Employment Law: Beyond the Basics
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NLRB's Expanding Agenda

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******These seminar materials are intended to provide only a very brief overview of selected portions of the NLRA and the procedures of the NLRB. Reading of the Act and the Board's Rules and Regulations is recommended. In addition, copies of the NLRB Casehandling Manual (August 2007/November 2013) and Representation Case Outline of Law (April 2013) are available for download at www.nlrb.gov. Reference to these manuals is also highly recommended.******

A. Overview of the NLRB

The National Labor Relations Board (NLRB) was established to administer and enforce the National Labor Relations Act (NLRA). The NLRB consists of the Board, the General Counsel, and the Regional Offices, Subregional, and Resident Offices.

The Board is composed of five members who are appointed by the President, with the consent of the Senate, for a term of five years. The Board members' terms are staggered. The General Counsel is also appointed by the President, with the consent of the Senate, for a term of four years. Louisiana is served by the Region 15 of the NLRB, whose Regional Office is located in New Orleans.

Noel Canning

In 2009, President Obama nominated attorney Craig Becker to the NLRB. Becker's confirmation was filibustered by Senate Republicans. The President then gave Becker a recess appointment in March of 2010. The nomination was resubmitted in early 2011, and was again filibustered. The filibuster also prevented a vote on nominee Terrance Flynn.

In 2010, the case of *New Process Steel v. NLRB* was decided by the Supreme Court. The Court found that the NLRA requires three lawfully participating members (a quorum) of the NLRB be in place in order for the Board to act. Becker's 2010 recess appointment was due to expire; therefore, the Board would have been reduced to only two members. As a result, in December of 2011 President Obama withdrew Becker's nomination and nominated Sharon Block and Richard F. Griffin Jr. The Senate failed to act on the nominations by the end of the session; therefore, the President gave recess appointments to Block, Griffin and Flynn in January of 2012. These recess appointments set the stage for *Noel Canning.*

Noel Canning, a Pepsi-Cola contract canning and bottling facility, sought relief in the D.C. Circuit to overturn an NLRB order finding that management had unlawfully refused to enter into a collective bargaining agreement with the Teamsters local representing its production employees. The Court determined that the Board's decision was correct, but could not be enforced. The Court held that President Obama's recess appointments were invalid; therefore, the NLRB lacked the necessary quorum to conduct business. The decision is based upon the Court's interpretation of the Recess Appointments Clause.

At first blush, *Noel Canning* seems to be of limited significance. The case affects only one NLRB order, and is binding only in the D.C. Circuit. However, the NLRB ruled on over 200 cases in the year between the recess appointments and the Court's opinion, which can now be challenged on recess appointment grounds.

The US Supreme Court is scheduled to hear argument on the matter on January 13, 2014. Keep in mind that some of the decisions discussed herein may be invalidated at a later date.

What to Expect

For the first time since 2003, all five Board members have been confirmed by the Senate. The current Board members are: Mark Gaston Pearce (Chairman), Nancy J. Schiffer, Kent Y. Hirozawa, Philip A. Miscimarra, and Harry I. Johnson, III. Three board members, along with the Board's general counsel – Richard F. Griffin, Jr. (confirmed October 2013) – have ties to Big Labor.

This portion of the seminar, "The NLRB's Expanding Agenda," is aptly named. Expect the panel to revisit the quickie election and poster rules, supervisor status of certain employees who are currently not permitted to vote in union elections, use of company e-mail for union solicitation, representation rights for non-union employees in disciplinary actions, and policies that affect non-union employees' rights, e.g. at-will employment, confidentiality, and social media. Also expect the Board to find other opportunities to expand section 7 rights of non-union employees to engage in "protected concerted activity."

Functions of the NLRB

The NLRB has two primary functions: to conduct representation elections and certify the results, and to prevent employers and unions from engaging in unfair labor practices.

What We Do

The National Labor Relations Board is an independent federal agency vested with the power to safeguard employees' rights to organize and to determine whether to have unions as their bargaining representative. The agency also acts to prevent and remedy unfair labor practices committed by private sector employers and unions.

Conduct Elections

The National Labor Relations Act provides the legal framework for private-sector employees to organize bargaining units in their workplace, or to dissolve their labor unions through a decertification election.

Investigate Charges

Employees, union representatives and employers who believe that their rights under the National Labor Relations Act have been violated may file charges alleging unfair labor practices at their nearest NLRB regional office.

Facilitate settlements

When a charge is determined to have merit, the NLRB encourages parties to resolve cases by settlement rather than litigation whenever possible.

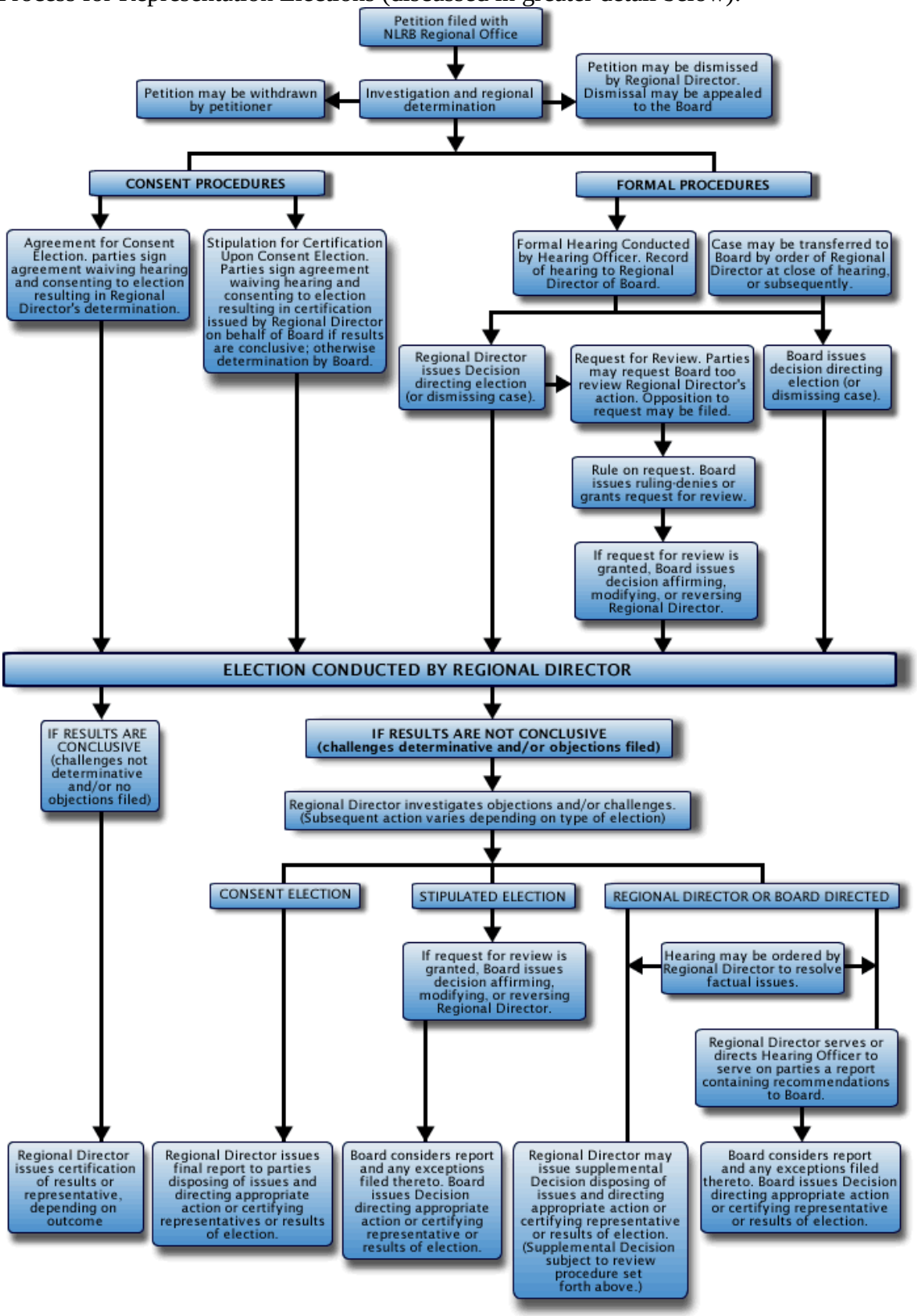
Decide Cases

On the adjudicative side of the NLRB are 40 Administrative Law Judges and a Board whose five members are appointed by the President and confirmed by the Senate.

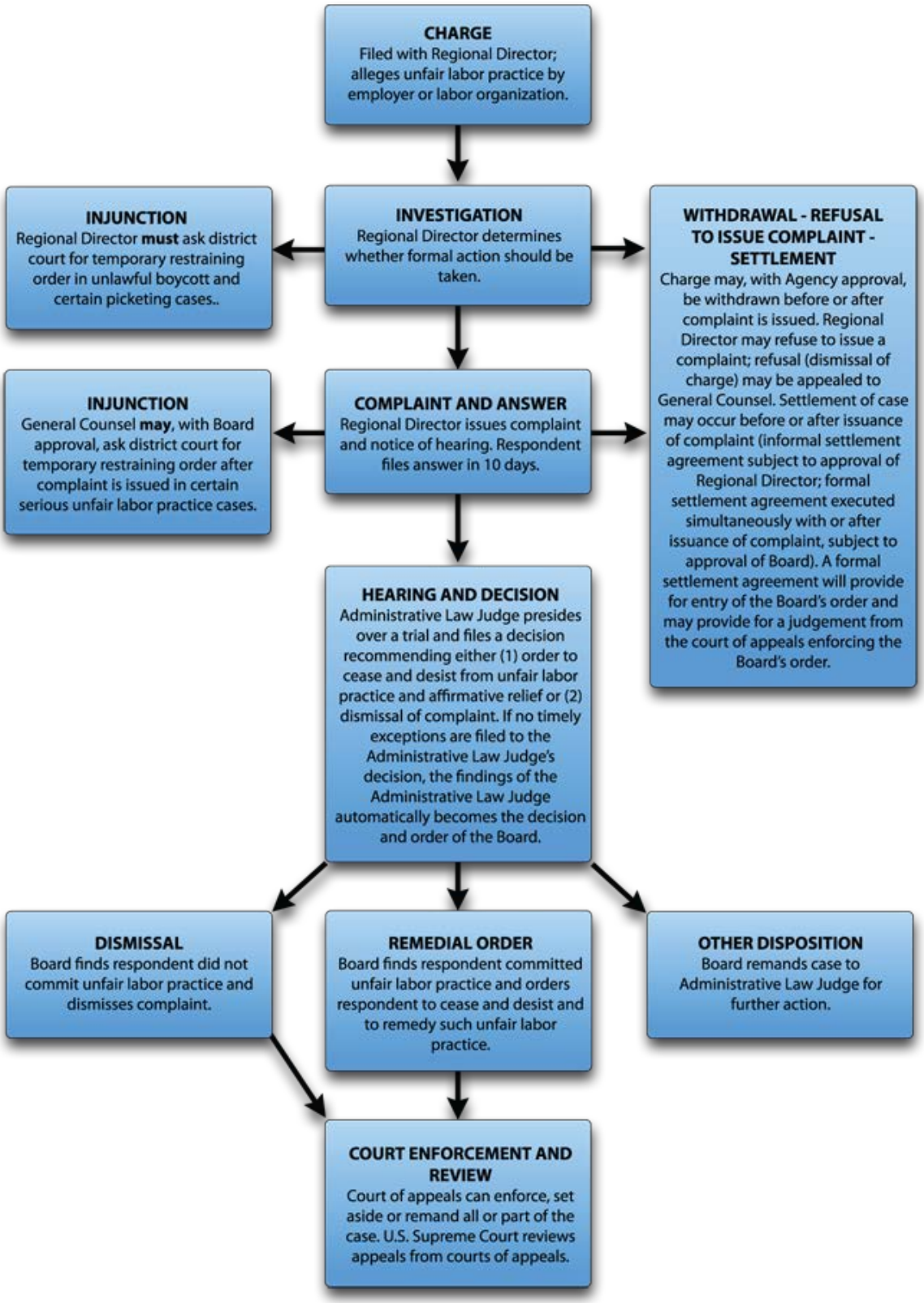
Enforce Orders

The majority of parties voluntarily comply with orders of the Board. When they do not, the Agency's General Counsel must seek enforcement in the U.S. Courts of Appeals. Parties to cases also may seek review of unfavorable decisions in the federal courts.

Process for Representation Elections (discussed in greater detail below):



Process for Unfair Labor Practice Charges:



Jurisdictional Standards

In order for the NLRB to act, the Board must have jurisdiction over the parties involved.

Factors required for NLRB jurisdiction:

- There must be a labor dispute, meaning any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing , or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee. Sec. 2. [29 USC § 152(9)];
- The labor dispute must involve employers, employees, and/or labor organizations as defined by Sec. 2 [29 § 152(2), (3) & (5)];
- The employer's operations must affect interstate commerce.

The NLRB is authorized to act only in cases of an employer whose operations "affect commerce". The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country. The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce. Sec. 2. [29 USC §152]

Examples of enterprises engaged in commerce are:

- A manufacturing company in California that sells and ships its product to buyers in Oregon.
- A company in Georgia that buys supplies in Louisiana.
- A trucking company that transports goods from one point in New York State through Pennsylvania to another point in New York State.
- A radio station in Minnesota that has listeners in Wisconsin.

When a company does not have direct dealings with a company in another state, its operations may still be deemed to affect commerce. For example, the operations of a Massachusetts manufacturing company that sells all of its goods to Massachusetts wholesalers affect commerce if the wholesalers ship to buyers in other States. The effects of a labor dispute involving the Massachusetts manufacturing concern would be felt in other States and the labor dispute would, therefore, "affect commerce".

The Board, in its discretion, has set certain requirements for the exercise of its jurisdiction. These "jurisdictional standards" are based on the yearly amount of business done, sales, or purchases.

NLRB jurisdictional standards.

- *Nonretail business*: Direct sales of goods to consumers in other States, or indirect sales through others (called outflow), of at least $50,000 a year; or direct purchases of goods from suppliers in other States, or indirect purchases through others (called inflow), of at least $50,000 a year.
- *Office buildings*: Total annual revenue of $100,000 of which $25,000 or more is derived from organizations that meet any of the standards except the indirect outflow and indirect inflow standards established for nonretail enterprises.
- *Retail enterprises*: At least $500,000 total annual volume of business.
- *Public utilities*: At least $250,000 total annual volume of business, or $50,000 direct or indirect outflow or inflow.
- *Newspapers*: At least $200,000 total annual volume of business.
- *Radio, telegraph, television, and telephone enterprises*: At least $100,000 total annual volume of business.
- *Hotels, motels, and residential apartment houses*: At least $500,000 total annual volume of business.
- *Privately operated health care institutions*: At least $250,000 total annual volume of business for hospitals; at least $100,000 for nursing homes, visiting nurses associations, and related facilities; at least $250,000 for all other types of private health care institutions defined in the 1974 amendments to the Act. The statutory definition includes: "any hospital, convalescent hospital, health maintenance organizations, health clinic, nursing home, extended care facility or other institution devoted to the care of the sick, infirm, or aged person." Public hospitals are excluded from NLRB jurisdiction by Section 2(2) of the Act.
- *Transportation enterprise, links and channels of interstate commerce*: At least $50,000 total annual income from furnishing interstate passenger and freight transportation services; also performing services valued at $50,000 or more for businesses which meet any of the jurisdictional standards except the indirect outflow and indirect inflow of standards established for nonretail enterprises.
- *Transit systems*: At least $250,000 total annual volume of business.
- *Taxicab companies*: At least $500,000 total annual volume of business.
- *Associations*: These are regarded as a single employer in that the annual business of all association members is totaled to determine whether any of the standards apply.
- *Enterprises in the Territories and the District of Columbia*: The jurisdictional standards apply in the Territories; all businesses In the District of Columbia come under NLRB jurisdiction.
- *National defense*: Jurisdiction is asserted over all enterprises affecting commerce when their operations have a substantial impact on national defense, whether the enterprises satisfy any other standard.
- *Private universities and colleges*: At least $1 million gross annual revenue from all sources (excluding contributions not available for operating expenses because of limitations imposed by the grantor).

- *Symphony orchestras*: At least $1 million gross annual revenue from all sources (excluding contributions not available for operating expenses because of limitations imposed by the grantor).
- *Law firms and legal assistance programs*: At least $250,000 gross annual revenues.
- *Employers that provide social services*: At least $250,000 gross annual revenues.
- *United States Postal Service*, through enactment of the 1970 Postal Reorganization Act, effective July 1, 1971.
- *Gambling casinos*: legally operated and at least $500,000 total annual revenue.

"These standards were adopted by the Board, inter alia, as an administrative aid to facilitate its jurisdictional determinations in order that it might reduce the amount of time and energy expended in the investigation of jurisdictional questions, so that it might concentrate its energies on substantive issues in the many important cases coming before it and thus increase its case-handling capacity. The adoption of such standards in no way precludes the Board from exercising its statutory authority, in any properly filed case, where legal jurisdiction alone is proven, if the Board is satisfied that such action will best effectuate the policies of the Act." *Tropicana Products*, 122 NLRB 121 (1958).

Even if the enterprise does the volume of business listed in the standard, the Board must still find, based on evidence, that the enterprise does in fact "affect" commerce. The Board will dispense with this requirement when the employer refuses to provide information sufficient to determine whether the monetary standards are met. The Board will also assert jurisdiction in instances where it is clear that the monetary standards are not met, but there is still a substantial effect on commerce. *See also National Labor Relations Bd. v. W. B. Jones Lumber Co*., 245 F.2d 388 (9th Cir. 1957).

Certain entities are excluded from the Board's jurisdiction. Excluded entities include:

- *Religious* organization employees who are involved in effectuating the religious purpose of the organization, such as teachers in church-operated schools, but not employees who work in the operations of a religious organization that do not have a religious character, such as a health care institution.
- *Indian tribal* enterprises that carry out traditional tribal or governmental functions.
- Federal, state and local *governments*, including public schools, libraries, and parks, Federal Reserve banks, and wholly-owned government corporations.
- Employers who employ only *agricultural* laborers, those engaged in farming operations that cultivate or harvest agricultural commodities or prepare commodities for delivery.
- *Domestic* service employees of any family or person at his home;
- Individual employed by *family* - parent or spouse;
- *Independent contractor*,
- Employers subject to the *Railway Labor Act*, such as interstate railroads and airlines.

There are also certain entities over which the Board has declined to exercise jurisdiction, pursuant to Section 14(c)(1):

- Racetracks,
- Owners, breeders, and trainers of racehorses, and
- Real estate brokers.

Information that an employer may be asked to provide in order to determine the Board's jurisdiction:

INTERNET
FORM NLRB-5081
(2-08)

NATIONAL LABOR RELATIONS BOARD
QUESTIONNAIRE ON COMMERCE INFORMATION

FORM EXEMPT
UNDER 44
U.S.C. 3512

Please read carefully. Answer all applicable items and return to the Regional Office. If additional space is required, use plain bond paper and identify item number.

CASE NAME	CASE NUMBER

1. TYPE OF BUSINESS
[ ] CORPORATION [ ] PARTNERSHIP [ ] SOLE PROPRIETORSHIP

2. CLASSIFICATION WHICH DESCRIBES YOUR BUSINESS

[ ] WHOLESALING	[ ] NEWSPAPER	[ ] OFFICE OF INDUSTRIAL BUILDING	[ ] RETAIL
[ ] HOSPITAL	[ ] HOTEL - MOTEL	[ ] MANUFACTURING/PROCESSING	[ ] SERVICE ORGANIZATION
[ ] TRUCKING	[ ] PUBLIC UTILITY	[ ] BROADCASTING STATION	[ ] NURSING HOME
[ ] TRANSIT SYSTEM	[ ] BUILDING AND CONSTUCTION	[ ] OTHER *(Describe)*	

3. EXACT LEGAL TITLE OF FIRM

4. IF A CORPORATION

A. INCORPORATED IN STATE OF:	B. NAME(s) AND ADDRESS(es) OF PARENT, SUBSIDIARY, OR RELATED CORPORATION, IF ANY, AND DESCRIBE RELATIONSHIP.

5. IF A PARTNERSHIP
FULL NAME AND COMPLETE ADDRESS OF ALL PARTNERS.

6. IF A PROPRIETORSHIP
FULL NAME AND COMPLETE ADDRESS OF PROPRIETOR.

7. BRIEFLY DESCRIBE THE NATURE OF YOUR BUSINESS *(General products handled or manfactured, or nature of services performed).*

8. PRINCIPAL PLACE OF BUSINESS LOCATED AT:	BRANCH(es) LOCATED AT:

9. NUMBER OF PERSONNEL PRESENTLY EMPLOYED BY YOUR FIRM

A. TOTAL	B. AT THE ADDRESS INVOLVED IN THIS PROCEEDING.

10. DURING THE PAST [ ] CALENDAR, [ ] FISCAL YEAR *(If Fiscal Year indicate dates)* OR [ ] LAST 12 MONTHS *(Check appropriate box):*

A. DID GROSS REVENUE FROM SALES OR PERFORMANCE OF SERVICES DIRECTLY TO CUSTOMERS OUTSIDE THE STATE EXCEED $50,000 [ ] YES [ ] NO IF LESS THAN $50,000 INDICATE AMOUNT	$
B. DID GROSS AMOUNT OF PURCHASES OF MATERIALS OR SERVICES DIRECTLY FROM OUTSIDE THE STATE EXCEED $50,000 [ ] YES [ ] NO IF LESS THAN $50,000 INDICATE AMOUNT	$
C. DID GROSS REVENUE FROM YOUR SALES OR PERFORMANCE OF SERVICES EQUAL OR EXCEED $50,000 TO FIRMS WHICH DIRECTLY MADE SALES TO CUSTOMERS OUTSIDE THE STATE AND/OR TO CUSTOMERS WHICH MADE PURCHASES FROM DIRECTLY OUTSIDE THE STATE [ ] YES [ ] NO IF LESS THAN $50,000 INDICATE AMOUNT	$
D. IF THE ANSWER TO 10(c) IS NO, DID GROSS REVENUE FROM SALES OR PERFORMANCE OF SERVICES EQUAL OR EXCEED $50,000 TO PUBLIC UTILITIES, TRANSIT SYSTEMS, NEWSPAPERS, HEALTH CARE INSTITUTIONS, BROADCASTING STATIONS, COMMERCIAL BUILDINGS, EDUCATIONAL INSTITUTIONS AND/OR RETAIL CONCERNS [ ] YES [ ] NO IF LESS THAN$50,000 INDICATE AMOUNT	$
E. DID GROSS AMOUNT OF YOUR PURCHASES EQUAL OR EXCEED $50,000 FROM FIRMS WHICH IN TURN, PURCHASED THOSE GOODS DIRECTLY FROM OUTSIDE THE STATE [ ] YES [ ] NO IF LESS THAN $50,000 INDICATE AMOUNT	$
F. GROSS REVENUE FROM ALL SALES OR PERFORMANCE OF SERVICES *(Check largest amount which firm equaled or exceeded):* [ ] $100,000 [ ] $200,000 [ ] $250,000 [ ] $500,000 [ ] $1,000,000 IF LESS THAN $100,000 INDICATE AMOUNT	$

11. ARE YOU A MEMBER OF, OR PARTICIPATE IN, AN ASSOCIATION OR OTHER EMPLOYER GROUP THAT ENGAGES IN COLLECTIVE BARGAINING?
[ ] YES [ ] NO *(If yes, give Name and Address of association or group).*

12. DID FIRM PERFORM NATIONAL DEFENSE WORK DURING THE PERIOD INDICATED IN 10 ABOVE? [ ] YES [ ] NO *(If Yes, amount of dollar volume and name(s) and address(es) for whom work was performed).*	$

13. PROVIDE NAME & TITLE OF YOUR REPRESENTATIVE BEST QUALIFIED TO GIVE FURTHER INFORMATION CONCERNING THE OPERATIONS OF YOUR BUSINESS

NAME	TITLE	TELEPHONE NUMBER

SIGNATURE OR AUTHORIZED REPRESENTATIVE COMPLETING THIS QUESTIONNAIRE

NAME AND TITLE *(Type or Print)*	SIGNATURE	DATE

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and/or unfair labor practice proceedings and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary. However, failure to supply the information may cause the NLRB to refuse to process any further a representation or unfair labor practice case, or may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court.

B. Representation Elections

Petition

The election process is initiated by the filing of a petition pursuant Section 9(C) of the NLRA. A petition may be filed by employees, an employer, or a union. There are six types of petitions:

- *RC-CERTIFICATION OF REPRESENTATIVE* – A substantial number of employees (generally at least 30%) wish to be represented for purposes of collective bargaining by Petitioner, and Petitioner desires to be certified as representative of the employees. Showing of interest, usually signed and dated union authorization cards, must be filed with the petition, or within 48 hours of filing the petition. The petition must also show that the employer has refused to recognize the union.
- *RM-REPRESENTATION (EMPLOYER PETITION)* – One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner. No showing of interest is required. The employer must prove that the union has demanded recognition (submission of a proposed contract, picketing, or request for contract renewal, not union campaigning). May also be filed by an employer who has a reasonable belief supported by objective considerations that the currently recognized union has lost its majority status.
- *RD-DECERTIFICATION (REMOVAL OF REPRESENTATIVE)* – A substantial number of employees (generally at least 30%) assert that the certified or currently recognized bargaining representative is no longer their representative.
- *UD-WITHDRAWAL OF UNION SHOP AUTHORITY (REMOVAL OF OBLIGATION TO PAY DUES)* – Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded.
- *UC-UNIT CLARIFICATION*- A labor organization is currently recognized by Employer, but Petitioner seeks clarification of placement of certain employees
- *AC-AMENDMENT OF CERTIFICATION*- Petitioner seeks amendment of certification issued in a prior Board case.

Petition Form:

FORM EXEMPT UNDER 44 U.S.C.

INTERNET
FORM NLRB-502
(2-08)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
PETITION

DO NOT WRITE IN THIS SPACE	
Case No.	Date Filed

INSTRUCTIONS: Submit an original of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located.

The Petitioner alleges that the following circumstances exist and requests that the NLRB proceed under its proper authority pursuant to Section 9 of the NLRA.

1. PURPOSE OF THIS PETITION (if box RC, RM, or RD is checked and a charge under Section 8(b)(7) of the Act has been filed involving the Employer named herein, the statement following the description of the type of petition shall not be deemed made.) (Check One)

- ☐ **RC-CERTIFICATION OF REPRESENTATIVE** - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees.
- ☐ **RM-REPRESENTATION (EMPLOYER PETITION)** - One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner.
- ☐ **RD-DECERTIFICATION (REMOVAL OF REPRESENTATIVE) - A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative.**
- ☐ **UD-WITHDRAWAL OF UNION SHOP AUTHORITY (REMOVAL OF OBLIGATION TO PAY DUES)** - Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded.
- ☐ **UC-UNIT CLARIFICATION**- A labor organization is currently recognized by Employer, but Petitioner seeks clarification of placement of certain employees: (Check one) ☐ In unit not previously certified. ☐ In unit previously certified in Case No. _____
- ☐ **AC-AMENDMENT OF CERTIFICATION**- Petitioner seeks amendment of certification issued in Case No. _____ Attach statement describing the specific amendment sought.

2. Name of Employer	Employer Representative to contact	Tel. No.
3. Address*(es)* of Establishment*(s)* involved *(Street and number, city, State, ZIP code)*		Fax No.
4a. Type of Establishment (Factory, mine, wholesaler, etc.)	4b. Identify principal product or service	Cell No.
		e-Mail
5. Unit Involved *(In UC petition, describe* **present** *bargaining unit and attach description of proposed clarification.)*		6a. Number of Employees in Unit:
Included		Present
Excluded		Proposed *(By UC/AC)*
(If you have checked box RC in 1 above, check and complete EITHER item 7a or 7b, whichever is applicable)		6b. Is this petition supported by 30% or more of the employees in the unit?* ☐ Yes ☐ No *Not applicable in RM, UC, and AC

7a. ☐ Request for recognition as Bargaining Representative was made on (Date) _____ and Employer declined recognition on or about (Date) _____ (If no reply received, so state).

7b. ☐ Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

8. Name of Recognized or Certified Bargaining Agent *(If none, so state.)*		Affiliation	
Address	Tel. No.	Date of Recognition or Certification	
	Cell No.	Fax No.	e-Mail

9. Expiration Date of Current Contract. If any *(Month, Day, Year)*	10. If you have checked box UD in 1 above, show here the date of execution of agreement granting union shop *(Month, Day and Year)*
11a. Is there now a strike or picketing at the Employer's establishment(s) Involved? Yes ☐ No ☐	11b. If so, approximately how many employees are participating?

11c. The Employer has been picketed by or on behalf of *(Insert Name)* _____, a labor organization, of *(Insert Address)* _____ Since *(Month, Day, Year)* _____

12. Organizations or individuals other than Petitioner (and other than those named in items 8 and 11c), which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in unit described in item 5 above. (If none, so state)

Name	Address	Tel. No.	Fax No.
		Cell No.	e-Mail

13. Full name of party filing petition (If labor organization, give full name, including local name and number)

14a. Address *(street and number, city, state, and ZIP code)*	14b. Tel. No. EXT	14c. Fax No.
	14d. Cell No.	14e. e-Mail

15. Full name of national or international labor organization of which Petitioner is an affiliate or constituent *(to be filled in when petition is filed by a labor organization)*

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

Name *(Print)*	Signature	Title *(if any)*
Address *(street and number, city, state, and ZIP code)*	Tel. No.	Fax No.
	Cell No.	eMail

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

Post-Petition Investigation

Once the petition is filed it is docketed and assigned to a Board. Copies are sent to each party and a Representation Hearing is scheduled. The Regional Office makes a determination as to jurisdiction, showing of interest, and timeliness of the petition. If any of the three elements is lacking, the petition will be dismissed.

Voluntary Election Agreements

Once the Board finds that an election is appropriate, the Board attempts to obtain a consent agreement from the parties regarding jurisdiction, the bargaining unit, voter eligibility, and time and place of the election. A consent agreement eliminates the need for a Representation Hearing.

There are three types of Voluntary Election Agreements:

- Consent – parties agree to an election, waive their right to a Hearing, and give the Regional Director the authority to make the final decision on all election issues.
- Full Consent – parties agree to have the Regional Director conduct a hearing and then resolve all pre-election disputes. The parties also waive the right to request review by the Board.
- Stip – parties agree to an election and waive the right to a pre-election, but not post-election hearing. Final decisions on election issues are made by the Board.

Representation Hearing

A Representation Hearing is held if the parties do not enter into a consent agreement. The Hearing is held before a hearing officer. Witnesses are called and evidence is introduced. The hearing is not governed by formal rules of evidence. Oral argument is allowed, and the parties may file briefs within seven days after the hearing.

Determining the Bargaining Unit

The Board will determine the appropriate bargaining unit based on the community-of-interests test. Several factors are considered: (1) similarity of duties, skills, wages, fringe benefits, hours, interest and working conditions; (2) amount of interchange among employees; (3) the employer's organizational structure; (4) integration of the work flow and interrelationship of the production process; (5) bargaining history in the particular unit and industry; (6) extent of organization; and (7) desires of the petitioner. *See Capital Bakers, Inc*., 168 NLRB 904 (1967).

If a person is a "supervisor" then that person is considered management, and cannot be part of a union bargaining unit. A supervisor is defined as, "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall,

promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." The NLRB recently tried to expand the definition of supervisor, but the Board's decision was vacated by the Court of Appeals. See *Lakeland Health Care Associates v. NLRB.* For additional cases regarding the NLRB's definition of "supervisor", see *Oakwood Healthcare, Inc., Golden Crest Healthcare Center,* and *Croft Metals, Inc.*

Decision and Appeal

After the Representation Hearing, the hearing officer submits a report to the Regional Director. A Decision and Direction of Election will be issued by the Regional Director if the Director determines that the Board has jurisdiction, the unit is a labor organization within the meaning of the NLRA, the unit is appropriate, a question concerning representation exists, and conducting an election is not barred. An election is usually scheduled 25 to 30 days later.

Within 14 days of service of the Decision, a party may appeal the Decision by filing a Request for Review. The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

(1) That a substantial question of law or policy is raised because of:

(i) The absence of; or

(ii) A departure from, officially reported Board precedent.

(2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

(3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

(4) That there are compelling reasons for reconsideration of an important Board rule or policy. [29 CFR § 102.67]

An opposing statement may be filed within seven days after the last day on which the request for review must be filed. If the Request is granted, the parties may file additional briefs within 14 days of the Order granting the Request for Review.

The Regional Director will proceed with the election as directed by the Decision while a Request for Review is pending. If on the day of the election the Request is still pending, any ballots whose validity are in question are separated out and remain sealed until the Board disposes of the Request for Review.

The Eligible Voter List

The employer must provide a list of the first and last names and addresses of each employee in the appropriate bargaining unit who were on the payroll during the payroll period immediately prior to the date of the Direction of Election or the approval of Consent Agreement. The Excelsior List must be provided within seven days after the Direction of Election or approval of the Consent Election Agreement. *See Excelsior Underwear*, 156 NLRB 1236 (1966). In order to be eligible to vote, the employee must be both employed and working on the established eligibility date. Failure to furnish a complete list may result in the election being set aside.

There are certain exceptions to the general rule of eligibility:

- *Economic Strikers* - Employees engaged in an economic strike who are not entitled to reinstatement will be eligible to vote under Board regulations as long as the election is conducted within twelve months after the start of the strike. Replacements employed on a permanent basis can also vote.
- *Unfair Labor Practice Strikers* - are eligible to vote regardless of when the election is held. Their replacements, however, cannot vote.
- *Employees on Lay-Off* - are eligible to vote if they have a reasonable expectation of re-employment with the Employer in the foreseeable future. The Board considers the following objective factors to determine whether a reasonable expectation of recall exists: the Employer's prior experience, the Employer's future plans, the circumstances of the layoff, and what, if anything, the Employee has been told about the recall.
- *Employees Who Previously Quit Or Were Discharged For Cause* – generally are ineligible to vote. Employees terminated in violation of the Act are eligible to vote.
- *Probationary Employees* - are eligible to vote if their duties and working conditions are substantially similar to those of regular employees and they have a reasonable expectation of continued employment.
- *Employees On Leave* - Employees on sick leave or other leaves of absence are eligible to vote if they are to be restored to their duties following the sick leave or other leave of absence.
- *Temporary Employees* - are eligible to vote only if they are employed on the eligibility date and their tenure of employment is uncertain. An Employee's tenure is considered uncertain so long as the prospect of termination was not sufficiently finite on the eligibility date.
- *Paid Union Organizers* - Full-time, paid union organizers are "employees" entitled to the Act's protections, and Employers cannot lawfully refuse to hire qualified individuals for the reason that they are paid union organizers

Pre-Election Conduct

Conduct may be found objectionable if it occurs anytime between the date of the filing of the petition and the date of the election. Objections to the election, on the basis of misconduct, must be filed with the Regional Director within 7 days after the ballot tally has been prepared. Certain misconduct also constitutes an unfair labor practice, and a charge may also be filed. Only objections may result in a rerun election, not unfair labor practices.

When formal or informal union organizing begins, employers are prohibited from engaging in certain kinds of conduct. TIPS is the acronym generally used to summarize the types of prohibited conduct: **T**hreats, **I**nterrogation, **P**romises, or **S**urveillance. Prohibited and permissible conduct is discussed in greater detail below.

Speech:
Promise of Benefits or Threats of Reprisal - the Employer cannot promise benefits nor threaten reprisals for Union activity. Threats of closure, job loss, and shutdowns can result in an election being invalidated if not based on objective facts.

Misrepresentations in Campaign Propaganda – an election may be set aside if misrepresentations are made in such a way that the Employees cannot fairly evaluate it.

Employees:
In general, Employees may distribute union literature in nonworking areas, during nonworking time, on company property, as long as the restriction does not apply strictly to union literature. Exceptions apply to health care facilities (no solicitation or distribution in immediate patient care areas) and retail stores (no solicitation or distribution on the selling floor).
Off-duty – Employees onsite who are off-duty may access parking lots, gates, and other non-working areas unless there is uniformly enforced and justified business reason to prohibit such activity.
Offsite – Employees who are offsite may access the Employer's facilities, unless there is a uniformly enforced and justified business reason to prohibit such activity.
Non-Employees – the Employer may prohibit distribution of Union literature on the company's property unless the location of the facility and the living arrangements of the Employees are beyond the reach of reasonable union efforts to communicate with the Employees.

Interrogation:
In general, coercive Employer interrogation of an Employee, regarding Union activity, is prohibited. If the Employer has a good-faith reasonable doubt as to the Union's majority status, the Employees may be polled. The following safeguards must be employed: (1) the Employees must be informed of the purpose of the poll; (2) secret ballots must be

used; (3) the Employer has not committed unfair labor practices or created a coercive atmosphere; and (4) assurances against reprisal must be given.

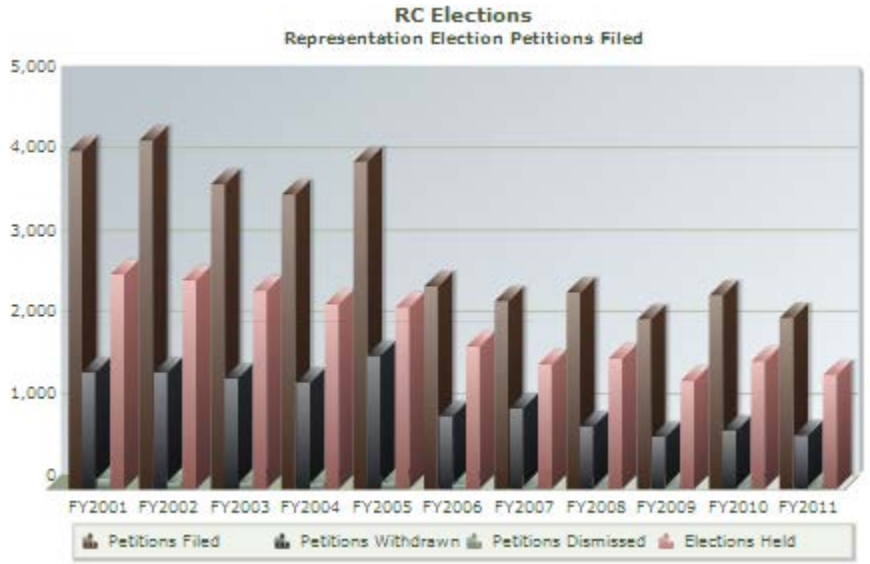
Surveillance:
The Employer cannot conduct surveillance of Employees engaged in Union activities; and cannot give the impression that such Employees are under surveillance.

Captive Audience Speeches:
An Employer may make a pre-election speech, but it cannot be during a mandatory employee meeting if made within the 24 hour period immediately preceding the election.

Misuse of the Election Process:
Campaign techniques that imply that the NLRB or the government favors a particular outcome are prohibited.

Certification

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



Election Process Changes

On December 22, 2011, the Board adopted a final rule which will modify certain procedures applicable to the processing of representation cases. The changes were effective April 30, 2012. Implementation of the changes was suspended on May 15, 2013 in response to the decision issued by the District Court in *Chamber of Commerce of U.S. v. N.L.R.B.*, 879 F. Supp. 2d 18 (D.C. Cir. 2012).

At the time the rules were adopted, the Board had only three members due to term expirations. Two of the three members voted in favor of the changes. The third member, Hayes, did not vote on the adoption of the final rule. The agency did not follow its usual practice of requesting a response, when Hayes failed to vote when the final rule was circulated for a vote. Accordingly, the District Court found that the Board lacked the statutorily mandated three-member quorum when it adopted the rule. The Court granted Plaintiffs' Motion for Summary Judgment and invalidated the rule.

Now that the Board is fully staffed, the lack of a quorum is no longer an issue. It is almost certain that the Board will reissue the "quickie election" or "ambush election" rules; therefore, employers should familiarize themselves with the new rules, and determine how the employer will respond to union organizing campaigns. If an employer does not have a response plan in place, a union could obtain an election before an employer has time to respond.

The Board has provided the following explanation of the election process changes:

"1. *Defining the Scope of the Pre-Election Hearing*. Most parties to NLRB elections agree to the election terms. When they can't agree, the NLRB conducts a pre-election hearing to determine whether an election should be held. This amendment alters Section 102.64 of the Rules to explicitly state that the purpose of the hearing is to determine whether a question of representation exists, and amends Section 102.66(a) to give the hearing officer the discretion to limit the hearing to relevant matters. Currently, questions concerning a small number of employees may be litigated at great length and expense despite having no effect on the final result, because the disputed individuals' eligibility to vote only becomes an issue if their votes would have made a difference in the final outcome of the election.

2. *Limiting Post-Hearing Briefs*. The second amendment alters Section 102.66(d) of the Rules to give hearing officers the discretion to control the filing, subject matter, and timing of any post-hearing briefs. This amendment was adopted because most cases involve only routine issues based on well-known principles of NLRA law. Briefing adds little to the decision-making process, but introduces further delay and adds significantly to the parties' litigation expenses.

3. *Consolidating Pre- and Post-Election Appeals*. The third amendment alters Sections 102.67 and 102.69 to eliminate the need to file multiple appeals. Currently, parties must file one appeal to seek Board review of pre-election issues and a separate appeal to seek Board review of post-election issues, such as challenges to voter eligibility and objections to a party's conduct during the course of the election. This amendment consolidates the two appeals into a single post-election procedure, which saves the parties from having to file and brief appeals that may become moot based on the outcome of the election. This change also conforms NLRB procedures with the ordinary rules found in both state and federal courts which limit interlocutory appeals.

4. *Eliminating the 25-Day Waiting Period*. The fourth amendment follows directly from the third by removing the 25-day waiting period after a regional director's pre-election decision issues. Under the current rules, Section 101.21(d) recommends that the regional director refrain from setting an election date sooner than 25 days after ordering an election to allow the Board sufficient time to consider any requests for review. Because the new rules eliminate pre-election appeals, the waiting period no longer serves any purpose.

5. *Establishing a Standard for Interlocutory Appeals*. The fifth amendment also takes aim at the problem of multiple appeals to the Board in a single case. The current rules fail to establish any standard for the filing of interlocutory appeals concerning individual rulings by hearing officers or regional directors during the course of a pre-election hearing. As a result, parties may, and have, filed numerous appeals in a single case regarding discrete rulings as to what evidence may, or may not, be permitted. By altering Section 102.65(c), the new rules make clear that the Board will grant such interlocutory appeals only under "extraordinary circumstances where it appears that the issue will otherwise evade review."

6. *Establishing Standards for Post-Election Procedures*. The amendment to Sections 102.62(b) and 102.69 codifies a long-established practice in which regional directors decide challenges and objections to elections through an investigation without a hearing when there are no substantial or material factual issues in dispute. The amendment also makes Board review of the regional directors' decisions discretionary. This change will require parties to identify significant prejudicial error by the regional director or some other compelling reason for Board review, allowing the Board to devote its limited time to cases where its review is warranted."

See also Office of the General Counsel Memorandum GC 12-04 – Guidance Memorandum on Representation Case Procedure Changes.

C. Extension of the Reach of the NLRA

Union membership is low. In 2012, the union membership rate – the percent of wage and salary workers who were members of a union – was 11.3 percent. The union membership rate for private-sector workers was 6.6 percent, according the Bureau of Labor Statistics (www.bls.gov/news.release/pdf/union2.pdf).

So why does the NLRA still matter, and why are the actions of the NLRB important? The NLRA protects various forms of "concerted activity for mutual aid or protection" that is not traditional union activity. Furthermore, the Obama appointed Board is using an expansive definition of "protected concerted activity" to insert itself in areas of the workplace where unions have never been.

While the recent decisions of the NLRB may be invalidated once the Supreme Court decides the constitutionality of the appointments of the members, these decisions give some insight into where the Board is heading, particularly with regard to "protected concerted activity".

Section 7 Rights

RIGHTS OF EMPLOYEES
Sec. 7. [§ 157.] Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and *to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection*, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

The NLRB has interpreted Sec.7 of the act to mean that employees have the right to act together to improve wages and other terms or conditions of employment. This right applies to union and non-union employees.

In 2012, the NLRB announced a new webpage focusing on protected concerted activity. The webpage tells the stories of recent cases involving protected concerted activity. The page also provides the following advice to employees:

> "Whether or not concerted activity is protected depends on the facts of the case…
>
> *Is the activity concerted?*
>
> Generally, this requires two or more employees acting together to improve wages or working conditions, but the action of a single employee may be

considered concerted if he or she involves co-workers before acting, or acts on behalf of others.

Does it seek to benefit other employees?

Will the improvements sought – whether in pay, hours, safety, workload, or other terms of employment – benefit more than just the employee taking action? Or is the action more along the lines of a personal gripe, which is not protected?

Is it carried out in a way that causes it to lose protection?

Reckless or malicious behavior, such as sabotaging equipment, threatening violence, spreading lies about a product, or revealing trade secrets, may cause concerted activity to lose its protection."

The Board is obviously trying to reach a broader range of workers. NLRB Chairman Mark Gaston Pearce stated, "We think the right to engage in protected concerted activity is one of the best kept secrets of the National Labor Relations Act, and more important than ever in these difficult economic times. Our hope is that other workers will see themselves in the cases we've selected and understand that they do have strength in numbers."

Protected Concerted Activity

The following summaries are excerpted from the NLRB's website: http://www.nlrb.gov/rights-we-protect/protected-concerted-activity.

Written complaints regarding wages

28-CA-022628

When a hotel housekeeping service announced a $2-per-hour wage cut, employees protested in letters to managers, written with the help of a community organization. Workers who led the effort and signed the letters were later fired

The workers sought help from a local community group, Somos un Pueblo Unido. With the group's help, the workers composed letters to senior management at the staffing company, asking them to reconsider cutting the current $9.50 per hour wage by $2. A short time later, Maria, whose signature was prominent on the letter, was transferred to another hotel and then fired. Her colleague and co-signer, Juan Lopez, was interrogated and then fired as well.

Maria and Juan filed charges with the NLRB regional office, and an investigation found reasonable cause to believe their firings were unlawful. The Regional Director, on behalf of the General Counsel, issued a complaint calling for a hearing before an administrative law judge. Prior to a trial, however, the employer settled the case. Both workers received full backpay and offers of reinstatement, which they declined.

Anonymous complaints regarding wages

18-CA-019755

The staff at an urgent care center sent an anonymous letter to the owner/doctor, asking him to reconsider a plan to immediately cut wages by 10% and suggesting alternate ways to save money. Within a month, two employees who wrote and edited the letter were fired.

When the owner of Northfield Urgent Care, Inc., Dr. Kevin B., announced to his staff of 10 that he would immediately cut wages by 10% to save the business from bankruptcy, employees were stunned and unhappy. After several conversations, they decided to write a joint, anonymous letter to express staff concerns and offer alternatives for saving money, such as eliminating the employer match to the 401K fund. The letter was written by the center's physician's assistant, Jennifer G., and edited by its radiation technologist, Michael B. It was then left unsigned on the doctor's desk.

During the next few weeks, the owner met with individual employees in an attempt to learn who wrote the letter, and the atmosphere became increasingly tense. He accused several employees of whispering and cliquish behavior, and repeatedly complained of "toxic talk" and negativity". Three weeks after the letter was delivered, Michael B. was demoted. He was fired three days later. The owner then learned by examining Michael B.'s work emails that Jennifer G. had written the letter. The next day, she was fired as well.

Jennifer G. filed a charge with the National Labor Relations Board Regional Office in Minneapolis. Following an investigation, the Regional Director issued a complaint alleging the owner's actions were unlawful. A trial was held before Administrative Law Judge Paul Buxbaum, who agreed.

In his decision, Judge Buxbaum expanded on the concept of protected concerted activity, mentioning other cases that involved employee groups as disparate as hair cutters and financial advisors. "The Board's recognition of the Act's protection of employees' activities that do not involve labor unions was explicitly endorsed by the Supreme Court in *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962)," he wrote. "In that case, employees of a foundry were not represented by any union. Nevertheless, they chose to walk off the job as a group in order to protest the lack of heat in the plant during a wintertime cold spell. The employer fired them for violating a company rule that

prohibited unauthorized departures from work. Management argued that the employees' concerns were merely "gripes", and that it was already working to have the furnace repaired at the time of the walkout. Both the Board and the Supreme Court ordered the reinstatement of the discharged employees."
Judge Buxbaum found that the activity did not lose protection because it was not defamatory or malicious; in fact, he described the letter as "both civil and respectful in its language and tone." He therefore found the actions unlawful. He ordered the employer to stop the unlawful activity and offer reinstatement and full backpay to both employees.

The clinic owner appealed Judge Buxbaum's decision to the Board in Washington D.C. On March 15, 2012, a panel of three members considered the record and unanimously decided to uphold the judge's decision in full.

Discussing wages with another employee

14-CA-26790

A customer service representative for a diaper supply company was fired after discussing her wages with another employee, based on a policy in the company handbook that the NLRB later found to be unlawful.

Gisele O., the customer service representative, frequently discussed work-related issues with her close friend, who also was her supervisor at Cotton Babies, an online cloth diaper supplier. Through one discussion, the supervisor learned she was earning less money than Gisele, and she quit. The company owner told Gisele that she broke the handbook rule that forbids employees from discussing their wages with each other, and that in order to keep her job, she would have to re-read the handbook and sign another form agreeing to follow its rules.

Gisele refused to sign, and two weeks later, she was fired. After an investigation, the regional director found reasonable cause to believe that Gisele was unlawfully fired because she had discussed her wages with another employee, which is protected activity under the National Labor Relations Act. The regional director also found reasonable cause to believe that some parts of the handbook contained unlawful rules, and issued a complaint.

The employer then engaged in mediation and reached a private settlement with Gisele, who received full backpay for the time off work and an offer of reinstatement, which she declined. The employer also agreed to change its handbook, adding a section that tells employees they have a right to talk with each other about their raises, wages, salaries, and other conditions of employment.

Complaints regarding sexual harassment

30-CA-17795

Women working the overnight shift at a plastics manufacturing plant discussed concerns about a new supervisor, who they later learned was a registered sex offender. They asked for a group meeting with Human Relations officials, but were instead called into individual meetings and disciplined. One employee was fired; others were demoted.

Soon after the supervisor started working the third shift at the Evco Plastics manufacturing plant, a group of female employees expressed concerns to each other about his aggressive attitude and preferential treatment of one of their co-workers. When an Internet search by one of the employees uncovered that the supervisor had a criminal history and was a registered sex offender, the women requested a group meeting with HR to talk about their concerns with the supervisor's behavior and actions, which also included inappropriately touching some employees at work.

Instead, each employee was called individually into a meeting with management, with the offending supervisor present. The women were questioned about what they knew, who they heard it from, and who they had talked to about it. Based on what was said in these meetings, the employer issued written warnings to the employees, demoted two of them, reassigned one to a different shift, and terminated another -- all for having talked about the supervisor with each other.

Five of the employees filed charges with the NLRB Milwaukee Regional Office. Following an investigation, the regional director determined that the employees had engaged in protected activities and there was reasonable cause to believe they had been unlawfully interrogated about and retaliated against because of these activities.

After the NLRB notified Evco Plastics that a complaint would issue, the company settled the case by providing full backpay to all affected employees, eliminating written warnings from their records, and offering to return the employees to their former positions.

Refusal to disclose involvement in protected activity

16-CA-025349

A supervisor at a dental association was fired after she refused to divulge the names of employees who had anonymously signed a petition protesting top management. The Board found the discharge was unlawful because she had rightfully refused to violate federal labor law by punishing concerted activity. In a settlement, the supervisor and another former employee waived reinstatement in exchange for $900,000 in lost wages and benefits.

Complaints of favoritism not discussed with other workers

05-CA-033245

A licensed practical nurse was fired after she complained to her boss at a pharmaceutical research firm that other employees were receiving special treatment. The Board found the employer violated the National Labor Relations Act by firing the employee to prevent her from talking about her complaints of favoritism with co-workers.

Parexel International conducts research for pharmaceutical companies at its Baltimore, Maryland location. Its staff includes a number of individuals from South Africa. When Theresa N., a licensed practical nurse for the company, received information from a co-worker that led her to believe that the employees from South Africa were receiving special treatment, she complained to her direct supervisor. The next day, Theresa was called into the office by a Human Resources official and the Manager of Clinical Operations, who is also from South Africa, to discuss the "rumor" she had mentioned.

In the meeting, Theresa explained that a co-worker, who was South African, told her that he received a raise when he was re-hired by the company and that his wife would also receive a raise when she was re-hired. Theresa expressed concern that the company was paying the employees from South Africa higher wages and the manager of clinical operations would continue favoring these employees. Theresa was then asked if she had discussed the conversation she had with her co-worker with anyone else besides her supervisor. Theresa said she had not. The next week, Theresa was fired.

Theresa filed a charge about her termination with the NLRB's Regional Office in Baltimore. After an investigation, a Complaint issued and a hearing was held on the matter. The judge's decision was reviewed by the Board in Washington, D.C., which found the termination unlawful, as the evidence indicated the company fired Theresa as a way to prevent her from discussing her concerns of favoritism with her co-workers. The Board held that a "pre-emptive" termination to keep an employee from discussing wages, hours, or working conditions with other employees is unlawful, even if the employee had not yet engaged in protected activity. As part of its decision, the Board ordered that Theresa be reinstated with full backpay.

The employer appealed the Board decision to the U.S. Court of Appeals for the District of Columbia, which appointed a mediator to the case. With the mediator's help, the parties reached a settlement under which Parexel agreed not to discharge employees to prevent them from engaging in protected concerted activities and to pay Theresa about $250,000 for back wages and medical expenses. In the agreement, Theresa declined reinstatement.

Complaints made to the media

11-CA-021378

A group of poultry workers walked off the job to protest a new requirement that they pay 50 cents per pair for the latex gloves they used on the line. As the workers gathered at a nearby church, two women told their story to a local newspaper and were quoted by name. They were soon fired.

One of the women was fired by Case Farms of North Carolina, Inc. on the same day that a company Human Resources official read the newspaper article. The second was suspended the following day and fired three days later. The employer said both terminations were for legitimate reasons unrelated to the newspaper article or the work stoppage.

After an investigation, the NLRB agreed with the fired workers and called for a hearing before an Administrative Law Judge, who found that the discharges were unlawful because they retaliated against protected concerted activity. That decision was appealed to the Board in Washington D.C.

The Board agreed that the firings were unlawful and ordered full backpay and reinstatement for one of the employees, Luz R. Because the immigration status of the second employee, Evodia D., was in doubt, the Board ordered that she be offered reinstatement if she could establish that she was legally able to work in the United States.

Case Farms appealed the decision to the U.S. Court of Appeals for the District of Columbia. With the help of a volunteer mediator, a settlement was reached in which Luz R. received $20,000 in backpay and waived reinstatement. No reinstatement or backpay was provided to Evodia D.

Facebook posts

34-CA-012576

After a work-related incident, an employee criticized her supervisor in a post on Facebook, which prompted other employees to reply to the posting. The employee was suspended the next day and later fired.

Dawnmarie S. was a long-term paramedic for American Medical Response of Connecticut, Inc., an emergency medical service provider in New Haven, Connecticut. After a verbal disagreement with her supervisor at work, Dawnmarie went home and posted a negative comment about her supervisor on her private Facebook page. Dawnmarie’s post prompted replies from other employees who were friends with Dawnmarie on Facebook.

Dawnmarie was suspended the next day and ultimately fired. In making the decision to fire her, the company relied, in part, on Dawnmarie's Facebook post, arguing that Dawnmarie violated the company's internet policy when she criticized her supervisor online.

A charge was filed with the Hartford NLRB Regional Office alleging Dawnmarie was unlawfully fired. The charge also alleged the company's handbook contained unlawful provisions which, among other things, prohibited employees from making negative comments about the company or supervisors.

After an investigation, the NLRB issued a Complaint alleging Dawnmarie was unlawfully fired because she engaged in protected concerted activity when she criticized her supervisor on Facebook. The Complaint also alleged that the company's handbook contained several unlawful provisions. Prior to a hearing, the company agreed to revise the provisions in the handbook which were alleged to be unlawful. The company also reached a private settlement with Dawnmarie regarding her termination.

<u>YouTube videos regarding safety concerns</u>

19-CA-31580

A construction contractor fired five employees after several of them appeared in a YouTube video complaining of hazardous working conditions.

The employees, all immigrants from El Salvador, learned they were building concrete foundations at a former Superfund site and worried that the soil they were handling was contaminated with arsenic and other toxins. They also said they were required to wear badges indicating they'd been trained to handle hazardous materials, when in fact, the badges belonged to other workers and they had never been trained.

Three of the employees took their concerns public in a YouTube video posted on July 21, 2008. Speaking in Spanish, they hid their faces in shadow in an attempt to avoid retaliation. However, within 10 days, the three who appeared in the video and two others who were close to them had all lost their jobs with Rain City Contractors. Through the ensuing months, according to charges filed with the agency's Seattle office, the employer continued to threaten and interrogate other employees, warning them not to talk about working conditions with outsiders.

Following an investigation of the charges, the NLRB Regional Director determined that the YouTube video was protected because the employees voiced concerns about safety in the workplace, and the public airing of their complaints did not lose the Act's protection because they accurately described their concerns about working conditions. On behalf of the NLRB General Counsel, the director issued a complaint calling for a hearing before

an administrative law judge. As a hearing opened, the case settled, with the workers receiving full back pay and declining reinstatement.

Stated concerns about safety

32-CA-025336

A long-time employee at a vegetable packing plant was fired after raising safety concerns on behalf of other workers with company management and a government agency.

Rick F., a storage and retrieval technician at the Dole Fresh Vegetables packing plant, complained to managers and co-workers multiple times about what he said were unsafe conditions that endangered him and other employees. At one point, he called the county health department to report a potentially dangerous situation involving rusted ammonia pipes. Hours after the Health Department disclosed to the company that it was Rick who made the complaint, he was suspended. Two days later, he was fired for allegedly leaving his work post and yelling at a supervisor -- charges that he denied.

A charge was filed in the Regional Office in Oakland. After an investigation, the Regional Director determined there was reasonable cause to believe that Rick was fired because of his stated concerns about employee safety, which was protected activity. The Regional Office issued a complaint and called for a hearing before an Administrative Law Judge. Prior to a scheduled hearing, the case settled and the employee was reinstated with full backpay for time off work.

Refusing to work due to safety concerns

24-CA-010613

When a heavy thunderstorm hit one March afternoon, 13 workers building the foundation of a luxury hotel retreated to a trailer to wait out the downpour. Supervisors ordered them back to work, but the workers refused, citing health and safety concerns, and were fired on the spot.

While in the trailer, the workers told supervisors at Morris Shea Inc. that there were exposed electrical cables at the job site and said they feared they would be electrocuted in the rain. The supervisors became angry and demanded that each worker sign a discharge letter, yelling racial slurs and belittling the workers.

Following an investigation, the regional director issued complaint alleging the contractor, Morris Shea, Inc., interfered with the workers' rights to engage in concerted activity to help each other on the job. The employer paid more than $50,000 in back wages and offered to reinstate all 13 discharged employees. Four of the workers accepted the offer

and returned. Morris Shea also agreed to post notices at all of its construction sites informing employees of their rights under the National Labor Relations Act.

To summarize, examples of protected concerted activity include:

1. Employees wearing buttons advocating a particular cause;
2. Employee statements attacking or criticizing their employer or supervisor, including on social media sites and statements made to the media; and
3. Employees complaining or discussing the employer's work policies, or terms and conditions of employment.

Also, it is an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of their section 7 rights. Currently, the Board is focusing on employer policies which may be construed to prohibit employees from engaging in protected concerted activity. Employers should review their policies regarding:

Access (off-duty employees and third-parties)
Confidentiality
Corporate Compliance
Discipline and Misconduct (work rules)
Dress Code
Investigation of Misconduct
Non-disparagement of the Employer/Supervisors
Social Media/E-mail
Solicitation and Distribution
Statements to the Media.

Additional decisions regarding section 7 rights are discussed below in the sections D and E of these materials.

NLRB Posting Requirements

Another way the NLRB has tried to insert itself into the private workplace is by a rule requiring the posting of employee rights under the NLRA. The effective date of the rule was April 30, 2012, but the rule was halted by the decision of the U.S. Court of Appeals for the D.C. Circuit.

Subpart A of the rule requires all employers subject to the NLRA to "post notices to employees, in conspicuous places, informing them of the NLRA rights, together with Board contact information and information concerning basic enforcement procedures." 29 CFR § 104.202(a). The notice is an 11x17 inch poster that can be downloaded from the NLRB website or obtained from any of the Board's offices. 29 CFR § 104.202(b), (e). If employers customarily communicate with their employees about personnel matters using an intranet or internet site, those employers are required to post the notice in a prominent location on the site. 29 CFR § 104.202(f). Failure to post the required notice is deemed to be a violation of section 8(a)(1) of the Act, which prohibits an employer from interfering with, restraining, or coercing employees in the exercise of their section 7 rights. The rule also alters the statute of limitations set forth under the Act.

The rule was challenged by the National Association of Manufacturers, the National Right to Work Legal Defense and Education Fund, Inc., the Coalition for a Democratic Workplace, the National Federation of Independent Business, and several small businesses. The D.C. Circuit Court found the notice posting requirement was within the Board's rulemaking authority; but the Board exceeded its statutory authority by promulgating the provision that would treat a failure to post the notice as an unfair labor practice. The Court also found that the statute of limitations provision was inconsistent with the language of the Act. The Fourth Circuit went even further than the D.C. Circuit, asserting express limitations on the authority of the Board:

> "...the rulemaking function provided for in the NLRA, by its express terms, only empowers the Board to carry out its statutorily defined reactive roles in addressing unfair labor practice charges and conducting representation elections upon request. Indeed, there is no function or responsibility of the Board not predicated upon the filing of an unfair labor practice charge or a representation petition."

See Nat'l Assoc. of Manufacturers v. NLRB and *Chamber of Commerce of the United States, et al. v. National Labor Relations Board, et al.*

As of right now, there is no posting requirement. Now that the NLRB is functioning with five members, it is likely the Board will continue to litigate the issue. Employers should monitor the NLRB's website for updated information on the issue.

Employee Rights

Under the National Labor Relations Act

The National Labor Relations Act (NLRA) guarantees the right of employees to organize and bargain collectively with their employers, and to engage in other protected concerted activity or to refrain from engaging in any of the above activity. Employees covered by the NLRA* are protected from certain types of employer and union misconduct. This Notice gives you general information about your rights, and about the obligations of employers and unions under the NLRA. Contact the National Labor Relations Board (NLRB), the Federal agency that investigates and resolves complaints under the NLRA, using the contact information supplied below, if you have any questions about specific rights that may apply in your particular workplace.

Under the NLRA, you have the right to:

- Organize a union to negotiate with your employer concerning your wages, hours, and other terms and conditions of employment.
- Form, join or assist a union.
- Bargain collectively through representatives of employees' own choosing for a contract with your employer setting your wages, benefits, hours, and other working conditions.
- Discuss your wages and benefits and other terms and conditions of employment or union organizing with your co-workers or a union.
- Take action with one or more co-workers to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government agency, and seeking help from a union.
- Strike and picket, depending on the purpose or means of the strike or the picketing.
- Choose not to do any of these activities, including joining or remaining a member of a union.

Under the NLRA, it is illegal for your employer to:

- Prohibit you from talking about or soliciting for a union during non-work time, such as before or after work or during break times; or from distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms.
- Question you about your union support or activities in a manner that discourages you from engaging in that activity.
- Fire, demote, or transfer you, or reduce your hours or change your shift, or otherwise take adverse action against you, or threaten to take any of these actions, because you join or support a union, or because you engage in concerted activity for mutual aid and protection, or because you choose not to engage in any such activity.
- Threaten to close your workplace if workers choose a union to represent them.
- Promise or grant promotions, pay raises, or other benefits to discourage or encourage union support.
- Prohibit you from wearing union hats, buttons, t-shirts, and pins in the workplace except under special circumstances.
- Spy on or videotape peaceful union activities and gatherings or pretend to do so.

Under the NLRA, it is illegal for a union or for the union that represents you in bargaining with your employer to:

- Threaten or coerce you in order to gain your support for the union.
- Refuse to process a grievance because you have criticized union officials or because you are not a member of the union.
- Use or maintain discriminatory standards or procedures in making job referrals from a hiring hall.
- Cause or attempt to cause an employer to discriminate against you because of your union-related activity.
- Take adverse action against you because you have not joined or do not support the union.

If you and your co-workers select a union to act as your collective bargaining representative, your employer and the union are required to bargain in good faith in a genuine effort to reach a written, binding agreement setting your terms and conditions of employment. The union is required to fairly represent you in bargaining and enforcing the agreement.

Illegal conduct will not be permitted. If you believe your rights or the rights of others have been violated, you should contact the NLRB promptly to protect your rights, generally within six months of the unlawful activity. You may inquire about possible violations without your employer or anyone else being informed of the inquiry. Charges may be filed by any person and need not be filed by the employee directly affected by the violation. The NLRB may order an employer to rehire a worker fired in violation of the law and to pay lost wages and benefits, and may order an employer or union to cease violating the law. Employees should seek assistance from the nearest regional NLRB office, which can be found on the Agency's Web site: **http://www.nlrb.gov.**

You can also contact the NLRB by calling toll-free: **1-866-667-NLRB (6572)** or **(TTY) 1-866-315-NLRB (1-866-315-6572)** for hearing impaired.

If you do not speak or understand English well, you may obtain a translation of this notice from the NLRB's Web site or by calling the toll-free numbers listed above.

*The National Labor Relations Act covers most private-sector employers. Excluded from coverage under the NLRA are public-sector employees, agricultural and domestic workers, independent contractors, workers employed by a parent or spouse, employees of air and rail carriers covered by the Railway Labor Act, and supervisors (although supervisors that have been discriminated against for refusing to violate the NLRA may be covered).

This is an official Government Notice and must not be defaced by anyone.

SEPTEMBER 2011

D. Policies that are *per se* Violations of the NLRA

The NLRB has, in the recent past, and continues to focus on private employer policies that interfere with the employees' right to engage in protected concerted activity for their mutual aid and protection. A rule that expressly restricts section 7 rights is *per se* unlawful. It is difficult to discern the difference between lawful and unlawful policies in light of the NLRB's recent decisions.

The NLRB has attempted to provide some guidance via advice memos. In general,

> "An employer violates Section 8(a)(1) of the Act through the maintenance of a work rule if that rule would "reasonably tend to chill employees in the exercise of their Section 7 rights." The Board has developed a two-step inquiry to determine if a work rule would have such an effect. First, a rule is unlawful if it explicitly restricts Section 7 activities. Second, if the rule does not explicitly restrict protected activities, it will violate the Act only 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.
>
> Rules that are ambiguous as to their application to Section 7 activity, and contain no limiting language or context that would clarify to employees that the rule does not restrict Section 7 rights, are unlawful. In contrast, rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such that they could not reasonably be construed to cover protected activity, are not unlawful."

Social Media

The NLRB has taken a particular interest in social media policies; however, social media will not be discussed in these materials in an effort to avoid duplication. Please see the materials regarding "Privacy and Social Media in the Workplace."

Confidentiality

In *American Red Cross*, the ALJ examined the following confidentiality policy:

> "I acknowledge that I may, in the course of my employment with Red Cross ("Employment"), have access to or create (alone or with others) confidential and/or proprietary information and intellectual property that is of value to Red Cross. I understand that this makes my position one of trust and confidence. I understand Red Cross' need to limit disclosure and

> use of confidential and/or proprietary information and intellectual property…. Therefore, I agree to the following:
>
> Confidential information shall include but not be limited to: … information relating to Red Cross' … personnel … matters."

The ALJ found that the policy violated Section 8(a)(1) of the NLRA by reasonably chilling employees in the exercise of their section 7 rights:

> "By defining confidential information as including information regarding "personnel" and "employees" the [policy] would be reasonably understood by employees to prohibit the disclosure of information including wages and terms of conditions of employment to other employees or to nonemployees, such as union representatives. It is, of course, clearly established that employees have a Section 7 right to discuss wages and terms and conditions of employment among themselves and with individuals outside of their employer. …
>
> The specific employee handbook provision that prohibits the release of confidential employee information without authorization is clearly facially overbroad, … in that such a rule would reasonably be understood by employees to prohibit the disclosure of information regarding wages and terms and conditions of employment to other employees or to union representatives."

The ALJ further found no merit in the argument that a "savings clause" in the handbook rendered the otherwise unlawful policy lawful:

> "[T]his Agreement does not deny any rights provided under the National Labor Relations Act to engage in concerted activity, including but not limited to collective bargaining." As the Charging Party correctly noted in its brief, under Board law, such a disclaimer does not make lawful the content of a provision that unlawfully prohibits Section 7 activity.… The "savings clause" noted above arguably would cancel the unlawfully broad language, but only if employees are knowledgeable enough to know that the Act permits employees to discuss terms and conditions of employment with each other and individuals outside of their employer."

See also, *DirectTV U.S. DirectTV Holdings, LLC.* The NLRB found the company's policies regarding contact with the media, communications with law enforcement, confidentiality of job and customer information, and disclosure of non-public information to be unlawful.

See also, *Jones & Carter* wherein an employee was terminated for discussing salaries with her co-workers. The company had a policy which prohibited employees from discussing "financial matters."

Bottom Line: Confidentiality policies should define confidential information as narrowly as possible. Furthermore, savings clauses which specifically enumerate the employees' section 7 rights may save a policy that the NLRB would otherwise deem to be overbroad.

Confidential Investigations

In *Banner Health Systems*, the Board found a violation of the NLRA because an HR officer asked an employee not to discuss a matter under investigation with co-workers in order to protect the integrity of the investigation. The request was made as a matter or course.

The Board ordered that Banner stop enforcing the rule, and found that employers cannot request that employees not discuss a matter undergoing investigation unless the employer has legitimate and substantial justification, i.e. "witnesses need[ed] 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."

Bottom Line: Employers who request 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. Blanket rules requesting confidentiality in investigations should be eliminated.

At-will Employment

The NLRB examines at-will employment policies on a case by case basis. In general, the NRLB distinguishes between policies that do not allow for the possibility that an employee's at-will employment status can be changed through a written agreement and those that do. Policies that don't provide for such a change violate section 7. At-will policies that do allow for changes to an employee's at-will status through a written agreement do not. Compare *American Red Cross* and *Hyatt Hotels, Corp.* with *Fresh & Easy Neighborhood Market.*

Bottom Line: Employers should update their at-will policies to state that even though the employer's representatives are not authorized to change the employee's at-will status, the employee's status may be changed by written agreement with company's chief executive.

Courtesy:

In *Karl Knauz Motors, Inc*., a salesperson at the BMW dealership posted negative comments, on a social media website, about the food served at a BMW event. The salesperson subsequently posted comments poking fun at a car accident at the Land Rover dealership. When management saw the postings, the salesperson was fired.

The NLRB found that the termination did not violate the NLRA because there was credible evidence that the dealership fired the employee for his comments about the accident (unprotected by Section 7) and not his comments about the food (protected by Section 7). However, the NLRB took issue with the company's Courtesy Policy which stated:

> "Courtesy is the responsibility of every employee. Everyone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language which injures the image or reputation of the [Company]."

The NLRB found that the policy was too broad and prohibited employees from engaging in Section 7 protected speech, for example criticizing of working conditions. The NLRB reasoned that an employee could construe the Courtesy policy as preventing him or her from criticizing working conditions because the employer could interpret such comments as "disrespectful."

Bottom Line: Employers should review their policies to ensure that they cannot be interpreted as prohibiting an employee's right to engage in protected concerted activity.

E-mail

In *Alpine Access, Inc.,* the NLRB's Division of Advice issued a Memorandum in which it decided that *Register Guard* is not applicable to a virtual workplace. In *Register Guard*, the NLRB held that employees had no statutory right to use an employer's email system for Section 7 matters.

The NLRB found Alpine's e-mail policy to be unlawful because Alpine's employees all worked from home, and had no other way to communicate with each other. However, the Division went on to urge the Region to use *Alpine* to convince the NLRB to overrule *Register Guard,* even as it applies to traditional workplaces.

Bottom Line: Employers with virtual workplaces should consider allowing employees to use e-mail for personal use, subject to the employer's need to maintain production and discipline.

ADR

In *Supply Technologies*, the NLRB struck down an ADR provision as overly broad. The agreement required employees to engage in ADR for all disputes related to their employment except for criminal, workers' compensation and unemployment matters. The agreement specifically provided that employees were free to file a charge or complaint with government agencies, and were free to cooperate with government agencies investigating a charge or complaint. Despite the clarification, the NLRB found that the policy could be construed to prohibit the filing of unfair labor practice charges.

Bottom Line: Employers should revise their ADR policies to add an exception for NLRA claims and disputes, and to acknowledge that nothing in the agreement restricts the employee's right to file an unfair labor practice charge.

E. NLRB Activities and Cases

Fresnius USA Manufacturing, Inc.

The NLRB decided that an employer, who suspended and then terminated an employee after he wrote crude and hostile statements on union newsletters, violated the NLRA.

A pro-union employee, Kevin Grosso, anonymously wrote, "Dear P!**&%$s, Please Read," "Hey cat food lovers, how's your income doing," and "Warehouse Workers, RIP" on union newsletters left in the company break room during a decertification campaign. Multiple female employees in the bargaining-unit, upset by the comments, approached company management, finding the comments offensive, vulgar, threatening, and directed towards them. Female employees also stated that they were concerned for their safety, and that the comments violated the company harassment policy.

Fresenius suspended and eventually terminated Grosso after discovering that he was the author of the offensive comments. Fresenius stated that Grosso's comments violated the company's equal employment opportunity and harassment policies and that he lied to company management during the investigation.

The NLRB issued a complaint alleging that Fresenius violated Section 8(a)(1) and (3) of the Act by investigating, questioning, suspending, and terminating Grosso because his conduct was protected under the Act. Fresenius maintained that it had a duty under federal equal employment opportunity law and its own policies to investigate and discharge Grosso.

An ALJ held that Fresenius had not violated the Act by investigating, questioning, suspending, or terminating Grosso because his comments were so offensive as to lose him the protection of the Act. The NLRB upheld the ALJ decision in part and reversed it in part. The Board found that although the investigation and questioning of Grosso was lawful, his suspension and termination violated the Act. The Board found that the employer had a legitimate business interest in investigating facially valid complaints regarding harassment and threats, even if that conduct took place during the employee's exercise of Section 7 rights. Furthermore, in questioning Grosso, the employer did not inquire into any union activity. Nevertheless, the Board found that Fresenius violated the Act by terminating Grosso for engaging in protected activity that was meant to encourage other workers to support the union during the decertification process.

The Board concluded that although an employee's otherwise protected activity may become unprotected if, in the course of engaging in such activity, the employee uses "sufficiently opprobrious, profane, defamatory or malicious language," an employee's use of vulgar language does not necessarily cost him the protection under the Act. The

Board found that Grosso's sexually offensive comments were not so "egregious" as to lose him protection.
The *Fresnius* decision makes it difficult for an employer to prevent and investigate harassment as required by Title VII. In doing so, the employer may infringe upon an employee's section 7 rights to engage in protected concerted activity and be faced with an unfair labor practice charge.

Boeing

On April 20, 2011, the Acting General Counsel of the National Labor Relations Board issued a complaint against the Boeing Company alleging that it violated federal labor law by deciding to transfer a second airplane production line from a union facility in the state of Washington to a non-union facility in South Carolina for discriminatory reasons. Counsel asserted that Boeing's decision to build its $750 million Dreamliner factory in South Carolina constituted illegal retaliation against the machinists' members in Washington for having exercised their federally protected right to strike. The charge was partially based upon statements made to the media.

After several months, Boeing and the machinists announced an agreement for a four-year contract extension that included substantial raises, unusual job security provisions and Boeing's commitment to expand aircraft production in the Puget Sound area. The union then asked the Board to withdraw the case, and the Board acquiesced.

Acting General Counsel maintained that, "This case was never about telling Boeing … where it could put its plants…This was a question of retaliation, and that remains the law."

Recently, The International Association of Machinists and Aerospace Workers rejected Boeing's eight-year contract offer which included a 1% wage increase every other year, starting in 2016, on top of annual cost-of-living increases. Pension accruals would be frozen, and traditional defined-benefit plans would be replaced with 401(k) accounts with a generous employer match. Boeing also offered to increase the basic pension benefit multiplier to $95 per month from $85, yielding an additional $2,400 annually for a new retiree with 20 years of service. Upon approving the contract, workers would also receive a $10,000 signing bonus, and an effective job guarantee for the next two decades.

Boeing warned that rejection of the contract could jeopardize 20,000 jobs. The local machinist president maintains that the job loss is worth the risk to preserve the union's sacred traditional pension. The machinists may be counting on intervention by the NLRB again.

Walmart

The NLRB recently announced that it has decided to pursue charges against Walmart for threatening and punishing workers who planned to go on strike last year. The agency's general counsel investigated and "found merit" in workers' claims that Walmart "unlawfully threatened" employees for taking part in walkouts during last year's Black Friday shopping season. According to the NLRB, Walmart intimidated, surveilled or punished workers in 14 different states, and illegally threatened workers in statements made in two news broadcasts.

The NLRB found no merit in claims that Walmart violated employees' rights by pushing protesters off of store property, and illegally changed employees' work schedules in retaliation for striking.

More strikes are planned for this holiday season.

Foreign workers

The National Labor Relations Board (NLRB) and the Ministry of Foreign Affairs of the United Mexican States signed a letter of agreement designed to strengthen their collaborative efforts to provide Mexican workers, their employers, and Mexican business owners in the United States with information, guidance, and access to education regarding their rights and responsibilities under the National Labor Relations Act.

Taxes on Back Pay

In *Latino Express, Inc.*, the Board ordered the employer to compensate employees for any additional federal and state income taxes incurred as a result of receiving a lump-sum back-pay award covering periods longer than one year.

Front Pay

In January of 2013, General Counsel for the NLRB announced, via Memorandum GC 13-2, that front-pay may start to be included in agency settlements. Reinstatement remains the preferred remedy.

Witness Statements

For an employer to be able to withhold witness statements from a union it must be prepared to engage in a "balancing" test; that is, it will have to demonstrate that the "confidentiality interest" in the witness statement outweighs the union's right to know the identity of the witnesses and the contents of their statements. To meet that test, the employer should be prepared to demonstrate that:

1. The employee/witness demanded, and was given, an assurance of

confidentiality and
2. The employer has a "legitimate and substantial confidentiality interest" in the statements

See Piedmont Gardens, wherein it was decided to overrule *Anheuser-Busch.*

Job Security

In *Hoodview Vending Co.*, the NLRB ruled that any talk by any employee about "job security" or possible firing was "inherently concerted" and therefore protected even if group action never happened or was never even contemplated. The employee was speculating with another employee that someone was going to be fired based on help wanted ad she had seen.

Opt-Out – Arbitration Agreement

The NLRB found that a provision giving employees 30 days to opt out of Kmart Corp.'s arbitration agreement, which contains a class waiver, does not save the policy from being considered unlawful under the board's *D.R. Horton* precedent. In *D.R. Horton,* the Board held that it is a violation of the NLRA for an employer to require as a condition of employment that employees waive their right to bring class or collective actions in any forum.