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Recent Developments Under the National Labor Relations Act

Rod Tanner
Matt Pierce
Tanner and Associates, PC
Fort Worth, Texas

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

A. Impact of *Noel Canning*

The National Labor Relations Board (*NLRB*) is still dealing with the aftermath of the Supreme Court's decision in *Noel Canning*, 134 S. Ct. 2550 (2014). 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. *Id.* at 2578. The decision related to all Board decisions issued between January 2012 and August 2013. Following the decision, there were 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 Richard Griffin 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)[1] of the National Labor Relations Act (*NLRA*), the Board would decide whether to modify or set aside the orders in the cases. Mr. Griffin explained that in the remaining 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 that time, the Board has issued decisions in cases remanded back to its docket and simply ratified many of the decisions nullified by *Noel Canning*, including the *Noel Canning* decision itself.

However, this ratification has not been universal. In *Fresenius USA Mfg., Inc.*, an employee who supported the union anonymously wrote offensive and threatening statements on union newsletters to try to convince his coworkers to support the union in an upcoming election. 362 NLRB No. 130 (June 24, 2015) (slip op. at 1). In response to employee complaints, the employer conducted an investigation and questioned the employee. The employee denied writing the comments; when he later unintentionally confessed to writing the comments during a phone conversation, he tried to conceal his identity. *Id.*

The employer discharged the employee for both his written statements and his subsequent dishonesty. *Id.* Originally, in 2012, Board held that the written statements constituted protected activity, and since the employer had discharged him because of that activity, it had violated the Act. 358 NLRB No. 138 (Sept. 19, 2012). After the D.C. Circuit Court of Appeals vacated that decision and remanded the case in accordance with *Noel Canning*, however, the Board changed its position and held that although "there is no dispute that [the employer] relied on those handwritten statements as one reason for suspending and discharging" [the employee]," his dishonesty was an unprotected activity that served as an independent basis for discharge. 362 NLRB No. 130 (slip op. at 3). This independent reason superseded any potential violation of the Act. The Board reasoned that a respondent can meet its burden of showing such an "independent (if not sole) reason" by various means. *Id.* Thus, in that case, the new Board disagreed with the previous decision and dismissed the charges against the employer relating to the employee's discharge.

[1] 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."

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.[2] This action removed any doubt about administrative appointments made during the aforementioned period.

B. Partial Invalidation of Lafe Solomon's Tenure as Acting General Counsel

On August 7, 2015, the D.C. Circuit Court found on a petition for review in *Southwest General, Inc. v. NLRB*, No. 14-1107 (D.C. Cir. Aug. 7, 2015), that Lafe Solomon unlawfully served as Acting General Counsel of the NLRB while he was both the acting officer and the permanent nominee in violation of the Federal Vacancies Reform Act (*FVRA*), 5 U.S.C. §§ 3345 *et seq.* The court therefore invalidated Solomon's tenure from January 5, 2011 to November 4, 2013,[3] and the Board order in that case was vacated because the complaint issued during Solomon's invalidated tenure.

The court, however, noted that "this case is not Son of *Noel Canning*" and should not "retroactively undermine a host of NLRB decisions." *Id.* (slip op. at 13). Indeed, the court held that Solomon's actions during his invalidated tenure as Acting General Counsel are *voidable*, not void, under the FVRA. The court then announced that the decision is to be narrowly applied to only those cases where the parties have raised a timely FVRA objection to complaints issued between January 5, 2011 and November 4, 2013.

C. 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.

II. EXPEDITED ELECTION RULES[4]

On April 14, 2015, the Board's newly adopted expedited election rules, which amend its rules and regulations governing representation-case procedures, took effect. The Board's new rules effectively reduce the time between the filing of a petition for representation and an actual

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[2] *NLRB Officials Ratify Agency Actions Taken During Period When Supreme Court Held Board Members Were Not Validly Appointed*, National Labor Relations Board, http://www.nlrb.gov/news-outreach/news-story/nlrb-officials-ratify-agency-actions-taken-during-period-when-supreme-court (last visited July 13, 2015).

[3] The court did not invalidate Solomon's tenure from June 2010 to January 2011, when he was serving as Acting General Counsel but had not yet been nominated for the permanent position of General Counsel.

[4] Representation—Case Procedures, 79 Fed. Reg. 74308 (Dec. 15, 2014) (to be codified at 29 C.F.R. pt. 101, 102, 103). *See also Guidance Memorandum on Representation Case Procedure Changes Effective April 14, 2015*, Office of the General Counsel, Memorandum GC 15-06 (Apr. 6, 2015).

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.[5]

Business organizations raised legal challenges to the new rules before their implementation in the Western District of Texas and in the D.C. District Court, and members of Congress also attempted to challenge the implementation of the rules.[6] However, neither of the lawsuits requested preliminary injunctive relief that could immediately delay the implementation of the rules. Accordingly, the Board trained its staff and labor law practitioners on the new procedures, and the rules came into effect on time.

Since the implementation of the new rules, both of the federal court challenges have been dismissed at summary judgment. See *Associated Builders & Contractors of Texas, Inc. v. NLRB*, No. 1-15-CV-026 RP, 2015 WL 3609116 (W.D. Tex. June 1, 2015); *Chamber of Commerce of United States of Am. v. Nat'l Labor Relations Bd.*, No. CV 15-0009 (ABJ), 2015 WL 4572948 (D.D.C. July 29, 2015).[7]

Below is a summary of the most significant changes made by the new rules.[8]

Hearings and Review of Regional Director Rulings

Under the new rules, pre-election hearings will generally be held eight 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.

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[5] In an April 6, 2015 informational meeting regarding these new rules, Martha Kinard, Regional Director for NLRB Region 16, explained that the median number of days between foiling of the petition and the election in Region 16 is 42 days. She stated that under the new rules, the Region could theoretically process a petition to election in 15 days, but that it seems unlikely that the Region will actually be able to process any petition to election in less than 25 days.

[6] 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 Obama Vetoes Congressional Resolution, Backs NLRB Adoption of 'Overdue Reforms'*, BLOOMBERG BNA, http://www.bna.com/obama-vetoes-congressional-n17179924833/ (Apr. 1, 2015).

[7] An appeal of the Western District of Texas's decision is currently pending before the Fifth Circuit. *Assoc. Builders and Contractors, et al v. NLRB*, No. 15-50497 (Fifth Circuit).

[8] 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).

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 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.[9] 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.[11]

On the other hand, the Board may occasionally request a written position statement from the petitioning party (generally, the Union requesting an election). However, the petitioner's position will generally be solicited orally at hearing. But because preclusion applies to both parties, the petitioner should be prepared to offer all of its arguments at the time of the hearing, whether through writing or orally.

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.

[9] The filing and service must be completed before noon the day before the pre-election hearing.

[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] Region 16 Regional Director Martha Kinard explained that it is within her discretion to allow a non-petitioning to supplement its statement of position, but that such a request would only be granted if good cause were shown. She then suggested that there will very rarely, if ever, be good cause for a supplemental position statement to be allowed.

Electronic Filing

The new rules allow for the electronic filing of documents by all parties. Additionally, NLRB offices may transmit notices and documents electronically. When a document is filed with the Board, it must be served on other parties in the same format in which the filing was made. However, if a document is electronically filed, it does not necessarily have to be served by electronic mail (since some small employers may not have access to email). Instead, the filing party must ensure that the document gets into the other parties' hands simultaneously with the filing, so a facsimile or hand delivery of service would be sufficient.

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, as set out in *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117 (3d Cir. 1982), enforcing 259 NLRB 148 (1981). However, since that 1982 decision by the Third Circuit, the Board, without any real explanation and without overruling any prior decisions, imposed additional requirements that narrowed the standard for joint employer status. Beginning with *TLI, Inc.*, 271 NLRB 798 (1984) and *Laerco Transportation*, 269 NLRB 324 (1984), the Board limited the application of the joint employer test by discounting a putative employer's reservation of the right to control workers and focusing exclusively on its actual exercise of that control, and by requiring that the exercise be direct, immediate, and not limited and routine.

Throughout the last year General Counsel Griffin has urged the Board to adopt a less stringent standard for determining joint employer status. On August 27, 2015, the Board finally revisited its joint employer standard and adopted a more inclusive standard in *Browning-Ferris Indus. of California, Inc.*, 362 NLRB No. 186 (Aug. 27, 2015).

A. *Browning-Ferris Industries*

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. *Browning-Ferris Industries of California*, Case No. 32-RC-109684 (Regional Director's Decision and Direction of Election, Aug. 16, 2013) at *1. The Teamsters sought to represent a unit of employees consisting of sorters, housekeepers, and screen cleaners. *Id*. at *4. This proposed unit included both Browning employees and Leadpoint employees. *Id*. at *2. The Teamsters argued that the unit was appropriate because Browning and Leadpoint are joint employers. *Id*.

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. *Id*. at *15-19. 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." General Counsel Amicus Br. 16-17 (Jun. 26, 2014), *available* at http://www.nlrb.gov/case/32-RC-109684?page=1. His proposed test considered factors such as the proliferation of "perma-temps" (temporary labor) in various industries.

On August 27, 2015, in a 3-2 decision, the Board rejected the Regional Director's finding and returned to the general standard articulated by the Third Circuit in 1982, whereby "two or more statutory employers are joint employers of the same statutory employees if they 'share or codetermine those matters governing the essential terms and conditions of employment.'" 362 NLRB No. 186 at *2 (internal citation omitted). The Board explained that "the initial inquiry is whether there is a common-law employment relationship with the employees in question. If this common-law employment relationship exists, the inquiry then turns to whether the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining." *Id.*

The Board expressly overruled two lines of Board law that had limited the evidence considered relevant to determining whether the putative employer held the necessary control over terms and conditions of employment. First, the Board stated, "We will no longer require that a joint employer not only *possess* the authority to control employees' terms and conditions of employment, but also *exercise* that authority." *Id.* (emphasis in original). The Board further explained that where a user employer has reserved a contractual right to set specific terms or conditions of employment for the supplier employer's workers, "it retains the ultimate authority to ensure that the term in question is administered in accordance with its preferences." *Id.* at *17.

Second, the Board held that it is no longer necessary to show that a statutory employer's control is exercised directly and immediately. *Id.* at *2. Instead, indirect control, such as control exercised through an intermediary, may be sufficient to establish joint employer status. *Id.* The Board also made clear that the requisite control need not be exercised in a non-routine manner. Stated differently, "[w]here the user firm owns and controls the premises, dictates the essential nature of the job, and imposes the broad, operational contours of the work, and the supplier firm, pursuant to the user's guidance, makes specific personnel decisions and administers job performance on a day-to-day basis, employees' working conditions are a byproduct of two layers of control." *Id.* at *18. For example, the Board explained that in this case, "BFI communicated precise directives regarding employee work performance through Leadpoint's supervisors. We see no reason why this obvious control of employees by BFI should be discounted merely because it was exercised via the supplier rather than directly." *Id.* at *21.

The Board retained the requirement that the employer's control be over "essential terms and conditions of employment," but continued to "adhere to the Board's inclusive approach in defining" such terms. *Id.* at *19. Applying its new standard to the facts of the case, the Board held that Browning-Ferris, which owned and operated the recycling facility (referred to as the *user employer*) was a joint employer of workers who performed sorting work in the facility who were supplied by and employed by Leadpoint (the *supplier employer*). The Board based in holding on the user employer's control over several terms and conditions of employment, including:

- **Hiring, firing and discipline**. "BFI retains the right to require that Leadpoint 'meet or exceed [BFI's] own standard selection procedures and tests,' requires that all applicants undergo and pass drug tests, and proscribes the hiring of workers deemed by BFI to be ineligible for rehire. . . . Similarly, BFI possesses the same unqualified right to 'discontinue the use of any personnel' that Leadpoint has assigned." *Id.* at *22.

- **Supervision, direction of work, and hours**. "Of particular importance is BFI's unilateral control over the speed of the streams and specific productivity standards for sorting. . . . BFI managers also assign the specific tasks that need to be completed, specify where Leadpoint workers are to be positioned, and exercise near-constant oversight of employees' work performance. The fact that many of their directives are communicated through Leadpoint supervisors hardly disguises the fact that BFI alone is making these decisions. . . . In addition, BFI specifies the number of workers that it requires, dictates the timing of employees' shifts, and determines when overtime is necessary." *Id.* at *23.

- **Wages**. "BFI specifically prevents Leadpoint from paying employees more than BFI employees performing comparable work." *Id.* The joint employers were party to a cost-plus contract "coupled here with the apparent requirement of BFI approval over employee pay increases." *Id.*

In explaining the need for this shift toward a new standard, the Board explained: "It is not the goal of joint-employer law to guarantee the freedom of employers to insulate themselves from their legal responsibility to workers, while maintaining control of the workplace. Such an approach has no basis in the Act or in federal labor policy." *Id.* at *25. The Board stated that the previous standard could no longer keep pace with changes in the diversifying American workforce. For example, it explained, in 2014, 2.87 million American workers – or two percent of the nation's workforce – were employed through temporary agencies, compared with only 1.1 million in 1990. *Id.* at *15.

The decision in Browning-Ferris has far-reaching implications. If workers at a fast-food restaurant employed by a franchisee or contractor unionize, they could now be immediately entitled to bargain with both the franchisee and the corporate headquarters.[12] However, in its decision the Board explained that, "as a rule, a joint employer will be required to bargain only with respect to such terms and conditions which it possesses the authority to control." *Id.* at *20. The decision also makes a franchisor more accountable for unfair labor practices committed by a franchisee. Finally, the franchisor can no longer simply terminate a franchisee or contractor when it appears that the particular contractor's employees were about to unionize; for the joint employer, this union busting tactic will now constitute an unfair labor practice.

In their lengthy dissent, Members Miscimarra and Johnson claimed that the majority creates a joint-employer test under which "there can be no certainty or predictability regarding the identity of the employer." *Id.* (Miscimarra and Johnson, dissenting). The Board's majority countered that it "cannot attempt today to articulate every fact and circumstance that could define

[12] *See* discussion of the pending cases against McDonald's USA, LLC, *infra*.

the contours of a joint employment relationship", and that when questions arise over a particular relationship, those issues will be best examined and resolved individually. *Id.* at *20.

B. *CNN America, Inc.*

In September 2014, while *Browning-Ferris* was still pending, the Board issued a decision that considered, among other things, whether or not a joint employment relationship was present. In *CNN America, Inc.*, 361 NLRB No. 47 (2014), the Board held that CNN and Team Video Services (*TVS*) — a former subcontractor of CNN — were joint employers. *Id.* at *1. The dispute stemmed from CNN's decision to cancel a subcontract agreement with TVS. *Id.* TVS employees operated the electric equipment in CNN's Washington D.C. and New York studios and were also unionized. *Id.* at *2. 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. *Id.* at *1.

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. *Id.* 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'". *Id.* at *3 (quoting *Laerco Transportation*, 269 NLRB 324, 325 (1984)). 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. *Id.* at *3-7.

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 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. *Id.* at *8. 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. *Id.* at *32.

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. *Id.* at *26.

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." *Id.* at *36. Member Miscimarra also rejected the majority's use of the "additional factors" in their joint-employer analysis. *Id.* 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. *Id.*

C. *McDonald's USA, LLC, A Joint Employer*

The General Counsel is moving forward with challenging the Board's joint employer standard in the franchisor/franchisee context. On December 19, 2014, the General Counsel announced that eighty-six (86) complaints had been issued against McDonald's USA, LLC and certain franchisees.[13] The fast food chain and its franchisees are accused of retaliating against employees who participated in demonstrations demanding representation and $15 per hour wages. In an effort to streamline the litigation surrounding the complaints, the NLRB consolidated hearings for the cases in three different regions.

Soon after those proceedings were consolidated, McDonald's moved for a bill of particulars or, in the alternative, to strike the joint employer allegations and dismiss the complaint, arguing that the complaint relied on vague and conclusory allegations which did not provide sufficient notice of the new joint employer theory proposed by the General Counsel. On January 22, 2015, the administrative law judge denied that motion, and on August 14 – before *Browning-Ferris* was decided – the Board upheld the judge's decision. *McDonald's USA, LLC, A Joint Employer, et al*., 362 NLRB No. 168 (Aug. 14, 2015).

In its brief decision, the Board explained that under the Board's Rules and Regulations, a well-pleaded complaint requires only a clear and concise statement of the facts upon which jurisdiction is predicated, and a clear and concise description of the acts claimed to constitute unfair labor practices; "[t]he General Counsel is not required to plead his evidence or the theory of the case in the complaint." *Id.* at *1. It then held that the facts as pled in the complaints against McDonald's were sufficient to put the employer on notice that the General Counsel is alleging a joint employer status based on McDonald's control over the labor policies of all of its franchisees. *Id.*

Just two weeks after that decision, the Board issued its opinion in *Browning-Ferris,* adopting its new standard for determining joint employer status. That standard will be applied as hearings in the McDonald's case move forward, making it much more likely that the parent company will be held liable in the event that any franchisees are found to have violated the Act.

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[13] *NLRB Office of General Counsel Issues Consolidated Complaints Against McDonald's Franchisees and their Franchisor McDonald's, USA, LLC as Joint Employers*, NLRB Office of Public Affairs, December 19, 2014, available at http://www.nlrb.gov/news-outreach/news-story/nlrb-office-general-counsel-issues-consolidated-complaints-against.

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.[14] 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*, 351 N.L.R.B. 1110 (2007), 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 VII for a more detailed discussion of this issue.

Weingarten and Non-union Settings: General Counsel Griffin appears to be questioning precedent established in *IBM Corp*., 341 N.L.R.B. 1288 (2004), which held that Weingarten rights did not extend to non-union employees. In *Weingarten,*[15] 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:[16] 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 Memorandum discussing employer work rules, immigration, and guidance on the application of the Board's decision in *Babcock & Wilcox Construction Co., Inc*.[17] In Memorandum GC 15-04, the General Counsel provides detailed guidance on employee work rules that violate the Act and also provides a

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[14] *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).

[15] *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

[16] *Affirmation of the 10(j) Program*, Office of the General Counsel, Memorandum GC 14-03 (Apr. 30, 2014).

[17] *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).

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. Memorandum GC 15-03 at *1. 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. *Id.* 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. *Id.* at *2. 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. *Id.* at *3. Additionally, the Memorandum notes that the Board may seek formal settlement agreements in cases in which back pay 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. *Id.* at *3-4.

The General Counsel's guidance on the Board's *Babcock* decision is discussed in Section IX, *infra*.

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*, 357 NLRB No. 83 (2011), addressed bargaining units in non-acute healthcare facilities, specifically, nursing homes. 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. *Id.* at *1.

Recently, the NLRB expanded the reach of *Specialty Healthcare* outside of the non-acute health care industry in *Macy's Inc.,* 361 NLRB No. 4 (2014), and *Value City Furniture*, Case No. 08-RC-120674, 2014 WL 1321039 (Apr. 3, 2014). 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. 361 NLRB No. 4, at *1. 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*. Case No. 08-RC-120674, 2014 WL 1321039 at *1 n.1. The employer argued that the bargaining unit include *all* non-supervisor and guard employees in the store—not just home furnishing consultants. *Id.*

However, the Board signaled an outer limit to the reach of *Specialty Healthcare* in *The Neiman Marcus Group, Inc. d/b/a Bergdorf Goodman*, 361 NLRB No. 11 (2014). In *Neiman Marcus Group,* women's shoe sales associates in two distinct departments within the store petitioned for recognition as a bargaining unit. *Id.* at *1. Relying on *Specialty Healthcare*, the Regional Director found that the proposed unit was appropriate. *Id.* 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]." *Id.* at *3. 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 department that sells clothes as well as shoes. *Id.* Additionally, the Board noted that the two groups did not share distinct skills or receive specialized training compared to other apparel sales staff. *Id.* Accordingly, the Board held that the petitioned-for unit was inappropriate.

VI. REPRESENTATION FOR STUDENT-ATHLETES: THE *NORTHWESTERN* DECISION

One of the most anticipated Board decisions of the past year involved efforts to organize made by student-athletes who receive grant-in-aid scholarships to play football for Northwestern University. In March 2014, the Regional Director of Region 13 issued a Decision and Direction of Election in which he determined that those football players who receive athletic scholarships from Northwestern, a private university, were *employees* of the university under Section 2(3) of the Act, and that a bargaining unit including all scholarship players was appropriate. *Northwestern University,* 362 NLRB No. 167 at *1 (Aug. 17, 2015). An election was held on April 25, 2014, and the ballots were impounded pending the Board's review of the Regional Director's decision. *Id* n.1.

The Board issued an invitation to the parties and interested amici to submit briefs, and it received 22 amici briefs from various groups of universities, labor organizations, and other interested parties. *Id.* at *1. However, in its unanimous August 17, 2015 decision, the Board declined to assert jurisdiction in the case and chose not to determine whether the scholarship players were statutory employees under the Act. *Id.* The Board noted that even in cases where it has the statutory authority to take action, "the Board sometimes properly declines to do so, stating that the policies of the Act would not be effectuated by its assertion of jurisdiction in that case." *Id.* at *3 (quoting *NLRB v. Denver Building Trades Council*, 341 U.S. 675, 684 (1951)).

In this case, the Board exercised its discretion not to assert jurisdiction and dismissed the representation petition filed by the union (College Athletes Players Association) on behalf of the scholarship players. *Id.* at *1, 7. The Board held that asserting jurisdiction would not promote labor stability due to the nature of the National Collegiate Athletic Association (*NCAA*) and the Big Ten Conference. *Id.* at *4-6. Of the roughly 125 teams that play football under the NCAA's Division I Football Bowl Subdivision (*FBS*), 108 are state-run colleges and universities, over which the Board lacks jurisdiction by statute. *Id.* at *6. Furthermore, Northwestern is the only private school in the 14-member Big Ten Conference, meaning that the Board could not assert jurisdiction over any of Northwestern's main competitors. *Id.* Thus, the Board held, asserting jurisdiction over this one university's football players would not promote stability in labor relations. *Id.*

The Board was careful to limit the scope of its decision. It explained that this decision does not concern any other individuals involved with FBS football, such as coaches, employees or referees. *Id.* Furthermore, the Board declined jurisdiction only over the players in this case and did not preclude reconsideration of the issue in the future, especially if new circumstances arise which compel the Board to revisit its policy. *Id.*

VII. 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,* 361 NLRB No. 31 (2014), 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. *Id*. at *2. Some employees raised concerns with management regarding the tax issue and Triple Play scheduled a staff meeting to address employee concerns. *Id*. 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. *Id*. Triple Play alleged that the responsive comments made by the former employee were defamatory and disparaging to Triple Play. *Id*. at 3.

Vincent Spinella, an employee of Triple Play, "liked" the former employee's initial Facebook status update. *Id*. Jillian Sanzone, another current employee, commented on the former employee's initial Facebook status update, calling the Triple Play owner an expletive. *Id*. at *2. The owner ultimately discharged Spinella and Sanzone for their involvement in the former employee's Facebook post. *Id*. at *3. 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. *Id*. The Board affirmed. *Id*. at *1.

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. *Id*. at *3. The NLRB disagreed and clarified that the standards announced in *NLRB v. Elec. Workers Local 1229* (*Jefferson Standard*)[18] and in *Linn v. United Plant Guard Workers of Am.*[19] are applicable in this context. 361 NLRB No. 31 at *5-6. 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

[18] 346 U.S. 464 (1953).
[19] 383 U.S. 53 (1966).

communication is not so disloyal, reckless, or maliciously untrue as to lose the Act's protections." *Id*. at *5.

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. *Id*. 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. *Id*. at *6. 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. *Id*.

In contrast, recently the Board provided guidance on when social media posts are unprotected under the NLRA. In *Richmond District Neighborhood Center*, 361 NLRB No. 74 (2014), the Board affirmed an ALJ decision that a Facebook conversation between two employees was not protected under the Act. *Id*. at *1. 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. *Id*. at *1-2. 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. *Id*. The Center became aware of the communication and rescinded offers of employment to Callaghan and Moore for the next school year. *Id*. at *2. Callaghan filed an unfair labor practice charge against the Center alleging he was terminated for engaging in protected concerted activity. *Id*. at *3. The Board found that the Facebook conversation exhibited "pervasive advocacy of insubordination" that was egregious enough to lose protection under the Act. *Id*. The degree of detail with which the employees discussed advocating insubordinate acts was key to the Board's decision. *Id*. 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. *Id*. n.9.

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*., 361 NLRB No. 126 (2014). Many believed this to be a settled issue in light of the Board's decision in *Register Guard*, 351 NLRB 1110 (2007), 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. 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. 361 NLRB No. 126, at *3. 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." *Id*. at *1.

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. *Id*. 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. *Id*. at *13. 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. *Id*. 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." *Id*. at *15

In support of its decision, the Board relied on *Republic Aviation*324 U.S. 793 (1945), 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 discipline." 361 NLRB No. 126 at *7. The Board reasoned that in today's working environments, email communication is a significant means of communication—much like oral communication. *Id.* at *6-8. 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";[20]
>
> (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",[21] 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";[22] and

[20] 361 NLRB No. 126 at *1.
[21] *Id.*
[22] *Id.* at *14.

(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."[23]

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." *Id.* at *17. 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. *Id.*

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. *Purple Communications, Inc*., Case 21-CA-095151 (NLRB Div. of Judges, Mar. 16, 2015). 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. *Id*. at *4. Purple Communications declined to argue that the policy was lawful under the NLRA due to the "special circumstances" defense articulated by the Board. *Id*. In the original hearing, Purple Communications employees testified that the purpose of electronic communications policy was to prevent "computer viruses, the transmission of inappropriate information, and the release of confidential information." *Id*. at *5. The ALJ noted that Purple Communications' proffered reasons for the policy were not sufficient to sustain the "special circumstances" defense. *Id*. at n.8.

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.,* 360 NLRB No. 39 (2014), the Company maintained a confidentiality policy prohibiting "idle gossip or dissemination of confidential information within [the Company], such as personal or financial information." *Id.* at *5. 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. *Id.* at *1.

In *Philips Electronics North American Corp.,* 361 NLRB No. 16 (2014), 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. *Id.* at

[23] *Id.* at * 1.

*1. Craft received a final warning for inappropriate behavior in violation of company policy related to his harassment of a co-worker. *Id.* After the warning was issued, Craft allegedly showed his disciplinary warning notice to other employees and also violated other provisions of the warning. *Id.* 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." *Id.* at *2. Due to Craft's violation, he was discharged for, among other things, "sharing confidential documentation and information during working hours[.]"*Id.* The Company did not maintain an official confidentiality policy. *Id.*

The General Counsel argued that Philips maintained an unlawful rule that employee discipline is confidential. *Id.* 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. *Id.* The Board reversed the ALJ's decision only as to the confidentiality rule. *Id.* 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. *Id.* at *2-3. The Board noted that the language in both documents admitted to the existence of a rule. *Id.* at *3.

On the other hand, the Board recently issued an opinion supporting the confidentiality interests of employers. In *Flex Frac Logistics, LLC*, 360 NLRB No. 120 (2014), the Board affirmed an ALJ's determination that an employer lawfully terminated an employee for violating a confidentiality rule the Board actually deemed unlawful. *Id.* at *1. Lopez had access to the rates Flex Frac charged its clients due to her work in the accounting department. *Id.* Lopez knew that Flex Frac closely guarded the information and that disclosure was prohibited under Flex Frac's confidentiality rule. *Id.* Lopez disclosed confidential rate information to a former driver for the company. *Id.* Soon thereafter, trucking companies that made deliveries for Flex Frac demanded more money for their services. *Id.* at *2. Flex Frac refused to pay more for deliveries, and the trucking companies ultimately stopped making deliveries for Flex Frac. *Id.* 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. *Id.*

The ALJ determined that the discharge was proper because the employee was not engaged in protected activity under Section 7. *Id.* 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. *Id.* 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. *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.*, 361 NLRB No. 120 (2014), the Board affirmed an ALJ's decision that an employer's non-solicitation policy violated the NLRA. 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." *Id.* at *3. 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. *Id.* at *8. The ALJ reasoned that the rule did not have to be enforced to be unlawful. *Id.*

In *Conagra Foods, Inc*., 361 NLRB No. 113 (2014), 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. *Id.* at *3. The United Food and Commercial Workers instituted an organizing campaign at Conagra's plant in Troy, Ohio. *Id.* at *1. Janette Haines worked at the facility and was a supporter of the campaign. *Id.* 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. *Id.* A few days later, Haines passed Schipper and Courtaway on the production floor and told them that she placed authorization cards in their lockers. *Id.* Courtaway was cleaning at the time and stopped cleaning momentarily when Haines spoke to her. *Id.* However, Schipper was waiting for her shift to begin. *Id.* Courtaway reported the conversation and Haines was given a verbal warning for violating the Company's non-solicitation policy. *Id.* 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. *Id.*

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. *Id.* The Board reasoned that solicitation usually means asking someone to sign an authorization card, not the simple mention of a union authorization card. *Id.* The Board explained that Haines' statement that she placed the authorization cards in the employee's mailboxes was 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. *Id.* 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. *Id.* at *3.

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. *Id.* at *10.

C. "Special Circumstances" Under Which an Employer May Ban Union Messages on Employees' Publicly Visible Apparel

In a recent decision, the D.C. Circuit Court of Appeals addressed the Board's "special circumstances" doctrine, which limits the scope of Section 7 rights by allowing an employer to "lawfully ban union messages on publicly visible apparel on the job when the company reasonably believes the message may harm its relationship with its customers or its public image." *S. New England Tel. Co. v. N.L.R.B.,* No. 11-1099, 2015 WL 4153873, at *2 (D.C. Cir. July 10, 2015) (citing *See Bell–Atlantic–Pennsylvania, Inc.,* 339 NLRB 1084, 1086 (2003)).

The case before the D.C. Circuit Court involved employees of AT&T who were involved in contentious contract negotiations with the employer. *Id.* at *1. As part of a public campaign to put pressure on the company, the union distributed black and white striped t-shirts to employees which said "Inmate" and "Prisoner of AT$T." *Id.* Hundreds of employees, many of whom interacted with customers or worked in public, sometimes entering the homes of customers, wore these shirts during work hours. *Id.* AT&T ordered all employees who interacted with customers or worked in public to remove the shirts and issued one-day suspensions to the 183 employees who did not comply with that order. *Id.*

The Board held that AT&T violated the employees' Section 7 rights, stating that the "Inmate/Prisoner" t-shirts did not fall under the special circumstances doctrine because the shirts "would not have been reasonably mistaken for prison garb", so "the totality of the circumstances would make it clear" that a technician wearing the shirt was an AT & T employee "and not a convict." *Southern New England Telephone Co.,* 356 NLRB No. 118, at *1 (2011). But the D.C. Circuit overturned this decision, holding that the Board unreasonably applied the special circumstances doctrine. 2015 WL 4153873, at *3. The true test, the court explained, is not whether AT&T's customers might confuse these shirts with actual prison garb, but whether AT&T could reasonably believe that the message on these shirts may harm its relationship with customers or harm its public image. *Id.*

Finding that AT&T reasonably believed that the "Inmate/Prisoner" shirts could damage their relationship with customers or public image, the court reversed and vacated the Board's order. *Id.* at *4. The court stated that "[c]ommon sense sometimes matters in resolving legal disputes", explaining that "[n]o company, at least one that is interested in keeping its customers, presumably wants its employees walking into people's homes wearing shirts that say 'Inmate' and 'Prisoner.'" *Id.* at *1.

VIII. REMEDIES

A. Additional Requirements for Back Pay Awards.

In *Don Chavas, LLC d/b/a Tortillas Don Chavas,* 361 NLRB. No. 10 (2014), the Board considered and adopted its holding in *Latino Express, Inc*., 359 NLRB No. 44 (2012), a decision issued without a valid Board quorum according to the *Noel Canning* 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. *Id.* at *1. 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. *Id.*

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. 361 NLRB. No. 10 at *1. 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. *Id.* at *2. The Board reasoned that the additional remedial requirements would ensure that prevailing employees

would incur minimal disadvantages should they receive a back pay award, but noted that the General Counsel had the burden to show the extent of any adverse tax liability resulting from a back pay award. *Id.* at *4-5.

B. More Stringent Remedies for Repeat Violators.

Under the authority of Section 10(c)[24] of the NLRA, the Board ordered rarely used remedies in *HTH Corporation*, 361 NLRB No. 65 (2014). HTH had a long history of litigation with the Board resulting from HTH's numerous violations the NLRA over a ten (10) year period. *Id.* at 2. 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. *Id.* To remedy HTH's previous unfair labor practices, the Board ordered the issuance of Section 10(j) injunctions. *Id.* Additionally, a federal court found HTH in contempt of court for violating a federal court's injunction. *Id.*

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. *Id.* The Board affirmed the ALJ's remedies, but determined that additional non-standard remedies were warranted due to HTH's continued violations. *Id.* at *3. 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. *Id.* 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. *Id.* 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. *Id.* at *26. 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. *Id.* at *3. 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. *Id.* at *4.

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. *Id.* at *10. The Board ultimately decided against awarding front pay in this case because neither the union nor GC had requested it. *Id.* at *11. 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." *Id.*

[24] 29 U.S.C. §160(c).

IX. OTHER SIGNIFICANT CASES

A. Pacific Lutheran University

In *Pacific Lutheran University*, 361 NLRB No. 157 (2014), 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. *Id.* at *11. The Service Employees International Union filed a petition seeking to represent all non-tenure eligible contingent faculty members employed by Pacific Lutheran. *Id.* at *1. 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. *Id.*

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,* 440 U.S. 490 (1979). As the Board explained, 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. 361 NLRB No. 157 at *3. 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. *Id.* After *Catholic Bishop*, the Board used the "substantial religious character" test to determine if the jurisdiction could be asserted over self-identified religious organizations. *Id.* at *4. 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." *Id.* at *6. 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 religious educational environment." *Id.* at *1. 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. *Id.* at *6. 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." *Id.* at *9. 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." *Id.* at *8. 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. *Id.* at *12. However, Pacific Lutheran failed to show that it held out the contingent faculty members as performing a religious function in support of the university. *Id.* 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. *Id.* 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. *Id.* at *13. 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,* 444 U.S. 672 (1980), 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. *Id.* at 691. 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." *Id.* at 682. 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". 361 NLRB No. 157 at *16. In doing so, the Board will examine the faculty members' role in the university and will give more weight to areas of policy making that affect the institution as a whole. *Id.* at *17. 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. *Id.* 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. *Id.* The secondary categories are: (1) academic policy; and (2) personnel policy and decisions. *Id.* at *17-18. 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." *Id.* at *18.

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. *Id.* at *24.

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. FedEx Home Delivery

Section 2(3) of the NLRA excludes independent contractors from the definition of employee. 29 U.S.C. § 152(3). In *FedEx Home Delivery*, 361 NLRB No. 55 (2014), 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. *Id.* at *3. The Regional Director found that the drivers were employees within the meaning of the NLRA. *Id.* at *1. 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. *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009). 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." *Id*. at 498-99.

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. 361 NLRB No. 55 at *1. 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. *Id.* at *2. The Board specified that there is not one decisive factor within the eleven-factor test to determine independent contractor status. *Id.*

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. *Id.* at *5. Additionally, the Board determined that the drivers' arrangement with FedEx prevented them from maintaining an independent business due to the schedule that FedEx required the drivers to maintain. *Id.* at *15. 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. *Id.*[25]

C. Babcock & Wilcox Construction Co., Inc.

In *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132 (2014), 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

[25] The Board later denied FedEx's motion for reconsideration. 362 NLRB No. 29 (Mar. 16, 2015).

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. *See Olin Corp.*, 268 NLRB 573, 573-74 (1984). 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. 361 NLRB No. 132 at *5. Additionally, the burden of proving that deferral is appropriate is with the proponent of the deferral. *Id.* at *2. The Board noted that arbitrators are not expected to engage in a detailed analysis of Board law to meet the new standard. *Id.* at *7. However, the arbitrator must identify the unfair labor practice issue and provide at least a general explanation for his or her finding. *Id.* 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. *Id.* at *7.

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. *Id.* at *4. 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. *Id.* at *5. 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. *Id.* at *6.

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. *Id.* at *13. 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." *Id.*

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. *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). 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. *Id.* at 9. 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 the whether the arbitrator was explicitly authorized to decide the statutory issue. *Id.* 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. *Id.* 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. *Id.* at 11, 14.

D. Verizon New England

In *Verizon New England, Inc*., 362 NLRB No. 24 (Mar. 29, 2015), the Board addressed whether signs displayed in employees' windows during contract negotiations constituted "picketing", which was prohibited by the parties' CBA, or whether it constituted protected Section 7 activity. In that case, the no-strike provision in the parties' contract clearly prohibited "picketing of any of the Company's premises". *Id.* at *1. However, the union had a long-established past practice of ambulatory informational picketing, generally toward the end of a contract's lifespan. *Id.* Accordingly, as contract negotiations were gearing up, the union distributed picket signs to employees which demanded that the employer honor the existing contract. *Id.*

Before any informational picketing started, some employees displayed the picket signs in the windows of their personal vehicles parked on the company's property while at work. *Id.* The company instructed the employees to remove the signs, and they did, without any discipline or disruption of operations. *Id.* The union then filed an unfair labor practice charge, alleging that the display of pro-union signs was a protected activity, and the Regional Director for Region 1 deferred the charge to arbitration under *Collyer Insulated Wire*, 192 NLRB 837 (1971).

At arbitration, the panel of arbitrators held that the employer did not violate the CBA when it ordered employees to remove signs from their windows, finding that this display qualified as "picketing" under the contract. *Id.* at *2. The panel refused to rule on the statutory question, stating: "Whether the [employer's] demand that the signs be removed from employees' vehicles infringed employees' Section 7 rights is a question that we do not have the authority to resolve." *Id.* The ALJ deferred to the arbitration award, holding that it was not repugnant to the Act and stating that "[t]here is nothing in Board law that prevents an arbitrator from interpreting the word 'picket' in a collective bargaining agreement provision prohibiting picketing more broadly than the Board would in an unfair labor practice case not involving such a provision." *Id.*

The Board, however, disagreed and reversed the ALJ. It noted that the new *Babcock & Wilcox* standard, discussed above, would not be applied to pending cases and so decided the deferral question under the previous *Olin* standard. *Id.* at *1 n.2. Under that standard, the Board held that the arbitration award was clearly repugnant to the Act, which protects an employee's display of pro-union signs in his or her car window on an employer's parking lot. *Id.* at *3.

Disagreeing with the ALJ, the Board also held that the union did not clearly waive the right of covered employees to post signs in their car windows by agreeing to the "no picketing" language in the CBA. *Id.* at *4. The Board stated that there was no evidence that this type of display was ever meant or understood to be included under the contract's definition of picketing. *Id.* at *5. Supreme Court and Board precedent establish that these actions were more akin to "bannering", since they did not involve the presence of individuals accompanying the communication or the necessary element of confrontation. *Id.* For these reasons, the Board did not defer to this clearly repugnant arbitration award and instead found that the employer violated the employees' Section 7 rights.

E. Oakland Physicians Med. Ctr.

In *Oakland Physicians Medical Center*, 362 NLRB No. 149 (July 22, 2015), the Board held that a Michigan hospital violated Sections 8(a)(5) and (1) of the Act by making unilateral changes, without consent from or notice to the union, to the employee's health insurance benefits, including the share of premiums paid by the employees.

Chairman Pearce and Member McFerran agreed with the ALJ that per the provisions of the parties' CBA, the employer retained the right to make some changes in the health care plan design, such as selecting a new insurance carrier, "provided that similar coverage is maintained." *Id.* at *1. However, they held, the CBA clearly denied the employer the right to change the employees' premium shares. *Id.*

The Board held that the relevant contract provisions were unambiguous and needed no interpretation, and because the hospital gave no notice to the union of its health care changes, the violation was so obvious that no arbitrator could interpret the hospital's actions differently. *Id.* at *3. For these, reasons, the ALJ and the Board agreed that deferral to arbitration was inappropriate because "no issue of contract interpretation [was] presented." *Id.*[26] The ALJ conducted his deferral analysis under the standards established in *Collyer*, 192 NLRB 837, and *United Technologies*, 268 NLRB 557, 558 (1984). *See id.* As General Counsel Griffin noted in his Guidance Memorandum, the changes to Board deferral policy set out in *Babcock & Wilcox*, discussed above, do not apply to 8(a)(5) cases, except when the 8(a)(5) allegations are entwined with related 8(a)(1) and/or (3) allegations. Memorandum GC 15-02 (Feb. 10, 2015).

Dissenting, Member Johnson wrote that the hospital interpreted the language of the contract differently than the union, and this interpretation could be argued before an arbitrator; and because Board precedent supports deferral to arbitration when the meaning of a contract provision lies at the heart of the labor dispute, the Board should have passed on this case. *Id.* at *6.

[26] Member McFerran also noted that deferral was inappropriate because before the ALJ, the employer argued at length that the union had consented to the mid-contract modifications. *Id.* n.9. This is a statutory defense to the alleged violation of Section 8(b)(5), but it is not a defense that could be argued or considered by an arbitrator, who is limited to considering the express provisions of the CBA. *Id.* Thus, one of the employer's pled and argued defenses was not susceptible to resolution through arbitration.