

**Negotiating and Drafting Settlement Agreements  
in Employment Discrimination Cases:  
Pointers for Plaintiff's and Defense Counsel**

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By:  
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## I. Overview

A. The focus of this presentation will be settlement agreements, and resolving and releasing claims brought under federal and State of South Carolina laws prohibiting discrimination in the workplace. These statutes include:

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e

2. Age Discrimination in Employment Act (“ADEA”), 29 U.S.C. §621 et seq., as amended by the Older Workers Benefit Protection Act (“OWBPA” or collectively referred to as “ADA”)

3. Equal Pay Act (“EPA”), 29 U.S.C. §206(d)

4. Family Medical Leave Act (“FMLA”), 29 U.S.C. §§2601 et seq.

5. Uniform Service Employees Reemployment and Reinstatement Act (“USERRA”) 38 U.S.C. §4301 et seq.

6. South Carolina Human Affairs Law, S.C. Code Ann. §1-13-10

B. State law tort and contract claims are often combined with federal and/or State claims alleging discrimination. Examples of claims are breach of contract, wrongful discharge, violation of public policy, intentional infliction of emotional distress, invasion of privacy, and defamation. While these claims will not be specifically addressed in this presentation, the settlement agreement release language should be broad enough to address these claims.

C. Certain State law claims are not waivable. See S.C. Code Ann. § 41-39-10 (Claim for unemployment benefits) and S.C. Code Ann. § 42-1-620 (Claim for Workers Compensation).

## II. EEOC Guidance on Waivers Under Civil Rights Laws

A. On July 1, 2009, the Equal Employment Opportunity Commission (“EEOC”) issued a guidance document entitled: “Understanding Waivers of Discrimination Claims and Employee Severance Agreement” (“Guidance”). See EEOC Enforcement Guidance on Non-Waivable Employee Rights Under EEOC Enforced Statutes, April, 1997. The Guidance contains, in laymen’s language and question and answer format, an explanation designed to help an employee faced with the issue of whether to sign a waiver understand whether the employer is providing the employee with an enforceable waiver. (EEOC Notice Number 915.002 dated April 10, 1997), <http://www.eeoc.gov/policy/docs/waiver.html>. The Guidance sets forth general principles the EEOC uses in determining whether a waiver of rights under civil rights laws prohibiting discrimination in the workplace are waivable. These principles are as follows:

1. Under the Guidance, a waiver of any right afforded by a federal law prohibiting discrimination is valid only if it is “knowing and voluntary.”
2. If an employee signs a waiver based on improper information, the waiver may be determined to be invalid because it is based on misrepresentation or fraud.
3. It is the EEOC’s position that all waivers requiring employees to waive rights under federal laws prohibiting discrimination (regardless of whether the OWBPA applies) must be easily understood by the employee and may not be obtained through subterfuge.
  - a. In considering whether a waiver is easily understandable, the totality of circumstances is considered including factors such as the education level of the employee, and the language used by the employer.
  - b. If the employer provides the employee with incorrect information, the waiver is subject to being invalidated on grounds of subterfuge or fraud.
4. The right of an employee to file an EEOC charge cannot be waived. The employee always the right to file a charge. The employee can, however, waive the right to a remedy specific to that individual provided the waiver itself is lawful. Similarly, an employee cannot waive a right to cooperate with an EEOC investigation.
5. The Guidance addresses the concept of “tender-back” (the return of consideration or attorney’s fees paid by the employer in the event of breach by the employee) which is prohibited in age discrimination claims, but may be permissible as to other claims.
6. In settlement of an ADEA claim, the employer cannot refuse to perform its obligations under a settlement agreement if the employee challenges the agreement; however, a Plaintiff’s claim that survives a purported waiver is subject to offset by the amount of consideration paid by the employer. *See* Understanding Waivers of Discrimination Claims in Employee Severance Documents, [http://www.eeoc.gov/docs/qanda\\_severance-agreements.html#11](http://www.eeoc.gov/docs/qanda_severance-agreements.html#11).

### III. Standard Provisions to Consider in Drafting a Settlement Agreement Settling Claims under the Discrimination Statutes.

#### A. Whereas Clauses

1. “Whereas clauses” should be simple and direct. They should not include any ambiguous language that could later create confusion as to the obligations of the parties or enforcement under the agreement.

2. The parties should be clearly identified in the “whereas clauses”.
3. The “whereas clauses” should not be drafted in a manner that would create animosity and complicate the opportunity for settlement. Usually, a general statement that the Plaintiff’s employment with the Defendant is being terminated and expressing the desire of the parties to provide for an amicable parting of the ways after identification of the parties is one way to transition into the substantive terms of the agreement without creating controversy.

## B. Standard Provisions

1. **Termination Date.** The agreement should expressly specify the date of termination of the employee. It should be noted that other provisions related to termination date would include payment for any contractual notice owed by the employer which would not constitute consideration under the agreement. Another issue that affects the termination date is whether the employee will serve in any other capacity for a set term.
2. **Consideration.** The agreement should specify the kind and amount of consideration. Consideration in agreements resolving claims must consist of monetary compensation or other benefits that the employee is not otherwise entitled to receive. Accordingly, accrued benefits normally paid by the employer would not be considered adequate consideration. Consideration is not limited to compensation but may consist of other benefits such as employer’s payment of COBRA payments, premiums, a reference letter for prospective employers and other items of value.
3. **Non-admission of Liability.** Employers usually request a provision expressly stating that the fact of entering into the agreement is not an admission of liability or wrongdoing.
4. **Acknowledgement of Receipt of all Wages and Benefits due.** This provision is often used by employers as a positive affirmation from the employee that he or she has received all wages due and benefits owed. Since claims under the Fair Labor Standards Act are not waivable, this kind of clause is often used by employers as an acknowledgement of proper payment.
5. **No Re-Employment Provision.** Some employers, especially if the events leading to termination are volatile or controversial, request the Plaintiff to agree not to seek re-employment with the employer. A possibility exists that such a provision could be considered retaliatory under certain circumstances (more than likely, such a provision will not be positively considered by the EEOC in a positive manner). A modification of a “no re-employment” provision that may be more acceptable, would be to provide that the agreement not to seek re-

employment is in effect for only a limited time period, which would give the parties a “cooling off” period and allow for a change of circumstances. Another way to limit this provision if the company is a large corporation would be to provide that it would not apply to companies acquired by the employer in acquisitions.

6. **Confidentiality**. If an employee has occupied a position involving access to trade secrets, customer lists and other documents valuable to the employer, it is common for the employer to request that a confidentiality provision be included in the settlement agreement. Any prior confidentiality agreements in effect should be considered in preparing the provision in a separation agreement and should be harmoniously incorporated or addressed in the separation agreement.
7. **Non-Competition Agreement**. A non-competition agreement may be appropriate to include in a separation agreement. If a prior non-competition or non-solicitation agreement is in effect, it should be reviewed and incorporated or addressed as appropriate.
8. **Return of Property**. If the employee is in possession of company property, such as company car, computer equipment, keys, etc., a provision should be included specifying a date, time and place for the equipment to be returned.
9. **Entire Agreement**. Settlement agreements typically provide that the settlement agreement is the entire agreement between the parties and that any prior oral or written agreement is merged into the settlement agreement. If, however, there are prior agreements that are to be unaffected by the settlement agreement, however, such as a non-competition or non-solicitation agreement, the settlement agreement should contain appropriate language either incorporating or stating the continued effect of these agreements.
10. **Knowing and Voluntary Agreement**. A provision should be included in the agreement that the employee is knowingly and voluntarily entering into the Agreement.
11. **Release of Claims**. The general consensus is that while a release should contain some general release of claims language, it should also spell out as many laws as may be applicable to ensure that the employee knowingly releases claims under those laws. The release should also be clear as to the parties bound by the release language, such as successors, heirs, executors, and administrators as appropriate.
12. **Non-Disparagement Clause**. Typically, especially in a controversial situation, employees are requested to sign an agreement with a non-disparagement clause. The employee may request that the clause be

mutual. Care should be taken that the clauses are not overly broad from the employer's standpoint since it may be difficult to control the actions of employees in a large company. As to the employee, exceptions should be considered for the employee's family members, accountants or other tax advisors.

13. **Charge Withdrawal.** A clause addressing withdrawal of a charge or a representation that no charge has been filed with the EEOC is typically included in the settlement agreement.
14. **Duty to Cooperate.** An agreement by an employee to cooperate with the company may be requested in certain situations, such as when the employee has specialized knowledge.
15. **Jurisdiction and venue.**
16. **Severability or savings clause.**

IV. Mandatory Elements for a Valid Waiver under the ADEA.

A. A waiver under the ADEA must contain certain additional requirements with the passage of the OWBPA. A waiver must be "knowing and voluntary." A waiver or release will not be determined to be "knowing and voluntary" unless it meets the following minimum statutory requirements:

1. **Written in clear and understandable language.** The language used must be written in "plain English" and not in "legalese". It must be written in a manner calculated to be understood by the individual who will be signing it. In this regard, the specific circumstances of the situation will be considered in determining whether this requirement is met, i.e., experience, education level of employee.
2. **Specific Reference to the ADEA.** The separation agreement must explicitly reference the ADEA and explain that the employee's rights to make a claim under the ADEA are being released.
3. **Restricted Scope of Release.** In order for the agreement to qualify as "knowing and voluntary", it must not contain any provisions purporting to waive rights of the employee that may arise in the future, after execution of the waiver.
4. **Consideration.** The agreement must be supported by consideration. The consideration must be something of value provided by the employer that is in addition to anything of value to which the employee is already entitled.

5. **Consultation with Attorney.** The employee must be specifically advised in the agreement to consult with an attorney prior to signing the agreement.
6. **Availability of Specific Amounts of Time for Consideration of Agreement Prior to Signing.** The employee must be allowed a specific amount of time to consider the agreement prior to signing. In the case of a single employee, the employee must be provided at least 21 days to consider the agreement. If the waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the amount of time that must be provided for consideration is at least 45 days.
7. **Revocation After Signing.** The release must specifically provide the employee with a 7 day period following signing of the agreement in which the employee may revoke the release. The release is not effective or enforceable until the revocation period has expired.
8. **Special Requirements for Group Programs.** If the release is requested in connection with an exit incentive or other employment termination program that is offered to a group or class of employees, special notice provisions apply. See 29 U.S.C. § 626(f)(1).

See 29 C.F.R. §1625.22 (Waiver of Rights and Claims Under the Age Discrimination in Employment Act).

**NOTE:** This paper does not address issues under Internal Revenue Code §409A related to “non-qualified deferred compensation arrangements.”

## V. Court Decisions Involving Settlement Issues that may Arise in Employment Cases.

### A. Authority of Federal Court to Enforce Settlement Agreements.

1. Federal courts possess inherent authority to enforce settlement agreements in discrimination cases and to enter judgment based on the agreement. This authority is part of the Court’s equitable powers.
2. Court authority to enforce a settlement agreement involving a claim under the federal discrimination laws may under appropriate circumstances, be conducted without a plenary hearing: “To exercise its inherent power to enforce a settlement agreement, a district court (1) must find that the parties reached a complete agreement, and (2) must be able to determine its terms and conditions.” Whisnant v. Bedlie, Inc., 2006WL 3827502 (D.S.C. Dec. 28, 2006) (citations omitted).
3. If a factual dispute exists, however, as to an agreement or terms of the agreement, a district court must hold a plenary hearing: “When such a factual dispute arises, the district court must hold a plenary evidentiary

hearing in order to resolve the dispute. Findings must be made on the issues in dispute.” Id. (citation omitted).

B. Common Problems Resulting in Issues as to Whether a Settlement has been Reached.

1. A lack of clear communication between attorney and client.
2. Clients often have second thoughts or remorse over the agreement reached. The Fourth Circuit has specifically held that “having second thoughts about the result of a valid settlement agreement does not justify setting aside an otherwise valid agreement.” Hensley v. Alcon Laboratories, Inc., 277 F.3<sup>rd</sup> 535, 539 (4<sup>th</sup> Cir. 2002) (citation omitted). In Hensley, the Fourth Circuit also noted that “the fact that the agreement is not in writing does not render it unenforceable”. Id., (citation omitted). In Hensley, the settlement agreement at issue was a court facilitated settlement agreement. The Fourth Circuit, however, reversed a summary finding that a settlement agreement had been reached and remanded the case for a plenary hearing on whether a binding agreement had been reached. The Court noted that neither the settlement agreement nor the hearing on the motion to enforce settlement had been placed on the record.
3. In order for a federal court to have inherent power to enforce a settlement agreement, the dismissal order must include a separate provision that explicitly provides that the Court retains jurisdiction over the settlement agreement or the terms of the agreement must be incorporated into a court order.

VI. Basic Concepts for Achieving Settlement.

- A. Realize the distinction between “settlement” strategy, which involves compromise, and trial strategy, which involves winning.
- B. Be fully prepared. Know the facts of the case thoroughly, no matter how insignificant.
- C. Communicate with the client. Explore with the client the ultimate objectives in the litigation. Communicating involves careful listening. There may be opportunities for settlement which the client may not have considered that become apparent through good communication and listening skills. Communicating with the client also involves being candid with the client about the “pros” and “cons” of the client’s case and candidly addressing unrealistic client expectations. Encourage the client to see the “whole picture” and to think of the case, not as a “win/lose” situation but to consider the case in the context of the client’s overall business strategy and objectives.

# 2013 South Carolina Bar Convention

*Employment and Labor Law*  
*Friday, January 25, 2013*

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Public Policy Claims After  
*Barron v. Labor Finders*

# Employment-at-will and Public Policy Exceptions

- *Ludwick v. This Minute of Carolina* (1985)
  - Created Public Policy exception to employment-at-will

Public Policy Exception Has  
Expanded Significantly

# *Barron v. Labor Finders*

- Payment of Wage Claim
- No anti-retaliation provision in the Act

# At the End of the Day ...

## The Primary Issue was:

- *Is it a violation of the Public Policy of the State of South Carolina for an employer to fire an employee because the employee complains internally to management that the employer is not paying wages due in violation of the South Carolina Payment of Wages Act?*

This all becomes an issue because the South Carolina Payment of Wages Act does not contain an anti-retaliation provision. In other words, there is no existing remedy for an employee who is terminated in retaliation for complaining about violation of the Wage Act.

# HISTORY

It all started with ...

*Dumas v. InfoSafe Corp.*, 320 S.C. 188, 463 S.E.2d  
641 (Ct. App. 1995).

We sued InfoSafe and the owner individually for violation of the South Carolina Payment of Wages Act.

We won.

The judge trebled the damages and awarded us attorney's fees, for a total judgment of around \$70,000.

Then the judge dismissed the owner, so our judgment was only against what became the insolvent company.

We appealed that ruling and won. The Court of Appeals held that the definition of “employer” in the Wage Act extended to individuals. Thus, it reinstated the judgment against the individual owner of InfoSafe.

The court said “[t]he South Carolina Payment of Wages Act is remedial legislation designed to protect the working people and assist them in collecting compensation wrongfully withheld.”

The second piece of the puzzle occurred in the mid-1990's when Sonya Keiger walked in my door. This meeting resulted in the reported decision of *Keiger v. Citgo*, 326 S.C. 369, 482 S.E.2d 792 (Ct. App. 1997).

She called the South Carolina Department of Labor and inquired if her employer could cut her wages with no notice. The labor board tells her No – they must provide notice.

# Keiger tells her manager:

- That she contacted the State labor board;
- That, according to the labor board, Citgo was violating the law by cutting her wages without notice; AND
- If the violations were not corrected immediately, she would file a formal complaint with the labor board.

The employer responded by firing Keiger. **Keiger never did file a formal complaint with the labor board.**

The Court said ...

“We hold the issue in the present case, whether an employer’s retaliatory discharge of an employee who **threatens** to invoke her rights under the Payment of Wages Act is a violation of a clear mandate of public policy is...a novel issue;”

AND

Whether the [Payment of Wage] statute itself, which was designed to protect the working people and assist them in collecting wrongfully withheld compensation *See Dumas* (citations omitted) constitutes a legislative declaration of public policy has never been addressed by the courts of this State.

Next came the case of *Evans v. Taylor Made Sandwich Co.*, 337 S.C. 95, 522 S.E.2d 350 (Ct. App. 1999).

*Evans* holds: First the jury has to determine if the employer terminated the employees because they filed a complaint with the Department.

Then they have to determine if the termination violated public policy – i.e., it's up to the jury to decide what is or is not the public policy in South Carolina.

So ...

# State of law before *Barron*:

- If an employee formally complains to the labor board and the employee is fired because of that – probably have a public policy claim;
- If an employee threatens her employer that she is filing with the labor board and she is fired because of the threat – maybe have public policy claim;
- If an employee just complains internally to an employer that they are violating the Wage Act and are fired for the complaint – no one knows;
- It is up to the jury to decide what the public policy of the state is;

# **BARRON CASE**

We filed suit for violation of the South Carolina Payment of Wages Act, breach of contract, breach of contract accompanied by a fraudulent act and wrongful termination in violation of public policy.

Plaintiff consented to summary judgment on the first three payment of wage claims, so all that was left was the wrongful termination in violation of public policy claim.

Procedurally, the case is complex. Defendant filed three summary judgment motions. The third one was granted on Barron's wrongful termination claim. We appealed.

## Court of Appeals Decision:

They uphold the summary judgment.  
They say no claim because Barron was not asked to violate the law and her termination did not violate criminal law.

Supreme Court Holding:

The determination of what constitutes public policy is a question of law for the courts to decide – not the jury. *Barron* overrules *Evans* to the extent *Evans* says a jury determines public policy.

“We overrule the Court of Appeals Opinion to the extent it holds the public policy exception applies only in situations where the employer asks the employee to violate the law or the reasons for the termination itself is a violation of criminal law.”

Ultimately, the Supreme Court upheld the summary judgment because Barron never “implicated” the Wage Act before she was terminated. She never filed a wage claim with the Department of Labor (*Evans*) or threatened to file one (*Keiger*).

The court also declined to address whether an employee who is fired for actually complaining to the labor board has a claim.

# From the Labor Finders perspective:

- Classic set of facts for retaliatory discharge  
but ...
- No legally protected activity  
but ...
- Might that activity become legally protected?

# Take aways

1. Documentation – Barron terminated for poor performance
2. Internal complaint/grievance procedure
3. Address concerns quickly
4. Expect more attempts to expand public policy exception ... and consider this is your advice to clients on both plaintiff and defenses side

# Case law update on public policy exceptions

# **SOUTH CAROLINA BAR CONVENTION 2013**

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## **NATIONAL LABOR RELATIONS BOARD UPDATE<sup>1</sup>**

### **I. SPECIALTY HEALTHCARE AND ITS IMPLICATIONS**

In 2011, the National Labor Relations Board decided a groundbreaking case, *Specialty Healthcare & Rehabilitation Center of Mobile*, which established a union's ability to petition for micro-units in non-acute healthcare facilities. While still novel, the principles set forth in *Specialty Healthcare* have begun to impact the way in which bargaining units are established and of whom they are comprised, both within and outside the healthcare industry. In order to begin, it is necessary to address the source of the Board's power to make unit determinations.

#### **A. NLRA Section 9(a)-(b)**

Sections 9(a)-(b) of the National Labor Relations Act expressly authorizes the Board to make decisions about the appropriateness of proposed units for the purpose of collective bargaining.

- (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, that any individual employee or a group of

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<sup>1</sup> The important contributions to this paper by former Ogletree, Deakins Shareholder, John S. Burgin, Esq. (1951-2012), current Ogletree, Deakins shareholder, Fred Suggs, and Ms. Camden Navarro, Student, George Washington University Law School, are gratefully acknowledged.

employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect: Provided further, that the bargaining representative has been given opportunity to be present at such adjustment.

- (b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, that the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit votes against separate representation; or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

It is with this overt authorization that the Board decided *Specialty Healthcare* and which the Board asserts permitted it to change the applicable test on appropriate units.

**B. *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 N.L.R.B. No. 83 (2011)**

In *Specialty Healthcare*, the Board decided that a petitioned-for unit consisting only of certified nursing assistants at a nursing home may comprise an appropriate bargaining unit under the law without including other nonprofessional employees at the facility. In so finding, the Board departed from, and expressly overruled, the Board's own 1991 *Park Manor Care Center* decision finding that its "idiosyncratic" approach to determining the appropriateness of a proposed bargaining unit in nursing homes, rehabilitation centers, and other non-acute healthcare facilities had become "obsolete." 305 N.L.R.B. 872 (1991). The Board created a new standard for determining an appropriate bargaining unit.

The Board announced a return, in this case and others like it, to the application of the previous traditional, community-of-interest, approach. *Id.* at 8. According to the Board, the suggestion that there is only one set of appropriate units in a given industry runs directly counter to statutory language and unit jurisprudence. *Id.* at 10. Unit jurisprudence holds that the Board need only find that the unit is an appropriate unit, instead of the most appropriate unit that could be proposed, and, further, that multiple units in any workplace can be appropriate. *Id.* at 10. In support, the Board contends that Section 9(b) of the Act purposefully permits multiple, presumptively appropriate, bargaining units in that it provides the Board shall decide whether "the unit appropriate for purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." *Id.* (referencing 29 U.S.C. § 159(b)). The Board expressed the belief that the first and central right encompassed in the Act is the employees' right to self-

organization. *Id.* at 11. The Board asserted that Section 9(a), “read in light of the policy of the Act, implies that the initiative in selecting an appropriate unit resides with the employees.” *Id.* (quoting *American Hosp. Assn.*, 499 U.S. 606, 610 (1991)). The Board perceived the first step in the representation process as permitting the petitioner to describe the unit within which a significant number of employees want to be represented. *Id.* Section 9(b) directs the Board to make appropriate unit determinations “which will assure to employees the fullest freedom in exercising rights guaranteed by the Act.” *Id.* (quoting *Federal Electric. Corp.*, 61 L.R.R.M. 1500 (1996)). The Board recognized that employees exercise their Section 7 rights by petitioning to be represented in a particular unit, not just by petitioning to be represented in general. *Id.* at 12. Ultimately, if the unit is appropriate, the Board proceeds no further. *Id.* at 11.

In determining unit appropriateness, the Board turned to “whether the employees in a proposed unit shared a community of interest.” *Id.* at 12. The Board examined whether the employees:

were organized into a separate department; had distinct skills and training; had distinct job functions and performed distinct work, including inquiry into the amount and type of job overlap between classifications; were functionally integrated with the employer’s other employees; had frequent contact with the other employees; had distinct terms and conditions of employment; and were separately supervised.” *Id.* at 12 (quoting *United Operations, Inc.*, 171 L.R.R.M. 1004 (2002)).

In *Specialty Healthcare*, the union proposed a unit of CNAs which consisted of an entire classification of employees that could clearly be identified as a group. By applying the traditional community of interest factors, the Board found that the CNAs’ distinct training, certification,

supervision, uniforms, pay rates, work assignments, shifts, and work areas, as well as the CNAs' lack of integration and interchange with other employee classifications in comparison to other employees, supported the holding that the CNAs shared a community of interest. *Id.* at 13. CNAs were found to be separate and distinct from all other employees. *Id.* The Board noted that, "A cohesive unit -- one relatively free of conflicts of interest -- serves the Act's purposes of effective collective bargaining." *Id.* at 14 (*quoting Pittsburgh Plate Glass Co. v. NLRB*, 8 L.R.R.M. 425 (1941)).

The Board suggested that when a proposed unit consists of employees readily identifiable as a group, especially after a consideration of the traditional factors, expressly demonstrates that the proposed unit of employees shares a community of interest as required under the *Specialty Healthcare* test. The process to include additional employees into an existing unit, according to *Specialty Healthcare*, requires a heightened showing on behalf of the party proposing to enlarge the unit. *Id.* at 15. Applying this analysis, the Board determined that a heightened showing is a showing that the included and excluded employees share an overwhelming community of interest such that there is no legitimate basis upon which to exclude certain employees from it. *Id.* at 15 (referencing *Blue Man Vegas, LLC v. NLRB*, 184 L.R.R.M. 2321 (D.C. Cir. 2008)). A unit is too narrow, according to the Board, only when it has no rational basis, *i.e.*, it is fractured. *Id.* at 17. Here, the Board determined that the proposed unit of all CNAs was not a fractured unit simply because a larger unit of employees might also be an appropriate unit or even a more appropriate unit than the one already proposed. *Id.* at 18. The Board turned to the *Blue Man Vegas* court, which held that, while considering traditional community of interest factors, two groups of employees have an overwhelming community of interest only when the factors overlap almost completely. *Blue Man Vegas*, 529 F.3d at 422.

The Board determined that continuing to apply *Park Manor* would be inconsistent with the current statutory charge and explicitly returned to the application of traditional community-of-interest considerations in determining if a proposed unit is an appropriate unit in non-acute healthcare facilities. The Board made clear that, when employees or a labor organization petition for an election in a unit of employees who are identifiable as a group -- including job classifications, departments, functions, work locations, skills, or other similar factors -- and the Board subsequently finds that the employees in the group share a community of interest after a consideration of the traditional criteria set forth under *Specialty Healthcare*, the Board will find the petitioned-for unit to be appropriate, despite the fact that other employees could be placed in the unit to make a larger unit, which would also be appropriate, or even more appropriate for that matter. Only if the contending party demonstrates that the employees in the larger unit share an “overwhelming” community of interest with those employees in the existing petitioned-for unit will the Board find the proposed unit inappropriate.

### **C. Possible Implications of Specialty Healthcare**

With *Specialty Healthcare*, the scales of the traditional community of interest balancing test have been tilted "overwhelmingly" in favor of unions -- and, carried to its logical conclusion, can only result in a proliferation of bargaining units at a single employer. While *Specialty Healthcare* deals with a healthcare entity, the unit determination holding is universal. As Member Brian Hayes said in dissent: "Make no mistake about it. Today's decision fundamentally changes the standard for determining whether a petitioned-for unit is appropriate in any industry subject to the Board's jurisdiction." *Specialty Healthcare* will have a material impact on all unit determination cases in the future. It is a union-friendly decision that, despite what the Board said,

is intended to assist unions to organize smaller units and potentially create multiple bargaining units at a single employer.

**D. Treatment of Specialty Healthcare in Current Case Law and Its Expansion  
Outside of the Non-acute Healthcare Context**

Since deciding *Specialty Healthcare*, there have been fifteen (15) published decisions, as well as two unpublished decisions, that specifically cite *Specialty Healthcare's* holding and reasoning. While seventeen (17) cases address or reference *Specialty Healthcare*, only a few utilize the decision in a relevant manner.

The implications that arise because of subsequent case treatment of *Specialty Healthcare's* principles in actions occurring outside the healthcare industry are important. While *Specialty Healthcare*, in footnote 29, asserted that *Specialty Healthcare* was not meant to disturb any special industry presumptions and occupational rules, it now appears that this noteworthy decision may have a significant impact outside of the non-acute healthcare industry. The Board has issued rulings which, taken together, suggest that the Board is ready to apply the principles set forth in *Specialty Healthcare* to eliminate special industry and occupational unit determinations outside of non-acute healthcare facilities. Through an examination of the relevant cases, it becomes clear that the Board is expanding *Specialty Healthcare*, despite Board statements to the contrary.

Each of the relevant cases that reference *Specialty Healthcare* is discussed below. It is essential to note that not one concerns the healthcare industry.

**1. DTG Operations, Inc., 357 N.L.R.B. No. 175 (2011)**

In *DTG Operations, Incorporated*, the Regional Director issued a Decision and Order in which she found that a petitioned-for unit of 31 rental service agents (“RSAs”) and lead rental

service agents (“LRSAs”) at the Employer DTG Operations, Inc.’s Denver International Airport rental car facility was not an appropriate unit for bargaining under the current *Specialty Healthcare* test. *Id.* at 1. Instead, the Regional Director found the appropriate unit to be a wall-to-wall unit containing all one-hundred nine (109) of the Employer’s hourly employees. *Id.* The wall-to-wall unit would include, in addition to the RSAs and LRSAs, the facility’s staff assistants, lead staff assistants, return agents, lead service agents, a fleet agent, exit booth agents, shuttlers, courtesy bus drivers, lead courtesy bus drivers, mechanics, assistant mechanics, bus mechanics, and a building maintenance technician. *Id.* When the Petitioner explicitly declined to represent the larger unit in a union election, the Regional Director dismissed the petition. *Id.* The Petitioner filed a timely request for review by the Board.

The issue before the Board was whether an overwhelming community of interest exists between the petitioned-for RSAs/LRSAs and the other hourly employees. *Id.* at 18. The Board determined that the principles set forth in *Specialty Healthcare* apply in cases such as this, where an employer contends that the smallest appropriate unit for bargaining must include additional employees beyond those in the petitioned-for unit. *Id.* In following *Specialty Healthcare*, the Board first assessed whether the petitioned-for unit was an appropriate bargaining unit by applying traditional community of interest principles. *Id.* The Board noted that if the petitioned-for unit satisfies the post-*Specialty* standard, the burden would shift to the employer to demonstrate that additional employees, the ones in which it seeks to include, share an overwhelming community of interest with the petitioned-for employees, such that there “is no legitimate basis upon which to exclude certain employees from” the larger unit because the traditional community-of-interest factors “overlap almost completely.” *Id.* (quoting *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421 (D.C. Cir. 2008)). In applying this framework, the

Board found that the petitioned-for unit was appropriate, partly because there were currently no unique, presumptively appropriate units in the rental car industry. The Board noted that it has previously found various types of units to be appropriate in this industry, including separate units that exclude rental agents. *Id.* at 19 n.16 (referencing *Budget Rent-A-Car of New Orleans, Inc.*, 220 N.L.R.B. 1264 (1975)). While not falling under a special industry or occupational rule, as addressed in footnote 29 of *Specialty Healthcare*, this case still broadly applied the *Specialty Healthcare* principles to other industries outside non-acute healthcare.

The Board first determined whether the RSAs and LRSAs shared a community of interest. In determining whether a unit shares a community of interest, the Board utilized the traditional community of interest factors as discussed in *Specialty Healthcare*. *Id.* at 21 (referencing *Specialty Healthcare, supra, slip op.* at 9). In applying the factors, the Board found that the RSAs and LRSAs shared virtually all of the community of interest factors listed in the ground breaking case. *Id.* at 21. The Board next determined whether the RSAs/LRSAs shared an overwhelming community of interest with the other hourly employees. The Board found that because the RSAs and LRSAs worked separately from the other employees, performed distinct sales tasks with distinct qualifications, and had distinct expectations and consequences for failure to meet those expectations, the record evidence failed to demonstrate an overwhelming community of interest with the other hourly employees. *Id.* at 22-23. A critical factor in the Board's determination that the RSAs and LRSAs had separate and distinct interests from the other hourly employees was their required participation in a potentially punitive incentive program, unlike any of the other employees. *Id.* at 26.

The Board found that the Regional Director's reliance on the Board's prior holding in *United Rentals Incorporated*, 341 N.L.R.B. 540 (2004), which held that a wall-to-wall unit was

the smallest appropriate unit, was misplaced in the current context. *Id.* at 30. *United Rentals* that involved a small equipment rental facility that employed a total of eighteen (18) employees, all of whom pitched in and performed the functions of different classifications. *Id.* The Board declared the same broad interchange did not apply in the instant case. *Id.* Although the Board found that the Employer's facility was functionally integrated, each classification of employee had a separate role in the process. *Id.* at 31. The Board found that the RSAs' and LRSAs' primary job functions and duties, skills and qualifications, uniforms, work areas, schedules, incentives, risks, and supervision were different from all other employees. *Id.* at 32-33.

The Board, after considering its recent decision in *Specialty Healthcare*, reversed the Regional Director's finding that the petitioned-for bargaining unit was inappropriate. *Id.* at 2. Applying *Specialty Healthcare*, the Board found that the RSAs and the LRSAs shared a community of interest and found the Employer failed to demonstrate that the additional employees that it sought to include in the bargaining unit shared an overwhelming community of interest with the RSAs and LRSAs. *Id.* at 2-3. The Board concluded that the petitioned-for unit comprised of RSA and LRSA employees was an appropriate unit for bargaining and, as such, the Board remanded the order to the Regional Director to direct an election in that unit. *Id.* at 3.

**2. *Northrop Grumman Shipbuilding, Inc.*, 357 N.L.R.B. No. 163 (2011)**

*Northrop Grumman Shipbuilding, Incorporated*, concerned a previously issued Decision and Direction of Election by the Regional Director in which he found that a unit of radiological control technicians ("RCTs"), calibration technicians, laboratory technicians, and RCT trainees, all of whom worked for the E85 radiology control department, was an appropriate unit, because they had a community of interest sufficiently distinct from the other technical employees at the shipyard operated by the Employer. *Id.* at 1. The Employer filed, and the Board granted, the

Employer's Request for Review. Upon Review, the Board affirmed the Regional Director's finding that a departmental unit of the above-listed technicians was an appropriate unit for bargaining, even though the group consisted of only 223 employees out of the total 18,500 employed by the Employer. *Id.* at 3.

In reviewing the Decision and Direction, the Board noted that the Act does not require a petitioner to seek representation of employees in the most appropriate unit, only an appropriate unit, which is determined by examining whether employees in the unit share a community of interest. *Id.* at 10. *See, e.g., Overnite Transportation Co.*, 322 N.L.R.B. 723 (1996). Here, the Employer did not contend that the employees within the petitioned-for unit did not share a community of interests. *Id.* at 11. Instead, the Employer argued that the smallest appropriate unit included not only the petitioned-for unit, but also all of the other technical employees at the shipyard. *Id.* The Board specifically relied upon the principles set out in *Specialty Healthcare* to analyze the facts of this case. *Id.* The Board concluded that additional employees only share a community of interest with petitioned-for employees when there is "no legitimate basis upon which to exclude [the] employees from" the larger unit because the traditional community-of-interest factors "overlap almost completely." *Id.* at 12 (*quoting Blue Man Vegas, LLC. v. NLRB*, 529 F.3d 417, 421 (D.C. Cir. 2008)).

The Board determined from the facts that the employees in the petitioned-for unit were "readily identifiable" as a group since they were all in the E85 RADCON department and since they all shared a unique function of providing independent oversight of radiation exposure. *Id.* at 13. The group shared a community of interest under the Board's traditional criteria as set forth in *Specialty Healthcare* because they all worked in the same department under common

supervision, their work had a shared purpose, and their work was functionally integrated according to the traditional inquiry factors. *Id.*

While the Employer relied on the fact that all of the Employer's technicians operated under the same salary structure and personnel policies, shared break facilities, and enjoyed the same benefits in order to support its argument that the other technical employees should have been included in the unit, the Board found that the facts distinguishing the E85 RADCON technicians from the other technicians outweighed the Employer's reliance on the factors it asserted. *Id.* at 13-14. In so doing, the Board noted that the RCTs' job functioned to ensure workplace safety as well as to control radioactive contamination in the shipyard, a task which was clearly distinct and separate from the production-oriented jobs of the other technical employees outside E85 RADCON. *Id.* The RCTs had an independent oversight role and were therefore not functionally integrated into the production workflow of the shipyard. *Id.*

The Employer further argued that special occupational and industry rules applied to technical employees, particularly technical employees in nuclear facilities. *Id.* at 16. In so arguing, the Employer referenced *Specialty Healthcare*, in which the Board recognized that "it has developed various presumptions and special industry and occupation rules in the course of adjudication" and made clear that the *Specialty Healthcare* holding was "not intended to disturb any rules applicable only in the specific industries" other than in the non-acute healthcare industry. *Id.* at 16 (referencing *Specialty Healthcare*, 357 N.L.R.B. No. 83, slip op. at 13 *fn.* 29). The Employer argued that to the extent that the Board had developed special rules applicable to technical employees, those rules remain applicable after *Specialty Healthcare*. *Id.* at 16. In response, the Board turned to two previous decisions.

The Board previously held that “[w]hen technical employees work in similar jobs and have similar working conditions and benefits, the only appropriate unit for a group of technicals must include all such employees similarly employed. *Id.* (referencing *TRW Carr Div.*, 266 N.L.R.B. 326 (1983)). The Board had also previously stated that, even with respect to technical employees, “The Act does not compel . . . representation in the most comprehensive grouping of employees unless such grouping constitutes the only appropriate unit.” *Id.* at 17 (referencing *Federal Electric Corp.*, 157 N.L.R.B. 1130, 1132 (1966)). The Board declared that if a subset of an employer’s technical employees share a community of interest “that is sufficiently distinct from all of the other technicals, separate representation may be appropriate.” *Id.* at 17 (referencing *TRW Carr*, 266 N.L.R.B. at 326 *fn.* 4).

In spite of both decisions, the Board determined that it need not address the question of whether a distinct test exists for technical employees or whether such a test constitutes a “special occupational rule,” as contemplated in *Specialty Healthcare*, because the Board found that it would reach the same result regardless, even under the technical employee line of cases. *Id.* at 18-19. The Board agreed with the Regional Director’s analysis of the traditional community of interest factors and determined that the E85 RADCON departmental unit constituted a “functionally distinct grouping with a sufficiently distinct community of interest as to warrant a separate unit appropriate for the purposes of collective bargaining.” *Id.* at 19.

In reaching this conclusion, the Board was required to further differentiate existing precedent. First, the Board determined that this case is distinguishable from a seemingly contrary case, *TRW Carr*, in which the Board found the proposed unit of a subsection of the technical employees was inappropriate. *Id.* The current Board distinguished the two by noting that the work of the excluded technical employees in *TRW Carr* was closely related to and integrated

with the functions of the included technicians, while the same could not be said for the included and excluded technicians in the current case because their primary job functions significantly differed. *Id.*; *TRW Carr*, 266 N.L.R.B. at 326. Second, the Board distinguished two prior *Westinghouse Electric Corporation* cases -- in which the Board held that a unit not including all of the technical employees was inappropriate -- by finding that while both the Westinghouse employers and the current Employer employ RCTs, the similarity between the two cases ended there. *Id.* at 24. The technical workforce between the two employers was profoundly different due to the differences in the types of labs operated by each of the employers. *Id.* The Board concluded that under either the *Specialty Healthcare* framework or the sufficiently distinct community of interest standard applied in *TRW Carr*, a unit of RCTs and other E85 RADCON technicians was an appropriate unit. *Id.* at 27.

### **3. *Odwalla, Inc.*, 357 N.L.R.B. No. 132 (2011)**

The Board in *Odwalla* considered determinative challenges in a unit election and the hearing officer's report which recommended disposition of them. More specifically, *Odwalla* concerned whether a proposed micro-unit was appropriate under the *Specialty Healthcare* analysis.

The Employer operated a facility in California which employed route service representatives (RSRs), who were essentially sales and delivery drivers; relief drivers; warehouse associates; cooler technicians; and merchandisers. *Id.* at 3. The Union had filed an election petition after which the parties had stipulated to an election in a unit that consisted of all full-time and regular part-time route sales drivers, relief drivers, warehouse associates, and cooler technicians. *Id.* The parties, however, could not agree on whether the merchandisers should have been included in the proposed bargaining unit. *Id.*

Upon review, the Board determined whether the merchandisers shared an overwhelming community of interest with the employees the parties had previously agreed should comprise the unit and whether the current unit was appropriate. In making its determination, the Board turned to the principles set forth in *Specialty Healthcare*. *Id.* at 18.

Despite this case arising in the context of a challenged ballot, rather than as a pre-election unit determination, the Board concluded that this context does not alter the applicability of *Specialty Healthcare*. *Id.* at 20. Where parties stipulate to a unit, the Board declared it will treat the stipulated unit as a petitioned-for unit for all intents and purposes of the analysis. *Id.* In turning to *Specialty Healthcare*, the Board began its application of the *Specialty Healthcare* community of interest factors by explaining that, “Employees inside and outside a proposed unit share an overwhelming community of interest when the proposed unit is a fractured unit. A petitioner creates a fractured unit when it seeks representation in an arbitrary segment of what would be an appropriate unit.” *Id.* at 22 (quoting *Pratt & Whitney*, 327 N.L.R.B. 1213, 1217 (1999)). The Board does not approve combinations of employees that have no rational basis. *Id.* (referencing *Seaboard Marine*, 327 N.L.R.B. 556 (1999)).

Here, the Board found the unit, which excluded the merchandisers, to be fractured under *Specialty Healthcare* analysis. *Id.* The recommended unit failed to track any “group” lines that had been drawn by the Employer -- such as classification, department, or function. *Id.* at 23. The unit was neither structured along the lines of supervision nor drawn in accordance with methods of compensation. *Id.* at 24-25. Several of the factors that distinguished the merchandisers from the RSRs also distinguished the RSRs from other classifications that were included in the proposed unit. *Id.* at 26. The Board believed the Employer carried its burden of proving that

there was no rational basis for excluding the merchandisers while including all other classifications and employees of the Employer. *Id.* at 29.

Because none of the traditional bases for drawing unit boundaries currently used by the Board supported excluding the merchandisers from the existing unit, while simultaneously including all the other employees, the Board concluded that the Employer carried its burden of proving that the merchandisers shared an overwhelming community of interest with the employees in the recommended unit. The Board found that the recommended unit improperly created a fractured unit that was consequently inappropriate under the Act according to the principles set forth in *Specialty Healthcare*.

**4. *Prevost Car U.S.*, 2012 N.L.R.B. Lexis 128 (March 15, 2012)**

In this one page decision on the Employer's Request for Review of the Regional Director's Decision and Direction of Election, the Board denied the Employer's Request because it raised no substantial issue warranting review. The Board, in denying review, found that the Employer had not sustained its burden of establishing that any of the disputed classifications shared an overwhelming community of interest with the petitioned-for employees, such that their inclusion in the unit is required under the *Specialty Healthcare* test.

**5. *Dyno Nobel, Inc.*, 2012 N.L.R.B. Lexis 226 (April 23, 2012)**

In this one-page decision, the Employer's Request for Review of the Regional Director's Decision and Direction of Election was denied since, in the Board's opinion, it raised no substantial issues warranting review. In issuing this opinion, Board Member Flynn, who joined his colleagues, noted that, in directing an election in the petitioned-for unit, the Regional Director applied the test set forth in *Specialty Healthcare*. In so noting, Board Member Flynn agreed that under the *Specialty Healthcare* test, the petitioned-for unit was appropriate, but he

would have also found the unit appropriate under pre-*Specialty Healthcare* precedent. *See, e.g., Wheeling Island Gaming*, 355 N.L.R.B. 637 n.2 (2010). Member Flynn found it unnecessary to determine whether *Specialty Healthcare* was rightly decided or not.

**6. *US Foods, Inc. v. NLRB*, 2012 N.L.R.B. Lexis 300 (May 23, 2012)**

In its Request for Review of the Regional Director's Decision and Direction of Election, the Employer raised an issue regarding the exclusion of van drivers from the petitioned-for unit. While the Board ruled that the issue would best be decided under the Board's challenge procedure, the decision was amended to permit the van drivers to vote under challenge, and the Request for Review was denied. The Board cited *Specialty Healthcare* in both its denial and amendment finding that the interests of the employees in the petitioned-for unit were sufficiently distinct from excluded employees whom the Employer sought to include.

**7. *Home Depot U.S.A., Inc.*, Case No. 20-RC-067144**

In *Home Depot U.S.A., Incorporated*, an NLRB Regional Director rejected a petitioner's proposed bargaining unit which consisted of some, but not all, of the sales associates in a Home Depot retail store. The Regional Director found that the only appropriate unit in such a case was the traditional retail wall-to-wall unit. While the petitioner challenged the finding, arguing that it ignored the principles set forth in *Specialty Healthcare*, the Board in a one-page decision unanimously denied the petitioner's request for review. As though the Board agreed with the Regional Director that the proposed unit was not appropriate, it refused to adopt the Regional Director's position that only a wall-to-wall unit was appropriate when considering retail industry cases. The Board left open the possibility of micro-units within workplace contexts outside non-acute healthcare.

**8. *Bergdorf Goodman*, Case No. 2-RC-076954**

The Board granted the Employer's Request for Review in *Bergdorf Goodman*, a case in which the Regional Director issued a decision which found appropriate a proposed micro-unit at the renowned retail store. The petitioned-for unit was the women's shoes associates on the 2<sup>nd</sup> and 5<sup>th</sup> floors of the store. While the Employer asserted that the only appropriate unit was a store-wide, wall-to-wall retail unit, the Regional Director found otherwise, by concluding that the proposed unit was appropriate, since the classification "requires a distinct skill set from other sales associates due to the unique nature of the product they are selling. If a shoe is not sized appropriately for a customer, discomfort and possible knee, back, and other physical injuries may occur." The Director also found that the women's shoes associates were compensated differently from other sales associates, and little interchange or interaction occurred with other employees. In the Regional Director's opinion, all of these factors outweighed the common terms and conditions of employment among all the employees.

While the Employer argued that *Specialty Healthcare* explicitly acknowledged that its ruling was not meant to disturb special industry and occupational rules for determining an appropriate unit – and, thus, that the Regional Director was inclined to follow the industry presumption that a wall-to-wall unit was the only appropriate unit in cases involving retail stores -- the Regional Director stated that even though the presumption of a store-wide unit exists, the presumption can be, and was, rebutted.

While the Board granted the Employer's Request for Review of the Regional Director's Decision, it has not yet made a determination as to the outcome of the case.

## **E. Conclusion**

Since issuing the *Specialty Healthcare* decision, the principles set forth in the opinion have significantly impacted the composition of what will be considered an “appropriate” collective bargaining unit under the NLRA’s standards. While *Specialty Healthcare* expressly noted that its holding was not meant to disturb any special industry presumptions and occupational rules, it is clear that this noteworthy decision has already expanded beyond the non-acute healthcare industry. The *Specialty Healthcare* principles change the standard for determining whether a petitioned-for unit is appropriate in *any* industry, subject to the Board’s jurisdiction, and will impact all future unit determination cases. *Specialty Healthcare* is a union-friendly decision that may assist unions to organize smaller units and create multiple bargaining units at a single employer, regardless of the industry.

## **II. THE NLRB’S EXPANSION OF CONCERTED ACTIVITY**

### **A. No Solicitation/Distribution Rules**

Almost every employer maintains some policy or practice governing solicitation and distribution. The primary purpose of these rules is to keep work time free from non-work-related interference, to ensure that working areas are kept free from litter and to keep non-employees who want to solicit or distribute literature off company property at all times. While employers can and should maintain a non-solicitation and non-distribution rule, absent special circumstances, the policy cannot ban employee solicitation during non-working time. In order for a policy to be presumptively valid, it must only prohibit solicitation during working time. Employers should carefully word non-solicitation policies to avoid such phrases as “working hours,” “company time,” or “business hours,” so as not to imply an overly broad, unlawful prohibition. Employer’s should also include language explaining that “working time” does not

include rest, meal or other authorized breaks. Uniform enforcement is required. An unlawfully broad No Solicitation/Distribution Rule is grounds for a rerun election, even if it was never enforced.

No-distribution policies are presumptively valid when the prohibition is limited to working time and working areas. As with all policies, having a valid policy is not enough. When policies, including no-solicitation/distribution rules, are not implemented until the onset of union organizing or are inconsistently enforced, employers risk an unfair labor practice charge.

**1. Representative Recent NLRB Cases on No Solicitation, Distribution**

*a. American Medical Response of Ct., Inc., and Nat'l.*

*Emergency Medical Svcs. Assoc., 356 N.L.R.B. No. 155, 190*

**L.R.R.M. 1350 (May 10, 2011)**

*American Medical Response* involved various employer unfair labor practices in the aftermath of an election in which a new union replaced the incumbent representatives. The incumbent union was allowed to post on a company bulletin board, but the new union's notices and information were systematically taken down. The administrative law judge (ALJ) concluded that the removal of the postings resulted from a management policy which deemed that the new union was not entitled to post under the company policy prohibiting outside solicitation and distribution.

The Board affirmed the ALJ's determination that the employer violated Section 8(a)(1) when it permitted one union's materials to be posted on a bulletin board, but did not allow another union's materials to remain posted. The Board held, "An employer is under no obligation to permit employees to use its bulletin boards to post pro-union materials or literature, even where the employer, itself, uses the same bulletin boards to post its own anti-union messages."

The Board concluded, however, that if the restrictions on employees' use of bulletin boards are discriminatorily enforced or promulgated with anti-union motivation, then an employer has violated Section 8(a)(1) of the Act.

***b. Jury's Boston Hotel, 356 N.L.R.B. No. 114, 190 L.R.R.M.***

**1237 (March 28, 2011)**

In *Jury's Boston Hotel*, the Board was presented with a decertification election that the union lost by a vote of 46 to 47, with no challenged ballots. The election held on the premises of the hotel was set aside and a new election ordered after the NLRB agreed with the union's objections regarding the employer's maintenance of rules on solicitation, loitering, and the wearing of emblems and buttons, which were present in the hotel's two-year-old employee handbook at the time of the election. While the hearing officer found the rules to be objectionable, he declined to set aside the election "because [the rules] were promulgated before the Employer recognized the Union, were not enforced or cited by the Employer during the critical period [before the election], and were not shown to have deterred any employee from exercising Section 7 rights."

The Board disagreed with the hearing officer and determined that the results of the election "might well have been affected by the rules at issue." The Board noted that there was no evidence that the rules were enforced against legally protected activity during the "critical period" before the election, but concluded that mere maintenance of the improper rules required setting aside the election – recognizing that precedent for setting aside elections based on mere maintenance of objectionable rules has been established.

In making its determination, the Board distinguished the case from *Delta Brands, Inc.*, 344 N.L.R.B. 252 (2005), a case in which a non-enforced objectionable rule in an employee

handbook was not sufficient to overturn a 10-8 election result. The majority demonstrated that *Delta Brands* must be limited to its specific facts, and that *Jury's Boston Hotel* is distinguishable because: (1) there were three objectionable rules in this case, rather than one; (2) there was some evidence that one of the rules had a chilling effect; and (3) a single vote decided the election. While the Board did not expressly overrule *Delta Brands*, it did limit the holding. Unions who lose elections can demand another election based on the existence of unenforced, overbroad rules.

In dissent, Member Hayes stated that the majority "strain[ed] to avoid controlling precedent and a record clearly indicating that none of the Employer's rules ... could reasonably have effected the election." He further noted that the union made no effort to challenge the handbook provisions until shortly before the decertification vote, and that the incumbent union failed to demonstrate that the rules had any chilling effect on employees' free choice concerning union representation.

The Handbook policies at issue were:

- Rule 43, which prohibited solicitation and distribution "on hotel property";
- Rule 30, which subjected employees to discipline (up to and including discharge) for "[b]eing in an unauthorized area and/or loitering inside or around the Hotel without permission," and for "us[ing] guest facilities for personal use including but not limited to, guest phones, ATM machines and restrooms"; and
- A rule in the "Grooming Standards" section of the handbook, which prohibited employees from "wear[ing] emblems, badges or buttons with

messages of any kind other than the issued nametags or other official types of pins that form an approved part of your uniform.”

**B. Representative Recent NLRB Cases on Limiting/No Access Rules**

Every employer should consider the appropriateness of a policy limiting access to company property by off-duty employees. In establishing such a policy, several things must be considered. First, off-duty employees cannot be completely banned from company property unless there are special circumstances which warrant the limitation. For example, policies restricting off-duty employees from the interior of the building or other working areas, which apply to those seeking access for any purpose, not just those wanting to engage in union activities, are generally upheld. Rules that deny off-duty workers access to parking lots, gates and other outside non-working areas will be found invalid, unless the employer can articulate a specific business reason for the prohibition. Business necessity may be demonstrated by identifying special security or safety concerns, the need to comply with statutory restrictions or regulations, or other unique circumstances. Absent a showing of prior problems in those areas, it may be difficult to establish a valid business necessity defense. In addition, employers must be cognizant, in both drafting and implementing access rules, that the right of access, even on a limited basis, has been extended by the Board to apply to employees assigned to one facility of the employer who seek access to exterior non-working areas of the employer at another facility.

In *Tri-County Medical Center*, 222 N.L.R.B. 1089 (1976), the NLRB established that an employer may promulgate a no-access rule for off-duty employees if the rule: 1) limits access solely to the interior of the plant and other working areas; 2) is clearly disseminated to all employees; and 3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity. The Board ruled that a no-access rule

which denies off-duty employees' entry to parking lots, gates, and other outside nonworking areas is invalid unless it is justified by business reasons. Business necessity can normally be shown, for example, by a need for security, safety or the prevention of theft. However, absent a showing of prior problems in those areas, it is doubtful that a valid business necessity defense can be established.

Accordingly, all rules limiting access to company property for off-duty employees should meet three conditions: 1) The policy should limit access solely to the interior of the premises and other working areas; 2) It must be clearly communicated to all employees; and 3) It must apply to off-duty employees seeking access to the plant for any purpose and not just those employees engaging in union activity.

**1. *New York-New York Hotel & Casino*, 190 L.R.R.M. 1185 (N.L.R.B. 2011)**

The issue of access was addressed by the Board in *New York-New York Hotel & Casino*, which was remanded to the NLRB by the Court of Appeals for the District of Columbia Circuit for further consideration. The Board found that a Las Vegas casino violated federal labor laws by prohibiting off-duty employees of restaurants inside the casino from distributing handbills on casino property. The handbills sought public support for the organizing efforts of employees of the restaurants, which were operated by a contractor inside the casino. Flyers were distributed to customers at restaurant entrances and at the casino's main entrance.

In addressing questions posed by the Court of Appeals, the Board modified the standard used to determine the rights of a contractor's off-duty employees to access the property owner's premises. In its decision, the Board stated, "We strike an accommodation between the contractor employees' rights under federal labor law and both the property owner's state-law property rights and legitimate managerial interests." The Board concluded that:

[T]he property owner may lawfully exclude such employees only where the owner is able to demonstrate that their activity significantly interferes with his use of the property or where exclusion is justified by another legitimate business reason, including, but not limited to, the need to maintain production and discipline.

In dissent, Member Hayes wrote that the majority's decision, which "artificially equates the Section 7 rights of a contractor's employees with those of the property owner's employees, pays only lip service to the owner's property interests, and gives no consideration to the critical factor of alternative means of communication." He would have found only that the casino acted unlawfully in excluding the handbillers from the sidewalk area outside its main entrance, but that it was within the employer's rights to expel the petitioners from the interior of the casino.

Because non-employees generally do not have a right of access to an employer's property, an employer can properly prohibit non-employees from soliciting and distributing on the employer's property. But, in order for an employer to prohibit non-employee access, rules relating to access, solicitation and distribution must be enforced in a non-discriminatory manner. Employers are at greater risk of being forced to grant union organizers access if access is granted to outside groups.

## **2. *Hawaii Tribune-Herald*, 190 L.R.R.M. 1097 (Feb. 14, 2011)**

In *Hawaii Tribune-Herald*, a newspaper publisher was found to have violated the LMRA when the publisher issued a written warning to an employee for allowing a union representative into the employer's building in what the publisher claimed was a violation of the publisher's new security policy. The publisher had learned, through unlawful interrogation, that the purpose of the union representative's visit was for the employee to give him a note dealing with union

business. Because the publisher's new policy did not require prior management approval for union representatives to enter the premises, the Board determined that the real reason the publisher disciplined the employee was in response to the employee's union activity.

**3. *Nova Southeastern University and SEIU, Local 32B-32J, 357***

**N.L.R.B. No. 74 (Aug. 26, 2011)**

In *Nova Southeastern University*, an off-duty employee of a maintenance contractor, who was regularly employed on the campus property, distributed "Justice for Janitors" flyers encouraging union organization before work one morning. The flyers were distributed in a campus parking lot near the plant/central services building. After distributing for about 5-10 minutes, NOVA's public safety officer asked him to stop citing NOVA's campus safety rule, which stated:

"No solicitation is allowed on any NSU campus or facility without the permission of the NSU executive administration."

The NLRB found a violation of Section 8(a)(1) following the reasoning adopted in *New York-New York Hotel & Casino*, 190 L.R.R.M. 1185 (N.L.R.B. 2011).

**4. *HTH Corp., 356 N.L.R.B. No. 182, 190 L.R.R.M. 1449 (N.L.R.B.***

**June 14, 2011)**

In *HTH Corp.*, a hotel was purchased by new management who instituted a new employee handbook for the employees, which included the following provisions:

- Forbid employees from being on hotel property when not scheduled to work, except for two exceptions: a 30-minute window when entering or exiting the property before and after

work and using the fitness center for 2 hours either before or after work.

The Board adopted the judge's findings that the access policy failed under the *Tri-County Medical Center* tripartite test for validity. Under that case, such rules are valid only if they: (1) limit access solely with respect to the interior of the facility; (2) are clearly disseminated to all employees; and (3) apply to off-duty employees seeking access to the plant for any purpose and not just those employees engaging in union activity. Since the definition of property was "not really defined," because the employer could offer no justification, and because the rule was ambiguous, the Board deemed the policy unlawful.

**5. *Community Medical Center, Inc.*, No. 4-CA-34888 (355 N.L.R.B. No. 128) (3d Cir. August 3, 2011)**

*Community Medical Center, Incorporated* involved an acute-care hospital that committed two unfair labor practices in the months leading up to a representation election among its nurses. First, on the day of and the day after the union filed its election petition, the employer publicly – in front of numerous nurses – denied union representatives access to its parking lot, even though it had granted them access previously. The Board found that this discriminatory denial of access violated the Act, and the Court agreed. In an unpublished opinion, the Third Circuit enforced the Board's order directing a second election.

**6. *Continental Group Inc.*, 191 L.R.R.M. 1130 (Aug. 11, 2011)**

In *Continental Group, Inc.*, an employee facing domestic violence charges was given vacation time-off. While he was on vacation, the managers learned that the employee had been sleeping in a common area of the building, living out of his car, and "hanging around" the building. Managers issued a written warning for "frequenting" and "loitering" based on the

company's policy which stated: "employees are only permitted to be on property while on duty unless you are picking up a paycheck or otherwise advised by the property manager or the Front Desk Coordinator. If you are on property while off duty, we expect you will still follow guidelines and dress neatly."

While the employee was disciplined pursuant to an unlawfully, overbroad rule restricting off-duty employee access, the Double Eagle Rule -- which asserts that discipline under an unlawful rule is always illegal -- was not implicated because the employee's conduct was wholly distinct from activity that falls within the ambit of Section 7. The Board reversed the judge's decision that Continental violated Section 8(a)(1).

### **C. Confidential Information Policies**

Many businesses have an interest in keeping certain information confidential. However, prohibiting employees from discussing confidential information relating to wages and salaries is a violation of an employee's rights under Section 7 of the Act. Section 7 rights include the right to "self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Employers are prohibited from interfering with these rights in Section 8. 29 U.S.C. § 158(a)(1). Any confidentiality policies in an employee handbook must be drafted very narrowly and specifically to avoid violating Section 8(a)(1).

In the lead case of *Lafayette Park Hotel*, 326 N.L.R.B. 824 (1998), the Board declined to find unlawful a rule that prohibited "divulging Hotel-private information to employees or other individuals or entities that are not authorized to receive that information." The Board found that employees would not reasonably read the rule to prohibit discussion of wages and working

conditions among themselves or with a union, even though the term “hotel-private” is not specifically defined in the rule. It also noted that employers have a substantial and legitimate interest in maintaining the confidentiality of private and proprietary information. *Ibid.* See also *Super K-Mart*, 330 N.L.R.B. 263, 263-264 (1999); and *Mediaone of Greater Florida, Inc.*, 340 N.L.R.B. 277, 278-79 (2003).

However, in *Brockton Hospital*, 333 N.L.R.B. 1367 (2001), the Board affirmed a judge’s finding that a rule requiring employees to respect the confidentiality of information regarding patients, employees, or hospital operations by not discussing such information was unlawful. 333 N.L.R.B. at 1367 n. 3, 1377. That rule specifically focused on employee information that might reasonably be read to include wage and benefit information. Similarly, in *Cintas*, 344 N.L.R.B. 943 (2005), *enf’d*, 482 F.3d 463 (D.C. Cir. 2007), the Board found unlawful a confidentiality rule, whose terms amounted to an unqualified prohibition on the release of “any information” regarding its employees. The rule in *Cintas*, like that in *Brockton Hospital*, specifically dealt with employee information; thus, the Board could properly read the rule as broadly prohibiting employees from discussing their wage and benefit information. Any rule precluding employees from discussing terms and conditions of employment, or sharing information about themselves or their fellow employees with non-employees, violates Section 8(a)(1). *Bigg’s Food*, 347 N.L.R.B. 425, n.4 (2006) (rule prohibiting employees from discussing their own or their “fellow employees” salaries with “anyone outside the company” violates Section 8(a)(1)); *Flamingo Hilton-Laughlin*, 330 N.L.R.B. 287, 288 n.3, 291, 292 (1999) (rule prohibiting employees from revealing confidential information regarding hotel’s customers, fellow employees, or hotel business, unlawful).

**1. Recent Representative NLRB Cases on Confidentiality**

**a. *NLRB V. Northeastern Land Services Ltd.*, 645 F.3d 475 (1st Cir.**

**June 22, 2011)**

Northeastern Land Services (NLS), a temporary employment agency, fired an employee for violation of the confidentiality clause in his employment contract. The clause stated:

“Employee . . . understands that the terms of his employment, including compensation, are confidential to Employee and NLS Group. Disclosure of these terms may constitute grounds for dismissal.”

The employee was sent to a worksite, but was having difficulty getting paid by NLS, and complained to NLS management. He also complained about the situation to a third party who had contracted with NLS for his services. NLS considered the employee’s contact with the third party to violate the employer’s confidentiality provision.

NLS argued that since it bid for projects, it kept actual labor payment costs confidential from third party employers, which was a legitimate business reason for the provision. The court disagreed and found the provision could be more narrowly tailored. The court found the provision was overbroad because employees could construe the clause to prohibit all discussions regarding compensation with “other parties,” which could include union representatives.

**b. *Security Walls, LLC*, 190 L.R.R.M. 1049 (NLRB 2011)**

In *Security Walls, LLC*, an employer, who provided security for a nuclear waste disposal facility, violated the LMRA by maintaining two overly broad confidentiality rules. The Board found the violation, despite the contention by the employer that the nature of its business required it to keep clients’ information confidential. The handbook rule regarding the restrictive covenant prohibited disclosure of “personal and/or sensitive information,” including wages and

other terms and conditions of employment, and also required employees who participated in investigation of harassment and discrimination claims to keep confidential all information “learned or provided.” The Board determined these rules were not clearly limited to legitimate business concerns, and employees could construe their language to prohibit discussions protected by Section 7.

**D. Policies on the Use of Company E-Mail and Electronic Media**

In *The Guard Publishing Company*, 351 N.L.R.B. No. 70 (2007), the NLRB held that even where an employer permits employees to use the company email system for some personal or other non-business purposes, it may lawfully prohibit employees from using the system for union-related solicitations, so long as it also prohibits its use for all solicitations of a similar nature. The Guard Publishing Company (Guard), a unionized company, implemented a policy that prohibited employees from using company communication systems and equipment to solicit for outside organizations. One of Guard’s employees, who was the local union president, sent three emails to coworkers using the company’s email system: one discussing a union rally, one soliciting support for the union’s position in negotiations, and one asking employees to participate in the union’s entry in the upcoming town parade. Guard disciplined the employee for sending the emails.

The NLRB held that the discipline for the rally email was unlawful because the email was a “communication,” not a prohibited “solicitation,” and Guard allowed employees to use the system for other “communications,” such as birthday wishes, baby announcements, and the like. The NLRB reasoned that the employer had improperly treated a union-related “communication” more harshly than other “communications.” The NLRB, however, found the discipline for the negotiation and town parade emails lawful, reasoning that they were, on their face, solicitations

on behalf of an outside organization prohibited by company policy, and there was no evidence that Guard had permitted similar solicitations on behalf of other outside organizations. Before *Guard*, it was believed that if an employer permitted employees to use its communications equipment for any non-business purpose, it could not lawfully prevent employees from using that equipment to engage in protected activity, such as union organizing.

Guard appealed to the D.C. Circuit Court challenging the Board's finding that its discipline for the rally email violated the Act. The union intervened to appeal the finding of no violation for the discipline regarding the other two emails, and the NLRB cross-applied for enforcement of its Order. On July 7, 2009, the D.C. Circuit dismissed the company's appeal, granted the union's appeal, and found that the NLRB's decision that Guard did not violate the Act by disciplining the employee for the negotiation and town parade emails was not supported by substantial evidence. The court remanded the proceedings to the NLRB for further findings. *Guard Publishing Co. v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009). The Court noted that the company policy made no distinction between individual and organizational solicitations, and that this was an "after-the-fact" explanation after the complaint had issued.

On remand in *Guard Publishing Co.*, 357 NLRB No. 27, 191 L.R.R.M. 1039 (July 26, 2011), the Board adopted the Court's rationale and held that the company had unlawfully disciplined the employee for her negotiation and town parade emails, since the company had allowed other employees to send non-union-related emails on the company's email system concerning invitations to parties, offers of sports tickets, dog walking services, birthday announcements, etc.

This latest 2011 decision made clear what had been previously predicted – that allowing employees to use company communication systems for non-business use will invalidate any prohibition on similar use of these systems for union-related purposes.

**1. Representative Recent NLRB Decisions on Communication Systems**

***a. Hyundai America Shipping Agency, Inc., 357 N.L.R.B. No. 80***

**(August 26, 2011)**

In *Hyundai America Shipping Agency, Inc.*, a unanimous panel of the Board adopted the Administrative Law Judge’s finding that the Employer violated the Act by maintaining or enforcing the following rules in its Employee Handbook: (1) a provision stating that “employees should only disclose information or messages from these systems [including the Employer’s email, instant messaging, and phone systems] to authorized persons”; (2) a provision stating that “any unauthorized disclosure of information from an employee’s personnel file is a ground for discipline, including discharge”; (3) a provision reading, “Voice your complaints directly to your immediate superior or to Human Resources through our ‘open door’ policy. Complaining to your fellow employees will not resolve problems. Constructive complaints communicated through the appropriate channels may help improve the workplace for all”; and (4) a provision threatening employees with disciplinary action for “performing activities other than company work during working hours.” A unanimous panel of the Board also adopted the judge’s finding that the Employer violated the Act by promulgating, maintaining, or enforcing an oral rule prohibiting employees from discussing with other persons any matters under investigation by its Human Resources Department.

Two Members of the Board also found, contrary to the judge, that the Employer did not violate the Act by maintaining or enforcing two rules in its Employee Handbook that threaten employees with disciplinary action for: (1) “indulging in harmful gossip;” and (2) “exhibiting a negative attitude toward or losing interest in your work assignment.” Member Pearce, dissenting, would have adopted the judge’s findings that the two rules violated the Act because employees would reasonably construe their language to prohibit protected activities.

**E. Policies on Employee Communications with the Media**

The NLRB has consistently struck down company policies which seek to prohibit employees from talking directly to the news media.

**1. Representative NLRB Cases Regarding Communications with Media**

**a. *Trump Marina Assoc., LLC. v. NLRB*, 2011 WL**

**2118278 (D.C. Cir. May 27, 2011)**

In *Trump Marina*, the Employer petitioned for review an NLRB order, 355 N.L.R.B. No. 107 (Aug. 23, 2010), *affirming* 354 N.L.R.B. No. 123 (Dec. 31, 2009), which interpreted the employer’s public speaking and media requests policy as overly broad. The handbook policy stated:

- Public Speaking/Media Requests: It is the policy of Trump Hotels & Casino Resorts that only the following employees, Chief Executive Officer, the respective property’s Chief Operating Officer, General Manager or Public Relations Director/Manager is authorized to speak with the media.

The Board held that the Employer's public speaking and media requests policy interfered with employees' rights to communicate with media regarding labor disputes, by broadly prohibiting employees from releasing statements to media without prior permission and limiting employees authorized to speak with media. National Labor Relations Act, § 8(a)(1), 29 U.S.C.A. § 158(a)(1).

***b. Santa Barbara News-Press, 191 L.R.R.M. 1081, 357***

**N.L.R.B. 51 (Aug. 11, 2011)**

*Santa Barbara News-Press* involved newspaper employees, in response to policy changes by the publisher, who requested that management recognize the union and "restore journalism ethics" to the newspaper. The employees held rallies and campaigned to persuade readers to cancel their subscriptions which were covered by the media (including the hanging of a banner from a highway overpass).

The Board noted that while it *has held* that employees' communications to the public may lose the Act's protection if they are "disloyal, reckless, or maliciously untrue," here, the purpose was to improve the journalistic quality of the paper, and the statements were related to the on-going labor dispute. The Board concluded that the protests were protected activities.

***c. MasTec Advanced Technologies, 191 L.R.R.M. 1017 (July 21, 2011)***

In *MasTec Advanced Technologies*, employees were service technicians for a company providing satellite TV equipment. The employees had recently been subjected to a new pay formula regarding installation policies and quota, which they claimed were unattainable, but which the employer, nevertheless, maintained. Employees voiced frustration to management to no avail. The employees went to the media and talked to a reporter from "The Problem Solvers

Segment” who “teased” a broadcast news story by stating they would reveal a “dirty little secret” about the company. The Employer saw the story and terminated each technician identified in the news report.

The NLRB held that the employees were engaged in protected activity when they spoke with the media and were critical of the installation policies and their effect on technicians’ pay. The Board held that the employer violated the LMRA when it discharged the technicians who participated.

***d. Karl Knauz Motors, Inc., Case No. 13-CA-45452***  
**(ALJ Decision, September 28, 2011)**

*Karl Knauz Motors, Inc.*, involved an automobile salesman, Becker, who made various posts to his Facebook account. In one post, he criticized his employer, a BMW dealership, for serving hot dogs at a sales event. In a second posting regarding an adjacent Range Rover dealership owned by the same company, he made light of a Range Rover salesperson allowing a 13-year-old boy to get behind the wheel of a large Range Rover SUV. The boy started the car, ran over his father’s foot, and plunged the Range Rover into a pond, destroying the SUV. The employee posted pictures of the damaged vehicle on his Facebook page. As a result of Becker’s action, the employer terminated his employment.

The ALJ found that the BMW hot dog posting was concerted activity, as other employees had joined Becker in criticizing this event, and that Becker’s posting, while clearly having a mocking and sarcastic tone, did not deprive his activity of protection under the Act. The ALJ found, nonetheless, that Becker’s posting of the Range Rover accident on his Facebook account was neither protected nor concerted activity – it was posted solely by Becker without any discussion with other employees and had no connection to any of the employees’ terms and

conditions of employment. While there was conflicting evidence as to management's position of which of the Facebook postings resulted in Becker's termination, the ALJ credited the testimony of the firing Manager that it was the Range Rover incident which led to the discharge. The ALJ concluded that Becker's termination was lawful.

In addition to the discharge issue, several company policies were alleged to have violated the Act. The employer's handbook contained the following provisions:

- (a) Bad Attitude: employees should display a positive attitude towards their job. A bad attitude creates a difficult working environment and prevents the dealership from providing quality service to our customers.
- (b) Courtesy: courtesy is the responsibility of every employee. Everyone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any language which injures the image or reputation of the dealership.
- (c) Unauthorized Interviews: as a means of protecting yourself and the dealership, no unauthorized interviews are permitted to be conducted by individuals representing themselves as attorneys, peace officers, investigators, reporters or someone who wants to "ask a few questions." If you are asked questions about the dealership or its current or former employees, you are to refer that individual(s) to your supervisor. A decision will then be made as to whether that individual may conduct any interview, and they will be introduced to you by your supervisor with the reason for the questioning. Similarly, if you are aware that an unauthorized interview is occurring at the dealership, immediately notify the general manager or the president.

- (d) **Outside Inquiries Concerning Employees:** all inquiries concerning employees from outside sources should be directed to the Human Resource Department. No information should be given regarding any employee by any other employee or manager to an outside source.

Approximately one month after the termination of the salesperson in question, the employer sent a memorandum to all employees, stating that all four of the above policies had been immediately rescinded, effective July 19, 2011. With respect to the policy issues, the ALJ held that the “bad attitude” policy was lawful. However, the ALJ held that the policies on courtesy, unauthorized interviews, and outside inquiries concerning employees were unlawful and required a remedial notice, even though the company had rescinded the policies.

#### **F. Dress Codes and Union Insignia**

The Board has generally recognized the right of employees to wear union insignia on their employer’s premises and while working, except, where “special circumstances” exist. In such cases, employers may limit that right. Recent Board decisions are instructive as to the limits of dress code rules, which may infringe on an employee’s Section 7 rights.

##### **1. Representative NLRB Decision on Union Insignia**

###### ***a. Stabilus, Inc., 355 N.L.R.B. No. 161 (August 27, 2010)***

In *Stabilus, Inc.*, the Board found, for the first time, that the well-recognized right of employees to display union insignia also extends to “substituting a pro-union t-shirt for a required company uniform.” Under *Stabilus*, even a few isolated exceptions, such as allowing employees to wear Halloween costumes or a shirt commemorating 9-11, may open the door to union t-shirts. The Board has narrowed the definition of “special circumstances,” giving

employees more latitude to display union messages and further restricted the employer's ability to manage such demonstrations.

***b. AT&T Connecticut, 356 N.L.R.B. No. 118 (March 25, 2011)***

On March 25, 2011, the Board ruled that the notion of maintaining a professional and non-threatening appearance with customers would not overcome an employee's right to display union messages on its clothing. In *AT&T Connecticut*, the NLRB ruled that the employer violated the law by prohibiting its service technicians from wearing t-shirts critical of the company when visiting customers' homes. The shirts at issue in the case, which were meant to replicate prison garb and included black stripes and the words "Prisoner of AT&T," were found not reasonably likely to cause fear or alarm among the employer's customers.

In the past, the Board had found "special circumstances" even where union apparel may only "unreasonably interfere with a public image, and where an employer has a legitimate interest in preserving customer relationships...." In *AT&T*, the Board held special circumstances did not exist that would justify the employer's decision to prohibit employees from wearing the prison t-shirts, despite the fact the employer only prohibited the wearing of the prison t-shirts when employees were interacting with customers.

This decision demonstrates just how far the current Board is willing to go to protect union interests, even at the cost of business relationships.

**G. Non-Disparagement Rules**

The Board has repeatedly held that an employee's negative comments about an employer are protected if they involve working conditions and are not so disloyal, reckless, or maliciously untrue as to lose the Act's protection. *Endicott Interconnect Technologies*, 345 N.L.R.B. 448, 450 (2005). *See also NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464

(1953), which is the lead case defining which comments are protected and which are not, in such circumstances.

Employees who are engaged in a labor dispute and, in the course of that dispute, make disparaging comments about their employer, do not lose the protection of the Act if those comments are not so “misleading, inaccurate, or reckless, or otherwise outside the bounds of permissible speech, to cause [the employee] to lose the protection of the Act.” *Endicott Interconnect*, 345 N.L.R.B. at 451, *quoting from Titanium Metals Corp.*, 340 N.L.R.B. 766 fn. 3 (2003), *enf. denied on other grounds*, 392 F.3d 439 (D.C. Cir. 2004). In *Endicott*, an employee was discharged for posting a statement on the internet, in connection with a union campaign and in response to a pro-union statement, which was critical of the employer for “job losses” that hurt employees. The statement referred to the employer “being tanked” and “put into the dirt.”

In *Endicott*, and most other cases involving the *Jefferson Standard* criteria, the Board considered whether the employee was disciplined for engaging in protected activity and whether improprieties during such protected activity were such as to make the conduct unprotected. The balancing of the competing interests in these types of cases is fact specific.

Currently, the Board uses a two-step test to determine whether the rule is lawful. If the rule explicitly restricts Section 7 protected activity, it is unlawful. If there is no explicit restriction, the rule will violate Section 8(a)(1) only when: employees would reasonably construe the language to prohibit Section 7 activity; the rule was promulgated in response to union activity; or the rule has been applied to restrict the exercise of Section 7 rights. The rule’s context is the key to the “reasonableness” determination. For example, a rule proscribing “negative conversations” about managers that is contained in a list of policies regarding working conditions, with no further clarification or examples, may be unlawful because of its potential

chilling effect. In contrast, a rule forbidding “statements which are slanderous or detrimental to the company,” which appear on a list of other prohibited conduct, such as sexual/racial harassment and sabotage, may not be understood to restrict protected activity.

The Board has struck down rules related to employees merely making a “false statement” about their employer. This issue was litigated in *TT&W Farm Products*, Case 26-CA-23722 (ALJ Decision, December 21, 2010). In that case, the employer’s rule read as follows: “bearing false witness for or against the Company under any and all circumstances is prohibited.” A violation of that rule, which was labeled an intolerable offense, was penalized by immediate discharge. The ALJ held that this rule essentially prohibited all false statements, and, as a result, infringed on the right of employees to make false, but nonmalicious, statements in the course of engaging in protected concerted or union activities. *Lafayette Park Hotel*, 326 N.L.R.B. 824 (1998).

In *Lafayette Park Hotel*, the Board, citing numerous authorities, found unlawful a rule that prohibited “[m]aking false, vicious, profane or malicious statements toward or concerning Lafayette Park Hotel or any of its employees.” 326 N.L.R.B. at 828. The Board noted that punishing employees for merely false statements, as opposed to maliciously false statements, was overbroad and had the tendency to chill protected activity. *Ibid.*

In *TT&W Farm Products*, the ALJ ruled:

I find that the Respondent’s rule can reasonably be read to prohibit merely false statements and thus is unlawfully broad under the Board’s holding in *Lafayette Park Hotel*. An ordinary employee would read the term “bearing false witness . . . against the company” to mean that he could not tell a lie or a falsehood when talking about his employer. Not only does

the rule prohibit lying, but it is specifically focused on lies about the company. This undoubtedly chills protected activity because employees have the right under the Act to criticize their employer when complaining about their terms and conditions of employment and deciding whether a union would help them in their dealings with their employer. And such criticism may include the occasional falsehood or hyperbolic comment. *See Jolliff v. NLRB*, 513 F.3d 600, 609-17 (6th Cir. 2008).

A rule limiting the violation to “maliciously false statements” may be sufficiently narrow.

**1. Representative NLRB Decisions on Disparagement Rules**

**a. *HTH Corp.*, 356 N.L.R.B. No. 182, 190 L.R.R.M. 1449  
(NLRB June 14, 2011)**

In *HTH Corporation*, a hotel instituted a new employee handbook including the following provisions:

- Prohibition on the sharing of information with the media and outsiders.
- Requirement for employees to keep confidential certain information about the business operations of the Hotel.
- Prohibition on employees making derogatory remarks.

The Board adopted the ALJ’s findings that the media policy, derogatory remarks policy, and confidentiality policies all were overbroad in violation of Section 8(a)(1) of the Act in accord with Board precedent.

**b. *MasTec Advanced Technologies*, 191 L.R.R.M. 1017 (July 21, 2011)**

Since its decision in *Jefferson*, the Board has continuously held that employee communications to third parties in an attempt to gain their support, are protected if the

communication relates to an ongoing employment dispute and is not disloyal, reckless, or maliciously untrue.

In *MasTec*, the employees were service technicians for a company providing satellite TV equipment. The employees had recently been subjected to a new pay formula. The employees voiced frustration to management to no avail. So, the employees, in their work uniforms, went to the news media and talked to a reporter from “The Problem Solvers Segment” who “teased” a broadcast news story by stating they would reveal a “dirty little secret” about the company. The station interviewed the employees about the employer’s alleged deceptive business practices. During the interview, the employees made misstatements, omitted information, and falsely represented what they were told to tell customers. The employer saw the story and terminated each technician identified in the news report.

The NLRB, despite the blatant departures from the truth, reversed the ALJ, holding that the employees were engaged in protected activity when they spoke with the media and criticized the employer’s installation policies and their effect on technicians’ pay. The Board found that the employees’ conduct was protected by the Act because the departures from the truth were merely good-faith misstatements, not malicious falsehoods, which would justify the removal of NLRA protection. The Board concluded that the employer violated the LMRA when it discharged the technicians who participated.

**c. *Hispanics United of Buffalo, Inc.*, -- N.L.R.B. -- ALJ, No.3-CA-27872 (Sept. 6, 2011) \* ALJ Decision**

In this case, Lydia Cruz-Moore, an employee of HUB, a non-profit organization, was critical of her co-workers’ job performance. She told one of her co-workers that she intended to

take her complaints to HUB's executive director. One of her co-workers then posted a message on her personal Facebook page stating:

“Lydia Cruz, a coworker feels that we don't help our clients enough at HUB. I about had it! My fellow coworkers how do u feel?”

The comments added to the Facebook posting from four co-workers included posts such as:

“What the F\*\*k try doing my job I have 5 programs”

“What the Hell, we don't have a life as is, What else can we do?”

Cruz-Moore responded by posting “stop ur lies about me.” Cruz-Moore then complained to the executive director. The five employees who posted on Facebook were terminated, citing the organizations zero tolerance harassment policy.

The NLRB held that Facebook postings were similar to talk “around the water cooler” and were, therefore, protected. The criticisms represented a “first step towards taking group action to defend themselves against accusations they could reasonably believe [their co-worker] was going to take to management.”

**d. *Wal-Mart*, 17-CA-25030 – Office of the General Counsel Advice  
Memorandum (July 19, 2011)**

In *Wal-Mart*, a customer service employee of the company posted on his Facebook page:

“Wuck Falmart! I swear if this tyranny doesn't end in this store they are about to get a wake up call because lots are about to quit!”

“You have no clue . . . [Asst. Mgr.] is being a super mega puta! I get chewed out cuz we got people putting stuff in the wrong spot and then the customer wanting it for that price . . . I'm talking to [Store Mgr.] about this shit cuz if it don't change walmart can kiss my royal white ass!”

A co-worker and Facebook friend of the employee showed the posting to the store manager the employee who discharged. The General Counsel found the conduct was not protected concerted activity because the employee's postings were merely an expression of an individual gripe with no language of inducement to co-workers to engage in group action.

**e. *JT's Porch Saloon & Eatery Ltd.*, 13-CA-46689 – Off. of  
General Counsel Advice Mem. (2011)**

In this case, a bartender conversed with his sister on his Facebook page and posted comments about the restaurant's tipping policy, complaining that he had not had a raise in 5 years, and calling the customers "rednecks," whom he hoped choked on glass as they drove home drunk. The bartender was fired.

The Board found that the conduct was not protected concerted activity because, although the posting addressed terms and conditions of employment, the bartender did not discuss the posting with his fellow employees, and none of his co-workers responded to the posting.

**f. *Three D, LLC d/b/a Triple Place Sports Bar*, Case No. 34-CA-  
12915 (ALJ Decision, January 3, 2012)**

In *Three D*, the Company maintained an internet/bloggging policy which stated that employees may be "subject to disciplinary action" for "engaging in inappropriate discussions about the Company, management and/or co-workers." The ALJ found that this policy was not unlawful, as it did not explicitly restrict Section 7 activity, was not issued in response to an organizing campaign, and there was no evidence that any employees were discharged pursuant to the policy or that the policy had otherwise been applied to restrict employees' Section 7 rights.

The ALJ found that the policy in question could not reasonably be construed as prohibiting Section 7 activity and noted that many similar policies had been upheld by the Board, such as: “verbal or other statements which are slanderous or detrimental to the company or any of the company’s employees is prohibited”; “rules prohibiting conduct on or off duty which could injure the company’s reputation”; “prohibition on any conduct which is so disloyal, disruptive, competitive or damaging to the company that tends to bring discredit to or reflects adversely on yourself, fellow associates, or the company”; “conducting oneself unprofessionally or unethically with the potential of damaging the reputation of a department of the company”; and “prohibiting off-duty misconduct that materially and adversely affects job performance or tends to bring discredit to the hotel.”

The ALJ reached this conclusion based on the wording of the Company’s policy as a whole, which states:

The company supports the free exchange of information and supports camaraderie among its employees. However, when internet blogging, chat room discussions, email, text messages or other forms of communication extend to employees revealing confidential and proprietary information about the company or engaging in inappropriate discussions about the company, management, and/or co-workers, the employee may be violating the law and is subject to disciplinary action, up to and including termination of employment. Please keep in mind that if you communicate regarding any aspect of the company, you must include a disclaimer that the views you share are yours and not necessarily the views of the

company. In the event state or federal law precludes this policy, then it is of no force or effect.

The NLRB General Counsel argued that the policy was overbroad in that it failed to provide specific examples of inappropriate discussions to clarify that the policy did not encompass protected activity. The ALJ rejected this argument, finding that, in many cases, the Board had found similar rules valid, even though they contained no specific examples of conduct which would expose an employee to potential discipline.

In addition to the policy question, the ALJ was also presented with a novel issue under the nature of employee disparagement. A former employee of the company posted notes on employees' Facebook pages indicating that the company had improperly calculated her income taxes, and that she owed money to the government as a result. Customers chimed in, commenting that this was absurd. When a current female employee of the company posted that she was also owed money, a former employee, customers, and the current female employee began criticizing the owners of the company, insinuating that the owners had "pocketed the money" from employees' paychecks and stated that the owner was an "asshole." A second current employee made no posts but clicked the "like" button in response to a customer's comment that "it's all Ralph's [the owner's] fault. He didn't do the paperwork right. I'm calling the labor board to look into it because he still owes me about \$2000 in paychecks."

The day after the posts the company terminated the employment of the female employee, who specifically posted derogatory comments about the company and the owners, and the male employee, who merely clicked the "like" button in response to a customer's remark. The ALJ found that the current employees were engaged in concerted activity and that their comments were not so disloyal or sufficiently egregious to lose the protection of the Act.

Other employees had joined into the Facebook posting “conversation” but had not specifically attacked either the company or the owners by name, and none of them were terminated. The employer sought to use this fact as evidence that it did not discharge the other two (2) current employees for illegal reasons, but simply terminated them because their derogatory statements against the company’s owner were sufficiently slanderous to warrant termination. The ALJ disagreed.

#### **H. Leaving Work Without Permission**

The NLRB has regularly challenged rules that prohibit the interruption of work and leaving one’s work station without permission. To the extent that those rules and that language can reasonably be viewed as precluding employees from engaging in a protected strike or work stoppage, those rules and that language violate the Act. *See Labor Ready, Inc.*, 331 N.L.R.B. 1656, n.2. (2000) (invalidating, as overbroad, a rule stating that, “Employees who walk off the job will be discharged”) and *Crowne Plaza Hotel*, 352 N.L.R.B. 382, 387 (2008) *citing NLRB v. Washington Aluminum Co.*, 307 U.S. 9, 16-17 (1962). In *Crowne Plaza Hotel*, the Board considered the lawfulness of rules which prohibited, “leaving your work area without authorization before the completion of your shift,” and “Walking off the job.” *Id.* at 383, 387. The Board in *Crowne Plaza Hotel* held that the rules were unlawfully overbroad because an employee would reasonably read the rules as prohibiting protected concerted activity, such as a mid-shift strike, thereby allowing management to abrogate or completely prohibit employees from engaging in activities which impact these Section 7 rights. *Id.* at 387. *See Labor Ready, Inc.*, 331 N.L.R.B. 1656, fn. 2 (2000); and *Crowne Plaza Hotel*, 352 N.L.R.B. 382, 387 (2008), *citing NLRB v. Washington Aluminum Co.*, 307 U.S. 9, 16-17 (1962), which makes it clear that

employees may strike, notwithstanding a similar rule against leaving the workplace in the absence of permission from the employer. Both *Labor Ready* and *Crown Plaza* involved the legality of the maintenance of restrictive rules, in the absence of actual enforcement. *See also Turtle Bay Resorts*, 353 N.L.R.B. at 1271-72 (2009).

**1. Representative NLRB Decisions on Leaving Work Without Permission**

**a. *Two Sisters Food Group, Inc.*, 357 N.L.R.B. No. 168 (2011).**

*Two Sisters Food Group, Inc.*, involved challenges to numerous company policies following an unsuccessful union organizing campaign. The challenged rules were as follows:

Rule 11 – leaving department or the plant during a working shift without a supervisor’s permission.

Rule 12 – stopping work before shift ends or taking unauthorized breaks.

Rule 28 – unauthorized soliciting of contributions on company property.

Rule 35 – inability or unwillingness to work harmoniously with other employees.

With respect to Rule 28, prohibiting “unauthorized soliciting of contributions on company premises”, the NLRB upheld the ALJ’s finding that this rule was unlawful on its face, because it was not limited to “working time.” The NLRB held “the rule [was] unlawful even though it was limited to the solicitation of contributions since solicitation of contributions to support an organizing drive, to help a fired fellow employee, and for many similar purposes was protected by Section 7.”

With respect to Rule 35, the NLRB upheld the ALJ’s finding that the respondent violated the Act by maintaining this rule which subjected employees to discipline for the “inability or

unwillingness to work harmoniously with other employees.” The Board noted that they had previously held in *Flamingo Hilton – Laughlin*, 330 N.L.R.B. 287 (1999) that a rule which prohibited “using loud, abusive, or foul language” was unlawful. Here, the NLRB again reasoned that since the rule did not define what it means to “work harmoniously,” it was ambiguous and could be reasonably interpreted as barring lawful union organizing propaganda. The Board agreed with the ALJ that the rule was sufficiently imprecise in that it could encompass any manner of disagreement or conflict among employees, including those related to discussions and interactions protected by Section 7 of the National Labor Relations Act and that the employees would reasonably construe the rule to prohibit such activity.

With respect to Rules 11 and 12, the ALJ found that the company’s rules prohibiting “leaving a department or the plant during a working shift without a supervisor’s permission” and “stopping work before shift ends or taking unauthorized breaks” violated the Act because they were “impermissibly overbroad.” The Board, however, disagreed. With respect to the unauthorized breaks rule, the Board noted that it only prevented an employee from taking unauthorized leaves or breaks and did not expressly restrict concerted activities. The Board noted that in *Labor Ready Inc.*, 331 N.L.R.B. 1656 (2000), it held that a rule prohibiting “walking off the job” was unlawfully broad as employees could reasonably understand such rule to prohibit a strike. “Walking off the job would be synonymous with the term “walk out” as a synonym for a strike.” The Board in this case drew a distinction and that the prohibition was only leaving the department or plant “during a shift” without permission or stopping work before a shift ends.

The NLRB also upheld the ALJ’s finding that the company policy requiring its employees to submit “all employment disputes and claims to binding arbitration” was unlawful,

by relying on the Federal Court decision in *U-Haul Co. of California*, 347 N.L.R.B. 375, 377-78 (2006), *enfd* 255 Fed. Appx. 527 (DC Cir. 2007), in which the Court upheld the Board's finding that a similar policy requiring arbitration of "all disputes relating to or arising out of an employee's employment" violates the law as employees would reasonably construe this broad language to prohibit even the filing of an unfair labor practice with the Board, despite the fact that the policy did not explicitly restrict access to the Board. Even though the policy was explicitly limited to claims "that may be lawfully resolved by arbitration," the policy did not mention excluding NLRB proceedings, and, as a result, the Board held that employees "as non-lawyers" would not be sufficiently familiar with the limitations and could infer that the policy barred protected acts.

#### **I. Expanding Protected Concerted Activity – The Preemptive Strike**

The NLRB issued a decision establishing a novel precedent by expanding what constitutes protected "concerted activity" under the NLRA. The Board concluded that an employer violates Section 8(a)(1) of the Act by terminating an employee, even if done before he or she engaged in protected concerted activity as defined by the NLRA.

##### **1. Representative NLRB Decisions on the Preemptive Strike**

###### ***a. Paraxel Int'l, LLC, 356 N.L.R.B. No. 82 (2011)***

In *Paraxel International*, a South African employee falsely informed the Charging Party that he had received a raise and that the manager was going to "look after" other South Africans employed by the employer. The Charging Party, who was not South African, discussed this with her immediate supervisor. Thereafter, a manager met with the Charging Party and asked if she had discussed these issues with any other employees. The Charging Party responded that she had not. Six days later, her employment was terminated.

The ALJ observed that concerted complaints about favoritism in the workplace are generally protected by the NLRA. Here, however, the ALJ found that the Charging Party's conduct was not "concerted" because she did not discuss her concerns about favoritism with anyone else prior to the one-on-one meeting with her supervisor. The ALJ concluded that while the discharge was "in some respects ... a preemptive strike to prevent her from engaging in activity protected by the Act," no violation occurred because there was no case law precedent for finding a violation absent some actual concerted protected activity.

A Board majority reversed the ALJ decision. In finding the discharge violated Section 8(a)(1) of the Act, the Board concluded: "[I]f an employer acts to prevent concerted protected activity -- to 'nip it in the bud' -- that action interferes with and restrains the exercise of Section 7 rights and is unlawful without more."

Dissenting, Member Hayes observed that "finding a Section 8(a)(1) motivational discharge violation in the absence of any actual concerted activity is unprecedented, and, at the very least, is in tension with *Meyers Industries*." Member Hayes further noted that the General Counsel litigated the case on the theory that the employee had, indeed, engaged in actual protected concerted activity, and that the "preemptive strike" theory did not arise until after the ALJ dismissed the complaint. According to Hayes, adequate notice had not been provided in the pleadings or at the hearing sufficient to alert the employer that it needed to defend a legal theory that even the ALJ conceded was unprecedented.

#### **J. General Counsel's 3<sup>rd</sup> Report on Social Media**

Section 7 of the National Labor Relations Act protects the right of employees to engage in "concerted activities" for the purpose of collective bargaining or in efforts to improve working conditions and terms of employment. These concerted activities can be done in person, or by

other methods of communication, including electronic media. Employers who terminate an employee based upon a social media posting that ultimately is determined to have been “protected concerted activity” may be held to have violated Section 7 of the NLRA.

In August 2011 and January 2012, the Acting General Counsel of the National Labor Relations Board issued reports that dealt with cases arising in the context of employee communications via social media. Those reports provided employers with a glimpse into the NLRB’s rationale for dealing with cases in which employees claim that an employer’s disciplinary action based on a social media posting violated Section 7. The reports did little to stem employers’ concerns related to the delicate balance between employees’ rights to open communication with each other and implementation and enforcement of company policies related to communications via social media.

On May 30, 2012, the NLRB issued its third and most recent report on social media, which was dedicated primarily to social media policies. The report summarized seven different policies, pointing out provisions in the first six which may violate Section 7, but holding up the seventh policy -- newly revised by a national retail chain -- as “lawful.”

Some of the examples of “unlawful” language in the first six policies may cause some concern among employers. For instance, one company’s policy stating that employees who were in doubt as to whether a posting might violate the policy should “check with [Employer] Communications or [Employer] Legal to see if it’s a good idea . . . .” was deemed a violation of law because a “rule that requires employees to secure permission from an employer as a precondition to engaging in Section 7 activities,” automatically violates the NLRA. A company’s policy that required employees to assure that “posts are completely accurate and not misleading and that they do not reveal non-public company information on any public site” was

deemed to be unlawfully overbroad and, according to the NLRB, could “reasonably be interpreted to apply to discussions about, or criticism of, the Employer’s labor policies and its treatment of employees that would be protected by the [NLRA]. . . .” Of real concern was the NLRB’s evaluation of a company policy that stated: “Offensive, demeaning, abusive, or inappropriate remarks are as out of place online as they are offline.” According to the Board, that statement was in violation of Section 7 because it “proscribes a broad spectrum of communications that would include protected criticisms of the Employer’s labor policies or treatment of employees.”

Following the Third Report, Employers should further rid themselves of the misconception that a “savings clause” will satisfy the NLRB from finding its policy to be unlawful. According to the report, such a savings clause -- as, “This policy will be administered in compliance with applicable laws and regulations, including Section 7 of the NLRA”-- “does not cure the ambiguities in [a] policy’s overbroad rules.” Even a savings clause attached to the end of each provision may not remedy an overly broad policy, according to the General Counsel.

While constructing a satisfactory social media policy may appear an unrealizable task, the Board provided a roadmap in the form of an “acceptable” policy when the General Counsel issued the latest report. According to the Board, the key to the acceptable policy’s lawfulness is that the policy “provides sufficient examples of prohibited conduct so that, in context, employees could not reasonably read the rule to prohibit Section 7 activity.” While a number of the policy’s provisions are as broad as those found to be in violation of Section 7, the concrete examples of what does and does not violate the policy seems to have satisfied the concerns that the Board expressed regarding the six earlier examples.

Employers should understand that company policies typically are not one-size-fits-all, as noted by the General Counsel, and should not simply use the exemplar policy in its totality -- such implementation would not ensure NLRA compliance. A more practical solution would be to review the exemplar policy carefully, and then tailor its core concepts to fit the values and existing needs of the specific employer.

**K. The Acting General Counsel's Efforts to Expand the Scope of the NLRA**

The Acting General Counsel has made several efforts to establish new labor law policy. This intention is reflected in multiple General Counsel Memoranda issued earlier this year. The Memoranda offered the Acting General Counsel's interpretation of recent case law, as well as his intentions on how the case law should be applied or challenged going forward. His objectives were made apparent when he issued a complaint against The Boeing Company.

**1. Representative NLRB Decisions Concerning Expansion of the NLRA**

**a. The Boeing Company Case**

In *Boeing*, the Acting General Counsel issued an unfair labor practice complaint against The Boeing Company. At the core of the complaint was Boeing's decision to situate a second assembly line for its 787 Dreamliner airplane in Charleston, South Carolina, instead of the State of Washington, in order to retaliate against its Washington-based employees who continuously participated in strikes.

After issuing the complaint against Boeing, the Acting General Counsel failed to produce sufficient evidence to support its contention that Boeing acted with any animus towards its current employees' protected union activity when it made the decision on where to establish a second operation. In reality, both Boeing and the union negotiated for several months about the pending decision to locate a new plant, and the Acting General Counsel had never alleged that

Boeing failed to bargain in good faith with the union at any point, especially about the specific issue of relocation.

Even if Boeing acted with animus towards its unionized employees, the Acting General Counsel's complaint was ridden with additional legal deficiencies. NLRA precedent has continuously held that viable retaliation claims must be supported by a showing that employees who were discriminated against experienced some kind of harm to their terms and conditions of employment as a result of employer retaliation. Here, there was no evidence presented which suggested that any of the Washington-based employees suffered any harm as a result of the Company's decision of where to locate a new plant.

The fact that the Acting General Counsel filed a complaint with utter lack of support in existing NLRA case law, illustrates the General Counsel's intent to radically expand the NLRA's control over entrepreneurial decision-making.

**L. Arbitration Agreements**

**1. Representative NLRB Decisions**

**a. *D.R. Horton*, 357 N.L.R.B. No. 184 (2012)**

In *D.R. Horton*, the Board considered whether an employer violated Section 8(a)(1) of the National Labor Relations Act when the employer required employees, as a condition of their employment, to sign an agreement that precluded them from filing joint, class, or collective claims addressing their wages, hours, or other working conditions against the employer in any forum, arbitrational or judicial. The Board found that such an agreement unlawfully restricted employees' Section 7 rights to engage in concerted activity for mutual aid or protection. The Board also found that there was no conflict between the Federal labor law and the Federal Arbitration Act (FAA), which generally makes employment-related arbitration agreements

judicially enforceable.

Respondent D.R. Horton, is a home builder who, on a corporate-wide basis, required all employees to sign a “Mutual Arbitration Agreement” (MAA) as a condition of employment. The MAA provided in part:

b. All disputes and claims relating to the employee’s employment with the Respondent . . . will be determined exclusively by final and binding arbitration.

c. That the arbitrator “may hear only Employee’s individual claims,” “will not have the authority to consolidate the claims of the other employees,” and “does not have the authority to fashion a proceeding as a class or collective action or to award relief to a group or class of employees in one arbitration proceeding.”

Pursuant to the MAA, all employment-related disputes were required to be resolved through individual arbitration, thus, waiving the employees’ right to a judicial forum, as well as the employees’ right to pursue a class or collective litigation of claims in any forum.

The Petitioner, employed by the Respondent as a superintendent, notified the Respondent that he had hired a firm to represent him in a nationwide class of similarly situated superintendents. Petitioner asserted that the Respondent had been misclassifying its superintendents as exempt from the provisions and protections of the Fair Labor Standards Act (FLSA) and gave notice of his intent to arbitrate the claim on a collective basis.

In filing an unfair labor practice charge, the General Counsel issued a complaint asserting that the Respondent violated Section 8(a)(1) of the Act by maintaining the MAA provision, which stated that the arbitrator “may hear only Employee’s individual claims and does not have

the authority to fashion a proceeding as a class or collective action or to award relief to a group or class of employees in one arbitration proceeding.” The General Counsel further alleged that the Respondent violated Section 8(a)(4) of the Act by maintaining arbitration agreements requiring employees, as a condition of employment, “to submit all employment related disputes and claims to arbitration . . . thus interfering with employee access to the [NLRB].”

The judge presiding over the complaint found that the MAA violated Section 8(a)(1) and (4) because its language would lead employers to reasonably believe that they were prohibited from filing unfair labor practice charges with the Board. The judge, however, dismissed the allegation that the class action waiver violated Section 8(a)(1). While the Board agreed with and confirmed the judge’s decision in part, the Board reversed the judge’s dismissal of the allegation that the class action waiver did not violate Section 8(a)(1).

In its reasoning, the Board found that employees who join together to bring employment-related claims on a class-wide or collective basis in court, or before an arbitrator, are exercising rights protected by Section 7. The Board observed that Congress has vested employees with “full freedom of association . . . for the purpose of [addressing inequality of bargaining power],” 29 U.S.C. § 151, and asserted that both the NLRB and the courts have previously recognized that collective enforcement of legal rights in court or arbitration serves that legislative goal. The Board further stated that employees are more likely to assert their legal rights, and do so more effectively, if they can affirm such rights in a collective manner. The Board claimed that when multiple employees join together to initiate an action, such activity is not only a concerted effort to redress or improve workplace wrongs or conditions, but it is also at the core of what Congress initially intended to protect by adopting the chosen language of Section 7 of the Act.

The Board held that the MAA clearly and expressly barred employees from exercising substantive Section 7 rights, and, thus, failed the first prong of the *Lutheran Heritage Village-Livonia* test. 343 N.L.R.B. 646 (2004). The Board supported its decision by asserting that since issuing the decision in *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944), the Court has continuously reaffirmed the principle that employers cannot enter into individual agreements with employees in which employees cede their statutory rights to act collectively.

The Board further concluded that in finding the MAA unlawful in regards to the NLRA, the holding neither conflicted nor interfered with the letter of the FAA, nor undermined its pro-arbitration policy, for the following reasons: (1) the purpose of the FAA is to prevent courts from treating arbitration agreements less favorably than other private contracts; and, here, the Board's holding did not rest on defenses that applied only to arbitration. The MAA would have equally violated the NLRA, even if it had refrained from mentioning arbitration and, instead, required employees to agree to pursue claims against the Respondent in court solely on an individual basis, because the immediate issue in *D.R. Horton* concerned the agreement to waive collective action in *any* forum; (2) while Supreme Court FAA jurisprudence made clear that an agreement may not require a party to forgo substantive rights afforded by the FAA, the issue in *D.R. Horton* was whether "the MAA's categorical prohibition of joint, class, or collective federal, state, or employment law claims in any forum directly violated the substantive rights" of employees, as provided by the NLRA alone; (3) there was nothing in the FAA which suggested that an arbitration agreement which was inconsistent with the NLRA was, nevertheless, enforceable; and (4) even if there was a direct conflict between the FAA and the NLRA, there was a strong indication that the FAA would be forced to yield to the NLRA under the terms of the Norris-LaGuardia Act, which states a private agreement that seeks to prohibit a lawful means of aiding

any person participating or interested in a lawsuit arising out of a labor dispute, is unenforceable as contrary to the public policy protecting employees' concerted activities for mutual aid or protection.

The Board did not mandate class arbitration in *D.R. Horton*, but, rather, held that employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in all forums, both arbitral and judicial. The Board found that if an employer leaves open a judicial forum for class or collective action claims, then employees' NLRA rights are preserved. The Board consequently asserted that employers remain free to require arbitral proceedings be conducted on an individual basis. In so holding, the Board emphasized the limits of its holding.

**M. At-Will Disclaimers in Company Policies**

A recent decision of which employers should be aware, concerns at-will disclaimers. Regional Director Cornele Overstreet, Region 28 (Phoenix), issued at least two known complaints challenging an employer's maintenance of an at-will disclaimer or acknowledgement of such a disclaimer in a company policy.

At a recent Connecticut Bar Association Meeting, the Acting General Counsel, Lafe Solomon, stated that, "If an employee could reasonably believe that even union representation and collective bargaining cannot alter his or her at-will status, then employees might conclude that organization is essentially futile -- in which case, the at-will language might violate the NLRA."

## 1. **Representative NLRB Decisions Concerning At-Will Disclaimers**

### *a. Hyatt Hotels*

Paragraph 5(k) of the Complaint in Hyatt Hotels included the following language: “Since about January 13, 2011, the Respondent has maintained the following overly broad and discriminatory acknowledgment form in its employee handbooks at various full service hotels in the United States:

I understand my employment is “at-will.” This means I am free to separate my employment at any time, for any reason, and Hyatt has these same rights. Nothing in this Handbook is intended to change my at-will employment status. I acknowledge that no oral or written statements or representations regarding my employment can alter my at-will employment status, except for a written statement signed by me and either Hyatt’s Executive Vice President/Chief Operating Officer or Hyatt’s President.

In order to retain flexibility in its policies and procedures, I understand Hyatt, in its sole discretion, can change, modify or delete guidelines, rules, policies, practices, and benefits in this handbook without prior notice at any time. The sole exception to this is the at-will status of my employment, which can only be changed in a writing signed by me and either Hyatt’s Executive Vice President/Chief Operating Officer or Hyatt’s President.”

The Board alleged that by including the disclaimer in the company handbook and by making the employees sign it, Hyatt had been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 in violation of Section 8(a)(1) of the NLRA, which makes it illegal for employers to interfere, restrain, or coerce employees concerning their Section 7 right to engage in protected concerted activity.

Hyatt Hotels settled the Complaint by agreeing to expunge the above underlined language in the employment disclaimer.

**b. *American Red Cross Arizona Blood Serv. Region*, Case 28-CA-23443, 2012 WL 311334 (NLRB Div. of Judges Feb. 1, 2012)**

In *American Red Cross*, an Administrative Law Judge considered a contention asserted by the General Counsel, which stated that the Respondent had unlawfully maintained a provision in its “Agreement and Acknowledgement of Receipt of Employee Handbook” form, which all employees were required to sign. According to the ALJ, the acknowledgement form attempted to define an “at-will” employment relationship. The definition included the following language: “I further agree that the at-will employment relationship cannot be amended, modified, or altered in any way.” The General Counsel contended that the Respondent violated the NLRA by maintaining and requiring employees to sign the acknowledgement form containing the above-cited language because the language was overly-broad and discriminatory.

The ALJ turned to Board precedent in order to make a determination considering the lawfulness of the at-will disclaimer. In determining whether the existence of specific work rules violated Section 8(a)(1) of the Act, the Board has previously held that, “the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights.” *Lafayette Park Hotel*, 326 N.L.R.B. 824, 825 (1998), *enf’d*, 203 F.3d 52 (D.C. Cir. 1999). Even absent enforcement, the Board can conclude that the rule’s maintenance is an unfair labor practice if the Rule is likely to have a chilling effect on Section 7 rights. *Id.* The Board further refined the *Lafayette Park Hotel* standard in *Lutheran Heritage Village-Livonia*, 343 N.L.R.B. 646, 646 (2004), by creating a two-step inquiry for determining whether the maintenance of a rule violates the Act. First, if the rule expressly restricts Section 7 activity, it is

clearly unlawful. If it does not, it will, nonetheless, violate the Act upon a showing that: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. *Id.* at 647.

In *American Red Cross*, the ALJ asserted that there is no doubt employees would reasonably construe the language in the acknowledgement form to expressly prohibit protected Section 7 activity, thus violating the first step in the *Lutheran Heritage* test. The ALJ found that the signing of the acknowledgement form was essentially a waiver in which an employee agrees that his or her at-will status cannot change, regardless of whether the employees are represented by a union – therefore relinquishing the employees’ right to advocate collectively in a concerted manner on their working conditions. The ALJ held that the acknowledgement form was unlawful under the NLRA.

### **III. UNION DISPLAYS TO PRESSURE SECONDARY EMPLOYERS AT THEIR PLACE OF BUSINESS**

Section 8(b)(4)(ii)(B) of the National Labor Relations Act prohibits conduct found to “threaten, coerce, or restrain” a secondary employer not directly involved in a primary labor dispute, if the purpose of such conduct is to cause the secondary employer to cease doing business with the primary employer. The practice of picketing, which typically seeks the end result of a consumer boycott of a secondary employer, is generally considered illegal because it is unlawfully coercive. Handbilling, however, is typically deemed constitutionally protected expressive conduct.

In recent decisions, a Board majority has declared lawful the union practice of displaying large banners and balloons at a secondary employer’s premises, in order to protest labor practices

of a separate, non-union contractor. In *Carpenter's Local 15006 (Eliason & Knuth of Arizona, Inc.)*, 355 N.L.R.B. No. 159 (2010), the Board found a union's display of large stationary banners at a secondary employer's premises to be lawful. The Board reaffirmed this position of legality and acceptability concerning union pressure on secondary employers in a more recent decision, *Sheet Metal Workers Int'l Ass'n, Local 15, AFL-CIO*, 356 N.L.R.B. No. 162 (2011).

**1. Representative NLRB decisions**

**a. Sheet Metal Workers Int'l Ass'n, Local 15, AFL-CIO, 356  
N.L.R.B. No. 162 (2011)**

*Sheet Metal Workers* presented the issue of whether the Respondent (Union) violated Section 8(b)(4)(ii)(B) of the NLRA by: (1) displaying a large inflatable rat at the hospital worksite of a secondary employer; and (2) stationing, at the vehicle entrance of the hospital, a union member who, with two arms outstretched, displayed a leaflet directed at incoming and outgoing traffic. The Board -- in applying the reasoning set forth in *Carpenters Local 1506*, 355 N.L.R.B. No. 159 (2010) (*Eliason*), which found that the display of large stationary banners at secondary employer locations did not violate the Act -- held that the Union's protest activity in *Sheet Metal Workers* did not violate the NLRA.

Relying on Supreme Court precedent culminating in *Debartolo Corp. v. Florida Gulf Coast Bldg. Trades Council*, 485 U.S. 568 (1988), the Board stated that the determinative question as to whether union activity at a secondary site violates Section 8(b)(4)(ii)(B) was whether it constituted "intimidation or persuasion." *Eliason*, 355 N.L.R.B. No. 159, *slip op.* at 4. According to the *Eliason* Board, "Union activity that is merely persuasive is lawful . . . even when the object of the activity is to induce the secondary to cease doing business with a primary employer." *Id.* Protest activity that owes more to intimidation than persuasion, however, is not

lawful. *Id.* at 6. The Board, in *Sheet Metal Workers*, declared that neither the inflatable rat nor the leaflet display, threatened, coerced, or restrained the hospital, nor was there any indication in the legislative history of Section 8(b)(4)(ii)(B) that suggested Congress intended to prohibit displays, like the banner displays in *Eliason*, which were stationary and peaceful.

The Board next addressed the issue of whether peaceful expressive activity at a purely secondary site violated Section 8(b)(4)(ii)(B) if the activity was deemed to be picketing. Having faced a similar issue, the Board in *Eliason* determined that the banner displays lacked the essential element of confrontation, which has long been central to the concept of picketing for purposes of the Act's prohibitions. 355 N.L.R.B. No. 159, *slip op.* at 6. In *Eliason*, the Board explained that the "core conduct that renders picketing coercive under Section 8(b)(4)(ii)(B), is the carrying of picket signs, combined with persistent patrolling that creates a physical or symbolic confrontation between the picketers and those entering the worksite." *Id.* The *Eliason* Board -- noting that the banners were held stationary, were located at sufficient distances from the vehicle or building entrances of the secondary site such that the members of the public and employees wishing to enter the secondary's sites did not confront an actual or symbolic barrier, and were not posted in such a manner that those entering the sites would perceive the individuals holding the banner as threatening -- found that the banner displays lacked the core characteristic of picketing, confrontation. *Id.* at 6-7. In the absence of confrontational elements, the *Eliason* Board concluded that an 8(b)(4)(ii)(B) violation could not be found solely on the basis that the banner displays constituted picketing.

The Board in *Sheet Metal Workers* similarly determined that neither the rat nor the leaflet display, which were stationary and were located at sufficient distances from the vehicle and building entrances to the hospitals so that visitors and employees were not confronted by an

actual or symbolic barrier, did not constitute picketing, because both displays lacked an element of confrontation. The Board further observed that there was no evidence that the individuals tending the rat or holding the leaflet display physically or verbally accosted hospital patrons or employees.

Having determined that both union displays did not constitute picketing, the *Sheet Metal Workers* Board addressed, in accord with *Eliason*, whether such conduct was, nevertheless, coercive. The Board in *Eliason* held that a violation of Section 8(b)(4)(ii)(B) may still be found if the non-picketing “conduct directly caused, or could reasonably be expected to directly cause, disruption of the secondary’s operations.” *Id.* at 10. The Board in *Sheet Metal Workers* found no evidence to support a finding that the displays in question constituted non-picketing conduct which was unlawfully coercive. As in *Eliason*, the attendants of the rat and leaflet displays in *Sheet Metal Workers* neither moved, shouted, impeded access, nor otherwise interfered with the hospital’s operations. The Board also determined that the rat balloon was a form of symbolic speech. While the balloon drew attention to the grievances presented by the union and cast suspicion upon the employer, the Board determined that nothing in its size, location, or features was likely to frighten those entering the hospital, disturb patients and their families at the hospital, or otherwise interfere with the operations of the hospital in such a manner that could be considered unlawfully coercive.

The *Sheet Metal Workers* Board offered support for its determination by stating that its holding was strongly supported by the “constitutional avoidance” doctrine. As explicated in *Eliason*, the Board must avoid, if possible, construing the statutory phrase “threaten, coerce, or restrain” in a manner that would raise serious problems under the First Amendment. *Id.* at 11. The *Eliason* Board found that there is no basis for treating banner displays differently than the

other forms of expressive activity that the Supreme Court has concluded implicate the First Amendment. *Id.* at 12. The Court in *Snyder v. Phelps*, 131 S.Ct. 1207 (2011), affirmed First Amendment protection of picketing -- by church members of a military funeral, adjacent to a public street, with banners communicating the members' beliefs that God hates the United States for its tolerance of homosexuality -- because the members displayed their signs peacefully on matter of public concern, at a public place, adjacent to a public street.

In following that line of reasoning, the Board in *Sheet Metal Workers* concluded that if the First Amendment protects statements as disturbing as those at issue in *Snyder*, surely prohibiting an inflatable rat display with a handbill referring to a "rat employer" would similarly raise constitutional concerns. The Board concluded that union displays should be viewed as expressive activity protected under the First Amendment. Applying the analysis set forth in *Eliason*, the *Sheet Metal Workers* Board concluded that the inflatable rat and union leaflet displays did not violate Section 8(b)(4)(ii)(B) of the NLRA.

In combining the holdings of *Eliason* and *Sheet Metal Workers*, the Board has essentially devitalized the secondary boycott provisions of the NLRA. The Board appears content to permit a union to apply pressure upon a neutral, secondary employer, at their place of business, in front of consumers and employees of the secondary employer, no matter how offensive or misleading the message, so long as the union does not place protest objects -- whether an inflatable rat balloon or banner -- on sticks or include moving supporters in tandem with the display.