Restoring Common Sense to Labor Law

Ten Policies to Fix at the National Labor Relations Board

U.S. CHAMBER OF COMMERCE
Workforce Freedom Initiative

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Introduction

Under the Obama administration, the Democratic majority of the National Labor Relations Board ("NLRB" or "Board") took an overly expansive view of how the National Labor Relations Act ("NLRA" or "Act") should be interpreted and enforced. In particular, the Board advanced a very broad reading of Section 7 of the Act, which says that employees have the right to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[1] Indeed, the Obama-era NLRB seemed to elevate Section 7 above any other workplace interest, including those established by other federal statutes. In furtherance of this view, the Obama Board overturned substantial precedent in almost 100 cases, equivalent to over 4,500 years of precedent.[2]

This paper highlights ten of the Obama Board's most egregious labor policy shifts, all of which stretched the boundaries of common sense and existing jurisprudence.

This paper highlights ten of the Obama Board's most egregious labor policy shifts, all of which stretched the boundaries of common sense and existing jurisprudence. Many of these Board decisions involved an employer's application of neutral employer policies to provide for a safe and efficient workplace, including maintaining the confidentiality of internal investigations, the ability to regulate inappropriate workplace

[1] 29 U.S.C. §157.
[2] *See* Maurice Baskin, Michael J. Lotito and Missy Parry, "Was the Obama NLRB the Most Partisan Board in History? The Obama NLRB Upended 4,559 Years of Precedent," (December 6, 2016) available at http://myprivateballot.com/2016/12/06/groundbreaking-report-obama-nlrb-slashed-4500-years-legal-precedent/.

conduct, employee use of company e-mail systems, and prohibitions on obnoxious, obscene, and harassing behavior.

The NLRB's broad reading of Section 7 also led the Board to invalidate class action waivers contained in employment arbitration agreements, which are intended to speed resolution of workplace disputes and reduce the burden of unnecessary litigation. Given its broad view of Section 7, the Board argued that these waivers deprived employees of their right to engage in concerted activity by limiting class action lawsuits. Many courts have disagreed, but the NLRB disregarded these decisions under its improperly-applied policy of non-acquiescence, leaving employers to defend charges related to arbitration at the Board and in federal courts. As a result of the Board's divisive actions, the Supreme Court recently agreed to hear the issue.

The Board has also disrupted the process by which parties to a collective bargaining agreement can refer matters not covered by a contract to arbitration. In so doing, it has interfered with the ability of unionized employers to manage their businesses effectively.

The actual process of union elections is yet another area where the Obama-era NLRB has sought to stack the deck against employers through the implementation of an "ambush" election rule and changes to the definition of an "appropriate" bargaining unit. The NLRB also adopted an expansive new joint employer standard in an attempt to

extend liability for unfair labor practice charges and to force more employers into collective bargaining obligations.

The time to move forward is now, because for employers, workers, and the economy, the restoration of rationality in labor law can't come soon enough.

Overall, the Obama-era NLRB took the interpretation and enforcement of Section 7 well beyond its historic norms. In the process, it disrupted long-standing, bipartisan labor policies—policies that fairly balanced workers' rights with employers' economic interests and the maintenance of a safe and harmonious workplace. Fortunately, the Trump administration will have an opportunity to restore common sense to labor law when it appoints new Board members and a new General Counsel. But Congress shouldn't simply wait for the NLRB to act—it should take advantage of the opportunity to enshrine reasonable Board policies into law so that a future administration cannot swing the pendulum back again. The time to move forward is now, because for employers, workers, and the economy, the restoration of rationality in labor law can't come soon enough.

I. *Specialty Healthcare* and the Presumption in Favor of "Micro" Units

One of the most dramatic shifts under the Obama Board was its new interpretation of what constitutes an appropriate bargaining unit. This shift came about in 2011, when the NLRB issued *Specialty Healthcare & Rehabilitation Center of Mobile*.[3] Under the standard established by *Specialty Healthcare*, as long as a union's petitioned-for unit consists of a clearly identifiable group of employees, the Board will simply presume the unit is appropriate. The Board has indicated it will expressly consider the "extent of employee organizing" as a factor in determining the appropriate bargaining unit and will not reject units simply because they are small.[4] In essence, unions can now gerrymander the bargaining units they wish to organize.

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In *Specialty Healthcare*, the Board created a nearly impossible hurdle for employers to overcome if they contest these small, gerrymandered units. Should an employer argue that a proposed unit should include additional employees, it must demonstrate that those workers share an "overwhelming" community of interest with the

[3] *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011) *enf'd. sub nom.* 727 F.3d 552 (6th Cir. 2013).
[4] *Id.* at 942, 943.

individuals in the union's petitioned-for unit.[5] *Specialty Healthcare* overturned long-standing bipartisan precedent applying the traditional "community of interest" standard, which favored larger, wall-to-wall bargaining units. [6]

The Board's new policy favors union interests because smaller groups of employees are typically easier to organize. As applied, the *Specialty Healthcare* decision means that the NLRB approves almost any bargaining unit proposed by a union, regardless of how small or fragmented. Moreover, the express consideration of the extent to which unions have organized is at odds with the language of Section 9(c)(5) of the NLRA.[7]

After the *Specialty Healthcare* decision was issued, the Board gave broad assurances that its approach was limited to the non-acute healthcare setting.[8] However, the Board soon began applying *Specialty Healthcare* to other industries.[9] For example, in *Macy's, Inc.,* the Board approved a petitioned-for unit of 41 cosmetics and fragrance

[5] In his dissenting opinion, Member Hayes noted that the Board's new test encourages unions to organize the smallest units possible, which results in a fragmentation of the workforce. He also recognized that the heightened burden on employers makes it "virtually impossible" for an employer to prove that excluded employees should be included in a petitioned-for unit.
[6] *Specialty Healthcare* overruled the standard applied in *Park Manor Care Center, Inc.,* 305 NLRB 872 (1991), and stated that its standard had become "obsolete" and "is not consistent with our statutory charge."
[7] 29 U.S.C. § 159(c)(5).
[8] The Board announced that *Specialty Healthcare "*did not create new criteria for determining appropriate bargaining units outside health care facilities." *See* NLRB, Office of Public Affairs, "Board Issues Decision on Appropriate Units in Non-Acute Care Facilities," Press Release (August 30, 2011); Melanie Trottman, "Business Irked as Labor Board Backs Unions," *The Wall Street Journal (*August 31, 2011).
[9] The Board first applied *Specialty Healthcare* in *Odwalla, Inc.,* 357 NLRB 1608 (2011). In that case, to avoid a fractured unit of employees, the Board found that a fragmented group of merchandising employees shared an overwhelming community of interests with drivers, warehouse employees, and technicians.

employees while rejecting the employer's position that such a unit should include other sales employees.[10] Instead, the Board found that Macy's failed to meet its burden of showing an "overwhelming community of interest" between the two groups. Likewise, the Board upheld a union's petitioned-for unit of 31 rental service agents and lead rental service agents at a rental car company,[11] ruling that the employer failed to demonstrate an overwhelming community of interest between these workers and the employer's other 109 employees. In *Bread of Life,* the Board determined that a fragmented unit limited to 17 of 43 bakers working in six geographically separate cafes was appropriate.[12] Under *Specialty Healthcare*, the Board has even recognized a unit of two separate small groups of janitorial employees at two unrelated facilities as an appropriate unit consistent with the union's election petition.[13] No evidence existed of functional integration or employee interchange between the facilities.

[10] *Macy's, Inc.,* 361 NLRB No. 4 (2014) *enf'd.*824 F.3d 557 (5th Cir. 2016).
[11] *DTG Operations, Inc.* 357 NLRB 2122 (2011).
[12] *Bread of Life, LLC dba Panera Bread,* 359 NLRB No. 24 (2012), *vacated and remanded* 2014 U.S. App. LEXIS 21795 (D.C. Cir. Nov. 18, 2014) *aff'd.* 362 NLRB No. 106 (2015).
[13] *Exemplar, Inc.*, 363 NLRB No. 157 (2016).

In a particularly high-profile case, the Board upheld a Regional Director's decision that a unit limited to 152 maintenance employees, carved out of 1,500 workers at

Volkswagen's Chattanooga facility, was an appropriate unit.[14] In that case, no separate maintenance department actually existed, and the union cobbled together a unit of workers from the employer's body, paint, and assembly shops. Significantly, the union had already sought to represent the larger group of 1,500 workers at the plant but only came up with the smaller unit after losing that election.

Employers have consistently challenged *Specialty Healthcare* through federal court litigation. However, the courts have given broad deference to the NLRB's interpretation of the Act and declined to reverse its micro-union standard.[15] As a result, it will be up to the new Board majority, and hopefully Congress as well, to restore a rational definition of an appropriate bargaining unit that again comports with the statute.

[14] *Volkswagen Group of America, Inc.,* NLRB Case No. 10-RC-162530; *Volkswagen Group of America Inc.*, 364 NLRB No. 110 (2016) *review pending* Case No. 16-1309 (D.C. Cir.).
[15] See *Kindred Nursing Centers E., LLC v. N.L.R.B.*, 727 F.3d 552 (6th Cir. 2013); *FedEx Freight, Inc. v. N.L.R.B.*, 839 F.3d 636 (7th Cir. 2016); *N.L.R.B. v. FedEx Freight, Inc.*, 832 F.3d 432 (3d Cir. 2016); *Nestle Dreyer's Ice Cream Co. v. N.L.R.B.*, 821 F.3d 489 (4th Cir. 2016); *Macy's, Inc. v. N.L.R.B.*, 824 F.3d 557 (5th Cir. 2016); *FedEx Freight, Inc. v. N.L.R.B.*, 816 F.3d 515 (8th Cir. 2016); *Constellation Brands, U.S. Operations, Inc. v. N.L.R.B.*, 842 F.3d 784, 787 (2d Cir. 2016).

II. Adoption and Interpretation of New Representation Election Rules

In addition to making it easier for unions to organize small groups of employees, the Board issued a new rule on election procedures, which became effective on April 14, 2015.[16] The "ambush election" rule made significant changes to how election petitions are processed and how employers must respond to these petitions. In so doing, it reduced the time frame for representation elections from an average of 42 days to as few as 10.

The ambush election rule contains numerous technical details that collectively result in the loss of employers' substantive rights, and an employer's failure to comply with these details can result in the overturning of an election result if a union loses. For example, the rule requires an employer to post a Notice of Petition for Election within two days of receiving a petition. The Notice must advise employees about the filing of an election petition by a union, their rights under the Act, election procedures, and the rules governing campaign conduct. If the employer uses e-mail to communicate with workers, it must distribute the Notice electronically. Failure to post the Notice as required can be grounds for setting aside an election if the union loses.

[16] National Labor Relations Board, *Representation Case Procedures*, 79 Fed. Reg. 74307 -74490 (Dec. 15, 2014). On April 6, 2015, Richard F. Griffin, the Board's General Counsel, issued a guidance memorandum outlining the new election procedures under the Rule. NLRB Office of the General Counsel, *Guidance Memorandum on Representation Case Procedure Changes*, Memorandum GC 15-06 (April 6, 2015).

The rule also makes it harder for employers to contest the appropriateness of a bargaining unit by compressing the representation hearing timeline. If an employer wants a pre-election hearing on the appropriateness of the petitioned-for unit, the employer must file a Statement of Position within seven days after the Notice of Hearing. The Statement of Position must detail why the petitioned-for unit is inappropriate, and an employer's failure to raise issues in the Statement of Position precludes the employer from raising those issues at the pre-election hearing. This procedural requirement places the burden on employers to identify complex factual and legal issues and raise all defenses within seven days (or forfeit them) and also gives the union extensive pre-hearing discovery to prepare its case.

Along with its Statement of Position, the employer must provide the full names, work locations, shift schedules, and job classifications of all employees in the petitioned-for unit and all employees the employer seeks to add or exclude from the unit. This information may be difficult for employers to assemble in the short timeframe provided by the rule.

Further compressing the schedule, pre-election hearings are now held eight days from when the Notice of Hearing is served, meaning that the employer must prepare the

Statement of Position, which is due on the seventh day, at the same time it prepares for the hearing on the eighth day. The Regional Director may only delay the hearing up to four days, and the hearing will continue for consecutive days until complete.

Issues for the pre-election hearing are now limited merely to whether there is a question concerning representation. The rule precludes an employer from litigating the voting eligibility of employees. In other words, an election can be held *before* determining who is allowed to vote. In practice, this means employers are uncertain if many front-line managers qualify as "supervisors" under the Act prior to the election. Not knowing the supervisory status of these individuals prevents a business owner from knowing who it may lawfully use as a company spokesperson in the campaign, effectively hamstringing an employer's ability to present its point of view to workers.

Other provisions limit an employer's right to provide detailed legal arguments and briefs at the close of the hearing. For example, no post-hearing briefs are allowed unless approved by the Regional Director. Under the old rules, parties were routinely given 7-10 days after the hearing to submit briefs. In addition, the rule eliminates the current 25-day waiting period between the issuance of the Regional Director's Decision and Direction of Election (DDE) and the holding of the election. All these procedures effectively shorten the election process, make it more difficult for an employer to respond to an organizing campaign, and limit the ability of workers to get balanced information.

Furthermore, the rule shortens the time for filing post-election objections to seven days, and the objecting party must submit supporting evidence at the same time such a filing is made. If a hearing is required on the objections, the hearing will be 21 days from the tally of ballots. Under previous practice, post-election hearings often were not scheduled for two to three months, allowing ample time to collect evidence and prepare for the hearing.

Finally, the rule threatens workers' privacy rights. Within two business days after the issuance of the DDE, or the approval of a Stipulated Election Agreement, the employer is required to electronically file a list of all eligible voters with the NLRB and provide the list to the union. This list must now include a great deal of personal information about workers, including their addresses, available personal cell and home telephone numbers, personal email addresses, work locations, shift schedules, and job classifications. Unions may use any and all of this information to repeatedly contact workers, whether workers desire such contact or not.

In the few cases interpreting the ambush election rule, the Board has enforced the technical requirements of the rules against employers, but not unions. For example, in *Brunswick Bowling Products, LLC,* the Board stated that the rule's requirement that each party file and serve a Statement of Position by noon on the business day before a

representation hearing must be literally enforced.[17] The union in this case, however, served its Statement of Position on the employer three hours late, meaning that at the hearing the Board should have precluded the union from introducing evidence to support its contention that a contract bar existed to a decertification petition. However, the Board decided that the Regional Director would have ultimately discovered the existence of the contract bar anyway and therefore allowed the union to proceed.

In a subsequent case, the NLRB imposed a much stricter reading of the election rules on an employer. In *URS Federal Services, Inc.,* the election agreement required the employer to submit a voter eligibility list within two days of the Regional Director's approval of the agreement.[18] The employer submitted the list to the NLRB on a Saturday prior to the deadline. However, the employer did not serve the list on the *union* (under the old procedures, the NLRB did so). On Monday, the NLRB, not the employer, timely forwarded the list to the union. The union subsequently lost the election, but then filed an objection on the basis that the employer violated the technical requirements of the rule. A two-member Board majority ruled for the union, arguing that under the ambush election rule, the employer in a representation case "shall provide to the regional director *and the parties"* the required list of eligible voters.[19] The Board reached this conclusion even though an NLRB Regional Director found that the union obtained the list in a timely

[17] *Brunswick Bowling Products, LLC,* 364 NLRB No. 96 (2016).
[18] *URS Federal Services, Inc.,* 365 NLRB No. 1 (2016).
[19] 29 C.F.R. § 102.62(d). Emphasis added.

fashion, and the fact that the NLRB rather than the employer provided the list had no impact on the election.

In its January 2017 *Williams-Sonoma* decision, the Board also precluded an employer from presenting evidence regarding whether the union's petitioned-for unit was appropriate because although the employer timely filed the statement of position with the Board, it served the union late (but prior to the start of the hearing).[20] The Regional Director ultimately dismissed the union's petition because the unit appeared to differ from the employer's organizational structure. Ironically, because the employer was precluded from presenting evidence, the record did not contain enough evidence to make the determination that the petitioned-for unit was appropriate. This case highlights how the Board has prioritized speedy elections over developing a complete record and making a thorough determination of the appropriate unit for bargaining.

Thus, the ambush election rule needlessly speeds up the election process at the cost of due process rights, a fair review of the evidence, and an informed vote.

Thus, the ambush election rule needlessly speeds up the election process at the cost of due process rights, a fair review of the evidence, and an informed vote. As *Brunswick Bowling*, *URS Federal Services*, and *Williams-Sonoma* show, unions and employers both can find it challenging to meet the rule's onerous technical requirements. The Board should return to the previous, long-standing procedures, which provided all

[20] *Williams-Sonoma Direct, Inc.*, 365 NLRB No. 13 (2017).

parties with the opportunity to gather and present evidence, ensured that the Board determined the appropriate bargaining unit, protected worker privacy, and allowed employers to lawfully communicate with employees to ensure that they were provided with balanced information. A new Board can do so through rulemaking, and Congress can codify these provisions into law.

III. *Browning Ferris* and the Expansion of Joint Employer

On August 27, 2015, the NLRB issued a decision in a case called *Browning-Ferris Industries of California, Inc.* (*BFI*).[21] The Board's decision represented a significant policy change that expanded the types of businesses that may be deemed joint employers under the NLRA. In *BFI*, the Board overruled more than 30 years of precedent and replaced the long-standing "direct and immediate control" standard for determining joint employer status with a sweeping and vague test based on "indirect" and "potential" control over the terms and conditions of employment. The new standard has exposed a broad range of businesses to workplace liability for workplaces they do not control and workers they do not employ.[22]

[21] *Browning-Ferris Industries of California, Inc., Newby Island Recyclery,* 326 NLRB No. 186 (2015) *review pending* Case Nos. 16-1208, 16-1063, 16-1064 (D.C. Cir.).

[22] The U.S. Chamber prepared two detailed reports of the impact of this standard on businesses, including contracting, subcontracting, and franchises. See "Main Street in Jeopardy: The Expanding Joint Employer Threat to Small Businesses" available at https://www.uschamber.com/report/main-street-jeopardy-the-expanding-joint-employer-threat-small-businesses; "Opportunity at Risk" available at

Until 2015, the NLRB found two separate and independent business entities to be "joint employers" only when the two entities exerted such direct and immediate control over the same employees that they effectively shared or co-determined the essential terms and conditions of employment.[23] In applying this test, the Board and courts consistently found that the control exercised by the putative joint employer must be actual, direct, and substantial, not simply theoretical, possible, limited, or routine.[24] Direct and immediate control was generally understood to include the ability to hire, fire, discipline, supervise, and direct the other entity's employees.

The Board took the first steps towards expanding its joint employer doctrine in 2014. In *CNN America, Inc.*, a case that had been pending at the Board for a decade,[25] the Board held that CNN and a unionized contractor at its Washington and New York bureaus were joint employers. While stating that it was merely applying its traditional direct control test, the Board actually injected

https://www.uschamber.com/report/opportunity-risk-new-joint-employer-standard-and-the-threat-small-business.

[23] *TLI, Inc.*, 271 NLRB 798 (1984); *Lareco Transportation*, 269 NLRB 324 (1984); *Airborne Freight Co.*, 338 NLRB 597(2002).

[24] *TLI, Inc.*, 271 NLRB 798.

[25] See *CNN America, Inc. and Team Video Services, LLC CNN America, Inc. and Team Video Services, LLC*, 361 NLRB 47 (2014) *review pending* Case Nos. 15-1112, 15-1209 (D.C. Cir.).The unfair labor practice charges in *CNN* were originally filed on March 5, 2004. The case was tried over 82 days from 2007 to 2008. The Board's decision was issued almost ten years after the filing of the original charges.

new factors into its analysis. It ruled that CNN controlled the "hiring, supervision, and direction" of the subcontractor's employees by setting terms in its labor agreement for staffing levels, reimbursements, and training costs. The Board also considered "additional factors," including that employees worked in CNN facilities, CNN paid for employee training and equipment, employees performed work at the core of CNN's business, and employees used CNN badges.

On the heels of *CNN*, the Board then officially overturned the direct control standard in *BFI* and focused on "indirect" and "potential" control as a means of bringing more companies into collective bargaining relationships. The question before the Board was whether Browning-Ferris was a joint employer with Leadpoint, a staffing company whose employees worked at BFI's recycling facility. The Board split 3-2 along party lines to find the companies joint employers based on Browning-Ferris' potential and indirect control of Leadpoint's workers.

To make a determination of joint employment under *BFI*, the Board will first decide whether a common-law employment relationship exists between the putative joint employer and the employees in question.[26] If this common-law relationship exists, the Board will then determine whether the putative joint employer possesses sufficient

[26] *Browning-Ferris Industries of California, Inc., Newby Island Recyclery*, 326 NLRB No. 186 Slip op. at 18.

control over the employees' essential terms and conditions of employment to allow for "meaningful bargaining" to take place.[27]

In making that determination, the Board will continue to look at essential terms and conditions of employment, including the right to hire, terminate, discipline, supervise, and direct the employees. However, the Board now considers this list "nonexhaustive" and has expanded the essential terms and conditions of employment to include, "dictating the number of workers to be supplied; controlling scheduling, seniority, and overtime; and assigning work and determining the manner and method of work performance."[28] Potential "reserved authority," even if not exercised, and indirect control alone are now sufficient to establish joint employer status.

BFI injects great uncertainty into what had been a fairly simple, bright line test for determining joint employer status. The previous, clear standard helped facilitate the expansion of business models like franchising and subcontracting, which have led to greater efficiency, flexibility and economic growth. By replacing the direct and immediate control standard with the ambiguous indirect and potential control test, the NLRB has made it difficult to predict which businesses will be liable for the workplace policies of another employer.

[27] *Id.* Slip op. at 15.
[28] *Id.* Slip op. at 15.

The franchising industry is an obvious target of the new standard, but subcontracting arrangements are also at risk. In either case, the consequences of a joint employer finding can be severe. A larger employer could be held responsible for unfair labor practice charges filed against a franchisee or subcontractor. A business might also be dragged into collective bargaining negotiations with a unionized joint employer. Secondary picketing and boycotts, illegal when conducted against neutral employers, would be fair game under a joint employer finding. Finally, small businesses that are lumped together with larger ones as joint employers could face new liabilities under Obamacare and other laws with small business exemptions.

> By replacing the direct and immediate control standard with the ambiguous indirect and potential control test, the NLRB has made it difficult to predict which businesses will be liable for the workplace policies of another employer.

Responding to criticism that the new test will foster bargaining instability by introducing too many conflicting interests on the employer's side of the bargaining table, the Board described situations where different employers would exercise comprehensive authority over discrete terms and conditions of employment. A joint employer, the Board opined, would only be required to bargain regarding the terms and conditions that it possessed the authority to control.[29] But this ignores how collective bargaining actually works. Unions may wish to trade off wages for benefits, or benefits for hours of service,

[29] *Id.* at Slip Op. at 16.

but finding agreement on such trade-offs among a diverse group of joint employers, each potentially responsible for only one of these issues, would require an unrealistically high level of cooperation.[30] Thus, the new joint employer standard will produce fragmented bargaining relationships that will complicate and extend negotiations.

A. McDonald's Cases

Even prior to *BFI*, the Board's General Counsel launched his own joint employer campaign by filing a consolidated complaint against McDonald's USA, LLC as a joint employer with numerous franchisees.[31] After initial hearings related to alleged unfair labor practices committed by these franchisees, the Board required the General Counsel and McDonald's to present evidence on the joint-employment issue.[32] Presumably, the General Counsel's evidence will attempt to establish that McDonald's USA, LLC is a joint employer under the NLRB's new standard in *BFI*, and demonstrate that McDonald's maintained indirect control over its franchisees' labor relations.[33] Given the complexity and broad scope of the complaints, these cases will linger well past 2017 unless terminated by a new General Counsel.

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[30] *Id.* at Slip Op. at 15, fn. 80.
[31] National Labor Relations Board Office of Public Affairs, *NLRB Office of the General Counsel Issues Consolidated Complaints Against McDonald's Franchisees and their Franchisor McDonald's, USA, LLC as Joint Employers* (Dec. 19, 2015), *available at* https://www.nlrb.gov/news-outreach/news-story/nlrb-office-general-counsel-issues-consolidated-complaints-against (last visited Dec.13, 2016).
[32] *McDonald's USA, LLC,* 363 NLRB No. 92 (2016); See also *McDonald's USA, LLC* , NLRB ALJ, Case No. 02-CA-093893(October 12, 2016).
[33] *Browning-Ferris Industries of California, Inc., Newby Island Recyclery,* 362 NLRB No. 186 (2015).

B. Joint Employment for Staffing Companies and Their Users

The Board has also expanded the joint employer standard to the contingent workforce industry. In *Retro Environmental, Inc. and Green JobWorks, LLC*, a staffing company oversaw the hiring and firing of its employees and their assignment to project sites.[34] A construction company, with whom they had done business, oversaw the day-to-day supervision of the job site. The Board ruled that the construction company and the temporary staffing agency were joint employers with regard to a union petition to represent a combined unit of employees, arguing that both companies codetermined essential terms and conditions of employment. Shockingly, at the time of the hearing, the two companies had no current projects together and no bids for future joint projects. In other words, the two alleged joint employers had no employment relationship whatsoever. This was noted in a dissent by Member Phil Miscimarra, who criticized the majority for assuming that any future relationship would automatically be structured as joint employment. He called the majority's analysis "doubly speculative."[35]

The Board further expanded on *BFI* with regard to temporary workers in a case called *Miller& Anderson, Inc*.[36] In this case, the Board majority reversed existing precedent, which held that consent from each employer was required for bargaining in

[34] *Retro Environmental, Inc. and Green JobWorks, LLC*, 364 NLRB No. 70 (2016).
[35] *Id* at 8.
[36] *Miller & Anderson, Inc*., 364 NLRB No. 39 (2016).

multi-employer units.[37] Instead, under *Miller & Anderson*, a union can freely organize a unit consisting of workers solely employed by one business, and temporary workers purported to be jointly employed by that business and a staffing agency. Under such a circumstance, an employer could be locked into a long-term collective bargaining arrangement involving "temporary" workers with whom it no longer had any actual employment relationship.

Both *Green JobWorks* and *Miller & Anderson make it difficult for an employer to* use temporary staffing agencies, even for discrete, limited projects, without the risk of creating a long-term joint employment relationship in the eyes of the NLRB.

Both *Green JobWorks* and *Miller & Anderson* make it difficult for an employer to use temporary staffing agencies, even for discrete, limited projects, without the risk of creating a long-term joint employment relationship in the eyes of the NLRB.

The NLRB's expanded definition of joint employer has already spread to other agencies and governmental authorities. Both the Occupational Safety and Health Administration and the Wage and Hour Division at the U.S. Department of Labor have released directives seeking to expand joint employer liability. In addition, some state and local governments, not to mention trial lawyers, are also beginning to explore their own expansive theories of joint employment.

[37] *Oakwood Care Center*, 343 NLRB No. 659 (2004).

BFI is not the last word on the NLRB's joint employer test. Both *BFI* and *CNN* are under review in the D.C. Circuit. In addition, legislation was introduced in the 114th Congress to change or limit the new standard.[38] Moreover, a new Board and General Counsel will have an opportunity to restore the previous well-defined and well-understood standard in the near future.

IV. Arbitration Agreements

A. *D.R. Horton* and the Attack on Class Action Waivers

The NLRB's overly broad reading of Section 7 also led the Obama-era Board to challenge class action waivers contained in employment arbitration agreements, which are intended to speed resolution of workplace disputes and reduce the burden of unnecessary litigation. Given its broad view of Section 7, the NLRB has argued that these waivers deprive employees of their right to engage in concerted activity. Thus, in a 2012 case called *D.R. Horton,* the NLRB found that arbitration agreements requiring employees to waive the right to file class action lawsuits violated the NLRA.[39] Despite the Fifth Circuit's refusal to enforce *D.R. Horton,* the Board reaffirmed its approach to arbitration agreements in a 2014 case, *Murphy Oil*.[40] Although the Fifth Circuit again

[38] Protecting Local Business Opportunity Act of 2015, H.R. 3459, S. 2015, 114th Cong. (2015); Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2016, H.R.3020, 114th Cong. (July 10, 2015).
[39] *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012) *enf. denied* 737 F.3d 344 (5th Cir. 2013).
[40] *Murphy Oil, USA, Inc.*, 361 NLRB No. 72 (2014).

refused to enforce the Board's order,[41] the Board continued to strike down employee arbitration agreements based on the theory it presented in both cases.

Most courts, including the Second, Fifth, and Eighth Circuits, and numerous federal district courts, have refused to follow the Board's approach to arbitration agreements in light of contrary Supreme Court precedent regarding class action waivers.[42] These courts generally rely on the Supreme Court's directive to enforce arbitration agreements as written in accordance with the Federal Arbitration Act.[43] However, the Ninth Circuit and the Seventh Circuit recently upheld *D.R. Horton*.[44] To resolve this circuit split, the Supreme Court has now agreed to take up the issue.[45]

In the meantime, the Board has inappropriately pursued a policy of non-acquiescence regarding *D.R. Horton* cases pending at the Board and refused to adhere to adverse federal court decisions until the Supreme Court settles the matter. As a result,

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[41] *Murphy Oil USA, Inc. v. N.L.R.B.*, 808 F.3d 1013 (5th Cir. 2015).
[42] *Id.*; *D.R. Horton, Inc. v. N.L.R.B.*, 737 F.3d 344 (5th Cir. 2013); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 n.8 (2d Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052 (8th Cir. 2013); *Cellular Sales of Missouri, LLC v. N.L.R.B.*, 15-1620, 2016 WL 3093363, at *1 (8th Cir. June 2, 2016).
[43] See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *CompuCredit Corp. v. Greenwood*, 565 U.S. 95 (2012); *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013); *DirecTV, Inc. v. Imburgia*, 136 S.Ct. 463 (2015).
[44] See *Morris v. Ernst & Young*, 834 F.3d 975 (9th Cir. 2016); *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1155 (7th Cir. 2016).
[45] *Murphy Oil USA, Inc. v. N.L.R.B.*, 808 F.3d 1013 (5th Cir. 2015); *Morris v. Ernst & Young*, 834 F.3d 975 (9th Cir. 2016); *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1155 (7th Cir. 2016) cert. granted 2017 WL 358632 (Jan. 25, 2017).

many employers have faced time-consuming and expensive litigation at the Board over their arbitration agreements. The D.C. Circuit placed at least one case in abeyance pending the Supreme Court's decision. [46] Rather than place its own cases in abeyance, the NLRB General Counsel directed its staff to "propose that the parties enter informal settlement agreements conditioned on the Agency prevailing before the Supreme Court in *Murphy/Epic/Ernst & Young*."[47] In reality, the General Counsel's Memo requires employers to agree not to compel its arbitration agreements in court pending the Supreme Court's decision. If the employer agrees to the settlement, the case will be placed in abeyance. If an employer refuses to waive this right, the Board will continue to process the case, issue complaints, and hold hearings. Only if the Supreme Court finds class action waivers lawful will the Board dismiss the charges and complaints. Hopefully, the Court will reject the Board's position, but regardless of what it decides, a new NLRB should take the opportunity to overturn *D.R. Horton* and its progeny as soon as possible.

[46] *Price-Sims, Inc. dba Toyota Sunnyvale v. N.L.R.B.,* Case No. 15-1457 (D.C. Cir. Jan. 23, 2017).
[47] NLRB Office of the General Counsel, *Impact on Pending Cases Due to Supreme Court's Grant of Certiorari in NLRB v. Murphy Oil USA*, GC Memo OM 17-11 (January 26, 2017).

B. Changing the Burden for Deferral to Arbitration

The Board's attack on arbitration agreements has extended past collective action waivers and into the actual decisions reached by arbitrators. Often, a workplace dispute may be both a contractual dispute and the basis for an unfair labor practice charge. In those cases, the Board had long refused to process the unfair labor practice charge and deferred to an arbitrator's decision so long as: (1) all parties had agreed to be bound by the arbitrator's decision; (2) the arbitration proceedings were "fair and regular" on their face; (3) the underlying factual issues before the Board were presented to and determined by the arbitrator; and (4) the arbitrator's award was not "clearly repugnant" to the purposes and policies of the Act.[48] For over sixty years, the Board placed the burden on the party seeking to avoid deferral to arbitration. In 2014, however, a 3-2 Board majority dramatically changed this standard. In *Babcock & Wilcox Construction Company*, the Board found that deferral is solely a matter for the Board's discretion because Section 10(a) of the Act allows the Board to adjudicate unfair labor practice charges even though they might have been the subject of an arbitration proceeding and award.[49]

[48] *Spielberg Mfg Co.*, 112 NLRB 1080 (1955); *Olin Corp.*, 268 NLRB 573 (1984).
[49] *Babcock & Wilcox Construction Company*, Inc., 361 NLRB No. 132 (2014).

This new standard shifts the burden from the party seeking to *avoid* arbitration to the party *requesting* deferral. The party requesting deferral must now show that: 1) the arbitrator was explicitly authorized to decide the unfair labor practice issue; 2) the parties presented the arbitrator with the statutory issue and the arbitrator considered the issue (or was prevented from doing so by the party opposing deferral); and 3) Board law reasonably supports the arbitration award. This last prong is higher than the previous standard, where the Board found deferral improper only if the decision was "clearly repugnant" or "palpably wrong" under the Act. Under *Babcock & Wilcox*, the decision must now simply be a reasonable interpretation of the Act and consistent with Board law.

This new standard increases the likelihood the Board will review or overturn an arbitrator's decision. This means that employers face the risk of having to re-litigate the same issues before the Board even after binding arbitration. In addition, arbitrations will become more complex as all potential unfair labor practice issues must be addressed by the arbitrator to gain deferral at the Board. All of this increases the cost of doing business.

The Board has applied this new standard to refuse deferral in several cases, particularly when it has determined that the decision was not consistent with its interpretation of Board law. In *St. Francis Regional Medical Center*, for example, the NLRB ruled that deferral to arbitration was inappropriate in a case involving discipline and discharge of a union steward during grievance processing because of the employer's alleged animosity to the employees' exercise of protected rights.[50] Similarly, in *Verizon New England, Inc.*, the Board refused to defer to an arbitration award that found that employees had violated the no-picketing provision of a collective bargaining agreement by displaying picket signs in their personal vehicles parked on employer property (ultimately this decision was reversed by the D.C. Circuit Court of Appeals).[51] A newly appointed Board should restore the primacy of arbitration and allow employers and workers to make use of this tool to speedily resolve disputes.

V. Erosion of Management Rights Clauses

The Board has restricted other important tools used by employers to maintain productive and efficient workplaces, even when voluntarily agreed to by a union.

Collective bargaining agreements cannot address every issue that arises between the parties during the term of the agreement. To address these situations, the parties often

[50] *St. Francis Regional Medical Center*, 363 NLRB No. 69 (2015).
[51] *Verizon New England, Inc.*, 362 NLRB No. 24 (2015) *enf. denied* 826 F.3d 480 (D.C. Cir. 2016).

include a management rights clause and agree that management may unilaterally make certain changes to terms and condition of employment. The union effectively agrees to waive its right to bargain on those subjects.

However, the NLRB has issued several decisions undermining the enforceability of management rights clauses. In *Graymont PA, Inc.*, for example, the Board ruled that an employer unlawfully changed its work rules, absenteeism policy, and progressive discipline schedule during the term of the parties' collective bargaining agreement.[52] The employer relied on a management rights clause, which gave it sole and exclusive rights to manage, direct, evaluate, discipline and discharge, and adopt and enforce rules, policies, and procedures. The NLRB concluded that because the management rights provision did not specifically reference work rules, absenteeism, or progressive discipline and no evidence was presented showing that the parties discussed these subjects during negotiations, the employer had failed to establish a "clear and unmistakable waiver" of the right to bargain over these changes.

The NLRB has issued several decisions undermining the enforceability of management rights clauses.

The Board applied this same rationale to effectively negate management rights clauses after the expiration of a union contract. In *E.I. DuPont de Nemours*, on remand from the D.C. Circuit Court of Appeals, the Board ruled that an employer unlawfully changed company-wide benefit plans unilaterally after the expiration of its collective

[52] *Graymont PA, Inc.*, 364 NLRB No. 37 (2016).

bargaining agreements at two facilities.[53] The employer relied on benefit plan documents that gave the company the right to change or discontinue the plans at its discretion. After the agreements expired, consistent with its past practice and the benefit plan documents, the employer made various changes to the plans. The union objected and demanded bargaining. The Board concluded that discretionary unilateral changes made pursuant to a past practice, even if developed under a management rights clause, are unlawful because the management rights clause does not extend beyond the expiration of the collective bargaining agreement.

The Board reached the same result in *American National Red Cross*.[54] The Board ruled that two local Red Cross organizations unlawfully implemented pension and 401(k) changes announced by its parent national organization after the expiration of their local collective bargaining agreements. The local chapters relied on contract language allowing them to unilaterally implement any changes made by the national Red Cross to its benefit plans. The NLRB decided that these clauses did not survive the expiration of local collective bargaining agreements because they were the equivalent of management rights' clauses and no specific language existed showing they would continue after expiration of the agreement.

[53] *E.I. DuPont de Nemours*, 364 NLRB No. 113 (2016).
[54] *American National Red Cross*, 364 NLRB No. 98 (2016).

In *Staffco of Brooklyn, LLC,* [55] the majority found that the employer unlawfully ceased making contributions to a pension fund upon the expiration of a collective bargaining agreement extension. The collective bargaining agreement required the employer to sign a form binding it to the plan's agreement and declaration of trust. Under the trust documents, however, the employer's obligation to contribute to the fund terminated when the company failed to meet the definition of "participating employer" under the plan, which occurred at the expiration of the agreement. The Board rejected an argument that language in a pension plan agreement and declaration of trust constituted a waiver by the union of its right to bargain about the continuation of benefits following contract expiration and concluded the employer had a "statutory" obligation to continue its contributions under the NLRA. The Board found that the policy did not specifically state that the employer's obligation to contribute to the fund ceased on expiration of the agreement. The dissent pointed out that the plan clearly contained a waiver and the majority was requiring "lawyerly perfection."

The Board's approach to management-rights has undermined long-standing relationships and understandings of how collective bargaining agreements work and ignores the real world needs of employers to address changes in their business.

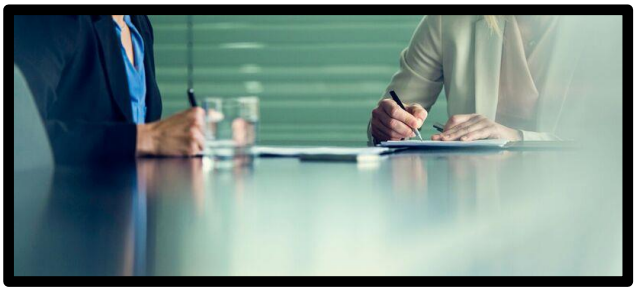
The Board's approach to management rights has undermined long-standing relationships and understandings of how collective bargaining agreements work, and it

[55] *Staffco of Brooklyn, LLC,* 364 NLRB No. 102 (2016).

ignores the real world needs of employers to address changes in their business. A new NLRB should quickly revisit this issue and restore stability to this area of the law.

VI. Imposing Bargaining Obligations on Employer Discipline Before First Contracts

The Board also negated the ability of employers to rely on their current management practices after employees select a bargaining representative but before a collective bargaining agreement is negotiated. In 2012, the NLRB issued a decision in *Alan Ritchey, Inc.*, a case in which it required employers with a newly certified union to bargain with that union before making discretionary disciplinary decisions, even though no contract had been signed.[56] Although this case was invalidated by the Supreme Court under *Noel Canning*,[57] the NLRB later reaffirmed *Alan Ritchey* in *Total Security Management Illinois 1, LLC.*[58]



In *Total Security Management*, the Board ruled that the employer violated the Act by discharging three employees without bargaining with a union after it was certified, but before a contract had been signed. The Board concluded that discretionary discipline is a

[56] *Alan Ritchey, Inc.*, 359 NLRB No. 40 (2012).
[57] *Noel Canning v. N.L.R.B.*,134 S. Ct. 2550 (2014).
[58] *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106 (2016).

mandatory subject of bargaining, like other terms and conditions of employment, and that employers may not impose that discipline unilaterally on employees represented by a union despite the lack of a contract. Employers can take solace that the Board at least allowed an exception if there is a reasonable, good faith belief that a worker's continued presence on the job presents a serious, imminent danger to the employer's business or personnel.

This new standard makes it difficult for an employer with a newly certified union to manage their business and maintain a safe and efficient workplace. While admittedly *Total Security* will apply in a relatively small number of circumstances, as a matter of principle it should be overturned by the new NLRB.

VII. Granting Access to Employer E-mail Systems

Since the advent of e-mail, the Board has consistently held that employees have no statutory right to use an employer's e-mail system for Section 7 communications because the employer has a "basic right" to regulate and restrict employee use of its property.[59] That is until a 3-2 majority upended that consistent policy in a case called *Purple Communications*. In this case, the Board found that employees who have access to an employer's e-mail system maintained a presumptive right to use that system for

[59] *Register Guard Publishing, Inc.*, 351 NLRB 1110 (2007*) enf. in relevant part* 571 F.3d 53 (D.C. Cir. 2009).

concerted activity (including union organizing) during non-working time.[60] The Board concluded that its long-standing precedent gave too much weight to employer property interests and not enough weight to employees' Section 7 rights.

The majority found previous precedent relied too much on a comparison of e-mail to employer-owned equipment. The Board concluded that e-mail was fundamentally different because its "flexibility and capacity" make non-work use less costly and disruptive than non-work use of other employer property. The Board asserted that previous precedent ignored the predominance of e-mail as a workplace communications tool. The majority described e-mail as "effectively a new 'natural gathering place'" where employees can congregate to share interests. Since employee workplace communication is at the heart of Section 7, restrictions on e-mail, the Board reasoned, unlawfully interfere with the exercise of concerted activity.

As a result of *Purple Communications*, an employer ban on nonbusiness use of corporate e-mail will be considered unlawful. The Board made it clear that "it will be the rare case where special circumstances justify a total ban on non-work e-mail by employees" in any workplace. Essentially, the NLRB has told employers, who pay for

[60] *Purple Communications, Inc.*, 361 NLRB No. 126 (2014).

and maintain workplace e-mail systems, that they no longer have control over how their property is used. Expanding on *Purple Communications*, the Board recently applied its logic to an employer's instant messaging system.[61]

The NLRB's expansive ruling in *Purple Communications* represents a shift in the law regarding employees' right to organize and broadly impacts employers' ability to regulate their e-mail systems and other technology. The decision makes it difficult for employers to maintain a productive work environment and ignores employers' property rights with regard to technology developed exclusively for business use. Like the other cases described in this report, it should be overturned as soon as possible.

VIII. The Board's Protection of Obnoxious, Obscene, and Harassing Behavior

The Obama-era NLRB repeatedly targeted employee handbook policies regardless of whether an employer was unionized or not. This unprecedented attack on the employee handbook has led to numerous non-controversial and long-standing employer policies being declared unlawful. It has also stretched the boundaries of common sense and interfered with maintaining a harmonious workplace. After all, employers designed these long-standing, neutral policies to promote safe workplaces,

[61] *Shadyside Hospital*, 362 NLRB No. 191 (2015).

ensure efficient operations, and prevent harassment and discrimination, not to violate workers' rights.

The Board's decisions span the breadth of social media policies, anti-harassment policies, non-discrimination policies, restrictions on the use of trademarked material, communications with the public and media regarding private company business, disparagement of employees, management and company products, and protecting the confidentiality of proprietary information. These cases are too numerous to examine in detail in this report.[62] However, some of the most troubling examples involve restrictions that seriously hinder an employer's ability to promote a safe workplace free of harassment and discrimination.

In *United States Postal Service*, for example, the NLRB ruled that an employer unlawfully disciplined a union steward for profane, threatening and insubordinate conduct during a grievance hearing.[63] During the hearing, the steward called a supervisor an obscenity, repeatedly used the "F" word, physically stepped around a chair and toward the supervisor and declared that she could swear, say anything she wanted, and do anything she wanted. The Board concluded that the steward's conduct, although "obnoxious," was not so inappropriate that it caused her to lose the protection of the Act.

[62] See "Theater of the Absurd: The NLRB Takes on the Employee Handbook," U.S. Chamber of Commerce, 12/3/15 available at https://www.uschamber.com/report/theater-the-absurd-the-nlrb-takes-the-employee-handbook.
[63] *United States Postal Service*, 364 NLRB No. 62 (2016).

In another case, on remand from the Ninth Circuit, the NLRB ruled that a used car salesman did not lose the protection of the Act because of an angry outburst in a meeting with the company's owner and two sales managers in a small office.[64] The employee lost his temper, raised his voice, and called the owner obscenities. At the end of the meeting, the employee stood up, pushed his chair aside, and stated the owner would regret it if he fired him. Incredibly, the Board ruled that the employee's outburst was not menacing, physically aggressive, or belligerent, and that it was protected conduct.

The Board has also protected extreme examples of employee disparagement of company products to customers. For example, the Board ruled that a sandwich shop franchisee violated the Act by discharging and warning employees who posted "sick days" posters in the employer's stores and nearby public places.[65] The posters showed side-by-side pictures of a sandwich, one described as being made by a healthy worker, and the other by a sick worker. The poster declared that since employees did not get sick days, "We hope your immune system is ready because you are about to take the sandwich test." The Board concluded that the posters did not constitute disloyalty or reckless disparagement.

[64] *Plaza Auto Center, Inc.*, 360 NLRB No. 117 (2014).
[65] *Miklin Enterprises, Inc., dba as Jimmy John's,* 361 NLRB No. 27 (2014) *enf'd.* 818 F.3d 397 (8th Cir. 2016) *rehearing en banc. granted* 2016 WL 46541405 (8th Cir. 2016).

In a case involving social media, the Board ruled that an employer violated the Act by discharging a worker who directed several obscene phrases to a manager and his family in a threatening manner via Facebook.[66] The Board found the comments were protected as part of an attempt by employees to protest their treatment by managers. Similarly, the Board found a non-union employer's termination of five employees for harassing Facebook posts unlawful.[67] The Board concluded that the employees' Facebook comments were protected in the same manner as employee comments made at the "water cooler."

The Board has also expanded Section 7 protections to include obscene and harassing conduct that occurs on a picket line. In *Consolidated Communications,* the Board ruled that striking employees' harassing and obscene conduct toward a non-unit employee is protected.[68] In this case, an employee was suspended for two days for hitting a non-unit employee's car mirror as she left work and for making a sexually inappropriate gesture while yelling the word "scab." The Board found that the suspension was unwarranted, and that even though the gesture was "totally uncalled for, and very unpleasant," it was not a form of actionable sexual harassment under Title VII,

[66] *Pier Sixty, LLC*, 362 NLRB No. 59 (2015).
[67] *Hispanics United of Buffalo*, 359 NLRB No. 37 (2012).
[68] *Consolidated Communications*, 360 NLRB No. 140 (2014) *enf'd. in part and denied in part* 837 F.3d 1 (D.C. Cir. 2016).

did not carry an implied threat of violence or future mistreatment toward a non-unit employee, and likely did not discourage her from reporting to work during the strike.

One of the most troubling decisions by the Obama-era Board in this area involved racial harassment on a picket line. In *Cooper Tire & Rubber Co.*, the company terminated a picketing employee for engaging in racist and offensive conduct in violation of the company's anti-harassment policy.[69] The Board ruled that the employer's discharge was unlawful, even though the employee's remarks were "racist, offensive and reprehensible," violated the company's non-discrimination policies, and even violated the union's own conduct rules for picketing. This decision overturned the Board's own precedent limiting the Act's protections for abusive workplace conduct and also disregarded an employer's obligation to prevent and correct workplace harassment under federal nondiscrimination laws.

With its attack on the ability of all employers, union and non-union alike, to manage their employees, the Board has made it more difficult to maintain a safe and efficient workplace. Clearly, the new NLRB needs to properly balance Section 7 rights with the requirements of other federal statutes and basic workplace decorum.

[69] *Cooper Tire & Rubber Co.*, 363 NLRB No. 194 (2016) *review pending* Case No. 16-2721 (8th Cir.).

IX. Confidentiality of Investigations and the Protection of Witness Statements

Employers and employees have strong interests in preserving the confidentiality of workplace investigations and in safeguarding the privacy of witness statements.

Unfortunately, the NLRB has undermined both of these goals in two important decisions.

In *Piedmont Gardens*, the Board reversed a 34-year-old precedent exempting witness statements obtained during an employer's internal investigation from disclosure to unions.[70] That precedent had created a "bright-line" rule exempting witness statements obtained during investigations from the general obligation to honor union information requests.[71] Instead, the Board decided that it will apply the balancing test found in *Detroit Edison Co. v. N.L.R.B.* to determine if a valid confidentiality interest exists sufficient to protect witness statements from disclosure.[72]

As a result of *Piedmont Gardens*, whether witness statements are sensitive or confidential in nature will be determined based upon the specific facts of each case, and

[70] *American Baptist Homes dba Piedmont Gardens*, 359 NLRB No. 46 (2012) *aff'd* 362 NLRB No. 139 (2015).
[71] *Anheuser-Busch, Inc.*, 237 NLRB 982 (1978).
[72] *Detroit Edison Co. v. N.L.R.B.*, 440 U.S. 301 (1979).

the party asserting the confidentiality interest bears the burden of establishing that interest. In addition, the party refusing to supply information on confidentiality grounds must bargain over an accommodation with the union.

Under *Piedmont Gardens,* employers may no longer promise witnesses that their statements will remain confidential, which makes it more difficult for employers to protect witnesses from intimidation, harassment, and retaliation. Obviously, this may dissuade individuals from cooperating in investigations and lead to a corresponding decrease in the ability of employers to effectively manage their businesses.

The Obama-era NLRB also told employers that they could not broadly instruct employees to keep workplace investigations confidential. For example, the Board determined that an employer's rule prohibiting employees from discussing any matters under investigation by its human resources department was unlawful.[73] Instead, the Board decided that in each case, the employer must first determine whether witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, and if corruption of the investigation is likely without a confidentiality instruction. Only if these elements exist is the employer free to instruct employees to keep investigations confidential.

[73] *Hyundai America Shipping Agency*, 357 NLRB No. 80 (2011) *enf'd. in part* 805 F.3d 309 (D.C. Cir. 2015).

In *Banner Health Systems*, the Board applied the same rule to an employer's use of an interview form instructing interviewers to ask employees not to discuss investigations with coworkers.[74] An Administrative Law Judge had found the form lawful because the employer used it for the legitimate business purpose of protecting the integrity of an investigation. The Board, however, found the form unlawful. In so doing, the Board created a presumption that confidentiality instructions are illegal and put the burden on employers to establish otherwise in each case.

The Board's decisions make it more difficult for employers to conduct confidential workplace investigations, even when those investigations are required by other federal statutes like the Equal Employment Opportunity Act. A new Board needs to address this area of the law and help employers maintain workplaces free of intimidation, harassment, and discrimination.

X. Expanding Picketing Rights at the Expense of an Employer's Private Property Rights

The Obama-era NLRB significantly expanded the ability of unions and others to picket and protest on employer property in areas that were traditionally off limits, such as retail sales floors and acute care hospitals. For example, the Board ruled that an employer unlawfully disciplined six employees after an in-store work stoppage, even

[74] *Banner Health Systems*, 362 NLRB No. 137 (2015).

though that stoppage involved protests in front of customers on the sales floor of a retail establishment. [75] The Board found this work stoppage protected by Section 7 and disregarded any violation of employer property rights.

The Board's General Counsel has also urged the Board to clarify and broaden the protection afforded employees who engage in intermittent and partial strikes.[76] According to the General Counsel, these multiple, repeated strikes for short periods of time, such as a series of one-day strikes, should now be considered legal even though long-standing Board policy has deemed otherwise. The General Counsel has issued a memorandum that includes a model brief for use by the NLRB when the issue arises in future cases.

The Board has even approved picketing in areas that may impact the care of acute hospital patients. In *Capital Medical Center*, the Board ruled that an acute care hospital violated the Act when it prevented off-duty employees from picketing on hospital property by threatening them with discipline and arrest.[77] Surprisingly, the Board

[75] *Wal-Mart Stores, Inc.*, 364 NLRB No. 118 (2016) *review pending* Case No. 16-1312 (D.C. Cir.).
[76] NLRB Office of the General Counsel, *Model Brief Regarding Intermittent and Partial Strikes,* Memorandum OM 17-02, (Oct. 3, 2016).
[77] *Capital Medical Center*, 364 NLRB No. 69 (2016).

decided that marching, chanting, making noise, and holding signs near the hospital entrance was no more disruptive than the distribution of literature.

These cases show the Board's willingness to ignore the disruption caused by protestors in retail businesses and its lack of concern about disturbing hospital patients. A new Board should return to previous long established rules recognizing the special considerations that apply to these businesses.

Conclusion

There is no question that the Obama-era NLRB significantly changed the landscape of U.S. labor law and stacked the deck in favor of unions. Cast aside was the careful balance of interests required by the National Labor Relations Act. The NLRB's elevation of Section 7 rights over all other workplace interests and even other federal statutes has led the Board to overturn long-standing precedent and bipartisan, reasonable standards. The new administration, new Board members, and the 115th Congress must take the opportunity to restore common sense to policies governing the workplace. Workers, employers, and the economy will all be the beneficiaries.

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