The NLRA Covers Nonunion Employees Too!: The Right to Engage in Concerted Activity for Mutual Aid and Protection with Special Emphasis on Concerted Enforcement Activity

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Introduction

Many employment lawyers may not have much exposure to the National Labor Relations Act (NLRA) and may assume that the NLRA only applies to employees who are trying to form a union or work for unionized employers. That has never been the case and, in recent years, the National Labor Relations Board (NLRB) has been actively applying Section 7 of the NLRA, which gives employees the right to engage in concerted activity for mutual aid and protection, in a variety of non-union settings. Attorneys who practice both traditional labor law and employment law (and there is a sub-group of NELA lawyers who fall in that category) know to look for potential NLRA violations when clients bring employment concerns to them, but others may not. In the right circumstances, claims made under the NLRA can provide additional protection or avenues of relief for clients who work for private employers. In this paper, we provide background and some practical suggestions for successfully utilizing the NLRA to protect nonunion employees.

I. The Right to Engage in Concerted Activity for Mutual Aid and Protection

A. NLRA Basics

The NLRB is an independent federal agency with headquarters in Washington, DC and with 26 regional offices located throughout the country. The agency is charged with the enforcement of the National Labor Relations Act, 29 U.S.C. §151 et seq. The NLRB handles two kinds of cases, representation cases, "R" cases, which involve the process for conducting elections to determine union representation and unfair labor practice matters, unfair labor practice cases, "C" cases, which involve the investigation of charges and, where appropriate, prosecution of various types of violations of the Act. An unfair labor practice charge should be filed in the regional office with jurisdiction over the location of the workplace in question. This paper addresses a particular kind of unfair labor practice, the violation of Section 7 rights, specifically the right to engage in protected concerted activity. Section 7 is codified at 29 U.S.C §157. Section 7 provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing**, to engage in other concerted activity for the purpose of collective bargaining or other mutual aid or protection**, and shall also have the right to refrain from any or all of such of such activities except to the extent such right may be affected by an agreement requiring membership in a labor organization as authorized in section 158(a)(3) of this title. (Emphasis added).
>
> Several other provisions bear on cases involving protected concerted activity:

Section 8(a) (1), which is codified at 29 U.S.C. §158(a) (1), provides:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title. [Section 7]

In the event of concerted job actions, another important provision is 29 U.S.C. §163 which protects the right to strike:

> Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or in any way diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

Finally, where an employee files a charge with the NLRB or participates in an NLRB case, the NLRA includes an anti-retaliation provision which provides protection for filing charges or giving testimony under the Act. 29 U.S.C. §158 (a)(4).

B. Who is covered by the statute?

Employee is defined in detail at 29 U.S.C. § 152 (3) but generally includes most private-sector employees unless they are agricultural laborers, employees of an employer covered by the Railway Labor Act (railroad and airline employers), independent contractors, or supervisors (defined by the Act at 29 U.S.C. §152(11)).[1] So if the client is employed by a private employer and is not in a supervisory role, they are likely covered.

C. What is protected concerted activity?[2]

As noted in the quoted statutory language, under Section 7, employees can engage in concerted activity for the purpose of collective bargaining or "other mutual aid or protection."

[1] Titles are not determinative of supervisory status and not all low-level supervisory personnel actually fall within the definition of a supervisor, for example, some lead persons or foremen are not supervisors. Moreover, in narrow circumstances even a termination of a 2(11) supervisor may be covered by the Act. *Parker-Robb Chevrolet,* 262 NLRB 402 (1982), enfd. sub nom.*Automobile Salesmen'sUnion Local 1095 v. NLRB,* 711 F.2d 383 (D.C. Cir. 1983) where the termination is based upon the supervisor's testimony in a Board hearing or a refusal to commit an unfair labor practice.

[2] The NLRB has a very helpful, easy to navigate website at www.nlrb.gov. There is a page devoted to protected concerted activity which describes a number of fact patterns where a determination was made to issue complaint, but in many of the cases, the matter was resolved before the issuance of a Board decision. However these descriptions provide a good survey of the kinds of activity protected by Section 7: https://www.nlrb.gov/rights-we-protect/protected-concerted-activity

There are two distinct requirements which must be met in order for any particular activity to come within the protection of Section 7, that the activity be concerted (involve more than a single employee) and the activity must be for mutual aid or protection (so that it relates to or involves matters of concern to employees as employees). Since 1986, the NLRB has applied the test set forth in *Meyers Industries* to determine if non-union-related activity is concerted.[3] To be concerted the activity must involve more than one employee, although, one employee can be seeking to engage one or more other employees or be acting on their behalf.[4] In restating the test in *Meyers II***,** the Board said:

> Indeed, *Meyers I* recognizes that the question of whether an employee has engaged in concerted activity is a factual one based on the totality of the record evidence. When the record evidence demonstrates group activities, whether "specifically authorized" in a formal agency sense, or otherwise, we shall find the conduct to be concerted.[5]

In *Meyers II***,** the Board referred to a case decided after *Meyers I, Walter Brucker & Co***.,** 273 NLRB 1306 (1984), where one employee discussed with other employees a common wage complaint and then, without specific authorization, the first employee pursued the wage complaint with management and the second employee refrained from doing so, knowing that the first employee intended to pursue the matter. In *Walter Brucker & Co.* the Board concluded the first employee's action was concerted. Similarly, the Board affirmed that its *Meyers I* definition of concerted activity encompasses circumstances where an individual employee seeks to initiate or to induce or to prepare for group action.**[6]** Thus, while formally authorized activity such as one

[3] In a union setting where there is a collective bargaining agreement, an individual's invocation of a contract provision is viewed as concerted because it invokes the collective bargaining agreement which grew out of collective action. *See NLRB v. City Disposal Systems*, 465 U.S. 822 (1984), where the Supreme Court concluded the NLRB's view that such conduct was concerted was a reasonable interpretation of Section 7.

[4] In *Meyers Industries, Inc*., 281 NLRB 882 (1986)(*Meyers II*) the NLRB reiterated the test it set forth in *Meyers I* (268 NLRB 493 (1984)) as the test it would apply to determine if activity was concerted.

[5] *Id.at 886.*

[6] *Id. at 887.*

employee carrying a petition signed by numerous employees regarding complaints about working conditions to management would clearly be concerted activity, there are other iterations as well, where the authorization and participation is less formal.

In addition to the requirement that the activity be concerted, the purpose must be for mutual aid or protection. Under this prong, the activity must relate to working conditions that affect more than just the single employee.[7] Generally this is the case so long at the activity is aimed at addressing or alleviating or improving some aspect of working conditions that affects or could affect more than one employee. The two elements are closely related but analytically separate and for the mutual aid or protection element, the analysis focuses on whether there is a link between the activity and matters concerning the workplace or employees' interests as employees. *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB No. 12, slip op. at 3 (2014).

But even if the activity is concerted and for mutual aid or protection, it may not be protected in some circumstances if it involves serious misconduct. For example, employee communications to third parties, even if they take place in connection with a labor dispute, may lose Section 7 protection if they are insubordinate, disloyal or disparaging of the company's product or services. *See NLRB v. IBEW Local No. 1229*, 346 U.S. 464 (1953) (*Jefferson Standard*) (employees were involved in a labor dispute but passed out handbills directed to the public that did not address or reference that dispute or their working conditions whatsoever and disparaged the quality of television services which the employer provided). In addition, in

[7] Contrast cases finding protected concerted activity such as, *Gaylord Hospital***,** 359 NLRB No.143 (2013)(employee approaches supervisor about concerns with seniority issues and accuracy of medication occurrence reports, concerns shared by colleagues after a state investigation); *Hoodview Vending Co*., 362 NLRB No. 81 (2015)(two employees discussing concerns about job security) with *Praxair Distribution, Inc*., 358 NLRB 27 (2012)(single employee who was bullied by another employee complained to management about the bullying, without first seeking the help of other employees. The bullying was directed solely at the employee making the complaint).

Atlantic Steel, 245 NLRB 814 (1979), and its progeny, the Board has found that conduct that meets the test for protection under Section 7 can involve misconduct that causes the conduct to lose the protection of the Act. Generally, a balancing test is applied to determine if the employee has crossed the line which "depends on several factors: (1) the place of the discussion;(2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice." 245 NLRB at 816.

Finally, the Board may find employer disciplinary actions which were motivated in part by protected concerted activity are not unlawful based upon application of a *Wright Line* defense where an employer affirmatively proves it would have taken the same action even in the absence of the protected concerted activity.[8]

D. A few examples to demonstrate how the NLRA can be used to assist your client

To begin the discussion, we start with a few examples, two from personal experience and one from a Supreme Court case decided more than fifty years ago. In each instance, the NLRA provided a basis for obtaining relief under circumstances that could easily be repeated in many non-union employment settings.

1. In *NLRB v. Washington Aluminum***,** 370 US 9 (1962), seven employees joined together and walked off their job on a particularly cold day in January in Baltimore. They worked in a machine shop with inadequate heating and several had previously complained about the uncomfortable working conditions. The day in question was bitterly cold and after talking among themselves, the employees jointly determined

[8]*Wright Line*, 251 NLRB 1083 (1980*).*In cases involving two motives, one involving protected concerted activity and the other not, the employer may defend its disciplinary action by proving that it would have imposed the same discipline even if the absence of the protected concerted activity. *Wright Line* is based on the Supreme Court decision in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977).

they were too cold and too uncomfortable to continue to work and so, as a group, walked off the job, shortly after the work day started. The company response was to terminate all seven employees. The NLRB determined the activity was concerted and for mutual aid and that the terminations violated Section 8 (a) (1). The Supreme Court agreed. This is a classic case of concerted activity in that the employees discussed their concerns and acted together to protest the uncomfortable working conditions and jointly determined a plan of action. There was no union in place but the Supreme Court concluded this was a "labor dispute" as that term is defined in the NLRA at Section 2(9) which includes "any controversy concerning terms, tenure or conditions of employment" and involved Section 7 rights. *Id*. at 15.

2. In a non-union setting, several employees discussed among themselves certain racist and sexist remarks made by their supervisor towards female and minority co-workers as well as more general, abusive and unfair treatment (not based on any protected characteristic) by this same supervisor. Ultimately they agreed on a plan of action and designated one of the employees involved in the discussions, who was not a minority or a woman, to act as a representative and go to the manager above their supervisor to raise these shared concerns. After doing so, that employee was terminated. Charges were filed with the EEOC alleging Title VII retaliation for opposing unlawful discrimination,[9] but in addition, an unfair labor practice charge was filed with the NLRB regional office alleging an 8(a)(1) violation based on the complaints not covered by Title VII, the supervisor's general mistreatment and abusive behavior towards the employees. The NLRB investigation was completed much more quickly

[9] 42 U.S.C. §2000e-3.

than that of the EEOC charge, and upon the region's merit determination, the NLRA charge led to resolution of all claims.

3. Several high-wage professional employees met together to discuss the impending closing of their local office. The employer had announced the closing and had, in general terms, promised a severance arrangement if the employees in the office stayed through the closing and trained their counterparts in another location where the work would be transferred. The company dragged its feet in announcing the details of the severance arrangements and the employees became concerned and discussed the issue among themselves and questioned their immediate supervisor about when more details would be forthcoming and what the terms would be. They were advised they were causing disruptions among other employees and they were instructed to stop discussing the issue of the impending closing and severance arrangements. Despite the warning, they continued their discussions and sought to contact higher level management to raise questions and concerns as the closure plans unfolded. Ultimately they were terminated a week before the final closing date and denied any severance or the other benefits provided to employees who remained employed until the final day. When the terminated employees sought legal counsel, they thought they had a breach of contract claim (which was weak if not non-existent) but instead a charge was filed with the NLRB alleging their terminations were in violation of Section 8 (a) (1) based upon their protected concerted activity of discussing and seeking more information related to their terms and conditions flowing from the impending closure.

In each of these cases, the NLRA provided a means of addressing the employee terminations and offered the remedies of reinstatement with back pay and benefits. A claim under Section 7 can provide an additional basis for relief or, in some situations, the only basis for relief. The relatively quick processing of NLRB charges (at least at the initial stages) provides advantages not available with charges filed at the EEOC.

Next we turn to a more detailed discussion of recent Board decisions concerning protected concerted activity.

E. Protected Concerted Activity in Different Settings

Although Section 7 has long been applied to non-union settings, in recent years there has been substantial activity in this area and in some sense an updating of the concept to apply to more modern circumstances. We describe some of the more recent cases in a number of new or expanding areas such as employee use of social media and employer email systems. In the last section of the paper, we address the use of Section 7 to challenge arbitration clauses which require waiver of the right to pursue collective actions.

1. Use of Facebook and other Social Media

Beginning five or six years ago, the NLRB's General Counsel began considering the application of Section 7 to employee exchanges or activity on Facebook and other social media. As the means used by employees to communicate with each other changed, there was a need to determine the application of the traditional concept of protected concerted activity to these new ways of communicating. Earlier cases considered discussions between employees about their working conditions at the water cooler and in break rooms but now employees often communicate with each other by email, text messages, and posting on Facebook or other social

media. Over the last several years a number of cases have addressed use of social media. The General Counsel's Division of Operations Management has issued several reports tracking the social media cases.[10] A review of these reports shows that, depending on circumstances, employee activity on social media may or may not be viewed as protected concerted activity using the traditional tests. More recently, some of these cases have resulted in Board decisions. A few examples are highlighted below:

Hispanics United of Buffalo, 359 NLRB No. 37 (2012), somewhat heated exchanges among five employees on Facebook related to working conditions (one employee had announced she was intending to complain to management about the job performance of other employees) constituted protected concerted activity and employer violated Section 8 (a) (1) by terminating the employees who posted on Facebook after copies of the postings were provided to the employer.

Richmond District Neighborhood Center, 361 NLRB No. 74 (2014), a Facebook conversation between two employees was not protected because the discussion involved planned insubordination. The Board held that the employees' discussion about going against management and doing whatever they wanted with the after school programming went beyond joking and evidenced serious intent to engage in insubordinate behavior, so the employer was justified in refusing to re-hire them for the program and did not have to wait for actual misconduct to occur.

Triple Play Sports Bar & Grille, 361 NLRB No. 31 (2014), enfd.__Fed. Appx.__(2nd Cir., 2015) where employees were discharged for participating in a Facebook conversation about alleged improper tax withholding by their employer. The employer acknowledged the conduct was

[10] Memorandum OM 11-74 (August 18, 2011); Memorandum OM 12-31 (January 24, 2012) and Memorandum OM 12-59 (May 30, 2012). These can be found on the NLRB's website (www.nlrb.gov).

within the ambit of Section 7 but argued that it had lost the protection of Section 7. The Board applied *Jefferson Standard* rather than the *Atlantic Steel* test, concluding that the latter test was not appropriate for review of off-duty, off-site use of social media and holding that nothing about the Facebook exchange resulted in loss of protection in this case.

Pier Sixty, LLC, 362 NLRB No. 59 (2015) (this case arose in connection with a union campaign but is instructive in terms of the Board's conclusions that the Facebook postings were not so egregious as to lose the protection of the Act) The employee's angry posting about mistreatment, which included language that could be viewed as vulgar and obscene, was protected under the totality of the circumstances, including the fact that such language was routinely tolerated at the workplace.

2. Use of Employer Email Systems

Another opportunity for concerted activity can be utilization of employer email systems by employees who have access to those systems in connection with their work responsibilities. In *Purple Communications*, 361 NLRB No. 126 (2014), the Board overruled *Register-Guard's*[11] prohibition on employee use of company e-mail for Section 7 activities. The Board held that "employee use of email for statutorily protected communications on nonworking time must presumptively be permitted by employers who have chosen to give employees access to their email systems." The presumption applies absent a showing by the employer of special circumstances that justify specific restrictions:

(1) A "total ban on non-work use of email" may be justified by a showing that ban is necessary to maintain production or discipline;

[11] 351 NLRB 1110 (2007)

(2) Or an employer may apply "uniform and consistently enforced controls" as necessary to maintain production and discipline;

(3) In either case, employer must "articulate the interest at issue and demonstrate how that interest supports the email use restrictions it has implemented".

3. Handbooks and Employer Policies

Another area the Board has elucidated in recent years has been employer handbooks and other employer policies interfering with the exercise of employee rights. The Board has issued numerous decisions addressing handbook provisions or policies relating to confidentiality, use of social media, use of company email, employer investigations, and rules prohibiting discussions of wages. In each of these instances the Board has applied the test set forth in *Lutheran Heritage Village-Livonia,* 343 NLRB 646 (2004), to determine whether the rule could reasonably chill employees in the exercise of their Section 7 rights. Rules which explicitly prohibit conduct which is protected under Section 7 clearly violate Section 8 (a) (1). If the rule (or handbook provision) does not explicitly prohibit Section 7 conduct, the test for determining whether or not it is lawful is as follows:

> If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. (343 NLRB at 647).

The current General Counsel, Richard F. Griffin, Jr., issued a report summarizing recent employer rule cases. Memorandum GC 15-04 which issued on March 18, 2015 is available on the NLRB Website. The Memorandum gives examples of rules which are viewed as lawful and unlawful relating to confidentiality, employee conduct towards the company and supervisors,

employee conduct towards fellow employees, interaction with third parties, use of company logos, copyrights and trademarks, photography and recording and use of personal electronic devices, leaving work, and conflicts of interest. This is a very good place to start when evaluating the rules and/or handbook provisions of any employer to determine if an 8 (a) (1) charge is likely to be meritorious.

Below is a summary of some of the Board decisions regarding handbook provisions:

a. Confidentiality Rules

*Fresh & Easy Neighborhood Market,*361 NLRB No. 8 (2014) where the Board found a confidentiality rule that precluded disclosure of employee information violated Section 8(a)(1) because employees could reasonably construe the rule to prohibit Section 7 activity. The text of the rule was as follows:

"Keep customer and employee information secure. Information must be used fairly, lawfully and only for the purpose for which it was obtained".

Rio All-Suites Hotel & Casino, 362 NLRB No.190 (2015), where the Board found a rule which precluded disclosure of salary information was unlawful. That rule provided:

> Confidentiality: All employees are prohibited from disclosing to anyone outside the Company, indirectly or directly, any information about the Company which has not been shared by the Company with the general public. This type of disclosure includes participation in internet chat rooms or message boards. Exceptions to the rule include disclosures which are authorized by the Company or required or authorized by the law. This information includes, but is not limited to: Organizational charts, salary structures, policy and procedures manuals.

b. Use of Social Media Rules

Lily Transportation Corporation, 362 NLRB No. 54 (2015), where the Board held that the following rule was unlawful:

> Information posted on the internet may be there forever, and employees would be well advised to refrain from posting information or comments about Lily, Lily's

> clients, Lily's employees or employees' work that have not been approved by Lily on the internet, including but not limited to blogs, message boards, and websites. Lily will use every means available under the law to hold persons accountable for disparaging, negative, false, or misleading information or comments involving Lily or Lily's employees and associates on the internet and may take corrective action up to and including discharge of offending employees.

The Board found that a reasonable reader of this rule would understand it to restrict employees' rights to engage in protected activity. The policy prohibits the posting of any information about the company without its approval. 362 NLRB No. 54, slip op. at 8.

c. Use of Employer Email

UPMC, 362 NLRB No. 191 (2015) where the Board found unlawful an email policy prohibiting use of the employer's systems "to solicit employees to support any group or organization, unless sanctioned by UPMC executive management" because it could reasonably be understood by employees to cover their union or other protected activity. 362 NLRB No. 191, slip op. at 2, FN 5.

d. No Discussion of Employer Investigations

Banner Estrella Medical Center, 362 NLRB No. 137 (2015) where the NLRB found that the employer's policy of requesting confidentiality in many types of investigations violated Section 8 (a) (1). The Board found that employees have a Section 7 right to discuss discipline or ongoing disciplinary investigations with their co-workers because such discussions are vital to their ability to assist one and other in addressing employment terms and conditions with the employer. An employer must determine on a case by case basis whether confidentiality is necessary to protect the integrity of the investigation (on an objectively reasonable basis) and to justify such a requirement by showing there was a legitimate and substantial business justification that outweighs the employees' Section 7 rights. 362 NLRB No. 137, slip op.at 6.

Boeing Co., 362 NLRB No. 195 (2015) where the Board found an 8 (a)(1) violation because the HR department routinely distributed to all employees involved in HR investigations a confidentiality notice which stated in part:

> Human Resources investigations deal with sensitive information and may be conducted under authorization of the Boeing Law Department. Because of the sensitive nature of such information, you are directed not to discuss this case with any Boeing employee other than company employees who are investigating this issue or your union representative, if applicable. Doing so could impede the investigation and/or divulge confidential information to other employees. As a participant in the investigation, the information you provide will be treated in a sensitive manner, however the Investigator will not promise absolute confidentiality. Information regarding the investigation may be disclosed to person(s) on a need to know basis. Please contact the investigator if you have any questions in this matter. If any coworker or manager asks to discuss the case with you, please inform him or her that you have been instructed not to discuss it and refer the individual to the Human Resources representative who is investigating your concern.

The Board stated, "We agree with the judge that the policy was unlawful. While an employer may legitimately require confidentiality in appropriate circumstances, it must also attempt to minimize the impact of such a policy on protected activity. Thus, an employer may prohibit employee discussion of an investigation only when its need for confidentiality with respect to that specific investigation outweighs employees' Section 7 rights. See *Caesar's Palace*, 336 NLRB 271, 272 (2001). As found by the judge, the Respondent's generalized concern about protecting the integrity of *all* of its investigations was insufficient to justify its sweeping policy. Rather, in weighing the competing interests, the Respondent was obligated to determine whether the particular circumstances of an investigation created legitimate concerns of witness intimidation or harassment, the destruction of evidence, or other misconduct tending to compromise the integrity of the inquiry……The Respondent's blanket approach clearly failed to

satisfy this requirement and thus interfered with employees' Section 7 rights." 362 NLRB No. 195, slip op. at 2.[12]

e. No Discussion of Wages

Alternative Energy Applications, Inc. 361 NLRB No. 139 (2014**)** where the employer violated Section 8 (a) (1) by instructing an employee not to discuss wages with other employees and threatening to discharge him if he did. In addition, the Board found that the employer further violated Section 8 (a) (1) by discharging the employee because they believed that he had discussed wages with other employees. The Board noted that discussions about wages are "inherently concerted" and as such are protected, regardless of whether they are engaged in with the express object of inducing group action.[13] 361 NLRB No. 139, slip op. at 4, FN10.

f. No Photographing or Recording

Whole Foods Market Group, Inc., 363 NLRB No. 87(2015) where the employer violated Section 8 (a) (1) by maintaining two rules that prohibited recording in the workplace. The Board found the following rules to be unlawful:

In order to encourage open communication, free exchange of ideas, spontaneous and honest dialogue and an atmosphere of trust, Whole Foods Market has adopted the following policy concerning the audio and/or video recording of company meetings: It is a violation of Whole Foods Market policy to record conversations, phone calls, images or company meetings with any recording device (including but not limited to a cellular telephone, PDA, digital recording device, digital camera, etc.) unless prior approval is received from your Store/Facility Team Leader, Regional President, Global Vice President or a member of the Executive Team, or unless all parties to the conversation give their consent. Violation of this policy will result in corrective action, up to and including discharge. Please note that while many Whole Foods Market locations may have security or surveillance cameras operating in areas where company

[12] Boeing's revision to change the notice to "recommend" that employees refrain from discussing the case did not make it lawful. *Id.*, slip op. at 3.

[13]Despite being clearly unlawful, rules prohibiting discussion of wages are fairly commonplace. In a 2014 survey by the Institute for Women's Policy Research, 62% of female respondents and 60 % of male respondents in the private sector said their employers have policies that prohibit or discourage employees from talking about their pay. INST. FOR WOMEN'S POLICY RESEARCH, PAY SECRECY AND WAGE DISCRIMINATION (2014), *available at* http://www.iwpr.org/publications/pubs/pay-secrecy-and-wage-discrimination-1/at_download/file

meetings or conversations are taking place, their purposes are to protect our customers and Team Members and to discourage theft and robbery.

It is a violation of Whole Foods Market policy to record conversations with a tape recorder or other recording device (including a cell phone or any electronic device) unless prior approval is received from your store or facility leadership. The purpose of this policy is to eliminate a chilling effect on the expression of views that may exist when one person is concerned that his or her conversation with another is being secretly recorded. This concern can inhibit spontaneous and honest dialogue especially when sensitive or confidential matters are being discussed.

In *Whole Foods,* the Board found that the two rules prohibited the recording of conversations, phone calls, images or company meetings with a camera or recording device without prior approval by management and that these rules could be reasonably construed by employees to prohibit Section 7 activity. "Such protected conduct may include, for example, recording images of protected picketing, documenting unsafe workplace equipment or hazardous working conditions, documenting and publicizing discussions about terms and conditions of employment, documenting inconsistent application of employer rules, or recording evidence to preserve it for later use in administrative or judicial forums in employment related actions." 363 NLRB No. 87, slip op. at 3.

g. Rules Prohibiting Job Actions or Leaving Without Permission

Heartland Catfish, Co., 358 NLRB No. 125 (2012) where the Board found that rules that prohibited "walking off the job or leaving the plant without permission or notifying the supervisor will be considered cause for immediate discharge" and "willfully restricting production, impairing or damaging product or equipment, interfering with others in the performance of their jobs or engaging or participating in any interruption of work will be considered cause for immediate termination", could reasonably be construed by employees to prohibit Section 7 rights.

h. No Negative Comments or Gossip

Hill & Dales General Hospital, 360 NLRB No. 70 (2014) where the employer's Values and Standards of Behavior Policy required that employees not make "negative comments about our fellow team members" including coworkers and managers, that employees represent the company in the community in a "positive and professional manner in every opportunity" and that employees "will not engage in or listen to negativity or gossip". The Board held that all three of these provisions could be reasonably construed by employees as prohibiting protected concerted activity and thus violated Section 8 (a) (1).

Laurus Technical Institute, 360 NLRB No. 133 (2014) where the employer's "no gossip" policy which prohibited employees from participating in or instigating gossip about the company, an employee, or customer could reasonably tend to chill employees in the exercise of their Section 7 rights and therefore was unlawful.

T-Mobile U.S.A., Inc. 363 NLRB No. 171 (2016) where the Board found a provision that required 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 could reasonably construe the provision to restrict potentially controversial or contentious communications or discussions, including those protected by Section 7. 363 NLRB No. 171, slip op. at 2.

3. Other Miscellaneous Section 7 Activity

Finally, these recent Section 7 cases are of interest but do not fit within the categories discussed above:

Fresh & Easy Neighborhood Market, 361 NLRB No. 12 (2015) where a female employee sought assistance from other employees in support of her sexual harassment claim which she was filing with the employer. Pursuant to instructions from her supervisor, the employee had written a message on a white board at the facility reminding him of her request for training related to the sales of alcohol. In part her message said "Bruce…could you please sign me up for TIPS training on 9/10/2011". The next day she noticed someone had altered her message by changing "TIPS" to "TITS". She asked her lead person about filing a sexual harassment complaint and showed him the alteration (he reported it to management and was told to take a picture of the white board and then erase it). Later the employee who had requested the training, copied the altered message to a piece of paper and asked her lead person and two other co-workers to sign the paper and all three did so. The complaining employee added further explanation to the paper after her co-workers had signed it and when questioned by management, the co-workers indicated they thought they were only signing to confirm the reproduced message correctly reflected what was written on the white board and were not joining her complaint of sexual harassment (although one of the female co-workers said she told management she would not have liked it if the same thing happened to her). One of the co-workers later complained she felt bullied into signing the paper by the complaining employee.

During the company investigation of the incident, the Employee Relations Manager who was conducting the investigation instructed the female employee who had filed the sexual harassment complaint not to obtain further employee statements (so the company could complete the investigation) but that she (the complainant) was free to talk to other employees and ask them to be witnesses for her.

The Board held that the employee who sought assistance from co-workers was engaged in protected concerted activity by asking for the assistance, regardless of whether those asked were unwilling to assist or were not interested in pursuing a complaint and that the activity was for mutual aid or protection.[14] 361 NLRB No. 12, slip op. at 3-7. But since no disciplinary action was taken against the employee who filed the sexual harassment complaint, and since the Employee Relations Manager made it clear the employee could continue to speak to other employees about the incident and ask them to be witnesses, the employer did not violate Section 8 (a) (1) by questioning her about her complaint and by instructing her not to obtain additional statements about her sexual harassment complaint, because the employer carried its burden of demonstrating a legitimate business justification for those actions that outweighed the employee's Section 7 rights. *Id*. at 8-9.

Sun Cab, Inc., d/b/a Nellis Cab Company, 362 NLRB No. 185 (2015), where the Board found an 8 (a) (1) violation when the employer suspended 17 employees who engaged in a concerted work stoppage (an extended break) to protest a proposed action that would affect their pay. The underlying issue was the Taxi Authority's consideration of whether to issue more taxi medallions. The employer favored this action (along with other cab companies) but many of the taxi drivers opposed it and were concerned it would result in lower income. These 17 employees participated in an organized demonstration (which included approximately 200 drivers from a number of companies). The demonstration consisted of meeting at a restaurant and then driving in a group downtown while flashing lights and honking their horns and refusing to pick up passengers. The extended break lasted 2-3 hours but for most of the 17 included their mandatory

[14] The Board overruled an earlier decision, *Holling Press, Inc.*,343 NLRB 301 (2004) to the extent the earlier case would have required a finding that the employee's activity was not for mutual aid and protection.

1 hour lunch break. During the extended break, the employer did not ask the drivers to return their cabs and later, when the employer made a request for some of the drivers to do so, they complied. The Board concluded that the extended break, which was intended to influence the employer and other taxi companies to take a position with the Taxi Authority that was more favorable to the drivers, was concerted activity for mutual aid and protection and did not lose its protection. The Board applied the balancing test set out in *Quietflex Mfg. Co.*, 344 NLRB 1055 (2005) and concluded that the intrusion on the employer's property rights was slight and insufficient to render the extended break unprotected. 362 NLRB No. 185, slip op. at 3-4.

St. Bernard Hospital & Health Care Center, 360 NLRB No. 12 (2013), where the employer violated 8 (a) (1) when it terminated an employee who had repeatedly raised his concerns and the concerns of his fellow employees about perceived safety issues based upon the removal of a sink and the relocation of a window in connection with renovations in the CT Suite where they worked.

II. The Right to Engage in Concerted Action to Enforce Workplace Rights

In *D.R. Horton*, 357 NLRB No. 184 (2012), and *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), the National Labor Relations Board held that the National Labor Relations Act prevents an employer from requiring employees to agree to arbitrate all workplace disputes and waive employees' right to act collectively to enforce their rights both in court and in arbitration. The decisions have been controversial and both were reversed by the Fifth Circuit. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013); *Murphy Oil USA, Inv. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015). Several other Circuits have criticized the Board's holdings in private litigation not arising out of Board proceedings, but without full or careful consideration. *See Richards v. Ernst & Young LLP*, 734 F.3d 871 and 744 F.3d 1072 (9th Cir. 2013); *Sutherland v.*

Ernst & Young LLP, 726 F.3d 290 (2d Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013). Two District Court's have followed the Board's holdings. *See Totten v. Kellog Brown & Root, LLC*, No. 14-1766 DMG (D.C.Cal. Ja. 22, 2016) (clarified March 21, 2016); *Lewis v. Epic Systems Corp*., No. 15-cv-82-bbc (W.D.Wis. Sept. 10, 2015); *Herrington v. Waterstone Mortgage Corp*., 993 F.Supp.2d 940 (W.D.Wis. 2014).

Adhering to its policy of non-acquiescence, the Board responded at length to the Fifth Circuit's reversal of *D.R. Horton* in *Murphy Oil* and has subsequently followed the two precedents in numerous cases. *See ISS Facility Servs., Inc.*, 363 NLRB No. 160 (2016); *Kenai Drilling Ltd.*, 363 NLRB No. 158 (2016); *SF Markets, LLC*, 363 NLRB No. 146 (2016); *Labor Ready Southwest, Inc.*, 363 NLRB No. 138 (2016); *AWG Ambassador, LLC*, 363 NLRB No. 137 (2016); *FAA Concord H, Inc.*, 363 NLRB No. 136 (2016); *UnitedHealth Group, Inc.*, 363 NLRB No. 134 (2016); *Cowabunga, Inc.*, 363 NLRB No. 133 (2016); *RGIS, LLC*, 363 NLRB No. 132 (2016); *Alternative Entm't, Inc.*, 363 NLRB No. 131 (2016) *Great Lakes Restaurant Mgmt, LLC*, 363 NLRB No. 130 (2016); *Ralph's Grocery Co.*, 363 NLRB No. 128 (2016); *Haynes Bldg. Servs., LLC*, 363 NLRB No. 125 (2016); *Fuji Food Prods., Inc.*, 363 NLRB No. 118 (2016); *Apple American Grp.*, 363 NLRB No. 111 (2016); *Flyte Tyme Worldwide*, 363 NLRB No. 107 (2016); *Network Capital Funding Corp.*, 363 NLRB No. 106 (2016); *Samsung Electronics America*, 363 NLRB No. 105 (2016); *Waffle House, Inc.*, 363 NLRB No. 104 (2016); *Multiband EC, Inc.*, 363 NLRB No. 100 (2016); *Century Fast Foods, Inc.*, 363 NLRB No. 97 (2016); *GameStop Corp.*, 363 NLRB No. 89 (2015); *CPS Security (USA), Inc.*, 363 NLRB No. 86 (2015); *24 Hour Fitness USA, Inc.*, 363 NLRB No. 84 (2015); *Logisticare Solutions, Inc.*, 363 NLRB No. 85 (2015); *SolarCity Corp.*, 363 NLRB No. 83 (2015); *RPM Pizza, LLC*, 363 NLRB No. 82 (2015); *MasTec Servs. Co.*, 363 NLRB No. 81 (2015); *Covenant Care California, LLC*,

363 NLRB No. 80 (2015); *Ross Stores, Inc.*, 363 NLRB No. 79 (2015); *Domino's Pizza*, 363 NLRB No. 77 (2015); *Citi Trends, Inc.*, 363 NLRB No. 74 (2015); *Keiser University*, 363 NLRB No. 73 (2015); *Advanced Servs., Inc.*, 363 NLRB No. 71 (2015), *Kmart Corp.*, 363 NLRB No. 66 (2015); *Pep Boys Manny Moe & Jack of California*, 363 NLRB No. 65 (2015); *Employers Resource*, 363 NLRB No. 59 (2015); *Philmar Care, LLC*, 363 NLRB No. 57 (2015); *Citigroup Technology, Inc.*, 363 NLRB No. 55 (2015); *Brinker Int'l Payroll Co.*, 363 NLRB No. 54 (2015); *Toyota Sunnyvale*, 363 NLRB No. 52 (2015); *Convergys Corp.*, 363 NLRB No. 51 (2015); *U.S. Xpress Enter.*, 363 NLRB No. 46 (2015); *Bristol Farms*, 363 NLRB No. 45 (2015) *Amex Card Servs. Co.*, 363 NLRB No. 40 (2015); *Nijjar Realty, Inc.*, 363 NLRB No. 38 (2015); *Professional Janitorial Serv. of Houston*, 363 NLRB No. 35 (2015); *Hoot Winc, LLC*, 363 NLRB No. 2 (2015); *On Assignment Staffing Servs., Inc.*, 362 NLRB No. 189 (2015); *Leslie's Poolmart, Inc.*, 362 NLRB No. 184 (2015); *PJ Cheese, Inc.*, 362 NLRB No. 177 (2015); *Countrywide Financial Corp.*, 362 NLRB No. 165 (2015); *Neiman Marcus Group, Inc.*, 362 NLRB No. 157 (2015); *Chesapeake Energy Corp.*, 362 NLRB No. 80 (2015); *Cellular Sales of Missouri*, 362 NLRB No. 27 (2015).

The issue is now pending in almost every circuit. Argument has already been held in *Lewis v. Epic Systems Corp*., No. 15-2997 (7th Cir.), *Cellular Sales of Missouri v. NLRB*, No. 15-1620 (8th Cir.), and *Morris v. Ernst & Young LLP*, No. 13-16599 (9th Cir.). There are numerous Board cases pending in the Fifth Circuit, several in the Ninth and the following lead cases in other circuits: *Price-Simms, Inc. v. NLRB*, Nos. 15-1457, 16-1010 (D.C. Cir.) (briefing ongoing); *Patterson v. Raymours Furniture Co*., No. 15-2820 (2d Cir.) (fully briefed); *The Rose Group v. NLRB*, No. 15-4092 (3d Cir.) (briefing ongoing); *AT&T Mobility Services v. NLRB*, Nos. 16-1099, 1159 (4th Cir.) (briefing ongoing); *NLRB v. Alternative Entertainment*, No. 16-

1385 (6th Cir.); and *Everglades Colleges Inc., v. NLRB*, No. 16-10341 (11th Cir.) (briefing ongoing).

We explain below why the Board's position is correct.

A. The NLRA Protects Employees' Concerted Efforts to Enforce Workplace Rights and Prohibits Employer Efforts to Induce Employees to Waive this Right

1. The NLRA Protects Employees' Concerted Efforts to Enforce Workplace Rights

At the outset, it is important to recognize the extraordinarily broad category of concerted activity that is protected by Section 7 of the National Labor Relations Act. That central provision of federal labor law declares, "Employees shall have the right to . . . engage in . . . concerted activities for the purpose of . . . mutual aid or protection." 29 U.S.C. § 157. Thus, the rights protected by the NLRA are not limited to forming, supporting and joining labor unions or engaging collective bargaining but extend to a broad range of employee actions so long as they are taken in concert and aimed at furthering employees' common interests as employees.

Employees' concerted action to enforce their workplace right falls well within the category of activity protected by Section 7. This is not a novel construction, but one that dates back almost to the enactment of the NLRA. As the Board observed in *Murphy Oil USA, Inc.*, "For almost 80 years, Federal labor law has protected the right of employees to pursue their work-related legal claims *together*, i.e., with one another, for the purpose of improving their working conditions." 361 NLRB No. 72 at 1 (2014). Indeed, the Supreme Court has recognized that the Act protects employees "when they seek to improve working conditions through resort to . . . judicial forums." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 566 (1978). The Board, in its two central decisions in this area, cites an unbroken line of Board and federal court precedent, dating back to the years immediately following adoption of the NLRA, holding the employees have a right to engage in collective enforcement of their workplace

rights both in court and in arbitration. *Murphy Oil*, 361 NLRB No. 72 at 5, 8; *D.R. Horton*, 357 NLRB No. 184 at 2-4 (2012). *See also Brady v. NFL*, 644 F.3d 661, 677 (8th Cir. 2011); *Mohave Elec. Co-op., Inc. v. NLRB*, 206 F.3d 1183, 1189 (D.C. Cir. 2000); *Altex Ready Mixed Concrete Corp. v. NLRB*, 542 F.2d 295, 297 (5th Cir. 1976); *Salt River Valley Water Users' Ass'n v. NLRB*, 206 F.2d 325, 328-29 (9th Cir. 1953).

2. The NLRA Prohibits Employer Efforts to Induce Employees to Waive this Right

In addition, it has been a central pillar of federal labor law since before the passage of the NLRA that employers cannot induce employees to waive their right to engage in concerted activity via agreement. Even before 1935, Congress recognized the danger to federal labor policy posed by employers requiring employees to "agree" to give up their right to act collectively, including in the enforcement of workplace rights. Congress declared such agreements in violation of federal labor policy and thus unenforceable in the Norris-LaGuardia Act of 1932, 29 U.S.C. § 101 *et seq*., and then prohibited such agreements in 1935 in the NLRA. Like the substantive right to act collectively to enforce workplace rights, the prohibition of employer compelled "agreements" to waive that right as a condition of employment is central to what Congress sought to accomplish in both federal labor statutes.

The Supreme Court has confirmed that "agreements" through which employees purport to waive their right to act collectively are unlawful under the NLRA. In *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940), the Court held that the Act prohibited an agreement between an employer and its employees whose "effect . . . was to discourage, if not forbid any presentation of the discharged employee's grievances to [their employer] through a labor organization or his chosen representatives, *or in any way except personally*." *Id*. at 360 (emphasis added). The Court concluded that such agreements "were a continuing means of thwarting the policy of the

Act." *Id.* at 361. "Obviously," the Court held, "employers cannot set at naught the [NLRA] by inducing their workmen to agree not to demand performance of the duties which it imposes." *Id.* at 364.

The increasingly common "agreements" to waive employees' statutory right to take concerted legal action are no different than an agreement waiving the right to join a union, and such agreements were central among the evils Congress sought to outlaw, first in Norris-LaGuardia and then in the NLRA. As the Board explained in *Murphy Oil*:

> We doubt seriously . . . that any court, would uphold -- or could uphold, consistent with either the NLRA or the Norris-LaGuardia Act, with its longstanding prohibition against "yellow dog" contacts -- a mandatory, individual arbitration agreement that compelled employees to give up the right to strike or picket, to hold a march or rally, to sign a petition, or to seek a consumer boycott, as a means to resolve a dispute with their employer over compliance with a federal statute. All of these forms of concerted activity are protected by Section 7, as is concerted legal activity. [361 NLRB No. 72 at 10.]

Just as an employer cannot demand a waiver of the right to collectively strike or otherwise protest unlawful working conditions, it cannot demand a waiver of the right to collectively seek legal remedies for such conditions.[15]

The Board in both *D.R. Horton* and *Murphy Oil* properly relied on an unbroken line of Board and federal court precedent holding that agreements to waive the statutory

[15] This logic is key to understanding the unique nature of NLRA rights. While a retailer might be able to require a consumer to agree to arbitrate disputes individually *and* to waive any right to picket or otherwise protest about the consumer dispute, the NLRA clearly and unmistakably bars an employer from requiring that an employee sign any such agreement.

right to act collectively are both unenforceable and unlawful. *Murphy Oil*, 361 NLRB No. 72 at 5; *D.R. Horton*, 357 NLRB No. 184 at 4-6.

Thus, it is clear that "agreements" to waive the right to take concerted legal action violate the NLRA unless some other federal law such as the Federal Arbitration Act immunizes the otherwise unlawful conduct. Of course, this is the heart of the current controversy. But the Board has twice correctly concluded that the FAA does not immunize the unfair conduct.

B. The Central Protections of Norris-LaGuardia and the NLRA Preclude Application of the FAA

Employers argue that the "agreements" are not unlawful under the NLRA or unenforceable under Norris-LaGuardia because they are somehow immunized by the FAA. The Board has correctly concluded this is not the case for four, separate reasons.

1. The "Agreements" Are Unenforceable Under the FAA's Savings Clause

In order to evaluate the FAA defense, courts must, of course, start with the language of the three laws.

As we demonstrate above, the NLRA has express language protecting employees' right to "engage in . . . concerted activities for the purpose of . . . mutual aid or protection." 29 U.S.C. § 157. This broad right clearly encompasses the right to act collectively in the enforcement of workplace rights as an unbroken line of Board, appellate court, and Supreme Court precedent holds.

The Norris-LaGuardia is even more explicit in denying enforcement to such agreements as contrary to public policy. Section 2 of Norris-LaGuardia declares it to be the "public policy of the United States" that the individual employee be free of "interference" or "restraint" by employers when they engage in "concerted activities for the purpose of . . . mutual aid or protection." 29 U.S.C. § 102. Section 3 of the Act provides that, "[*a*]*ny* undertaking or

promise" that is contrary to the policy declared in section 2 "shall not be enforceable in any court of the United States." 29 U.S.C. § 103 (emphasis added).[16] Thus, taken together, sections 2 and 3 of the Act provide that "any . . . undertaking or promise in conflict with the public policy" that employees "shall be free from the interference . . . of employers . . . in . . . concerted activities for the purpose of . . . mutual aid or protection" "shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court." 29 U.S.C. § 102, 103. On their face, these provisions bar enforcing the agreements at issue.

The language and structure of section 3 of the Act make clear that it was intended to do more than bar enforcement of contracts prohibiting union membership (so called "yellow dog contracts"). It denies enforcement to a broad array of "promises" and "undertakings" that would bar concerted activity to improve working conditions. Section 3 prohibits enforcement of two categories of contracts:

(1) "Any undertaking or promise, such as is described in *this* section" *and*

(2) "Any other undertaking or promise in conflict with the public policy declared in section 2 of this Act." 29 U.S.C. § 103 (emphases added).

The undertakings or promises "described in *this* section" are those to refrain from joining or withdrawing from membership in labor organizations.[17] Consequently, the second category of

[16] Three years after Norris-LaGuardia was enacted, Congress took the policy set out in § 2 and reiterated it verbatim as part of the affirmative right created by § 7 of the NLRA. 29 U.S.C. § 157. Congress also made it an unfair labor practice for an employer to interfere with employees' exercise of their right to engage in concerted activity for mutual aid or protection. 29 U.S.C. § 158(a)(1). Employers were thus denied the power to impose terms of employment that the courts had been denied the power to enforce, *i.e.*, terms containing any promise by which employees cede the right to seek or come to the aid of others in the vindication of their rights as employees.

[17] Section 3 provides that the prohibition "specifically" includes:

> Every undertaking or promise hereafter made . . . constituting or contained in any contract or agreement of hiring or employment between any individual, firm, company, association, or corporation, and any employee or prospective employee of the same, whereby
>
> (a) Either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or of any employer

unenforceable contracts − "any *other* undertaking or promise in conflict with the public policy declared in section 102 of this Act" (emphasis added) − necessarily encompasses a wider array of agreements not to take concerted action to improve working conditions, such as the agreements at issue here.

Section 4 of the Act embodies Congress' intent to protect a broad range of concerted activity engaged in to improve working conditions, expressly including collective litigation. It provides:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing, whether singly or in concert, any of the following acts:
> . . . .
> (d) By all lawful means aiding any person participating or interested in any labor dispute who is . . . *prosecuting, any action or suit in any court of the United States or of any State*;
> . . . .
> (h) Agreeing with other persons to do or not to do any of the acts heretofore specified.

29 U.S.C. § 104 (emphasis added). Read together, subsections (d) and (h) of section 4 of the Act make clear that Congress intended that joining with another person in a suit seeking a remedy in a labor dispute be within the category of "concerted activity for the purpose of . . . mutual aid and protection." Such group legal action is insulated from employer "interference, restraint, or coercion" by section 2. As a result, "any undertaking or promise" made by the employee purportedly to cede the right to engage in such group resort is unenforceable under section 3 – it is contrary to the "public policy of the United States."

> organization; or
> (b) Either party to such contract or agreement undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains a member of any labor organization or of any employer organization.

The language of Norris-LaGuardia thus encompasses collective enforcement of workplace rights. The Supreme Court has unequivocally stated that with respect to the identical language in section 7 of the NLRA: "concerted activities . . . for the purpose of 'mutual aid or protection'" encompasses seeking redress in any forum – legislative, judicial, administrative – in which employees may "protect their interests as employees." *Eastex*, 437 U.S. at 565-66. This includes filing group lawsuits.

Just as a promise not to form a union or an informal group to present a grievance about low wages cannot be enforced under Norris-LaGuardia, neither can a promise not to present a group grievance seeking to have a promised or statutorily guaranteed wage actually paid – whether the grievance is presented to the employer directly or in any forum where relief may be granted: in court or in arbitration as the forum substituted for court. As the Senate Report on the measure observed, "If these contracts are held to be legal in one type of litigation, it would follow that they must be legal in all other controversies. . . ." S. Rep. No. 72-163 15 (1932).[18]

By contrast, the FAA says *nothing* about collective proceedings. The operative section of the FAA simply provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing

[18] A group of scholars, all of whom have written about this issue, has filed a brief in a number of circuits as amicus curiae setting forth in detail the argument under Norris-Laguardia. *See, e.g., Patterson v. Raymours Furniture Co*., No. 15-2820, Document No. 43-2 (2d Cir.). The brief's primary author is Matthew Finkin who set forth much of the argument in *The Meaning and Contemporary Vitality of the Norris-LaGuardia Act*, 93 Neb. L. Rev. 6 (2014).

> controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. [9 U.S.C. § 2.]

The FAA cannot render the "agreements" enforceable or lawful despite Norris-LaGuardia and the NLRA because the FAA, on its face, merely provides that agreements to arbitrate shall be valid and enforceable "save upon such grounds as exist at law or in equity for revocation of any contract." *Id*. "[T]he purpose of Congress [in enacting the FAA] was to make arbitration agreements as enforceable as other contracts, but not more so. To immunize an arbitration agreement from judicial challenge [on grounds applicable to other contracts] would be to elevate it over other forms of contract – a situation inconsistent with the 'saving clause.'" *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967).

Contracts that violate public policy are void and unenforceable regardless of whether they also provide for arbitration. *See, e.g., Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987). A contract that violates the NLRA or Norris-LaGuardia is void and unenforceable under both Acts and thus falls within the FAA's savings clause. *See, e.g., Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83 (1982) ("It is . . . well established . . . that a federal court has a duty to determine whether a contract violates federal law before enforcing it.")

An example suffices to validate that conclusion. If a contract of hiring had no arbitration clause but simply provided that in return for employment and wages paid, employees agree to waive their right to pursue class or collective actions relating to their employment, the agreement would be revocable, unenforceable and unlawful under both Norris-LaGuardia and the NLRA. *See, e.g., Grant v. Convergys Corp*., No. 12-CV-496, 2013 U.S. Dist. LEXIS 28298 (E.D. Mo. Mar. 1, 2013). Under the express language of Section 2 of the FAA, it makes no difference that

employers add access to an arbitration procedure (provided the employees participate as individuals) to the consideration provided for the unlawful waiver.

There simply is no conflict among the three statutes because the "agreements" fall squarely within the FAA's savings clause. The Board's decisions place the "agreements," including their arbitration provision, "upon the same footing as other contracts" as the FAA requires. *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20, 24 (1991).

2. The "Agreements" Require Employees to Waive a Substantive Right

Even if the "agreements" did not fall squarely within the FAA's savings clause, the Supreme Court has held that an agreement to arbitrate may not require a party to "forgo the substantive rights afforded by [a] statute," *Gilmer,* 500 U.S. at 26, and that is exactly what the "agreements" do. Given the unbroken line of precedent holding that employees have a substantive right under the NLRA to take collective action to enforce their workplace rights, the Supreme Court's construction of the FAA makes clear that the "agreements" are not enforceable under the FAA and thus the FAA does not conflict with Norris-LaGuardia or the NLRA.

In order to hold that those Supreme Court rulings are not controlling, the courts would have to conclude either that the NLRA creates no "substantive rights" or that the right to take concerted action to enforce workplace rights is not among the rights protected by the NLRA. Neither construction is permitted under the established precedent cited above. The NLRA clearly created substantive rights and vested them in employees. Section 7 is headed, "Right of employees as to organization, collective bargaining, etc." and it provides, "Employees shall have the right . . . ." 29 U.S.C. § 157. The very next section makes it unlawful for employers "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7]." 29 U.S.C. § 158(a)(1). The Board, the lower federal courts, and the Supreme Court have

all held that the right to take collective action to enforce workplace rights is among the substantive rights protected by the NLRA. As a recent Note in the Harvard Law Review concluded, "deference is also warranted for the Board's finding that the NLRA provides employees with a substantive right to pursue legal claims collectively, which would render the arbitration agreements waiving that right unenforceable under the FAA." Note, *Deference and the Federal Arbitration Act: The NLRB's Determination of Substantive Statutory Rights*, 128 Harv. L. Rev. 907, 908 (2015). The Note correctly points out that deference is warranted because that "determination is based on the NLRB's interpretation of the nature of the rights guaranteed by the NLRA, the statute it administers." *Id*. at 909.[19]

Thus, the "agreements" do precisely what the Supreme Court has indicated agreements to arbitrate cannot do – purport to waive a substantive right.

3. The Board Carefully and Correctly Accommodated All Three Statutes

Even if Norris-LaGuardia and the NLRA were in tension with the FAA, the Supreme Court has clearly instructed both the Board and the lower federal courts how to analyze a potential conflict among federal statutes and the Board did as instructed in both *D.R. Horton* and *Murphy Oil*. When a possible conflict exists, the Board and courts must seek a "careful accommodation" of the conflicting statutes. *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942). As detailed above, enforcement of the "agreements" would undermine the core protection extended by Norris-LaGuardia and the NLRA through a means Congress specifically intended to outlaw. By contrast, the only arguable tension with the FAA created by

[19] In other words, it is for the courts to "determine that the waiver of a substantive statutory right makes an arbitration agreement unenforceable under the FAA, which the Supreme Court's precedent suggests it does," but it is for the Board to determine, in the first instance, "whether the NLRA provides a substantive right to concerted activity," including concerted enforcement activity in court and arbitration and courts should only "deferentially evaluate the NLRB's interpretation" of the NLRA. 128 Harv. L. Rev. at 920, 922.

nonenforcement of the "agreements" is with a policy implicit in the Act and only recently identified by the Supreme Court in *AT&T Mobility v. Concepcion*, 131 S. Ct 1740, 1748 (2011) -- to insure "the enforcement of arbitration agreements according to their terms so as to facilitate steamlined proceedings."

The Board correctly found that the policy in favor of "streamlined proceedings" implicit in the FAA was not significantly compromised by its holding in *D.R. Horton* and *Murphy Oil*. Notably, when employees pursue collective or class claims, the actions tend to be smaller and more manageable than the consumer class actions at issue in *AT&T Mobility*. *See D.R. Horton*, 357 NLRB No. 184 at 11-12.

Moreover, the Board's holdings, of course, apply only to agreements between employers and employees covered by the NLRA. The vast majority of agreements governed by the FAA are unaffected because they do not concern employee-employer disputes or they involve employers or employees not covered by the NLRA. *See D.R. Horton*, 357 NLRB No. 184 at 12.

Finally, nothing in the Board's two holdings prevents employers from requiring that employees arbitrate purely individual claims. *See D.R. Horton*, 357 NLRB No. 184 at 13.

The Board's holdings protect express, core principles of federal labor law while not significantly affecting even the implicit policies of the FAA and thus representing a "careful accommodation" of the federal statutes.

4. The Later Enacted Norris-LaGuardia and NLRA Control

Finally, even if there was a direct conflict among the three statutes, the Supreme Court has instructed that in the rare case of an "irreconcilable" statutory conflict, the later-enacted statute controls. *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936). Not only were both Norris-LaGuardia (1932) and the NLRA (1935) adopted after the FAA (1925), Norris-LaGuardia

expressly provides that "[a]ll acts and parts of acts in conflict with the provisions of this chapter are repealed." 29 U.S.C. § 115.

Although some courts have cited the 1947 recodification of the FAA in concluding that Congress intended the FAA to trump any inconsistent provisions in Norris-LaGuardia and the NLRA, *see, e.g., Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053 (8th Cir. 2013), the legislative history of the FAA's re-codification makes clear that no substantive change was made or intended. *See* H.R. Rep. No. 80-251 (1947), *reprinted in* 1947 U.S.C.C.A.N. 1511 (1947 recodification made "no attempt" to amend existing law); H.R. Rep. No. 80-255 (1947), *reprinted in* 1947 U.S.C.C.A.N. 1515 (same). Re-codification by itself is not a substantive amendment. *See, e.g., Finley v. United States*, 490 U.S. 545, 554 (1989); *United States v. Welden*, 377 U.S. 95, 98 (1964); *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 227 (1957); *Anderson v. Pac. Coast S.S. Co.*, 225 U.S. 187, 198-99 (1912). The Supreme Court has thus held that, for purposes of the last-in-time rule, a non-substantive re-enactment of a statute does not take precedence over an earlier enacted statute. *See Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961). Moreover, the NLRA was substantively and significantly amended in 1947, 1959, and 1974.[20] Consequently, for purpose of last-in-time analysis, the NLRA and Norris-LaGuardia would take precedence over the FAA if there were an irreconcilable conflict among them.

For each of these reasons, the FAA does not immunize the unlawful "agreements."

C. Contrary Decisions in the Circuits Are Not Persuasive

Only one Court of Appeals has fully considered the NLRA question at issue here, the Fifth Circuit in *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013). But the 2-1 majority in

[20] *See* Pub.L. No. 80-101, 61 Stat. 136 (July 30, 1947); Pub.L. No. 86-257, 73 Stat. 136 (Sept. 14, 1959); Pub.L. No. 93-360, 88 Stat. 395 (July 26, 1974).

that case wholly failed to analyze the application of Norris-LaGuardia. *See* 737 F.3d at 362 n. 10. And the majority was wrong about the NLRA for the following reasons:

1. The Fifth Circuit Failed to Give Proper Deference to the Board's Construction of the NLRA

The Fifth Circuit acknowledged that courts must defer to the Board's construction of ambiguous terms in the NLRA. 737 F.3d at 356. The Fifth Circuit also did not question the Board's construction of the NLRA and its conclusions that the Act gives employees a right to take action in concert to enforce employment rights and that the Act prohibits required agreements to waive that right. 737 F.3d at 357 ("[t]hese cases under the NLRA give some support to the Board's analysis that collective and class claims, whether in lawsuits or in arbitration, are protected by Section 7"). But the Fifth Circuit did not even acknowledge the Board's express conclusions that the right at issue is central to the NLRA and the prohibition key to the Act's enforcement. Thus, the panel gave inadequate weight to the NLRA while acknowledging that the case called for "careful accommodation of one statutory scheme to another." 737 F.3d at 356 (quoting *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002)).

2. The Fifth Circuit Erroneously Concluded that the "Agreement" Did Not Purport to Waive a Substantive Right

The Fifth Circuit erred in holding that the Board's conclusion that the agreement at issue in *D.R. Horton* was unlawful is inconsistent with the FAA. The Fifth Circuit did so because it focused narrowly on Rule 23 class actions (even though the claim at issue in *D.R. Horton* arose under the FLSA which does not permit Rule 23 class actions, *see D.R. Horton*, 357 NLRB No. 184 at 1; 29 U.S.C. § 216(b)), and on cases not involving the NLRA. The Fifth Circuit posited that "[t]he use of class action procedures … is not a substantive right" and "there are numerous

decisions holding that there is no right to use class procedures under various employment-related statutory frameworks." 737 F.3d at 357. But the Board in *D.R. Horton* and *Murphy Oil* did not hold that there is a "right to use class procedures." Rather, it held there is a right under the NLRA to act in concert to enforce workplace rights by *seeking to invoke whatever mechanisms are available.*[21] None of the cases cited by the Fifth Circuit hold to the contrary. In fact, none concerned the NLRA. In other words, the Fifth Circuit simply failed to consider the substantive right identified and vindicated by the Board and thus failed to apply Supreme Court precedent holding that agreements to arbitrate cannot waive substantive rights.

This oversight also led the Fifth Circuit to the erroneous conclusion that "the Board's decision creates either a right that is hollow or one premised on an already-rejected justification." 737 F.3d at 361. But the right is in no way "hollow" as it permits employees to act collectively to better their working conditions by together handbilling, picketing, striking, filing a grievance, or initiating a lawsuit. Congress clearly believed the right to act in concert was meaningful and far from "hollow."

Moreover, the Fifth Circuit is simply wrong in concluding that "a substantive right to proceed collectively has been foreclosed by prior decisions." 737 F.3d at 361. Neither of the cited cases, *Gilmer* and *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294 (5th Cir. 2004), was decided under the NLRA or Norris-LaGuardia. Moreover, the Supreme Court's decision in *Gilmer* considered arbitration of age discrimination cases, but not compelled agreements to do so individually. In fact, the arbitration procedure at issue in *Gilmer* expressly permitted collective claims. *See* 500 U.S. at 32. But, more importantly, the ADEA and the FLSA create private rights of action in court and a device to join similar claims, 29 U.S.C. § 216(b), but only as

[21] For this reason, the Fifth Circuit's observation that Rule 23 did not exist in its present form in 1937, 737 F.3d at 362, is simply beside the point.

procedural means to aid with enforcement of the central rights created by those statutes – to be paid the minimum wage and overtime and to be free of discrimination on the basis of age. "Section 7 of the NLRA is fundamentally different. It is neither the grant of a judicial forum nor a device for joining legal claims to facilitate vindication of some *other* statutory protection provided by the NLRA. Section 7 provides employees with the general ability to act concertedly, through legal action or otherwise. It is the central protection the NLRA provides." 128 Harv. L. Rev. at 927 (emphasis added).[22]

3. The Fifth Circuit Erroneously Concluded that the Agreements' Unenforceability Under Norris-LaGuardia and Invalidity Under the NLRA Did Not Place It Within the FAA's Savings Clause

The Fifth Circuit also erroneously rejected the Board's conclusion that the agreement's violation of the NLRA placed it within the "saving clause" of the FAA again because it misunderstood the Board's holding. The Fifth Circuit did not disagree with the Board's conclusion that the agreement violated the NLRA. Nor did it explain why that conclusion does not place the agreement squarely within the savings clause given that its inconsistency with the NLRA makes it invalid "upon such grounds as exist at law . . . for the revocation of any contract." 9 U.S.C. § 2. Instead, the Fifth Circuit stated, "While the Board's interpretation is facially neutral – requiring only that employees have access to collective procedures in an arbitral or juridical forum – the effect of this interpretation is to disfavor arbitration." 737 F.3d at 359. But the Board's holdings in *D.R. Horton* and *Murphy Oil* do not disfavor arbitration. Rather, the Board held that employers cannot force their employees to waive their right to act in

[22] This procedural/substantive distinction under the FAA is analogous to that same distinction in choice-of-law jurisprudence, in which "procedural rules . . . govern only 'the manner and the means by which the litigants' rights are enforced'; [while] substantive rules . . . alter 'the rules of decision by which [the] courts will adjudicate [those] rights.'" Note, *A Substantive Right to Class Proceedings: The False Conflict Between the FAA and NLRA*, 81 Fordham L. Rev. 2945, 2980 (2013) (quoting *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1442 (2010)). Under this approach, the Board's rule of decision in *D.R. Horton* and *Murphy Oil* is plainly substantive because it sets forth the legal principles governing the scope of protected section 7 rights.

concert to enforce workplace protections – whether by handbilling, picketing, striking, filing a representative lawsuit, or filing a class action – and whether the waiver is contained in an agreement to arbitrate or any other form of agreement.

The Board's order also did not in any way require that "employees have access to collective procedures in an arbitral or judicial forum." It merely held that agreement that purport to prohibit employees from *seeking* such access are unlawful. Employers remain free to establish arbitration procedures that can be invoked only by individuals just as Congress or a state legislature could abolish collective enforcement of wage and hour laws. But employers cannot demand a waiver of employees' right to pursue available collective enforcement mechanisms whether that waiver is in exchange for employment, higher wages, or access to an individual arbitration system. Thus, the Fifth Circuit provides no reason for rejecting the Board's holding that the agreement falls within the savings clause as invalid and unenforceable upon "grounds [that] exist at law . . . for the revocation of any contract."

The Fifth Circuit next concluded that the NLRA contains no "congressional command to override the FAA." 737 F.3d at 360.[23] The lack of a specific, express reference to the FAA is not surprising given that when the NLRA was enacted in 1935, the FAA did not apply to agreements between employers and employees covered by the NLRA. *See Circuit City Stores v. Adams*, 532 U.S. 105 (2001). Nevertheless, Norris-LaGuardia contains such a command. *See* 29 U.S.C. § 115. Moreover, the NLRA's express protection of employees' "right to . . . engage in . . . concerted activities for the purpose of . . . mutual aid or protection," 29 U.S.C. § 157, also

[23] Of course, such a command is not necessary if the agreement falls into the savings clause or purports to waive a substantive right.

constitutes a congressional command that the FAA not be enforced to permit employers to require waiver of that right.[24]

4. The Fifth Circuit Erred in Concluding that the Later Enacted Norris-LaGuardia and NLRA Do Not Control

The Fifth Circuit was also simply incorrect when it stated that there is "no clear answer to the validity of the Board's use of the NLRA and FAA's respective enactment dates." 737 F.3d at 361. The Fifth Circuit erred when it stated that it is "unclear" whether the last in time priority (discuss above) applies with "the same force for a recodification." *Id*. at 632. The Supreme Court has made it clear that a non-substantive recodification is irrelevant to this analysis and thus the Board is correct that Norris-LaGuardia and the NLRA are the later enacted statutes and thus control here.

5. The Fifth Circuit Erred in Relying on Inapposite and Poorly Reasoned Decisions of Other Circuits

Finally, the *D.R. Horton* majority indicated that it was "loathe to create a circuit split," 737 F.3d at 362. But none of the cited cases contains substantive analysis of the question and all of the analysis that exists is unsound. It is also surely of note that penetrating, scholarly analysis of the question *universally* supports the Board's holdings. *See* Matthew Finkin, *The Meaning and Contemporary Significance of the Norris-LaGuardia Act*, 93 Neb. L. Rev. 6 (2014); Catherine Fisk, *Collective Actions and Joinder of Parties in Arbitration: Implications of DR Horton and Concepcion*, 35 Berk. J. Empl. & Labor L. 175 (2014); Julius Getman & Dan Getman, *Winning the FLSA Battle: How Corporations Use Arbitration Clauses to Avoid Judges,*

[24] The Fifth Circuit's observation that the NLRA has been held under certain circumstances to "permit and require arbitration," 737 F.3d at 361, is beside the point. In *D.R. Horton*, the Board expressly disclaimed "any form of hostility to arbitration" and acknowledged that "arbitration has become a central pillar of Federal labor relations policy." 357 NLRB No. 184 at 13. The Board made clear, "our holding rests not on any conflict between an agreement to arbitrate and the NLRA, but rather solely on the conflict between the compelled waiver of the right to act collectively in any form, judicial or arbitral, in an effort to vindicate workplace rights and the NLRA." *Id*.

Juries, Plaintiffs, and Laws, 86 St. John's L. Rev. 447 (2012); Stephanie M. Greene & Christine Neylon O'Brien, *The NLRB v. the Courts: Showdown over the Right to Collective Action in Workplace Disputes*, 52 Am Bus. L.J. 75 (2015); Ann Hodges, *Can Compulsory Arbitration be Reconciled with Section 7 Rights?*, 38 Wake Forest L. Rev. 173 (2003); Charles Sullivan & Timothy Glynn, *Horton Hatches the Egg: Concerted Action Includes Concerted Dispute Resolution*, 64 Ala. Rev. 1013 (2013); Note, *Deference and the Federal Arbitration Act: The NLRB's Determination of Substantive Statutory Rights*, 128 Harv. L. Rev. 907 (2014); Note, *A Substantive Right to Class Proceedings: The False Conflict Between the FAA and NLRA*, 81 Fordham L. Rev. 2945 (2013).

D. Rejection of the NLRB's Holdings Would Lead to Unacceptable Consequences

Finally, it is important to recognize the sweeping consequences that will ensue if the courts reject the NLRB's holdings. The number of employers that are requiring their employees to waive their right to take concerted action to enforce workplace rights is skyrocketing. The law firm of Carlton, Fields, Jorden, Burt conducted a survey of "326 companies of all sizes and business types" in 2013 and found that 72% included arbitration clauses in their contracts, up from 55% in 2012, and that 40% of those clauses precluded class actions, double the percentage from 2012. *The 2014 Carlon Fields Jorden Burt Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation* at 1, 30 (2014) (available at http://classactionsurvey.com/pdf/2014-class-action-survey.pdf).

If the Board's holding are rejected, we can predict with great confidence that all well-counseled employers will require all of their employees to waive their rights under such "agreements." As a result, concerted legal action that is critical to ensuring employees are paid a minimum wage will be barred. Class actions that broke the back of employment discrimination

after the passage of the Civil Rights Act of 1964 will be no more. And all other forms of collective enforcement that are peculiarly essential to the enforcement of employment rights will become a thing of the past. There will be no more employment class actions and section 16(b) of the FLSA will be rendered a nullity in FLSA, ADEA, and Equal Pay Act cases. Employees will stand completely alone in seeking to enforce their rights against their employer.[25] Without regard to whether or not such a result is inconsistent with any other laws, it is contrary to the central tenets of federal labor law.

[25] As the Board recognized, the "risk of retaliation is virtually unique to employment litigation compared, for example, to securities or consumer fraud litigation." *D.R. Horton*, 357 NLRB No. 184 (2012) at 3.

Procedures for Filing
An Unfair Labor Practice Charge
with
National Labor Relations Board

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#NELA16
National Employment Lawyers Association
2016 Annual Convention
June 22-25, 2016
Westin Bonaventure Hotel, Los Angeles, California

Introduction

The National Labor Relations Act (29 U.S.C. §152, et seq.) applies in both union and nonunion workplaces. The act proscribes certain types conduct conduct that are referred to as unfair labor practices (ULPs). This is a brief overview of how unfair labor practices are processed by the National Labor Relations Board, including interference with covered employees' right to engage in concerted activity.

Coverage of the NLRA

The Act applies to private sector employers excluding federal, state and local governments, agricultural employers and employers subject to the Railway Labor Act (45 U.S.C. §151, et. seq.). Employers must also be engaged in interstate commerce. See 29 C.F.R. §104.204

Retail employers must have a gross annual volume of business in of $500,000 or more. For nonretail employers the threshold is $50,000 in goods and services sold

or purchased out of state. There are a number of special categories with varying thresholds, for example, the threshold for law firms is $250,000.

Certain categories of employee are also not covered. In most, but not all cases, supervisors are excluded. Family members even if employed are not covered. Independent contractors are not employees by definition and are not covered

Fundamental Right to self-organization and engage in concerted activities

All covered employees are entitled to the fundamental rights set forth in 29 U.S.C.§ 157:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and **to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection**, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title." Emphasis added.

Employer Unfair Labor Practices

Unfair Labor Practices are defined at 29 U.S.C. §158. Subsection (a) sets out employer ULPs. They are summarized here:

(a) Unfair labor practices by employer

> **It shall be an unfair labor practice for an employer—**
> **(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;**
> (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: [proviso omitted];
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: [proviso omitted];
> (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, [proviso omitted].

Initiation of an Unfair Labor Practice
Statute of limitations, filing and service on employer

ULP's are initiated by filing a charge. The standard NLRB charge form is appended to this article.

A charge must be filed within six (6) months of the act or omission giving rise to the ULP.

Charges may be e-filed at https://www.nlrb.gov/node/4634.

Charges may also be filed at NLRB offices, a list of which can be found at https://www.nlrb.gov/who-we-are/regional-offices

A charge can be filed by an employee whose rights have been violated, a coworker, friend, relative, union representative or attorney.

The charge should consist of a simple statement. The particular facts and circumstances are spelled out after receiving an initial letter from the NLRB.

The filer (or someone acting for him or her) is responsible for serving a copy of the charge on the employer.

Investigation of the Charge

The Board will assign someone to investigate a charge. Normally affidavits will be taken from the affected employee and witnesses, as well as the employer and witnesses. Other evidence will be marshalled, as well. An attorney can provide service to the client and assure a prompt and accurate evaluation of the charge's merit by assembling and submitting evidence to the assigned board agent.

Decision to Issue a Complaint or to Dismiss Charge

The NLRB will determine whether to dismiss the charge or file a complaint. The sole authority to issue a complaint of dismiss a charge rests exclusively with the NLRB.

The Board's web site states: "Typically, a decision is made about the merits of a charge within 7 to 12 weeks, although certain cases can take much longer. During

this period, the majority of charges are settled by the parties, withdrawn by the charging party, or dismissed by the Regional Director.

Individuals have the right to file charges, but not to initiate complaints. This is akin to filing a police report that is then referred to a local prosecuting authority, who has sole authority to file a criminal charge. There is no private cause of action, but charging parties may be represented by attorneys.

If a complaint is issued it will be served on the employer by the NLRB. The employer has the right to file an answer. The matter will be set for a hearing before an administrative law judge. Every effort, however, will be made to settle the matter.

Right to Appeal Dismissal of Charge

A charging party has the right to appeal a dismissal to the NLRB's Office of Appeals in Washington, D.C. The NLRB's standard form is appended. An appeal must be filed within two (2) weeks. The following is from https://www.nlrb.gov/what-we-do/investigate-charges:

> "The Office handles about 2000 cases a year. Each appeal is assigned to an attorney and a supervisor for a review of all documents in the case, **including new information submitted by the charging party.** All cases in which it is proposed to reverse the Regional Director's determination are presented to the General Counsel for decision.
>
> "Significant cases may be presented for General Counsel review even where the recommendation is to uphold the Regional determination. The Office may also remand cases to the regions for further investigation where necessary. **Because such decisions are not reviewable in court, there is no further recourse for parties who believe that a charge has been unfairly dismissed."** Emphasis added.

Hearings and Appeals

Trials are conducted by administrative law judges, who issue recommend decisions.

If a violation is found an ALJ can: (a) order the employer to cease and desist from violating the employee's rights; (b) order affirmative relief, such as reinstatement; (c) award monetary relief including back pay with interest and

other make whole remedies; and (d) order posting of a notice in the workplace alerting other workers to that fact a violation has occurred and containing the employer's promise not to violate the Act in the future.

Fines, liquidated, compensatory and punitive damages are not available.

If no exceptions are filed within 10 days, the recommendation becomes the decision of the NLRB.

If exceptions are taken, the recommendations are reviewed by a three-member panel of the National Labor Relations Board.

A panel decision may be appealed to the United States Court of Appeals. Venue lies in the D.C. Circuit or the circuit in which the ULP occurred.

Questions to Discuss

What is an attorney's ethical obligation to investigate the possibility of an unfair labor practice?

When is an attorney's ethically obligated to counsel an employee that filing a ULP is in the client's best interest, even if it means foregoing a private cause of action for which compensatory and other damages and attorneys' fees are available?

May an attorney who represents a charging party charge a fee when the case is prosecuted by the NLRB? If yes, what would be a reasonable fee? What disclosures regarding the fee must be made?

Resources

Download the NLRB (free) app for iphone or android
https://www.nlrb.gov/news-outreach/nlrb-mobile-apps

Need help go to https://www.nlrb.gov/reports-guidance/manuals>

Want the inside scoop get the NLRB Case Handling Manual on ULPs at
https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1727/CHM-February%202016.pdf.pdf

Please Review the Following Important Information Before Filling Out a Charge Form!

- Please call an Information Officer in the Regional Office nearest you for assistance in filing a charge. The Information Officer will be happy to answer your questions about the charge form or to draft the charge on your behalf. Seeking assistance from an Information Officer may help you to avoid having the processing of your charge delayed or your charge dismissed because of mistakes made in completing the form.
- Please be advised that not every workplace action that you may view as unfair constitutes an unfair labor practice within the jurisdiction of the National Labor Relations Act (NLRA). Please click on the Help Desk button for more information on matters covered by the NLRA.
- The section of the charge form called, "Basis of Charge," seeks only a brief description of the alleged unfair labor practice. You should **NOT** include a detailed recounting of the evidence in support of the charge or a list of the names and telephone numbers of witnesses.
- After completing the charge form, be sure to sign and date the charge and mail or deliver the completed form to the appropriate Regional Office.
- A charge should be filed with the Regional Office which has jurisdiction over the geographic area of the United States where the unfair labor practice occurred. For example, an unfair labor practice charge alleging that an employer unlawfully discharged an employee would usually be filed with the Regional Office having jurisdiction over the worksite where the employee was employed prior to his/her discharge. An Information Officer will be pleased to assist you in locating the appropriate Regional Office in which to file your charge.
- The NLRB's Rules and Regulations state that it is the responsibility of the individual, employer or union filing a charge to timely and properly serve a copy of the charge on the person, employer or union against whom such charge is made.
- By statute, only charges filed and served within **six (6) months** of the date of the event or conduct, which is the subject of that charge, will be processed by the NLRB.

FORM EXEMPT UNDER 44 U.S.C 3512

INTERNET
FORM NLRB-501
(2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE	
Case	Date Filed

INSTRUCTIONS:
File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer

b. Tel. No.

c. Cell No.

f. Fax No.

d. Address *(Street, city, state, and ZIP code)*

e. Employer Representative

g. e-Mail

h. Number of workers employed

i. Type of Establishment *(factory, mine, wholesaler, etc.)*

j. Identify principal product or service

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and *(list subsections)* _____ of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge *(set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)*

3. Full name of party filing charge *(if labor organization, give full name, including local name and number)*

4a. Address *(Street and number, city, state, and ZIP code)*

4b. Tel. No.

4c. Cell No.

4d. Fax No.

4e. e-Mail

5. Full name of national or international labor organization of which it is an affiliate or constituent unit *(to be filled in when charge is filed by a labor organization)*

6. DECLARATION

I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

Tel. No.

Office, if any, Cell No.

Fax No.

e-Mail

By _____ _____
(signature of representative or person making charge) *(Print/type name and title or office, if any)*

Address _____ _____
(date)

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

#NEtA16749

FORM NLRB-4943
(9-12)

National Labor Relations Board

NOTICE OF DESIGNATION OF ATTORNEY OR REPRESENTATIVE

	CASE NO.

To: Regional Director,

I, _____, the undersigned, hereby designate

_____, whose name and address appear below,

as my attorney/representative in this proceeding.

This designation shall remain valid until a written revocation of it, signed by me, is filed with the Board.

FULL NAME OF WITNESS
_____ SIGNATURE OF WITNESS *(please sign in ink)*
_____ DATE

NAME OF ATTORNEY/REPRESENTATIVE
☐ REPRESENTATIVE IS AN ATTORNEY
MAILING ADDRESS
EMAIL ADDRESS
TELEPHONE NUMBER

FORM NLRB-4701
(9-03)

NATIONAL LABOR RELATIONS BOARD

NOTICE OF APPEARANCE

and	**CASE**

☐ **REGIONAL DIRECTOR**

☐ **EXECUTIVE SECRETARY**
NATIONAL LABOR RELATIONS BOARD
Washington, DC 20570

☐ **GENERAL COUNSEL**
NATIONAL LABOR RELATIONS BOARD
Washington, DC 20570

THE UNDERSIGNED HEREBY ENTERS APPEARANCE AS REPRESENTATIVE OF _____

_____

_____

IN THE ABOVE-CAPTIONED MATTER.

CHECK THE APPROPRIATE BOX(ES) BELOW:

☐ **REPRESENTATIVE IS AN ATTORNEY**

☐ **IF REPRESENTATIVE IS AN ATTORNEY, IN ORDER TO ENSURE THAT THE PARTY MAY RECEIVE COPIES OF CERTAIN DOCUMENTS OR CORRESPONDENCE FROM THE AGENCY IN ADDITION TO THOSE DESCRIBED BELOW, THIS BOX MUST BE CHECKED. IF THIS BOX IS NOT CHECKED, THE PARTY WILL RECEIVE ONLY COPIES OF CERTAIN DOCUMENTS SUCH AS CHARGES, PETITIONS AND FORMAL DOCUMENTS AS DESCRIBED IN SEC. 11842.3 OF THE CASEHANDLING MANUAL.**

(REPRESENTATIVE INFORMATION)

NAME: _____

MAILING ADDRESS: _____

_____

E-MAIL ADDRESS: _____

OFFICE TELEPHONE NUMBER: _____

CELL PHONE NUMBER: _____ ***FAX:*** _____

SIGNATURE: _____
(Please sign in ink.)

DATE: _____

[1] IF CASE IS PENDING IN WASHINGTON AND NOTICE OF APPEARANCE IS SENT TO THE GENERAL COUNSEL OR THE EXECUTIVE SECRETARY, A COPY SHOULD BE SENT TO THE REGIONAL DIRECTOR OF THE REGION IN WHICH THE CASE WAS FILED SO THAT THOSE RECORDS WILL REFLECT THE APPEARANCE.

FORM NLRB-4767
(7-03)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

APPEAL FORM

To: General Counsel
Attn: Office of Appeals
National Labor Relations Board
Room 8820, 1099 14th Street, N.W.
Washington, D.C. 20570

Date:

Please be advised that an appeal is hereby taken to the General Counsel of the National Labor Relations Board from the action of the Regional Director in refusing to issue a complaint on the charge in

_____

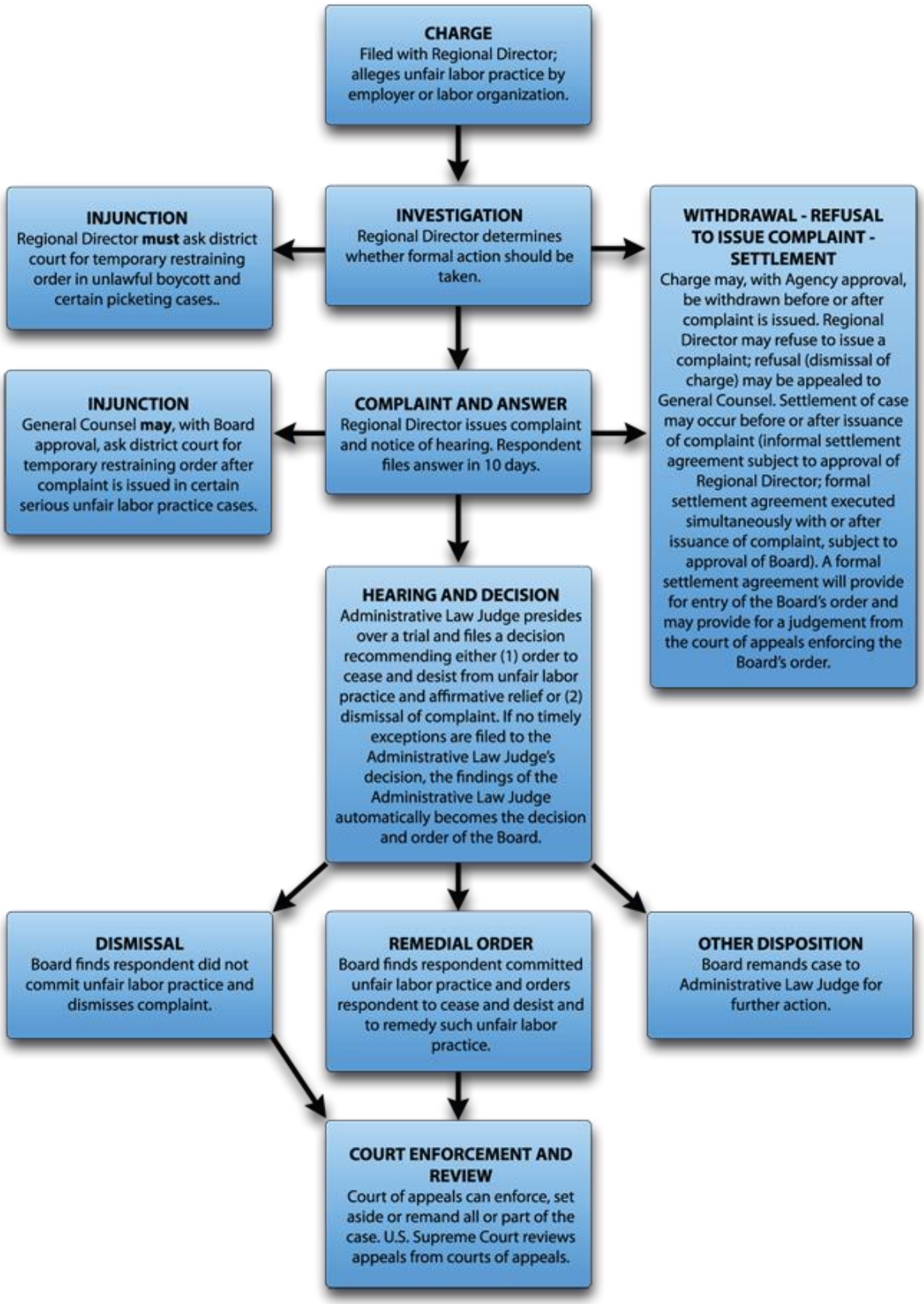
Case Name(s).

_____

Case No(s). (If more than one case number, include all case numbers in which appeal is taken.)

_____

(Signature)


CHARGE
Filed with Regional Director; alleges unfair labor practice by employer or labor organization.
INVESTIGATION
Regional Director determines whether formal action should be taken.
INJUNCTION
Regional Director must ask district court for temporary restraining order in unlawful boycott and certain picketing cases..
WITHDRAWAL - REFUSAL TO ISSUE COMPLAINT - SETTLEMENT
Charge may, with Agency approval, be withdrawn before or after complaint is issued. Regional Director may refuse to issue a complaint; refusal (dismissal of charge) may be appealed to General Counsel. Settlement of case may occur before or after issuance of complaint (informal settlement agreement subject to approval of Regional Director; formal settlement agreement executed simultaneously with or after issuance of complaint, subject to approval of Board). A formal settlement agreement will provide for entry of the Board's order and may provide for a judgement from the court of appeals enforcing the Board's order.
COMPLAINT AND ANSWER
Regional Director issues complaint and notice of hearing. Respondent files answer in 10 days.
INJUNCTION
General Counsel may, with Board approval, ask district court for temporary restraining order after complaint is issued in certain serious unfair labor practice cases.
HEARING AND DECISION
Administrative Law Judge presides over a trial and files a decision recommending either (1) order to cease and desist from unfair labor practice and affirmative relief or (2) dismissal of complaint. If no timely exceptions are filed to the Administrative Law Judge's decision, the findings of the Administrative Law Judge automatically becomes the decision and order of the Board.
DISMISSAL
Board finds respondent did not commit unfair labor practice and dismisses complaint.
REMEDIAL ORDER
Board finds respondent committed unfair labor practice and orders respondent to cease and desist and to remedy such unfair labor practice.
OTHER DISPOSITION
Board remands case to Administrative Law Judge for further action.
COURT ENFORCEMENT AND REVIEW
Court of appeals can enforce, set aside or remand all or part of the case. U.S. Supreme Court reviews appeals from courts of appeals.