UT LAW CLE THE UNIVERSITY OF TEXAS SCHOOL OF LAW

Presented:
22nd Annual Labor and Employment Law Conference

May 12 – 13, 2015
Austin, TX

Recent Developments Under the National Labor Relations Act

Danielle E. Needham
Rod Tanner

Danielle E. Needham
Jackson Walker L.L.P.
Fort Worth, Texas
dneedham@jw.com
817.334.7227

Rod Tanner
Tanner and Associates, PC
Fort Worth, Texas
rtanner@rodtannerlaw.com
817.377.8833

TABLE OF CONTENTS

I. IMPACT OF *NOEL CANNING* AND OTHER NLRB UPDATES

A. Impact of *Noel Canning*.

The National Labor Relations Board (*NLRB* or *the Board*) is still dealing with the aftermath of the Supreme Court's decision in *Noel Canning.*[1] In *Noel Canning*, the Supreme Court held that President Obama's recess appointments of three Board members, in January 2012, were invalid because Congress was not in recess at the time of the appointments.[2] The decision related to all Board decisions issued between January 2012 and August 2013. Following the decision, there were ninety-eight (98) cases pending in federal court that were decided within the aforementioned time period while these invalidated members sat on the Board.

During an ABA webinar in July 2014, NLRB General Counsel explained how the Board planned to handle some of the administrative issues presented by the *Noel Canning* decision. Mr. Griffin explained that 43 cases were cases in which the Board had not yet filed a record, so pursuant to Section 10(d)[3] of the National Labor Relations Act ("NLRA" or the "Act"), the Board would decide whether to modify or set aside the orders in the cases. Mr. Griffin explained that in the remaining fifty (55) cases in which a record had been filed, the Board already filed motions in most of the cases asking courts to vacate and remand the cases back to the Board. Since the Webinar, the Board has issued decisions in cases remanded back to its docket and simply ratified many of the decisions nullified by *Noel Canning*.

In addition to Board decisions, *Noel Canning* also affected administrative decisions made by the Board between January 2012 and August 2013. On July 18, 2014, the Board ratified all administrative, personnel, and procurement matters taken by the Board between January 4, 2012 and August 5, 2013[4]. This action removed any doubt about administrative appointments made during the aforementioned period.

B. Current Board Members

The current Board members are: Chairman Mark Gaston Pearce and Members Kent Y. Hirozawa, Harry I. Johnson, III, Lauren McFerran, and Philip Miscimarra. Ms. McFerran is the most recently appointed Board member, as she replaced Nancy Schiffer whose Board term expired on December 16, 2014.

---

[1] 134 S. Ct. 2550 (2014).
[2] *Id*. at 2578.
[3] 29 U.S.C. § 160(d), "[u]ntil the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it."
[4] *NLRB Officials Ratify Agency Actions Taken During Period When Supreme Court Held Board Members Were Not Validly Appointed*, NAT'L LABOR RELATIONS BD., http://www.nlrb.gov/news-outreach/news-story/nlrb-officials-ratify-agency-actions-taken-during-period-when-supreme-court (last visited Mar. 28, 2015).

II. EXPEDITED ELECTION RULES[5]

On April 14, 2015, the Board's newly adopted expedited election rules, which amend its rules and regulations governing representation-case procedures, take effect. The Board's new rules effectively reduce the time between the filing of a petition for representation and an actual election. The rules are meant to avoid delays in the election process by focusing only on major questions concerning representation raised by the parties before conducting elections, rather than litigating all disputes up front. They are also meant to ease the filing process for petitioners. Although the final rules do not set a hard deadline, or even a target timeline, for the amount of time between filing of hearing and election, the election is to be held "as soon as practicable." This is expected to significantly reduce the current delay period, which is approximately 38-42 days.

Legal challenges to the new rules have been brought by two organizations – the Associated Builders and Contractors of Texas, Inc.[6] and the U.S. Chamber of Commerce[7] – and members of Congress have also challenged the implementation of the rules.[8] However, neither of the lawsuits requested preliminary injunctive relief that could immediately delay the implementation of the rules. Accordingly, the Board has begun training its staff and labor law practitioners on the new procedures, and they are expected to come into effect on time. Below is a summary of the most significant changes made by the new rules.[9]

Hearings and Review of Regional Director Rulings

Under the new rules, pre-election hearings will generally be held eight (8) days after a hearing notice is served, making the scheduling of pre-election hearings uniform across all regions. Additionally, issues litigated during pre-election hearings are limited to those issues necessary to determine whether an election may be held. Regional Directors have discretion to decide whether or not to resolve most questions of voter eligibility and bargaining unit inclusion before an election. Further, post-hearing briefs will no longer be automatically accepted after a hearing, as the new rules grant the Regional Director discretion to accept post-hearing briefs.

In a change to the procedures a party uses to request Board review, parties are no longer required to submit requests to the Board to review Regional Directors' representation-case rulings before an election is held. The new rules allow parties to request Board review of a Regional Director's rulings *after* an election. This change essentially eliminates the current

---

[5] Representation—Case Procedures, 79 Fed. Reg. 74308 (Dec. 15, 2014) (to be codified at 29 C.F.R. pt. 101, 102, 103)

[6] Complaint for Declaratory and Injunctive Relief, *Associated Builders and Contractors of Texas, Inc., et al. v. NLRB,* (W.D. Tex. 2015) (No. 1:15-cv-00026).

[7] Complaint, *Chamber of Commerce of the United States of America, et al. v. NLRB,* (D.C. Cir. 2015) (No. 1:15-cv-9).

[8] House and Senate Republicans submitted a joint resolution to President Obama that would have blocked the new election rules; however, on March 31, 2015, President Obama vetoed the measure. *See President Vetoes GOP Attempt to Nix Quickie Election Rules,* http://www.laborrelationstoday.com/2015/03/articles/senate/president-vetoes-gop-attempt-to-nix-quickie-election-rules/ (last visited April 1, 2015).

[9] The Board attempted to adopt similar amendments in 2012; however, the amendments were invalidated by the U.S. District Court for the District of Columbia because they were adopted without a valid Board quorum. *See Chamber of Commerce v. NLRB,* 879 F. Supp. 2d 18, 30 (D.D.C. 2012).

mandatory twenty-five (25) day waiting period before an election that provides the Board time to consider requests for review of Regional Director rulings.

Finally, with regard to the timing of hearings, the new rules specify that post-election hearings on challenges or objections to an election will be held twenty-one (21) days after the tally of ballots, or as soon as practicable.

Position Statements

In most cases, the new rules require that one (1) business day before a pre-election hearing, the non-petitioning party must submit a position statement that identifies any issues the non-petitioning party may have with the petition, including issues related to the appropriateness of the bargaining unit or the date, time, and place of the proposed election. Employers will not be able to litigate issues that are not raised in their position statement in the pre-election hearing.[10] Additionally, an employer's position statement must include a list of the names, job classifications, shifts, and work locations of employees in the petitioned-for unit, and the identical information for any other employees the employer desires to add to the unit.

List of Eligible Voters

Within two (2) days of the issuance of a Direction of Election or an Election Agreement, employers must produce a list of eligible voters, including the employees' names, home addresses, telephone numbers (if available), email addresses (if available), job classifications, shifts, and work locations.

Electronic Filing

The new rules allow for the electronic filing of documents by all parties. Additionally, NLRB offices may transmit notices and documents electronically.

III. JOINT EMPLOYER STATUS

The NLRB has long held that legally separate entities are joint employers only when they actually share the ability to control or co-determine essential terms and conditions of employment.[11] However, General Counsel Griffin is currently urging the Board to adopt a less stringent standard for determining joint employers. The Board has indicated that it is reconsidering its position by soliciting briefs in *Browning-Ferris Industries of California.*[12]

Browning-Ferris operates a recycling business and Leadpoint, a subcontractor, provides staff to Browning-Ferris to sort recyclable items from waste and to clean the facility.[13] The Teamsters sought to represent a unit of employees consisting of sorters, housekeepers, and

[10] The expedited election rules will apply to all representation case elections, including decertification and unit clarification proceedings. Thus, in all cases, these rules of preclusion will relate to the non-petitioning party, which could be the employer or the labor union.
[11] *TLI, Inc*., 271 N.L.R.B. 798 (1984).
[12] *Browning-Ferris Industries of California*, Case No. 32-RC-109684 (Aug. 16, 2013).
[13] *Id*. at *1.

screen cleaners.[14] This proposed unit included both Browning employees and Leadpoint employees.[15] The Teamsters argue that the unit is appropriate because Browning and Leadpoint are joint employers.[16] The Regional Director for Region 32 in Oakland, California found otherwise, reasoning that under the Board's current joint employer standard, Browning did not exert sufficient control over Leadpoint's workers to make Browning a joint employer.[17] The Teamsters appealed the decision. The General Counsel submitted an amicus brief urging the NLRB to replace the current joint employer standard with a "totality of the circumstances" test that looks to the reality of the structure of the two companies to determine "if a putative joint employer exercises sufficient control over the other entity such that meaningful bargaining could not occur in its absence."[18]

Browning-Ferris is currently pending before the Board; however, in September 2014, the Board issued a decision that considered, among other things, whether or not a joint employment relationship was present. In *CNN America, Inc.*,[19] the Board held that CNN and Team Video Services ("TVS")—a former subcontractor of CNN—were joint employers.[20] The dispute stemmed from CNN's decision to cancel a subcontract agreement with TVS.[21] TVS employees operated the electric equipment in CNN's Washington D.C. and New York studios and were also unionized.[22] Upon CNN's decision to cancel the contract with TVS, CNN did not bargain with the union that represented TVS employees regarding the decision to terminate the contract or the effects of that decision, refused to recognize or bargain with the union, and hired all of the non-unionized employees for in-house positions.[23]

The Board majority held that CNN violated the Act by failing to bargain with the union regarding the termination of the TVS contract because CNN was a joint employer.[24] In *CNN*, the Board announced that joint employer status would be found when entities "share or codetermine those matters governing the essential terms and conditions of employment" with the putative employer "meaningfully affect[ing]…matters relating to the employment relationship 'such as hiring, firing, discipline, supervision and direction'".[25] Upon applying the aforementioned *Laerco* factors to the CNN case, the Board found that CNN was a joint employer because CNN controlled the hiring and work hours of TVS employees, controlled the assignment of work for TVS employees, and directed and supervised the work performed by TVS employees.[26]

The majority then extended this analysis finding "additional factors" supporting their finding, including that 1) CNN provided TVS with floor space in CNN building; 2) CNN provided TVS employees with CNN e-mail accounts; 3) CNN supplied all the equipment used

[14] *Id*. at *4.
[15] *Id*. at *2.
[16] *Id*.
[17] *Id*. at 15-19.
[18] General Counsel Amicus Br. 16-17, Jun. 26, 2014, *available* at http://www.nlrb.gov/case/32-RC-109684?page=1.
[19] 361 NLRB No. 47 (2014).
[20] *Id*. at *1.
[21] *Id*.
[22] *Id*. at *2.
[23] *Id*. at *1.
[24] *Id*.
[25] *Id*. at *3 (quoting *Laerco Transportation*, 269 NLRB 324, 325 (1984)).
[26] *Id*. at *3-7.

by TVS employees; 4) TVS employees performed work that was at the core of CNN's business and worked exclusively for CNN; and 5) CNN granted TVS employees security clearances and required them to wear CNN security badges, thus holding TVS employees out as their own employees.[27] CNN, as a joint-employer with TVS of the bargaining-unit employees, therefore violated Section 8(a)(1), (3), and (5) of the Act by failing to bargain over the decision to terminate the TVS contract, the effects of its cancellation, and the subsequent lay-off of TVS employees.[28]

Additionally, the Board majority held that CNN's conduct following the termination of the TVS contract violated the Act since CNN was a successor to the CNN-TVS joint-employment relationship. Finding that "on the day following the termination of the [TVS contract], CNN continued the same business operations with employees who performed the same work, at the same locations, and using the same equipment as TVS technicians," the Board found that CNN's refusal to recognize and bargain with the union regarding changes in terms and conditions of employment was a violation of Sections 8(a)(5) and (1) of the Act.[29]

Member Miscimarra dissented asserting that CNN was not a joint-employer of the TVS employees since it did not have any "role in hiring, firing, disciplining, discharging, promoting, or evaluating employees and that CNN did not actively co-determine the TVS technicians' other terms and conditions of employment."[30] Member Miscimarra also rejected the majority's use of the "additional factors" in their joint-employer analysis.[31] Finally, Member Miscimarra, while agreeing that CNN was a successor to the TVS contract, dissented on the grounds that CNN would not have had an obligation to bargain over the changes it made to the terms and conditions of employment.[32]

IV. GENERAL COUNSEL INITIATIVES AND INTERPRETATIONS

Since being appointed as the NLRB General Counsel on November 4, 2013, Richard Griffin has actively engaged in initiating changes to certain long-standing Board law. Two Memoranda issued by the General Counsel in 2014 outlines Mr. Griffin's initiatives and policy objectives for his four (4) year term.[33] Some of the issues of interest to the General Counsel are Section 7 Rights and Employer Email Systems, the appliance of Weingarten rights in non-union settings, and Section 10(j) remedies.

Section 7 and the Employer's Email System: The General Counsel successfully petitioned the Board to reconsider its decision in *Register Guard*[34], which held that employees did not have a right to use the employer's email system for Section 7 purposes because an employer's email system is property of the employer. See Section VI for a more detailed discussion of this issue.

---

[27] *Id.* at *8.
[28] *Id.* at *32.
[29] *Id.* at *26.
[30] *Id.* at *36.
[31] *Id.*
[32] *Id.*
[33] *Mandatory Submissions to Advice*, Office of the General Counsel, Memorandum GC 14-01 (Feb. 25, 2014); *Affirmation of the 10(j) Program*, Office of the General Counsel, Memorandum GC 14-03 (Apr. 30, 2014).
[34] 351 N.L.R.B. 1110 (2007).

Weingarten and Non-union Settings: General Counsel Griffin appears to be questioning precedent established *IBM Corp*.[35] which held that Weingarten rights did not extend to non-union employees. In *Weingarten*[36] the Board held that when an employer conducts an investigation or interview of a union employee that could result in disciplinary action, and the employee requests a union representative, the employer may not hold the meeting/interview without the union representative present. The General Counsel and has instructed Regional Directors to forward all relevant cases to the Division of Advice before processing.

Section 10(j) Remedies:[37] The General Counsel has endorsed initiatives by his predecessors to seek Section 10(j) injunctions in first-time contract cases and cases involving unlawful discharges or employees who become victims of serious unfair labor practices because of union organizing at their place of employment. Additionally, the General Counsel intends to seek Section 10(j) relief in successor refusal to hire or refusal to bargain cases.

This year, the General Counsel has already issued three (3) Memorandum discussing employer work rules, immigration, and guidance on the application of the Board's decision in *Babcock & Wilcox Construction Co., Inc*.[38] In Memorandum GC 15-04, the General Counsel provides detailed guidance on employee work rules that violate the Act and also provides a discussion of work rules that were modified pursuant to a settlement agreement, that in the General Counsel's opinion, do not violate the Act.

In Memorandum 15-03, the General Counsel discussed updates to the procedures addressing immigration status issues arising during unfair labor practice proceedings. Under the new procedures, Regional Office staff members are required to immediately contact the Division of Operations-Management as soon as they become aware of immigration status issues in a case.[39] The Office of Operations-Management will then provide technical assistance, determine whether interagency engagement could assist with the enforcement of the Act, explore remedial options with Regional Office staff, and coordinate the agency's response to the issues presented.[40] The memorandum makes clear that the immigration status of anyone involved in a case before the agency should not be an issue during the investigation stage.[41] However, when considering remedial options in cases in which immigration issues may limit the available remedies, the Memorandum provides that the Office of Operations-Management will consider alternate remedies such as consequential damages, reimbursement of organizing or bargaining expenses, or publication of a notice in newspapers or other public forums.[42] Additionally, the Memorandum notes that the Board may seek formal settlement agreements in cases in which

---

[35] 341 N.L.R.B. 1288 (2004).
[36] *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).
[37] *Affirmation of the 10(j) Program*, Office of the General Counsel, Memorandum GC 14-03 (Apr. 30, 2014).
[38] *Guideline Memorandum Concerning Deferral to Arbitral Awards, the Arbitral Process, and Grievance Settlements to Section 8(a)(1) and (3) cases*, Office of the General Counsel, Memorandum GC 15-02 (Feb. 10, 2015); *Updated Procedures in Addressing Immigration Status Issues that Arise During Unfair Labor Practice Procedures*, Office of the General Counsel, Memorandum GC 15-03 (Feb. 27, 2015); *Report of the General Counsel Concerning Employer Rules*, Office of the General Counsel, Memorandum GC 15-04 (Mar. 18, 2015).
[39] *Updated Procedures in Addressing Immigration Status Issues that Arise During Unfair Labor Practice Procedures*, Office of the General Counsel, Memorandum GC 15-03, at *1 (Feb. 27, 2015).
[40] *Id*.
[41] *Id*. at *2.
[42] *Id*. at *3.

backpay or reinstatement remedies are not available due to a complainant's immigration status, thereby, availing the agency of the option to utilize the court's contempt power.[43]

The General Counsel's guidance on the Board's *Babcock* decision will be discussed in Section VII.

V. EXPANSION OF *SPECIALTY CARE*: DETERMINING THE APPROPRIATE UNIT

The size and scope of appropriate collective bargaining units is one of the most debated subjects of the Board in recent years. The Board's re-examination of standards used to determine the appropriate size and scope of a proposed bargaining unit in *Specialty Healthcare* addressed bargaining units in non-acute healthcare facilities, specifically, nursing homes.[44] Under *Specialty Healthcare*, once a union establishes that a proposed bargaining unit is appropriate the burden then shifts to the employer to establish that any employees it considers to be inappropriately excluded from the proposed unit share an "overwhelming community of interest" with the included employees.[45]

Recently, the NLRB expanded the reach of *Specialty Healthcare* outside of the non-acute health care industry in *Macy's Inc.*[46] and *Value City Furniture.*[47] In *Macy's Inc.*, the Board affirmed the Regional Director's ruling that cosmetic and fragrance employees in a department store are an appropriate unit at a single Macy's store.[48] In *Value City Furniture*, the Board affirmed the Regional Director's determination that a group of home furnishing consultants was an appropriate unit under *Specialty Healthcare*.[49] The employer argued that the bargaining unit include *all* non-supervisor and guard employees in the store—not just home furnishing consultants.[50]

However, the Board signaled an outer limit to the reach of *Specialty Healthcare* in *The Neiman Marcus Group, Inc. d/b/a Bergdorf Goodman.*[51] In *Neiman Marcus Group* women's shoe sales associates in two distinct departments within the store petitioned for recognition as a bargaining unit.[52] Relying on *Specialty Healthcare*, the Regional Director found that the proposed unit was appropriate.[53] The Board reversed that decision, however, finding the "boundaries of the petitioned-for unit [did] not resemble any administrative or operational lines drawn by the [employer]."[54] The Board noted that though one group of women's shoe sales associates worked in a stand-alone department, the other group was actually part of a larger

[43] *Id*. at *3-4.
[44] 357 NLRB No. 83 (2011).
[45] 357 NLRB No. 83, at *1 (2011).
[46] 361 NLRB No. 4 (2014).
[47] *Value City Furniture*, Case No. 08-RC-120674, 2014 NLRB LEXIS 243 (Apr. 3, 2014).
[48] 361 NLRB No. 4, at *1 (2014).
[49] *Value City Furniture*, Case No. 08-RC-120674, 2014 NLRB LEXIS 243 (Apr. 3, 2014).
[50] *Id.*
[51] 361 NLRB No. 11 (2014).
[52] *Id*. at *1.
[53] *Id*.
[54] *Id*. at 3.

department that sells clothes as well as shoes.[55] Additionally, the Board noted that the two groups did not share distinct skills or receive specialized training compared to other apparel sales staff.[56] Accordingly, the Board held that the petitioned-for unit was inappropriate.

VI. SECTION 7 RIGHTS

A. Social Media and Electronic Communications

i. Application of an Old Statute to a Modern Development.

In recent years, the Board has wrestled with the application of the NLRA to social media. In a recent case, the Board addressed protection of "likes" and comments in Facebook posts. In *Three D, LLC d/b/a Triple Play Sports Bar and Grille*[57], the Board held that a Facebook "like" and comment could constitute protected activity under Section 7.

Employees of Triple Play discovered they owed state taxes and speculated that they owed because of a clerical mistake by the Triple Play owner.[58] Some employees raised concerns with management regarding the tax issue and Triple Play scheduled a staff meeting to address employee concerns.[59] Before the meeting, a former employee vented about the issue in a Facebook status update on which the former employee and others made additional comments.[60] Triple Play alleged that the responsive comments made by the former employee were defamatory and disparaging to Triple Play.[61]

Vincent Spinella, an employee of Triple Play, "liked" the former employee's initial Facebook status update.[62] Jillian Sanzone, another current employee, commented on the former employee's initial Facebook status update, calling the Triple Play owner an expletive.[63] The owner ultimately discharged Spinella and Sanzone for their involvement in the former employee's Facebook post.[64] The Administrative Law Judge ("ALJ") determined that Section 7 of the NLRA protected the Facebook discussion because the discussion related to terms of employment and was intended for the employees' mutual aid and benefit.[65] The Board affirmed.[66]

Triple Play argued that Sanzone and Spinella adopted the former employee's allegedly defamatory and disparaging comments as a result of their Facebook activities and therefore engaged in unprotected activity.[67] The NLRB disagreed and clarified that the standards

---

[55] *Id*.
[56] *Id*.
[57] 361 NLRB No. 31 (2014).
[58] *Id*. at *2.
[59] *Id*.
[60] *Id*.
[61] *Id*. at *3.
[62] *Id*.
[63] *Id*. at *2.
[64] *Id*. at *3.
[65] *Id*.
[66] *Id*. at *1.
[67] *Id*. at *3.

announced in *NLRB v. Elec. Workers Local 1229*[68] ("Jefferson Standard") and in *Linn v. United Plant Guard Workers of Am.,*[69] are applicable in this context.[70] Applying the aforementioned standards, the Board has held that "employee communications to third parties in an effort to obtain their support are protected where the communication indicated it is related to an ongoing dispute between the employees and the employers and the communication is not so disloyal, reckless, or maliciously untrue as to lose the Act's protections."[71]

The Board found that Spinella's "like" and Sanzone's comment endorsed their former co-worker's initial Facebook status update, which was protected under Section 7, and not the later comments made by the former employee. The Board then analyzed Spinella and Sanzone's comments under the Jefferson Standard and *Linn* and found that the comments were not disloyal because they did not mention Triple Play's products or services.[72] The Board further explained that the comments were not defamatory because there was no evidence that the employees' underlying claim, that their tax liability was due to an error by Triple Play, was maliciously untrue.[73] Additionally, the Board noted that Sanzone's use of an expletive in her comment was her way of voicing her opinion about the Triple Play owner.[74]

In contrast, recently the Board provided guidance on when social media posts are unprotected under the NLRA. In *Richmond District Neighborhood Center,*[75] the Board affirmed an ALJ decision that a Facebook conversation between two employees was not protected under the Act.[76] Ian Callaghan and Kenya Moore worked for a community center that provides after-school activities for students and engaged in a Facebook conversation laced with profanity and disparaging remarks about the Center's management.[77] Among the topics discussed during the conversation were the employees' intentions to overlook the Center's rules and plan activities for the students on their own, plans to teach the students how to draw graffiti on the facility's walls, plans to engage in activities without considering the Center's budget, and plans to take field trips whenever they desired.[78] The Center became aware of the communication and rescinded offers of employment to Callaghan and Moore for the next school year.[79] Callaghan filed an unfair labor practice charge against the Center alleging he was terminated for engaging in protected concerted activity.[80] The Board found that the Facebook conversation exhibited "pervasive advocacy of insubordination" that was egregious enough to lose protection under the Act.[81] The degree of detail with which the employees discussed advocating insubordinate acts was key to

[68] 346 U.S. 464 (1953)
[69] 383 U.S. 53 (1966)
[70] *Id*. at *5-6.
[71] *Id*. at *5.
[72] *Id*.
[73] *Id*. at *6.
[74] *Id*.
[75] 361 NLRB No. 74 (2014).
[76] *Id*. at *1.
[77] *Id*. at *1-2.
[78] *Id*.
[79] *Id*. at *2.
[80] *Id*. at *3.
[81] *Id*.

the Board's decision.[82] The Board noted that its decision was not based on the employee's use of profanity or disparaging characterization of the Center's management staff.[83]

ii. Electronic Communication.

In a highly anticipated decision, the Board considered whether employees have the right to use an employer email system for Section 7 activities in *Purple Communications, Inc*.[84] Many believed this to be a settled issue in light of the Board's decision in *Register Guard*,[85] which held that employees did not have a right to use an employer's email system for Section 7 purposes because the email system was the property of the employer.[86] Relying on *Register Guard*, the ALJ dismissed allegations in the instant case that the employer violated Section 8(a)(1) of the Act by prohibiting the use of its email system and electronic equipment for activity unrelated to the employer's business purposes.[87] The Board reversed the ALJ's decision and found that the employer's electronic communication policy violated Section 8(a)(1) of the Act and also overruled *Register Guard* "to the extent it holds that employees can have no statutory right to use their employer's email systems for Section 7 purposes."[88]

The Board established a new framework for determining whether an employee has a right to use an employer's email system for Section 7 activities. The Board explained that there is a presumption that any employee who has access to their employer's email system cannot be prohibited from using the employer email system for Section 7 purposes, absent special circumstances.[89] Though the Board did not explicitly define special circumstances, the Board noted that special circumstances are determined by the nature of the employer's business.[90] Additionally, the Board clarified that its holding is limited to email systems only and that the presumption of permitted use is limited to nonworking time.[91] The Board specified that the holding does not prevent employers from monitoring their email systems for productivity purposes or for other reasons that could give rise to employer liability, as long as the employer "does nothing out of the ordinary, such as increasing its monitoring during an organizational campaign or focusing its monitoring efforts on protected conduct or union activities."[92]

In support of its decision, the Board relied on *Republic Aviation*[93] in which, in the Board's own words, "[the Supreme Court]…approved the Board's established presumption that a ban on oral solicitation on employees' nonworking time was an unreasonable impediment to self-organization and that a restriction on such activity must be justified by 'special circumstances' making the restriction necessary in order to maintain production and

---

[82] *Id*.
[83] *Id*. fn. 9.
[84] 361 NLRB No. 126 (2014).
[85] 351 NLRB 1110 (2007).
[86] *Id*. at 1110.
[87] 361 NLRB No. 126, at *3 (2014).
[88] *Id*. at *1.
[89] *Id*.
[90] *Id*. at 13.
[91] *Id*.
[92] *Id*. at 16.
[93] *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

discipline."[94] The Board reasoned that in today's working environments, email communication is a significant means of communication—much like oral communication.[95] Accordingly, the Board determined that its treatment of employer email systems required a new approach.

The majority set forth several grounds on which employers may be permitted to limit or ban employee use of e-mail for Section 7 activities, namely:

> (1) The rule "applies only to employees who have already been granted access to the employer's email system in the course of their work and does not require employers to provide such access";[96]
>
> (2) "[A]n employer may justify a total ban on nonwork use of email, including Section 7 use on nonworking time, by demonstrating that special circumstances make the ban necessary to maintain production or discipline",[97] although the Board explains that "[b]ecause limitations on employee communication should be no more restrictive than necessary to protect the employer's interests, we anticipate that it will be the rare case where special circumstances justify a total ban on nonwork email use by employees";[98] and
>
> (3) "Absent justification for a total ban, the employer may apply uniform and consistently enforced controls over its email system to the extent such controls are necessary to maintain production and discipline."[99]

Member Miscimarra dissented, asserting the property right justifications advanced by the Register Guard majority and criticizing the Board majority for creating a "new statutory right."[100] Member Johnson wrote a separate dissent stating that *Republic Aviation* cannot be properly applied to employee e-mail communications since Board precedent shows that there is no Section 7 right to the use of employer-provided equipment.[101]

The Board remanded the case back to the ALJ for reconsideration in light of its decision. On March 16, 2015, the ALJ issued a supplemental decision that applied the Board's holding to the facts presented in the case.[102] The ALJ held that Purple Communication's Electronic Communication Policy violated Section 8(a)(1) of the Act because the policy was broad enough to prohibit the use of the company's email system for Section 7 activities during nonworking times.[103] Purple Communications declined to argue that the policy was lawful under the NLRA due to the "special circumstances" defense articulated by the Board.[104] In the original hearing, Purple Communications employees testified that the purpose of electronic communications

---

[94] 361 NLRB 126, at *6.
[95] *Id*. at * 6-8.
[96] *Id*. at *1.
[97] *Id*.
[98] *Id*. at *14.
[99] *Id*. at * 1.
[100] *Id*. at * 17.
[101] *Id*.
[102] *Purple Communications, Inc*., Case 21-CA-095151 (NLRB Div. of Judges, Mar. 16, 2015).
[103] *Id*. at *4.
[104] *Id*.

policy was to prevent "computer viruses, the transmission of inappropriate information, and the release of confidential information."[105] The ALJ noted that Purple Communications' proffered reasons for the policy were not sufficient to sustain the "special circumstances" defense.[106]

B. Continued Examination of Work Rules

Employer work rules and policies have come under intense scrutiny by the Board in recent years, with a particular interest in confidentiality policies and non-solicitation policies. As a result of the increased scrutiny, many employers have reexamined their policies; however, the quantity of Board decisions issued regarding work rules has made this into an ever-evolving body of law.

i. Confidentiality Rules

In three recent decisions, the Board explored the boundaries of written and unwritten confidentiality policies and also the legitimate confidentiality interests of employers. In *MCPc, Inc.*[107] the Company maintained a confidentiality policy prohibiting "idle gossip or dissemination of confidential information within [the Company], such as personal or financial information."[108] The ALJ found that the policy was overbroad and the Board affirmed the ALJ's decision, finding that employees could construe the policy to prohibit discussions protected under Section 7 of the NLRA.[109]

In *Philips Electronics North American Corp.*[110] the Board considered whether or not Philips maintained an "informal" confidentiality policy. Lee Craft worked for Philips Electronics and had a history of performance and disciplinary problems.[111] Craft received a final warning for inappropriate behavior in violation of company policy related to his harassment of a co-worker.[112] After the warning was issued, Craft allegedly showed his disciplinary warning notice to other employees and also violated other provisions of the warning.[113] A management employee created a summary of the incident that included the following statement: "employees are aware that disciplinary forms are confidential information and should not be shared on the warehouse floor, at any time, much [sic] especially during working hours."[114] Due to Craft's violation, he was discharged for, among other things, "sharing confidential documentation and information during working hours[.]"[115] The Company did not maintain an official confidentiality policy.[116]

---

[105] *Id*. at *5.
[106] *Id*. at fn.8.
[107] 360 NLRB No. 39 (2014).
[108] *Id*. at *5.
[109] *Id*. at *1.
[110] 361 NLRB No. 16 (2014).
[111] *Id*. at *1.
[112] *Id*.
[113] *Id*.
[114] *Id*. at *2.
[115] *Id*.
[116] *Id*.

The General Counsel argued that Philips maintained an unlawful rule that employee discipline is confidential.[117] However, the ALJ found that Craft was lawfully terminated and that Philips did not unlawfully maintain a rule requiring employees to keep disciplinary actions confidential.[118] The Board reversed the ALJ's decision only as to the confidentiality rule.[119] The Board's decision focused on management's wording in the incident summary and in Craft's discharge notice, and found that there was sufficient evidence to establish that Philips maintained an unlawful confidentiality policy related to discipline.[120] The Board noted that the language in both documents admitted to the existence of a rule.[121]

On the other hand, the Board recently issued an opinion supporting the confidentiality interests of employers. In *Flex Frac Logistics, LLC*,[122] the Board affirmed an ALJ's determination that an employer lawfully terminated an employee for violating a confidentiality rule the Board actually deemed unlawful.[123] Lopez had access to the rates Flex Frac charged its clients due to her work in the accounting department.[124] Lopez knew that Flex Frac closely guarded the information and that disclosure was prohibited under Flex Frac's confidentiality rule.[125] Lopez disclosed confidential rate information to a former driver for the company.[126] Soon thereafter, trucking companies that made deliveries for Flex Frac demanded more money for their services.[127] Flex Frac refused to pay more for deliveries, and the trucking companies ultimately stopped making deliveries for Flex Frac.[128] Though the source of the information was never revealed, Flex Frac believed that Lopez disclosed the information and terminated her for violating the confidentiality rule. [129]

The ALJ determined that the discharge was proper because the employee was not engaged in protected activity under Section 7.[130] The NLRB affirmed the decision, finding that Lopez betrayed Flex Frac's strong confidentiality interest and caused the company harm, in spite of finding in a previous decision that the confidentiality rule was unlawful.[131] The Board reasoned that other employees would understand that Lopez was terminated for gross misconduct and that any chilling impact on the exercise of Section 7 rights would be minimal.[132]

---

[117] *Id*.
[118] *Id*.
[119] *Id*.
[120] *Id*. at *2-3.
[121] *Id*. at *3.
[122] 360 NLRB No. 120 (2014).
[123] *Id*. at *1.
[124] *Id*.
[125] *Id*.
[126] *Id*. at *1-2.
[127] *Id*. at *2.
[128] *Id*.
[129] *Id*.
[130] *Id*.
[131] *Id*.
[132] *Id*.

ii. Non-Solicitation Policies

In two cases decided within a few days of each other, the Board examined employer non-solicitation policies. Non-solicitation policies have received varied treatment by the Board over the years. In *Mercedes-Benz U.S. International, Inc*.[133] the Board affirmed an ALJ's decision that an employer's non-solicitation policy violated the NLRA.[134] The problematic portion of the policy stated "MBUSI prohibits solicitation and/or distribution of non-work related materials by Team Members during work time or in working areas."[135] Even though Mercedes-Benz actually allowed employees to discuss union activity in the workplace, in spite of the policy, that fact did not save Mercedes-Benz from an adverse decision.[136] The ALJ reasoned that the rule did not have to be enforced to be unlawful.[137]

In *Conagra Foods, Inc*.,[138] the Board considered the definition of "solicitation." Conagra maintained a non-solicitation policy and also posted a letter that "reminded" employees that union discussions on the production floor were prohibited by the company's non-solicitation policy.[139] The United Food and Commercial Workers instituted an organizing campaign at Conagra's plant in Troy, Ohio.[140] Janette Haines worked at the facility and was a supporter of the campaign.[141] Haines spoke with two employees, Schipper and Courtaway, in the restroom during a break about signing union authorization cards and both employees indicated that they would.[142] A few days later, Haines passed Schipper and Courtaway on the production floor and told them that she placed authorization cards in their lockers.[143] Courtaway was cleaning at the time and stopped cleaning momentarily when Haines spoke to her.[144] However, Schipper was waiting for her shift to begin.[145] Courtaway reported the conversation and Haines was given a verbal warning for violating the Company's non-solicitation policy.[146] Haines filed an unfair labor practice charge and an ALJ determined that Conagra violated Section 8(a)(3) and 8(a)(1) of the Act by disciplining Haines.[147]

The Board affirmed the ALJ's decision and held that Haines' behavior could not lawfully violate the company's non-solicitation policy because her actions did not amount to solicitation.[148] The Board reasoned that solicitation usually means asking someone to sign an authorization card, not the simple mention of a union authorization card.[149] The Board explained that Haines' statement that she placed the authorization cards in the employee's mailboxes was

---

[133] 361 NLRB No. 120 (2014).
[134] *Id*.
[135] *Id*. at *3.
[136] *Id*. at *8.
[137] *Id*.
[138] 361 NLRB No. 113 (2014).
[139] *Id*. at *3.
[140] *Id*. at *1.
[141] *Id*.
[142] *Id*.
[143] *Id*.
[144] *Id*.
[145] *Id*.
[146] *Id*. at *2.
[147] *Id*.
[148] *Id*.
[149] *Id*.

not a solicitation because it did not call for a response of any kind and did not pose a significant disruption to the production floor as the message was conveyed in a few seconds.[150] The Board went on to hold that the Company letter that "reminded" employees about the non-solicitation policy was unlawful because it could be viewed as barring all discussions during working times.[151]

Member Miscimarra dissented, finding that the majority' s definition of solicitation requires an employee to display a union authorization card which will make it difficult to determine in advance if solicitation is prohibited by an employer.[152]

VII. REMEDIES

A. Additional Requirements for Backpack Awards.

In *Don Chavas, LLC d/b/a Tortillas Don Chavas*[153] the Board considered and adopted its holding in *Latino Express, Inc.*,[154] a decision issued without a valid Board quorum according to the *Noel Canning*[155] decision. In *Latino Express* the Board held that in cases where employees are awarded make-whole relief, employers must report the back pay amount to the Social Security Administration so that it can be allocated to the appropriate calendar quarters for the employee.[156] Additionally, *Latino Express* held that employers are required to reimburse employees for any additional federal or state taxes the employee may owe due to receiving a lump-sum back pay award.[157]

In *Don Chavas*, the Board affirmed an ALJ decision which found that the employer violated Section 8(a)(1) of the Act by constructively discharging and threatening to discharge employees engaged in protected activity.[158] The Board granted the employees make-whole relief in line with the *Latino Express* decision and specified that the additional remedial obligations applied in all pending and future cases.[159] The Board reasoned that the additional remedial requirements would ensure that prevailing employees would incur minimal disadvantages should they receive a backpay award, but noted that the General Counsel had the burden to show the extent of any adverse tax liability resulting from a backpay award.[160]

B. More Stringent Remedies for Repeat Violators.

Under the authority of Section 10(c)[161] of the NLRA, the Board ordered rarely used remedies in *HTH Corporation*.[162] HTH had a long history of litigation with the Board resulting

---

[150] *Id*.
[151] *Id*. at *3.
[152] *Id*. at *10.
[153] 361 NLRB. No. 10 (2014).
[154] 359 NLRB No. 44 (2012).
[155] 134 S. Ct. 2550 (2014).
[156] 359 NLRB No. 44, at *1 (2012).
[157] *Id*.
[158] 361 NLRB. No. 10, at *1 (2014).
[159] *Id*. at 2.
[160] *Id*. at. *4-5.
[161] 29 U.S.C. §160(c).
[162] *HTH Corporation*, 361 NLRB No. 65 (2014).

from HTH's numerous violations the NLRA over a ten (10) year period.[163] Examples of HTH's violations included unlawfully granting promotions and wage increases during the period before an election, unlawfully withdrawing recognition from the selected union, and unilaterally changing terms and conditions of employment.[164] To remedy HTH's previous unfair labor practices, the Board ordered the issuance of Section 10(j) injunctions.[165] Additionally, a federal court found HTH in contempt of court for violating a federal court's injunction.[166]

Upon finding violations of the Act in the instant case, the ALJ recommended a cease-and-desist order and a notice reading requirement, in addition to the Board's standard remedies.[167] The Board affirmed the ALJ's remedies, but determined that additional non-standard remedies were warranted due to HTH's continued violations.[168] The notable remedies include monetary damages, which included an award of litigation costs, and other related costs, to the General Counsel and to the Union.[169] Additionally, the Board expanded the ALJ's notice reading requirement by ordering the attendance of HTH supervisors at a reading of the notice and ordering the publication of the notice in a generally circulated publication.[170] In a critique of the majority decision, Member Johnson argued that the grant of litigation costs was beyond the scope of the remedies authorized by the NLRA.[171] However, the majority identified Board case law in which litigation expenses had been awarded in cases involving bad faith in the conduct of the litigation.[172] Having found that HTH demonstrated bad faith in the litigation by failing to remedy earlier unfair labor practices, the Board majority determined that an award of litigation costs was appropriate.[173]

In addition, the Board discussed in detail the possibility of awarding front pay to an employee who was twice unlawfully terminated for engaging in protected activity.[174] The Board ultimately decided against awarding front pay in this case because neither the union nor GC had requested it.[175] But the Board strongly suggested that it would award such a remedy in a future case, stating that "the Supreme Court's decision in *Pollard* [*v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001)] provides strong support for concluding that an award of front pay reasonably serves a make-whole purpose that falls squarely within the Board's remedial authority."[176]

---

[163] *Id*. at 2.
[164] *Id*.
[165] *Id*.
[166] *Id*.
[167] *Id*.
[168] *Id*. at *3.
[169] *Id*.
[170] *Id*.
[171] *Id*. at *26.
[172] *Id*. at *3.
[173] *Id*. at *4.
[174] *Id*. at *10.
[175] *Id*. at *11.
[176] *Id*.

VIII. OTHER SIGNIFICANT CASES

A. *Pacific Lutheran University*[177]

In *Pacific Lutheran*, the Board articulated new tests for determining when the Board could exercise jurisdiction over faculty-members at self-identified religious colleges and universities and for determining when faculty members are managerial employees and therefore excluded from a proposed bargaining unit.

Pacific Lutheran University is a university affiliated with the Evangelical Lutheran Church in America.[178] The Service Employees International Union filed a petition seeking to represent all non-tenure eligible contingent faculty members employed by Pacific Lutheran.[179] On appeal of the Regional Director's Direction of Election, Pacific Lutheran argued that they were exempt from the Board's jurisdiction with regard to the representation petition because they are a religious organization and alternatively that, if the Board could properly exercise jurisdiction, the *full-time* contingent faculty members included in the proposed bargaining unit were managerial employees and should be excluded from the bargaining unit.[180]

First, the Board examined the jurisdiction issue. The Board reviewed its standard developed after the Supreme Court's Decision in *NLRB v. Catholic Bishop of Chicago.*[181] Prior to *Catholic Bishop*, the Board only declined to assert jurisdiction in cases involving a religiously sponsored organization if the organization was completely religious, and not just religiously associated.[182] In *Catholic Bishop*, the Court dismissed the Board's test and held that the Board could not assert jurisdiction over two catholic schools with regard to a representation petition of lay teachers because the Board's jurisdiction would create a significant risk that First Amendment religious rights would be infringed as the teachers played a significant and unique role in the fulfilling the mission of the church-operated schools.[183] After *Catholic Bishop*, the Board used the "substantial religious character" test to determine if the jurisdiction could be asserted over self-identified religious organizations.[184] However, the aforementioned test was not applied consistently which prompted the Board to articulate a new test in the instant case.

Under the new test, the threshold issue in determining whether the Board may assert jurisdiction over a proposed bargaining unit of faculty members of a self-identified religious university or college, is whether "the college or university demonstrates that it holds itself out as providing a religious educational environment."[185] If the institution satisfies the threshold requirement, the institution must then show that it "holds out the petitioned-for faculty members as performing a religious function…[which] requires a showing by the college or university that it holds out those faculty as performing a specific role in creating or maintaining the university's

[177] *Pacific Lutheran University*, 361 NLRB No. 157 (2014).
[178] *Id*. at *11.
[179] *Id*. at *1.
[180] *Id*.
[181] 440 U.S. 490 (1979).
[182] *Id*. at *3.
[183] *Id*.
[184] *Id*. at *4.
[185] *Id*. at *6.

religious educational environment."[186] The Board specified that evidence to sustain the threshold issue may be found in the institution's "handbooks, mission statement, corporate documents, course catalogs, and documents published on a school's website" that indicate that a college or university holds itself out as providing a religious environment. [187] With regard to the second part of the test, the Board specified that appropriate evidence may be found in "job descriptions, employment contracts, faculty handbooks, statements to accrediting bodies, [or] statements to prospective and current faculty and students."[188] The Board noted that "generalized statements" of faculty members' support of the mission or goals of the school are not enough to sustain the aforementioned test because general statements do not convey that the "religious nature of the university affects faculty member's job duties and responsibilities."[189] If an institution puts forth sufficient evidence for each prong of the test, the Board will not assert jurisdiction.

The Board applied the new test to the facts of Pacific Lutheran and held that the university met the threshold requirement, in spite of the fact that the university generally emphasized acceptances of other faiths and explicitly deemphasized specific Lutheran traditions.[190] However, Pacific Lutheran failed to show that it held out the contingent faculty members as performing a religious function in support of the university.[191] The Board found that there was little to no evidence that the faculty members at issue were held out as having a specific role in creating or maintaining the university's religious environment.[192] A general statement in the contingent faculty member's contracts that they are "require[d]…to be committed to the mission and objectives of the University" was not sufficient to satisfy the second prong of the test.[193] Accordingly, the Board determined that it could properly assert jurisdiction over the case.

Next, the Board considered whether the full-time non-tenure eligible contingent faculty members were managerial employees. In *NLRB v. Yeshiva University*[194], the Supreme Court held that a group of faculty members at Yeshiva University could not be included in a proposed bargaining unit because they were managerial employees.[195] In *Yeshiva,* the Court examined the structure of educational institution and defined a managerial employee as a person who "formulate[s] and effectuate[s] management policies by expressing and making operative the decisions of their employer."[196] Since *Yeshiva,* the Board has issued many opinions discussing the managerial status of university faculty members. Considering the Board's divergent body of law on the issue, the Board decided to articulate a clearer test in the instant case.

Under the new test, the Board will focus on the "breadth and depth of the faculty's authority[.]"[197] In doing so, the Board will examine the faculty members' role in the university

[186] *Id*. at *1.
[187] *Id*. at *6.
[188] *Id*. at *9.
[189] *Id*. at 8.
[190] *Id*. at *12.
[191] *Id.*
[192] *Id*.
[193] *Id*. at *13.
[194] 444 U.S. 672 (1980).
[195] *Id*. at 691.
[196] *Id*. at 682.
[197] 361 NLRB No. 157, at *16 (2014).

and will give more weight to areas of policy making that affect the institution as a whole.[198] Additionally, the Board will look to the administrative structure of the university as well as the nature of the faculty's employment with the university.[199] The Board divided its consideration of the decision-making authority of faculty members into five categories, noting the primary and secondary categories. The primary categories are (1) academic programs; (2) enrollment management; and (3) finances.[200] The secondary categories are: (1) academic policy; and (2) personnel policy and decisions.[201] Additionally, the Board announced that decisions in a particular policy area would only be attributed to faculty if it was shown that the faculty "actually exercise[d] control or ma[de] effective recommendations."[202]

The Board applied the new test to the full-time non-tenure eligible contingent faculty members at Pacific Lutheran and determined that they could not be excluded under the managerial exemption because there was not sufficient evidence that the faculty members actually controlled or made effective recommendations in any of the primary or secondary categories.[203]

The new tests articulated by the Board in *Pacific Lutheran* will likely have a significant effect on the organizing of university faculty members, particularly in institutions with large populations of non-tenured faculty.

B. *Babcock & Wilcox Construction Co., Inc.*[204]

In *Babcock* the Board overturned over thirty years of precedent with regard to the Board's standard for deferring to arbitral decisions in cases alleging violations of Section 8(a)(1) and 8(a)(3) of the NLRA. The Board's previous standard, often referred to as the "*Olin* standard", provided that deferral was appropriate in unfair labor practice cases where the contractual issue was factually parallel to the unfair labor practice issue, the arbitrator was generally presented with the relevant facts of the unfair labor practice, and the award was not clearly repugnant to the NLRA.[205] The Board's new standard is articulated as follows: If the arbitration procedures appear to have been fair and regular, and if the parties agree to be bound, the Board will defer to an arbitral decision if the party urging deferral shows that (1) the arbitrator was explicitly authorized to decide the unfair labor practice issue—which may be effectuated through a collective bargaining agreement or the explicit authorization of the parties; (2) the arbitrator was presented with and considered the statutory issue, or was prevented from doing so by the party opposing deferral; and (3) Board law reasonably permits the award.[206] Additionally, the burden of proving that deferral is appropriate is with the proponent of the deferral.[207] The Board noted that arbitrators are not expected to engage in a detailed analysis of

---

[198] *Id*. at 17.
[199] *Id*.
[200] *Id*.
[201] *Id*. at *17-18.
[202] *Id*. at *18.
[203] *Id*. at *24.
[204] *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132 (2014).
[205] *Olin Corp.*, 268 NLRB 573, 573-74(1984).
[206] *Id*. at *5.
[207] *Id*. at *2.

Board law to meet the new standard.[208] However, the arbitrator must identify the unfair labor practice issue and provide at least a general explanation for his or her finding.[209] Additionally, the fact that the Board may have reached a different decision than the arbitrator does not result in a denial of deferral, as the Board explained that the arbitrator's decision only needs to be reasonable.[210]

Upon review of the *Olin* standard, the Board determined that the standard did not effectuate the goals of the NLRA because the *Olin* standard amounted to a "conclusive presumption" that the arbitrator adequately considered the unfair labor practice if the arbitrator was merely presented with facts relevant to a contract violation *and* the unfair labor practice, but did not require the arbitrator to even acknowledge consideration of the unfair labor practice is the arbitration decision.[211] The Board pointed out that in its opinion the shortcomings of the *Olin* standard were clearly evident in *Babcock* as there was clear evidence that Babcock terminated an employee for her union activity.[212] However, under the *Olin* standard, the Board would be forced to defer to the arbitrator's determination that Babcock terminated the employee for using profanity.[213]

In line with its reasoning for modifying the post-arbitral standard, the Board also clarified the standards for prearbitral deferral and deferral to settlement agreements. With regard to prearbitral deferral, the Board held that they "would no longer defer unfair labor practice allegations to the arbitral process" unless the parties explicitly authorized such action.[214] Finally, the Board held that it will continue to defer to prearbitral settlement agreements arising under the grievance-arbitration process, only if "the parties intended to settle the unfair labor practice issue; [the parties] addressed it in the settlement agreement; and Board law reasonably permits the settlement agreement."[215]

In light of the Board's new standards, the General Counsel issued a memorandum on February 10, 2015 providing guidelines for the new deferral arbitral awards, the arbitral process, and grievance settlements.[216] One of the most significant topics discussed in the memo is the application of the *Babcock* standard to pending and future cases. The memo advises Regional Offices to apply the *Olin* standard in cases in which in the arbitration hearing occurred on or before December 15, 2014 and apply the *Babcock* standard if the collective-bargaining agreement under which the grievance arose was executed after December 15, 2014.[217] Additionally, the memo provides that in cases in which the "collective-bargaining agreement, under which the grievance arose, was executed on or before December 15, 2014, and the arbitration hearing occurred after December 15, 2014" the applicable standard will depend upon

---

[208] *Id*. at *7.
[209] *Id*.
[210] *Id*. at * 7.
[211] *Id*. at *4.
[212] *Id*. at *5.
[213] *Id*. at *6
[214] *Id*. at *13.
[215] *Id*.
[216] *Guideline Memorandum Concerning Deferral to Arbitral Awards, the Arbitral Process, and Grievance Settlements to Section 8(a)(1) and (3) cases*, Office of the General Counsel, Memorandum GC 15-02 (Feb. 10, 2015)
[217] *Id*. at *9.

the whether the arbitrator was explicitly authorized to decide the statutory issue.[218] If the arbitrator was authorized, the *Babcock* standard will apply. However, if the arbitrator was not explicitly authorized to decide the statutory issue, the *Olin* standard would apply.[219] With regard to the new prearbitral deferral standard and the new settlement deferral standard, the memo provides that the applicability of those standards should mirror the applicability of the postarbitral standard discussed above.[220]

C. *Fedex Home Delivery*[221]

Section 2(3) of the NLRA excludes independent contractors from the definition of employee.[222] In *FedEx Home Delivery* the Board examined FedEx Home Delivery's staffing model for drivers to determine if the drivers were employees and independent contractors. The case arose out of a representation petition by the Teamsters to represent drivers who work out of FedEx Home Delivery's Hartford, CT facility.[223] The Regional Director found that the drivers were employees within the meaning of the NLRA.[224] FedEx argued to the Board that the drivers were independent contractors citing a decision issued by the Court of Appeals for the District of Columbia in a similar case involving FedEx drivers in Wilmington, Massachusetts, in which the court held that drivers were independent contractors.[225] The court relied on the common law agency test; however, the court placed primary importance on evidence of "significant entrepreneurial opportunity for gain or loss."[226]

In the instant case, the Board rejected the court of appeals' approach and found that the drivers were employees under the NLRA and not independent contractors.[227] The Board applied a multi-factor common law agency test, which includes consideration of (i) the skills required in the particular occupation, (ii) the length of time for which a person is employed, and (iii) whether or not the work is part of the regular business of the employer—along with eight (8) other factors.[228] The Board specified that there is not one decisive factor within the eleven-factor test to determine independent contractor status.[229]

In the case of the FedEx Home Delivery drivers, some factors weighed in favor of an independent contractor status, including the fact that drivers must purchase their own vehicle and uniforms and that they operate their routes independently. There was also evidence that weighed in favor of an employee status, including the fact that FedEx imposed standards on the drivers related to their trucks and their physical appearance.[230] Additionally, the Board determined that the drivers' arrangement with FedEx prevented them from maintaining an independent business

---

[218] *Id*.
[219] *Id*.
[220] *Id*. at *11, 14.
[221] *FedEx Home Delivery*, 361 NLRB No. 55 (2014).
[222] 29 U.S.C. § 152(3).
[223] *Id*. at *3.
[224] *Id*. at *1.
[225] *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009).
[226] *Id*. at 498-99.
[227] *Id*. at *1.
[228] *Id*. at *2.
[229] *Id*.
[230] *Id*. at *5.

due to the schedule that FedEx required the drivers to maintain.[231] Other specific requirements that FedEx imposed on drivers added to an overall level of control by FedEx Home Delivery at odds with drivers' operation of independent businesses.[232]

[231] *Id*. *15.

[232] *Id*. Special thanks to Judy Bennett Garner, an Associate in the Labor and Employment Section of Jackson Walker, L.L.P., for assisting with the preparation of this paper.