UNDERSTANDING THE NATIONAL LABOR RELATIONS ACT

by

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I. OVERVIEW

A. The NLRA And Its Amendments' Coverage

In 1935, Congress passed the National Labor Relations Act, "NLRA," (29 U.S.C. § 151, et seq.) (or the "Wagner Act") in an effort to protect employees who were unionized or who wished to unionize from the unfair labor practices of employers. Originally, the NLRA was commonly referred to as the union's "Bill of Rights," since it addressed only the unfair labor practices committed by management.

In 1947, the NLRA was amended by the Taft-Hartley Act, or the Labor Management Relations Act. Taft-Hartley established what is now referred to as management's "Bill of Rights," which is a list of acts considered to be unfair labor practices committed by unions. Taft-Hartley also established the Federal Mediation and Conciliation Service in an effort to help facilitate negotiations and arbitration between management and labor.

Additionally, Taft-Hartley granted the President of the United States the authority to intervene in any industry-wide disputes which in his opinion could imperil the nation's national "health or safety" if allowed to continue. If the President does intervene, then a "Board of Inquiry" is appointed to investigate the matter and report back to the President. The Board of Inquiry makes no recommendations to the President; it only investigates and reports the results of this investigation.

If he so chooses, the President is then empowered to ask a federal judge to grant an 80-day injunction to stop the strike. After 60 days, a report on the status of the dispute is to be given to the President, and within the next 15 days, a poll of the striking employees is taken regarding management's last offer. If no resolution occurs after this 80-day period, then only special emergency legislation by Congress can end the strike.

In 1959, Congress passed the Landrum-Griffin Act, or the Labor Management Reporting and Disclosure Act, amending the NLRA again by imposing certain

regulations on the internal affairs of unions and giving union members themselves rights regarding their union. Specifically, the Landrum-Griffin Act requires that every labor union:

1. Adopt a constitution and bylaws, and a bill of rights which contain minimum safeguards for its members,

2. File with the Secretary of Labor a report outlining its policies and procedures, as well as an annual financial report, and then disclose this information to its members,

3. Establish standards regarding union elections and trusteeships, and reports on trusteeships must be filed with the Secretary of Labor, and

4. Assume a fiduciary relationship regarding their members, as well as file a report with the Secretary of Labor for transactions presenting a conflict of interest.

Additionally, union members were given the right to nominate and elect union officers, attend and participate in union meetings and to have their pension funds properly managed.

Today, the NLRA basically covers all persons involved in a labor dispute with a covered employer. A "covered employer" is defined as being any private sector employer who engages in a business activity that affects interstate commerce, which covers virtually all employers, with certain exclusions.

Many states have laws that directly parallel the NLRA which apply to the public sector. Unionization by federal employees, on the other hand, is governed by Title VII of the Civil Service Reform Act of 1978, or the Federal Service Labor-Management Relations Act. Section 2(2) of the NLRA excludes from its coverage such employers as federal or state offices, Federal Reserve Banks, employers subject to the Railway Labor Act, which governs the unionization of railroad and airline employees, and labor unions and their officers and agents, other than when they are acting as employers.

Next, § 2(9) of the NLRA defines a labor dispute as being **any** controversy concerning the terms, tenure, or conditions of employment, or any controversy concerning the association or representation of persons in negotiating, maintaining, changing, or seeking to arrange the terms or conditions of their employment. As a result, the dispute does not necessarily have to be between an employer and an employee to be covered by the Act.

Additionally, the NLRA defines an "employee" as being anyone whom the employer has the right to control the "manner and means" of their work.

However, § 2(3) of the NLRA specifically excludes from its coverage the following employees:

1. Farm workers,

2. Domestic workers,

3. Persons employed by parents,

4. Independent Contractors ("right to control" standard is used),

5. Supervisors (conducts any such duties as the hiring, firing, directing, evaluating, transferring, and disciplining of other employees: §2(11)),

6. Anyone subject to the Railway Labor Act of 1926, which includes railroad and airline employees,

7. Teachers in parochial schools,

8. Anyone working for an employer not covered by the Act,

9. Managers (those in a position to formulate policy), and

10. Confidential Employees (those who assist in a confidential capacity to persons who formulate and effectuate labor relations policy).

B. Enforcing The NLRA

The governing administrative body of the NLRA is the National Labor Relations Board, or the NLRB. The NLRB consists of a five-member board who each serve staggered five-year terms. Each member of the NLRB is appointed by the President of the United States with a new member being appointed each year.

Basically, through its administrative network, which consists of the general counsel, regional directors, numerous field agents and attorneys in regional offices and sub-offices, a national office staff, and administrative law judges, or ALJs, the NLRB oversees union elections and hears charges of unfair labor practices allegedly committed by either management or labor.

However, in reality, even though the NLRB operates as the adjudicative body enforcing the NLRA, it is the General Counsel's Office who actually investigates and prosecutes unfair labor practice cases through its regional offices. General counsels are appointed by the NLRB for four-year terms under § 3(d). ALJs are entrusted with hearing unfair labor practice cases and making recommendations to the NLRB.

C. Representation Cases And Complaint Cases

Basically, there are two types of cases that occur under the NLRA, Representation Cases and Complaint Cases. However, the authority of the NLRB is not self-executing. In order to initiate an investigation or an election, either a complaint or a petition must be filed with the Board. (Employees file "complaints," whereas unions file "petitions.")

The first type of case under the NLRA is a Representation Case, or an "R-Case," which involves overseeing union authorization and decertification elections. In such cases, it is the regional office of the NLRB who decides whether a question of representation exists, as well as whether the petitioning union is the appropriate bargaining unit. The regional office then oversees the final voting results.

The second type of case brought before the NLRB are unfair labor practice Complaint Cases, or "C-Cases." First, an unfair labor practice charge is filed by the charging party with the General Counsel's Regional Office. The statute of limitations for filing a charge of an unfair labor practice is six months after its occurrence. The regional director then investigates the charge and decides whether to issue a complaint. Up until a complaint is issued, the charge may be withdrawn by the charging party. The regional director may also dismiss the charge and this decision to dismiss is subject only to a limited and final review by the general counsel.

If the regional director decides to issue a complaint, the NLRB may seek a temporary injunction or a restraining order against the unfair labor practice. The party against whom the complaint is filed is then given a chance to reply. A hearing is then supposed to be held before an ALJ within five days. A regional attorney, or counsel for the general counsel, will often present the general counsel's case, but the charging party may also intervene. In this hearing, the ALJ may call and examine witnesses and the ordinary federal rules of evidence and procedure are followed.

After the ALJ hears the evidence presented, he will then prepare his decision for the NLRB. The ALJ can then issue a "cease and desist order" against the employer if he believes the complaint is valid, as well as issue remedial measures.

Either party may then file objections with the NLRB to the ALJ's decision within 20 days of it being issued. If neither party files objections to this decision, the NLRB may adopt the ALJ's decision as its own. If either party does file any objections, then the NLRB, usually acting in the form of a three-member panel, will review the case. The parties may file briefs, and occasionally the NLRB will schedule an oral argument. The NLRB may substitute its own findings at this appeal or it may adopt those of the ALJ. If a case involves important questions of policy, then the full Board will most likely consider the case.

If either party objects to the NLRB's findings, that party may then appeal the case to the appropriate federal court of appeals. Of course, only those parties who intervened at the hearing level can appeal.

Of course, the employer can just ignore the NLRB's, or the ALJ's, order, since an administrative agency has no true enforcement power. However, the NLRB can go to the federal court of appeals and ask for an injunction. The federal court of appeals may set aside the NLRB's findings only if the court concludes that the Board's decision is not supported by "substantial evidence on the record considered as a whole," or if the NLRB made errors of law in rendering its decision.

A party may then make a final appeal to the U.S. Supreme Court, but the chances of gaining further review by the Supreme Court are remote. The Supreme Court will "intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." (Universal Camera Corporation v. N.L.R.B., 340 U.S. 474 (1951)).

D. Critical Sections Of The NLRA

Some of the more important sections of the NLRA are as follows:

- § 7 states that covered employees have a statutory right to organize or to refrain from organizing under the Act.
- § 8 states what these statutory rights are in the form of unfair labor practices.
- § 9 outlines the procedures that are to be used in conducting union elections and defines the term "exclusive representatives."
- §10 outlines how employees' rights in § 7 and § 8 are enforced.

II. WHO IS A "SUPERVISOR" UNDER THE NLRA?

Over the past decade, the definition of "supervisor" has been the subject of a great deal of debate under the National Labor Relations Act (the Act). Of course, under the NLRA, if an employee is classified as a "supervisor," that employee does not have the right to engage in concerted activity under Section 7 of the Act. That means they are not protected from speaking out against the employer under the NLRA.

It also means they cannot join the union.

In Frenchtown Acquisition Company v. NLRB, 683 F.3d 298 (6th Cir. 2012), the Court of Appeals for the Sixth Circuit rejected the employer's claim that charge nurses at a long-term care and rehabilitation facility were supervisors. The court's detailed decision reviewed eight separate supervisory actions related to discipline, hiring and giving work assignments that these "supervisors" performed. In each case, the court agreed with the

National Labor Relations Board (NLRB) that the employer's evidence was insufficient to prove supervisory status.

The court applied the 3-part test for determining supervisory status enunciated by the United States Supreme Court in NLRB v. Kentucky River Commission, 532 U.S. 706 (2001), and interpreted the NLRB's later decision in Oakwood Healthcare, Inc., 348 NLRB 686 (2006).

Under Kentucky River case, the Supreme Court determined that a supervisor must:

1. Have authority to engage in any 1 of the 12 enumerated supervisory actions, which includes the authority to assign, responsibly direct others, hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, adjust employee grievances, transfer other employees, or effectively recommend these actions. (29 U.S.C. § 152(11));

2. Use independent judgment in exercising that authority; and

3. Hold that authority in the interests of the employer.

The Sixth Circuit ruled that Frenchtown's charge nurses did not **actually** have the authority to assign, responsibly direct, discipline, hire, or transfer other employees, or effectively recommend these actions. At best, this authority existed only on paper, according to the Court.

The Sixth Circuit found that, although the tasks were listed in their job descriptions, the **charge nurses were not involved in the formal disciplinary process** (oral or written counseling, suspensions or discharges) but were only involved in issuing "in-service" training. The Court found that such training was not part of the discipline process.

The Court also found that it was "insufficient" that the charge nurses sometimes sent employees home for engaging in egregious conduct. The Court reasoned that "true" supervisors or managers would have subsequently investigated the conduct and made the decision as to whether formal discipline was needed.

The Court therefore found that the charge nurses' assignment of work and their involvement in transfers (limited to "floating" nurse's aides based on a float list) were simply routine tasks that did not involve the exercise of independent judgment.

Additionally, the Court held that a supervisor must exercise the authority to perform these duties in the interest of the employer, and, most importantly, an employee claimed as a supervisor must use "independent judgment." See 29 U.S.C. § 152 (11); NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706, 712-612 (2001).

An employee exercises "independent judgment" when he or she may take or effectively recommend action "free from the control of others and form an opinion or evaluation by discerning and comparing data." In re Oakwood Healthcare, Inc., 348 NLRB 686, 692-693 (2006), the NLRB held that **merely following company policies or rules, verbal**

instructions from a supervisor or other higher authority or a collective bargaining agreement will not suffice.

The bottom line is that whenever an employer claims that an employee is a "supervisor," that employee's "supervisory authority" must be **backed up in writing and in practice.** If, for example, an employer claims that charge nurses are dispensing discipline, then employee personnel files should contain written warnings or other notices of discipline signed by charge nurses.

Second, written policies (including collective bargaining agreements) or practices may negate claimed supervisory status. In Frenchtown, the employer argued that in-service counselings delivered by charge nurses were disciplinary in nature (or part of the discipline process). However, the collective bargaining agreement for nurse's aides did not allow aides to have union representation with them when they received an in-service, which is a clear union right whenever discipline is being administered. The NLRB and the court concluded that this was evidence that in-services were educational and not disciplinary in nature.

Third, the supervisory duties must entail the exercise of independent judgment. In Frenchtown, the charge nurses transferred aides to ensure that the employer maintained adequate staffing levels. That is not considered an exercise of independent judgment, even though the ability to transfer employees is one of the enumerated supervisory duties under the NLRB.

However, this more narrowed definition "supervisor" has continued to narrow under the NLRB's recent interpretations.

In Cook Inlet Tug & Barge, Inc., 362 NLRB No. 111 (2015), the NLRB found that the functions performed by tugboat captains did not constitute any real "assignment of authority." Therefore, these tugboat captains were classified as "employees" and not "supervisors" under the NLRA.

In reaching its decision, the NLRB relied mainly on the fact that each of the employer's vessels typically had only one deckhand and one captain assigned to it. Therefore, according to the NLRB, any authority assigned to the captains did not include any exercise of "**independent judgment**" because all of the directives given by the captain would have had "only one obvious and self-evident choice." The NLRB stated that all of the captain's directions and the assignment of tasks was controlled by ***management's criteria***.

According to the NLRB, a supervisor's assignment of a task should not be "self-evident" or based on availability, but should require the supervisor **to tailor the employee's capabilities to the task**. The NLRB found that the captains issued ad hoc directions to perform "discrete" (i.e., not substantial) tasks in assigning deckhands to close hatches and prepare equipment. A task that flows logically from an employer's routine operation is not substantial.

Further, the NLRB reasoned that there was no specific evidence showing that any of these captains were ever actually held accountable for deckhand performance.

Also, although the employer did show that these captains are held "responsible" under Coast Guard regulations, there was no evidence that the employer would apply these same regulations to the captains.

Likewise, the NLRB found that the captains did not schedule employees using independent judgment. While a supervisor who designates work hours may possess assignment authority, he does not do so if ***management sets and controls changes to the schedule***.

The employer argued that the captains of the boats chose which deckhand would work on his vessel, which it argued constituted independent judgment.

However, the NLRB held that the employer did not establish that the captain exercised any real "assignment authority" under the NLRA because it was not clear what criteria the captains used to base their decisions, nor was it clear that such decisions were free from the control of others.

Next, the NLRB found that the captains did not responsibly direct employees because they were ***not accountable for actions of those that reported to them***. The NLRB reiterated that any evidence of accountability must show that the supervisor would suffer consequences when the employees commit errors, not just when the captain himself commits these errors. Without specific examples showing that such accountability has occurred, the employer cannot show that these captains had "full authority" on their vessels.

Therefore, the NLRB ruled that these captains were not supervisors and were eligible to vote in representation elections and to be represented as part of a collective bargaining unit. (363 NLRB No. 58, 2015 WL 7873627 (Dec. 2, 2015).)

Then, in Buchanan Marine, L.P., 363 NLRB No. 58 (2015), the NLRB found that although tugboat captains did exercise independent judgment in directing their crew members' work, the captains are not supervisors under Section 2(11) of the NLRA **because the employer did not hold the captains accountable for the crew members' job performance**.

Even though a captain might lose his license if he failed to ensure compliance on his boat, the NLRB found that the evidence did not establish accountability because the loss of the captain's license would flow from captain's ***personal*** failings, not from the failings of his employees.

In a 2-1 decision, the NLRB held:

- An employer seeking to show an employee's supervisory status under the NLRA must provide evidence showing how (or for what) the employee is held accountable for other employees' job performance.

- Buchanan Marine's tugboat captains are not supervisors under Section 2(11) of the NLRA because Buchanan Marine failed to provide evidence that:

- ✓ it holds the captains accountable for crew members' job performance; and

- ✓ the captains are responsible for the direction of crew members as required by Section 2(11).

Therefore, simply serving as the highest-ranking employee on an employer's work site does not mean that an employee is a supervisor under the NLRA. (See also Brusco Tug & Barge, 362 NLRB No. 28 (March 18, 2015) and Training School at Vineland, 332 NLRB 1412 (2000)).

Therefore, the NLRB made it clear that:

- The key issue to determining supervisory status in the tugboat context is whether the **employer**, rather than some legal regulation or some other source, holds the supervisor accountable for other employees' job performance.

- Under the accountability standard, relying on Oakwood Healthcare, Inc., the NLRB gave the example of where a captain would be held accountable as a supervisor if he could be held responsible for a deckhand causing a tow to break loose.

- Although tugboat captains exercise independent judgment in directing crew members' work, Buchanan Marine failed to produce sufficient evidence to show that it actually holds captains accountable for the actions of the crew and that captains can suffer adverse consequences for their crew members' work errors or poor job performance.

The NLRB also found that it was "irrelevant" to this case that the captains were the only supervisors on board the boats. As a result, according to the NLRB, these tugboats were being operated without any supervisors on board.

Then, in Palmetto Prince George Operating, LLC v. NLRB (4th Cir 11/01/2016), the employer operated a nursing home that employed a total of 23 supervisors to staff its units: six registered supervisors (RNs) and 17 licensed practical supervisors (LPNs).

Provided 24-7 nursing home care for its patients. It employed 23 supervisors, which included six RNs and 17 LPNs. Those supervisors exercised authority over 40 certified nursing assistants (CNAs).

All of the supervisors assessed patients, answered patient calls, administered medications, and provided patient care. The CNAs assisted nursing home residents with daily tasks such as bathing and restroom use.

The management team consisted of a director of nursing, an assistant director of nursing, and three unit managers. The unit managers supervised and disciplined the nursing staff, arranged their schedules and assignments, and monitored and evaluated the quality of nursing care they provided.

The supervisors and CNAs were the first line of authority, although the supervisors were listed above the CNAs on Palmetto's organizational chart.

The NLRB found that the nursing supervisors were in realty rank-and-file employees under the NLRB and could therefore be part of the union.

The employer appealed to the Fourth Circuit Court of Appeals. The court held in favor of the NLRB.

Again, the Supreme Court has held that in order to be a "supervisor" under the NLRA, that supervisor must:

1. Have authority to engage in any 1 of the 12 enumerated supervisory actions, which includes the authority to assign, responsibly direct others, hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, adjust employee grievances, transfer other employees, or effectively recommend these actions. (29 U.S.C. § 152(11));

2. **Use independent judgment in exercising that authority; and**

3. Hold that authority in the interests of the employer.

Even though the NLRB challenged the first and second prongs of the test for supervisory status, the Fourth Circuit addressed only the second:

> Did the supervisors exercise the authority under the first prong in a manner that was not merely clerical or routine but required the use of **independent judgment**?

The employer argued that the supervisors were supervisors because they **had authority to discipline and to responsibly direct the work of certified nursing assistants (CNAs)** in a manner that required the use of independent judgment.

The court concluded that both of the employer's arguments failed for the same reason:

> The employer had not shown that the supervisors must use any independent judgment when performing these functions.

Regarding discipline, the employer relied on an incident where the supervisor sent a CNA home for sleeping on the job, an offense punishable **only** by discharge, which the **director of nursing after investigation imposed**.

However, the court found that the manager conducted a separate investigation of misconduct and made all final disciplinary decisions. Based on this fact, the court stated that a reasonable mind could certainly conclude that the employer did not offer evidence sufficient to establish that the supervisors used independent judgment when disciplining CNAs.

Regarding responsibility, the court found the supervisors ' responsibility in every case seemed to amount to the same thing:

> Making sure the CNAs follow the
> pre-established written instructions.

The court noted that the employer did not offer even one instance in which the supervisors had actually directed the CNAs largely without guidance from the employer's instructions, or the managers remained on call after work and on the weekend to assist these supervisors. Given these facts, the court found that the supervisors did not exercise independent judgment when directing CNAs.

With respect to the Fourth Circuit's precedent in Oakwood Healthcare, Inc., 348 NLRB 686, which implemented guidance offered directly by the United States Supreme Court concerning "independent judgment" in NLRB V. Kentucky River Cmty. Care, Inc., 532 US 706 (2001), **the court deferred to the Board's interpretation of "independent judgment" and applied the standards expressed in Oakwood.**

Therefore, according to the Fourth Circuit Court of Appeals, the NLRB's current interpretations of the NLRA's standards regarding who is a supervisor under the NLRA supersede the Circuit's prior cases.

WHAT DOES THIS MEAN TO HR?

Under these decisions, employers must now meet a much higher and more difficult standard in order for anyone to be classified as a "supervisor" under the NLRA.

Unions, on the other hand, will be thrilled with these interpretations by the NLRB. Since supervisors are not considered employees under the NLRA and are therefore excluded from bargaining units, more employees will be eligible to join the union, which, of course, will likely lead to much larger bargaining units. This will then lead to more potential dues-paying members for the unions.

More importantly, however, is the fact that employers typically rely on their supervisors to represent the company and present the company's arguments during a union campaign. The primary key to building good employee relations in any organization lies in the supervisor/employee relationship. Executives rarely have the time to build trusting relationships with rank-and-file employees. This means there will be much fewer supervisors to build trust in an organization with the employees, which makes an organization much more susceptible to unionization.

Of course, with the new "Quickie Election Rules," employers will not be able to litigate the supervisory status of an employee until *after* a union election.

Therefore, it will make it even more difficult for the employer to determine which of its employees satisfy the NLRB's much more narrow view of who is a supervisor.

Therefore, if an employer wants to designate an employee as being a "supervisor" under the NLRA, the employer needs to be able to show with concrete evidence that its supervisors have been held directly accountable for the actions of its employees.

III. WHAT IS AN "UNFAIR LABOR PRACTICE"?

If an employer violates the NLRA, what can happen to an employer?

By law, the NLRB cannot assess penalties against an employer.

However, the agency may seek make-whole remedies, such as reinstatement and back pay for discharged workers. Perhaps even more damaging are the "informational remedies" the NLRB can assess, such as requiring the employer to read and post a notice stating that it has violated the employees' rights under the NLRA and that it promises never to do it again. This posting must remain up for 60 days.

If an employer was worried about becoming unionized, reading such an admission to all of its employees and then posting this notice for the next 60 days may very well be the death nail for that employer's union free environment.

IV. SECTION 7: RIGHTS OF EMPLOYEES

A. Rights Granted

Section 7 of the NLRA grants employees basic unionization rights, which includes the right to form, join or assist labor organizations, the right to bargain collectively with the employer through representatives of their own choosing, and the right to engage in any other concerted activities for the purpose of collective bargaining or for the purpose of mutual aid and protection of each other.

Therefore, under Section 7 of the National Labor Relations Act, rank-and-file employees have the right to unionize. Employers are not permitted to unlawfully interfere with employees as they exercise this right.

Likewise, Section 8(a)(1) of the NLRA says that employees are permitted to discuss the "wages, terms and conditions of employment" amongst themselves and with others.

In 1947, the Taft-Hartley Act also gave employees the right to refrain from engaging in these activities unless such rights are affected by a labor agreement that requires membership in a union as a condition of employment.

As a result, these unionization rights under the NLRA apply to not only unionized employers, but they also apply to **nonunionized employers** because their employees ***may*** want to unionize one day.

Both unionized and non-unionized employers alike should be familiar with the NLRA since many of its provisions apply to both. The NLRA not only protects unionized employees, but § 7 specifically protects employees who act together in a "concerted activity" for the purpose of collective bargaining, which is two or more employees acting in concert with one another. Therefore, if a company's employees are acting together in a concerted activity, they may very likely be afforded many of the protections available under the NLRA, unionized or not.

B. Is An Individual Employee's Activities A "Concerted" Activity?

In NLRB v. City Disposal Systems, 465 U.S. 822 (1984), James Brown was a truck driver who refused to drive one of his employer's trucks due to faulty brakes. Brown's refusal was in accordance with his union contract, but he was fired anyway.

On appeal, the U.S. Supreme Court held that the "Interboro Doctrine" says that when one single employee asserts his rights under a collective bargaining agreement, this employee is really engaging in a "concerted activity" covered under § 7 of the NLRA. Such an assertion of rights is really a "constructive concerted action" since when one member exercises his rights under the contract, he is speaking for everyone. Therefore, the act of one employee can serve as a concerted activity under the NLRA.

In Fresh & Easy Neighborhood Market, Inc., 361 N.L.R.B. No. 12 (2014) Margaret Elias, a cashier at a Fresh & Easy grocery store, asked her supervisor if she could participate in training for alcohol sales known as "TIPS." When the supervisor told the cashier to write him a note on a whiteboard in the break room, she wrote the following message:

"Bruce … Could you please sign me up for
TIPS training on 9/10/11?"

The next day, Elias saw that someone had changed the word "TIPS" to "TITS" and had drawn a picture of a worm or a peanut urinating on her name.

Because employees at the cashier's level were not permitted to have cameras in the facility, Elias hand-copied the picture and altered message that were on the whiteboard onto a piece of paper. She then asked her male team leader and two female coworkers, apparently not in a very polite or subtle fashion, to sign the paper in order to witness that she had copied the message and picture accurately, which they did.

After the team leader and two coworkers signed the paper, Elias added the following statement to the paper:

"Someone changed the board to 'TITS' instead of TIPS
and [sic] and put a worm pissing on my name.
I take this as sexual harassement [sic].
This has been on the [b]oard since I got here at 2PM."

Elias testified that while she did not intend this statement she added to the paper to be a joint complaint, “I was offended and I believe that the other girls were offended too. And it just seemed that if we were to file a harassment charge that it wouldn't happen again.”

Later that same day, when the supervisor spoke with the team leader and two employees about Elias's request that they sign her handwritten reproduction of the altered whiteboard message, all three said they believed they were only witnessing that Elias's reproduction was correct, that they did not want to help Elias bring a sex harassment complaint, and that they felt forced to sign the paper.

One of the two female coworkers also made a formal complaint against Elias for “bullying” her into signing the paper and accused Elias of altering the paper after she had signed it.

Another employee later testified that she signed only because Elias was making a scene in front of customers.

The other female coworker testified that the day after she signed the paper she told her supervisor she thought the whiteboard alteration was inappropriate and that she hoped he would “take care of it.”

No one signed the paper intending to take group action.

The company's employee relations manager investigated the whiteboard incident and the complaints against the cashier. When the manager asked Elias why she felt she had to get her coworkers to sign the statement, Elias responded that it was for her own protection. The employee relations manager also instructed Elias not to obtain any further statements so that she could conduct her investigation of the incident. The manager told Elias, however, that she could speak with other employees and ask them to be witnesses for her. Elias was never disciplined or threatened with discipline for her actions.

After the investigation was completed and the employee who altered the whiteboard disciplined, the employee relations manager informed Elias in writing of what had been done and assured Elias she would be protected against retaliation.

Elias filed the following unfair labor practice (ULP) charges:

- Elias Engaged in Concerted Activity for the Purpose of Mutual Aid and Protection
- The Employer did not Violate Section 8(a)(1) by Instructing Elias not to Obtain Additional Statements from her Coworkers
- The Employer did not Violate Section 8(a)(1) by Questioning Elias about the Whiteboard Incident and her Request to Her Coworkers (Interrogation)

Elias Engaged in Concerted Activity for the Purpose of Mutual Aid and Protection

First, the NLRB found that Elias was engaged in "concerted" activity for the "purpose of mutual aid or protection," conduct that the NLRA protects. Therefore, merely soliciting her co-workers to sign the paper made her actions "concerted," even though:

- Her co-workers didn't agree with her complaint;
- The solicited employee was uncomfortable with the solicitation; or
- Elias was the only immediate beneficiary of the solicitation.

The majority further held that the conduct was for the purpose of "mutual aid or protection" because Elias sought to invoke the protection of a law that benefits employees:

The prohibition against sexual harassment in the workplace.

It did not matter that Elias was confronting activity directed solely at her. Invoking the "solidarity principle," the majority held that the solicited employees had an interest in helping Elias because next time "it could be one of them…." As a result, there was an "implicit promise of future reciprocation" by Elias that in the future she would help the employees that she solicited if they experienced any workplace problems.

The Employer as did not Violate Section 8(a)(1) by Instructing Elias not to Obtain Additional Statements from her Coworkers

In this case, the employer told Elias not to gather any more statements from other employees. The NLRB found that this instruction was permissible because it was "narrowly tailored to address the [employer's] need to conduct an important and thorough investigation."

The NLRB noted that Elias could have harmed the investigation if she continued to ask for employee statements. Further, Elias was seen as a "bully" by another employee.

Additionally, it was important to the NLRB that the employer did not prohibit Elias from speaking to anyone about this issue. In a previous NLRB decision, Banner Health System, 358 N.L.R.B. No. 93 (July 30, 2012), employees were prohibited by the employer from talking to each other during an investigation. Since the employer could not show that any harm would result from them talking to each other about the investigation, such an instruction was seen as being unlawful.

In this case, the employer told Elias not to gather any more statements from other employees. The NLRB found that this instruction was permissible in this case because it was "narrowly tailored to address the [employer's] need to conduct an important and thorough investigation." However, the NLRB specifically noted that the employer **did not** prohibit Elias from, among other things, talking to other coworkers or asking them to be witnesses.

The Employer did not Violate Section 8(a)(1) by Questioning Elias about the Whiteboard Incident and her Request to Her Coworkers (Interrogation)

The NLRA generally prohibits employers from questioning employees about their protected concerted activity, including ***why*** they chose to engage in that activity.

At the same time, the Board has recognized that, as part of a full and fair investigation, it may be appropriate for the employer to question employees about facially valid claims of harassment and threats, even if that conduct took place during the employees' exercise of Section 7 rights. Therefore, the NLRB did not find such questioning of Elias to be illegal.

It was clear to the NLRB that the employer's questioning of Elias was focused just on a legitimate part of the investigation, which were her coworkers' complaints against her. Since her coworkers complained to management about Elias' own conduct in seeking their assistance in raising a sexual harassment complaint to management, and since one felt "bullied," her conduct was in question.

Finally, in closing the investigation, the employer assured Elias that it was committed to protecting her against retaliation of any kind and told her to report any future incidents of harassment or retaliation. Such assurances are relevant to a determination of whether an employer's questioning of an employee about her collective actions is lawful.

ALTERNATIVE POINT OF VIEW

NLRB Member Miscimarra (R), however, said that he would have found that Elias' conduct was neither concerted nor for the purpose of mutual aid or protection. No one intended to take group action. Also, Elias had her supervisor and co-workers sign that they were merely affirming that Elias had copied the whiteboard accurately. It was not a petition or similar document to be shared with management.

Member Miscimarra also criticized the "solidarity" principle the cited by the majority. That principle requires the employee to prove that the conduct was for the **purpose of mutual aid or protection.**

Member Miscimarra found no such proof in the record because Elias' purpose in pursuing signatures on her handwritten transcription "pertained solely to her individual complaint that she presented on behalf of herself."

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

This decision will very likely lead to a great deal of litigation across the next several years. For now, there are some major implications arising from this decision that employers need to be thinking about:

- There are ***many*** rights protecting employees, such as wage/hour, workplace safety, Workers' Compensation, unemployment compensation, and discrimination laws. Under this decision, every time employees exert their rights under these protections, they could very likely be acting in a concerted manner … even if they are acting on their own.

- The "concerted activity" protections of the NLRA will complicate your investigations.

  In this case, the employer asked just **two questions** that the employee said constituted an unlawful "interrogation." While the NLRB did not find a violation in this case, the majority's holding rests on **extremely** narrow grounds.

  Therefore, future investigations that might involve different conduct and different questions may **not** be protected. Careful consideration of how the investigation is structured and what is asked will be very important in the future.

- Under Banner, employers are not allowed to prohibit employees from talking to each other during an investigation, unless the employer can show that it could avoid harm by doing so. In this case, the employer told Elias not to gather any more statements from other employees. The NLRB found that this instruction was permissible in this case because it was "narrowly tailored to address the [employer's] need to conduct an important and thorough investigation." However, the NLRB specifically noted that the employer **did not** prohibit Elias from, among other things, talking to other coworkers or asking them to be witnesses.

V. UNION'S "BILL OF RIGHTS"

In order to afford employees the right to organize, the NLRA gave unions the following "bill of rights," which if violated by an employer are deemed to be unfair labor practices and are actionable under the Act.

1. Section 8(a)(1): An employer may not interfere with, restrain or coerce employees regarding their rights under the Act.

2. Section 8(a)(2): An employer may not dominate or interfere with a union.

3. Section 8(a)(3): An employer may not discriminate against an employee to either encourage or discourage union membership.

4. Section 8(a)(4): An employer may not discriminate against an employee for exercising his rights under the NLRA.

5. Section 8(a)(5): An employer may not refuse to bargain in good faith with the union over the wages, hours and other terms and conditions of employment.

VI. SECTION 8(a)(1): IT SHALL BE AN UNFAIR LABOR PRACTICE FOR AN EMPLOYER TO INTERFERE WITH, RESTRAIN, OR COERCE EMPLOYEES IN THE EXERCISE OF THEIR RIGHTS GUARANTEED UNDER SECTION 7 (RIGHT TO ORGANIZE).

A. Solicitation And Distribution Of Materials By Non-Employees: Restricting Activities On Company Owned Property

1. Inaccessibility Exception

In Lechmere, Inc., v. NLRB, 502 U.S. 527 (1992), the United Food and Commercial Workers Union wanted to organize the employees at the Lechmere retail store, the employer. The union placed handbills on the employees' car windows in Lechmere's lot, picketed for six months, passed out handbills, and recorded license plate numbers in order to contact the employees at home. The union then wanted to send a non-employee union representative onto the employer's property and post signs. Lechmere objected.

The U.S. Supreme Court reasoned that two rights were in conflict here: The employer's property rights from the common law, which includes the right to exclude others, and the employees' statutory rights under the NLRA to organize. Additionally, the Court reasoned that the NLRA says nothing about the union's right to organize, since § 7 covers only the rights of employees.

The Court therefore held that an employer may prohibit the solicitation of employees or the distribution of literature by non-employee organizers anywhere on company property if the union has another means of communicating with the employees available to it. This rule is referred to as the "inaccessibility exception" to the employer's property rights.

In order for the union to invoke the inaccessibility exception, the employees must be beyond the "reasonable efforts" of the union to reach, such as in a company-owned town.

In Lechmere, however, the union had already demonstrated that it had reasonable means by which to reach employees, such as by recording employee license plate numbers and contacting them at home. Therefore,

the Court denied the union's request to enter the employer's facility since contacting these employees was not beyond the reach of the union by using reasonable efforts.

Additionally, the employer in Lechmere claimed that allowing the union onto its property over its objections would force it to use its property for a purpose other than for what it desired. As a result, the Takings Clause of the U.S. Constitution would therefore be violated. However, the Court held that while such a ruling would be a "taking" of the employer's property, the intrusion would be de minimus.

In NLRB v. Babcock & Wilcox Company, 222 F.2d 316 (5th Cir. 1955), the Fifth Circuit upheld an employer's refusal to allow non-employees to handbill in its parking lot. The court indicated that even though the union had been unsuccessful in reaching employees, there were other means available, such as copying down the car license plate numbers of employees by pro-union employees. Of course, the union may distribute literature off the employer's premises on public property, such as by the road leading into the employer's facility.

The NLRB frequently applies Lechmere and Babcock & Wilcox in denying union organizers access to any areas open to the public on the employer's property. In North American Rockwell Corporation, 195 N.L.R.B. 1046 (1972), the NLRB held that an employer may limit pro-union solicitation by outsiders on an employee's free time (i.e., before or after work, at breaks or mealtime), and it may impose this limitation even after the start of a union campaign.

B. No Access Policies For Off-Duty Employees

In Marina Del Ray Hospital, 31-CA-029929 (Oct. 22, 2015), the NLRB upheld a hospital's off-duty access policy as lawful on its face, but then concluded that the hospital applied the policy in a discriminatory manner by permitting social events while barring meetings with union representatives.

Relying upon Tri-County Medical Center, 222 NLRB 1089 (1976), the NLRB confirmed that employers may maintain **off-duty employee access policies** so long as they are "**limited to the interior of the facility, clearly disseminated to all employees, and apply to off-duty access for all purposes, not just union activity**."

In this case, the hospital's policy restricted off-duty employees from entering the hospital except for visiting a patient, receiving medical treatment, or hospital-related business as follows:

- Off-duty employees may access the Hospital only as expressly authorized by this policy. An off-duty employee is any employee who has completed or not yet commenced his/her shift.

- An off-duty employee is not allowed to enter or re-enter the interior of the Hospital or any Hospital work area, except to visit a patient, receive medical treatment, or conduct hospital-related business. "Hospital related-business" is defined as the pursuit of an employee's normal duties or duties as specifically directed by management.

- An off-duty employee may have access to non-working, exterior areas of the Hospital, including exterior building entry and exit areas and parking lots.

- Any employee who violates this Policy will be subject to disciplinary action up to and including termination.

The NLRB majority concluded the policy was identical to a policy upheld in Sodexho America LLC, 391 NLRB 97 (2014), and was therefore lawful.

However, the NLRB majority also concluded that **because the hospital used this off-duty access policy to prevent employees from meeting with union representatives, while permitting access for social events such as retirement parties, the hospital's actions discriminated against union activity in violation of Section 8(a)(1) of the NLRA**.

The dissenting member agreed the off-duty policy was lawful, and that the hospital applied it discriminatorily, but differed in his reasoning. He argued the majority was misinterpreting Tri-County. Saint John's Health Center, 357 NLRB No. 170 (2011) concluded that under Tri-County, any exception to an off-duty restriction was enough to invalidate the policy, and subsequent cases, such as Sodexho, had to create "exceptions" to the rule. Instead, the dissenting member argued, the Tri-County rule should be read merely as prohibiting policies directly restricting union access, and allowing policies which contained reasonable exceptions "unrelated to union or other protected concerted activity." For that reason, instead of the Board-related exceptions in Sodexho, the hospital's policy was lawful.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

Even is employers draft a legal policy, it is absolutely vital that the "theory" set forth in the policy matches its practical application in the real world.

REMEMBER: **PRACTICE trumps POLICY**.

C. Employees May Re-Enter Company Property And Recruit For The Union

In First Healthcare Corporation v. N.L.R.B., No. 01-2478 (6th Cir. 09/19/2003), First Healthcare operated nursing homes at various locations throughout the United States. In September 1994, Alfredo Chavez, an employee at First Healthcare's Alta Vista, California, facility, traveled to the company's Bakersfield, California, facility to assist in a union organizing effort among that facility's employees. Chavez entered the employee parking lot and began handing out fliers touting the benefits of union membership. He also spoke to several employees about joining the union as they changed shifts.

Chavez was ordered to leave the premises by the facility's administrator, who threatened to call the police if he refused. The administrator knew at the time that Chavez was a company employee.

In July 1995, Alta Vista employee Jenny Davenport distributed union literature in an outdoor break area adjacent to the Bakersfield facility and spoke to employees on break about the benefits of unionization. The facility's business manager ordered her to leave the property. When questioned about the decision to deny Davenport access to the Bakersfield premises, he responded that employees couldn't distribute materials on company property unless "they have the approval of management."

Charges against First Healthcare were filed with the National Labor Relations Board (NLRB), which ruled that the company had no right to prevent its off-duty, off-site employees from entering the company's property outside of nonwork areas for the purpose of union organizing.

The company appealed that decision to the Sixth Circuit. The Sixth Circuit held for the NLRB.

The Sixth Circuit held that the law is clear: Nonemployee union organizers have no right of access to an employer's property, unless they can show that entering the employer's premises is the only practical way to contact e employees (e.g., telephone calls, mail, or off-site handbilling are not effective).

On the other hand, employee organizers have an absolute right to solicit their co-workers in nonwork areas during break and meal periods, whether paid or unpaid, as long as the solicitation doesn't interfere with work or the employer's operations.

In 1989, in NLRB v. Ohio Masonic Home, the Sixth Circuit extended the rights of employee organizers when it held that a nursing home in Springfield, Ohio, couldn't deny off-duty employees access to parking lots, gates, and other outside nonwork areas for purposes of union-related activity unless the employer had "justified business reasons for doing so." The off-duty employees, however, actually worked at the site involved in the dispute.

On appeal, First Healthcare argued that its off-site employees are like nonemployees for purposes of union organizing and should be treated as such. The Sixth Circuit disagreed.

The Sixth Circuit held that "off-site employees are more akin to on-site employees for purposes of [rights under the National Labor Relations Act], noting in part that off-site and on-site employees share the same common concerns as to a specific employer, not only as to employment in general for purposes of garnering union support, but also on matters relating to such things as wages, benefits, and other workplace issues."

First Healthcare also argued that it had a sufficient business reason for denying off-site employees access — "that it would be extremely difficult and burdensome to keep track of all of its employees." In this case, however, since the employer had no problem identifying the employees involved, the court ruled that there was enough evidence to affirm the NLRB's rejection of this defense.

The court did note that off-site employees' access rights aren't unlimited. The employer "would not be without recourse if it were faced with security concerns, traffic problems, or other difficulties in allowing offsite employees access to its facilities."

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

If you have a no-access policy for off-duty employees and you want to apply it to outside nonwork areas, you must be prepared to justify it based on **safety, security, traffic problems, or another valid business reason**. It won't be enough to say: "It's our property, it's not open to the general public, and we wish to decide who may enter it."

D. Solicitation By Employees

Due to the employer's common law right to direct the work of its employees, an employer may limit the solicitation of its employees by other employees, within certain boundaries.

In Our Way, Inc., 268 N.L.R.B. 394 (1983), the NLRB held that an employer's work rules banning solicitation and distribution of literature during working hours was presumptively valid. However, such rules relating to employees' "free time" at work are presumptively invalid. Still, if an employer can show that union solicitation is disruptive to its production, even though employees are on nonworking time in certain areas of the premises (i.e., retail floor), the solicitation can be banned.

For instance, in Marshall Field & Company v. NLRB, 200 F.2d 375 (7th Cir. 1952), the Seventh Circuit upheld the employer's ban on employee solicitation even during employee breaks since it was found to be confusing and disruptive for the customers.

In Stoddard-Quirk Mfg. Company, 138 N.L.R.B. 615 (1962), the NLRB held that an employer may usually ban the distribution of literature by its own employees during their nonwork time due to the employer's legitimate interest in keeping the plant free of litter.

As for the wearing of union buttons at work, absent "special circumstances" based on an employer's legitimate safety or production concerns, an employer may not prohibit the wearing of union buttons or insignias by employees (Malta Construction Company, 276 N.L.R.B. 1494 (1985)).

However, in Burger King Corporation v. NLRB, 725 F.2d 1053 (6th Cir. 1984), the Sixth Circuit held that the employer could lawfully prohibit its employees from wearing union buttons since it had supplied those employees who had regular contact with the public with uniforms. The employer enforced its "no button" rule in a non-discriminatory manner, and since the employer has a right "to project a clean, professional image to the public," the court found for the employer.

In Tri-County Medical Center, 222 N.L.R.B. 1089 (1976), the NLRB held that employers may also deny off-duty employees access to its facility if:

1. It limits off-duty employees' access solely with respect to the interior of the facility and other work areas,

2. The policy is clearly disseminated to all employees, and

3. It applies to off-duty employees seeking access to the plant for any purpose and not just to those engaging in pro-union activity.

However, the NLRB construes this test narrowly, so an employer's rule denying off-duty employees entry to parking lots, gates and other **outside nonworking areas** would probably be held invalid.

E. Can Employers Enforce A "No Solicitation" Rule While Conducting An Anti-Union Campaign Of Their Own?

In NLRB v. United Steel Workers (Nutone, Inc.), 357 U.S. 357 (1958), during an organizational campaign by the United Steelworkers, NuTone, the employer, distributed noncoercive anti-union literature to its employees, while at the same time enforcing a rule against distributing or posting literature by any of its employees, whether it be anti- or pro-union, during working hours. The Steelworkers filed an unfair labor practice charge with the NLRB, claiming that the "no solicitation" rule was discriminatory.

However, the U.S. Supreme Court held that an employer may engage in noncoercive anti-union solicitation while at the same time it enforces an anti-solicitation rule against its employees. The Court also held that an employer's right to "free speech" is guaranteed by § 8(c) of the NLRA. Therefore, an employer's anti-solicitation rule does not violate § 7 per se ("by itself").

The Court then reasoned that the mere fact that the employer broke its own anti-solicitation rule is not enough to establish an unfair labor practice. On the other hand, if it can be shown that the channels of communication available to the union are not as great as those of the employer, then there might be a basis for an unfair labor practice charge.

The Court then pointed out that an employer's limitation on solicitation must not discriminate solely against the union or the distribution of union literature. Therefore, if the employer allows other types of solicitation or the distribution of other materials to occur, then such a limitation would be an unfair labor practice.

F. Anti-Union Speech And Section 8(c)

Section 8(c) of the NLRA, which was part of the 1947 Taft-Hartley Amendment, states that it is not an unfair labor practice for an employer to express its views or arguments, either in oral or written form, regarding organized labor unless such expressions also contain threats of reprisal or a promise of future benefits for opposing the union. Therefore, under the NLRA, an employer has a statutory right to express its views, but if such an expression is viewed as being coercive or containing promises to employees for opposing the union, the employer will have committed an unfair labor practice.

In determining the "coerciveness" of an employer's expression, the NLRB and the courts will examine the "totality of the circumstances" in which the comments were made. For example, an employer's "suggestions" or "preferences" may be coercive where the employees, from prior experience, know the consequences of incurring the employer's strong displeasure.

In NLRB v. Gissel Packing Company, 395 U.S. 575 (1969), the president of Gissel told his employees that the union trying to organize the company, the Teamsters, were a "strike-happy" outfit and that other local businesses have closed because of their activities. He also said that the company was on "thin ice" financially, and that a strike could lead to closing the plant. When the Teamsters then lost the election, it filed an unfair labor practice with the NLRB.

On appeal, the U.S. Supreme Court said that under § 8(c), employers are free to express their views. However, if the employer makes any predictions regarding the union, these predictions must be based on objective fact and convey a belief as to what will probably happen as a result of consequences **beyond its control**. Therefore, an employer is free only to predict what it reasonably believes will be the likely economic consequences of unionization that are outside of its control.

However, the Court then stated that if there is any implication at all in the employer's comments that a threat of reprisal exists, then the statement is no longer a prediction of what may occur if the union is elected. As a result, the employer loses its § 8(c) protections under the NLRA, as well as its free speech protections under the First Amendment.

The Court therefore found that such statements by Gissel did indeed contain an

implied threat, since predicting that electing a union could result in closing the facility was not based on fact. To make such a prediction, the statement must be based upon a "demonstrable economic fact," which was not the case here. Consequently, Gissel committed an unfair labor practice with these statements. The Court then ordered that a new election be held.

It is important to understand that even if Gissel had been found not guilty of committing an unfair labor practice, the NLRB has found that an employer's right to speak under § 8(c) only applies to unfair labor practices. Consequently, an employer's right to speak under § 8(c) does not apply to Representation Cases where the NLRB insists on maintaining an atmosphere of "laboratory conditions" free from coercion in which to hold elections.

As a result, even though an employer may not be found guilty of committing an unfair labor practice, if an employer's conduct creates an atmosphere which makes it impossible to hold an election where employees are free to vote either for or against the union, the NLRB and **still** order the election to be vacated and a new election held, even if the employer has not committed any unfair labor practices. Unfortunately for employers, unions very often win the second election.

G. Employees As Captive Audiences

As previously discussed, an employer may give anti-union speeches to its employees on company time and on its own property (i.e., to a captive audience), as long as the speech itself is not coercive. This is true even if the employer refuses to give the union an equal opportunity to reply on company property during work hours, unless the union has no other reasonably available channel through which to express its views, which could then constitute an unfair labor practice by the employer.

Of course, if an employee insists on stating his position on the union or asking a question following an employer anti-union speech, this employee is protected from discharge under § 8(a)(1).

H. Polling And Interrogating Employees

If an employer wants to poll its employees in order to determine for itself how much support the union has, it may do so if it follows the guidelines established in Operating Engineers Local 49 v. NLRB (Struksnes Construction Company), 353 F.2d 852 (D.C. Cir. 1965), which state that:

1. The purpose of the poll is to determine the validity of the union's claim that it represents a majority of the employees,

2. The employees must be aware of this specific purpose of the poll,

3. Assurances against reprisals must be given by the employer,

4. The poll must be conducted by secret ballot, and

5. The employer must not have engaged in any previous unfair labor practices or have otherwise created a "coercive" atmosphere.

Still, an employer may not poll its employees when a petition for a union election is pending before the NLRB.

There are also two dangers that exist with polling employees.

First, if an employer discovers through this poll that the majority of its employees want a union, the employer will then most likely have the union imposed upon it. The rationale used by the NLRB in such cases is that once an employer becomes aware of the fact that the union has a majority of the employees wanting representation, the employer must recognize the union as the employees' exclusive representative.

Secondly, if conducting such a poll destroys the "laboratory conditions" of the election, considering the totality of the circumstances, the NLRB could order the union to be imposed against the employer.

Next, **individual** interrogations of employees by the employer regarding their views, or other employees' views, of the union is strictly prohibited, no matter how diplomatic and noncoercive the employer might be in conducting such a session. Additionally, even if an employer merely initiates a conversation with an employee in his work area regarding the union, this too could be seen as being a coercive interrogation.

On the other hand, considering the totality of the circumstances, an employer may question its employees **as a group** if:

1. No history of coercion or hostility exists,

2. The nature of the information sought does not seem to be for the purpose of taking action against the employees.

3. The questioning is not too intimidating (i.e., Where was it held? Who did the questioning? etc.), and

4. The employees' responses are truthful, which tends to indicate a lack of coercion.

I. Investigatory Interviews And Concerted Activity

In NLRB v. Weingarten, Inc., 420 U.S. 251 (1975), a store manager and a loss prevention specialist summoned an employee to ask her about some stolen chicken. The employee asked to have her union representative present, but this request was denied. The employee then confessed to eating free lunches and was ordered to make restitution for the chicken, which came to $160.

On appeal, the U.S. Supreme Court held that where it is reasonably believed that

an investigatory interview will lead to disciplinary action, an employee cannot be denied his request to have a union representative present. Otherwise, § 8(a)1 is violated. The Court reasoned that people enter into unions for their own mutual aid and protection. Therefore, to deny union representation at such sessions violates an employee's § 7 rights.

This holding has since become known as the "Weingarten Rule." Still, the Weingarten Rule only applies to investigatory interviews, acting as a sort of "right to counsel" policy. The Weingarten Rule does not apply to sessions where an employee's punishment or discipline has already been decided and it is merely being pronounced.

If a union employee's rights are denied under the Weingarten Rule, the employee can refuse to attend the investigatory session. However, the employee must ask for representation to be present at this meeting. Such a right is not self-initiating.

The Weingarten Rule only applies to union employees. Non-union employees have no such protection.

See also earlier discussion in Fresh & Easy Neighborhood Market, Inc.

J. Economic Inducement And Coercion

During a union organizing campaign, employers must conduct "business as usual" regarding their personnel policies and benefits (i.e., Raises, bonuses, days off, etc.). If the employer fails to maintain the status quo in such areas, the employer is likely to be found guilty of committing an unfair labor practice under § 8(a)(1).

In NLRB v. Exchange Parts Company, 375 U.S. 405 (1964), when the employer was targeted by the union, it gave a new floating holiday and other new benefits to the employees. On appeal, the U. S. Supreme Court held that even if these benefits being offered by the employer are permanent, such a tactic is an unfair labor practice.

The Court reasoned that when employers give such benefits to employees, it is a reminder that the employer is the one who really controls the employees' economic purse strings, which is basically the proverbial "fist in the velvet glove" approach to labor relations.

Of course, employers are not required to withhold a term or condition of employment previously established just because it coincides with an organizational campaign. For example, if an employer had been known to give Christmas bonuses in the past, it would not be required to forego paying such bonuses just because they coincided with an organization campaign.

Additionally, the converse of the Exchange Parts rule is also true. That is, an employer may not withhold a general wage increase customarily given at a specified time each year because employees have elected to seek union representation.

K. Violence And Spying

The Byrnes Act (18 U.S.C. § 1231) makes it an unlawful and criminal act to transport persons across state lines for the purpose of obstructing the rights of employees to organize or to peacefully picket during any labor controversy relating to the wages, hours or conditions of employment by means of force or threats.

Additionally, using spies or informants, whether concealed or overt, in order to monitor any employees as they exercise their right to organize is prohibited by § 8(a)(1). If an employer does use such tactics and the union loses the election, the NLRB may set the election aside and either order a new one or impose the union against the employer.

Still, there must be proof that the employer caused or authorized the surveillance before it can be found guilty of an unfair labor practice under § 8(a)(1). (As a basic rule of thumb, an employer is not allowed to "TIPS" regarding the union, which stands for threaten, interrogate, promise or spy. Employers are allowed to use "FOE" speech, which stands for facts, opinions, and examples.)

WHAT SUPERVISORS *CANNOT* SAY & DO

"TIPS" RULE

As a basic rule of thumb, an employer is not allowed to "TIPS" regarding the union, which stands for:

"T" = THREATEN

"I" = INTERROGATE

"P" = PROMISE

"S" = SPY

Under the National Labor Relations Act, supervisors are guaranteed the right to speak freely about unions and to express their opinion so long as they do not threaten employees or promise them benefits. Simply stated, you have complete freedom to tell employees how bad **YOU FEEL** unions are; to point out to them all of the disadvantages of union representation; and to express **YOUR OPINION** that to vote for representation would be a mistake. The only limitation of your freedom to speak is the prohibition against threats, bribes, interrogation and spying on the union. An easy way to remember what to avoid is to keep in mind the word "**TIPS.**"

WHAT ARE TIPS?

- ❖ Do not threaten employees to attempt to cause them to refrain from union activities

- ❖ Do not ask questions of employees about union activities
- ❖ Do not speak to Employees privately about the union (tends to be viewed as an interrogation)
- ❖ Do not promise employees **ANYTHING** to encourage them to avoid union activities
- ❖ Do not spy on employees in the exercise of their rights to engage in union activities

WHAT SUPERVISORS *CAN* SAY

FACTS…OPINIONS…EXAMPLES

- ***FACTS* = Union Dues, Union Promises, Management Can No Longer Deal Directly With Employees, and so on.**
- ***OPINIONS* = "I don't think we need a union here," "I think a union would hurt us by protecting the problem people," "I wouldn't pay the union $500 to $600 a year," and so on…**
- ***EXAMPLES* = Any true examples that support the manager's facts and/or opinions.**

The WORST approach a company can take to potential union activity is to IGNORE IT. Managers should be aware of not only what they cannot say, but more importantly, what they CAN say.

Whereas managers should remember TIPS regarding what they CANNOT say, they should also remember "FOE" regarding what they CAN say. In short, managers can state anything that is a…

FACT…such as the cost of union dues, they union cannot guarantee anything to the employees, if we have a union, the company cannot deal with the employees directly, and so on….

OPINION… such as "I don't think we need a union here," "I think a union would hurt us by protecting the problem people," "I wouldn't pay the union $500 to $600 a year," and so on… and

EXAMPLES… which would basically be any true examples that support the manager's facts and/or opinions.

Therefore, companies are permitted to directly combat a unionization attempt by voicing their opinions, stating facts and using examples to support their points. However, knowing what your rights are under the NLRA is not enough. Managers might know all the right things to say from a legal perspective, but still **tick employees off** to the point that not only does production drop, **but employees can't wait to vote for the union.**

WHAT SUPERVISORS CAN SAY

- ❖ Tell employees that you and ABC COMPANY prefer to deal with them directly, rather than through an outside organization.
- ❖ Tell employees that you or a member of management are always willing to discuss with them any subject of interest to them.

- ❖ Tell employees about the benefits they presently enjoy.
- ❖ Tell employees how their wages, benefits and working conditions compare with other companies, whether unionized or not.
- ❖ Tell employees that no union can make a company agree to anything it does not wish to, or pay more than it is willing or able to.
- ❖ Tell employees your opinion about union policies and union leaders, even though this may be a negative opinion (negative news items).
- ❖ Tell employees that they are free to join or not join any organization without prejudice to their status with the company.
- ❖ Tell employees that signing a union authorization card or application for membership does not mean that they must vote for the union in an election.
- ❖ Tell employees that ABC COMPANY opposes the principle of compulsory union membership.
- ❖ Tell employees that all rules and regulations are administered without regard to any employee's union activities or beliefs, and will continue to be enforced impartially and in accordance with customary action.

ABC COMPANY'S POSITION ON UNIONS

ABC COMPANY does not believe that having a union is in the best interest of our employees or our organization. Strikes, slowdowns, jurisdictional disputes and boycotts are all issues that may be associated with unions that could harm the service we provide to our customers, which would directly affect job security for all of us, as well as our children and our communities. Working together directly with our employees is what has made ABC COMPANY successful and our philosophy is to treat our employees as an important part of our success.

We are committed to providing wages and benefits to our employees that are competitive with those in our labor market and that allow us to remain a viable organization for the long term. We are also committed to creating a safe and positive work environment for all of us to enjoy. If you have any concerns about your working conditions or compensation, you are strongly encouraged to voice your concerns openly, respectfully and directly to your supervisor, any member of management or human resources.

We believe that the best way to deal with concerns is to face them directly, getting you involved with your supervisor and working out a solution directly. We feel the best work environments exist when we deal openly, respectfully and directly with each other.

Therefore, in order to protect and maintain our direct company/employee communications, we will resist union organization in order to protect our organization, customers and your right to speak for yourself. We believe that you are more than capable of thinking, speaking, and acting for yourself than through another organization.

Further, ABC COMPANY does not see why our employees should pay several hundred after tax dollars to the union every year in order to get what they should receive from their employer for free.

If you are ever asked to consider joining a union, we strongly encourage you to carefully investigate the costs of unionization, such as union initiation fees, regular deductions from your paychecks for union dues, and the possibility of fines and special assessments levied against you by the union itself.

If you are ever asked to sign a union authorization card, you should understand one thing- it is a **legal and binding document**. It is very unlikely that a union will ever return a signed card.

Also, do not think that an authorization card will only be used for an election. Signing a union authorization card is often used as a binding vote for unionizing an employer. Unions often demand to be recognized by an employer without providing all of the employees a chance to participate in an open and private election process once they secure these authorization cards. Therefore, signing an authorization card can very likely result in denying all of our employees a chance to voice their opinion through a democratically held election.

Without a union, you can speak for yourself and ABC COMPANY is given a chance to respond to you as an individual. It is always ABC Company's goal to listen to your concerns and do our best to give you a responsible reply.

If you have any questions or concerns about unionization, please feel free to discuss these things with your supervisor, any manager or with human resources.

L. Discussing Wages Is A Protected Activity…Union Or Not

In National Labor Relations Board v. Main Street Terrace Care Center, 218 F.3d 531 (6th Cir. 2000), Main Street Terrace Care Center was a non-union nursing home in Ohio. The Care Center had a rule in place that forbade employees from discussing their wages with each other.

When Mary Craig was hired by the Care Center, she was told not to discuss her wages with other employees. However, as problems with incorrect paychecks arose, Ms. Craig would assist her co-workers with these errors. When Ms. Craig approached the Care Center with these errors, she was terminated.

Ms. Craig sued the Care Center for committing an unfair labor practice under the NLRA. The Sixth Circuit agreed with Ms. Craig.

The court held that the NLRA grants employees basic rights to act in concert with one another. These rights include right to engage in concerted activities for the purpose of collective bargaining or for the purpose of mutual aid and protection of each other. One of the most basic of these rights is the right to discuss wages with one another.

The court then held that Section 8(a)(1) of the NLRA states that employers are not permitted to interfere with, restrain or coerce employees regarding the exercise of their rights under the NLRA. Since the NLRA makes no distinction between union and non-union employees, Ms. Craig was entitled to the protections of the NLRB.

M. Employee Walkout Is A Protected Activity…Union Or Not

In Bethany Medical Center, 328 NLRB No. 161 (1999), the non-union employees in the catheterization laboratory engaged in a walkout in protest certain terms and conditions of their employment. They left the job for two hours and then returned. They only gave a 15-minute notice to the Medical Center prior to the start of the workday.

The Medical Center terminated the employees for walking off the job. The employees filed an unfair labor practice with the NLRB. The employees claimed their strike was a protected activity under the NLRB, even though they were non-union.

Section 8(g) of the NLRA states that before a labor organization can engage in any strike, picket or any other concerted refusal to work at a healthcare institution shall notify the Federal Mediation and Conciliation Service in writing of that intention **at least 10 days before the action begins.**

However, the NLRB ruled that since no labor organization was involved in this walkout, then the strike requirements of Section 8(g) did not apply. Instead, the

NLRB stated that the proper inquiry to make in this case was whether the walkout was "indefensible" by the employees. In making this determination, the NLRB looked to see if any patients were placed at risk.

In making this analysis, the NLRB discovered that no patients were in the laboratory at the time and no emergency patients were in need of assistance. Therefore, the walkout was found to be defensible by the employees and therefore a legal strike under the NLRA.

It is interesting to note that had these employees been represented by a labor union, the strike would have been declared unlawful due to the failure to provide 10 days of notice to the FMCS. However, since these employees acted on their own, they actually had greater rights under the NLRA than if they were covered by a labor union.

VII. NLRB's PERSUADER RULE

A. The History of Reportable "Persuader Activity" and the Advice Exemption

The Labor-Management Reporting and Disclosure Act of 1959's "Persuader Rule" has always required any individuals who were hired to "directly persuade" employees not to join the union to report their presence to the Department of Labor (DOL).

For over 50 years, the LMRDA persuader activity regulations required such reporting ***only*** when labor relations consultants were hired to communicate ***directly*** with **employees to persuade them concerning unionization**. The regulation was consistent with the original intent of Congress, which was originally designed to prevent the deceptive practice where "**middlemen**" were hired by the employer to pose as employees. However, these middlemen were in fact hired to covertly "persuade" fellow employees not to join a union.

Therefore, the persuader activity regulations were adopted under the LMRDA to prevent undisclosed consultants from posing as employees to communicate with them directly.

Congress also included the "advice exception" (Section 203(c)) in the LMRDA. This exception exempted employers from reporting of "advice" they received from employers by outside consultants. This "advice" included legal services by lawyers that **did not involve direct communications with employees,** which an employer was free to accept or reject.

Therefore, Consultants and lawyers who provide employers with indirect advice on labor relations, which includes conducting training to supervisors on management, leadership and union avoidance, planning union avoidance strategies, drafting union avoidance materials and revising policies to reflect the company's union avoidance philosophy, are not covered by the Persuader Rule.

B. Public Disclosure of "Persuader Activity"

"Persuader activity," as defined by Section 203(b) of the LMRDA, must be reported by labor relations "**consultants**" (including lawyers, law firms, public relations firms, and even trade associations) on **Form LM-20** within **30 days** of the engagement or agreement to provide persuader services, and by **employers** on **Form LM-10** within **90 days after the end of the fiscal year in which the consultant was engaged to provide persuader services**.

Failure to file, or the filing of false or incomplete information, exposes the consultant and employer to civil and criminal penalties.

VIII. SECTION 8(a)(1): EMPLOYEE FREEDOM OF SPEECH ISSUES

A. NLRA Finds FACEBOOK Posting Termination Lawful

In Karl Knauz Motors Inc., (NLRB ALJ, No. 13-CA-46452), a National Labor Relations Board ("NLRB") administrative law judge (ALJ) found that Knauz BMW lawfully terminated the employment of Robert Becker, a salesperson, after he posted pictures and comments on his Facebook page about two different workplace incidents -- an automobile accident and a dealership sales event. The judge also found that several Employee Handbook policies, unrelated to social media postings, contained overly broad language.

The first incident Becker posted on his Facebook page concerned an accident at a Land Rover dealership also owned by Knauz on an adjacent property. Becker posted pictures of the accident, as well as comments such as, "This is your car: This is your car on drugs."

The same day, Becker also posted pictures of a dealership sales event. Becker and other salespersons disagreed with the General Sales Manager's choice of food and beverages for the event, including hot dogs and chips. Becker posted pictures of the other salespersons with the food and beverages, as well as several comments on his Facebook page, such as:

"The small 8 oz bag of chips, and the $2.00 cookie plate from Sam's Club, and the semi fresh apples and oranges were such a nice touch…but to top it all off…the Hot Dog Cart. Where our clients could attain an over cooked wiener and a stale bunn [sic]…"

Although both posts were made on the same day, managers of the dealership testified that Becker's employment was terminated because "[he] had satirized a very serious car accident that occurred at our Land Rover facility on his Facebook page by posting pictures of the accident accompanied by rude and sarcastic remarks about the incident."

The ALJ held that the termination for the posting of the accident was lawful because the posting did not amount to protected or concerted activity under the National Labor Relations Act ("NLRA"). Rather, Becker posted it "apparently as

a lark, without any discussion with any other employee of the Respondent and [it] had no connection to any of the employees' terms and conditions of employment."

On the other hand, the ALJ opined that had the dealership terminated Becker's employment for the Facebook postings regarding the **sales event**, the termination would have been unlawful. According to the ALJ, the sales event posting constituted protected concerted activity that could have affected Becker's compensation. Although it would be unlikely, a customer may have been "turned off" by the food offered at the event and may not have purchased a car or may have given the salesperson a lower rating.

Further, Becker and another salesperson both spoke up during a meeting about what they considered to be the inadequacies of the food being offered at the event and salespersons also discussed the subject after the meeting. Although only Becker complained about it on his Facebook page, the ALJ equated Becker's posting to an individual employee bringing a group complaint to the attention of management, which is protected concerted activity. The ALJ concluded, however, that Becker had been terminated for the first, unprotected posting and not the second, protected posting.

The ALJ then considered charges regarding certain policies in the dealership's Employee Handbook. The ALJ upheld the dealership's "Bad Attitude" policy, which mandated that employees "display a positive attitude toward their job" because it protected the relationship between the dealership and its customers.

The ALJ held, however, that a policy entitled "Courtesy," which prohibited employees from being "disrespectful," was overly broad, as "[d]efining due respect, in the context of union activity, seems inherently subjective." The ALJ also held that two other policies entitled, "Unauthorized Interviews," and "Outside Inquiries Concerning Employees" were also overly broad as employees "would not be able to discuss their working conditions with union representatives, lawyers or Board agents."

Although the dealership previously notified its employees that the Employee Handbook policies at issue were rescinded and the dealership did not commit any other unfair labor practices, the ALJ nonetheless held the rescission to be insufficient. The ALJ faulted the employer for not providing further explanation about the rescission to its employees and found the rescission inadequate to inform employees that the dealership would not interfere with their rights. The dealership was ordered to post a notice informing employees of their rights to form, join or assist a union, among other things, and that the dealership would not interfere with employees' rights.

Although the ALJ upheld the employment termination, this case provides examples of what may be considered to be protected, concerted activity under Section 7 of the NLRA, in connection not only with social media policies and practices, but Employee Handbook policies in general.

Also …

In Fresenius USA Manufacturing, Inc., 358 NLRB No. 138, a pro-union employee anonymously wrote offensive and possibly threatening statements on several union newsletters left in an employee break room in an attempt to encourage fellow employees to support the union in an upcoming decertification election. The Board unanimously found, in agreement with the administrative law judge, that the employer lawfully investigated the statements and questioned the employee.

However, the Board also unanimously found, in agreement with the judge, that the employer unlawfully admonished the employee not to speak about the investigation with other employees.

A Board majority, consisting of Members Griffin and Block, further found, in disagreement with the judge, that the employer unlawfully suspended and terminated the employee. The majority believed that the employee's written statements did not lose the protection of the Act under either Atlantic Steel or a totality of the circumstances analysis. The majority also believed that the employee's false denials of authorship during the investigation could not serve as a lawful justification for suspension and discharge because, under the circumstances, the employee could not be forced to disclose his protected conduct.

Dissenting in part, Member Hayes found that the written statements were so offensive that they lost the protection of the Act. He further found that an employee does not have a Section 7 right to lie during a lawful interrogation about alleged sexual harassment in order to conceal participation in union activity. However, inasmuch as he found that the employer lawfully discharged the employee for his written statements, Member Hayes believed that it was unnecessary to pass on whether the employee's untruthful responses were a legitimate independent basis for his discharge.

B. The NLRB Says The F-WORD Is OK

Under Section 7 of the National Labor Relations Act, employees have the right to unionize. Employers are not permitted to unlawfully interfere with employees as they exercise this right.

Likewise, Section 8(a)(1) of the NLRA says that employees are permitted to discuss the "wages, terms and conditions of employment" amongst themselves and with others.

Therefore, not only are unionized employers covered by the NLRA, but so are nonunionized employers because their employees ***may*** want to unionize one day.

In Plaza Auto Center, Inc., 360 NLRB No. 117 (May 28, 2014), PAC, which sells used cars in Yuma, Arizona, and is owned by Tony Plaza ("Plaza"), hired Nick Aguirre as a salesman at the end of August 2008. Very quickly Aguirre became an unhappy employee, believing he was being mistreated and improperly paid. Matters came to a head in a meeting held on October 28, 2008.

At this meeting, Plaza told Aguirre that he was "talking a lot negative stuff," that he needed to follow policy and procedure, and that he should not be complaining about pay. Plaza twice told Aguirre that if he did not trust the company, he did not need to work there.

At that point, Aguirre lost his temper and in a raised voice berated Plaza. He called Plaza "f****** mother f******" (sic), "f****** crook," and "asshole." He also told Plaza he was stupid, nobody liked him, and everybody talked behind his back. During the outburst, Aguirre stood up, pushed his chair aside, and told Plaza that if he fired him, he would regret it. Plaza then fired Aguirre.

An unfair labor practice hearing followed in 2009 before Administrative Law Judge Lana Parke. Judge Parke found that Plaza's invitations for Aguirre to quit his employment at the October meeting, and earlier, constituted unfair labor practices.

However, Judge Parke then looked to whether Aguirre's conduct in the October meeting was so egregious or abusive that he lost the protection of the NLRA and could be legally fired.

In assessing whether Aguirre's behavior was so egregious that he could be lawfully fired, Parke considered the factors set out in Atlantic Steel, 245 NLRB 814, 816 (1979). The factors to be considered in such cases are:

1) The place of the discussion;

2) The subject matter of the discussion;

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

4) Whether the outburst was in any way provoked by the employer's unfair labor practice.

Judge Parke determined that factors 1, 2, and 4 favored protecting Aguirre from termination. However, factor 3, the nature of the outburst, weighed against giving him any protection.

Judge Parke found that without extreme provocation, "Aguirre repeatedly reviled Mr. Plaza in obscene and denigrating terms accompanied by menacing conduct and language." Parke then discredited Aguirre's testimony where it contradicted

that of Plaza. She found Aguirre's conduct belligerent and found based on Plaza's credibility that he rose from his chair and said if he was fired, Plaza would regret it. Considering and balancing all the factors, Judge Parke concluded that the termination of Aguirre did not violate the law. (Plaza Auto Center Inc., 355 NLRB 493, 498–506 (2010))

However, the NLRB disagreed with and overruled Judge Parke's findings. Chairman Liebman, Member Pierce and Member Schaumber all saw the situation quite differently.

The Board majority instead characterized Aguirre's behavior as a single brief outburst that was **provoked** by Plaza. Further, the NLRB reasoned that Aguirre's outburst was "**unaccompanied** by insubordination, physical contact, threatening gestures or threat of physical harm."

(Yes, astonishingly, these Board members **did not** see Aguirre's profanity as insubordination.)

The Board majority concluded that Aguirre's conduct **was not outside the realm of acceptable conduct** and found the discharge to be an unfair labor practice. (Plaza Auto Center Inc., 355 NLRB 493 (2010))

Plaza's Appeal to the Ninth Circuit

Plaza appealed to the Ninth Circuit Court of Appeals.

In a unanimous decision, the Ninth Circuit refused to enforce the NLRB's decision. Instead, the Ninth Circuit found that Aguirre's "obscene and denigrating" remarks to Plaza, which the court also found to be insubordinate, caused him to lose the NLRB's protection. The court concluded that the Board erred when it found that the "nature-of-outburst" factor weighed in favor of protection.

The Ninth Circuit remanded the case back to the Board so it could **properly** balance the Atlantic factors, finding that the Board had erred in finding that the nature of Aguirre's outburst was protected under the NLRA.

Additionally, the Court instructed the Board to give "full effect" to Judge Parke's factual and credibility findings, including that Aguirre's behavior was menacing or at least physically aggressive, unless the clear preponderance of all relevant evidence showed that Judge Parke was wrong in that regard. (Plaza Auto Center, Inc. v. NLRB, 664 F.3d 286, 296 (9th Cir. 2011))

The NLRB's Second Decision

When it reconsidered this case, which focused primarily on the nature of Aguirre's outburst, a Board majority (consisting of Chairman Pearce and Member Kent Y. Hirozawa) again found that Aguirre's outburst was not "menacing, physically aggressive, or belligerent." In this regard, the Board found that

Aguirre's statement that if he was fired, Plaza would regret it, not to be a threat of physical harm.

Further, the Board noted that the employer's stated reason for discharging the employee was for his verbal attack against Plaza, not for any physical conduct.

The Board then rebalanced the four Atlantic Steel factors. The Board agreed with the court that the third factor regarding the nature of the employee's outburst weighed against statutory protection.

However, the Board still concluded that Aguirre did not lose the protection of the NLRB even though he used obscene and denigrating language. Despite stating that the employee's remarks must be given "considerable weight" because the employee "targeted Plaza personally, uttered his obscene and insulting remarks during a face-to-face meeting with Plaza, and used profanity repeatedly," the Board concluded that the other three factors (location, subject matter, and employer provocation) weighed in favor of protection outweighing the one factor weighing against protection. Notably, the Board reasoned that the employee's outburst would not have occurred but for the company's provocation, which included threats of discharge.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

Wow … This is an extremely troubling decision.

Back on January 24, 2012, in an effort to help employers in this area of employee free speech under the NLRB, the Acting General Counsel (AGC) of the NLRB, Lafe Soloman, issued a report on this issue. After reviewing the various NLRB cases that dealt with employees' right of free speech under the NLRA, the AGC gave us a listing of types of language and behavior that would be plainly egregious and therefore prohibited under the NLRA.

This listing included conduct that could be classified as:

… vulgar, obscene, threatening, intimidating, harassing, maliciously dishonest and/or unlawfully discriminatory …

While such guidance was not by any means clear, it at least gave some guidance as to what could be prohibited.

One disturbing aspect of this case is that the NLRB decided that an employee may not be disciplined for verbal misconduct that is **not accompanied** by physical threats.

That is absurd. Those are **two different issues**.

As Member Johnson pointed out in his dissent, using of vulgarities and obscenities is not the reality of industrial life. Employees do not typically curse at each other and their superiors like characters in a Martin Scorsese film. It is

perfectly reasonable to expect that people treat each other with civility in the workplace.

If that does not constitute profanity, even under the AGC's report, then what ever will?

Member Johnson also noted that in the modern regulated workplace, it is essential for a company to regulate profane behavior that could create a harassing or bullying atmosphere. The Board is not, he wrote, an "'uberagency' authorized to ignore [other] laws in an effort to protect the legitimate exercise of Section 7 rights."

Further, the majority of the NLRB allows employees to say whatever they want if they see any type of "agitation" by the employer. In this case, threatening to fire the employee in a heated exchange allowed the employee to use such profanity.

Stay tuned. Perhaps the Ninth Circuit will once again overturn the NLRB in this case.

For now, employers should proceed with caution when disciplining an employee who is engaged in protected concerted activity. In general, a concerted activity is protected under the NLRA whenever an employee discusses the wages, terms and conditions of their employment, which covers a tremendous range of topics.

Therefore, the action of a single employee can also be concerted if it involves a subject of common concern, such as where Aguirre was complaining about the company's compensation policy.

Notwithstanding this ridiculous decision by the Board, employers have the right to maintain a safe and civil workplace. Employers should continue to enforce policies prohibiting insubordination, bullying, harassment, and other similar workplace misconduct. As always, employers should make sure to mete out discipline for violating workplace conduct policies in a consistent manner.

All employers, union and non-union alike, should ensure that their managers and supervisors receive appropriate training on what constitutes protected concerted activity. Further, managers and supervisors should be careful not to make statements that could be perceived as retaliating against or discouraging employees from engaging in protected concerted activity.

Supervisors should also be trained regarding the Plaza decision. They should understand if they "agitate" or "escalate" conflicts with employees, employees have a right to react is an "obscene" manner.

C. The F-WORD Is Still OK … For Your Family Too!

In NLRB v. Pier Sixty, LLC., No. 15-1841 (2nd Cir 05/09/2017), two days before a union election, Hernan Perez was working as a server at a Pier Sixty venue. A supervisor, Robert McSweeney, gave Perez and two other servers various directions in what the NLRB described as a "harsh tone." These directions included "Turn your head that way [towards the guests] and stop chitchatting," and "Spread out, move, move."

McSweeney's attitude in delivering these instructions upset Perez, who viewed them as the latest instance of the management's continuing disrespect for employees.

So, Perez posted the following message about McSweeney on his Facebook page:

> **"Bob is a NASTY M@!#!!R F$@!!@R don't know how to talk to people!!!!!! F@!# his mother and his entire f#!@ing family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!!"**

The employer fired Perez, who filed a charge with the NLRB alleging retaliation for engaging in "protected concerted activity."

The abusive behavior at issue was Perez's use of obscenities in the workplace through a Facebook post.

The court did not use the traditional four-factor test of Atlantic Steel for uttering obscenities, but used several factors out of the nine-factor "totality of the circumstances" test for recent social media cases.

First, the court found that although Perez's message was dominated by vulgar attacks on the supervisor and his family, the "subject matter" of the message included workplace concerns:

> **Management's allegedly disrespectful treatment of employees, and the upcoming union election."**

Secondly, the court reasoned that the employer consistently tolerated profanity among its workers.

And thirdly, the 'location" of Perez's comments was an online forum that was a key medium of communication among coworkers and a tool for organization in the modern era.

The court concluded that the employer failed to meet its burden of showing that Perez's behavior was so egregious as to lose the protection of the NLRA under the Board's "totality of the circumstances" test.

This decision is just another in a long line of cases where the courts support the NLRB in allowing employees to engage in the worst form of vulgar and obscene conduct.

Back on January 24, 2012, in an effort to help employers in this area of employee free speech under the NLRB, the Acting General Counsel (AGC) of the NLRB, Lafe Soloman, issued a report on this issue. After reviewing the various NLRB cases that dealt with employees' right of free speech under the NLRA, the AGC gave us a listing of types of language and behavior that would be plainly egregious and therefore prohibited under the NLRA.

This listing included conduct that could be classified as:

… vulgar, obscene, threatening, intimidating, harassing, maliciously dishonest and/or unlawfully discriminatory …

While such guidance was not by any means clear, it at least gave some guidance as to what could be prohibited.

However, today, it is clear the such profanity as exhibited in this case will be upheld by the current NLRB.

Again, in dealing with "problem" employees, it is always best to focus on performance issues. It is also critical that supervisors be trained in how to properly resolve conflict and how to increase their own levels of Emotional Intelligence.

D. The Eighth Circuit Now Says Racial Slurs Are "OK"

In Cooper Tire & Rubber Co., Case 08–CA–087155 (June 5, 2015), Cooper was collectively bargaining with the union at its plant in Findlay, Ohio. After its last best and final offer was rejected, Cooper locked out bargaining unit employees and operated the facility using supervisors, managers, and replacement employees. Many of the replacement employees were African- American and were brought in from a Cooper plant in Tupelo, Mississippi.

During the lockout, the union set up picket stations around the Ohio facility.

After participating in a hog roast sponsored by the union, Anthony Runion joined the picket line. He was joined in the picket line by his girlfriend's young son.

Even though its members were warned by the Union prior to the picketing not to mount racial attacks against replacement workers while in the line, Runion, on January 7, 2012, as vans transporting replacement workers drove past the picket line, Runion yelled:

- **"Hey, did you bring enough KFC for everyone?" and**

- **"Hey, anybody smell that? I smell fried chicken and watermelon."**

Runion made both statements based in part on the reaction of his girlfriend's son, who immediately after the "fried chicken and watermelon" statement turned and said, "You know what I smell? You know what I smell? I smell (inaudible) scabs."

While yelling, Runion's hands were in his pockets; he made no overt physical movements or gestures. There is no evidence the replacement workers heard Runion's statements (though dozens in the crowd did).

An unidentified picketer shouted, **"Go back to Africa, you bunch of f__king losers!"**

At some point after Runion left the picket line, an unidentified individual yelled:

- **"F__king monkey scabs" and**

- **"F__king n__ger scabs."**

Like most employers, Cooper has a policy prohibiting harassment based on race, color, religion, sex, age, or national origin. The policy calls for treating employees with "dignity, respect and courtesy." The policy defines harassment as "**unwelcome comments or conduct relating to race, color**, religion, sex, age, or national origin, which fails to respect the dignity and feelings of any Cooper employee."

Under the policy, harassment is not "condoned or tolerated under any circumstances, whether committed by Cooper employees, vendors, customers or other visitors." Employees who harass other workers are subject to disciplinary action, up to and including discharge. Runion signed a copy of the employer's harassment policy.

Cooper discharged Runion for his racially offensive comments.

The union and Cooper agreed to arbitrate all grievances filed on behalf of employees discharged during the lockout and agreed that the arbitrator's decision would be final and binding. The union filed a grievance alleging that Runion's discharge violated its collective bargaining agreement, and the grievance proceeded to arbitration.

After a full and fair hearing, **the arbitrator found that Runion made the racially offensive and derogatory statements**. The arbitrator concluded that the statements violated the terms of Cooper's harassment policy because they were related to race and were disrespectful of the dignity and feelings of African-American workers.

Perhaps most importantly, the arbitrator found that Runion's use of racial slurs in the picket line **increased** the **possibility of violence and that the statements constituted "serious misconduct" under any circumstances**.

Therefore, the arbitrator held that Cooper had just cause to terminate Runion.

However, the union then filed an unfair labor practice (ULP) charge with the NLRB alleging that Runion's discharge violated the National Labor Relations Act (NLRA). The NLRB regional director "deferred" processing the ULP charge pending the arbitrator's decision.

The ULP proceeded to a hearing before an NLRB ALJ, Thomas Randazzo. Mr. Randazzo found that although Runion's comments were "racist, offensive, and reprehensible," they were not "**violent in character, and they did not contain any overt or implied threats to replacement workers or their property**."

The ALJ rejected the employer's argument that hate-filled, racist speech increased the potential for violence in the picket line.

Cooper also argued that:

1. Firing an employee for making racist comments cannot be a violation of the NLRA,

2. Racist statements should not be protected, and

3. Runion violated the company's harassment policy by making racist statements.

The ALJ rejected the employer's arguments, stating that Runion's comments should *not* be evaluated in the "context of the normal workplace environment."

According to the ALJ, the fact that the comments were made while Runion was engaged in picketing protected him and prevented his termination.

As for the arbitrator's decision, the ALJ ruled it was "**palpably wrong**" and "**clearly repugnant**" to the NLRA. The ALJ ordered Cooper to rehire Runion and provide back pay.

Cooper Tire then appealed to the Eighth Circuit Court of Appeals. (Cooper Tire & Rubber Co. v. NLRB, No. 16-2721 (8th Cir. 2017)).

The Eighth Circuit found for the NLRB.

The Eighth Circuit reasoned, "One of the necessary conditions of picketing is a confrontation in some form between union members and employees." Chicago Typographical Union No. 16, 151 NLRB 1666, 1668 (1965), *citing* NLRB v. United Furniture Workers of Am., 337 F.2d 936, 940 (2d Cir. 1964).

The court also reasoned, "**Impulsive behavior on the picket line is to be expected especially when directed against nonstriking employees or strike breakers**." Allied Indus. Workers No. 289 v. NLRB, 476 F.2d 868, 879 (D.C. Cir. 1973) (internal citation omitted).

The Eighth Circuit then analyzed picket-line conduct under the Clear Pine Mouldings test:

> **A firing for picket-line misconduct is an unfair labor practice unless the alleged misconduct "may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act."**

NMC Finishing v. NLRB, 101 F.3d 528, 531 (8th Cir. 1996), *citing* Clear Pine Mouldings, Inc., 268 NLRB 1044, 1046 (1984), *enf'd*, 765 F.2d 148 (9th Cir. 1985). The test is objective. Id.

Cooper Tire argued that the court should not defer to the Board. It argued that the Board should have analyzed Runion's discharge ***not*** under Clear Pine Mouldings, but under Wright Line, 251 NLRB 1083 (1980), enf'd, 662 F.2d 899 (1st Cir. 1981).

However, the court reasoned that Wright Line applies "when an employer has discharged (or disciplined) an employee for a reason assertedly ***unconnected*** to protected activity."

In Wright Line, the employer claimed the employee was terminated for inaccurate recordkeeping. Wright Line, 662 F.3d at 900.

Here, Cooper Tire does not allege that Runion was fired for any reason "unconnected" to participation in the picket line. This court applied Clear Pine Mouldings to evaluate a firing for alleged misconduct **during** picketing.

Cooper Tire believes that NMC Finishing and Earle "compel a finding that Cooper Tire did not violate the Act when it discharged Runion."

In NMC Finishing, a picketer held up a sign for five minutes that said, "**Who is RhondaF Sucking Today**?" Id. *a*t 530. The sign was directed at a **specific employee** crossing the picket line. Id.

Applying Clear Pine Mouldings, this court concluded that the singled-out woman would, objectively, feel coerced, intimidated, or harassed. *Id.* at 532. This court emphasized that an individual was singled out:

> **Had the offensive words been part of a package of verbal barbs thrown out during a picket line exchange or of a sign-borne message dealing with the morals and character of crossovers generally, we might have a different view**. Here, however, a specific employee was singled out and vilified by a sign paraded in the presence of everyone near to or passing by the exit gate. Id. (emphasis added).

Here, Runion's comments were not directed at any one individual. Nor were they on display for an extended period. Runion's words were a "package of verbal

barbs thrown out during a picket line exchange." The NMC Finishing case supports the Board, not Cooper.

In Earle, the employee was fired for dishonesty and insubordination on the plant floor. Earle, 75 F.3d at 407. There was neither an ongoing strike nor a picket line. *Id.* at 401-03. **Earle distinguished its facts from cases "in the context of strikes" and "grievances**." Id. at 406 (recognizing that "in the context of strikes," there exists "**the need to excuse impulsive, exuberant behavior (so long as not flagrant or rendering the employee unfit for employment) as an inevitable concomitant of struggle**"). The Earle case does not apply here.

The court also noted that the Board relied on Airo Die Casting, Inc., 347 NLRB 810, 811 (2006) and Consolidated Communications in reaching its decision.

In Airo, replacement workers were transported to an employer's plant during a strike. Airo, 347 NLRB at 811. During a picket, one picketer advanced towards the replacement workers with both middle fingers extended and screamed "f*** you n*****." Id. The employer fired the picketer for violating its harassment policy. The Board reversed. Id. at 813. The Board found the picketer's conduct "did not differ from the **general atmosphere** on the picket line with the usual tensions between striker and replacement workers and the use of obscene gestures and vulgar language." Id. at 812.

It concluded that the picketer's "use of obscene language and gestures and a racial slur, standing alone without any threats or violence, did not rise to the level where he forfeited the protection of the Act." Id., citing Clear Pine Mouldings, 264 NLRB at 1046.

In Consolidated Communications, the D.C. Circuit held that a picketer who grabbed his crotch, said "f*** you," and gave the middle finger, was protected under the Act. Consol. Commc'ns, 837 F.3d at 6. The court ruled that while the actions were "totally uncalled for and very unpleasant," they could not objectively be perceived "as an implied threat of the kind that would coerce or intimidate a reasonable [replacement] employee from continuing to report for work." Id. At 12.

The court reasoned that because the picketers' statements in both Airo and Consolidated Communications were protected, it was not "illogical or arbitrary" for the Board to protect Runion's statements under Clear Pine Mouldings. Substantial evidence supports the Board's conclusion that Runion's statements were "not violent in character, and they did not contain any overt or implied threats to replacement workers or their property. The statements were also unaccompanied by any threatening behavior or physical acts of intimidation by Runion towards the replacement workers in the vans."

The court then deferred to the Board's interpretation that Cooper Tire violated the Act by discharging Runion.

Cooper Tire also argued that reinstating Runion conflicts with its obligations under Title VII. Harassment is actionable under Title VII if it is so "severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."

However, the court disagreed. Instead, the court reasoned that Runion's comments, even if they had been made in the workplace instead of on the picket line, were not severe or pervasive enough to create a hostile work environment.

Cooper Tire also argued that it had "just cause" to fire Runion under Section 10(c) of the Act:

> "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged ***for cause***." 29 U.S.C. § 160(c) (emphasis added).

However, the court reasoned that the NLRA does not define the term "for cause," so the Board has exercised its authority to interpret this term.

In this case, the Board concluded that "Runion was discharged for a prohibited reason:

The protected activity of engaging in picketing.

Cooper also argued that Runion's statements "would have been serious misconduct in any context, but in the context of the picket line, where there was a genuine possibility of violence, his comments were even more serious." The arbitrator's view that a "genuine possibility of violence" made Runion's comments "even more serious" is contrary to well established precedent giving greater protection to picket line misconduct.

However, Cooper Tire's argument that Runion's comments were "even more serious" because they were made "in the context of the picket line" is inconsistent with established law.

The Eighth Cicuit therefore found in favor of the NLRB.

However, Circuit Judge Arlin Beam wrote a powerful dissent reasoning that no employer in America is or can be required to employ a racial bigot. Judge Bema then concluded that this is what the court is requiring Cooper Tire to do here. Judge Beam then reasoned that this "is tantamount to requiring that Cooper Tire violate federal anti-discrimination and harassment laws, including Title VII, as well as numerous other similar state and local laws."

Judge Beam then reasoned that the U.S. Supreme Court has stated "[t]he phrase, terms, conditions or privileges of employment' in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a

working environment heavily charged with ethnic or racial discrimination." Meritor Savs. Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986) (second alteration in original) (quoting Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971)).

Therefore, according to Judge Beam, the two crucial issues at work in this presently mishandled dispute are:

(1) Whether Anthony Runion exhibited racial bigotry directed toward African American employees of Cooper Tire and

(2) Whether the exercise of such bigotry is protected by the terms and conditions of the National Labor Relations Act (NLRA).

The answer to question one is clearly yes and the answer to query two is undoubtedly no!

The court and the National Labor Relations Board (NLRB) limit their analyses of Cooper Tire's purported violations of NLRA sections 157 and 158 solely within the ambience that existed on the picket line. However, this court totally disregarded the conditions on the factory floor when, as here, the labor/management issues are settled and work resumes with a day-to-day labor force consisting of members of various races including at least some Runion-maligned African American citizens. This is an error.

While there were no NLRA violations by Cooper Tire, any proper inquiry must clearly include the suitability, or not, of Runion, by now well-established as a racial bigot, as a continuing member of Cooper Tire's work force in a workplace potentially involving a number of African American employees.

In this regard, Judge Beam recommend and fully endorse in its entirety Judge Millett's concurrence in Consolidated Communications, Inc. v. NLRB, 837 F.3d 1, 20-24 (D.C. Cir. 2016). For proper emphasis, in part, Judge Millett's well-chosen words must be examined, which are equally applicable in this dispute:

> I write . . . to convey my substantial concern with the too-often cavalier and enabling approach that the Board's decisions have taken toward the sexually and racially demeaning misconduct of some employees during strikes. Those decisions have repeatedly given refuge to conduct that is not only intolerable by any standard of decency, but also illegal in every other corner of the workplace. The sexually and racially disparaging conduct that Board decisions have winked away encapsulates the very types of demeaning and degrading messages that for too much of our history have trapped women and minorities in a second-class workplace status.

While the law properly understands that rough words and strong feelings can arise in the tense and acrimonious world of workplace strikes, targeting others for **sexual or racial degradation is categorically different**. **Conduct that is designed to humiliate and intimate another individual *because of and in terms***

***of that person's gender or race* should be unacceptable in the work environment**. 837 F.3d at 20-21 (Millett, J., concurring) (emphasis in original).

As established in the seminal case of Spielberg Mfg. Co., 112 NLRB 1080 (1955), the NLRB is to defer to an arbitrator's award in these circumstances if the proceedings appear to have been fair and regular, all parties have agreed to be bound, and the decision of the arbitrator is not clearly repugnant to the purposes and policies of the Act. Olin Corp., 268 NLRB 573, 573-74 (1984).

The Board itself, not the language of the NLRA, established this standard and its purported deference in order to ensure that arbitrator decisions in these circumstances are given ***more*** deference, not less.

The Union itself was clearly aware of the potential for volatility that ensues when racial, sexist, or sexually explicit language is used on the picket line, despite the higher bar tolerated for expected, highly charged, expressions in the picket-line environment. As importantly noted by the arbitrator, "[i]ndeed, the Union acknowledged the inadvisability of using racist language on the picket line by including a rule prohibiting such language in the Picket Line Rules which were distributed to the picketers for the purpose of keeping the picket line peaceful and avoiding disturbances."

The racial epithets expelled by Runion were not simply tolerated, impulsive behavior. They were expressions that tended to coerce and intimidate African American employees in the exercise of rights protected under the Act.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

The NLRB now forces employers to retain employees who violate its harassment policy by making racist or illegally harassing statements. When Runion made these statements, he was an employee of Cooper, and he directed his comments at other Cooper employees. There is no dispute that the comments he made were racially harassing and derogatory. Yet the NLRB and the Eighth Circuit held such racially harassing comments were protected because they were made during picketing.

E. NLRA Protects Workers Who Make False Statements To Customers

In Jolliff v. NLRB, 513 F.3d 600 (6th Cir. 2008), John Jolliff, Steven Daniels and other employees of TNT Logistics of North America Inc. were unhappy about their terms and conditions of employment. So, they decided to put all of their grievances together into a letter. This letter listed the various complaints these employees had with TNT. However, this letter also included the following statement:

> "[s]ome drivers are being asked [by dispatchers and management] to ***fix their log books*** to make extra runs. These drivers are being asked by dispatchers and management to do

these runs and either fix their log books or turn their heads on it" (emphasis added)

The employees then sent this letter to not only corporate executives at TNT Logistics, which is based in Florida, but they also sent the letter to a corporate officer at Honda, TNT's largest customer.

However, the employees did not sign the letter. Instead, they only referred to themselves as "we the dockworkers and drivers" at the Ohio TNT facility.

Managers at the Ohio TNT location questioned employees and discovered who had sent the letter. Three employees were terminated.

The employees filed charges against TNT with the National Labor Relations Board (NLRB), claiming that they were terminated for exercising their rights under the NLRA. The Board held for the employer, TNT, reasoning that the employees were discharged "for cause" because the letter was not protected under the NLRA.

On appeal, the Sixth Circuit Court of Appeals reversed the NLRB's decision and found for the employees. In reaching its decision, the Sixth Circuit looked to see if appealing to a third party, which in this case was Honda, is permissible under the NLRA.

The National Labor Relations Act (NLRA) protects the rights of employees to organize and engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. "Mutual aid or protection" includes seeking to improve the terms and conditions of employment through channels outside the immediate employer-employee relationship.

The Sixth Circuit then looked to the United States Supreme Court's previous decision in Eastex, Inc. v. NLRB, 437 U.S. 556 (1978). In that case, the Supreme Court held that the "mutual aid or protection" clause of § 7 of the NLRA protects employees who "seek to improve terms and conditions of employment or otherwise improve their lot as employees by using channels outside the immediate employee-employer relationship." The Court then reasoned that if employees did not have this protection under the NLRA, then employees would be ...

"... open to retaliation for much legitimate activity that could improve their lot as employees. As this could 'frustrate the policy of the Act to protect the right of workers to act together to better their working conditions,' we do not think that Congress could have intended the protection of § 7 to be as narrow as [to exclude protection outside the employer-employee context]."

Having decided that appealing to a third party, such as a customer, is protected under the NLRA, the court looked to see what comments are protected and which ones are not.

The court first looked to Congress' intent to encourage free debate on issues that divide labor and management when it passed the NLRA. The court held that an employee's appeal to a third party, which in this case was TNT's largest client, Honda, is protected under the NLRA if it ***relates to the employer's labor practices and mere opinion or is not maliciously false***.

Consequently, there is a two-part inquiry for determining whether the employees' statement of "fixing the books" loses its protection under the NLRA.

First, the NLRB must determine whether the logbooks statement made by the employees was "false" within the context of defamation law. In other words, was this statement presented as a "fact" or was it presented as being a mere opinion, hyperbole, or rhetorical exaggeration. If the statement was presented as a mere opinion, it would not be defamatory. However, if it was presented as a "fact," then the court need to move onto the second step in this analysis, which is to determine if the statement was made with "actual malice."

No specific test exists to determine whether a specific statement is presented as a fact or as opinion. Instead, the U.S. Supreme Court held that:

> "A statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection" and that "statements that cannot 'reasonably [be] interpreted as stating actual facts,'" are not actionable."

The Court then relied on the "general tenor" of the context in which the statement was made in determining whether it was "sort of loose, figurative, or hyperbolic language that would eliminate any impression that the writer was being serious."

Jolliff testified at the hearing that the company had established new time standards for driving routes and that because the drivers' performance bonuses were tied to completing routes within the allotted time, the new standards created pressure for the drivers either to drive illegally or to falsify their logs. While Jolliff and Daniels concede that TNT did not ***expressly*** instruct its drivers to "fix their logs," the employees argued that "TNT's impossible time allotments presented drivers, in their estimation, with an impossible choice: either drive unsafely and be on time, or drive safely and fudge the records."

However, the Sixth Circuit held that the reasonable interpretation of the meaning of the phrase "fix their log books" and "being asked by dispatchers and management to do these runs and either fix their log books or turn their heads on it" does not suggest hyperbole or opinion. Instead, these comments relating to "fixing the books" were intended to be viewed as "factually based statements."

Therefore, since these statements were presented as facts and not opinions, the Sixth Circuit then had to decide if these statements were made with "actual malice." In doing this, you need to look to the party who actually made the statement, who was Jolliff. Jolliff said that "***some*** drivers were" being asked by

"dispatch and management" to fix the logbooks. Even if Jolliff was never personally asked to fix the logbooks, there might still have been good reason for him to believe that ***other employees*** had been asked to fix the logbooks.

Therefore, the Sixth Circuit held that even though the statement was presented as a "fact," it was still related to ***the employer's labor practices and was not maliciously false*** since there was a reasonable basis for the employees to believe that some employees were asked to fix the books."

As a result, even though this statement by these TNT employees was false, they were still protected under the NLRA for sending this comment to TNT's largest client, Honda.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

When an employee commits "treason" and complains to a third party about the organization, **STOP AND THINK BEFORE YOU HAVE AN EMOTIONAL REACTION.**

If the employee is complaining to third parties about the terms or conditions of employment, employers must determine whether these complaints are protected. This can be done by simply applying the Sixth Circuit's analysis, as outlined in this case.

- Did the employee make a factually based comment to the outside party?
- Was there any reasonable basis for the comment, thus making it "without malice"?

F. NLRB Finds "NO DISCUSSION OF INVESTIGATION" Rule To Be An ULP

In Banner Health System, 358 N.L.R.B. No. 93 (July 30, 2012), the employer, Banner Health System, provided its human resources employees with an "Interview of Complainant Form" to use when interviewing employees as part of an internal investigation. While the form was titled "Interview of Complainant Form," it apparently was also used for interviews of the subjects of complaints. One of the bullet points under "Introduction for all interviews" noted that employees should be told not to discuss ongoing investigations. Although the form was never provided to employees, one human resources manager testified that she frequently, but not always, instructed employees not to discuss the investigation.

Members Richard Griffin and Sharon Block concluded that such an instruction violated Section 8(a)(1) of the Act because the statement, "viewed in context, had a reasonable tendency to coerce employees, and so constituted an unlawful restraint on Section 7 rights." The Board held that "to 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."

In its ruling, the Board sustained objections to the administrative law judge's determination that the prohibition on discussing ongoing investigations was justified by the employer's concern in protecting the integrity of the investigations. The Board rejected such a "blanket approach" justification. Instead, the Board noted that the employer had the burden "to first determine whether in any given investigation witnesses needed protection, evidence was in danger of being destroyed, testimony was in danger of being fabricated, or there was a need to prevent a cover up." The Board found that the general assertion of protecting the integrity of an investigation "clearly failed to meet" that burden.

The majority rejected Member Hayes' conclusion that the instruction was only a suggestion because it appeared as part of the introduction "for all interviews" and was given in most interviews. On the basis of those facts, the Board concluded that the instruction or rule had the tendency to coerce employees against exercising their Section 7 rights. Further, the majority noted that a supervisor's instructions carry sufficient weight to make a statement unlawfully coercive even without actual discipline or the threat of discipline.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

The Board's Banner Health decision applies equally to unionized and nonunion settings. The decision, however, is not a total prohibition on asking employees for confidentiality during an internal investigation. However, employers who do ask for confidentiality should be prepared to establish that confidentiality is necessary to protect a witness, prevent the destruction of evidence, preserve testimony, prevent a cover-up, or further another legitimate business interest.

In light of the Board's Banner Health decision, employers should consider reviewing their internal investigation policies, appropriately revising forms that may be used, and discussing the decision with their human resources professionals in order to avoid potential violations of the NLRA.

IX. SECTION 8(a)(1): NLRB ALLOWS EMPLOYEES TO USE EMPLOYER EMAILS TO ORGANIZE

In Purple Communications, Inc. and Communications Workers of America, AFL-CIO, 361 NLRB No. 126 (2014), the company's email policy said that its systems were to be used for business purposes only. The policy also prohibited employees from using the company's email systems to "engage in activities on behalf of organizations or persons with no professional or business affiliation with the company." It also prohibited employees from sending "uninvited emails of a personal nature."

The Communications Workers of America and the AFL-CIO brought an unfair labor practice charge against Purple Communications with the NLRB, claiming that the company's policy interfered with the employees' right to engage in "concerted activity" under Section 7 of the National Labor Relations Act.

On December 11, 2014, a 3-2 majority of the NLRB held that employees who have access to their employer's email system in connection with their work can also use the

system for union organizing during "**nonworking time**," unless the employer can show that there are narrowly defined "special circumstances" that would support a uniformly applied ban on nonbusiness email use.

The Board reasoned that "in many workplaces, email has effectively become a 'natural gathering place,' pervasively used for employee-to-employee conversations." Therefore, company email is "[central] to employee discussions, including their Section 7-protected discussions about the terms and conditions of employment."

This new ruling overturned the NLRB's previous 2007 decision in The Guard Publishing Company d/b/a The Register-Guard and Eugene Newspaper Guild, CWA Local 37194, 351 NLRB No. 17 (2007), which held that an employer may ban employees' use of email for union-organizing purposes and other activity ordinarily protected by Section 7 of the National Labor Relations Act (which applies to both unionized and union-free employers).

However, the majority in Purple Communications declared that the earlier ruling was "flawed" because it compared an employer's email restrictions to restrictions on the use of physical equipment, such as copying machines and bulletin boards. The majority in Purple Communications reasoned that the previous decision in Guard Publishing did not adequately recognize that email has become the predominant means of employee communication.

The Purple Communications majority ruled that totally banning nonwork email by employees who are authorized to use email for business purposes **may** be permitted in "special circumstances." However, the Board made it very clear that these circumstances must be **narrowly defined**. For example, an employer could institute a universal ban on nonwork emails if it could show that such a rule was needed to avoid network damage or overloads due to excessive use. Even then, the Board ruled that such a rule will **only** be permissible if ***all*** nonwork use is prohibited.

The Board acknowledged that even when a total ban would **not** be permissible, the Board acknowledged that employers may still apply uniform and consistently applied controls over use of the email system to the extent necessary to maintain production and discipline.

The Purple Communications decision, however, did not say whether employees would have the right to use employer's email to communicate directly with unions and other outside parties concerning workplace issues. While allowing such communications seems likely, the Board did not address that aspect of the use of email in this decision. This decision applied only to internal email communications between employees.

In sum, the NLRB's decision:

- Only applies to employees who have already been granted access to the employer's email system in the course of their work and does not require an employer to provide such access;

- Allows an employer to justify a total ban on nonwork use of email if it can demonstrate that special circumstances make the ban necessary to maintain production or discipline;

- Absent justification for a total ban, the employer may apply uniform and consistently enforced controls over its email system to the extent such controls are necessary to maintain production and discipline;

- The ruling does not address email access by nonemployees;

- The ruling does not address any other type of electronic communications systems.

Of course, because this ruling applies to all employers, regardless of whether or not they are unionized, all employers should review their electronic communications policies to ensure they are not in conflict with the Board's newest ruling.

X. NLRB CHANGES HANDBOOK RULES … *FOR THE BETTER*!

In The Boeing Company, 365 NLRB No. 154 (Dec. 14, 2017), the NLRB overruled its previous decision in Lutheran Heritage Village, 343 NLRB 646 (2004), which had held that a work rule that does not explicitly restrict rights protected by the Act may nevertheless run afoul of § 8(a)(1) if:

- Employees would reasonably interpret the language of the rule as prohibiting § 7 rights; or

- The rule was promulgated in response to union activity; or

- The rule has been applied in a manner that restricts § 7 rights.

Under the new standard established in Boeing, if the rule is **not explicitly unlawful**, the Board will evaluate two things:

- The rule's potential impact on protected concerted activity; and

- The employer's legitimate business justification for maintaining the rule.

Boeing held that if the justifications for the rule outweigh the potential impact on employees' rights, the rule is lawful.

Conversely, if the potential impact on employees' rights outweighs the justifications for the rule, it is unlawful.

Following up on the NLRB's decision in The Boeing Company, 365 NLRB No. 154 (Dec. 14, 2017), on June 6, 2018 NLRB General Counsel Peter Robb issued a new Guidance Memorandum (18-04) detailing how NLRB Regional Offices receiving claims of improper employment policies are to interpret employer workplace rules.

In Boeing, the Board established a new, and much more employer-friendly, standard for the lawfulness of employee work rules. This Memo gives examples of specific policies

that are to be found lawful and directs Regional Offices to no longer interpret ambiguous rules against the drafter or generalized provisions as banning all activity that **could** conceivably be included within the rule. Therefore, the Regional Offices will now look to whether a rule **would** be interpreted as prohibiting Section 7 activity, as opposed to whether it **could** conceivably be so interpreted.

In Boeing, the Board reassessed its standard for when the mere maintenance of a work rule violates Section 8(a)(1) of the NLRA. The Board established a new standard that focused on the balance between the rule's negative impact on employees' abilities to exercise their NLRA Section 7 rights, and the rule's connection to an employer's right to maintain discipline and productivity in the workplace.

Going forward, work rules are to be categorized in three categories:

(1) rules that are generally **lawful** to maintain,

(2) rules warranting **individualized scrutiny** and

(3) rules that are plainly **unlawful** to maintain.

The General Counsel's Memo places a number of commonly found workplace policies into these three groupings.

Category 1 Rules are generally lawful either because the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of rights guaranteed by the NLRA, or because the potential adverse impact on protected rights is outweighed by the business justifications associated with the rule.

The examples provided in the Memo of the types of rules that fall into this category include:

- Civility rules (such as "disparaging, or offensive language is prohibited");
- No-photography rules and no-recording rules;
- Rules against insubordination, non-cooperation, or on-the-job conduct that adversely affects operations;
- Disruptive behavior rules (such as "creating a disturbance on company premises or creating discord with clients or fellow employees is prohibited");
- Rules protecting confidential, proprietary and customer information or documents;
- Rules against defamation or misrepresentation;
- Rules against using employer logos or intellectual property;
- Rules requiring authorization to speak for the company; and

- Rules banning disloyalty, nepotism, or self-enrichment.

Category 2 Rules are not obviously lawful or unlawful and must be evaluated on a case-by-case basis to determine whether the rule would interfere with rights guaranteed by the NLRA, and if so, whether any adverse impact on those rights is outweighed by legitimate justifications.

General Counsel Robb identified the following examples of types of Category 2 Rules:

- Broad conflict-of-interest rules that do not specifically target fraud and self-enrichment and do not restrict membership in, or voting for, a union,

- Confidentiality rules broadly encompassing "**employer business**" or "**employee information,**" as opposed to confidentiality rules regarding **customer or proprietary information**, or confidentiality rules more specifically directed at **employee wages, terms of employment, or working conditions**,

- Rules regarding disparagement or criticism of the **employer,** as opposed to **civility rules regarding disparagement of employees**,

- Rules regulating use of the **employer's name**, as opposed to rules regulating use of the **employer's logo/trademark**,

- Rules generally restricting **speaking to the media or third parties**, as opposed to rules restricting speaking to the media **on the employer's behalf,**

- Rules banning off-duty conduct that might harm the employer, as opposed to rules banning insubordinate or disruptive conduct at work, or rules specifically banning participation in outside organizations and

- Rules against making **false or inaccurate statements**, as opposed to rules against making **defamatory statements**.

Category 3 Rules are generally unlawful because they would prohibit or limit NLRA-protected conduct, and the adverse impact on the rights guaranteed by the NLRA outweighs any justifications associated with the rule. The examples provided in the Memo of the types of rules that fall into this category include:

- Confidentiality rules specifically regarding wages, benefits, or working conditions; and

- Rules against joining outside organizations or voting on matters concerning the employer.

WHAT DOES THIS MEAN FOR HR?

Before Boeing, employers had to be very careful whenever they prohibited pretty much any employee conduct when they were drafting their handbooks since the NLRB rules at the time said that employee handbooks had to be viewed from the perspective of whether

or not its rules could be construed as **possibly** infringing on employees' Section 7 rights. NLRB GC Robb's Guidance Memorandum provides helpful clarity, with a detailed analysis and specific examples, as to how certain types of workplace rules would fall within the three-category analysis espoused by the Board in Boeing. The Memorandum is particularly enlightening to employers as it foreshadows the manner in which a NLRB Regional Office would prosecute a potential unfair labor practice charge brought by an employee or union. Significantly, GC Robb expressly stated that Regions **will not** interpret ambiguities in rules against the drafter, which clearly benefits employers in any proceeding. We expect this guidance to lead to fewer charges brought against employers in this arena, but only if employers heed the GC's advice when drafting their employee handbooks.

XI. SECTION 8(a)(1): "EMPLOYMENT AT WILL" POLICIES ARE FOUND TO BE UNFAIR LABOR PRACTICES

At-will disclaimers in employee handbooks typically clarify that the employment may be terminated at any time, for any reason, and by either party, and ordinarily do not allow the at-will status to be modified unless it is reduced to writing and agreed to by the employer. Employers rely on these provisions to protect themselves from claims that an employee has an enforceable employment contract with the employer based on the handbook's employment provisions.

Recently however, the National Labor Relations Board ("NLRB" or the "Board") has closely scrutinized and disapproved of broadly-worded at-will disclaimers that can have a "chilling effect" on the employee's right to engage in concerted activity under the National Labor Relations Act ("NLRA" or the "Act"), to the extent that they potentially imply that union representation and collective bargaining will not alter the at-will employment status. In two recent complaints, the NLRB's Acting General Counsel has taken issue with seemingly common at-will provisions, indicating that there may be a new enforcement target that all employers should be aware of when drafting at-will provisions.

In NLRB v. American Red Cross, 2012 WL 311334 (N.L.R.B. Feb. 1, 2012), the American Red Cross in Tucson, Arizona was found to be in violation of Section 8(a)(1)[1] of the NLRA by "[m]aintaining an overly-broad and discriminatory provision in its 'Agreement and Acknowledgement of Receipt of Employee Handbook'" form. Specifically, the complaint alleged that the at-will provision in American Red Cross's employee handbook was overly-broad, discriminatory, and violated the Act because it required the employee to sign an acknowledgement stating,

"I further agree that the at-will employment relationship cannot be amended, modified or altered in any way."

In determining whether the at-will employment provision violated the Act, the Administrative Law Judge ("ALJ") stated that "the appropriate inquiry is whether the [work rule] would reasonably tend to **chill** employees in the exercise of their Section 7 rights," [2] citing Lafayette Park Hotel, 326 NLRB 824, 825 (1998).

The ALJ also relied on previous NLRB precedent set out in Lutheran Heritage Village-Livonia, 343 NLRB 646, 646 (2004), which provided that a work rule violates the Act upon a showing that:

1. Employees would reasonably construe the language 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."

Even though the ALJ acknowledged that the at-will provision at issue did not "mention union or protected concerted activity, or even the raising of complaints involving employees' wages, hours and working conditions," there was "no doubt that employees would reasonably construe the language to prohibit Section 7 activity."

The ALJ reasoned that the signing of the at-will acknowledgement form was essentially a waiver which forced the employee to agree that their at-will status could not be changed, thereby relinquishing their right to advocate concertedly, whether represented by a union or not, to change their at-will status. The ALJ stated that the provision premised employment on the employee's agreement not to enter into any contract, to make any efforts, or to engage in any conduct could result in union representation and in a collective-bargaining agreement, which would amend, modify, or alter the at-will relationship. The ALJ stated that "[c]learly such a clause would reasonably chill employees who were interested in exercising their Section 7 rights."

The Red Cross contended that, despite its position that the clause was not unlawful, **that it repudiated its conduct by permitting the employee to strike out the offensive wording upon her objection before signing the acknowledgement form.**

Further, after receiving the complaint, the Red Cross deleted the entire provision and re-issued the handbook for re-execution by all of its employees, out of "an abundance of caution."

Accordingly, the Red Cross argued that:

1. Since it did not enforce the provision against the employee, it could not have restricted her Section 7 activity; and

2. The recently amended language in the handbook remedied any previous overly-broad and discriminatory provisions, making the issue before the Board moot.

The ALJ rejected these arguments, holding that the maintenance of the at-will acknowledgment forms, which were still distributed to employees for execution for almost one year after the employee's initial objection, was still an unfair labor practice, "even absent evidence of enforcement."

The ALJ also noted that no efforts were made to delete the offending language until after the General Counsel filed the complaint. Further, the ALJ was not convinced that Red Cross employees were adequately informed of the at-will provision retraction or given

any assurances that their Section 7 rights would not be interfered with in the future. Therefore, the Red Cross did not establish effective repudiation of the unlawful at-will provisions.

As a result, the ALJ found that Red Cross violated Section 8(a)(1) of the Act and ordered it to post notices assuring its employees that it would respect their rights under the Act.

In addition to physically posting paper notices, the notices also had to be distributed electronically, i.e., by email, posting on an intranet or internet site, and/or other electronic means, if that was how the Red Cross customarily communicated with its employees, to ensure complete message dissemination.

In NLRB v. Hyatt Hotel Corp, Case 28 CA-061114 (February 29, 2012), shortly after the decision in American Red Cross, the NLRB's Acting General Counsel filed an unfair labor practice complaint against Hyatt Hotels in Phoenix, Arizona stating that its at-will provisions also violated Section 8(a)(1) of the Act because it required employees to acknowledge that their at-will employment status could not be altered unless it was in writing and signed by a top Hyatt executive. Specifically, the provisions at issue provided:

- "I understand that my employment is at will"
- "I acknowledge that no oral or written statements or representations regarding my employment can alter my at-will employment status, except for a written statement signed by me and either Hyatt's Executive Vice President/Chief Operating Officer or Hyatt's President."
- "In order to retain flexibility in its policies and procedures, I understand Hyatt, in its sole discretion, can change, modify or delete guidelines, rules, policies, practices and benefits in this handbook without prior notice at any time. The sole exception to this is the at-will status of my employment, which can only be changed in a writing signed by me and either Hyatt's Executive Vice President/Chief Operating Officer or Hyatt's President."

Again, the Acting General Counsel took the position that these provisions constituted employer interference, restraint and coercion with respect to an employee's exercise of their right to engage in concerted activity should they want to change the status of their employment, as guaranteed by the Act. This case settled before the matter was presented for hearing, and Hyatt agreed to modify its at-will employment policies on a nationwide basis.

Similar to the American Red Cross directive, the settlement required Hyatt to revise the at-will provisions, rescind the acknowledgement forms that included the challenged at-will provisions and post written notices in all Hyatt hotels across the country that the at-will language at issue would no longer be in effect.

Then at a June 2012 Connecticut Bar Association annual meeting, Lafe Solomon, NLRB's Acting General Counsel, addressed his view and recent interest in at-will disclaimers during a meeting with the Connecticut Bar Association. He stated that he is

not necessarily targeting policies that generally outline the at-will employment relationship, but explained that an employee acknowledgement which could reasonably lead an employee to believe that even union representation and a collective bargaining agreement could not alter their at-will status is unlawful because it implies a futility of unionization and fails to acknowledge that a collective-bargaining relationship could affect the at-will relationship.

THEN … On November 1, 2012 …

NLRB Acting General Counsel Lafe Solomon released an analysis of at-will employment clauses in two employee handbooks, finding that both are lawful under the National Labor Relations Act.

SWH Corporation d/b/a Mimi's Café
http://mynlrb.nlrb.gov/link/document.aspx/09031d4580d6f56d

Rocha Transportation
http://mynlrb.nlrb.gov/link/document.aspx/09031d4580d6f56e

In reviewing these two decisions, the National Labor Relations Board (NLRB) Office of General Counsel (G. C.) issued two Advice Memoranda clarifying whether employment at-will language in an employee handbook, applications or other employment policies violates the National Labor Relations Act (NLRA) by "chilling" employee rights under Section 7 of the NLRA. Concern had arisen among employers as a result of findings in an earlier unfair labor practice charge (ULP) indicating that certain employment at-will provisions violated the NLRA. The Advice Memoranda reflects a common sense approach by considering the context of most at-will employment provisions in employee handbooks.

In the first Advice Memorandum, the NLRB Office of General Counsel considered the following language in the Rocha Transportation Employee Handbook:

> Employment with Rocha Transportation is employment at-will. Employment at-will may be terminated with or without cause and with or without notice at any time by the employee or the Company. Nothing in this Handbook or in any document or statement shall limit the right to terminate employment at-will. **No manager, supervisor, or employee of Rocha Transportation has any authority to enter into an agreement for employment for any specified period of time or to make an agreement for employment other than at-will. Only the president of the Company has the authority to make any such agreement and then only in writing.**

In the second Advice Memorandum, the Office of General Counsel considered the following language in the Mimi's Café Teammate Handbook:

> The relationship between you and Mimi's Café is referred to as "employment at will." This means that your employment can be terminated at any time for any reason, with or without notice, by you or

> the Company. **No representative of the Company has authority to enter into any agreement contrary to the foregoing "employment at will" relationship.** Nothing contained in this handbook creates an express or implied contract of employment.

In the ULP charges filed against Rocha Transportation and Mimi's Café, the claimants alleged that the bolded language in the handbooks violated the NLRA "because it is overbroad and would reasonably chill employees in the exercise of their Section 7 rights."

In rejecting these claims, the NLRB Office of General Counsel stated that any language that potentially violates the NLRA cannot be read in isolation but must be considered in context. The employment at-will policies at issue did not explicitly restrict employee Section 7 rights to change their at-will employment status through concerted activity among themselves, or through union organizing. Further, there was no indication that the policies were implemented in response to union organizing or that the policies had been applied to restrict protected concerted activity by employees. Thus, the handbook provisions would only be unlawful if employees would reasonably construe the policies "in context" to restrict their Section 7 activities.

The G. C. concluded that the handbook provisions did not require employees to refrain from seeking to change their at-will status or to agree that their at-will status could not be changed in any way. Instead, the handbook provisions simply made clear that the employer's own representatives were prohibited from entering into employment agreements that would provide for other than at-will employment and were not authorized to modify an employee's at will status. The Rocha Transportation provision clearly indicated the possibility of a modification of the at-will relationship through a collective bargaining agreement ratified by the company's president.

Further, the clear meaning of the Mimi's Café provision was to reinforce the purpose of the at-will policy, *i.e.*, that the handbook did not create an express or implied contract of employment. The G. C. noted "[i]t is commonplace for employers to rely on [such] policy provisions . . . as a defense against potential legal action by employees asserting that the employee handbook creates an enforceable employment contract."

The G. C. distinguished the prior American Red Cross Arizona Blood Services Region case which had raised concerns among employers about the liability of at-will disclaimers. In that case, the employer was held to have violated the NLRA by maintaining the following language in an acknowledgement form that employees were required to sign:

> **"I further agree that the at-will employment relationship cannot be amended, modified or altered in any way."**

The G. C. stated that this language required the employee – through the use of the personal pronoun "I" – to agree that at-will status could not be changed and was **"essentially a waiver" of the employee's right "to advocate concertedly . . . to change his/her at-will status."**

The NLRB guidance on at-will provisions in employee handbooks, employment applications, employee acknowledgment forms and other employment documents has clarified that at-will policies phrased in terms of what the ***employer*** can and cannot do, ***rather than what employees can and cannot do***, generally will not violate employee Section 7 rights under the NLRA. Employers should carefully review their employment at-will policies for compliance with the NLRA.

XII. SECTION 8(a)(2): IT SHALL BE AN UNFAIR LABOR PRACTICE FOR AN EMPLOYER TO DOMINATE OR INTERFERE WITH THE FORMATION OR ADMINISTRATION OF ANY LABOR ORGANIZATION OR CONTRIBUTE FINANCIAL SUPPORT TO IT.

A. Basic Test

When an employer's activity in the union reaches a point where it is reasonable to believe that an employer has chosen the employees' union for them, or so dominates the union that it is not truly representing the employees before the employer, then the employer has violated § 8(a)(2).

In International Ladies Garment Workers' Union v. NLRB, 366 U.S. 731 (1961), the employer mistakenly recognized a union that did not in fact represent a majority of its employees. (This is known as a "Sweetheart Contract.") On appeal, the U.S. Supreme Court held that even though the employer honestly believed that this union represented a majority of its employees, the employer has still committed an unfair labor practice under § 8(a)(2).

The Court then reasoned that the good faith of both parties is no defense. Otherwise, employers and unions would be able to circumvent § 8(a)(2) by being careless. Therefore, since knowledge is not a requirement under § 8(a)(2), employers have a duty to make sure that the union they voluntarily recognize does in fact represent a majority of employees. Otherwise, the *employer* is choosing the union and not the *employees.*

However, it does not violate § 8(a)(2) to include a "maintenance of membership" clause in a union contract that requires everyone hired by the company to join the union and stay in the union as a condition of employment. Such an agreement is referred to as maintaining a "union shop."

On the other hand, it is an unfair labor practice under § 8(a)(2) for an employer to operate a "closed shop," which occurs when an employer refuses to hire anyone who is not already a member of the union.

It is also not an unfair labor practice for the union to keep employee representatives in the employer's workplace that are paid by the employer to administer the contract. These people may also receive "super seniority" from layoff in order to retain those who have a working knowledge of the union contract. Of course, in order to qualify for these privileges, these individuals must have actual "hands-on" responsibility for administering the contract, as in the case of shop stewards.

Employers are also not permitted to favor one union over another, such as by allowing one to use office space on site but not another. However, such incidental benefits as providing free coffee have been viewed as being de minimus.

Additionally, although many employers have adopted such programs, Quality Circles and Peer Review Committees have been found to violate § 8(a)(2) if the employer retains the final say over the committee's decisions and/or if these committees consider issues related to the wages, hours, and other terms and conditions of employment. Such topics are to be left to the collective bargaining process.

XIII. SECTION 8(a)(3): IT SHALL BE AN UNFAIR LABOR PRACTICE FOR AN EMPLOYER TO DISCRIMINATE AGAINST EMPLOYEES IN ORDER TO EITHER ENCOURAGE OR DISCOURAGE UNION MEMBERSHIP OR ACTIVITY.

A. Proving Such Discrimination

In order to prove that an employer has unlawfully discriminated against an employee due to his union affiliation, it must be shown that the employee's union activity, or lack of it, was the motivating force behind the employer's conduct.

In 1947, the Taft-Hartley Act amended the NLRA to add § 10(c), which says that in order to prevail in such a discrimination action, the plaintiff must sustain his burden of proof by a preponderance of the evidence, which is also the standard the NLRB uses to base its decisions.

As for proving such a claim, the General Counsel's Office of the NLRB, who argues the NLRB's cases, has the burden of proving by a preponderance of the evidence that the employee's union activity was either in whole or in part the basis of the employer's reason for taking this adverse action against the employee. If this can be shown, then the burden of proof shifts to the employer, who must then show by a preponderance of the evidence that the action taken against the employee would have been taken even in spite of the individual's union activity.

If the employer can then sustain this burden, then the burden of proof shifts back to the general counsel, who then tries to demonstrate that the employer's reason offered to the court is pretextual.

Additionally, §§ 10(e) and 10(f) state that the courts are to review and uphold the NLRB's decisions if they are supported by "substantial evidence contained in the record as a whole."

B. Hiring Halls And Encouraging Union Membership

In International Brotherhood of Teamsters, Local 357 v. NLRB, 365 U.S. 667 (1961), the employer hired Slater without going through the union's hiring hall. When the union complained, the employer fired Slater. Slater then sued the employer and the union claiming that he was discriminated against in violation of

§ 8(a)(3) due to the fact that he was not a union member.

However, the U.S. Supreme Court held that hiring employees exclusively through a hiring hall is not illegal under § 8(a)(3) per se. Instead, the union's and the employer's true motive for using a hiring hall must be examined. If the true intent is to create a "closed shop" and exclude non-union members, then the hiring hall violates § 8(a)(3).

In this case, the only requirement placed upon those to be hired through the hiring hall was that they have at least three months of experience in the industry. Therefore, being a union member was not a requirement of participating in the hiring hall, so this hiring hall agreement was found not to be discriminatory under § 8(a)(3) of the NLRA.

The Court also disagreed with the NLRB's contention that hiring halls were discriminatory under § 8(a)(3) in their application since such an arrangement grants great loyalty to the union. The Court reasoned that the "real motive" of having a hiring hall is to obtain qualified workers quickly, and since an individual does not have to be a union member to use the union's hiring hall in order to obtain employment, but instead must meet an experience requirement, this purpose is supported. Therefore, the Court upheld the use of the hiring hall in this case.

In Radio Officers' Union v. NLRB, 347 U.S. 17 (1954), the employer refused to hire a nonunion radio officer because he was not already a union member even though no valid hiring hall arrangement existed. The employer also granted retroactive wage increases to union members but not to any nonunion members. The U.S. Supreme Court held that the employer was guilty of encouraging union participation in violation of § 8(a)(3).

In Mastro Plastics Corporation v. NLRB, 350 U.S. 270 (1956), where the union's contract expired and the employer invited another union into its shop, the U.S. Supreme Court held that inviting another union into its facility violated § 8(a)(3).

C. Closed Shops

Under § 8(a)(3), it is illegal for an employer to require that an employee become a member of a union, which is referred to as a "closed shop," except:

1. To require union membership after 30 days of employment, or more, (Union Shop) or

2. If the employer has reasonable grounds for believing that union membership was not available to the employee previously or that the employee was denied union membership in the past (i.e., racial discrimination) for any reasons other than the employee's failure to pay dues or an initiation fee required as a condition of employment (Union Shop).

D. Agency Shops

Although Article VI of the U.S. Constitution gives supremacy to U.S. Treaties, the Constitution and all federal laws (Supremacy Clause) over any conflicting state laws, § 14(b) of the NLRA relinquishes this supremacy back to the states. Section 14(b) allows the states to prohibit the use of those union shop security agreements allowed under § 8(a)(3) if they choose to do so (i.e., mandatory union membership after 30 days). Such states are referred to as "right-to-work" states.

As a result, in right-to-work states, it is illegal to force an employee to join a union...no exceptions. Therefore, in an agency shop, employees can choose whether or not they want to join a union after being hired. Consequently, union employees work right beside nonunion employees in an agency shop. Of course, as previously stated, agency shops only exist in right-to-work states.

E. Checkoff

Upon receiving written authorization from the employee, the employer can deduct union dues and initiation fees from their employees and not violate § 8(a)(3). However, it is important to note that only the collection of union dues and initiation fees are included in this exception. Union fines, on the other hand, are not included.

Consequently, an employer can legally discipline an employee for failing to pay his union dues or his initiation fee, but it cannot discipline an employee for failing to pay a union fine. Collecting a fine is solely an issue for the union to resolve.

F. Fair Share Fees

The issue of fair share fees usually arises in agency shops where employees can choose whether or not they want to join the union. However, the issue of collecting fair share fees can arise in a union shop where an employee has a religious objection to joining the union under § 19 of the NLRA. (Forcing an employee to join a union over his religious beliefs may also present a conflict with the Establishment Clause of the First Amendment that dictates a separation of church and state.)

A "fair share fee" is a fee that is paid by the nonunion employee to the union for the services the employee receives from the union solely by virtue of working in the same location as a union, such as higher wages, better benefits, etc. However, forcing an employee to contribute money to support issues he disagrees with violates the nonunion employee's right to free speech under the First Amendment. Therefore, the courts must decide which expenses unions can spend these fair share fees on and which they cannot.

In Ellis v. Brotherhood of Railway, Airline & Steamship Clerks, 466 U.S. 435 (1984), Ellis was a nonunion employee working in an agency shop. Ellis objected to having his nonmember agency fees used by the union for purposes he opposed.

The U.S. Supreme Court reasoned that forcing nonunion employees to pay agency fees, or fair share fees, to support issues they do not believe in violates their First Amendment rights. As an example, forcing a nonunion employee to support the union's political activities is always impermissible.

The Court then examined a list of the union's various expenses to determine if such expenditures benefited nonmembers. If so, then the union would be allowed to apply nonmembers' fair share fees to these expenditures.

The following expenditures were found to be permissible:

1. National Convention expenses were deemed permissible since they maintain the union's existence, which benefits nonmembers.

2. Social activities sponsored by the union that are also open to nonmembers are permissible since they help promote harmonious relationships. However, those portions of the activities related to political causes are not permissible.

3. National publications are permissible, except for those portions devoted to political causes.

4. Litigation expenses are permissible if the litigation is of direct local concern. If the litigation is general litigation, then the expense is not allowed.

5. Expenses related to organizing are not allowed.

In Lehnert v. Ferris Faculty Association, 500 U.S. 507 (1991), the U.S. Supreme Court formulated a three-part test to determine which union activities are constitutionally chargeable to nonunion members and which are not.

Fair Share Test

1. Is the activity germane to the collective bargaining activity?

2. Is this activity justified by the government's vital interest in avoiding "free riders" who benefit from union services without paying for it?

3. Does this union activity significantly add to the burdening of free speech or violate the nonmembers' First Amendment rights?

The Court also noted that it is the union who bears the burden of proving that it used the nonunion employee's fair share fees only for chargeable expenses and in the proper proportion to its total expenses.

In the past, employers used to collect the full agency fee, or fair share fee, then rebate an amount back to the nonunion employee if too much was originally collected. However, in Chicago Teacher's Union, Local 1 v. Hudson, 475 U.S. 292 (1986), the U.S. Supreme Court held that using any rebate system was illegal.

The Court reasoned that the union should not be permitted to use impermissible funds at all.

The Court therefore stated that not only must the nonmembers' fair share fees be reduced before they are deducted from the nonunion employee's pay, but the nonmembers are entitled to receive adequate information regarding their appropriate fair share. Although nonunion employees have the burden of raising the objection, the union has the burden of proving that the fair share fee it charged to nonunion employees is proportional to the services and benefits these nonmembers received from the union.

Additionally, the Court held that the union's procedure for addressing a nonunion member's objections must be expeditious and conducted in a fair and objective manner.

G. U.S. Supreme Court: Public Sector Fair Share Fees Violate The First Amendment's Right of Free Speech

In Janus v. AFSCME, No. 16-1466, 585 U.S. ___ (US Supreme Ct 06/27/2018), the United States Supreme Court overruled a 41 year precedent established in Abood v. Detroit Board of Education, 431 U.S. 209 (1977) and held that it is unconstitutional to collect "agency" or "fair share" fees from non-consenting nonmembers in the public sector.

Public sector unions, which include members working for state and local governments, are governed by individual state laws. Requiring these union members who decide to opt out of the union to still pay their "fair share fees" had been previously been allowed by the Supreme Court in Abood.

In Abood, the Court found that as long as the dues collected from non-members were used **only** for the union's purposes of collective bargaining, contract administration, and grievance adjustment, it did not violate the non-members' First Amendment Free Speech Rights under the U. S, Constitution.

However, in 2018, the U.S. Supreme Court ruled (5-4) that it is a violation of the First Amendment for a state to require nonconsenting public sector employees to pay agency fees to a union, overruling Abood.

> "We conclude that this arrangement violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern."

The Court characterized agency fees as a "compelled subsidy" for the speech of other private speakers, and emphasized the inherently political nature of public-sector bargaining. The Court applied "exacting scrutiny" (less than strict; more than rational basis) to the issue and concluded that agency fees do not "serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms."

Therefore, neither an agency fee nor any other form of payment to a public-sector union may be deducted from an employee, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay.

The Court found that agency fees cannot be upheld on the ground that they promote an interest in labor peace because labor peace can readily be achieved through less restrictive means. As for the argument that agency fees are needed to eliminate free riders, the Court said that in non-agency-fee jurisdictions, unions are quite willing to represent nonmembers in the absence of agency fees, and any event States can avoid free riders through less restrictive means.

The Court said that Abood is not supported by the First Amendment's original meaning.

Also, Abood was never based on Pickering v. Board of Ed., 391 U. S. 563 (1968), and even under some form of Pickering, agency-fee arrangements would not survive.

Further, the Court said Abood was poorly reasoned, applied a deferential analytical standard, did not take into account the difference between the effects of agency fees in public and private-sector collective bargaining, did not anticipate administrative problems with classifying union expenses as chargeable or nonchargeable, did not foresee practical problems faced by nonmembers wishing to challenge those decisions, and did not understand the inherently political nature of public-sector bargaining.

H. What Concerted Activities (§ 7) Are *Not* Protected By § 8(a)(3)

First, if employees engage in an illegal strike or a work slowdown, they are not protected by the NLRA. The courts have been consistent in holding that employees are not permitted to continue receiving wages from an employer while engaging in a work slowdown or a boycott. The reasoning here is clear: Employers are not expected to finance their own strikes.

In Elk Lumber Company, 91 N.L.R.B. 333 (1950), the employees were supposed to unload a certain number of railroad cars per hour. However, the employees felt they were underpaid, so they engaged in a work slowdown. These employees were terminated.

The NLRB said that while the desired end result of the employees' strike, or work slowdown, was legal, the **means** they used was not. Therefore, the employees were not protected by § 7 of the NLRA for such actions and their terminations were allowed to stand.

The NLRB and the courts have also held that employees who act in a disloyal manner toward their employers are not protected by § 7 of the NLRA either.

In NLRB v. IBEW Local 1229, 364 U.S. 464 (1953), TV station employees distributed handbills in their off-hours criticizing the station's **programming**.

The handbill did not reference the union, a labor controversy or their contract. However, the U.S. Supreme Court held that such actions were reasonably calculated to harm the employer, so these employees were not protected by § 7 of the NLRA.

Therefore, in order to be protected by § 7 of the NLRA when protesting an employer's practices publicly, the union:

1. Must be on strike and

2. The publicity or the employees' practices must relate to the current labor dispute.

As for "wildcat" strikes, which occur when employees go out on strike without the union's permission, the union is required to notify the employees that they must return to work. If the employees refuse, they can lawfully be fired under the NLRA.

After an illegal work stoppage is over, the employer may punish the strikers universally, randomly or in proportion to guilt. The employer can therefore punish only the union steward if the steward instigated the illegal work stoppage or slowdown and not violate § 8(a)(3).

However, unless the contract says otherwise, an employer cannot discipline union officials more harshly than other employees for illegal strikes or slowdowns. On the other hand, if the contract calls for the union to take steps to terminate any unlawful work stoppage, the employer may discipline union officials who participate in an unlawful work stoppage or slowdown more severely than others who participated.

I. Legal Strikes Protected By § 8(a)(3)

The U.S. Supreme Court decided in Dorchy v. Kansas, 272 U.S. 306 (1926), that employees have no Constitutional right or common law right to strike, unlike peaceful and truthful picketing which was protected under the common law, as well as by the First Amendment's right of free speech. However, under the NLRA, the right to strike is a protected activity under certain conditions.

Basically, there are two types of strikes unions can legally engage in and still be protected by the NLRA. These strikes are economic strikes and unfair labor practice strikes.

When a union decides to engage in an economic strike, which is a strike over the wages, hours, terms and other conditions of employment, § 8(d)(4) establishes certain "cooling off" period requirements. The union must comply with these requirements or the employees on strike will lose their status as employees. Therefore, a union cannot strike unless:

1. It serves the employer with 60 days' notice, and

2. The union offers to meet and confer with the employer for negotiating, and

3. The union notifies the Federal Mediation and Conciliation Service (FMCS) within 30 days after this notice is given to the employer.

Such requirements do not exist for unfair labor practice strikes.

Of course, one of the most controversial issues surrounding economic strikes is the use of replacement workers. In NLRB v. MacKay Radio & Telegraph Company, 304 U.S. 333 (1938), the employer hired replacement workers to run its business while the union was on an economic strike. The employer offered permanent employment to 11 of these replacement workers and five accepted.

As a result, once the strike ended, five union members were not rehired. The union claimed that not rehiring these five union members violated § 8(a)(3).

The U.S. Supreme Court held that employees have a right to strike. However, this does not mean that the employer is required to shut down its operations during a strike. Rather, employers are allowed to continue operating their businesses by hiring replacement workers.

Of course, in order to hire replacement workers in the first place, employers must make certain promises to these new employees, such as the promise of permanent employment. Therefore, the Court found that the employer's actions were legal and did not violate § 8(a)(3) of the NLRA.

In reality, the union usually requests an unconditional reinstatement of its members as a condition of ending the strike. However, as the Court mentions, since employers must often promise these replacement employees permanent employment, due to the fact that temporary workers are very difficult to hire, if the employer then terminates these permanent replacement workers after having made such promises, these permanent replacement workers may then have a cause of action against the employer for breach of contract. Therefore, employers must be careful in what assurances they give to replacement workers.

It is important to note that the issue of replacement workers only arises when the union is engaged in an economic strike. If the union strikes for any reason related to an unfair labor practice allegedly committed by the employer, then the issue does not arise since using replacement workers during an unfair labor practice strike is illegal.

However, economic strikers who apply for reinstatement while their jobs are being filled by permanent replacement workers remain employees and they are entitled to reinstatement when the permanent replacement worker leaves the employer, unless they have in the meantime acquired another regular and substantially equivalent job.

Of course, if the economic strikers can prove that the employer did not really have

a substantial and legitimate business reason for hiring these replacements, such as not really needing these replacements to operate the business during the economic strike, then these economic strikers would get their jobs back once the strike is over. Additionally, no time limit exists on an employer's obligation to reinstate economic strikers who have made an **unconditional** application for reinstatement. An employer, however, may not terminate these employees' seniority or recall rights without bargaining with the union.

It is permissible, however, for employers to establish a fixed period of time within which economic strikers can be recalled if:

1. The time period is not unreasonably short,

2. It is not intended to discriminate against union membership,

3. The employer did not insist upon the time period in order to undermine the union, and

4. The time period decided upon came about as a result of good faith bargaining.

It is also important to note that if an unfair labor practice is at issue at all in a strike, permanent replacement workers cannot be used. Additionally, if the employer breaches a strike settlement agreement governing the rehiring of strikers, it is an ipso facto unfair labor practice under § 8(a)(3).

Also, if no contract requirement says otherwise, then the employees who honor another employer's picket line are also economic strikers. Therefore, employers may not discipline such strikers, but the employer can hire permanent replacements in order to maintain operations.

It is also important to understand that a seasonal layoff of a permanent replacement worker does not create an open position for a displaced economic striker. Therefore, if the laid-off permanent replacement workers have a "reasonable expectation" of being recalled, then they retain their recall priority over the displaced economic strikers.

Of course, if the permanent replacement workers are given different positions **after** the strike is over, then the replacements cannot be considered "permanent," unless they were in training for these positions that opened up during the strike.

And finally, collective bargaining agreements may include "no-strike" provisions for both economic and unfair labor practice strikes. However, such provisions must refer to these two types of strikes specifically in order to be enforceable. Even then, the courts are very reluctant to allow contract provisions that prohibit unfair labor practice strikes.

J. Inherently Destructive Acts

In NLRB v. Erie Resistor Corporation, 373 U.S. 221 (1963), the employer hired replacement workers and accepted cross-overs from the union to work during the union's economic strike. However, as an inducement, the employer also awarded these replacements and cross-overs 20 years of super-seniority, which gave these employees "bumping rights" over the vast majority of the company's striking union employees.

The U.S. Supreme Court held that such an action by the employer was "inherently destructive" to the union, which makes it an unfair labor practice under § 8(a)(3). The Court reasoned that when an employer offers super-seniority to employees, the statutory right to strike is inherently destroyed even though it is not necessarily an anti-union act.

K. Lockouts

A "lockout" is basically the employer's equivalent of a union strike. In an effort to defend itself against a union strike, employers are permitted to "lockout" their employees from coming to work until the dispute is settled.

In NLRB v. Brown, 380 U.S. 278 (1965), the union went on an economic strike against one employer of a multi-employer bargaining unit. Instead of simply waiting to have their employees go on strike, the remaining employers in the bargaining unit locked out their employees and hired temporary replacement workers.

The U.S. Supreme Court held that locking out employees as a defensive move during an economic strike in order to protect the multi-employer unit is permissible. The Court reasoned that the NLRA does not require the employer to sit and wait to be a victim.

Lockouts have also been found to be permissible in collective bargaining situations. In American Shipbuilding Company v. NLRB, 380 U.S. 300 (1965), the union was negotiating with the employer when they reached an impasse in August, which was during the employer's slow season. So, instead of waiting until its busy season, which began in November, the employer locked out its employees in August. The union claimed this lockout violated § 8(a)(1) and § 8(a)(3).

However, the U.S. Supreme Court held that the employer was not required to wait for the October 1st contract deadline to lockout its employees. The fear of an impending strike by the union **was reasonable**, which made the lockout justified. Consequently, an employer does not have to sit and wait for a strike to hit it. The beginning and the end of the contract is to be determined by **both** parties, even though the union wants it to end in the employer's busy season. Here, the employer decided that the agreement should end in its slow season due to the

impasse that had been reached.

Today, the legality of a lockout depends on whether the lockout is inherently prejudicial to the union's interest and so devoid of significant economic justification that no evidence of intent to undermine the union is necessary. Therefore, an impasse is not necessary to invoke a lockout, but it is a strong indication that a lockout is necessary.

Still, the burden lies with the employer to establish that its actions were motivated by legitimate objectives and that its actions were not inherently destructive to the union (i.e., Super-seniority). However, employers can reschedule or refuse to pay vacation benefits during a strike and they can refuse to pay bonuses (i.e., Christmas) where a requirement for the bonus was that the employee had to be working on the date of distribution.

On the other hand, employers cannot stop paying disability or sick pay benefits to employees who are already receiving these payments when the strike began, they cannot give grand parties or bonuses to nonstriking employees (inherently destructive), and they cannot take actions against employees they **believe** will induce violence during a strike, regardless of employer's good faith.

L. Shutting Down Operations

In Textile Workers Union v. Darlington Manufacturing Company, 380 U.S. 263 (1965), when the employer lost a union election, it decided to close its operations down and sell off its equipment. The union filed an unfair labor practice charge against the employer under § 8(a)(3) and under § 8(a)(5) claiming that it was refusing to bargain in good faith.

However, the U.S. Supreme Court held that a company is free at all times, even if motivated by anti-union animus, to close its operation. On the other hand, an employer cannot close only part of its operation (i.e., one plant) and continue its business at a different location since this will discourage unionism at the other locations.

Therefore, it is not an unfair labor practice under § 8(a)(3) for an employer to close its operations down in an effort to avoid the union unless:

1. The employer has a substantial interest in another business, regardless of whether or not the other business is related to the closed plant, and there is a chance the employer will reap a benefit from the closing by discouraging union membership, and

2. The act was committed for this purpose, or

3. The employer has a relationship with the other businesses such that it is reasonably foreseeable that the company's other employees will fear persecution for their union activity.

However, if an employer relocates and opens up a new business, and if it can be determined that this relocation was undertaken for the purpose of avoiding the union, which is referred to as a "run away shop," then an unfair labor practice under § 8(a)(3) will have been committed. In determining if the employer was indeed motivated by anti-union animus, the courts will examine:

1. Statements made by the employer or commonly held beliefs that the employer will never operate its business with a union,

2. How quickly the employer closed the facility after being organized, and

3. Whether the new business located somewhere else is under the same management and in the same line of business as before the move.

Still, even if an employer is found guilty of being a "run away" shop, the employer will normally only be ordered to pay for the employees' moving expenses and offer them employment at the new facility. The courts will not ordinarily order the employer to return to its previous location.

The courts will also not ordinarily order the union contract to be imposed on the new facility. Instead, a new election would usually be held to see if the employees at the new facility want to be represented by a union. And finally, the courts will not usually order the employer to pay any damages to the displaced employees under the NLRA.

XIV. SECTION 8(a)(4): IT SHALL BE AN UNFAIR LABOR PRACTICE FOR AN EMPLOYER TO DISCHARGE OR OTHERWISE DISCRIMINATE AGAINST AN EMPLOYEE BECAUSE HE HAS FILED CHARGES OR GIVEN TESTIMONY UNDER THIS ACT.

Much like Title VII, employers are not permitted to discriminate against employees for exercising their rights under the NLRA, which includes the filing of unfair labor practice charges, testifying at an NLRB hearing, etc. Interestingly enough, unlike an EEOC investigation, if any employer pays the wages of an employee for the time off needed to testify on its behalf at an NLRB hearing, that same employer is not obligated to pay the wages for the time off needed by employees who intend to testify against the employer.

XV. SECTION 8(a)(5): IT SHALL BE AN UNFAIR LABOR PRACTICE FOR AN EMPLOYER TO REFUSE TO BARGAIN COLLECTIVELY WITH THE REPRESENTATIVE OF ITS EMPLOYEES, SUBJECT TO THE PROVISIONS OF SECTION 9(a).

Employers are also required to bargain in "good faith" with the employees' union over issues related to their "wages, hours and other terms and conditions of employment. For a more in-depth discussion of this topic, see Section "XVIII. Collective Bargaining" and "XIX. Subjects of Collective Bargaining" later in these materials.

XVI. MANAGEMENT'S "BILL OF RIGHTS"

In 1947, the NLRA was amended by the Taft-Hartley Act in response to the feeling that the balance of the law had been tipped too far in favor of the unions. Consequently, management obtained its "bill of rights," which is a list of unfair labor practices that could be committed by the union.

1. Section 8(b)(1)(A) and (B): A union cannot retain or coerce its employees for exercising their rights under the NLRA, nor can a union interfere with management's selection of its bargaining representative.

2. Section 8(b)(2): A union cannot force an employer to discriminate against employees.

3. Section 8(b)(3): A union cannot refuse to collectively bargain in good faith with an employer over the wages, hours and other terms and conditions of employment.

4. Section 8(b)(4): A union may not invoke "secondary boycotts."

5. Section 8(b)(5): A union may not charge excessive initiation fees.

6. Section 8(b)(6): A union may not engage in "featherbedding."

7. Section 8(b)(7): Restrictions placed on unions regarding "organizational" and "recognition" picketing.

8. Section 8(e): A union is prohibited from entering into a "hot cargo" agreement.

XVII. SECTION 8(b)(1)(A) and (B): IT SHALL BE AN UNFAIR LABOR PRACTICE FOR A LABOR ORGANIZATION OR ITS AGENTS TO RESTRAIN OR COERCE EMPLOYEES IN THE EXERCISE OF THE RIGHTS GUARANTEED IN SECTION 7 OR INTERFERE WITH AN EMPLOYER IN THE SELECTION OF ITS REPRESENTATIVES FOR THE PURPOSES OF COLLECTIVE BARGAINING OR THE ADJUSTMENT OF GRIEVANCES.

Unions are not permitted to retaliate against employees for exercising their rights under the NLRA, nor are they permitted to coerce or restrain employees who wish to exercise their rights under the Act. However, unions are permitted to discipline their members, such as fining members who refuse to participate in a strike, if certain conditions apply.

In order to determine if a union rule, and thus its corresponding fine, is valid and its mode of enforcement is proper, the following requirements must be met:

1. The rule must support the "legitimate interests" of the union and must not impair any "overriding" policy of the federal labor laws,

2. The rule must not be enforced through union coercion or employer discrimination, and

3. The rule must otherwise be "reasonably" enforced against union members who are free to leave the union or relinquish full membership in order to escape the rule. In this respect, the union violates § 8(b)(1) if it fines an employee for working during a strike who has already *resigned* from the union.

Of course, unions may not fine their members for refusing to commit unlawful practices (i.e., for refusing to violate no-strike clauses, for refusing to violate contractual provisions, etc.). Additionally, unions cannot penalize their members for filing an unfair labor practice against the union.

This section of the NLRA also prohibits unions from interfering with management as it chooses its official representative, or bargaining agent. In other words, a union cannot refuse to bargain with anyone duly chosen by management to represent it at the bargaining table.

XVIII. SECTION 8(b)(2): IT SHALL BE AN UNFAIR LABOR PRACTICE FOR A LABOR ORGANIZATION OR ITS AGENTS TO CAUSE OR ATTEMPT TO CAUSE AN EMPLOYER TO DISCRIMINATE AGAINST AN EMPLOYEE OR TO DISCRIMINATE AGAINST AN EMPLOYEE WITH RESPECT TO WHOM MEMBERSHIP IN SUCH AN ORGANIZATION HAS BEEN DENIED OR TERMINATED (FOR SOME REASON OTHER THAN FAILURE TO PAY DUES OR INITIATION FEE).

This section prohibits a union from causing or attempting to cause an employer to discriminate against an employee on behalf of the union, such as when a union asks management to discipline one of its members for breaking a union rule or when a union demands that an employer not hire an individual due to the fact that this person has been denied or lost his union membership for any reason other than his failure to pay an initiation fee or dues.

XIX. SECTION 8(b)(3): IT SHALL BE AN UNFAIR LABOR PRACTICE FOR A LABOR ORGANIZATION OR ITS AGENTS TO REFUSE TO BARGAIN COLLECTIVELY WITH AN EMPLOYER.

Just as § 8(a)(5) makes it an unfair labor practice for an employer to refuse to bargain in good faith over wages, hours and other terms and conditions of employment, it is also an unfair labor practice for the union to refuse to bargain in good faith over such mandatory subjects of bargaining. For a more in-depth discussion of this topic, see Section "XVIII. Collective Bargaining" and "XIX. Subjects of Collective Bargaining" later in these materials.

XX. PICKETING

A. Forms Of Picketing

In order to discuss the topic of picketing, it is important to understand that different types of picketing exist.

First, there is "primary" picketing. Primary picketing occurs when employees picket their own employer over some labor dispute. By far, this is the kind of picketing people think of most often. Primary picketing enjoys the greatest degree of Constitutional protection, mostly from the First Amendment's right to free speech provision.

Still, primary picketing must be conducted in a peaceful manner (means) and for a lawful purpose (ends) in order to enjoy such protections. (Under the common law, both the ends desired and the means by which a labor union obtained its objectives must be legal, which was referred to as the Ends/Means Test.)

Primary picketing is particularly troublesome for employers since union employees cannot be forced to cross a primary picket line under § 8(b)(4) of the NLRA, which is basically a legal boycott.

Secondly, there is "stranger" picketing. Stranger picketing occurs when nonemployees picket an employer on behalf of a union that does not represent the employees of this company, such as when an employer is picketed as part of a union organizing campaign by nonemployees. Stranger picketing is also protected by the Free Speech provision of the First Amendment if it is conducted for a lawful purpose and in a peaceful manner.

Thirdly, there is "secondary" picketing. Secondary picketing occurs when a union has a labor dispute with the employer, but instead of picketing the employer, the union pickets the employer's customers in order to force the customer, or secondary employer, to stop doing business with the primary employer. The NLRA prohibits secondary picketing.

B. Picketing And The Constitution

Picketing is a form of expression that is protected by the First Amendment under its Freedom of Speech provision. However, this right to picket is not absolute.

For instance, picketing must be peaceful and truthful. (The First Amendment will not protect violence or untruthfulness in picketing.) The U.S. Supreme Court has also held that secondary picketing is not protected by the First Amendment due to the great infringement such picketing has on the rights of innocent third parties.

Additionally, picketing may be seen as coercive and therefore not protected by the First Amendment, if a union engages in "mass picketing," which occurs when

more than three or four pickets congregate at an employer's entrance. Pickets are permitted to communicate their message, but they are not allowed to block an employer's ingress and egress of customers or employees.

C. Remedies For Illegal Picketing

In Teamsters, Local 901 (Lock Joint Pipe & Company), 202 N.L.R.B. 399 (1973), when the union threatened some of its members for failing to support its strike, which prevented these employees from going to work, the employer filed an unfair labor practice against the union under § 8(b)(1) for the wages these threatened employees lost.

The NLRB held that the only remedies available for employers to recover for illegal picketing were injunctions, contempt and cease and desist orders. The NLRB reasoned that to allow employers the opportunity to recover more would inhibit employees' right to strike and picket. Also, the employees themselves still have a private cause of action against the union for such threats and lost wages.

XXI. SECTION 8(b)(4): SECONDARY PRESSURE

A. Secondary Boycotts Defined

A "primary boycott" occurs when a union applies pressure in the form of picketing, striking or any type of action against the company whose employees are represented by the union. A "secondary boycott," on the other hand, is defined as being union pressure, usually occurring in the form of a strike or picketing, aimed at an employer or some other person with whom the union has no labor dispute.

The purpose of a secondary boycott is usually to "persuade" a neutral party, such as a customer, to stop dealing with the employer in an effort to force the employer to meet the union's demands. Section 8(b)(4) regulates secondary boycott activities, not primary ones.

The activities prohibited by § 8(b)(4) include:

1. Engaging in a strike, refusing to handle goods, or inducing another individual to strike or to refuse to handle goods against secondary persons (i.e., customers), or

2. Threatening, coercing, or restraining secondary individuals.

These "secondary" activities are prohibited by § 8(b)(4) if they are undertaken for any of the following purposes:

1. To force an employer to enter into a "hot cargo" (§ 8(e)) agreement (NLRA § 8(b)(4)(A)), (A "hot cargo" agreement is a labor agreement with the union that prohibits the employer from doing business with a secondary employer with whom the union has a dispute. Section 8(e)

makes hot cargo agreements illegal.)

2. To force a third (neutral) party to stop handling the employer's goods, or to force the third party to stop doing business with the employer (NLRA § 8(b)(4)(B)), or

3. To compel an employer to assign work to one union rather than another (NLRA § 8(b)(4)(D)).

B. Moore Dry Dock Rule: Common Location Situation

In Sailors' Union of the Pacific & Moore Dry Dock Company, 92 N.L.R.B. 547 (1950), a Greek ship, the Phopho, was in dry dock with Moore Dry Dock Company. The Phopho was to be restaffed with a nonunion American crew, so the union wanted to picket the Phopho, which was the primary employer. However, the Phopho was located at Moore Dry Dock, the secondary employer. As a result, if the union picketed the Phopho, it would also be picketing the secondary employer's location, Moore Dry Dock.

When the union asked Moore Dry Dock if it could place pickets at the site of the ship, Moore Dry Dock refused. However, Moore Dry Dock did agree to let the union picket the entrance. Of course, as a result, the Moore Dry Dock employees honored the union's picket line and refused to work on the Phopho, although they did agree to only work on the other ships in the drydock. Moore Dry Dock claimed it was the victim of a Secondary Boycott by the union under § 8(b)(4)(A).

The NLRB reasoned that ordinarily, the union's picketing occurs at the primary employer's location, but this is apparently not always the case. The NLRB then held that picketing the premises of the secondary employer remains a "primary" picket if:

1. The picketing is limited to times when the situs of the primary dispute is located on the secondary employer's premises, and if

2. The primary employer at that time is engaged in its normal business at the situs, and if

3. The picketing is limited to an area close to the situs, and

4. The picketing clearly discloses that the union's dispute is with the primary employer and not the secondary employer.

The NLRB held that since all of these factors were met in this case, then no illegal secondary picketing occurred.

C. Picketing An Entire Location

In International Union of Electrical, Radio & Machine Workers, Local 761, AFL-CIO v. NLRB [General Electric], 366 U.S. 667 (1961), General Electric was being picketed by the union. However, General Electric's facility had five entrance gates, and Gate 3-A was clearly marked for independent contractors only, who were not represented by the union. Still, the union picketed every entrance, including Gate 3-A. Consequently, the independent contractors refused to cross the picket line and go to work.

The U.S. Supreme Court held that picketing Gate 3-A was an illegal secondary boycott. Since General Electric clearly indicated that only independent contractors and not any unionized employees were to use this gate, and since the work being performed by these independent contractors was completely unrelated to the usual operations of the union employees, since General Electric was having some new equipment installed, this was a secondary boycott by the union.

On the other hand, the Court also stated that if the work being performed by the independent contractors had been related to General Electric's normal operations, then this picketing would have been legal.

D. Separate Gates At A Construction Site

In Building & Construction Trades Council of New Orleans [Markwell & Hartz, Inc.], 155 N.L.R.B. 319 (1965), when the general contractor on a construction site had a dispute with the union, the general contractor hired subcontractors to replace the unionized union employees. The union then went on strike and picketed all of the general contractor's gates, even though the general contractor clearly indicated that the subcontractors' employees were to use only one specific gate. Since the union picketed this gate too, the subcontractor's employees refused to cross the picket line and report to work. The union claimed that this was not a secondary boycott under the General Electric standard since these subcontractors were performing duties previously performed by the union.

However, the NLRB held that the Moore Dry Dock standards should be applied in this case, so picketing the subcontractor's gate was a secondary boycott. The NLRB reasoned that the purpose of picketing this gate was to induce the subcontractors not to go to work. The relationship between these subcontractors and the general contractor was one of **employer to employer, not employee to employer**. Since no dispute existed between these subcontractors and the union, this was a secondary boycott.

E. Secondary Employer Doing Primary Employer's Work

In NLRB v. Business Machine & Office Appliance Mechanics Conference Board, IUE, Local 459 [Royal Typewriter Company], 228 F.2d 553 (2nd Cir. 1955), the Royal Typewriter Company was in the typewriter repair business when its union went out on strike. Since Royal was afraid it would lose its service contract customers, it told these customers to send their typewriters to Tytell for repair and Royal would pay the bill.

The union then picketed Tytell. Royal claimed this was a secondary boycott by the union.

The Second Circuit held that the NLRA's prohibition against secondary boycotts will not protect an employer who knowingly does the work for another employer that is ordinarily performed by the primary employer's striking employees. In this case, Royal, the primary employer, arranged to have its clients' work done by Tytell, and it then paid Tytell for this work.

The secondary boycott provision of the NLRA is not designed to protect the secondary employer who is acting as an ally of the primary employer. Additionally, Tytell had the burden of proving that it did not know it was performing the work ordinarily being completed by the striking union.

F. Section 8(b)4: Publicity Proviso

In NLRB v. Fruit Packers [Tree Fruits], 377 U.S. 58 (1964), when the fruit packers union went out on strike against the employer, it went to the stores where the employer's Washington apples were sold, then distributed handbills and displayed signs telling the stores' customers that it had a dispute with the employer who supplied these stores with Washington apples. This publicity urged the stores' customers to **only** refrain from buying these apples.

The union did not picket the stores, nor did it encourage their customers to boycott the stores entirely. The union also did not interfere with the stores' deliveries or their employees.

The employer claimed this was still an illegal secondary boycott.

However, the U.S. Supreme Court held that the union was merely **following** the primary employer's product to the stores where it was sold and then **publicizing** the fact that it was picketing Washington apples only. The union was clear in communicating that it had no dispute with these stores and it did not interfere with the stores' employees.

Such publicity picketing falls under the protections of § 8(b)(4), which states that a union **can publicize** its dispute with the primary employer where ever the primary employer's product is sold by any means **other** than picketing as long as

this publicity does not have the **effect** of inducing the secondary employer's employees or delivery persons to disrupt its business. Therefore, no secondary boycott exists.

However, if this publicity had the effect of creating a work stoppage or if it had interfered with any deliveries made to the secondary employer (the stores), then this publicity picketing would have been illegal, regardless of the union's intent or good faith.

The publicity proviso of § 8(b)(4) can also be used to convince a customer to boycott the primary employer's product before the union actually publicizes its dispute to the public.

For instance, in NLRB v. Servette, Inc., 377 U.S. 46 (1964), Servette was a wholesale food distributor whose union went on strike. The union then went to Servette's customers (grocery stores) and asked them to boycott Servette's products. Otherwise, the union said it would exercise its rights under § 8(b)(4)'s publicity proviso and pass out handbills asking the public not to buy products distributed by Servette.

The U.S. Supreme Court held that it is not a secondary boycott under the NLRA if the union approaches a store manager and threatens him with the publicity proviso. This then becomes a managerial decision.

XXII. SECTION 8(b)(5): EXCESSIVE INITIATION FEES AND SECTION 8(b)(6): FEATHERBEDDING

Section 8(b)(5) is very simple: Unions are prohibited from charging their new members initiation fees which the NLRB finds to be excessive. In the past, some craft unions used to charge new members tremendously high initiation fees for the purpose of keeping workers out of the skilled trades. As a result of these high fees, just about the only ones who could afford to join the skilled trade unions were the children of skilled tradesmen. Section 8(b)(5) was intended to put an end to such nepotism practices.

Section 8(b)(6) of the NLRA outlaws "featherbedding," which occurs when a union forces an employer to keep an extra employee on duty "just in case" this employee is needed. Before § 8(b)(6) made featherbedding illegal, some unions used this tactic to secure employment for their membership.

XXIII. SECTION 8(b)(7): RECOGNITIONAL AND ORGANIZATIONAL PICKETING

Section 8(b)(7) of the NLRA states that a union cannot picket or threaten to picket an employer where *any* object or purpose of the picketing is to force the employer to recognize the union or to force the employees to accept this union as their exclusive representative in two instances:

1. Instance #1: §8(b)(7)(A) says it is unlawful for an uncertified union to picket an employer for the purpose of organizing its employees, or to force the employer to recognize this union as representing the employees if the

employer is **currently** recognizing another union under § 9.

2. Instance #2: §8(b)(7)(C) says that:

   a) A union can picket for a "reasonable period of time" before filing a petition. Thirty days is customarily seen as being "reasonable."

   b) The union then gets priority for expediting its petition (§ 10(1)).

   c) Under the "publicity proviso," even if a union has **not** filed its petition within 30 days, the union can then continue to conduct "publicity picketing" for the purpose of truthfully advising the public that the employer does not employ union members nor does it have a contract with a union. This picketing cannot have the **effect** of causing anyone employed by another employer not to pick up, deliver, or transport goods, or not to perform any services for the employer being picketed.

Of course, if the union is already the certified representative of the company's employees, then this issue of recognitional or organizational picketing does not arise.

Additionally, it is important to note that § 8(c) allows the union to express its views, arguments, or opinions by written, printed, or visual means if this expression contains no threats of reprisal, force, or promise of benefits. Of course, after 30 days, any recognitional and organizational picketing can be enjoined by the court.

As a caveat to the recognitional and organizational picketing rules of § 8(b)(7), another type of picketing is "area standards picketing." In Houston Building & Construction Trades Counsel [Claude Everett Construction Company], 136 N.L.R.B. 321 (1962), when the local unions discovered that an employer was not paying union wages, the union began "publicity picketing" against the employer.

The signs the union used to picket the employer stated that it did not intend to disrupt the employer's business. These unions, however, failed to file a petition with the NLRB within 30 days of beginning its picketing campaign. The employer claimed that this picketing interfered with its work.

The NLRB held that this was area standards picketing. The NLRB reasoned that these unions were not interested in recognition or organizing the employer, so § 8(b)(7)(C) of the NLRA did not apply. The union's intent here was to merely inform the public of the employer's wage practices. As a result, the fact that the employer's business was interrupted is inconsequential. The NLRB held for the union and allowed the picketing to continue.

XXIV. NLRB "SALTING" RULE

In Toering Electric Co., 352 NLRB No. 102, Michigan electrical contractor Toering Electric Co. found itself on the receiving end of a salting campaign in 1994. ("Salting" is the union practice of sending a member to a nonunion job site, apply for a job and then try to organize the workers.) The International Brotherhood of Electrical Workers (IBEW) submitted members' resumes to the company in response to blind help-wanted ads.

Some resumes lacked previous dates of employment, while others were more than one year out of date. Another resume came from someone who didn't even show up for work when the company offered her a job the year before to settle a prior unfair labor practice charge. As a result, Toering did not hire any of the 18 IBEW applicants, prompting an unfair labor practice charge.

Toering argued that the IBEW applicants had no protection against discrimination in hiring because their intent was to "manufacture" unfair labor practices and tie up the company in expensive litigation that would negate any cost advantage Toering had over union contractors. The judge who initially heard the case rejected the company's argument and found that it had discriminated against the 18 workers and consequently illegally interfered with their right to organize. The company appealed to the NLRB.

The NLRB, in a 3-2 decision, ruled that job applicants must be "genuinely interested" in working for an employer in order to be protected from discrimination under the National Labor Relations Act. Furthermore, the NLRB's general counsel, who files unfair labor practice charges, has the burden of showing that the applicants had a "genuine interest" in working for the employer. If the General Counsel is not able to show that such interest existed, then there is no need to even examine the employer's motivation for not hiring the applicant.

Previously, it was up to the employer to try to prove that a job applicant wasn't interested in employment because there was a presumption that the applicant was interested. Thanks to the Toering decision, no such presumption exists.

The Toering decision also illustrated how this new rule will work in hearings on unfair labor practices:

1. First, the general counsel must show that the "salt" applied for employment.

2. Then, the employer may offer evidence that the applicant wasn't really interested in a job. Evidence can include proof that the applicant recently refused similar employment with the employer, placed "belligerent or offensive comments" on the application, engaged in similar behavior during the application process, or took other action inconsistent with genuine interest in employment.

3. Then, the general counsel must prove the applicant was truly interested in employment.

The NLRB majority explained it was changing the rule to prevent its procedures from being subverted by one party to inflict economic injury on another. The ruling offers good news for employers besieged by job applicants with hidden agendas for two reasons. First, removing the burden placed upon employers of having to prove that whether an applicant was truly interested in the job for which they applied is a great relief to employers. Secondly, this burden has now shifted to the NLRB's General Counsel, which could most likely force the counsel to more diligently screen out dubious charges and possibly file fewer of them against employers.

XXV. SECTION 9: REPRESENTATION PETITIONS

A. Section 9(c)(1): Four Types Of Petitions

The first type of petition available under the NLRA is a "certification petition," which occurs when the union requests to be the exclusive representative for a group of employees (§ 9(c)(1)(i)). These petitions are informally referred to as "RCs," or a "request for certification."

The second type of petition available under the NLRA is a "decertification petition," which occurs when employees request to decertify the union currently representing them (§ 9(c)(1)(ii)). Section 9(e)(1) of the NLRA states that in order to hold a decertification election, 30 percent of the employees must request for such an election to be held. Such petitions are uniformly referred to as "RDs" or a "request for decertification."

Thirdly, an employer can request a "deauthorization petition," which occurs when an employer files a petition with the NLRB alleging that it has been presented with more than one union claiming to represent the majority of its employees. Such petitions are informally referred to as "RMs," or "request for majority" petitions.

And finally, as previously discussed, the Landrum-Griffin Act of 1959 gave the President of the United States the authority to request a national emergency petition in order to delay a strike that will effect an entire industry or imperil the nation's health or safety. (See previous section "I.")

B. Section 9(b): Determining The Appropriate Bargaining Unit

The NLRA requires employers to bargain only with a union who represents an "appropriate" majority of a particular unit of employees. The NLRA does not require that a "unit" or "group" of employees be the **only** unit or even the **most appropriate** unit of employees. The group of employees organized need only be "appropriate."

The NLRB uses several factors in determining whether a group of employees is appropriate or not, which include:

1. The mutuality of interests that exist between these employees, with the similarity of the employees' skills, wages, hours and other working

conditions as probably being the most relevant factors.

2. Whether or not there is a history of joining these employees together as a single unit for the purpose of collective bargaining in the industry.

3. The desires of the employees may be significant where all of the other factors are evenly balanced, especially if the question is decided by a "globe" election. (A "globe" election occurs when a particular group of employees, usually craft employees, could either bargain as a separate unit or be merged into a larger existing unit. The NLRB will allow such employees to choose between these two alternatives, unless there is a pattern or history indicating another appropriate unit.)

4. The extent to which these employees have organized with this company in the past is **a factor**, but it is not controlling (§ 9(c)(5)). (This is more of a factor in craft severance elections.)

As for craft severance elections, which occurs when a particular group of craft employees want to sever their affiliation with another group of employees and form their own unit, the NLRB in Mallinckrodt Chemical Works, 162 N.L.R.B. 387 (1966), held that several factors should be considered in determining the appropriateness of a craft unit, such as:

1. Is the new unit a true craft?

2. Is the union seeking to carve out the new group that traditionally represents such workers?

3. What is the possibility of disrupting the employer's operations if the severance is granted?

4. How integrated is the craftsmen's work with the company's production process?

5. What are the qualifications of the union seeking to represent these craftsmen?

6. How separated is this craft unit from the other employees?

Other "appropriate units" can be decided by each individual location or they can be established for the entire employer covering all of its locations. Such considerations are really "gerrymandering principles." The employer usually wants a broader unit of employees in order to obtain a more heterogeneous group while the union usually wants the unit to be more homogeneous and more narrowly defined, although strategies may differ given the different circumstances of each situation.

In making such a determination, the NLRB generally considers several factors, such as the:

1. Geographical separation of the locations in question, the

2. Division of authority for management in each location, the

3. Amount of interchange between employees, the

4. Bargaining history of the employees, and

5. Whether this or another union wants to represent multiple locations.

Still, a single location, especially in retail, is presumptively an appropriate unit.

However, this presumption can be overcome where the above criteria indicates it is appropriate.

C. Requirements for Petitions

The NLRB will not approve a petition sent before it unless the following conditions are met:

1. The employer's business must meet the requirements for NLRB jurisdiction as set forth under the Act.

2. An appropriate bargaining unit exists.

3. Evidence is presented to show that at least 30 percent of the employees in the appropriate bargaining unit favor certification or decertification, which is done through authorization cards (§ 9(e)(1)).

4. The NLRB ordinarily will not approve a petition when unremedied unfair labor practices exist.

5. If a valid election for the same bargaining unit has been held within the preceding 12 months, the NLRB will not proceed further regardless of whether or not a union was certified in the prior election (§ 9(c)(3)).

6. Similarly, if there is an existing, valid collective bargaining agreement between a union representing the bargaining unit and the employer, and it has not been in effect for an unreasonable length of time (three (3) years), the NLRB will refuse to investigate further.

D. Multi-Employer Units

Basically, a multi-employer bargaining unit exists when several different employers all bargain with the same union. However, in order to establish a multi-employer unit for bargaining, the employer association must have the consent of all the employers, the union and the NLRB. Once the association is established and negotiations begin, an employer is not permitted to withdraw except in "unusual circumstances."

In Charles D. Bonanno Linen Service v. NLRB, 454 U.S. 404 (1982), Bonanno was part of a multi-employer bargaining unit. When negotiations with the union reached an impasse, Bonnano claimed this was an unusual circumstance, so he dropped out of the employer bargaining unit. The union filed an unfair labor practice when Bonnano refused to follow the new agreement.

The U.S. Supreme Court held that an impasse is not an unusual circumstance, but a *total* breakdown of negotiations is, as opposed to a temporary impasse. Another unusual circumstance would be if an agreement operated to fragment the employer unit. Therefore, Bonnano was not justified in dropping out of the bargaining unit.

E. Unions Challenging Other Unions

Many times, a union will try to become the exclusive representative of a group of employees that are already represented by another union. However, there are only certain times when another union can challenge an existing union for the right to represent a group of employees.

First, if the current union has a valid contract with the employer, then the other union cannot challenge the existing union for the right to represent these employees. In order to be considered a "valid" contract, the contract must be signed by both the employer and the union and it must contain substantial agreements relating to the wages, hours, terms and other conditions of the employees' employment.

However, there are a few situations where an existing union contract is not a bar to a challenging union, such as if:

1. The contract has no fixed term,

2. The employer contracts with an uncertified union and that union seeks certification during the period of the contract,

3. The contracting union becomes defunct,

4. The existing contract has a clause entailing racial discrimination,

5. The existing contract has an illegal "closed shop" provision, or

6. The existing contract was prematurely extended,

7. A major change in circumstances has occurred (i.e., major change in jobs, employer expansion or merger, etc.), or

8. The union members and officials join a new union.

Regardless of whether a valid contract is in place or whether one of these preceding exceptions applies, a rival union can still challenge an existing union if:

1. It obtains authorization cards from at least 30 percent of the employees in the bargaining unit, and

2. The rival union files its certification petition with the NLRB between 60 and 90 days before the end of the employer's existing contract with the current union, which are referred to as the "Mill-B Days."

And finally, if the current union does not have a valid contract with the employer, and if it has been at least 12 months since the current union has been certified and duly elected by the employees, then the rival union can challenge the current union for the right to represent these employees.

However, a rival union cannot challenge a current union for 12 months after the current union is certified as the employees' exclusive bargaining representative.

F. Obtaining A Union Without An Election

Sections 9(b)(4) and 9(c)(4) state that an employer can waive its right to a union election and voluntarily recognize the union once the union presents the employer with authorization cards from at least **50 percent** of its employees. This is referred to as a "consent" election.

However, every so often, the NLRB may impose a union on an employer when it feels that the employer has committed so many serious unfair labor practices that the "laboratory conditions" needed to hold a fair election have been destroyed.

In Gissel Packing Company, 180 N.L.R.B. 54 (1969), the union claimed that even though it had collected authorization cards from more than 50 percent of the employer's employees at the beginning of its campaign, the employer had committed so many unfair labor practices that it lost its majority status and thus the election.

The NLRB held that § 9(a) of the NLRA does not require an election to take place in order for an employer to have a union. Therefore, where a union has shown that it did indeed have a majority of the employees' authorization cards at one time and that the employer has committed so many unfair labor practices that holding a fair election is now impossible, then the NLRB has the authority under § 9(a) and § 10(c) to impose a union on the employer. Obviously, in order for the NLRB to invoke such an order, the authorization cards themselves must have been obtained without any coercion or misrepresentation, and they must clearly state what they are to be used for by the union.

However, in J.P. Stevens Company v. NLRB, 441 F.2d 514 (5th Cir. 1971), the Fifth Circuit imposed the union on the employer and ordered the employer to bargain with the union even though the union could not establish that it had represented a majority of the employees at any given time. Still, the court reasoned that the employer's unfair labor practices were **so** "outrageous" and "pervasive" that their coercive effects could not be overcome.

G. Illegal Policies Requires A New Union Election

In Blommer Chocolate Co. of California, LLC, Case No. 32-RC-131048 (February 17, 2016), the union lost a secret-ballot election by a vote of 18 to 50. The union immediately filed an objection to the election contending that three work rules in the employer's handbook "tainted" the election results.

One of the employer's work rules prohibited employees from using the employer's name or logo without its permission.

The next rule allowed employees to occasionally use the company's phones, email system and computers for personal use, so long as the employee did not use those means of communication to advocate personal opinions.

The third rule prohibited employees from disseminating "confidential information," and included within the definition of "confidential" information regarding employees, including lists of employees.

By a 2-1 majority, the NLRB found that all three work rules were illegal, or "Unfair Labor Practices." As a result, the NLRB invalided the election results.

Interestingly, the Administrative Law Judge who conducted the initial hearing noted that there was no evidence at all the company ever tried to enforce the rules in a way. This fact made no difference to the NLRB at all. Actually, there was no evidence that the employees were even aware of the rules in question. This made no difference to the NLRB.

The NLRB reasoned that because the employer had these three overly broad policies in place, these work rules "could reasonably have affected the outcome of the election."

Further, the tremendously wide margin of victory for the employer did not make any difference to the NLRB. The NLRB reasoned that this great margin of victory by the employer reasonably might have been attributable to the coercive impact of these work rules, even though there was no evidence most of the employees were even aware of these rules.

More so, the impact of the overly broad confidentiality rule was not mitigated by the fact that the union had a copy of the employer's Excelsior List, which is a list of all the employee names and contact information, for a significant portion of the critical pre-election period.

Instead, the NLRB noted that employees were required to sign forms acknowledging that they received the handbook and agreed to follow the rules, and that the handbook stated that the employer would impose discipline when necessary to assure compliance with the rules.

Therefore, the mere existence of these policies was sufficient to overturn a pro-employer election and so another election was held.

WHAT DOES THIS MEAN TO HR?

Without a doubt, employers must have their policies reviewed by a labor attorney in order to ensure that all of its policies will pass the new tests laid down by the NLRB in recent years. Otherwise, not only could employers find themselves defending the disciplinary actions they take against employees, but they could easily find themselves have to "re do" union elections … which rarely works out good for the employer.

H. Professional Employees And Security Guards

Section 9(b)(1) states that an employee bargaining unit is not appropriate if it includes both professional and nonprofessional employees **unless** a majority of the professional employees agree to the unit. The NLRA defines "professional" employees in § 2(12) as being employees who engage in work that is predominately intellectual and varied in character, that involves consistent exercise of discretion and judgment in its performance, and requires knowledge of an advanced type.

Additionally, § 9(b)(3) states that security guards who enforce rules for the protection of property or safety on an employer's premises may not be included in a unit with other employees. The rationale for such a rule is clear: Considering the responsibilities such employees assume, there should be no temptation of favoritism towards any other group of employees.

XXVI. NLRB ADOPTS NEW "QUICKIE ELECTION" RULES

On December 12, 2014, the NLRB adopted by a 3-2 majority a new rule that will significantly speed up the union election process. The final rule, which was effective April 14, 2015, and **greatly limits** the time employers have both to mount a response to a union's efforts to organize and to provide employees with information regarding their choice to vote for the union or to remain unrepresented.

The NLRB categorized the changes from these new rules into three major areas:

- **Modernizing Board Procedures**
- **Streamlining Board Procedure and Reducing Unnecessary Litigation**
- **Increasing Transparency and Standardizing Board Process**

More specifically, the new rules implement the following important changes in the election process:

- Election petitions, election notices and voter lists can all be filed electronically now. The NLRB can also deliver notices and documents electronically, instead of by fax or mail.

- Unions are required to send a copy of the Petition for Election to the employer in addition to the NLRB. While some companies may see this as a welcome this courtesy, in reality, it further reduces the number of days from the date the union files its petition to the date of the election.

- In reality, this streamlined digital approach will reduce the number of days from the time the union files its certification petition with the NLRB to the time of the election. As a result, this greatly reduces the number of days an employer has to make its case to the employees against unionization.

- Employers are now required to provide the union with a list of eligible voters, along with their personal email addresses and the phone numbers so the union can communicate directly with prospective voters using what the NLRB referred to as the "modern forms of communication." The employer must also provide the union with each of the eligible voters' job classifications, shift assignments and work locations. All of the information must be provided to the union within **two business days**, rather than the previous **seven calendar days**, after the decision has been made to grant the election.

- Consequently, employees will likely be inundated with unwanted spam emails and telemarketer-style phone harassment from unions encouraging them to support an organizing effort at their workplace.

- Pre-election hearings will now be limited in scope.

- Employers must now file their "Statement of Position" **one business day** before the NLRB's pre-election hearing regarding the union's election petition. Further, under this new rule, "except in cases presenting ***unusually complex issues***, pre-election hearing will occur **8 days** after a hearing notice is served on the parties."

- This pre-election hearing is **critical** to employers because it defines who is eligible to vote in the upcoming election. When the union files its Petition for Election, it will define a "voter pool" that is overwhelmingly in favor of the union. The hearing is the company's opportunity to re-shape the group of eligible voters. Allowing the employer only 8 days to prepare is a ridiculously short period of time to prepare for the hearing.

- The following scenario will likely occur:

> The union files its petition electronically shortly before midnight on a Thursday. The employer may learn about the filing on Friday, but most likely on Monday. Management meets and decides to hire outside labor counsel. The employer and its legal counsel meet on

Tuesday, which is now the 5th day after the Petition was filed. This leaves the employer's legal counsel with just two days to determine who should be allowed to vote, gather the evidence needed to support their position, identify and prep witnesses, etc.

- An employer who fails to include arguments or defenses in its Statement of Position may waive those arguments or defenses going forward.

- Regional directors and hearing officers can **exclude evidence or prevent pre-election litigation** over voter eligibility, supervisory status, and the inclusion or exclusion of particular positions, meaning that those issues will be resolved only ***after*** the election has occurred.

- Written briefs, including post-hearing briefs, will be allowed **only** if the regional director determines they are necessary.

For example, whether low-level supervisors, working foremen, or assistant managers are a part of the potential bargaining unit will not be decided until after the election is over.

- An employer who fails to include arguments or defenses in its Statement of Position may waive those arguments or defenses going forward.

- The employer is required to post a Notice of Petition for Election containing more detailed information on the filing of the petition and employee rights within two business days of the region's service of the petition. The Notice of Election will provide prospective voters with more detailed information about the election and the voting process.

- Previously, elections were delayed 25-30 days to allow the Board time to consider any requests for it to review the regional director's decision that may be filed.

- Under the new rule, elections are no longer automatically stayed a minimum of 25 days following the regional director's decision to order an election to be held.

- Hearings on post-election issues generally will be set for **14 days** after the filing of objections.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

These new "Quickie Election" rules will work against employers by limiting the time they have to conduct their union-free campaigns once a petition is filed. However, that is the plan. These rules will greatly work to the advantage of the unions by providing them with earlier and broader information concerning potential voters.

In the end, these changes will likely reduce the time from the filing of a representation petition to the holding of an election from the current average of approximately 38 days to somewhere between 10 and 20 days.

In order to head off the limited time employers will have to respond to union organizing petitions, employers should take a number of proactive steps now.

First, the time to start avoiding being organized is **before** the employer is even targeted by the union. Employers need to be even more proactive about assessing and addressing workplace issues. Employees join unions today because they feel they are not being treated fairly or with respect by their employer. Employers need to take a more proactive stance in explaining to employees before any unionization petition is ever filed why their employees should remain union-free.

If an employer's goal is to remain non-union, the time to start publicizing that to their employees is now. If an employer is ashamed of being nonunion, then that employer needs to rethink their position.

Employers should train their supervisors in what they can and cannot say regarding unionization, as well as employees' "free speech" rights under the NLRA. Otherwise, employers could very easily find themselves on the losing end of an unfair labor practice charge.

Supervisors should also be trained in the unionization process, including being able to recognize an authorization card when they pop up … and what to do about it.

Employers who feel they are at risk of being targeted need establish a clear rapid response plan in case a unionization petition is filed.

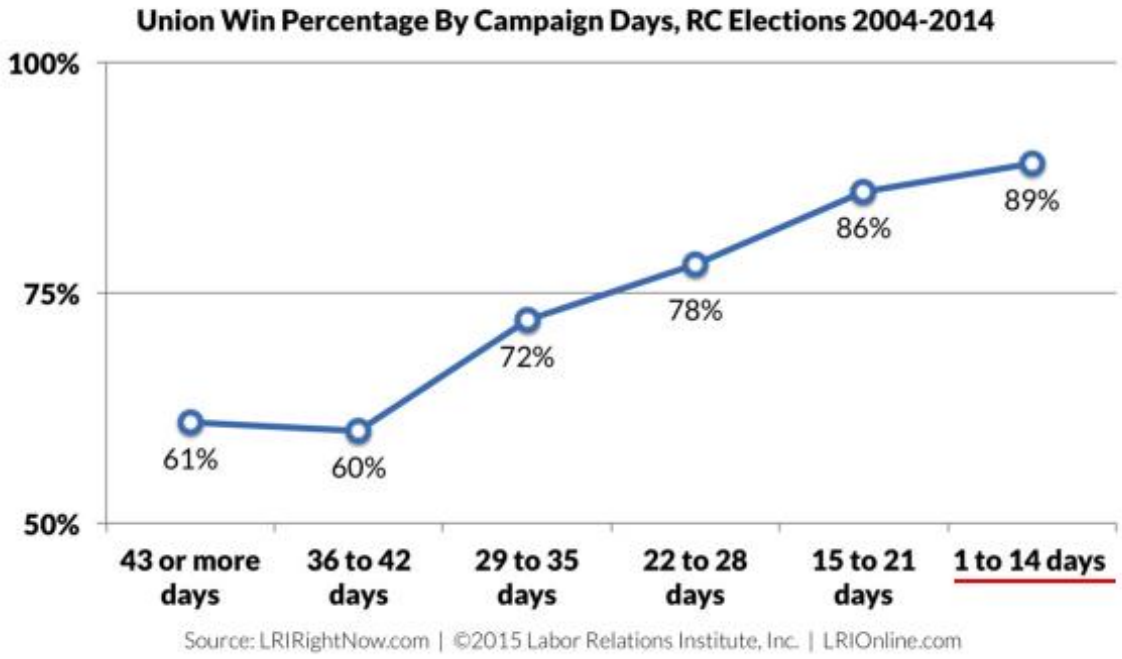
They should assemble in advance the data that they would be required to produce in case a unionization petition is filed, and determining the employer's position with respect to the supervisory, managerial, or confidential status of employees, and with respect to appropriate bargaining units.

As a result of these new expedited election rules, employers now have no choice but to focus on year-round on their anti-union avoidance programs. The days of relying on anti-union campaigns that begin after a representation petition has been filed with the NLRB are over.

Employers that want to remain non-union must take a hard look at their operations. They need to determine which employees or departments are most likely to fall to a union's organizing efforts. Employers must then consider pro-actively engaging employees in trust and team building. Management must be trained in communication skills, trust and team building.

REMEMBER: Employees do not vote for a union. They vote against you.

ARE QUICKIE ELECTIONS EFFECTIVE?



Comparison of Current/New Procedures

The following table provides a side-by-side comparison of current and New procedures:

Current procedures	**New procedures**
Parties cannot electronically file election petitions. Parties and NLRB regional offices do not electronically transmit certain representation case documents.	Election petitions, election notices and voter lists can be transmitted electronically. NLRB regional offices can deliver notices and documents electronically, rather than by mail.
The parties and prospective voters receive limited information.	Parties will receive a more detailed description of the Agency's representation case procedures, as well as a Statement of Position form, when served with the petition. The Statement of Position will help parties identify the issues they may want to raise at the pre-election hearing. A Notice of Petition for Election, which will be served with the Notice of Hearing, will provide employees and the employer with information about the petition and their rights and obligations. The Notice of Election will provide prospective voters with more detailed information about the voting process.
The parties cannot predict when a pre- or post-election hearing will be held because practices vary by Region.	The Regional Director will generally set a pre-election hearing to begin 8 days after a hearing notice is served and a post-election hearing 14 days after the filing of objections.
There is no mechanism for requiring parties to identify issues in dispute.	Non petitioning parties are required to identify any issues they have with the petition, in their Statements of Positions, generally one business day before the pre-election hearing opens. The petitioner will be required to respond to any issue raised by the non-petitioning parties in their Statements of Positions at the beginning of the hearing. Litigation inconsistent with these positions will generally not be allowed.

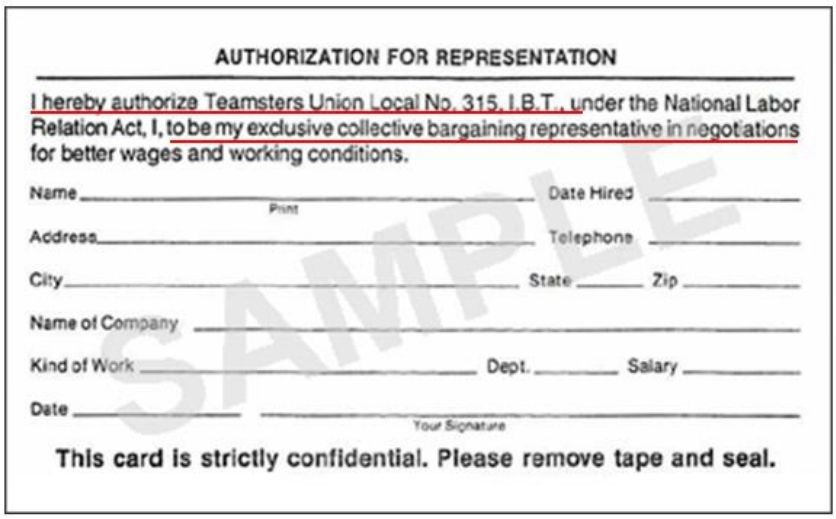
The employer is not required to share a list of prospective voters with the NLRB's regional office or the other parties until after the regional director directs an election or approves an election agreement.	As part of its Statement of Position, the employer must provide a list of prospective voters with their job classifications, shifts and work locations, to the NLRB's regional office and the other parties, generally one business day before the pre-election hearing opens. This will help the parties narrow the issues in dispute at the hearing or enter into an election agreement.
Parties may insist on litigating voter eligibility and inclusion issues that do not have to be resolved in order to determine whether an election should be held.	The purpose of the pre-election hearing is clearly defined and parties will generally litigate only those issues that are necessary to determine whether it is appropriate to conduct an election. Litigation of a small number of eligibility and inclusion issues that do not have to be decided before the election may be deferred to the post-election stage. Those issues will often be mooted by the election results.
Parties may file a brief within 7 days of the closing of the pre-election hearing, with permissive extensions of 14 days or more.	Parties will be provided with an opportunity to argue orally before the close of the hearing and written briefs will be allowed only if the regional director determines they are necessary.
Parties waive their right to challenge the regional director's pre-election decision if they do not file a request for review before the election. This requires parties to appeal issues that may be rendered moot by the election results.	Parties may wait to see whether the election results have made the need to file a request for review of the regional director's pre-election decision unnecessary and they do not waive their right to seek review of that decision if they decide to file their request after the election.
Elections are delayed 25-30 days to allow the Board to consider any request for review of the regional director's decision that may be filed. This is so even though such requests are rarely filed, even more rarely granted and almost never result in a stay of the election.	There will be no automatic stay of an election.
The Board is required to review every aspect of most post-election disputes, regardless of whether any party has objected to it.	The Board is not required to review aspects of post-election regional decisions as to which no party has raised an issue, and may deny review consistent with the discretion it has long exercised in reviewing pre-election rulings.

The voter list provided to non-employer parties to enable them to communicate with voters about the election includes only names and home addresses. The employer must submit the list within 7 days of the approval of an election agreement or the regional director's decision directing an election.	The voter list will also include personal phone numbers and email addresses (if available to the employer). The employer must submit the list within 2 business days of the regional director's approval of an election agreement or decision directing an election.

XXVII. THE ELECTION PROCEDURE

Typically, whenever a union decides to organize a group of employees, the following procedure is invoked:

- ***UNION TARGETS EMPLOYER OR EMPLOYEE CONTACTS UNION.***
- ***UNION BEGINS SOLICITING EMPLOYEES & COLLECTING "AUTHORIZATION CARDS."***
- ***IF THE UNION GETS "AUTHORIZATION CARDS" SIGNED FROM 30% OF THE EMPLOYEES, THE UNION CAN PETITION THE NLRB FOR AN ELECTION***
- ***IF THE UNION GETS "AUTHORIZATION CARDS" SIGNED FROM 50% OF THE EMPLOYEES, THE UNION APPROACHES THE EMPLOYER FOR RECOGNITION.***



AUTHORIZATION FOR REPRESENTATION

I hereby authorize Teamsters Union Local No. 315, I.B.T., under the National Labor Relation Act, I, to be my exclusive collective bargaining representative in negotiations for better wages and working conditions.

Name _____ Date Hired _____
Print

Address _____ Telephone _____

City _____ State _____ Zip _____

Name of Company _____

Kind of Work _____ Dept. _____ Salary _____

Date _____ _____
Your Signature

This card is strictly confidential. Please remove tape and seal.

SAMPLE

Knowing what you are signing is important.

An authorization card is a union organizer's first step toward establishing a union as your exclusive bargaining unit.

If a union gets enough cards signed, it is possible that you would have a union without a secret ballot vote.

WHO CAN SIGN AUTHORIZATION CARDS?

- **Employees**
- **Temporary Employees**
- **Employees on Leave, including Workers' Compensation**
- **Certain Laid-Off Employees**

- ***IF THE UNION GET CARDS SIGNED FROM 50% OF THE EMPLOYEES IN AN APPROPRIATE BARGAINING UNIT, IT MAY REQUEST THAT THE EMPLOYER DIRECTLY AND VOLUNTARILY RECOGNIZE THE UNION AS THE BARGAINING AGENT OF ITS EMPLOYEES WITHOUT AN ELECTION. IF THE EMPLOYER DECLINES, THE UNION COULD ENGAGE IN A RECOGNITIONAL STRIKE.***
- ***IF THE UNION GET CARDS SIGNED FROM MORE THAN 50% OF THE EMPLOYEES IN AN APPROPRIATE BARGAINING UNIT AND THE EMPLOYER COMMITS A SERIOUS UNFAIR LABOR PRACTICE THAT DESTROYS THE "LABORATORY CONDITIONS" OF THE ELECTION, THE UNION CAN ASK THE NLRB TO ISSUE A BARGAINING ORDER DIRECTING THE EMPLOYER TO RECOGNIZE THE UNION AND BARGAIN WITHOUT AN ELECTION.***
- ***IF SOMEONE IN SUPERVISION IS DUMB ENOUGH TO ACCEPT THESE SIGNED "AUTHORIZATION CARDS," THE EMPLOYER HAS A NEW UNION WITHOUT AN ELECTION.***
- ***IF NOT, THEN THE UNION BEGINS ITS "CORPORATE ORGANIZING CAMPAIGN."***
- ***MANAGEMENT BEGINS ITS "UNION- FREE CAMPAIGN." (Too late)***
- ***UNION PETITIONS THE NLRB FOR AN ELECTION.***
- ***NLRB SETS A DATE FOR THE ELECTION.***

- ***THE "SECRET BALLOT" ELECTION IS HELD. IF 51% OF THE EMPLOYEES VOTE FOR THE UNION, THE UNION WINS. IF 51% VOTE AGAINST THE UNION, THE EMPLOYER WINS.***

- ***IF THE UNION WINS, THE "BARGAINING PROCESS" BEGINS. THERE IS NO REQUIREMENT THAT A CONTRACT AGREEMENT IS REACHED.***

- ***IF NO AGREEMENT IS REACHED AFTER ONE (1) YEAR, THE EMPLOYEES CAN PETITION FOR A UNION DECERTIFICATION ELECTION.***

XXVIII. OTHER ELECTION ISSUES

A. Special Election Rules

Whenever an employer is engaged in a union election, there are a few special rules that must be observed.

First, the employer is required to provide the union with a list of all the employees' names and addresses in the bargaining unit no later than seven (7) days before the day of the election **regardless** of whether or not the union is otherwise unable to reach these union members, in spite of the rulings in Babcock & Wilcox and Nutone (Excelsior Underwear, Inc.), 156 N.L.R.B. 1236 (1966)).

Next, employers are not permitted to address their employees in mass within 24 hours of the election, since such an address may interfere with the laboratory conditions of the election (Peerless Plywood Company, 107 N.L.R.B. 427 (1954)). It is also important to note that a more stringent standard is used to determine if an employer's actions interfere with the laboratory conditions of an election than is used to determine if an unfair labor practice exists.

The reason a stricter standard is used regarding the "laboratory conditions" of an election is due to the fact that when such conditions are destroyed, then a fair election cannot be held, thus depriving employees of their § 7 rights. Therefore, in order to preserve the employees' rights and effectuate the purpose of the NLRA, the NLRB may impose a union upon the employer, as previously discussed.

However, even though an employer cannot orally address its employees within 24 hours of the election, it can send letters to the employees' homes. Still, such letters cannot contain any statements that could be construed as being threats of reprisal (Larson Tool & Stamping Company, 296 N.L.R.B. 895 (1989)).

Sections 9(a) and 10(c) also state that if either side makes misleading statements regarding the election, the election can be set aside by the NLRB and a new one held. However, unions often offer to waive initiation fees for employees in exchange for joining the union, which is generally not seen as being an unfair labor practice.

B. Majority Of Employees And Eligibility To Vote

When the NLRA states that a majority of the employees must vote for the union in order for it to be certified by the NLRB as the employees' exclusive representative, the phrase "a majority of the employees" refers to **a majority of those who actually vote...not a majority of everyone eligible to vote**.

If no union gets a majority of the employees' vote, such as if Union #1 gets 35 percent, Union #2 gets 40 percent and Union #3 receives 25 percent of the votes, then a run-off election is held between Union #1 and Union #2 (§ 9(c)(3)).

In a decertification election, a tie vote will decertify the union, since the union is no longer supported by a majority of the employees.

As for those who are specifically eligible to vote, § 9(c)(3) states that economic strikers are eligible to vote, even if they have been permanently replaced. However, if the employer can show that an economic striker has been permanently replaced and that he has found substantially equivalent employment elsewhere, then the economic striker will not be eligible to vote.

Permanent replacements are also eligible to vote if they have truly been hired on a permanent basis.

As for the election itself, both a union and a company representative oversee the voting. Either party can challenge the eligibility of an employee to vote *before* the person votes. If an employee's eligibility to vote is challenged, then the challenged employee's vote usually goes into a sealed envelope and it is set aside. The vote only comes into play if it would determine the outcome of the election.

C. Whose Duty Is It To File A Petition?

In Linden Lumber Division, Summer & Company v. NLRB, 419 U.S. 301 (1974), when the union presented the employer with authorization cards signed by the majority of its employees, the employer failed to recognize the union. The union then went on strike against the employer.

The U.S. Supreme Court held that it is the union's responsibility to file a certification petition with the NLRB in order to begin the election process. This is not the employer's responsibility. The employer is under no obligation to consent to having a union merely because the union has the appropriate number of authorization cards.

Therefore, unless an employer has engaged in an unfair labor practice that impairs the electoral process, even if a union has enough authorization cards from a majority of the company's employees, the union still has the burden of invoking the NLRB's election procedure. Although an employer can petition for election, it is not required to do so. Whether or not the employer has good reason to doubt the union's majority status is irrelevant.

D. Withdrawing Petitions

Generally, if a union disclaims its interest in the election petition in a "clear and unequivocal" manner after the petition has been granted by the NLRB, the petition will be dismissed. However, if the union engages in conduct that is incompatible with its disclaimer, such as where the union continues to seek recognition by striking or making direct demands upon the employer, then the petition will not be dismissed.

If the NLRB's regional director allows a petition to be withdrawn, the same union may not file another petition for recognition for at least six months thereafter, unless good cause is shown by the union as to why it should not have to wait six months to refile.

As an organizational tactic, sometimes a union will ask to have its petition for certification withdrawn once it has obtained its "Excelsior List" containing the employees' names and addresses, which employers are obliged to provide to the union seven (7) days before the election. The union must therefore wait six months, file for certification again, and then possibly use this list in its next organizing campaign.

E. One-Year Period of Bargaining

Section 9(c)(3) of the NLRA states that once a union wins a certification election, the employer has a duty to bargain in good faith with the union for a period of one year. The employer must fulfill this one-year obligation even if it appears as if the union has lost its support among the majority of the employees.

If "unusual circumstances" exist within this one-year period, the employer may be released from its obligation to bargain. Such unusual circumstances would exist if:

1. The certified union dissolves, or if

2. All of the certified union's members and officers transfer to another union, or if

3. The size of the unit fluctuates radically within a short period of time.

Additionally, no other petitions can be filed during this one-year period by any other union wishing to organize these employees or by the employees wishing to decertify the union.

F. Permanent Replacement Workers And A Duty To Bargain

In NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775 (1990), during an economic strike, the employer hired permanent replacement workers. The union also had a few crossovers from the union. The employer then refused to bargain with the union, claiming that the majority of its employees were now either union crossovers or permanent replacements. The employer contended that these employees obviously did not support the union, so the union no longer represented a majority of its employees.

However, the U.S. Supreme Court held that there were many reasons why a union member might become a crossover or why a permanent replacement worker would cross the union's picket line. These reasons may be purely economic or these employees may disagree with the union over this one issue but not all of the issues related to the union.

Therefore, the law will presume that the union represents a majority of the employees until this assumption is disproved by an election.

XXIX. COLLECTIVE BARGAINING

A. Individual Contracts With Employees Do Not Act As A Bar To Collective Bargaining

Once a union has been selected by a majority of employees in the bargaining unit, § 9(a) states that the union then has the exclusive authority to represent all employees in the unit on matters that are properly the subject of collective bargaining (wages, hours and other terms and conditions of employment). Consequently, if the employer has any individual contracts with employees who belong to the union that cover topics related to the collective bargaining agreement, then these individual contracts with employees are rendered void.

Therefore, a union contract replaces such individual contracts. Of course, employers can still have individual contracts with union employees that do not conflict with the union contract.

Additionally, a group of employees who belong to the bargaining unit cannot try and circumvent the union's negotiations or its contract with the employer by trying to negotiate their own contract with the employer that would conflict with the union contract. Once elected, the union is the exclusive bargaining representative for the employees. Employees who insist on circumventing the union and negotiating with the employer themselves are committing an unfair labor practice and are not protected by the NLRA.

Of course, the union has a statutory duty to bargain fairly on behalf of all of the employees in the bargaining unit, including agency shop nonmembers. Its failure to do so may be an unfair labor practice.

B. Good Faith Bargaining

Section 8(a)(5) of the NLRA states that it is an unfair labor practice for management to refuse to bargain in good faith with the union certified to represent its employees.

Correspondingly, § 8(b)(3) states that it is an unfair labor practice for a union who is certified to represent a group of employees to refuse to bargain in good faith with the employer.

And finally, § 8(d) states that in the collective bargaining process, it is the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, but such an obligation does not compel either party to agree to a proposal nor does it require either party to make concessions.

Therefore, it is important to understand what is meant by this term "good faith" bargaining. In NLRB v. General Electric Company, 418 F.2d 736 (2nd Cir. 1969), Lemuel Boulware, the vice president and chief negotiator for General Electric, stated that General Electric believed that it was responsible for deciding what was fair regarding the wages, hours and other terms and conditions of employment for its employees...union or no union. Therefore, General Electric determined by itself what was "fair" for the employees to receive, and then presented its proposal to the union as a "fair firm offer" that was nonnegotiable.

However, the Second Circuit found that such a "take it or leave it" proposal was an unfair labor practice under § 8(d) of the NLRA since such a tactic leaves no room for any "give and take," or good faith bargaining. (Such tactics are now referred to as "Boulwareism.)

Consequently, how an employer or a union proceeds with its bargaining reveals their intentions, and "good faith" bargaining is inconsistent with either party resolving ahead of time not to budge from an initial position.

Of course, "hard bargaining" is not the same as "bad faith." At some point in the negotiations, either the employer or the union might very well make a "final offer" proposal to the other side. However, such a final offer is only made after good faith bargaining has taken place.

In reality, both the NLRB and the courts examine the "totality of the circumstances" to see if a party's conduct manifests good faith bargaining.

Bad faith may therefore be shown by examining the substantive nature of the proposals made by either party or by the tactics a party uses in bargaining. For instance, bad faith may be inferred when an employer makes offers to the union that no responsible person could accept. Also, a proposal that would result in employees receiving less at the end of the year following certification than they received before the union became their bargaining agent may demonstrate a

refusal to bargain in good faith.

Additionally, when a party uses "dilatory tactics," which occur when a party simply shifts its position whenever an agreement seems to have been reached, or whenever a party uses tactics adopted solely for the purpose of delaying or frustrating the bargaining process, that party may be found guilty of bargaining in bad faith. However, simply withdrawing an earlier offer does not in itself indicate bad faith if none of its earlier proposals had been unconditionally accepted.

And finally, neither side has any control over who will be negotiating for the opposition. For instance, if the union does not want to negotiate with the employer's representative, the union really has no choice in the matter. If it refuses to bargain with this person, it will be committing an unfair labor practice.

C. Remedies For Bad Faith Negotiating

Basically, the only remedy that is available against a party who is bargaining in bad faith is for the NLRB to issue a "cease and desist" order to the offending party under § 10(c). Therefore, monetary damages are not allowed.

The NLRB can also not force one party to accept a particular provision into the contract. In H.K. Porter v. NLRB, 397 U.S. 99 (1970), the union wanted the NLRB to force the employer to adopt a dues checkoff provision in the contract. However, the U.S. Supreme Court held that while a dues checkoff provision is a compulsory, or mandatory, bargaining topic, the NLRB has no authority to compel a party to accept any specific contractual provision. Even though both parties are required to bargain over compulsory bargaining topics, the NLRB cannot create or mandate contracts for parties, since Congress never intended for the NLRB to become a party to the negotiations.

Additionally, the NLRB has no authority to order either party to provide the other with "make whole" remedies. In Ex-Cell-O Corporation, 185 N.L.R.B. 107 (1970), the employer refused to bargain with the union for two years while it challenged the union's certification. The union charged that such a refusal to bargain was an unfair labor practice (§ 8(a)(5)). The NLRB agreed and ordered the employer to pay the union members the amount of compensation they had lost for the last two years due to the employer's refusal to bargain in an effort to make the employees "whole."

However, the U.S. Supreme Court overruled the NLRB and held that the NLRB cannot require an employer to compensate employees in accordance with a contract that the employer **might** have adopted if it had bargained in good faith.

The Court reasoned that such a "make whole" remedy order would simply punish the employer for exercising its right to question the certification of the union. In fact, imposing such relief would have the effect of writing a contract for the parties, which the NLRB is clearly not empowered to do. Therefore, the NLRB does not have statutory authority to issue such relief.

D. Unilateral Actions

While negotiations are continuing, it is an unfair labor practice for an employer to unilaterally make any changes in the wages, hours or other terms and conditions of employment for its employees or to make any such related offers to employees directly.

On the other hand, if negotiations have broken down, the employer may **unilaterally** alter the wages, hours or other terms and conditions of employment as long as these changes are substantially equivalent to and not greater than the last proposal it made to the union.

The rationale for such a rule is that the NLRB and the courts do not want employers undercutting the union. However, if negotiations have broken off, and if the union found the employer's offer unacceptable, there is no reason the employer cannot institute these improvements that were first offered to the union.

E. Supplying Information To The Union

In NLRB v. Truitt Manufacturing Company, 351 U.S. 149 (1956), while the employer was bargaining with the union, it claimed it could not afford a 10¢ per hour raise for the employees. The union therefore asked to see the employer's financial record books. The employer refused, and the union claimed this refusal was an unfair labor practice (§ 8(a)(5) and § 8(d)).

The U.S. Supreme Court held that good faith bargaining requires honest claims, and the union cannot check the truthfulness of the employer's claims without some form of substantiation.

All such cases must necessarily turn on their own facts, but where, as here, the company has expressed a specific amount beyond which its claims it cannot afford, the employer should be required to produce some data to support its claim.

Also, in NLRB v. Acme Industrial Company, 385 U.S. 432 (1967), when the employer fired an employee for tardiness, the union asked to see the employer's records regarding employee terminations for tardiness as part of the grievance procedure. The employer refused. However, the U.S. Supreme Court held that the employer was required to supply this information to the union.

Consequently, if certain information appears to be necessary and relevant to the dispute between the employer and the union, this data must be provided to the other party. Additionally, this information must be presented in an organized manner.

XXX. SUBJECTS OF COLLECTIVE BARGAINING

A. Compulsory Subjects

Section 8(d) of the NLRA requires employers and unions to bargain collectively over "wages, hours, and other terms and conditions of employment." However, since the NLRA does not define what is meant by the phrase "wages, hours and other terms and conditions of employment," the NLRB and the courts have been forced to determine what bargaining subjects are within the Act's requirements.

It is important to understand that if a certain bargaining topic is deemed to be included in this phrase, then the subject is one that is compulsory, or mandatory, under the NLRA. As a result, neither the employer nor the union can refuse to bargain over it during their negotiations.

To refuse to bargain over a compulsory subject is an unfair labor practice, although the NLRA does not require the negotiating parties to come to an agreement on these issues.

Of course, some of the topics of bargaining that are considered compulsory are obvious, such as the employees' compensation and their hours of work. Additionally, the NLRB and the courts have interpreted the phrase "wages, hours and other terms and conditions of employment" to also include employee time-off benefits, employee work assignments, grievance procedures and safety rules, to mention a few.

Retirement plan benefits have also been interpreted as being a compulsory subject of bargaining for **current employees but not for retired employees, since the NLRA only covers active employees**.

B. Permissive Subjects

If a bargaining topic is not compulsory, and if it is not illegal, then the employer and the union **may** still bargain collectively over the subject only if both parties elect to do so. Such topics as the general business practices of the employer, the way the employer organizes its business, the size and composition of its supervisory workforce and where the employer locates its new facilities have all been deemed to be management prerogatives and not compulsory subjects of bargaining.

These areas may become subjects of bargaining if both sides agree.

Still, since such topics are permissive subjects, so the union cannot require an employer to bargain over these areas. To do so would be an unfair labor practice under the NLRA.

Even though management is entitled to run its own operations, in Fibreboard Paper Products Corporation v. NLRB, 379 U.S. 203 (1964), where the employer wanted to subcontract work out that was being performed by union employees, the U.S. Supreme Court held that an employer may have a duty to bargain with the union before making such economically motivated decisions. The Court reasoned that "contracting work out" that was previously performed by union employees directly affects their conditions of employment.

Additionally, it has been held that the work performed by a supervisor is a compulsory bargaining subject and not a management prerogative where the union contends that the supervisor is depriving union employees of work.

On the other hand, in First National Maintenance Corporation v. NLRB, 452 U.S. 666 (1981), the U.S. Supreme Court held that an employer is not required to negotiate with the union regarding closing part of its business. The Court reasoned that Congress did not expect a union to become an equal partner in running the business. Such decisions as closing all or a part of the business down involve deciding upon the scope and direction of the enterprise. In reaching such a decision, management may have the need for speed, flexibility, and secrecy. However, the employer is required to negotiate with the union regarding the effects of a partial closing (i.e., severance pay).

Management's rights clauses, which specify which rights management retains full control over throughout the life of the contract, have also been found to be compulsory subjects of bargaining and not permissive.

Additionally, just because the parties have agreed to bargain over a permissive subject, and then included it in their collective bargaining agreement, this does not change the nature of the topic. It is still a permissive subject of bargaining.

As a result, an employer is not guilty of committing an unfair labor practice if it thereafter changes or modifies the agreement unilaterally on these issues without first consulting the union. The union's remedy in such a situation is to sue the employer for breach of contract.

C. No Duty To Bargain On Subjects Covered By Agreement

Neither party has a duty to bargain over a topic that is already covered by an existing agreement. Therefore, if for instance the union wants to modify some term or provision in the contract before it is time to renegotiate, the employer has no duty to re-open negotiations and bargain over the issue again.

However, if a subject is not covered by the current agreement, then a duty to bargain over the issue does exist if the other party insists.

In order to avoid such situations, most collective bargaining agreements contain "zipper clauses." A "zipper clause" basically states that all relevant topics have

been included in the contract and that both parties agree to waive their rights to bargain over any other issues that may have been excluded before the current contract expires.

XXXI. TEMPORARY WORKERS, JOINT EMPLOYERS AND UNIONIZATION

On February 26, 2020, the National Labor Relations Board (NLRB) issued a final rule addressing joint-employer status under the NLRA. This final rule restores the "old" definition of joint employment.

According NLRB Chairman John F. Ring, "This final rule gives our joint-employer standard the clarity, stability, and predictability that is essential to any successful labor-management relationship."

Under a joint-employment theory, one entity may be held responsible for the wrongs of an unrelated entity when they have joint control over employees' terms and conditions of employment. For example, joint-employer liability may be at issue when a business contracts with a staffing company to supplement its workforce. There may also be joint-employer concerns in joint-venture arrangements or franchising situations.

A joint employer finding has significant implications for rights and obligations under the NLRA in relation to collective bargaining, strike activity and unfair labor practice liability:

- If the employees are represented by a union, the joint employer must participate in collective bargaining over their terms and conditions of employment.
- Picketing directed at a joint employer that would otherwise be secondary and unlawful is primary and lawful.
- Each business comprising the joint employer may be found jointly and severally liable for the other's unfair labor practices.

Because of these important consequences, the purposes of the NLRA are not furthered by drawing into a collective-bargaining relationship, or exposing to secondary coercion and joint and-several liability, a direct employer's business partner that does not actively participate in decisions setting employees' wages, benefits, and other essential terms and conditions of employment.

Long-standing NLRB precedent held that to be considered a joint employer, the two entities must "share or codetermine those matters governing the essential terms and conditions of employment," and indirect control of employment terms was generally deemed to be insufficient for two entities to be deemed joint employers.

However, in 2015, the NLRB "substantially relaxed the requirements" for imposing joint employer liability. In the Browning-Ferris decision, the Board announced a new standard, holding that "direct and immediate" control of employees was unnecessary and that even

an unexercised option to control or manage employees was enough to invoke joint-employer status.

The NLRB later reversed the Browning-Ferris decision in December 2017 in Hy-Brand Industrial Contractors, 365 NLRB No. 156 (2017), but then later vacated that decision in Hy-Brand Industrial Contractors, 366 NLRB No. 26 (2018), because one of the Board members who participated in the first Hy-Brand decision was disqualified because it affected his former law firm's client, which was Browning Ferris Industries.

The Board then decided to address the joint employer issue through rule making rather than case law.

This final rule, which went into effect April 27, 2020, essentially returns to the NLRA to the pre-2015 standard, which says:

- Specifies that a business is a joint employer of another employer's employees **only** if the two employers share or codetermine the employees' essential terms and conditions of employment;

- Clarifies the list of essential terms and conditions: **wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction;**

- Provides that to be a joint employer, a business must **possess and exercise** such **substantial direct and immediate control** over one or more essential terms and conditions of employment of another employer's employees as would warrant a finding that the business meaningfully affects matters relating to the employment relationship;

- Specifies that evidence of **indirect and contractually reserved but never exercised control over essential terms and conditions**, and of control over mandatory subjects of bargaining other than essential terms and conditions, is probative of joint-employer status, but only to the extent that it supplements and reinforces evidence of **direct and immediate control**;

- "Substantial" control refers to control that is "direct and immediate" and "has a regular or continuous consequential effect on an essential term or condition of employment of another employer's employees."

- Defines the key terms used in the final rule, including what does and does not constitute "substantial direct and immediate control" of each essential employment term; and

- Makes clear that joint-employer status cannot be based solely on indirect influence or a contractual reservation of a right to control that has never been exercised.

Also, the final rule specifically states:

> "Control is not 'substantial' if it is only exercised on a sporadic, isolated or de minimis basis."

The final rule also specifically states:

> "Essential terms or conditions" are defined to include hiring, firing, discipline, supervision, and direction, and the final rule added wages, benefits, and hours of work.

Therefore, determining whether two entities are joint employers for under the NLRA is a very fact specific analysis. The NLRB's new final rule provides greater clarity and guidance on how to avoid a joint-employer determination and/or how to recognize and plan for joint-employer relationships.

XXXII. U.S. SUPREME COURT UPHOLDS ARBITRATION AGREEMENTS THAT BAR CLASS ACTION LAWSUITS

In Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018), Systems Corporation (Epic) was a Wisconsin-based healthcare data management software company. Epic had an arbitration agreement that required its employees to resolve any employment-based disputes with Epic through individual arbitration, which required employees to waive their right to participate in or receive any benefits from any class action, collective action or any representative lawsuits.

In February 2015, former Epic employee Jacob Lewis sued Epic in federal court individually and on behalf of similarly-situated employees, claiming that they had all been denied overtime wages in violation of the Fair Labor Standards Act of 1938.

Therefore, the underlying action in this case was the Fair Labor Standards Act.

Epic moved to dismiss the complaint and cited the waiver clause of its arbitration agreement. The district court denied Epic's motion and held that the waiver was unenforceable because it violated the right of employees to engage in "concerted activities" under Section 7 of the National Labor Relations Act (NLRA).

The U.S. Court of Appeals for the Seventh Circuit affirmed the lower court's decision and added that the waiver was also unenforceable under the savings clause of the Federal Arbitration Act (FAA). That clause provides that arbitration agreements are to be enforced **unless** there legal or equitable grounds that would render a contract unenforceable.

However, since the Seventh Circuit found that the NLRA rendered the "waiver of collective proceedings" illegal, the court held that the arbitration agreement was unenforceable under the FAA.

Epic then appealed to the U.S. Supreme Court.

This case required the court to reconcile provisions of two competing laws:

The Federal Arbitration Act (FAA) and the National Labor Relations Act (NLRA).

Before the passage of the FAA in 1925, federal courts were historically reluctant to enforce arbitration agreements. The FAA recognized such agreements as legally binding and made arbitration awards enforceable the same as judgments entered by any court of law.

The NLRA wasn't passed until 1935. In addition to granting workers the right to collectively bargain and form unions, the law also protects their right to engage in "other concerted activities." This term has historically been interpreted broadly to allow employees to advocate for each other in matters relating to their terms and conditions of employment. The right to engage in concerted activity under the NLRA can't be waived.

The legal issue for the Court was whether participation in a class action lawsuit qualifies as "concerted activity" that is protected by the NLRA. The answer to that question would determine whether arbitration agreements in which employees waived their right to bring or join in a class action lawsuit are enforceable.

Even though participating in a class action lawsuit is a "concerted activity" under the NLRA, the Court held that such agreements do not violate the NLRA and are therefore are enforceable. In short, it found that the NLRA's "concerted activities" clause was intended to protect employees' freedom of association in the workplace, to collectively bargain and form unions, **not** their right to pursue collective legal actions against their employers.

The Court further reasoned:

> "In the Federal Arbitration Act, Congress has instructed federal courts to enforce arbitration agreements according to their terms, including terms providing for individualized proceedings. Nor can we agree with the employees' suggestion that the National Labor Relations Act (NLRA) offers a conflicting command [that must always permit class arbitration]."

The Court then went onto harmonize the FAA with the NLRA:

> "The NLRA secures to employees rights to organize unions and bargain collectively, but it says nothing about how judges and arbitrators must try legal disputes that leave the workplace and enter the courtroom or arbitral forum. This Court has never read a right to class actions into the NLRA -- and for three quarters of a century neither did the National Labor Relations Board. Far from conflicting, the Arbitration Act and the NLRA have long enjoyed separate spheres of influence and neither permits this Court to declare the parties' agreements unlawful."

The Court then stated that the FLSA specifically "allows employees to sue on behalf of 'themselves and other employees similarly situated,' 29 U.S.C. § 216(b), and it is precisely this sort of collective action the employees before us wish to pursue."

The Court then concluded that if the NLRA is meant to bar such class and collective actions, then that is a job left to Congress.

WHAT DOES THIS MEAN FOR HR?

This U.S. Supreme Court decision basically opens the door for employees to join together in wage and hour class action lawsuits could have a dramatic and lasting impact on the American workforce.

In many industries and among the general workforce, employment agreements are still relatively uncommon. They tend to be used more for high-level and highly paid individuals. However, in our increasingly litigious society, it may be worth considering the broader use of an employment agreement that requires employees both to submit employment disputes to arbitration and to waive their right to pursue class action litigation.

The pros and cons are fairly obvious. Class action lawsuits can last years, and the legal bills can be sky high. Moreover, they allow one disgruntled employee to file suit and add similar claims by other employees, driving up the settlement value of the case. A plaintiffs' attorney can turn a single client with an unpaid overtime claim into a large, expensive, and time-consuming case pretty quickly.

Binding arbitration tends to be more efficient and less costly (although it doesn't always work out that way). The proceedings and outcome of the dispute are confidential. Unlike in court, there is no right to appeal, which can be good or bad depending on how the arbitrator rules but is typically viewed as more favorable for employers than employees.

Ultimately, if you're interested in using arbitration agreements for the first time or expanding them to a broader segment of your workforce, you will need to undertake a careful analysis with the assistance of your employment attorney to determine whether such agreements are right for you. Some of the issues you might discuss include:

- ❖ What are your risks for high-stakes employment litigation?
- ❖ Are you confident of your employment practices, or are there gaps you just can't seem to get around to filling?
- ❖ How disciplined and trained are your supervisors? Do you have loose cannons?
- ❖ How confident are you in your wage and hour practices, particularly your classification of employees as exempt from overtime requirements?

The less certain you are about the answers to those and similar questions, the more you may benefit from using employment contracts with mandatory arbitration and class action waivers in your workplace.

XXXIII. REMEDIES

A. Types Of Remedies Available

Typically, employees who win their unfair labor practice disputes against employers can receive back pay, reinstatement, and instatement at the employer's new location in the case of a runaway shop, as well as reimbursement for moving expenses. The courts also typically grant cease and desist orders against employers to stop committing the specific offense.

However, the courts rarely ever order "runaway shop" employers to relocate back to their original location. Where an employer successfully argues that an unfair labor practice has been committed against it by the union, the courts will generally uphold the employer's decision to discharge or discipline an offending employee, since actions which constitute an unfair labor practice enjoy no NLRA protections.

B. Reinstatement

In Clear Pine Mouldings, 268 N.L.R.B. 1044 (1984), during an unfair labor practice strike, the employer fired two union members. One union member was fired for yelling threats and another was fired for breaking the windows out of a replacement worker's truck. The union filed an unfair labor practice charge against the employer for firing these two employees during the strike.

The NLRB reasoned that while not all employees' improprieties are serious enough to deprive them of the NLRA's protection, "serious" misconduct can deprive an employee of these protections. Therefore, some verbal threats, coercion or intimidation can be grave enough to result in a loss of NLRA protections for striking workers.

The NLRB then stated that striking workers who merely make nonthreatening insults are still protected by the Act as long as they do not "exceed the bounds of peaceful and reasoned conduct." However, that was not the case here where violence and serious verbal threats occurred, thus justifying the firings. The NLRB therefore denied reinstatement.

There are two additional factors that the NLRB and the courts typically consider in making such determinations, which are:

1. Was the employer's original unfair labor practice so blatant that the employees were provoked into acting in this manner? and

2. Is reinstating the employee the only remedy available in order to prevent the employer from benefiting from its unfair labor practice by helping to weaken or destroy the union?

Section 10(c) also states that no reinstatement or back pay should be awarded to an employee discharged "for cause." However, if it is discovered that an unfair labor practice has been committed, then § 10(c) states that a cease and desist order must be given, as well as reinstatement and back pay in order to "effectuate the policies of the Act."

It is also important to remember that if a strike is not conducted legally, then no protections exist for the union employees under the NLRA.

C. Back Pay

Even though employees are awarded back pay, they still have a duty to obtain interim employment in order to mitigate their damages. If an employee conceals any of the wages he earned during his absence from work, then he will **forfeit all** of his back pay that was awarded for each quarter he concealed these wages.

Employers may also be ordered to pay interest on their back pay awards. In calculating the amount of back pay to award an employee, the employee's lost wages are calculated on a quarterly basis.

For instance, consider an employee who earns $10,000 a year working for his employer, or $2,500 per quarter. If that employee earns $5,000 in one quarter, and then earns nothing for the remainder of the year, then the employee will receive no back pay for the quarter in which he earned the $5,000, but he will receive $7,500 in back pay for the three quarters he earned nothing.

Additionally, any unemployment compensation paid to the employee during his time away from work is not deducted from these back pay calculations since unemployment compensation is part of social legislation (NLRB v. Gullett Gin Company, 340 U.S. 361 (1951)).

D. Temporary Restraining Orders and Injunctions

If a union is engaging in an illegal practice that is disrupting an employer's operations, such as a secondary boycott, that employer will obviously want to put an end to these activities as soon as possible. However, putting an end to these illegal practices by filing an unfair labor practice complaint with the NLRB is far from expedient. Therefore, employers will often attempt to get a temporary restraining order against the union to put an end to its illegal activities, and then obtain an injunction against these activities.

In order for a court to grant a restraining order against a union and instantly end the practice, the employer must show that:

1. If this practice is not ended quickly, the employer will suffer irreparable harm,

2. The employer has given the union notice to stop the illegal practice,

3. The employer has posted a bond to pay for any harm done to the union in case the temporary restraining order is erroneously issued,

4. And the employer must support its contentions with evidence and affidavits.

However, a temporary restraining order is only good for 14 days, but it may be extended another 14 days by the court. Thereafter, the employer must obtain a preliminary injunction to end the union's activities until more permanent measures can be invoked.

However, in 1932, Congress passed the Norris-LaGuardia Act, sponsored by Senator George Norris of Nebraska and Congressman Fiorella LaGuardia of New York, which prohibited temporary restraining orders and injunctions from being granted by a federal court in a labor dispute when the purpose of the order or injunction is to end a peaceful action by a union and the union is not engaging in any acts of fraud or violence.

However, even though an employer cannot get an injunction or a temporary restraining order against a union in federal court, the NLRB itself can obtain such relief under §10(j) of the NLRA, or the employer could file for such relief in state court, since many states do not have anti-injunction laws for labor disputes.

If the NLRB does file for such relief in federal court, the NLRB must demonstrate that:

1. Unlawful acts have been committed or threatened and will continue,

2. Substantial and irreparable injury will occur if relief is not granted,

3. More harm will be inflicted by denying relief than by granting it,

4. The complaint has no adequate remedy at law, and

5. The public officers charged with the duty of protecting the claimant's property are unable or unwilling to do so.

Still, the employer must make every reasonable effort to settle this dispute either by negotiation, by arbitration, or by mediation. Of course, such temporary restraining orders are good for only five days when they are issued to the NLRB.

Notice: Legal Advice Disclaimer

The purpose of these materials is not to act as legal advice but is intended to provide human resource professionals and their managers with a general overview of some of the more important employment and labor laws affecting their departments. The facts of each instance vary to the point that such a brief overview could not possibly be used in place of the advice of legal counsel.

Also, every situation tends to be factually different depending on the circumstances involved, which requires a specific application of the law.

Additionally, employment and labor laws are in a constant state of change by way of either court decisions or the legislature.

Therefore, whenever such issues arise, the advice of an attorney should be sought.

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