

The NLRB's Expanding Agenda

by:

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A. Overview of the NLRB's Procedures and Jurisdiction and a Word on the Expanding Agenda.

To those unfamiliar with the laws concerning collective bargaining in the United States, the information contained in this paper concerning proposed revisions to the National Labor Relations Board's representation election procedures may seem designed to unfairly restrict employers' ability to oppose labor organizations, and inexplicably to "stack the deck" in favor of labor organizations. Surely, to create such an un-level playing field must be beyond the Board's power, or violate the public policy of the National Labor Relations Act?

Unfortunately, the likely answer is in the negative. The Board is given broad powers by the National Labor Relations Act, to encourage the practice and procedure of collective bargaining. Sections 1 - 6 of the Act provide these broad powers and read, in pertinent part, as follows:

¹ Nothing in this paper is intended to substitute for professional legal advice about specific matters. Minor differences in facts or legal characterizations can have a significant impact on your potential or actual liability. You should consult your labor and employment law counsel to resolve any questions you may have about your compliance with the laws and regulations discussed in this paper.

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Sec. 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce, . . . by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection

Section 3. There is hereby created a board, to be known as the “National Labor Relations Board” . . .

Section 6. The Board shall have the authority . . . to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act

While the proposed regulations do benefit unions, the Board likely will argue that the regulations comply with the basic purpose of the Act – to encourage collective

bargaining.³ The Board has periodically reviewed and revised its procedures in representation cases to carry out its duties under NLRA. Since the NLRA was enacted in 1935, the Board has amended its representation case rules at least three dozen times, often in substantial ways. The Board claims that its most recent proposed reforms are merely an effort to improve its service to the public.

While unions may have the advantage of favorable rules, employers will still win their fair share of elections. This is not 1935, and most employees understand they do not need a union to provide basic fairness and a voice at their worksite. Nevertheless, an employer must become familiar with the proposed changes in the election process, to ensure that it can adequately convey its message to employees during a representation election campaign.

1. The National Labor Relations Board

The National Labor Relations Board is an independent federal agency that is charged with enforcing the National Labor Relations Act, namely, conducting elections for employee representation by labor organizations, and investigating and remedying unfair labor practices by employers and unions.

The NLRB is governed by a five-person board and a General Counsel, who are appointed by the President with the consent of the Senate. Board members are appointed to five-year terms. The General Counsel is appointed to a four-year term. The General

³ Congress passed the Taft-Hartley Act in 1947 to make unions subject to the NLRB's unfair labor practice powers. However, Congress preserved the Wagner Act's national labor policy language encouraging collective bargaining.

Counsel acts as a prosecutor and the Board acts as an appellate judicial body to which litigants appeal decisions rendered by administrative law judges.

The NLRB is headquartered in Washington, D.C., and has over 30 regional, sub-regional, and residential offices.

2. The National Labor Relations Act – Statutory Definitions

The National Labor Relations Act generally regulates “employees,” “employers,” “labor organizations,” and “persons” (who may not be employees, employers, or labor organizations). Section 7 of the Act grants rights to employees, while Section 8(a) restricts certain actions by employers that interfere with those rights, and Section 8(b) restricts similar activities by labor organizations.

The definition of “employer” under the Section 2(2) of the Act starts with the broad, common law definition of the term, and then excludes the following: the United States; wholly owned government corporations; Federal Reserve Banks; the individual States; political subdivisions of the individual States; persons subject to the Railway Labor Act; labor organizations (other than when acting as an employer); and anyone acting in the capacity of officer or agent of a labor organization. 29 U.S.C. § 152 (2).

Section 2(3) of the Act does not expressly define the term employee. 29 U.S.C. § 152 (3). A common law employee is an employee under the Act unless specifically

excluded.⁴ Employees who have ceased work in connection with a labor dispute may remain employees under the Act for certain purposes.

The NLRA provides employees certain rights, as enumerated in Section 7 of the Act. These “Section 7” rights read as follows:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representative of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

The term “labor organization” is defined in Section 2(5) the Act. A “labor organization” must satisfy three elements: (1) employee participation; (2) a purpose to “deal” with the employer; and (3) the element of dealing must concern grievances, labor disputes, wages, rates of pay, hours or other terms and conditions of work. Thus, the scope of the definition of “labor organization” is broader than the traditional labor union. For example, it can include employee associations created by the employer to deal with employee concerns, when the association includes: (1) employee participation; (2) a purpose to “deal” with the employer; (3) concerning wages, hours or other terms and conditions of employment. *See Electromation Inc.*, 309 NLRB 990 (1992), *enforced* 35 F.3d 1148 (7th Cir. 1994).

⁴ Section 2(3) excludes from the definition of employee any individual employed: (1) as an agricultural laborer; (2) in the domestic service of any family or person at his home; (3) by his parent or spouse; (4) as an independent contractor; (5) as a supervisor; (6) by an employer subject to the Railway Labor Act; or (7) by any other person who is not an employer as defined in the Act. 29 U.S.C. § 152 (3).

Section 2(1) of the Act defines the term “person” as including “one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in cases under Title 11 of the United States Code, or receivers.” 29 U.S.C. § 152 (1). This definition is expansive, and includes individuals and organizations excluded from the definitions of employer and employee.

3. NLRB Jurisdiction.

The Board’s jurisdiction under the National Labor Relations Act extends to enterprises whose operations affect interstate commerce. The United States Supreme Court has recognized that the Board’s jurisdiction extends to all such conduct as might constitutionally be regulated under the commerce clause, subject only to a *de minimis* rule. *See NLRB v. Fainblatt*, 306 U.S. 601-07 (1939).

Traditionally, the Board has limited its statutory jurisdiction to those cases that, in the Board’s opinion, have a substantial effect on commerce. The Board has adopted standards for the assertion of jurisdiction that are based on the volume and character of the business performed by the employer. Please note these standards are an administrative creation and the Board is free to disregard them and the exercise of jurisdiction will be valid, as long as the dispute affects commerce.

The Board maintains separate, unique jurisdictional standards over private sector employers in the following industries: nonretail; retail; instrumentalities, links, and channels of interstate commerce; labor organizations; architects; amusement industry; apartment houses; art museums, cultural centers, and libraries; bandleaders; cemeteries; colleges, universities, and other private schools; enterprises engaged in the operation of

radio or television broadcasting stations, or telephone or telegraph systems; condominiums and cooperatives; credit unions; day care centers; financial information organizations and accounting firms; gaming; government contractors; health care institutions; hotels and motels; law firms and legal service corporations; newspapers; nonprofit charitable institutions; office buildings; private clubs; professional sports; public utilities; restaurants; restaurants; shopping centers; social services organizations; stock brokerage firms, symphony orchestras, taxicab companies; and transit systems. An employer operating in one of these industries should review the Board's Outline of Law and Procedure in Representation Cases, published by the Office of General Counsel (available at www.nlr.gov/sites/default/files/attachments/basic-page/node-1727/representation_case_outline_of_law_4-16-13.pdf) and applicable caselaw to determine whether the employer's business falls within the applicable jurisdictional standard.

Generally speaking, the Board's current standards are summarized as follows:

- Retailers: Employers operating retail businesses are within the Board's jurisdiction if they have a gross annual volume of business of \$500,000 or more. This includes employers in the amusement industry, apartment houses and condominiums, cemeteries, casinos, home construction, hotels and motels, restaurants and private clubs, and taxi services. Shopping centers and office buildings have a lower jurisdictional standard of \$100,000 per year.
- Non-retailers: Jurisdiction is based on the amount of goods sold or services provided by the employer out of state or purchased by the employer from out of

state, regardless of whether the purchases were directly or indirectly from out of state sources. The Board asserts jurisdiction when the employer's annual inflow or outflow is at least \$50,000.

- Special Categories:

1. Channels of interstate commerce (*i.e.* employers providing essential links in the transportation of goods or passengers, including trucking and shipping companies, private bus companies, warehouses and packing houses): minimum \$50,000 gross annual volume;

2. Hospitals, medical and dental offices, social services organizations, child care centers and residential care centers: minimum \$250,000 gross annual volume;

3. Nursing homes and visiting nurses associations: minimum \$100,000 gross annual volume;

4. Law firms and legal service organizations: minimum \$250,000 gross annual volume

5. Cultural and educational centers (e.g., private and non-profit colleges, universities, and other schools, art museums and symphony orchestras): minimum \$1 million gross annual volume;

6. Federal contractors: no minimum required.

7. Religious organizations: The Board generally will not assert jurisdiction over employees of a religious organization who are involved in effectuating the religious purposes of the organization, such as teachers in church-operated schools. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). The Board has asserted

jurisdiction over employees who work in the operations of a religious organization that did not have a religious character, such as a health care institution. *See Ukiah Valley Medical Center*, 332 NLRB 602 (2000).

8. Indian tribes: The Board asserts jurisdiction over the commercial enterprises owned and operated by Indian tribes, even if they are located on a tribal reservation. The Board does not assert jurisdiction over tribal enterprises that carry out traditional tribal or governmental functions.

Finally, the Board does not exercise jurisdiction over the following employers, either based on statutory or regulatory exemptions.

a. Federal, state, and local governments, including public schools, libraries, and parks, Federal Reserve banks, and wholly-owned government corporations.

b. Employers who employ only agricultural laborers, those engaged in farming operations that cultivate or harvest agricultural commodities or prepare commodities for deliver.

c. Employers subject to the Railway Labor Act, such as interstate railroads and airlines. *See Federal Express Corp.*, 317 NLRB 1155 (1995).

d. Horseracing and dog racing industries. *See Empire City at Yonkers Raceway*, 355 NLRB 225 (2010). However, such an employer may fall within the Board's jurisdiction, if the operation becomes primarily a casino. *Id.*

B. Representation Elections Update

1. Current procedures for Representation Election (RC)

Under the Board's current procedures, to start the election process a petition must be filed with the nearest NLRB Regional Office showing that at least 30% of the employees in a proposed bargaining unit have expressed interest in being represented by the union for purposes of collective bargaining. NLRB Agents will then investigate to determine whether the Board has jurisdiction, the union is qualified, and there are no existing labor contracts that would bar an election.

Board agents will then seek an election agreement between the employer and union setting the time and place for balloting, the ballot language, the size of the voting unit, and a method to determine who is eligible to vote. Once an agreement is in place, the parties authorize the NLRB Regional Director to conduct the election.

If no agreement is reached, the Regional Director can schedule a hearing to determine the remaining issues and then order the election and set the conditions in accordance with the Board's rules and decisions.

The Board attempt to conduct elections within 30 days of a Director's order or authorization. *See* NLRB Casehandling Manual, Part 2, Section 11302.1. However, an election may be postponed if a party files charges alleging conduct that would interfere with employee free choice in the election, such as threatening loss of jobs for benefits by an employer or a union, granting promotions, pay raises, or other benefits to influence the vote, or making campaign speeches to employees on company time within 24 hours of the election.

When a union is already in place, a competing union may file an election petition if the labor contract has expired or is about to expire, and it can show interest by at least

30% of the employees. This would normally result in a three-way election, with the choices being the incumbent labor union, the challenging one, and "none." If none of the three receives a majority vote, a runoff will be conducted between the top two vote-getters.

Representation and decertification elections are decided by a majority of votes cast. Observers from all parties may choose to be present when ballots are counted. Any party may file objections with the appropriate Regional Director within seven days of the vote count. The Board may also conduct a post-election hearing to resolve challenges to voters' eligibility. The Regional Director's ruling may be appealed to the Board in Washington, D.C. Results of an election will be set aside if conduct by the employer or the union created an atmosphere of confusion or fear of reprisals and thus interfered with the employees' freedom of choice.

Otherwise, a union that receives a majority of the votes cast is certified as the employees' bargaining representative and entitled to be recognized by the employer as the exclusive bargaining agent for the employees in the unit. Failure to bargain with the union at this point is an unfair labor practice.

There is an alternate path to NLRB-conducted elections. If employees persuade an employer to voluntarily recognize a union after a showing of majority support by signed authorization cards or other means, the union receives bargaining representative status. This status cannot be challenged during a reasonable period for bargaining, which the Board defines as not less than six months (and not more than one year) after the parties' first bargaining session.

In reality, there can be a substantial delay from the time of the filing of an election petition and the election vote. The NLRB’s website, found at www.nlr.gov, provides the following statistics:

Median Days from Petition to Election

	Median Number of days	with Election Agreement	with Contested Cases
FY04	39	39	67
FY05	38	38	67
FY06	38	38	67
FY07	39	39	70
FY08	38	36	64
FY09	37	37	67
FY10	38	38	66
FY11	38	37	64.5
FY12	38	37	66
FY13	38	37	59

The practical effect of a delay between the filing of a petition and the election vote is that the employer has additional time to actively campaign to educate and

persuade employees that they do not need a union to represent them. Perhaps unions see this as one of the main reasons why the percentage of private sector employees represented by unions⁵ has declined to 7.5% in 2013. *See* “Table 3. Union affiliation of employed wage and salary workers by occupation and industry, 2012-2013 annual averages,” found at www.bls.gov/news.release/union2t03.htm.

2. Proposed Changes to RC Process

The NLRB is proposing to amend its rules and regulations governing the filing and processing of election petitions. The Board believes these modifications will simplify representation case procedures, 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 rules amendments will also significantly shorten the period of time between the filing of a petition and the election, calling many to refer to the proposed rules as “ambush” regulations.

This is not the first time the Board has proposed “ambush” regulations. The Board first made these proposals on June 22, 2011. 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), that final rule was set aside by the U.S. District

⁵ In the private sector, only 6.7% of employees are union members. *See* “Table 3. Union affiliation of employed wage and salary workers by occupation and industry, 2012-2013 annual averages,” www.bls.gov/news.release/union2t03.htm. In 1983, 16.8% of all workers in private industry were union members. www.bls.gov, “Percent of employed, Private wage and salary workers, Members of Unions.”

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. The present proposal is, in essence, a reissuance of the proposed rule of June 22, 2011, but this time by three Board Members.

Under the proposed amendments, a typical representation case in which a union seeks to represent an unrepresented unit of employees would proceed in the following manner, if the union and the employer were not able to reach an election agreement:

a. Petition: The union files an *election petition* with the Board's Regional Office, along with a "showing of interest" demonstrating enough employee support (30% of the unit described in the petition) to justify an election. The union serves the petition on the employer, along with a description of Board procedures, informing parties of their rights and obligations in the process, and a "statement of position" form.

b. Investigation: The Board's Regional Director investigates the petition and, if it is properly supported, serves the parties with a *notice of hearing*, setting the hearing for seven days from service (absent special circumstances). The employer then posts an initial notice of election (and distributes it electronically, if appropriate) for employees in the designated unit.

c. Identifying and narrowing the issues: No later than the date of the hearing, the employer files and serves its "*statement of position*" form, setting forth its position on election-related issues that it intends to raise at the hearing, including the Board's jurisdiction; the appropriateness of the bargaining unit sought by the union; and the type, date, and location of the election. The employer is not required to state its position on the eligibility of individual employees, as individual eligibility can be contested via the challenge procedure during the election. The employer will also file and serve a *preliminary list of voters*, stating their name, work location, shift and classification. The union responds to the positions taken by the employer. Both parties describe the evidence they would offer relevant to any disputed issues.

d. Hearing: The Board's hearing officer identifies disagreements and

accepts evidence only concerning genuine disputes of material fact. Parties will not be permitted to litigate issues that they did not identify in their statement of position or response, except that any party may contest the Board’s statutory jurisdiction at any time.

Litigation of disputes involving the eligibility of voters constituting less than 20% of the unit will be deferred until after the election.

e. Decision on pre-election issues: Based on the record created at the hearing, the Regional Director will determine whether a “question of representation” exists and, if appropriate, will *direct an election*, specifying its type, date (the “earliest date practicable consistent” with the rules), time, and place. The employer will post a final notice to employees of the election (and distribute it electronically, if appropriate) for at least two days before the election and the Regional Director will distribute the final notice to employees via email if practicable.

f. Election: Within two days of the direction of election (absent extraordinary circumstances), the employer will provide a *final list of eligible voters* to the union, including phone numbers and email addresses when available. On the date stated in the direction of election, a *secret-ballot election* will be held, the ballots counted, and a tally prepared. If a voter’s eligibility is disputed, he or she is permitted to vote under challenge.

g. Decision on post-election issues: Within seven days of the tally of ballots, a party may file with the Regional Director *objections* to the conduct of the election or conduct affecting the election results together with a description of the evidence supporting the objections. The Regional Director will resolve the objections and any potentially outcome-determinative challenges to ballots, after a hearing (if necessary) commencing 14 days after the tally or as soon thereafter as practicable.

h. Review by the Board: The parties may ask the Board, in its discretion, to review the Regional Director’s pre- or post-election decisions.

3. Comparison of Current/Proposed Procedures

The following table, courtesy of the National Labor Relations Board, provides a side-by-side comparison of current and proposed procedures:

Current procedures	Proposed procedures
Parties or the Board cannot electronically file or transmit important representation case documents, including election petitions.	Election petitions, election notices, and voter lists could be transmitted electronically. NLRB regional offices could deliver notices and documents electronically rather than by mail, and could directly notify employees by email, when addresses are available.
The parties receive little compliance assistance.	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', which will help parties to identify the issues they may want to raise at the pre-election hearing. The Regional Director may permit parties to complete the form at the hearing with the assistance of the hearing officer.
The parties cannot predict when a pre- or post-election hearing will be held because practices 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 14 days after the tally of ballots (or as soon thereafter as practicable.)
In contrast to federal court rules, the Board's current procedures have no mechanism for quickly identifying what issues are in dispute to avoid wasteful litigation and encourage agreements.	The parties would be required to state their positions no later than the start of the hearing, before any other evidence is accepted. The proposed amendments would ensure that hearings are limited to resolving genuine disputes.
Encourages pre-election litigation over voter-eligibility issues that need not be resolved in order to determine if an election is necessary and that may not affect the outcome of the election and thus ultimately may not need to be resolved.	The parties could choose not to raise such issues at the pre-election hearing but rather via the challenge procedure during the election. Litigation of eligibility issues raised by the parties involving less than 20 per cent of the bargaining unit would be deferred until after the election.
A list of voters is not provided until	The non-petitioning party would produce a

<p>after an election has been directed, making it difficult to identify and resolve eligibility issues at the hearing and before the election.</p>	<p>preliminary voter list, including names, work location, shift, and classification, by the opening of the pre-election hearing.</p>
<p>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.</p>	<p>The parties would be permitted to seek review of all Regional Director rulings through a single, post-election request.</p>
<p>Elections routinely are delayed 25-30 days to allow parties to seek Board review of Regional Director rulings even though such requests are rarely filed, even more rarely granted, and almost never result in a stay of the election.</p>	<p>The pre-election request for review would be eliminated, along with the unnecessary delay.</p>
<p>The Board itself is required to decide most post-election disputes.</p>	<p>The Board would have discretion to deny review of post-election rulings -- the same discretion now exercised concerning pre-election rulings -- permitting career Regional Directors to make prompt and final decision in most cases.</p>
<p>The final voter list available to all parties contains only names and home addresses, which does not permit all parties to utilize modern technology to communicate with voters.</p>	<p>Phone numbers and email addresses (when available) would be included on the final voter list.</p>
<p>Deadlines are based on outdated technology, for example, allowing seven days after the direction of election for the employer to prepare and file a paper list of eligible voters.</p>	<p>The final voter list would be produced in electronic form when possible, and the deadline would be shortened to two workdays.</p>
<p>Representation case procedures are described in three different parts of the regulations, leading to</p>	<p>Representation case procedures are consolidated into a single part of the regulations.</p>

redundancy and potential confusion.	
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C. Extension of the Reach of the NLRA

As stated earlier, union membership in the private sector is near its all-time low. To raise the level of employees engaged in collective bargaining, a public policy tenet of the NLRA, the Board has focused on informing non-union employees of their Section 7 rights and enforcing those rights, even in the absence of a union.

The NLRB does not hide its shift to expand and enforce employees' rights to engage in Section 7 activity in the non-union setting. The Board devotes a page of its website, found at www.nlr.gov/rights-we-protect/protected-concerted-activity, to informing non-union employees of their right to engage in protected, concerted activity "either with or without a union." *Id.* The website provides the following example, from a recent unfair labor practice charge involving an employer in Moss Point, Mississippi:

Several dozen welders performing contract work under temporary visas signed a petition protesting their poor living conditions and irregular hours. The worker who delivered the petition to the employer was threatened with deportation and then fired that day. The NLRB issued complaint and scheduled a trial, but before it began, the parties settled with the worker receiving \$13,000 in backpay.

Five Star Contractors supplied skilled laborers from Brazil and other countries to work in shipyards on the Gulf Coast under contract to Signal International LLC. The workers said recruiters promised free lodging, 40-hour weeks, and plenty of overtime pay, but that instead they were charged \$75 a week to live in storage buildings and never worked a full week.

In February of 2008, several dozen workers signed a petition demanding better living conditions, full-time work and reimbursement of travel costs to the United States. Moises S. was selected to deliver the petition to

supervisors while the other workers stood behind him. He said he was immediately threatened with deportation and then fired 20 minutes later.

Assisted by a local nonprofit group, the Alliance of Dignity for Guest Workers, the workers filed a charge with the NLRB Regional Office in New Orleans. Following an investigation, the Regional Director issued a complaint alleging that Five Star violated federal labor law by threatening and then firing Moises S. The parties settled in August, with Moises S. receiving about \$13,000 in back wages for the time he would have worked had he not been fired.

Id. In addition, on the Board’s “Q & A” page and in response to the question of whether an individual must be in a union to be protected by the NLRA, the Board provides the following instruction:

Employees at union *and* non-union workplaces have the right to help each other by sharing information, signing petitions, and seeking to improve wages and working conditions in a variety of ways. For more information on this aspect of the law, including a description of recent cases, see our Protected Concerted Activity page.

The NLRB is also targeting several characteristics and/or items traditionally found in union-free employment relationships, such as employee handbooks, at-will employment statements, confidentiality provisions, and class action waivers. While the Board argues that it is merely enforcing the NLRA’s ban against any employer’s unlawful restriction of employees’ right to engage in protected, concerted activity, enforcing these rights in the non-union setting certainly has an educational component as well.

1. Impact on employers: both union and non-union

a. Social media

In 2010, the Board began receiving charges in its Regional Offices related to employer social media policies and to specific instances of discipline for Facebook

postings. To ensure consistent enforcement actions, and in response to requests from employers for guidance, Acting General Counsel Lafe Solomon released three memoranda in 2011 and 2012 detailing the results of investigations in social media cases.

The first report was issued on August 18, 2011. In four cases involving employees' use of Facebook, the Office of General Counsel found that the employees were engaged in "protected concerted activity" because they were discussing terms and conditions of employment with fellow employees. In five other cases involving Facebook or Twitter posts, the activity was found to be unprotected.

The second report was issued on January 25, 2012, and provided additional cases concerning employers' social media policies. The second report underscored two main points regarding the Board and social media: (1) employer policies should not be so sweeping that they prohibit the kinds of activity protected by federal labor law, such as the discussion of wages or working conditions among employees; and (2) an employee's comments on social media are generally not protected if they are mere gripes not made in relation to group activity among employees.

The third report, issued May 30, 2012, examined seven employer policies governing the use of social media by employees. Provisions were found to be unlawful when they interfered with the rights of employees under the Act, such as the right to discuss wages and working conditions with co-workers.

In the fall of 2012, the Board began to issue decisions in cases involving discipline for social media postings.

b. Confidentiality policies

In *Banner Health Sys. d/b/a Banner Estrella Med. Ctr.*, 358 NLRB No. 93 (2012), the Board found that a nonunion employer violated Section 8(a)(1) by maintaining a policy of instructing employees making harassment complaints not to discuss the company's subsequent internal investigation with other employees. According to the Board, employers cannot have a blanket prohibition on employees sharing information regarding internal investigations with other employees. Employers must evaluate the need to issue such instructions on a case-by-case basis. According to the Board, "[t]o justify a prohibition on employee discussion of ongoing investigations, an employer must show that it has a legitimate business justification that outweighs employees' Section 7 rights." Examples of business justifications trumping Section 7 rights include: (1) where witnesses need protection, (2) where evidence is in danger of being destroyed, or (3) confidentiality is needed to prevent a cover-up. The burden is on the employer to prove the substantial business justifications.

In *Cintas Corp. v. NLRB*, 482 F.3d 463 (D.C. Cir. 2007), the Court of Appeals for the District of Columbia Circuit upheld the Board's determination that Cintas, a prohibition of and discussion of pay among employees unlawfully restricts an employee from engaging in his/her Section 7 rights. The Court upheld the Board's determination even though Cintas had never enforced its policy prohibiting discussion of employee pay, nonunion employer, had a confidentiality policy that prohibited employees from discussing their pay. Even though Cintas had never enforced its policy, the D. C. Circuit upheld the Board's determination that the policy was unlawful, because

it could reasonably “chill” an employee’s ability to discuss wages with other employees.

c. Email use policies

Employers often maintain policies restricting employees’ use of email systems to work-related use only. The NLRB is becoming increasingly active in invalidating employer policies on the ground that the policies chill employees’ rights to engage in protected, concerted activity guaranteed by Section 7. Although *Register-Guard*, 351 NLRB 1110 (2007), *enf’d in part by Guard Publ. Co. v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009), a Bush-era pro-employer Board decision defining an employer’s right to restrict employees’ use of email, still stands, it is clearly within the new Board’s crosshairs.

Register-Guard primarily involved the legality of an employer’s policy prohibiting employees from using the employer’s email system for any non-job-related solicitations. When the union president sent union-related emails to employees at their work email addresses, the employer disciplined her.

The Bush-era Board ruled that employees have no legal right under the Act to use their employer’s email system for Section 7 purposes. The rules governing use of the email system are the same as those governing use of other employer property. An employer may lawfully bar employees’ non-work-related use of its email system and other property, unless the employer discriminates, allowing other non-work-related use but prohibiting use that involves Section 7 activity. *Id.* at 1116.

Under this standard, an employer unlawfully discriminates against the exercise of Section 7 activities only if it engages in disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected

status; however, “nothing in the Act prohibits an employer from drawing lines on a non-Section 7 basis.” *Id.* at 1118-19. The Board provided the following examples:

For example, an employer clearly would violate the Act if it permitted employees to use email to solicit for one union, but not another, or if it permitted solicitation by antiunion employees but not by pro-union employees. In either case, the employer has drawn a line between permitted and protected activities on Section 7 grounds. However, nothing in the Act prohibits an employer from drawing lines on a non-Section 7 basis. That is, an employer may draw a line between charitable solicitations and non-charitable solicitations, between solicitations of a personal nature (i.e., a car for sale) and solicitations for the commercial sale of a product (i.e., Avon products), between invitations for an organization and invitations of a personal nature, between solicitations and mere talk, and between business-related use and nonbusiness-related use. In each of these examples, the fact that union solicitation would fall on the prohibited side of the line does not establish that the rule discriminates along Section 7 lines. For example, a rule that permitted charitable solicitations, but not non-charitable solicitations, would permit solicitations for the Red Cross and the Salvation Army, but it would prohibit solicitations for Avon and the union.

Id. at 1118.

On February 25, 2014, NLRB General Counsel Richard Griffin issued an internal memorandum to all regional offices listing issues that must be submitted to the Office of General Counsel for review. The list includes matters that involve General Counsel initiatives or “areas of the law and labor policy that are of particular concern” to the General Counsel. The list includes:

- Whether a perfectly clear successor should have an obligation to bargain with the union before setting initial terms of employment;
- Employee use of an employer’s email system;
- The duty to furnish financial information in bargaining;
- Weingarten rights in non-unionized settings;

- *Collyer* deferral where an arbitration has not/will not be conducted within a year; and
- Effective remedies in organizing campaigns including access to employer electronic communications systems, access to non-work areas, and equal time to respond to captive audience speeches.

Thus, while the *Register-Guard* decision remains good law, it may not remain so for long. As a practical matter, this does not mean that every employer should immediately revise its email policies; after all, *Register-Guard* is still the rule. However, if you are likely the target of union organizing, and you stand a good chance of defeating the union campaign, your company should conduct a review of its email policies to determine if re-drawing the lines for prohibited use are less likely to be construed as an encroachment on Section 7 activity.

d. Employment-at-Will Statements/Disclaimers

The NLRB has also targeted employers' statements regarding the application of the employment-at-will rule to their workers. *See, e.g., American Red Cross*, 28-CA-23443, 2012 WL 3111334 (NLRB Div. of Judges, Feb. 1, 2012) Administrative Law Judge held that the following employment-at-will disclaimer contained in the employee handbook violated employees' Section 7 rights: "I further agree the at-will employment relationship cannot be amended, modified or altered in any way." According to the ALJ, employees could reasonably construe this language to prohibit Section 7 concerted activity, namely, the employees' ability to have a union negotiate such items as a just cause provision in a collective bargaining agreement.

The NLRB's Office of the General Counsel has issued Advice Memoranda providing examples of lawful employment-at-will policy language. The General

Counsel's office approved an at-will disclaimer that contained the following: "[n]o representative of the Company has the authority to enter into any agreement contrary to the ... employment-at-will relationship." See Memorandum from Barry J. Kearney, NLRB Associate General Counsel, to Cornele A. Overstreet, Regional Director, SWH Corp. d/b/a Mimi's Café, No. 280CA-084365 (Oct. 31, 2012). The distinction, according to the General Counsel, is that the latter example does not completely foreclose employees' ability to change their employment-at-will status.

e. Class action/collective action waivers.

The Board also has found fault with employers' class action and collective action waivers, holding that broadly-worded waivers and releases may cause an employee to believe he or she has waived their right to seek assistance from the NLRB. See *D.R. Horton*, 357 NLRB No. 184 (2012), *enf'd D.R. Horton v. NLRB*, 737 F.3d 344 (5th Cir. 2013). In *D.R. Horton v. NLRB*, 737 F.3d 344 (5th Cir. 2013), the United States Court of Appeals for the Fifth Circuit reviewed decision in which the NLRB ruled an employer's mandatory arbitration agreement and class or collective action waiver constituted an unfair labor practice. The agreement provided that employees agree to arbitrate "without limitation[:] claims for discrimination or harassment; wages, benefits, or other compensation; breach of any express or implied contract; [and] violation of public policy." *Id.* at 363. The Board held that the agreement's restriction on class and collective actions barred employees from exercising their rights to engage in Section 7 concerted protected activity; in other words, the agreement itself directly infringed on employees' Section 7 rights, and therefore it was *per se* unlawful. The Fifth Circuit rejected the "unlawfulness

per se” position and held that the Board failed to adequately consider the Federal Arbitration Act, which generally favors arbitration agreements and requires their enforcement.

While the court found that employers do not automatically violate the Act through the use of arbitration agreements containing class and collective action waivers, it agreed with the Board that D.R. Horton’s agreement violated the Act because its language could reasonably be interpreted as prohibiting employees from filing unfair labor practice charges with the Board. The Court focused on the agreement’s language that the employee “knowingly and voluntarily waiv[es] the right to file a lawsuit or other civil proceeding relating to Employee’s employment with [Horton] as well as the right to resolve employment-related disputes in a proceeding before a judge or jury.” D. R. Horton argued that the policy on its face did not address administrative proceedings, such as unfair labor practice charges before the Board. According to the Fifth Circuit, “[t]he reasonable impression could be created that an employee is waiving not just his trial rights, but his administrative right as well.”

2. Impact on bargaining unit - - the rise of the “micro-unit”

The Board, and now the U.S. Court of Appeals for the Sixth Circuit, have given unions another weapon in their organizing arsenal – the “micro-unit.” A “micro-unit” is a smaller group of the total number of employees at a particular worksite that a labor union seeks to represent. Micro-units are advantageous to unions, because they can control the group of eligible voters in the proposed unit, thereby increasing the union’s odds of winning a majority of votes cast.

The NLRA authorizes the Board to determine “the unit appropriate for the purposes of collective bargaining.” Other than specifically providing that certain units are not considered appropriate, such as ones including guards with other employees, the law does not provide much guidance on the issue. With the exception of proposed units in the healthcare industry (for which the Board has issued rules identifying appropriate bargaining units in acute care hospitals), the scope of a proposed unit generally is requested by the union, opposed by the employer, and then made the subject of the hearing at which the hearing officer will determine the appropriate unit. The standard is simply that the employees in the unit must share a “community of interests.” So, if a union proposes a unit of all production and maintenance employees, and all of the employees share a community of interests (e.g., similar wages, benefits, skills, duties, working condition, and supervision, frequency of contact and interchange with other employees, and functional integration⁶), then all of the employees will be included in the unit and all eligible employees in the unit will be allowed to vote in the election.

As a matter of election strategy, unions always want to maintain majority support in any proposed unit; therefore, if an organizing union suspects it will not win the support of a majority of all production and maintenance employees, it will petition for a smaller unit. Smaller units are often easier to organize, and can establish the union’s “beach head” in the employer’s operation, from which the union will mount additional campaigns. Not

⁶ See generally *Agri Processor Co. v. NLRB*, 514 F.3d 1, 8 (D.C. Cir. 2008) (to determine if a community of interest exists, the Board typically looks at the similarity of wages, benefits, skills, duties, working conditions, and supervision of employees), *cert. denied* 555 U.S. 1031 (2008); see also Chapter 12, Appropriate Unit-General Principles, National Labor Relations Board Outline of Law and Procedure in Representation Cases (August 2012), found at www.nlr.gov.

surprisingly, employers generally oppose a union's attempt to seek a smaller unit, and contend that there is no legitimate reason for a union seeking to carve out a smaller group from the larger group, where all such employees share a community of interests.

The NLRB considered the issue of micro-units in *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011). The Board found that a smaller unit is appropriate in a non-acute healthcare facility, even though the remaining employees also share a community of interests with the micro-unit. The Board clarified an employer's burden as follows: "[i]n cases in which a party contends that a petitioned-for unit containing employees readily identifiable as a group who share a community of interest is nevertheless inappropriate because it does not contain additional employees, the burden is on the party so contending to demonstrate that the excluded employees share an overwhelming community of interest with the included employees." *Id.* The Board cited Supreme Court precedent (*American Hospital Association v. NLRB*, 499 U.S. 606 (1991)) recognizing the Board's position that Section 9(a) of the Act allows employees to seek to organize a unit that is appropriate, and that "an appropriate unit" does not have to be the "most appropriate" unit, as long as the employees in the unit share a community of interests. The Board has held that the appropriateness of an overall unit does not establish that a smaller unit is inappropriate. *Montgomery Ward & Co.*, 150 NLRB 598, 601 (1964).

To overcome the union's petitioned-for unit that is found to be an appropriate unit, an employer must make a "heightened showing," that is, in essence, a showing that the included and excluded employees share an "overwhelming" community of interest. Such

a showing will require all of the considered factors to overlap almost completely for all of the considered employees. *See also Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 422 (D.C. Cir. 2008). The Board provided examples:

If the proposed unit here consisted of only selected CNAs, it would likely be a fractured unit: the selected employees would share a community of interest but there would be “no rational basis” for including them but excluding other CNAs. If the proposed unit here consisted of only CNAs working on the night shift or only CNAs working on the first floor of the facility, it might be a fractured unit. In other words, no two employees’ terms and conditions of employment are identical, yet some distinctions are too slight or too insignificant to provide a rational basis for a unit’s boundaries. But the proposed unit of CNAs is in no way a fractured unit simply because a larger unit containing the CNAs and other employee classifications might also be an appropriate unit or even a more appropriate unit.

Id. (citations omitted). The employer appealed the Board’s ruling.

In *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013), the United States Court of Appeals for the Sixth Circuit upheld the Board’s recognition of micro-unions in *Specialty Healthcare*. In reviewing the Board’s decision, the Court noted that it must uphold the Board’s interpretation of the Act if it is reasonably defensible, and that the Court may not reject the Board’s interpretation merely because the courts might prefer another view of the statute. *Id.* at 559. The Sixth Circuit characterized the Board’s analysis as a cogent explanation of its approach, and found that the Board’s interpretation was reasonably defensible. Thus, employers can expect unions to seek to represent micro-units whenever it is in their strategic best interests.

3. What is covered by the NLRB definition of Section 7 Rights

Section 7 is the heart and soul of the Act. It grants basic rights to individual employees. Section 7 gives employees rights “to self-organization, to form, join or assist

labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection,” and, importantly, the right to “refrain from any or all such activities.” Thus, conduct protected by Section 7 must satisfy two standards: (1) it must be concerted; and (2) it must be engaged in for purposes of collective bargaining or other mutual aid and protection.

Not surprisingly, the Board interprets the term “protected, concerted activity” very broadly. The Board focuses on whether the activity is concerted, whether it seeks to benefit other employees (whether in pay, hours, safety, workload, or other terms of employment), and whether it is carried out in a way that may cause it to lose protection (e.g., reckless or malicious behavior, such as sabotaging equipment, threatening violence, or revealing trade secrets). The following are recent representative cases:

- *Mercedes-Benz of Orlando*, 358 NLRB No. 163 (2012). The Board found that an employee had engaged in protected, concerted activity when he complained to a visiting public health official about other employees not washing their hands after using the restroom. While the administrative law judge made a finding that the public health official was a guest of the employer and unaware of the ongoing issues surrounding hand washing, the Board found it irrelevant that the comment was not made to a management official who was aware of the employees' concern. The Board stated that "what is relevant is that his comments furthered employees' protected concerted activity addressing sanitary restroom habits, an employment term and condition."

- *Marriott International, Inc. d/b/a J.W. Marriott Los Angeles at L.A. at L.A.*

Live, 359 NLRB No. 8 (2012). The Board declared invalid an employer's rule prohibiting employees from being in the interior of the hotel more than fifteen minutes before or after a shift without prior approval from a manager. The Board found the rule was unlawful because it necessarily required employees to disclose to management the nature of the activity for which they sought access, and the requirement has a tendency to the chill exercise of Section 7 rights. The Board similarly invalidated as overbroad a rule that prohibited employees from using the guest facilities during nonworking hours without prior approval from management. In doing so, the Board determined that application of such a rule could apply to an employee who stayed after work to discuss union matters with co-workers over supper in the hotel.

- *N.L.R.B. v. Starbucks Corp.*, 679 F.3d 70 (2d Cir. 2012). The Second Circuit held that Starbucks had met its burden of establishing that its restriction of allowing only one union button to be worn by employees was in furtherance of a legitimate business interest in promoting a particular public image through employee buttons. "Special circumstances justify restrictions on union insignia or apparel when their display may ... unreasonably interfere with a public image that the employer has established." *Id.* at 78. The Court ruled that Starbucks is entitled to require its employees to wear buttons promoting its products and could limit the union buttons to one in order to avoid the distraction from its messages that multiple union buttons might create. The court ruled that management had a "legitimate, recognized managerial interest" in limiting the number of buttons employees could wear, and that the rule did not unlawfully prevent or chill the employees' exercise of Section 7 rights.

4. NLRB posting requirement and the impact on communications with employees

In August 2011, the NLRB issued a final rule requiring all employers subject to the NLRA to post a copy of a notice advising employees of their rights under the NLRA and providing information pertaining to the enforcement of those rights. Originally, the Rule was scheduled to take effect on November 14, 2011. However, in October 2011, the Board postponed the implementation date until January 31, 2012, allowing for additional education and outreach to employers. In December 2011, the Board postponed again the effective date, this time until April 30, 2012, to allow a federal court more time to consider a lawsuit by the National Association of Manufacturers seeking an injunction to prevent the enforcement of the notice-posting rule.

Since that time, several federal courts have issued decisions invalidating the final rule in its entirety. *See, e.g., National Association of Manufacturers v. NLRB*, 717 F.3d 947 (D.C. Cir. 2013); *Chamber of Commerce of the United States v. NLRB*, 721 F.3d 152 (4th Cir. 2013). Based on these decisions, the NLRB takes the position, as posted on its website, that it is enjoined from enforcing the notice posting rule. The NLRB adds, “However, employers are free to voluntarily post the notice, if they wish.”

D. Per Se Violations of the NLRA

An employer’s policies and practices that violate employees’ Section 7 rights may subject the employer to an unfair labor practice charge under Section 8(a)⁷. Section

⁷ The NLRB protects employees’ Section 7 rights through Section 8 of the NLRA. Section 8(a) restricts the activities of employers, while Section 8(b) restricts the activities of labor organizations.

8(a)(3) prohibits employers from intentionally retaliating or discriminating against union members. Section 8(a)(1)⁸, on the other hand, prohibits an employer from any interference with an employee's exercise of Section 7 rights, *regardless of the employer's motive*. It is a "strict liability" provision.

An employer may violate Section 8(a)(1) by maintaining a work rule that would reasonably tend to chill employees in the exercise of their Section 7 rights, *even absent enforcement of the rule*. "[I]f the rule explicitly restricts Section 7 activity, it is unlawful If the rule does not explicitly restrict Section 7 activity, it is nonetheless unlawful if: (1) employees would reasonably construe the language of the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. *NLRB v. Northeastern Land Services, Ltd.*, 645 F.3d 475, 482 (1st Cir. 2011); *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). The Board has also held that "ambiguous employer rules – rules that reasonably could be read to have a coercive meaning – are construed against the employer. This principle follows from the Act's goal of preventing employees from being chilled in the exercise of their Section 7 rights – whether or not that is the intent of the employer – instead of waiting until the chill is manifest, when the Board must undertake the difficult task of dispelling it." *Flex Frac Logistics, LLC*, 358 NLRB No. 127 (2012), *enf'd Flex Frac Logistics, LLC v. N.L.R.B.*, No. 12-60752 (5th Cir. March 24, 2014). Generally, if an employer disciplines an employee who engages in Section 7 activity in violation of a work rule that restricts such activity, then the employer violates

⁸ Section 8(a)(1) forbids an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."

Section 8(a)(1) regardless of whether the employee's conduct could have been prohibited by an otherwise lawful rule.

Using this standard, the Board is increasingly finding that benign employer policies violate Section 8(a)(1). For example, in *American Red Cross Blood Services, Western Lake Erie Region*, Case 08-CA-090132, 2013 NLRB LEXIS 395, 2013 WL 2446134 (Carissimi, June 4, 2013), the Administrative Law Judge found the employer unlawfully restricted employees' Section 7 rights through its confidentiality policy, despite a statement in a separate document, signed by employees, which stated, "I acknowledge and agree that this Agreement does not deny any rights provided under the National Labor Relations Act to engage in concerted activity, including but not limited to collective bargaining." *Id.* According to the ALJ, statements in the handbook and other documents provided to employees could be read to include personnel information, such as wages, benefits, and working conditions, in the scope of the matters employees must keep confidential. The Office of the NLRB's General Counsel argued that the rules were facially overbroad, because they did not restrict the definition of confidential information to exclude terms and conditions of employment.

The ALJ ruled against the employer by finding the policy facially overbroad, and based his holding a long list of NLRB cases in which the Board found confidentiality policies violative of Section 8(a)(1):

Further examples of confidentiality rules similar to those in the instant case that the Board has found to be facially overbroad and violative of Section 8(a)(1) are found in *Sheraton Anchorage*, 359 NLRB No. 95, slip op. at 3-4 (2013) (finding a rule unlawful as facially overbroad that provided "[a]ssociates are not to disclose any [] confidential or proprietary information except as required solely for the benefit of the Company in the

course of performing duties as an associate of the Company ... examples of confidential and proprietary information include ... personnel file information ... [and] labor relations [information] ...”; *Hyundai America Shipping Agency, Inc.*, 357 NLRB No. 80, slip op. at 12 (2011) (finding a rule unlawful that prohibited “[a]ny unauthorized disclosure from an employee’s personnel file”); *Cintas Corp.*, 344 NLRB 943 (2005) *enf’d*. 42 F.3d 463 (D.C. Cir. 2007) (unlawful rule required employees to maintain “confidentiality of any information concerning the Company, its business plans, its partners (employees), new business efforts, customers, accounting and financial matters.”); *IRIS U.S.A. Inc.*, 336 NLRB 1013, 1013, fn. 1, 1015, 1018 (2001) (finding a rule unlawful that stated all information about “employees is strictly confidential” and defined “personnel records” as confidential); *University Medical Center*, 335 NLRB 1318 (2001) (finding unlawful a rule prohibiting “release or disclosure of confidential information concerning patients or employees.”); and *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999) (finding unlawful a code of conduct that prohibited employees from revealing confidential information about customers, hotel business, or “fellow employees.”)

American Red Cross Blood Services, 2013 NLRB NEXIS at **24-26.

The NLRB’s work rule analysis under Section 8(a)(1) applies equally to employers’ at-will employment statements and class action/collective action waivers, discussed above.

E. NLRB Activities and Cases

1. *Boeing Company*, Case No. 19-CA-089374, 2013 NLRB LEXIS 537, 2013 WL 3895502 (July 26, 2013).

In the *Boeing Company*, Case No. 19-CA-089374, 2013 NLRB LEXIS 537, 2013 WL 3895502 (July 26, 2013), the ALJ held that an employer cannot direct employees involved in workplace investigations to keep the information concerning those investigations confidential among other employees. Boeing posted two policies, one “directing” employees not to discuss workplace investigations, and subsequently one “recommending” that employees not discuss the investigations. The ALJ followed

Banner Estrella Medical System, 358 NLRB No. 93 (2012) (discussed above), which prohibited blanket confidentiality rules that have the potential effect of chilling the exercise of Section 7 rights. The fact that the Company indicated its desire for confidentiality, and that its confidentiality concerns should be taken seriously, is enough to have a reasonable tendency to chill employees from exercising their statutory rights.

2. *Fresenius USA Manufacturing*, 358 NLRB No. 138 (2012)

In this case, employee Grosso, an open and active supporter of the union, anonymously scribbled vulgar, offensive, and threatening statements on several union newsletters left in an employee break room in an undisputed attempt to encourage his fellow employees to support the union in an upcoming decertification election. In a good-faith response to female employees' complaints about those statements, Fresenius investigated the statements, questioned Grosso about them, and, upon confirming Grosso's authorship, suspended and discharged him for making the statements and falsely denying responsibility for them. While the Board found that the employer lawfully investigated Grosso and his activities, the Board found that his suspension and discharge violated the Act.

The facts of the case arose during the course of a decertification campaign. Three union newsletters with handwritten statements were found in the employee break room. The first read, "Dear Pussies, Please Read!" The second read, "Hey cat food lovers, how's your income doing?" The third stated, "Warehouse workers, RIP."□□Several women working in the warehousing unit complained that the statements were vulgar, offensive and threatening. One said that she recognized the handwriting on the

newsletters as Grosso's. □ A manager met with the employees and promised to investigate the statements.

A company vice president and senior director visited the facility on Sept. 21 to discuss the decertification election, and several women brought up their concerns about the handwritten statements. □ □ The vice president, senior director and manager questioned Grosso later in the day. The four of them started the discussion talking about sports. Grosso said, "Hey, the Red Sox, RIP." The vice president then asked Grosso about the handwriting on the newsletters. Grosso denied seeing the newsletters. The vice president noted the similarity between the "Warehouse workers, RIP," statement and the "Red Sox, RIP" comment. Grosso responded that "RIP" is a common expression and denied responsibility for the statements. □ □ The next day, Grosso attempted to call a union representative to discuss the previous day's questioning, but accidentally dialed the vice president's phone number instead. Mistakenly thinking he was speaking to his union representative, Grosso admitted writing the statements. When the vice president informed Grosso that he and other managers had heard Grosso's confession, Grosso pretended he was someone else. Grosso was asked to report to work and was suspended pending an investigation. □

On Sept. 25, the vice president referred the female employees' written complaints to a senior HR manager, who after speaking with the vice president, senior director and manager decided to discharge Grosso. □ □ Grosso sued, claiming the termination violated the National Labor Relations Act (NLRA). □ □

□ On appeal to the NLRB, the board agreed that the investigation was lawful, but

ruled that the termination was not. □ □ “An employee’s otherwise protected activity may become unprotected if in the course of engaging in such activity, the employee uses sufficiently opprobrious, profane, defamatory or malicious language,” the Board acknowledged. □ □ An employee’s use of vulgar language, however, does not necessarily cost him the protection of the act if it is part of otherwise protected activity, the board added. □ □ It emphasized that in writing his comments, Grosso was attempting to convey to co-workers his concern over the faltering support for the union. “In so doing, Grosso was exercising his Section 7 right to attempt to organize, or more accurately, reorganize, his fellow employees—a right that is at the very core of protected activity.” □ □ The comments were impulsive rather than premeditated, the board said, and they occurred at a workplace—a warehouse and loading dock—that was not unused to profane speech, the board determined. □ □

3. *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted* 133 S. Ct. 2861, 186 L. Ed. 2d 908 (June 24, 2013) (No. 12-1281).

The United States Supreme Court heard oral arguments in the *Noel Canning* case on January 13, 2014 and a decision is expected by the end of the Court’s 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. The additional question is relevant to the facts of this case, as Senate Republicans in 2012 held *pro forma* sessions every three days in an effort to prevent a “recess” and the corresponding exercise of the President’s recess appointment power. The Constitution does not specify how many days the Senate has to be away before a president can make a recess appointment, but Republicans argue that none have taken such action during a break of less than 10 days.

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.

4. *First Transit Inc. and Amalgamated Transit Union Local #1433, AFL-CIO*, 360 NLRB No. 72 (April 2, 2014).

The Board invalidated an employer’s personal conduct rule, which prohibited “discourteous or inappropriate attitude or behavior to passengers, other employees or members of the public, as well as disorderly conduct during working hours.” The Board found the language overbroad and ambiguous, which could cause employees to reasonably construe the rule as encompassing any disagreement or conflict among employees, including those related to discussions and interactions protected by Section 7.