for remedying potentially unlawful overbroad confidentiality requirements may include:

- Eliminating blanket non-disclosure requirements from investigatory procedures;
- Re-evaluating those policies that expressly connect the violation of a non-disclosure requirements with disciplinary action;
- Developing and implementing revised policies concerning investigations that emphasize promotion of confidentiality on a case-by-case basis, particularly where there is evidence of the need to:
    - Protect witnesses and/or evidence; or
    - Prevent the fabrication of testimony or a cover up.

- Encouraging management representatives to discuss concerns with their supervisors prior to requesting an employee maintain confidentiality; and

- Training human resources employees who conduct investigations on:

    - Determining which investigations require confidentiality; and

    - Proper documentation of justifications for confidentiality so that unfair labor practice charges are more easily defended.

*****

For more information about this Advisory, or other labor-related issues, please contact:

Steven M. Swirsky
New York
(212) 351-4640
sswirsky@ebglaw.com

Adam C. Abrahms
Los Angeles
(310) 557-9559
aabrahms@ebglaw.com

Donald S. Krueger
New York
(212) 351-4516
dkrueger@ebglaw.com

D. Martin Stanberry
New York
(212) 351-4579
mstanberry@ebglaw.com

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.

EPSTEIN BECKER GREEN | LABOR AND EMPLOYMENT PRACTICE

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:

---

[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.

For more information about this Advisory or other labor-related issues, please contact:

Steven M. Swirsky
New York
212-351-4640
sswirsky@ebglaw.com

Michael F. McGahan
New York
212-351-3768
mmcgahan@ebglaw.com

This Advisory has been provided for informational purposes only and is not intended and should not be construed to constitute legal advice.

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.