Ogletree Deakins

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The Practical NLRB Advisor

What's in *your* handbook? The NLRB wants to know.

In this Issue

Acme Corp., a mid-sized manufacturing company with 250 employees, just emerged victorious in a union representation election among employees of the company's warehouse and distribution operation. It was a close call; 29 employees voted against the Teamsters union and 26 voted in support. Acme's human resources director was drafting a memorandum to the warehouse and distribution employees, discussing the election outcome and thanking them for their support. "Let's continue to work together as a unified team to resolve any challenges that may arise, as we strive toward our common goal of making our company even greater," she wrote.

Her "feel good" vibes were dashed, however, when she received notice of the union's election objections. The Teamsters claimed that several of Acme's employee handbook provisions, including its social media policy, its rule barring recording in the workplace without consent, and its policy requiring employees to treat all members of the Acme community with respect and civility, had interfered with the election. The union also contended one of its supporters was improperly written up for getting into a heated argument with an antiunion coworker. If the National Labor Relations Board's Regional Director agrees, he will call for a second election to be held—and Acme may be back to square one.

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BRIAN IN BRIEF

In terms of sheer volume, no issue has received more attention from the current NLRB than employer handbooks, policies, and work rules. Of the approximately 1,200 decisions issued by the Board in contested unfair labor practice cases over the last five years, more than 200 have, in some part, involved the legality of provisions in an employer's handbook or personnel policies. It is, by far, *the* most prevalent issue in recent Board decisions.

The Board's decision-making in the handbook area has been, by various turns, confusing, inexplicable, result-oriented, disruptive, and downright frustrating. Moreover, unlike some Board developments, it is one that directly affects virtually every U.S. employer, unionized or not, since almost no employer operates these days without some form of written employment policies.

The consequences of merely having an unlawful policy "on the books," even if it is never enforced or applied, are significant. A negative Board finding, remedial posting, and public rescission of a promulgated rule cause obvious reputational damage and invariably cast an employer in an unfavorable light among its own employees. Moreover, in the Board election context, a bad rule is almost always grounds for setting aside an employer victory and requiring a rerun election. In addition, problematic rules are often the "door opener" to an employer's business for both unions and the NLRB.

Beyond being both pervasive and consequential, the Board's decisions in this area have frequently been controversial and divisive, with many prompting extensive dissents. Indeed, in a recent case, dissenting Board Member Miscimarra called for a complete revision in the Board's analysis of workplace rules, and a reversal of the precedent on which all of its current decisions hinge. Board critics have applauded the call for a new approach that abandons the patent subjectivity and picayune parsing of the current analytical framework. No one, however, expects any real change in the short term. The Board and reviewing courts will likely engage in endless analytical tinkering and years of debate over how a "reasonable" employee might possibly construe an "ambiguous" rule. In the meantime, the rest of us in the real world must try to cope with Board decisions that often appear to defy logic.

In this issue of the *Practical NLRB Advisor,* we have attempted to report on some of the more significant handbook cases issued by the NLRB over the past few years. While the Board, unfortunately, has not provided employers with any "safe harbor" language for use in their handbooks or policies, certain general guidelines do

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About Ogletree Deakins' *Practical NLRB Advisor*

At Ogletree Deakins, we believe that client service means keeping our clients constantly apprised of the latest developments in labor and employment law. With the whirlwind of activity taking place at the National Labor Relations Board (NLRB) in recent years—affecting both unionized and nonunion employers—a quarterly newsletter focused on the NLRB is an essential tool to that end.

Ogletree Deakins' *Practical NLRB Advisor* seeks to inform clients of the critical issues that arise under the National Labor Relations Act and to suggest practical strategies for working successfully with the Board. The firm's veteran traditional labor attorneys will update you on the critical issues in NLRB practice, with practical, "how to" advice and an insider's perspective. Assisting us in this venture are the editors of Wolters Kluwer Legal and Regulatory Solutions' *Employment Law Daily.*

The *Practical NLRB Advisor* does not provide legal advice. However, it does seek to alert employers of the myriad issues and challenges that arise in this area of practice, so that they can timely consult with their attorneys about specific legal concerns.

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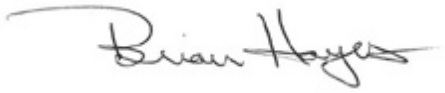
emerge from their decisions. For example, the Board's recent cases make clear that the use of vague or undefined terms to describe prohibited forms of behavior is almost always problematic. Employers need to define the terms of the rule and specify the type of conduct that is not permitted. Employers also need to carefully consider their legitimate authority and business interest in regulating employee behavior and draft rules that coincide with the limits of that authority and interest. Rules need to be "narrowly tailored" to address employee conduct within those limits. Employers also need to critically view their rules as others may see them. Remember, the test of a rule's validity is not what the employer intended—it is how someone else might read it.

Lastly, if nothing else, we hope this issue will prompt you to take a fresh look at your handbooks and personnel policies. If you have not reviewed them in years, chances are pretty good there's a problem lurking in those pages.

Sincerely,



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WHAT'S IN *YOUR* HANDBOOK? **continued from page 1**

Acme's HR director was dumbfounded. She had long suspected that employees didn't even read the company handbook even though they signed acknowledgments that they had! Apparently, however, the union had read the handbook…

A sea change. Over the past few years, the National Labor Relations Board (NLRB) has begun to scrutinize, in painstaking detail, the contents of employers' company handbooks. Certain handbook mainstays—like nonsolicitation or nondistribution policies—have long been viewed with suspicion by the NLRB, which has carefully policed these clauses over concern that they infringe on the type of employee activities that are at the heart of a traditional union organizing drive. Lately, however, the Board has been upending standard, facially neutral employment policies that are commonplace in unionized and nonunion settings alike—policies that would not, on their face, seem to implicate employees' rights under Section 7 of the National Labor Relations Act (NLRA) to engage in "protected, concerted activity."

For example, the NLRB has invalidated the following types of employer handbook policies and work rules:

- "civility" codes that prohibit bullying and discourage workplace disputes;
- confidentiality policies restricting employees from disclosing information about the company or its workforce;
- provisions barring the use of a company's logo or trademarks without prior approval;
- rules against recording or photography in the workplace or restricting the use of electronic devices;
- efforts to control the use of social media by employees, on and off the job;
- policies affirming that employment is "at will," and asking employees to acknowledge as much; and
- mandatory arbitration agreements requiring employees to arbitrate any employment-related disputes on an individual basis.

Indeed, under the Obama administration, the NLRB has aggressively redefined the landscape for employer rules contained in employee handbooks, employer policies, and/or employment agreements. In apparent recognition of this sea change, in 2015, NLRB General Counsel Richard Griffin issued a memorandum "to offer guidance on [his] views of this evolving area of labor law." In it, he acknowledged that "most employers do not draft their employee handbooks with the object of prohibiting or restricting conduct protected by the National Labor Relations Act." However, he added: "the law does not allow even well-intentioned rules that would inhibit employees from engaging in activities protected by the Act."

To run afoul of the NLRA, it's enough to have an unlawful policy in the company handbook—even if the employer doesn't actually enforce the provision. Disciplining an employee for violating the rule will draw a *second* unfair labor

practice charge. The NLRB view is that the mere presence of such a policy, even if not enforced, may, nonetheless, deter employees from engaging in protected conduct. Apparently, in the current NLRB's estimation, employees are easily deterred.

The legal "test." The NLRB's approach to evaluating the lawfulness of employer work rules is set out in *Lutheran Heritage Village-Livonia*, a 2004 Board decision. Under the *Lutheran Heritage* test, an employer violates Section 8(a)(1) of the Act when it maintains a work rule that would "reasonably tend to chill employees in the exercise of their Section 7 rights." The Board has developed a two-step inquiry to determine if a work rule would have such an effect:

1. A rule is unlawful if it explicitly restricts Section 7 activities;
2. If the rule doesn't *explicitly* restrict Section 7 activities, it nonetheless violates the Act if:
   a. employees would "reasonably" construe the language to prohibit such activity;
   b. the rule was promulgated *in response to* union activity; *or*
   c. the rule has been *applied* to restrict the exercise of Section 7 rights.

The NLRB view is that the mere presence of such a policy, even if not enforced, may, nonetheless, deter employees from engaging in protected conduct.

While this test sounds logical in the abstract, it becomes a problem in practice, particularly with respect to how employees would reasonably construe a given rule. There is typically no evidence about how employees actually construed a given rule. Rather, it is mere speculation by the NLRB as to how an employee *might* have construed the rule. Under the *Lutheran Heritage* test, as currently applied, in determining whether a work rule would reasonably tend to chill employees in the exercise of their Section 7 rights, "would" really means the more speculative "could." And, as for that "reasonable" person envisioned under the standard? Well, that person has yet to be identified.

A dissenting voice of reason? In its recent decision in *William Beaumont Hospital*, a divided NLRB invalidated portions of the hospital's code of conduct for surgical services, which prohibited employee behavior that was "inappropriate or detrimental to patient care," finding that employees would reasonably construe the prohibitions as barring protected activity. Dissenting, Philip Miscimarra, the lone Republican Board member, accused the majority of disregarding the *literally* life-or-death issues that arise in the hospital setting in its rush to defend employees' Section 7 rights. In his view, the challenged rule was lawful under *Lutheran Heritage* since it would likely have little chilling effect on employees because they would understand that it was simply intended to promote patient care.

Miscimarra's dissent, however, went beyond the specific rule at issue and questioned the efficacy of the *Lutheran Heritage* test itself. As he saw it, the current approach—particularly its "reasonably construes" prong—is premised on a "misguided belief" that employers and employees would be better off with no handbook policies at all. The standard, he argued, has little regard for different industries and work settings, and fails to take into account an employer's "legitimate justifications" for a given work rule. *Lutheran Heritage* "imposes a form of blindness on the Board," Miscimarra asserted, "requiring that we ignore every important consequence associated with our decisions in this area, and with employment policies, work rules, and handbook provisions, *except* their potential impact on the NLRA."

Miscimarra urged the Board to adopt a balancing test instead—one that weighs the potential adverse impact of a given work rule on NLRA-protected activity against an employer's legitimate justifications for maintaining the rule. Under a proper balancing test, "a facially neutral rule should be declared unlawful only if the justifications are outweighed by the adverse impact on Section 7 activity."

The majority, however, would have none of it. "In this sometimes difficult area of labor law," the majority wrote, "the Board should not take a step backward." Thus, notwithstanding Miscimarra's voice of reason, employers are left with an ill-defined and totally subjective standard, in the hands of an overzealous arbiter.

No rhyme or reason. The challenge of fashioning compliant employment policies has been exacerbated by the Board's inability to articulate a clear objective test that would result in uniform and predictable determinations.

As Miscimarra noted in dissent, the *Lutheran Heritage* approach to analyzing employer work rules has "defied all reasonable efforts to make it yield predictable results." This would seem to be the obvious and expected result of applying *Lutheran Heritage*'s totally subjective "test."

The Board majority, however, argues that the problem is not the legal test, but, rather, the ever-increasing "bureaucratization of work." They claim that the Board's apparent inconsistency in construing work rules is simply "inherent in the remarkable number, variety, and detail of employer work rules, drafted with differing degrees of skill and levels of legal sophistication."

It's not just the Board. Some critics of the NLRB contend that its foray into employer rules is just another attempt to ensure its own relevance in the face of a dwindling unionized presence in the private-sector workforce. Regardless of the impetus, the Board's recent activism in this area has impacted nonunion employers in unprecedented ways. What might once have been a reflexive "we don't need to worry about the NLRB—we don't have a union here" is no longer an accurate or safe assumption, and it is one that nonunion employers can ill afford. Indeed, attacks on employee handbooks continue to be the biggest Board-generated "thorn in the side" of most HR officials.

Even if the rule is never enforced, it can still be deemed a violation of the Act, a finding that enables union organizers and others to brand the employer as a "labor law violator."

Keep in mind, though, that much of the Board's activity in this area is in response to a deliberate strategy on the part of organized labor. Unions seeking to organize a workplace increasingly pore over the contents of a targeted employer's employee handbook in search of policies that may, in the eyes of a labor-friendly NLRB, chill protected activity. They will often file a complaint with the Board contending those policies are unlawful, or will have union supporters push the boundaries of a particular work rule in hopes of "drawing a foul." A bad rule provides a union with the opportunity during an organizing campaign to tag an employer with a predicate violation, to add credibility to their pitch to employees that the employer is dishonest and does not care about them, and to heighten the NLRB's scrutiny of the employer's overall behavior.

The consequences of getting it wrong. Indeed, that appears to be the tactic that the Teamsters deployed in the case of our fictional Acme Corp. above. The union knows that the consequences can be significant for an employer found to have promulgated an unlawful work rule.

Contrary to the common misconception, the remedy for a work rule violation isn't merely a matter of "just posting a notice." Even posting is no small matter in itself—particularly for employers with nationwide operations. Beyond that remedy, however, if the NLRB determines that an employer's work rule does indeed violate the Act, the employer will be ordered to affirmatively repudiate the offending provision and formally issue, at no small expense, a revised and compliant policy. Any employee who is disciplined pursuant to that policy has a viable Board claim that the discipline imposed is unlawful. Thus, disciplinary action predicated on a bad rule could trigger a Board investigation and potentially result in the rescission and remediation of the discipline. Even if the rule is never enforced, it can still be deemed a violation of the Act, a finding that enables union organizers and others to brand the employer as a "labor law violator."

Finally, as our opening scenario suggests, a "bad" rule, even if unenforced, may invalidate a certification or decertification election in which the employer has prevailed. Thus, even while General Counsel Griffin concedes that most employers do not draft their handbook rules with the intent of violating the NLRA, the cost, disruption, and business risk of even inadvertently getting a policy "wrong" can be substantial.

In this issue of the *Practical NLRB Advisor,* we'll take a look at the kinds of employer policies that tend to attract heightened scrutiny by the current Board and General Counsel and offer tips on how to draft rules that will accomplish their purpose while still complying with the NLRA. ■

Walking the policy tightrope

Most well-managed companies promulgate workplace rules as a guide for their employees to ensure that they conduct themselves in accordance with the employer's established practices, with the law, and with respect for their coworkers, management, and the company. In order to make the "rules of the road" easily accessible, most employers collect and publish them in an employee handbook. However, these sound business practices can easily run afoul of the National Labor Relations Act (NLRA), particularly in the view of the current National Labor Relations Board (NLRB), which has frequently found violations of the statute in many common handbook provisions.

How can employers, union and nonunion alike, maintain civility and a smoothly functioning workplace in the face of the NLRB's latest encroachment on their operations? Drafting work rules that are both effective and lawful under the increasingly watchful eye of the NLRB is often a balancing act.

Drafting work rules that are both effective and lawful under the increasingly watchful eye of the NLRB is often a balancing act.

General Counsel offers guidance. For a glimpse at the kinds of work rules that the Board deems acceptable, a useful place to start is a 2015 Memorandum issued by NLRB General Counsel Richard Griffin. The document sets out several examples of both lawful and unlawful rules for eight different categories of employee behavior that are frequently at issue before the Board:

1. confidentiality;
2. employee conduct towards a company and its supervisors;
3. employee conduct towards fellow employees;
4. employee interaction with third parties;
5. use of company logos, copyrights, and trademarks;
6. photography and recording;
7. leaving work; and
8. conflicts of interest.

For each category, the General Counsel details the Section 7 rights that are impacted; outlines the Board's standard to determine what conduct employers may and may not restrict; and gives examples of provisions that do and do not pass muster under the Act, based on prior Board decisions. The memo also discusses the Board's decision in *Lutheran Heritage,* which established the critical element of "how a reasonable employee would interpret" a given rule in analyzing its legality. Finally, the memo sets out specific employer rules deemed lawful and unlawful by the NLRB's Office of General Counsel as part of a settlement agreement.

For example, as to confidentiality rules, the memo states:

Employees have a Section 7 right to discuss wages, hours, and other terms and conditions of employment with fellow employees, as well as with nonemployees, such as union representatives. As such, a rule prohibiting employee discussions about wages, hours, or workplace complaints—or one that employees would reasonably understand to prohibit such discussions—is unlawful. Broad prohibitions on employees discussing "employee" or "personnel" information are also unlawful. On the other hand, broad prohibitions on disclosing "confidential" information are lawful so long as they do not reference information regarding employees or anything that would reasonably be considered a term or condition of employment, because employers have a substantial and legitimate interest in maintaining the privacy of certain business information.

The memorandum then presents the following examples of unlawful confidentiality rules:

- "Do not discuss 'customer or employee information' outside of work, including 'phone numbers [and] addresses.'"
- "You must not disclose proprietary or confidential information about [the Employer, or] other associates (if the proprietary or confidential information relating to [the Employer's] associates was obtained in violation of law or lawful Company policy)."
- Employees are prohibited from "[d]isclosing . . . details about the [Employer]."

- "Sharing of [overheard conversations at the work site] with your co-workers, the public, or anyone outside of your immediate work group is strictly prohibited."
- "Discuss work matters only with other [Employer] employees who have a specific business reason to know or have access to such information. . . . Do not discuss work matters in public places."

In contrast, it offers the following examples of lawful confidentiality rules:

- No unauthorized disclosure of "business 'secrets' or other confidential information."
- Misuse or unauthorized disclosure of confidential information not otherwise available to persons or firms outside [Employer] is cause for disciplinary action, including termination.

Can you discern why certain provisions are acceptable under the NLRA, while others would be stricken by the Board? Can you walk the tightrope between lawful and unlawful?

- Do not disclose confidential financial data, or other non-public proprietary company information. Do not share confidential information regarding business partners, vendors or customers.

Can you discern why certain provisions are acceptable under the NLRA, while others would be stricken by the Board? Can you walk the tightrope between lawful and unlawful? Again, under *Lutheran Heritage*, the question is whether the rule in question would "reasonably tend to chill employees in the exercise of their Section 7 rights" to engage in protected, concerted activity.

Thus, a confidentiality rule that completely prohibits sharing any information about coworkers might prevent employees from discussing common concerns such as wages or the terms of their employment, or from providing contact information to union organizers. Such prohibitions would impinge on employees' Section 7 rights. On the other hand, a prohibition against disclosing an employer's "business or trade secrets" does not implicate Section 7 and does not run afoul of the Act.

The memorandum addresses the other categories in a similar fashion, giving employers valuable insight into the General Counsel's reasoning. Regardless of whether one agrees with his interpretation of the *Lutheran Heritage* standard, the document is a useful roadmap for assessing what handbook policies the Board would likely deem lawful—at least at this moment in time.

But tread carefully. With the *Lutheran Heritage* principles and the latest Board developments in mind, employers must continually review their work rules and policies to ensure compliance. While the General Counsel's pronouncements are a useful part of that ongoing analysis, they do not provide a "safe harbor." Even strict adherence to the General Counsel's expressed views is not foolproof.

For example, in drafting its communication policy, one grocery retailer used language expressly approved by former Acting General Counsel Lafe Solomon in his 2012 report on cases related to employer social media policies. Nonetheless, an NLRB administrative law judge (ALJ) struck down the retailer's policy as overbroad. The ALJ was not persuaded by the General Counsel's guidance, which—like Griffin's memorandum—was not binding. Nor was he swayed by the fact that another NLRB Regional Director had previously settled charges against an employer by allowing it to maintain a policy nearly identical to the one at issue. "It simply does not matter what position a Regional Director took in a different case three years ago in order to settle that case," the ALJ said.

Policy pointers. A deft hand is needed when drafting handbook policies that can survive Board scrutiny while simultaneously meeting their intended business purposes. Here are a few useful principles to keep in mind:

- **Context matters; location, too.** When defending a particular work rule before the agency, employers often argue that the provision cannot be read in isolation and that it must be construed in context. They often point to disparate passages in an employee handbook that, "when read together," would remove any prospect of potential interference with Section 7 rights. For example, an employer may explain that a broad confidentiality rule on page 3 is meant to apply only to a provision on protecting intellectual property discussed on page 17.

Unfortunately, employers will find little success with this defense if the exculpatory provision is far removed from the challenged rule. The Board will not expect the proverbial "reasonable employee" to reconcile various clauses from widely separated pages of the document. If a particular policy must be placed in a remote location from its "context," the drafter should clearly reference and cite to the relevant provision that serves to inform the intended, lawful meaning.

Even the most artfully drafted employee handbook may come under NLRB scrutiny. When faced with the prospect of defending a work rule before the NLRB, keep these points in mind.

- **Consider the "reasonable employee."** According to the NLRB, what may appear "clear" to the drafter of a rule may be subject to a differing interpretation by the so-called "reasonable employee." Unfortunately, this "test" has largely become not so much a matter of how an employee *would read* a policy, but how that same employee *could read* the policy. Consequently, a careful drafter will consider all *possible* interpretations of the language he or she chooses to employ.

- **Lead by examples.** The most common charge when attacking a handbook rule is that it is "overbroad" or unduly vague. Indeed, employers often use vague terms by design, to ensure that the provision encompasses the full range of potential infractions. But such ambiguity often equals "overbroad" in the NLRB's calculations. A drafter can minimize a subsequent claim of ambiguity by including specific examples of the conduct prohibited by the rule. However, the rule should note that the examples are meant to be illustrative, not exhaustive.

- **No harbor is safe.** In addition, it may prove helpful for the drafter to note that a rule is *not* intended to interfere with activity protected under Section 7 of the NLRA. As in other cases, the location of this type of "limiting" language matters. Such language buried in the back of a handbook, for example, may prove to be of little value. On the other hand, if included in the specific rule language, it may serve to insulate the rule from attack. For example, a handbook's confidentiality provision might include limiting language indicating that the rule "is not intended to prohibit employees from discussing wages or any other specific terms and conditions of employment."

Unfortunately, such "savings clauses" are not "slam dunks" and may not completely shield an employer from NLRB charges. For example, in one case, an employer handbook included a "freedom of association" policy expressly stating that management supported the right of employees to vote for or against union representation, without interference. But because it "focused solely on union organizational rights" and not "the broad panoply of rights protected by Section 7," the Board invalidated the clause. The Board has sent mixed messages with respect to savings clauses and other forms of limiting language. In the end, the language is almost always helpful, but no matter how carefully written, is not a guarantee against a successful Board charge.

Defending a work rule charge. Even the most artfully drafted employee handbook may come under NLRB scrutiny. When faced with the prospect of defending a work rule before the NLRB, keep these points in mind:

- **The standard is "tend to chill."** It does not matter whether a work rule *actually* chilled employees from exercising their statutory rights; the relevant test is whether the rule "would reasonably tend to chill" employees. Arguing the former before the current Board is likely to be of no avail. Likewise, whether you have *enforced* a work rule in a manner that would chill Section 7 rights is beside the point; there need not be an aggrieved employee for the Board to find fault with the rule itself.

- **Board law is unpredictable.** As illustrated by the grocery retailer example above, an employer cannot safely presume that even nearly identical facts will

always result in an identical outcome. The case law on work rules continues to "evolve" and, given the fact-specific nature of the challenges and the proclivities of individual law judges, Regional Directors, and Board members, it will likely continue to evolve in a haphazard fashion.

- **Repudiation must be clear.** If there is a finding that a work rule violates the Act, quietly removing the offending rule provision will not be sufficient to placate the NLRB. As noted below, employers are required to unambiguously repudiate an unlawful provision, and notify employees of the rule change. ■

NLRB insists: Repudiate like you mean it

To be relieved of liability for a workplace rule that constitutes an unfair labor practice, longstanding NLRB policy requires that an employer affirmatively repudiate the offending provision, even if it has discontinued or revised the rule in a manner that complies with the NLRA. An employer must "signal unambiguously" to employees that it acknowledges its wrongful actions and employees' protected Section 7 rights, and pledge not to interfere with them again. Why? The "fundamental remedial purpose" of the repudiation requirement, according to the Board, is to protect employees from the potential lingering effects of an unfair labor practice, even though that practice has since ended.

In a recent decision in *Boch Imports, d/b/a Boch Honda v. NLRB*, the First Circuit upheld the Board's affirmation of that principle in a case where the employer worked hand-in-hand with an NLRB regional office to craft a lawful replacement for its unlawful dress code policy. The Board held that the employer, a Massachusetts auto dealership, did not properly repudiate its earlier unlawful policy—which banned the wearing of pins, insignia, and "message clothing' in the workplace—even as it revised the policy in cooperation with the NLRB's regional office to ensure that it would pass muster.

The appeals court rejected the employer's contention that the repudiation requirement does not apply "with the same vigor" to defunct handbook provisions. Nor was the extent of the employer's cooperation or noncooperation with the Board in revising the unlawful policies relevant in determining whether there was a sufficient repudiation of those policies.

How to repudiate. The NLRB established the elements for effective repudiation of an improper workplace rule in *Passavant Memorial Area Hospital*, a 1978 Board decision, where it held:

- The notice of repudiation must be "adequately published" to the affected employees.
- It must be "timely," "unambiguous," and "specific in nature to the coercive conduct."
- It must not be accompanied by the "proscribed conduct on the employer's part after the publication."
- It must be "free from other proscribed illegal conduct."
- It "should give assurances to employees that in the future their employer will not interfere with the exercise of their Section 7 rights.

Handbook rules under fire

Because the NLRB's "test" is essentially subjective, it is also unpredictable. Almost *any* employee handbook policy or work rule *could* be interpreted by a "reasonable employee" as interfering with his or her right to engage in protected, concerted activity. These common employer policies, which do not appear on their face to implicate employees' Section 7 rights, are nonetheless frequent targets of the Board's scrutiny:

Civility policies

The National Labor Relations Board (NLRB) has found employer policies that require employees to "maintain a positive work environment," "treat others with respect," or refrain from "discourteous or inappropriate behavior" all run afoul of the National Labor Relations Act (NLRA). For example, the Board has held an employer's policy requiring employees "to maintain a positive work environment by communicating in a manner that is conducive to effective working relationships" was vague and ambiguous and that employees would construe the rule as restricting all "potentially controversial or contentious communications and discussions," including those protected under the NLRA. Worse still, the Board observed, the provision would be read in context with other unlawful work rules that barred employees from "arguing" or making "detrimental" comments about the company. The employer contended that the rule was put in place to further the legitimate business objective of promoting "efficiency, productivity and cooperation" and that employees would rightly perceive it as such. In the Board's view, however, the rule provided no basis upon which employees could determine which communications would detract from "a positive work environment" and which communications would not. Days later, in *Valley Health System LLC d/b/a Spring Valley Hospital Medical Center*, the NLRB found an employer unlawfully maintained a rule prohibiting conduct that was "offensive" to fellow employees. The rule did not provide sufficient context for an employee to determine what types of "offensive" comments or behaviors it was targeting, or how it would or would not be applied in the context of Section 7 activity.

In *William Beaumont Hospital*, a divided Board panel invalidated portions of a hospital's code of conduct prohibiting employee behavior that was "inappropriate or detrimental to patient care." The Board majority found the policy ran afoul of the NLRA in its use of "imprecise" language to prohibit any conduct that "impedes harmonious interactions and relationships." The majority found that this directive was unlawfully overbroad, observing that it could cover any conflict among employees, including disagreements and interactions protected by Section 7. Member Miscimarra, reliably dissenting, argued that the conduct rules were well-supported by substantial justification and that employees would understand that the rules were simply intended to promote patient care, not to impinge on NLRA-protected activity. However, according to the Board majority, all that mattered was whether the rule would reasonably tend to chill employees in the exercise of their protected rights. Member Miscimarra argued further that the time has come for a reevaluation and reformulation of the way the Board analyzes the legality of employer rules.

Social media policies

When employees complain, commiserate, and communicate about their workplace, they increasingly do so via social media. Because social media typically has a wider audience than "water cooler" complaining, employers have begun to establish rules identifying the acceptable parameters of employees' social media discourse. In turn, the NLRB has started aggressively policing employer policies governing employees' online activity, often finding the policies interfere with protected Section 7 rights.

One of the more significant Board decisions in the social media area was *Three D, LLC d/b/a Triple Play Sports Bar and Grille,* in which the Board invalidated as overbroad a restaurant's Internet/blogging policy that barred "inappropriate discussions." The Board majority found that employees would reasonably construe the restaurant's policy to prohibit the type of protected Facebook posts that led to

Handbook rules under fire

the underlying unlawful discharges in this case. The NLRB found it problematic that the rule contained only one other prohibition—against revealing confidential information—and offered no examples as to the types of discussions that the employer would deem inappropriate. Consequently, the term "inappropriate" as used in the policy was "sufficiently imprecise" as to raise Section 7 concerns. Member Miscimarra disagreed on this point. "It does not per se violate Federal labor law to use a general phrase to describe the type of conduct that may do so," he argued; if that were true, he reasoned, then "just cause" provisions found in most bargaining agreements over the last eight decades would be deemed invalid. Nonetheless, the majority's position was upheld by the Second Circuit in a summary order.

More recently, an NLRB law judge ruled that Chipotle Mexican Grill violated the Act when it told an employee to delete a Twitter comment, finding that the restaurant chain's prohibition against disparaging statements could easily encompass communications protected by Section 7,

Solomon on social media

As the "social media cases" mushroomed in the earlier part of the decade, NLRB Acting General Counsel Lafe Solomon issued a series of reports detailing the cases being brought before the agency and how the Board ruled in those cases. Solomon expressed the hope that the reports would assist practitioners and HR professionals in developing policies that were compliant with the Act. Whether that effort was successful or not, the reports do provide useful insight on the reasoning that shapes current Board thinking in this area of law.

The first report covered 14 cases involving social media policies and other policies on media use in general. Four cases involved employees' use of Facebook as a form of online protected concerted activity where employees use it to discuss terms and conditions of employment with fellow employees. The second report reviewed seven additional cases and focused on the breadth of the prohibitions contained in the policy. In one case, for example, an employer's social media policy that prohibited "[m]aking disparaging comments about the company through any media, including online blogs, other electronic media or through the media" was deemed overbroad. While on the other hand, a policy asking employees to confine their social networking to matters unrelated to the company, if securities regulations so required, passed muster. The report illustrates the point that the broader a restriction is, the more likely it may be problematic in the NLRB's view.

The final report dealt with seven more social media policies. Many of the provisions found unlawful were ones dealing with the dissemination of company information and the use of coworker images. For example, the "information security" provision of a national retailer's social media policy, which required employees to follow guidelines if they mentioned the employer on sites like Facebook and Twitter, improperly prohibited employees from releasing confidential company information or information about team members, as it could be reasonably construed as prohibiting employees from discussing those topics among themselves. A motor vehicle manufacturer's policy that restricted the disclosure of nonpublic information also violated the Act, according to the General Counsel. The policy warned employees to be completely accurate and to not be "misleading" when discussing the company on social media—a directive that could be perceived as barring conversations about the company's labor practices and its treatment of workers. Among other invalid policies, according to the General Counsel, were provisions warning employees to "think carefully" about "friending" coworkers, not to post "offensive" remarks online (which could chill criticism of the employer's labor policies), not to divulge personal information about coworkers or contingent workers, not to pick fights and to avoid potentially objectionable topics in online discussions, and discuss legal matters online.

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notwithstanding the policy's disclaimer to the contrary. The employee's tweets were intended to educate the public, the law judge concluded, and to engender "sympathy and support" for hourly workers in general and Chipotle's workers specifically; as such, the online comments amounted to protected, concerted activity, and Chipotle's policy barring those comments was unlawful.

Prohibitions on workplace recording

The NLRB has held that photography and audio or video recording in the workplace, as well as the posting of photographs and recordings on social media, are protected by Section 7 as long as employees are acting in concert and for their mutual aid or protection, and no overriding employer interest is present. In so doing, the Board has cited numerous examples of "protected" recording, including employees recording images of their picketing activity, documenting unsafe workplace equipment or hazardous working conditions, documenting and publicizing discussions about terms and conditions of employment, and documenting the inconsistent application of employer rules. The case law is replete with examples where photography or recording, often covert, was an essential element in vindicating an underlying Section 7 right, according to the Board.

The NLRB found unlawful a Las Vegas hotel-casino's rule prohibiting the use of camera phones on the property "without permission from a Director or above." The provision at issue in *Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino* was part of a rule addressing the use of personal cell phones. Another rule prohibited the use of cameras, any type of audio-visual recording equipment, and/or recording devices unless specifically authorized for business purposes. In finding the policies unlawful, the Board placed great emphasis on the fact that the casino did not tie the prohibition to any particularized business interest, such as the privacy of its patrons. Although the casino did have a guest privacy provision in its confidentiality rules, it failed to link guest privacy to the cell phone and camera provisions, and, thus, the NLRB found, employees would not reasonably interpret these rules as protecting guest privacy. "Without such a limiting principle … employees are left to draw the reasonable conclusion that these two prohibitions would prohibit their use of audiovisual devices in furtherance of their protected concerted activities," the Board said. According to the Board, the absence of a limitation, or express linkage to a business purpose, distinguished the case from its 2011 decision in *Flagstaff Medical Center,* where it found a medical center's rule prohibiting employee use of "cameras for recording images of patients and/or hospital equipment, property, or facilities" lawful because it expressly referenced "recording images of patients" and was clearly designed to protect privacy or other legitimate interests.

Taking it up a notch, in *Whole Foods Market, Inc.*, the Board invalidated two rules prohibiting recordings. The grocery chain made it a policy violation "to record conversations, phone calls, images or company meetings with any recording device … unless prior approval is received" "or unless all parties to the conversation give their consent." The second rule stated it was a policy violation "to record conversations with a tape recorder or other recording device unless prior approval is received from your store or facility leadership."

The stated purpose of one of the rules was to encourage "open communication, free exchange of ideas, spontaneous and honest dialogue and an atmosphere of trust" and "to eliminate [any] chilling effect on the expression of views" that would arise if employees believed their conversations might be secretly recorded. This was particularly true "when sensitive or confidential matters are being discussed." But that rationale did not sway the Board. Nor was it impressed with Whole Foods' argument that nonconsensual recording is unlawful in many of the states in which the retailer operates, since the rules were not limited to stores in those states, and they did not refer to those laws or specify that the restrictions were limited to recording that does not comply with state law.

In another decision, the Board found unlawful a rule prohibiting employees from recording "people or confidential information using cameras, camera phones/devices, or recording devices (audio or video) in the workplace" and prohibiting employees from making "sound recordings of work-related or workplace discussions." The rules were designed "to prevent harassment, maintain individual privacy, encourage open communication, and protect confidential information." Nonetheless, the Board found the rule overbroad because it did not distinguish between recordings that are protected by Section 7 and those

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that are not, or exclude recordings made on nonwork time, in nonwork areas. The employer argued that the restriction was justified by the company's general interest in maintaining employee privacy, protecting confidential information, promoting open communication, and prohibiting harassing conduct. However, the Board found that the rule was not narrowly tailored to protect these legitimate interests, nor was it drafted to exclude protected activity from its reach. Moreover, it held that while the employer insisted that the intent of the rule was not to restrict Section 7 activity, the employer's "proffered intent" could not cure its overbreadth.

"We do not hold that an employer is prohibited from maintaining any rules regarding recording in the workplace," the Board had stressed in *Whole Foods*. However, any such rules must be narrowly drawn "so that employees will reasonably understand that Section 7 activity is not being restricted."

Use of company logo

Giant Food LLC's social media policy that restricted employees' use of the company logo, trademark, or graphics was unlawful, according to a 2012 advice memorandum issued by the NLRB's Associate General Counsel. Such a prohibition could be seen by employees as prohibiting their use of the logo or trademark in their protected online communications, such as electronic leaflets, cartoons, "or even photos of picket signs containing" the logo. The employer's proprietary interest in its trademark would not be "remotely implicated" by employees' noncommercial use of the images while engaged in Section 7 activity, the memorandum stated.

Confidentiality and nondisclosure rules

The Board has held that Section 7 of the NLRA protects the rights of employees to share information with, and about, each other. Although many handbook provisions are intended to protect employees' personal information and to safeguard the company's brand and proprietary information, they may be so vague or overbroad that the Board views them as potentially interfering with the type of information sharing by employees that is protected by the Act.

For example, in *Fresh & Easy Neighborhood Market*, the Board held a grocery chain maintained an overbroad confidentiality rule in its 20-page "Code of Business Conduct" that prohibited the disclosure of employee information. The policy covered a range of topics, including protection of company and customer resources, and included a section on "Confidentiality and Data Protection." The section advised employees to "Keep customer and employee information secure," and directed that such information was to be used "fairly, lawfully and only for the purpose for which it was obtained." This clause, the Board reasoned, would be construed by employees as prohibiting the protected disclosure of terms and conditions of employment, such as their wages, benefits, and other working conditions. It reinforced the impression that the rule bars Section 7 activity, given that the employer's business purpose "clearly does not include protected discussion of wages or working conditions with fellow employees, union representatives, or Board agents."

Handbook provisions invalidated by the Board in *First Transit, Inc.* barred the disclosure of "any company information," including wage and benefit information; prohibited employees from making statements about work-related accidents to anyone but the police or company management; prohibited "false statements" about the company; and restricted participation in outside activities that would be "detrimental" to the company's image. In *Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino*, a confidentiality rule prohibiting employees from sharing "any information about the Company which has not been shared by the Company with the general public" was likewise found unlawfully broad.

In *Schwan's Home Service, Inc.*, the Board held an employer's work rule unlawfully barred employees from sharing "information concerning customers, vendors, or employees," among other things. It required preapproval before disseminating information containing the company name. An additional rule restricted employees from sharing information about "wages, commissions, performance, or identity of employees." Employees would reasonably understand the provisions as prohibiting the sharing of employee information with each other or third parties, including union representatives, the Board said, rejecting the employer's argument that employees would reasonably understand the rule to apply only to confidential proprietary information, which they have no Section 7 right to disclose.

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The U.S. Court of Appeals for the District of Columbia Circuit upheld a Board decision finding that Quicken Loans' confidentiality and nondisparagement rules ran afoul of the Act. According to the appeals court, the Board appropriately determined that employees would reasonably construe the rule's sweeping prohibitions as treading on their right to discuss and object to employment terms and conditions, and to coordinate efforts and organize to promote employee interests. The very information that the rule explicitly forbade employees to share—personnel lists, employee rosters, and employee contact information—has long been recognized as information that employees must be permitted to gather and share among themselves and with union organizers in exercising their Section 7 rights. The same rationale applied to prohibitions against the disclosure of handbooks and other types of workplace information contained in "personnel files." Quicken Loans argued that the Board overlooked the company's "substantial and legitimate interest" in protecting its nonpublic information in a business that is "highly regulated, competitive, and involves substantial and significant confidential and proprietary information." However, by carefully confining its decision to the confidentiality rule's operation on the types of personnel information protected by Section 7, the Board left portions of the rule protecting proprietary information intact, the appeals court pointed out, and it afforded Quicken Loans adequate room to revise and "narrowly tailor the rule to achieve its goal without interfering with section 7 activity."

Loyalty, conflicts of interest, nondisparagement rules

While employers rightfully expect their employees to have the company's best interests in mind, the NLRB has invalidated handbook provisions that, in its view, demand such loyalty at the expense of statutorily protected rights.

For example, in its *Quicken Loans* decision, the Board also invalidated a nondisparagement rule that barred mortgage bankers from "publicly criticizing, ridiculing, disparaging or defaming the Company or its products, services, policies, directors, officers, shareholders, or employees" in any written or oral statement, including on the Internet or even in private emails. In upholding the Board's decision, the D.C. Circuit held the Board reasonably concluded that such a sweeping restriction, which essentially prohibited employees from expressing any negative opinions about the company, its policies, or its leadership in almost any public forum, would significantly impede the exercise of employees' Section 7 rights.

The Board majority in *Remington Lodging & Hospitality, LLC d/b/a The Sheraton Anchorage* found four employer rules, including one prohibiting "conflicts" of interest with the employer, facially invalid. The majority found that employees would construe the rule to prohibit employee conduct that was potentially detrimental to the employer's image or reputation, but nevertheless protected by the NLRA. In dissent, Member Miscimarra argued that: "Employers have a legitimate interest in preventing employees from maintaining a conflict of interest, whether they compete directly against the employer, exploit sensitive employer information for personal gain, or have a fiduciary interest that runs counter to the employer's enterprise." In his view, the rule "merely conveys a prohibition on truly disabling conflicts and not a restriction on activities protected by the Act."

Noncompete agreements

In *Minteq International, Inc.*, the NLRB struck down an "Interference with Relationships" provision in an employer's noncompete and confidentiality agreement, which employees were required to sign as a condition of employment. While employed, and for 18 months thereafter, employees were not to "intentionally solicit or encourage any present or future customer or supplier of the Company to terminate or otherwise alter his, her, or its relationship with the Company in an adverse manner." In the Board's view, this provision placed unlawful restrictions on employees' ability to communicate with the employer's customers and their ability to "improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship." Employees would reasonably read the rule, for example, as prohibiting protected conduct such as asking customers to boycott the employer's products in support of a labor dispute.

No personal business

An NLRB judge in *Casino Pauma* found that a prohibition on "conducting personal business while at work" was unlawfully

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overbroad. The policy also provided that the casino's property was to be used "only for business purposes," and that any personal use of company equipment, such as telephones and computers, was prohibited. Under the rule, employees were only to be on casino property while conducting casino business and, while at work, were to "conduct only Casino Pauma business." The judge found the policy ran afoul of the NLRA because it would "reasonably be read to restrict the communications of employees with each other about union or other Section 7 protected rights in non-work areas and on non-work time." Included within the "personal business" category would be employee communications about unions or complaints about working conditions, the judge reasoned.

At-will employment clauses

Several years ago, the NLRB alarmed employers with a rather surprising complaint against Hyatt Corporation out of the Board's Phoenix regional office. The General Counsel alleged that the hotel chain violated the NLRA with an employee handbook "receipt" provision requiring employees to acknowledge that they are employed "at will," and that their at-will status may only be altered by the company's president or executive vice president, in writing. The complaint provoked fears that the agency had set its sights on the very notion of at-will employment itself.

But in a subsequent pair of memos, the NLRB's Division of Advice concluded that two other at-will handbook clauses were lawful. Lafe Solomon, the Board's Acting General Counsel at the time, weighed in on several more at-will provisions, concluded both were lawful, and refused to issue a complaint. However, emphasizing that "Board law in this area remains unsettled," the General Counsel's office in February 2014 instructed the regions to submit any cases involving at-will handbook provisions to the Division of Advice, suggesting that careful scrutiny of at-will employment would continue. Ultimately, though, the NLRB backed off.

In July 2016, the NLRB itself invalidated an at-will employment policy. Importantly, though, in this case it was a unionized employer that was bound to a collective bargaining agreement with a "just cause" discharge provision; the panel found the at-will clause could reasonably discourage employees from engaging in conduct that would otherwise be protected by the contractual "just cause" guarantee. It was the conflict, then, between the bargaining agreement and the at-will clause that troubled the agency, not the at-will provision itself. For now, it appears that at-will employment—a deeply entrenched, near-universal principle in the United States, and a common feature of many employee handbooks—has escaped the Board's enforcement overreach in this area unscathed.

Arbitration policies with class waivers

In its 2012 decision in *D.R. Horton, Inc.*, the NLRB dropped a bombshell: it held that an employer violates the NLRA by implementing a mandatory arbitration policy that requires employees, as a condition of employment, to forego the right to bring class or collective action lawsuits. The Board's reasoning was that filing or joining a classwide lawsuit amounts to employees banding together "for mutual aid or protection," within the meaning of Section 7; thus, by insisting that employees waive the right to do so, an employer interferes with employees' protected rights under the Act.

Since *D.R. Horton* , the NLRB has struck down a spate of employer arbitration agreements, some with various permutations. The Board continues to do so, even as most federal courts have debunked its reasoning and affirmed the supremacy of the Federal Arbitration Act, which favors the private resolution of employment disputes as a matter of federal policy. Thus far, several appeals courts and scores of district courts have rejected the Board's theory that class waivers interfere with NLRA-protected rights. However, throwing a curve ball into what was shaping up to be a resounding and uniform rejection of Board jurisprudence on the question, the Seventh and, most recently, the Ninth Circuits have sided with the Board, finding that such an arbitration policy is unlawful.

For more details on the latest developments on the mandatory arbitration front, see *Other NLRB developments* on page 16. And stay tuned: Mandatory arbitration pacts will be the subject of a forthcoming issue of the *Practical NLRB Advisor.* ■

Other NLRB developments

Here is a brief summary of other noteworthy developments in recent months:

ALERT:

Withdrawing recognition absent secret-ballot election may draw a complaint

In yet another attempt to upend long-established precedent, National Labor Relations Board (NLRB) General Counsel Richard Griffin has ordered the Board's Regional Directors to raise the continuing viability of the Board's *Levitz Furniture Co. of the Pacific* doctrine when issuing complaints based on an employer's unilateral withdrawal of recognition from an incumbent union. Under *Levitz,* an employer can lawfully withdraw recognition if it has "objective evidence" that a union has lost its majority status, even if the union has not been formally decertified in a secret ballot election. In a memorandum issued in May, Griffin instructed the NLRB's regional offices to plead an alternative theory challenging the *Levitz* doctrine in all complaints involving an employer's allegedly unlawful withdrawal of recognition. Under the alternative theory, no withdrawal of recognition is lawful unless it is based on the results of a secret-ballot election. Griffin's purpose in requiring the alternative pleading is to get the *Levitz* issue before the Board for decision—a decision he hopes will overturn *Levitz* and result in a new rule that withdrawal of recognition can only be lawfully predicated on the results of a Board election.

However, a rule requiring that lawful withdrawal can only be based on an election has significant practical problems. Experience has demonstrated that resolution of majority status through a decertification election—a process that unions typically drag out by filing unfair labor practice charges—too often serves to delay and, in some cases, completely deny the will of employees who no longer wish to be represented by an unwanted union. The current practice under *Levitz*, by contrast, is far more efficient and expeditious and allows an employer to withdraw recognition when presented with "objective evidence," such as a signed petition from a majority of employees indicating that they no longer support or wish to be represented by the union.

Given the position now taken by Griffin, employers that withdraw union recognition without the results of an NLRB-conducted secret-ballot election, even in the face of overwhelming "objective evidence" of the union's loss of support, may face an NLRB complaint and litigation. Moreover, if the NLRB eventually issues a decision adopting the General Counsel's position—a result that appears likely given the Board's current composition—it would undo more than six decades of NLRB precedent permitting employers to withdraw recognition from a union that no longer has the support of a majority of its members.

For more information on the General Counsel's memorandum, see our blog post by Harold P. Coxson, chair of Ogletree Deakins' Government Relations Practice Group.

ALERT:

75-year-old precedent on permanent replacements under threat

In a significant decision, a divided NLRB has injected the issue of subjective *motive* in determining whether an employer violates the National Labor Relations Act (NLRA) by permanently replacing economic strikers. The ruling, *American Baptist Homes of the West d/b/a Piedmont Gardens*, issued in May, opens the floodgates to second-guessing an employer's motivation in retaining permanent replacement workers. If the Board determines that the employer's motive for hiring permanent replacements was discriminatory it can order reinstatement of the economic strikers, and backpay when warranted. Since the decision now opens an employer to substantial after-the-fact liability for exercising its right to hire permanent replacements for economic strikers, it is likely to make employers less inclined to do so. Additionally, potential replacement workers may be less likely to accept positions that prove to be only temporary. The chilling effect of the decision on employers is that it is likely to decrease their ability to maintain operations during an economic strike and may embolden unions to take employees out on economic strikes more frequently.

Most employers do not hire permanent replacements to "teach striking employees a lesson" or to "prevent

future strikes." Usually, their sole purpose is attempting to stay in business during a strike when it is difficult to find temporary replacements willing to cross a picket line to accept short-term employment. At any rate, before *American Baptist Homes*, an employer's motivation for hiring long-term replacement workers was "immaterial." Now, however, employers may have to justify legitimate business operational reasons for the decision. Employers should expect the NLRB and charging parties to search aggressively for any employer statements, comments, or actions that might suggest an unlawful discriminatory or retaliatory motive for the hiring of permanent replacements during an economic strike.

For more information on the case, see our blog post by James H. Fowles, shareholder in Ogletree Deakins' Columbia, South Carolina office, and Harold P. Coxson.

ALERT:

Temps and permanent employees can be in same bargaining unit

The other shoe has dropped: In the wake of its July decision in *Miller & Anderson, Inc.*, the NLRB will now permit a single bargaining unit to include employees who are solely employed by an employer and workers who are jointly employed by that employer *and* a staffing company or other personnel provider—all without the consent of either employer.

The decision is another example of the NLRB's ongoing "contingent workforce" activism, and it forms a predictable bookend to the NLRB's August 2015 decision in *Browning-Ferris Industries of California, Inc d/b/a BFI Newby Island Recyclery*, which relaxed the NLRB's standards for finding joint-employer status. The decision is also yet another example of the current Board overturning longstanding precedent. While the Board majority claimed (quoting the Supreme Court) it was merely exercising its "responsibility to adapt the Act to the changing patterns of industrial life," its decision is actually rooted in precedent from the 1940s. The decision effectively takes the law backward 70 years with decidedly negative potential consequences when applied to the industrial reality of 2016. The decision is a clear threat to the efficiencies that employers have achieved through the appropriate use of contingent workforces.

In nonunion workplaces utilizing contingent workforces, labor unions now can petition to represent both the primary workforce and the contingent workforce in a single bargaining unit, imposing a legal obligation on both the "supplier employer" and the "user employer" to bargain with the union over the terms and conditions of employment for both groups of employees simultaneously. In workplaces where the primary workforce already is represented by a union, and that primary workforce is supplemented by a contingent workforce from a staffing provider, unions may now have the opportunity to file unit clarification petitions seeking to accrete the contingent workforce into the existing bargaining unit without an election. Unions also may seek to have a so-called "Armour-Globe" self-determination election, in which the contingent workforce would vote on whether to join the existing bargaining unit. However established, negotiating in such a mixed unit creates substantial problems for the "employer side" of the bargaining table since the interests and bargaining goals of the supplier-employer and user-employer are different and often in conflict.

Both users and suppliers of staffing services and contingent workforces should continue to evaluate the nature of their relationships and, where possible, to refine their contracts to clearly define and allocate the respective authorities or rights of control, including *potential* rights of control. Employers with union-represented primary workforces in addition to contingent workforces that are excluded from the current bargaining unit should evaluate their collective bargaining agreements' treatment of contingent workers and evaluate the potential vulnerabilities, including the possibility of accretion into existing units through unit clarification or an Armour-Globe election.

For more information on the *Miller & Anderson, Inc.* decision, see our blog post by Timothy C. Kamin, a shareholder in Ogletree Deakins' Milwaukee office.

Courts of appeals uphold *Specialty Healthcare*.

The Fifth Circuit has found that the NLRB's 2011 *Specialty Healthcare* decision (which departed from Board precedent to sanction union elections among small "micro"-units within a company) does not contravene the NLRA, concluding that a retailer failed to establish that a

bargaining unit consisting solely of cosmetics and fragrance employees at one of its stores was clearly not appropriate—or that the Board abused its discretion in articulating and applying its "overwhelming-community-of-interest" test. Agreeing with its sister circuits that in *Specialty Healthcare*, the Board "clarified—rather than overhauled—its unit determination analysis," the appeals court granted enforcement of a Board order finding that the bargaining unit was appropriate and that the employer unlawfully refused to bargain.

"Quickie" election rule upheld. In June, the Fifth Circuit decided that the NLRB's revised rule modifying the procedures for union representation elections, commonly known as the "quickie" election rule, did not on its face contravene the NLRA or the Administrative Procedure Act (APA). Employer groups contended that the rule changes were improper in three particular respects: (1) they limited the scope of the pre-election hearing, particularly the deferral of individual voter eligibility issues; (2) they required employers to disclose to unions personal employee information; and (3) they cumulatively shortened the time period between petition and election to less than 30 days. To succeed on their facial challenge, the employer groups had to show that "no set of circumstances exists under which the [Rule] would be valid." Emphasizing the high burden faced by the plaintiffs, however, the appeals court held that the challenged provisions neither exceeded the scope of the Board's authority under the NLRA nor violated the APA's arbitrary and capricious standard (*Associated Builders and Contractors of Texas, Inc. v. National Labor Relations Board*, June 10, 2016).

Circuits split on class waivers. Recent decisions by the Seventh and Ninth Circuits have created a split in appellate authority regarding the NLRB's view that class action waivers contained in mandatory arbitration agreements violate the NLRA. In *Lewis v. Epic Systems Corp.* (May 26, 2016), the Seventh

Federal contractors to feel the heat

The NLRB has announced a new procedure to implement President Obama's Fair Pay and Safe Workplaces Executive Order 13673 and facilitate the flow of NLRB case information into the databases used by federal contracting agencies. The goal of the procedure is to identify employers with federal contracts and ensure that federal contracting agencies know when the NLRB has issued a complaint against a federal contractor.

EO 13673, aptly dubbed "the federal contractor blacklisting regulation," makes a contractor's record of any labor law "violations" a factor in awarding federal contracts or in suspending or debarring contractors from current or future contracting. The proposed regulations make the mere issuance of a complaint a reportable violation even though there has been no adjudication or finding of an actual violation.

The NLRB undoubtedly intends to use the potential of a negative impact on federal contracting opportunities as leverage against employers. "Employers should expect Regional Directors to increase their saber-rattling and threats to issue complaints once they learn that an employer is a federal contractor," warns James J. Murphy, a shareholder in Ogletree Deakins' Washington, D.C. office. "The NLRB clearly sees the issuance of a complaint as a key point of leverage to force a contractor into settling a charge rather than face an NLRB complaint, which could jeopardize current and future contracts."

The NLRB's procedure will enhance the ability of agency labor compliance advisors to scrutinize NLRA violations before a contract award decision is made, Murphy notes. "Even after a contract is awarded, the NLRB's database coordination procedure will increase the pressure on contractors to sign labor compliance agreements with the NLRB." As a critical example of the challenges employers face as a result of the "contractor blacklisting" regulations, an employer must now rethink whether to draw a technical Section 8(a)(5) refusal-to-bargain violation in order to secure appellate review following a union election win. Doing so can ultimately undermine its status as a federal contractor.

The final regulations and guidance to implement EO 13673 were published on August 25. For detailed information about the Fair Pay and Safe Workplaces Executive Order, read Ogletree Deakins' blog post on the topic.

Circuit held that a software company violated the NLRA by imposing a mandatory arbitration agreement barring employees from seeking class, collective, or representative remedies to wage-and-hour disputes. Affirming the lower court's denial of the employer's motion to compel arbitration of a putative class and collective action for unpaid overtime wages, the appeals court held that the class waiver interfered with employees' protected Section 7 rights to engage in concerted activity and that nothing in the Federal Arbitration Act (FAA) justified enforcing the arbitration agreement in the face of its illegality.

According to the Seventh Circuit, however, there were "several problems" with the logic of the D.R. Horton *opinion—one being that it made no effort to harmonize the FAA and NLRA.*

In *D.R. Horton, Inc. v. National Labor Relations Board*, the Fifth Circuit had arrived at the opposite conclusion months earlier. According to the Seventh Circuit, however, there were "several problems" with the logic of the *D.R. Horton* opinion—one being that it made no effort to harmonize the FAA and NLRA. "When addressing the interactions of federal statutes, courts are not supposed to go out *looking* for trouble," the Seventh Circuit remarked; instead, they must employ a "strong presumption" that the statutes may both be given effect.

Just a few days after the *Epic Systems* decision was issued, however, the Eighth Circuit once again rejected the Board's argument that "a mandatory agreement requiring individual arbitration of work-related claims" violated the Act (*Cellular Sales of Missouri, LLC v. National Labor Relations Board*, June 2, 2016). The decision was consistent with its previous ruling in *Owen v. Bristol Care, Inc.*, and the appeals court denied the Board's motion for a hearing before the full court requesting that it reconsider its earlier holding. Instead, in accordance with *Owen*, the Eighth Circuit concluded that the employer did not violate Section 8(a)(1) of the Act by requiring employees to enter into an arbitration agreement that included a waiver of class or collective actions in all forums to resolve employment-related disputes.

Having rejected the NLRB's theory regarding class action waivers in *D.R. Horton*, the Fifth Circuit did so again in *Murphy Oil USA, Inc. v. National Labor Relations Board*. In addition, it denied Board requests for a rehearing *en banc* in both *D.R. Horton* and *Murphy Oil*. Most recently the Fifth Circuit, in a terse, one-sentence order, granted an employer's request for summary reversal and refused to enforce the NLRB's order in yet another class action waiver case (*24 Hour Fitness USA, Inc. v. National Labor Relation Board*, June 27, 2016).

However, relying on the Seventh Circuit's contrary holding, a divided Ninth Circuit panel in *Morris v. Ernst & Young* (August 22, 2016) concluded class action waivers in arbitration agreements violate the NLRA and therefore are unenforceable. Here, the provision at issue required employees to proceed with their claims of unpaid overtime and misclassification "in separate proceedings" and therefore was construed as a class action waiver.

There is a significant chance that the *Morris* decision will be reheard by a full panel of the Ninth Circuit or reviewed by the Supreme Court. Both Epic Systems and Ernst & Young have recently petitioned the High Court for certiorari of their respective adverse decisions; the NLRB has asked the Court to take up the issue as well.

Meanwhile, the Board continues to issue decisions invalidating mandatory class waivers, and several other important rulings worth noting:

Volkswagen's micro-unit challenge rejected. A divided NLRB panel denied Volkswagen's request for review of a Regional Director's decision directing a union election among a "micro"-unit of maintenance workers at the automaker's Chattanooga, Tennessee, plant. Volkswagen had asked the Board to reverse the decision approving a United Auto Workers election within a discrete 160-employee group, after the union's earlier bid to organize the entire 1,400-worker plant had failed. UAW Local 42 won a December 2015 election among the smaller unit, with over 70 percent of the maintenance workers voting in favor of the union. But Volkswagen refused to bargain, contending the bargaining unit was inappropriate. A 2-1 majority concluded that Volkswagen

raised no substantial issues that warranted Board review, and upheld the decision and direction of election, finding the petitioned-for unit satisfied *Specialty Healthcare* criteria. In dissent, Member Miscimarra again registered his objections to the *Specialty Healthcare* decision but noted that even under this standard, the bargaining unit here was an impermissible "fractured unit" (*Volkswagen Group of America, Inc.*, April 13, 2016).

Not statutory supervisors. An NLRB Regional Director should not have dismissed a representation petition for a unit of road supervisors employed by a van shuttle service because there was no showing they were supervisors under the NLRA, a divided Board panel held. The written reports that the supervisors completed in the course of their duties observing van drivers and ensuring that the drivers abided by a local transit authority's policies and procedures appeared to be nothing more than "counselings" or warnings, the majority found. It was not apparent that the supervisors meaningfully recommended discipline, as the reports were not shown to be part of a true progressive discipline system.

Member Miscimarra pondered: If the road supervisors were not supervising the van drivers, who *was* supervising them? Although the company employed some 600 van drivers, the company's management structure above the level of the 15 road supervisors was "extremely sparse," he pointed out. In his view, this question—who else could be the supervisor?—should be considered in determining supervisory status as a matter of policy (*Veolia Transportation Services, Inc.*, May 12, 2016).

Mixed-guard union. Abandoning the rule adopted more than 30 years ago in *Wells Fargo Corp.*, which permits an employer of guards to withdraw recognition from a mixed-guard union in the absence of a collective bargaining agreement, a divided four-member Board panel ruled that once an employer voluntarily recognizes a mixed-guard union as the representative of a unit of guards, it must continue to recognize and bargain with the union unless and until it is shown that the union actually has lost majority support among unit employees. Absent such a showing, the Board found an employer's withdrawal of recognition from a mixed-guard union, which was based on the stated reason that *Wells Fargo* allowed it to do so, was an unlawful refusal to bargain. Because *Wells Fargo* provided the controlling rule for over 30 years, however, the Board declined to apply this holding retroactively. Dissenting, Member Miscimarra recognized that NLRA Section 9(b)(3) is open to several reasonable interpretations, including the one adopted in *Wells Fargo*. *Wells Fargo* reflected a reasonable middle position, he argued, and was the most consistent with the compromise that Congress struck when it restricted the representation of guards by mixed guard/nonguard unions (*Loomis Armored US, Inc.*, June 9, 2016).

High Court to weigh in on Acting GC

The Supreme Court will review a D.C. Circuit ruling that former Acting General Counsel Lafe Solomon served in violation of the Federal Vacancies Reform Act (FVRA). In *SW General, Inc. d/b/a Southwest Ambulance v. National Labor Relations Board*, the D.C. Circuit held that because Solomon was never a "first assistant" and the president nominated him to be general counsel when he was six months into his temporary appointment as Acting General Counsel, the FVRA prohibited him from serving in that position from that date forward. According to the NLRB's petition for certiorari, the D.C. Circuit's decision "repudiates an interpretation of the FVRA on which every President since the enactment of the statute has relied." More importantly, if left undisturbed, the decision "will cast a cloud over the service of past and current officers at high levels of government," the Board argued. And, because just about every action of any federal administrative agency can be challenged in the District of Columbia, the appeals court's ruling poses a significant impediment to any president's ability to temporarily fill executive branch posts with the person he or she deems most qualified to fill them permanently, the petition asserts.

Failure to disclose *lack of* information. An employer unlawfully failed to timely inform a union that information it requested regarding changes in work rules and policies did not exist, a divided four-member NLRB panel determined. In so holding, it overruled its 2007 decision in *Raley's Supermarkets* to the extent it precludes the Board from considering an unalleged failure to timely disclose that the requested information does not exist when, as here, the unalleged issue was closely connected to the subject matter of the complaint and had been fully litigated. The Board also found it appropriate to apply this decision retroactively (*Graymont PA, Inc.*, June 29, 2016).

The NLRB issued a flurry of significant decisions as August drew to a close, as often happens when a Board member's term draws to a close. (In this case, it was Democrat Kent Y. Hirozawa, whose term expired August 27.) We will discuss these rulings and their potential impact on employers in the forthcoming issue of the *Practical NLRB Advisor*. ■

UPDATE: Court enjoins DOL persuader rule

In our last issue of the *Practical NLRB Advisor*, we reported that on March 24, the Department of Labor (DOL) published new regulations dramatically expanding the obligations of employers and their labor relations consultants to report certain information related to the provision of labor relations guidance under the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA). The regulations applied to both attorney and nonattorney consultants. As we noted, the revised "persuader rule" represented a serious threat to employers' ability to obtain the critical advice they need during a representation campaign. On June 27, however, a federal district court in Texas enjoined the DOL from enforcing the rule on a nationwide basis, finding that the regulation was "defective to its core."

"We are gratified by the Judge's decision," said Jeffrey C. Londa, a shareholder in Ogletree Deakins' Houston office, who was lead counsel representing the plaintiffs in the Texas case. "DOL's new rule is not only confusing, vague, and unwarranted, it constitutes a blatant overreach by the administration designed to assist unions by making it more difficult for employers to obtain professional, including legal, assistance when exercising their constitutional right to oppose unionization. I want to thank our clients for having the courage to oppose DOL's efforts."

The DOL recently gave notice that it is appealing the issuance of a preliminary injunction to the Fifth Circuit Court of Appeals. That appeal is pending. Also pending before the federal district court in Texas is the plaintiffs' Motion for Summary Judgment, which seeks to make the court's preliminary injunction permanent. For the latest in this ongoing case, read Ogletree Deakins' blog post.

What's next at the NLRB?

Ask the General Counsel!

On March 22, NLRB General Counsel Richard Griffin released Memorandum GC 16-01, entitled "Mandatory Submissions to the Division of Advice." The memorandum instructs the Board's regional attorneys to submit certain types of high-profile cases to the NLRB's Division of Advice before taking action. The document reflects the priority matters in which the General Counsel is likely to seek to change the law.

The evolution of Board law typically begins with the General Counsel, who utilizes his complaint-issuing authority to tee up a new theory or a change in extant Board law for eventual decision by the five-member Board. The memorandum clearly signals the intention of the General Counsel to push the envelope, and seek numerous additional changes in Board law.

From the long laundry list of topics covered in the memorandum, it is clear that the NLRB is far from finished with its long-running assault on current Board precedent. In fact, if the memorandum is a roadmap for the future, perhaps the better question is not "What's next at the NLRB?" but "What's *not* next?"

For a full summary of all the issues targeted by the General Counsel please see, our blog post.

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