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Legal Update

Recent Developments at the National Labor Relations Board and the Impact on Colleges and Universities

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**NLRB cases and developments**

The National Labor Relations Board remains extremely busy, continuing the pro-labor agenda that began with the election of President Obama and his appointment of new members to the Board. The Board’s aggressive agenda, however, has been dampened by the recent decision of the U.S. Court of Appeals for the District of Columbia in the *Noel Canning* case (discussed *infra*), where the Court found that President Obama’s appointment of three members to the Board on January 4, 2012 was in violation of the Constitution’s provision on recess appointments. Whether that decision has the effect of nullifying most of the Board’s decisions from 2012 forward remains to be seen. The Board, however, has announced it is proceeding with its decision-making despite the ruling.

This paper will primarily summarize the work of the Board over the past year or so. Highlights include:

1. A Call for Briefs by the Board in deciding whether or not to reverse *Brown University* and treat graduate teaching assistants as employees.

2. A Call for Briefs by the Board to examine what factors should be considered and emphasized under the *Yeshiva University* decision when assessing faculty managerial status.

3. Continuation of the “small bargaining unit” philosophy of the *Specialty Healthcare* case.

4. A decision rejecting the broad right of an employer to keep workplace investigations confidential.

5. Aggressive outreach to the non-union sector, including the defense of Section 7 rights for non-unionized employees in areas of employer policy and practice and in the new world of social media.

6. Decisions that narrow the degree to which employers may restrict union solicitation on its property.

7. Reversal of several long standing precedential decisions, including areas such as dues checkoff after a contract expires; duty to bargain over disciplinary actions prior to a first contract; union’s entitlement to witness statements from employer investigations, and other decisions.

8. The Board’s continued defense of its earlier NLRB posting mandate and expedited election rules.
1. Board appointees

In *Noel Canning Divisions of Noel Corp. v. NLRB*, D.C. Cir., No. 12-1115 (January 25, 2013), the U.S. Circuit Court for the District of Columbia decided that President Obama’s recess appointments to the NLRB in early 2012 were not valid. Current Members Sharon Block and Richard Griffin, along with Terrence Flynn who later resigned, were appointed by the President on January 4, 2012.

The particular case was before the Court because the company, found guilty of unfair labor practices by the Board, argued that Members Block and Griffin, who sat on the case, were not properly appointed. The employer in the case asserted *inter alia* that the Board did not have a quorum for the conduct of business on the operative date that it found the company guilty of unfair labor practices. Citing *New Process Steel v. NLRB*, 130 S.Ct.2635 (2010) which held that the Board cannot act without a quorum of three members, the company said, that even though there were five members on the Board on the date the Board ruled against the company, three of them were invalidly appointed, and thus there was no such quorum on that date. While Board Chairman Pearce and Member Hayes had been confirmed by the Senate, Members Flynn, Block and Griffin were all “recess appointments.” The employer claimed “the purported appointments of the last three members of the Board were invalid under the Recess Appointments Clause of the Constitution, Article II, Section 2, Clause 3.”

In its decision, the Court’s three judge panel (Chief Judge Sentelle and Justice Henderson, with a concurring opinion by Justice Griffith) had to deal with the term “the Recess” as use in the Recess Appointments Clause of the Constitution.

The employer argued that the term only refers to “the intersession recess of the Senate, that is to say, the period between the sessions of the Senate when the Senate is by definition not in session and therefore unavailable to receive and act upon nominations from the President.” In contrast, the NLRB argued that the alternative appointment procedure created by the Clause “is available during *intrasession* recesses,” or breaks in the Senate’s business when it is otherwise in continuing session.”

*The Court agreed with the employer and found that the term “the Recess” only refers to the intersession breaks between formal sessions of Congress and not breaks or adjournments that may take place during a session of Congress.*

To reach that result, the Court first looked at the clear language of the Clause. It noted that the phrase “the Recess” clearly envisions but one recess, not many.

Unlike “a” or “an,” that definite article [“the”] suggests specificity. As a matter of cold, unadorned logic, it makes no sense to adopt the Board’s proposition that when the Framers said “the Recess,” what they really meant was “a recess.” This is not an insignificant distinction. In the end, it makes all the difference.
It is universally accepted that “Session” here refers to the usually two or sometimes three sessions per Congress. Therefore, “the Recess” should be taken to mean only times when the Senate is not in one of those sessions.

The Board sought to show that history favored the right of the President to use intrasession appointments. The Court, also reviewing how the term had been applied in the history of the country, noted instead that for the first 80 years following ratification of the Constitution, “no President attempted such an [intrasession] appointment, and for decades thereafter, such appointments were exceedingly rare.” [perhaps only twice].

Though it is true that intrasession recesses of significant length may have been far less common in those early days than today, it is nonetheless the case that the appointment practices of Presidents more nearly contemporaneous with the adoption of the Constitution do not support the propriety of intrasession recess appointments. Their early understanding of the Constitution is more probative of its original meaning than anything to be drawn from administrations of more recent vintage.

The Court then continued to underscore the problem with the Board interpretation. If the term “recess” does not refer to “the Recess” between legislative sessions, then what does it mean? No one was pursuing an argument that adjourning business for the evening constituted a recess. But if one tries to argue that a recess must mean a break of a certain number of days, what is the correct number? Ten? Twenty?

Given that the appointments structure forms a major part of the separation of powers in the Constitution, the Framers would not likely have introduced a flimsy standard. Moreover, the text of the Recess Appointments Clause offers no support for the functional approach. Some undefined but substantial number of days’ break is not a plausible interpretation of “the Recess.”

Another alternative offered by the Board was that “the Recess” means any adjournment of more than three days pursuant to the Adjournment Clause. Article I, section 5, cl 4 (“Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days.”) The Court said that this approach lacked any constitutional basis because, quite simply, the Framers did not use the word “adjournment” in the Recess Appointments Clause. Instead, they used “the Recess.”

Finally, the Board urged the Court to consider the argument that the President had the discretion to determine when the Senate is in recess.

This will not do. Allowing the President to define the scope of his own appointments power would eviscerate the Constitution’s separation of powers. The checks and balances that the Constitution places on each branch of
government serve as “self-executing safeguards against the encroachment or aggrandizement of one branch at the expense of the other.” The Board’s interpretation would give “free rein” to the President to appoint his desired nominees at any time he pleases, “whether that time be a weekend, lunch or even when the Senate is in session and he is merely displeased with its inaction. This cannot be the law. The intersession interpretation of “the Recess” is the only one faithful to the Constitution’s text, structure and history.”

Thus, turning to the case at hand, since the President made three appointments on January 4, 2012, after Congress began a new session on January 3 and while that new session continued, the appointments were invalid at their inception. Because the Board therefore lacked a quorum of three members when it issued its decision in the case at bar on February 8, 2012, its decision must be vacated.

As a secondary argument nullifying the appointments, the Court also said that the vacancies did not “happen,” i.e. take place during “the Recess” but were only “in existence” at that time. The Constitution’s language mentions filling “vacancies that may happen during the Recess of the Senate.” Thus, since the vacancies here did not come into being during “the Recess,” there was no authorization to fill them.

The power of a written constitution lies in its words. It is those words that were adopted by the people. When those words speak clearly, it is not up to us to depart from their meaning in favor of our own concept of efficiency, convenience or facilitation of the functions of government. In light of the extensive evidence that the original public meaning of “happen” was “arise,” we hold that the President may only make recess appointments to fill vacancies that arise during the recess.

The Court acknowledged that its interpretation placed it at odds with the 9th Circuit and the 2nd Circuit in this issue- both courts contending on the “in existence” approach – but nevertheless felt that its interpretation of the Constitutional language was the correct one.

While the Noel Canning case was definitive on the issue of the President’s lack of power to make the NLRB appointments, it is true that other cases involving the same issue are also pending, including Richards v. NLRB, No. 12-1973 and Lugo v. NLRB, No. 12-1984, both out of the Seventh Circuit. Oral arguments were heard in those cases on November 30, 2012. A review by the U.S. Supreme Court seems likely in any event.¹

2. **Board invites briefs on managerial status of faculty members**

On May 22, 2012, the Board requested briefs in the case of *Point Park University* on the issue of whether the faculty members of that institution are statutory employees or

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¹ NOTE: On February 13, 2013, President Obama renominated Members Block and Griffin for appointments to the Board.
rather are excluded managerial employees consistent with the U.S. Supreme Court’s decision in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980).

In his original decision and direction of election, the Regional Director found that the faculty members were not managerial employees, and, after an election, the Petitioner was certified as their collective bargaining representative. The underlying issue ultimately was presented to the United States Court of Appeals for the District of Columbia Circuit, which found that the Board had “failed to adequately explain why the faculty’s role at the University is not managerial.” *Point Park University v. NLRB*, 457 F.3d 42, 44 (D.C. Cir. 2006). The court instructed the Board to identify which of the relevant factors set forth in *Yeshiva University*, supra, are significant and which less so in its determination that the Employer’s faculty members are not managerial employees and to explain why the factors are so weighted. Following the court’s remand, the Regional Director issued a Supplemental Decision on Remand. The Employer sought review of that decision, which the Board granted on November 28, 2007.

The Board – after a five year wait – this summer asked for briefs from interested parties. Specifically, the Board said the briefs should address some or all of the following questions:

1. Which of the factors identified in *Yeshiva* and the relevant cases decided by the Board since *Yeshiva* are most significant in making a finding of managerial status for university faculty members and why?

2. In the areas identified as “significant,” what evidence should be required to establish that faculty make or “effectively control” decisions?

3. Are the factors identified in the Board case law to date sufficient to correctly determine whether faculty are managerial?

4. If the factors are not sufficient, what additional factors would aid the Board in making a determination of managerial status for faculty?

5. Is the Board’s application of the *Yeshiva* factors to faculty consistent with its determination of the managerial status of other categories of employees and, if not, (a) may the Board adopt a distinct approach for such determinations in an academic context or (b) can the Board more closely align its determinations in an academic context with its determinations in non-academic contexts in a manner that remains consistent with the decision in *Yeshiva*?

6. Do the factors employed by the Board in determining the status of university faculty members properly distinguish between indicia of managerial status and indicia of professional status under the Act?

7. Have there been developments in models of decision making in private universities since the issuance of *Yeshiva* that are relevant to the factors the
Board should consider in making a determination of faculty managerial status? If so, what are those developments and how should they influence the Board’s analysis?

(8) As suggested in footnote 31 of the *Yeshiva* decision, are there useful distinctions to be drawn between and among different job classifications within a faculty--such as between professors, associate professors, assistant professors, and lecturers or between tenured and untenured faculty--depending on the faculty's structure and practices?

In response to this request, the AAUP filed an extensive brief urging the Board to read *Yeshiva* narrowly. It went on to offer additional factors the Board should consider. The thrust of the AAUP’s brief essentially is that since the 1980 decision, the growth of the corporate business model of running colleges and universities has increased dramatically and is now pervasive. Some of the key points and consequences presented by the AAUP to support this thesis included the following:

- There has been a major expansion of administration hierarchy which exercises greater unilateral control over academic affairs.
- Administrations today are making unilateral academic and other decisions based on market forces rather than relying on faculty recommendations.
- Faculty influence has eroded through administrations’ application of corporate business model

Ironically, some of these points advanced by the AAUP in its brief on the evolution of collegial institutions to top-down corporations were exactly the same points advanced by the dissent in the *Yeshiva* case. Thus, Justice Brennan writing for the dissent noted:

But the university of today bears little resemblance to the "community of scholars" of yesteryear. Education has become "big business," and the task of operating the university enterprise has been transferred from the faculty to an autonomous administration, which faces the same pressures to cut costs and increase efficiencies that confront any large industrial organization. The past decade of budgetary cutbacks, declining enrollments, reductions in faculty appointments, curtailment of academic programs, and increasing calls for accountability to alumni and special interest group has only added to the erosion of the faculty’s role in the institution’s decision-making process.

These economic exigencies have also exacerbated the tensions in university labor relations, as the faculty and administration more and more frequently find themselves advocating conflicting positions not only on issues of compensation, job security, and working conditions, but even on subjects formerly thought to be the faculty's prerogative. (444 U.S. 672 at 703-704)
Collective bargaining has been effective where it exists and has not created the conflict of loyalties and other problems that the Court envisioned in 1980.

Faculty interests are not aligned with administrations in many of the initiatives set forth by modern colleges and universities.

Between 1976 and 2009:

- Full time executives and managers on campuses grew 129% compared to faculty growth of only 68%.
- Places like Cornell and MIT and other major universities are layered with high level academic administrators, thus creating “buffer” zones between faculty and administration.
- More money is now allocated in budgets for administrative spending rather than instructional needs.
- There has been an increase in part time faculty by 256% and a diminution of tenure track faculty, thus diminishing further the input of full time faculty into decision making.

Administrations are making decisions on program discontinuance and student admissions standards independent of faculty involvement and approval.

Administrations have increased involvement in nonacademic matters, such as hiring, reappointment, promotion and tenure decisions.

General Counsels have made statements that faculty handbooks are not contracts and not binding on the administration.

Strategic initiatives and market considerations are made by administrations rather than faculty.

There has been a growing influence of corporate donors on issues like curriculum and program content.

The AAUP brief goes on to state:

Justice Brennan’s argument that universities are already “big business” operations suggests that the AAUP is probing deeper into the decision itself and arguing that the entire issue of managerial status should be stripped down and reviewed de novo.
Administrators have made it increasingly clear that they will consult with faculty when they please, fail to consult with them when they please, accept or reject faculty input and recommendations when they please, and even dissolve faculty governance bodies when they please. As a result, administrations increasingly make and implement unilateral decisions when they please. The faculty does not make “effective recommendations” or have “effective control” over many academic and nonacademic matters. These conditions show that administration and faculty interests are not aligned.

In conclusion, and specifically, the AAUP urged the Board to consider the following additional factors in assessing managerial status under Yeshiva.

1. The extent of administration hierarchy
2. The extent to which administrations make academic decisions based on revenue generation or other market based considerations
3. The degree of consultation by administrations with faculty over academic and nonacademic matters
4. Whether administrations see faculty recommendations as advisory rather than effective
5. Whether administrations routinely approve nearly all faculty recommendations without independent review
6. Whether conflict between the administration and the faculty reflects lack of alignment of administration and faculty interests.

On the other side of the argument, an amicus brief filed on behalf of the American Council on Education, National Association of Independent Colleges and Universities, Council of Independent Colleges, Association of Independent Colleges and Universities of Pennsylvania, College and University Professional Association for Human Resources emphasized that the Board’s very call for amicus briefs constituted de facto rulemaking and expanded the mandate of the D.C. Circuit, namely, that the Board should “identify which of the relevant factors set forth in Yeshiva... are significant and which less so... and to explain why the factors are so weighted.” The questions posed by the Board in its call for briefs go far beyond that directive.

The brief supports an argument that the Point Park University faculty members are indeed managers. In addition, the brief emphasizes the core findings of the Supreme Court. These include the central points that the “effective authority in matters of
curriculum and course selection are of paramount importance under Yeshiva and such authority is the sine qua non of managerial status; that graduation policies, course scheduling, grading, student admission and retention policies, matriculation standards and teaching methods are also important and faculty should ordinarily have authority in a majority of these areas to be considered managerial; and that other considerations like faculty status matters are relevant but not central to managerial status under Yeshiva.”

Such factors remain the only factors the Board should consider; the Supreme Court identified these factors as the core of its decision with great articulation and therefore there is no need for the Board to expand those factors in considering future cases.

Further, the brief underlined that the Supreme Court recognized that the Act cannot be applied to higher education in the same manner that it would be to private industry generally. The Board must analyze managerial factors in that spirit.

*If such an inquiry proves different in the context of higher education than it does in the context of manufacturing, retail, health care or any of the other myriad areas subject to the Board’s jurisdiction, it is simply a product of the fact that, as recognized by Yeshiva, higher education does not fit within the mold of pyramidal hierarchies found in private industry generally.*

Finally, the brief noted, in answer to one of the Board’s questions, that there have been no significant developments in models of decision-making in private universities since Yeshiva. Faculty today continue to exert the same amount of influence and control, if not more, over the aspects of institutional governance as they always have.

Unlike the issue discussed below on the employee status of graduate student teaching assistants, the Board cannot reverse precedent in this case, as the Supreme Court’s decision remains the law of the land for determining managerial status of private sector faculty. However, the Board’s slant in this case, its possible decision to choose some factors over others in importance, or to add other considerations in deciding these types of cases make the Point Park University case extremely interesting to watch for future litigation.

**3. Board invites briefs on graduate student teaching assistants’ status**

On June 22, 2012, the Board invited briefs from interested parties in two cases, *New York University*, Case No. 2-RC-23481 and *Polytechnic Institute of New York University*, Case No. 29-RC-12054. Both cases dealt with the overall issue of the employee status of graduate teaching and research assistants and whether or not such individuals have a right to unionize under the NLRA.

The Board wrote that parties and *amici* specifically were invited to address the following questions:
1. Should the Board modify or overrule *Brown University*, 342 NLRB 483 (2004), which held that graduate student assistants who perform services at a university in connection with their studies are not statutory employees within the meaning of Section 2(3) of the National Labor Relations Act, because they “have a primarily educational, not economic, relationship with their university”? 342 NLRB at 487.

2. If the Board modifies or overrules *Brown University*, should the Board continue to find that graduate student assistants engaged in research funded by external grants are not statutory employees, in part because they do not perform a service for the university? See *New York University*, 332 NLRB 1205, 1209 fn. 10 (2000) (relying on *Leland Stanford Junior University*, 214 NLRB 621 (1974)).

3. If the Board were to conclude that graduate student assistants may be statutory employees, in what circumstances, if any, would a separate bargaining unit of graduate student assistants be appropriate under the Act?

4. If the Board were to conclude that graduate student assistants may be statutory employees, what standard should the Board apply to determine (a) whether such assistants constitute temporary employees and (b) what the appropriate bargaining unit placement of assistants determined to be temporary employees should be?

In this case, amici curiae briefs were filed by interested parties, including one by the American Council of Education, the Association of American Medical Colleges, the Association of American Universities, the College and University Personnel Association for Human Resources, and the National Association of Independent Colleges and Universities. The central points of that brief are:

1. *Brown* was correctly decided because the relationship of students to the University is one of student/teacher, not master/servant, and thus graduate teaching assistants are not employees within the meaning of Section 2 (3) of the Act. This relationship is not primarily a commercial but educational relationship.

2. Mandatory collective bargaining cannot be imposed without undermining the University’s control over academic decisions at the core of its educational mission. This includes the right to evaluate students’ performance, determine admission and matriculation standards, tuition, enrollment levels, eligibility for and issuance of award scholarships and grants, and all aspects of educational curriculum, including what courses will be offered, to whom and by whom courses will be taught, and the teaching methods used. Indeed, the experience of graduate teaching assistant collective bargaining in the public sector has shown that unions representing such groups have frequently reached into the academic sphere with their proposals and demands. The brief states:

   The NLRB properly recognized in *Brown* that none of the subjects of collective bargaining which Petitioners would characterize as
unalloyed issues of wages and “other terms and conditions of employment” can be separated from the core educational concerns and academic decisions of the University – such as decision as who, what, where to teach or research, the class size, time, length and content of graduate students’ duties, stipends and evaluations of their performance.

On the other side, a brief filed by the AAUP, NEA and AFT stresses:

1. *Brown* should be reversed. Graduate teaching assistants are employees under common law and Supreme Court rulings and should therefore have the right to unionize.

2. Under the National Labor Relations Act, institutions are free to reject any particular proposals at the bargaining table, including those that might impinge on their educational missions. Therefore, the institutions themselves control to what degree a union representing such individuals will intrude into academic decisionmaking and educational missions.

3. The experience of public sector bargaining involving graduate teaching assistants has demonstrated that bargaining has not been injurious to the institutions in question in terms of their fundamental education mission.

All indications have been for some time that the Board will ultimately reverse *Brown*. The call for briefs will likely give it a better cover to do so and may influence the Board as to the rationale it uses to make that reversal.

4. **Appropriate bargaining units**

As may be remembered, the Board issued a major decision on bargaining units at the end of 2010 which has had and will continue to have a ripple effect on organizing in all industries, including higher education. The case was *Specialty Healthcare & Rehabilitation Center of Mobile*, 356 NLRB No. 56 (December 22, 2010), where the Board drastically altered its approach to bargaining units and indicated that it would look favorably on units with a small grouping of employees who share a community of interest, even if a larger unit makes more sense in light of all community of interest factors. In particular, the Board held that:

...in cases in which a party contends that a petitioned-for unit containing employees readily identifiable as a group who share a community of interest is nevertheless inappropriate because it does not contain additional employees, the burden is on the party so contending to demonstrate that the excluded employees share an overwhelming community of interest with the included employees
This approach will make it very difficult for employers to seek to expand the scope of petitioned units and may lead to the so-called “micro-units” where small clusters of employees who are identifiable as a group and who share a community of interest will now have the right to unionize even if they have a considerable amount of connection to, and community of interest with, other employees. Standard bargaining units like production and maintenance units or service and maintenance units – common throughout the country – may now be subdivided by craft or department or job function. The Board’s use of the term “overwhelming” is a clear signal that it will not lightly accept employer arguments that only a larger unit of employees is appropriate.

The Specialty Healthcare case is now on appeal in the 6th Circuit, as the employer engaged in a technical refusal to bargain in order to test the composition of the unit. The companion unfair labor practice case is Specialty Healthcare & Rehabilitation Center of Mobile 357 NLRB No. 83, at *1(Aug. 26, 2011) cross-appeals pending sub nom. Kindred Nursing Ctrs.E., LLC v. NLRB, Nos. 12-1027 & 12-1174 (6th Cir.).

Recent Application of Specialty Healthcare

Specialty Healthcare has already been applied in a number of cases. See for example, DTG Operations, 357 NLRB No. 175 (December 30, 2011). Rental services agents and lead rental service agents at a car rental facility shared virtually all community of interest factors and constituted an appropriate unit. Employer’s claim that unit must include staff assistants, return agents, lot agents, service agents, fleet agents, exit booth agent, shuttlers, bus drivers and building maintenance techs was not found valid. Rental agents did not have an overwhelming community of interest with them.

Northrup Grumman Shipbuilding, Inc., 357 NLRB No. 163 (December 30, 2011). A petitioned unit of radiological control technicians, calibration technicians, lab technicians, and RCT trainees was an appropriate unit even though it excluded other technical employees. In Nestle Dryer Ice Cream, the maintenance employees petitioned for their own unit, but the employer requested the production employees be included as well – as had been the circumstances of previous organizing efforts by the same union in the same facility. The Board’s Regional Director rejected the employer’s request, citing the Specialty case. The employer engaged in a technical refusal to bargain to challenge the unit. Unfair labor practice found by the Board (358 NLRB No. 45, May 18, 2012) and case is on appeal to the Fourth Circuit.

Bergdorf Goodman, Case No. 2-RC-076954 (May 4, 2012) Unit of women’s shoes associates (total of 46 employees) was deemed appropriate despite employer’s claim that only an overall store unit of 372 sales associates was appropriate. All sales associates had identical evaluation forms and procedures; identical benefits and time off policies and probation period; access to same cafeteria. Women’s shoes department was one department out of ten. Employer failed to show “overwhelming community of interest” with other associates. The distinct method of payment (draw versus commission basis as opposed to base plus commission basis applicable to all other sales associates) was deemed critical. Transfers in or out of department only numbered 4 out of 42 transfers.
store-wide over 13 years. Even though “the presumption of a store-wide unit exists, the presumption can and has been rebutted in this case.”

*Cf. Odwalla Inc*, 357 NLRB No. 132 (December 9, 2011), where a proposed unit that included route sales drivers, relief drivers, warehouse associates, and cooler techs, but excluded merchandisers, was deemed to be a “fractured unit,” because it did not track any lines drawn by the Employer, such as classification, department, function, lines of supervision, methods of compensation or work location.

**Consequences for higher education**

In the world of higher education, one can imagine a myriad of potential bargaining units that now might ordinarily be seen as inappropriate fragments of larger units of employees. For example, a unit of lab technicians might be deemed appropriate as opposed to a broad unit of all technical employees, or all clerical and technical employees. A unit of academic counselors might be distinct enough in job function to constitute its own unit as opposed to being in a broad unit of all professionals. Similarly, a unit of admissions counselors who travel around the country on behalf of an institution might be an appropriate unit based on the unique nature of their work. Indeed, even certain departments of faculty, or divisions of faculty, or schools of faculty may have enough distinctive qualities to be certified as an appropriate bargaining unit. For example, a unit of library faculty might very well be separated as a separate unit from other faculty. Indeed, would a unit of the faculty of a School of Education have enough of a community of interest unto itself such that it could stand separate and apart from all other faculty at a major university? We will wait to see how the Board applies its new standards to higher education in some future case.

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5. **Prohibition on confidentiality during investigations**

*Banner Estrella Medical Center*, 358 NLRB No. 93 (July 30, 2012)

In this case, the employer’s human resources consultant routinely would ask employees making a complaint not to discuss the matter with their coworkers while the company’s investigation was going on. The Board found such a blanket approach to be in violation of the Act by restricting employees from discussing working conditions and matters under investigation.

To justify a prohibition on employee discussion of ongoing investigations, an employer must show that it has a legitimate business justification that outweighs the employees’ section 7 rights. … In this case, the judge found that the Respondent’s prohibition was justified by its concern with protecting the integrity of its investigations. Contrary to the judge, we find that the Respondent’s generalized concern with protecting the integrity of its investigations was
insufficient to outweigh employees’ Section 7 rights. Rather, in order to minimize the impact on Section 7 rights, it was the Respondent’s burden “to first determine whether in any given investigation witnesses needed to be protected, evidence was in danger of being destroyed, testimony was in danger of being fabricated, or there was a need to prevent a cover up.” [Citing Hyundai America Shipping Agency, 357 NLRB No. 80 (2011).

In order to minimize the impact on section 7, the employer has the burden of first determining whether in any given investigation witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, or there is a need to prevent a cover up. This will call for a more particularized use of the “keep it confidential” directive, and may, in addition, require employers to modify existing sexual harassment and other policies that categorically state that all investigations are confidential or that those interviewed in any investigation should not discuss the investigation with anyone.

The impact of this case is considerable. Most investigations, especially those involving sensitive areas of possible misconduct like sexual harassment, are appropriately cloaked in confidentiality in order to assure the unalloyed testimony of employees as the employer seeks the truth. Confidentiality avoids advanced information about questions to be asked being provided to employees who have not yet been interviewed and has the secondary effect of safeguarding privacy to the extent feasible. The benefit of seeking the truth in these important investigations would seem to override the minimal temporary “chilling” effect on Section 7 rights that the Board seems so concerned about.

6. **Rules, policies and social media: The Board reaches out to the non-unionized sector**

   a. **Background**

   The NLRB, for the first time in its history, has aggressively delved into the area of non-unionized employees and their rights under the Act. This initiative has been manifested in a variety of ways, most notably in its unprecedented decision to require employers to post official Notices of Employee Rights under the Act (now pending in litigation); the creation of a dedicated web page on its site to legal developments in this area; and a very strong effort to get ahead of the developing area of social media policies and to severely limit what any employer can prohibit in these and other normal employment policies. This latter initiative has drawn the attention of employers and employees alike. The Board, through its General Counsel, has issued three detailed Memoranda on this subject in less than two years.

   The few decided Board cases and General Counsel Memoranda from the Division of Advice on social media and employer rules and regulations fall into two broad categories. The first grouping has to do with whether an employee may be disciplined for conduct away from the workplace by his or her critical comments about the employer
through postings on social media sites like Facebook. The second is whether general employer policies in these areas, by themselves, are illegal because they chill employees’ Section 7 rights to engage in concerted protected activity.

Some of the guiding case law from the past that the Board has utilized in its decisions and which have been cited by the General Counsel in his Advice Memos are the lead cases of *Lafayette Park Hotel*, 326 NLRB 824 (1998) enfd. 203 F. 3d 52 (D.C. Cir. 1999) (a work rule violated section 8 (a)(1) if it would “reasonably tend to chill employees in the exercise of their Section 7 rights.”) and *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) where Board adopts two step inquiry in deciding whether or not an employer’s rule violates the Act. Under that case, the Board found:

First, a rule is clearly unlawful if it explicitly restricts Section 7 protected activities. Second, if the rule does not explicitly restrict Section 7 protected activities, it will only violate Section 8 (a)(1) upon a showing that:

1. The 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.

b. Four Board decisions in this area this past year

On the policy front, the Board issued four recent cases dealing with social media and related policies. In the first case, *Costco Wholesale Corporation*, 358 NLRB No. 106 (Sept. 7, 2012), a three member panel of Pearce, Griffin and Block found that the maintenance of the following Policy violated Section 8 (a)(1) of the Act:

a) Unauthorized posting, distribution, removal or alteration of any material on Company property is prohibited
b) Employees are prohibited from discussing “private matters of members and other employees… including topics such as but not limited to sick calls, leaves of absence, FMLA call outs, ADA accommodations, workers’ compensation, injuries, personal health information, etc.

c) Sensitive information such as membership, payroll, confidential financial, credit card numbers, social security numbers or employee personal health information may not be shared, transmitted, or stored for personal use or public use without prior management approval;

d) Employees are prohibited from sharing “confidential” information such as employees’ names, addresses, telephone numbers and email addresses.

The Board concluded that such language restricts employees in the exercise of their Section 7 rights because it would ban discussions of wages and other terms and conditions of employment among employees. It would prohibit the sharing of names, addresses and phone numbers and thus blunt efforts for employees to work collectively to
organize unions. And it would require Company permission to engage in normal union organizing activity.

In addition, the Board found that the following employer policy also violated the Act:

Any communication transmitted, stored or displayed electronically must comply with the policies outlined in the Costco Employment Agreement. Employees should be aware that statements posted electronically (such as online message board or discussion groups) that damage the Company, defame any individual or damage any person’s reputation, or violate the policies outlined in the Costco Employment Agreement, may be subject to discipline up to and including termination of employment.

In finding that this language was also a violation, the Board cited Lafayette Park, supra and Lutheran Heritage Village-Livonia, supra and noted that while the policy did not explicitly address Section 7 rights, the broad prohibition against making statements that “damage the company, defame any individual or damage any person’s reputation”

…. clearly encompasses concerted communications protesting the Respondent’s treatment of its employees. Indeed, there is nothing in the rule that even arguably suggests that protected communications are excluded from the broad parameters of the rule. In these circumstances, employees would reasonably conclude that the rule requires them to refrain from engaging in certain protected communications (i.e. those that are critical of the Respondent or its agents). See Southern Maryland Hospital, 293 NLRB 1209, 1222 (1989)(rule prohibiting “derogatory attacks on hospital representatives” found unlawful); Claremont Resort & Spa, 344 NLRB 832 (2005) (rule prohibiting “negative conversations about associates and/or managers” found unlawful); Beverly Health & Rehabilitation Services, 332 NLRB 347, 348 (2000) enf. 297 F. 3d 468 (6th Cir., 2002)(rule that prohibited ‘making false statements or misleading work related statements concerning the company, the facility or fellow associates” found unlawful).

In the same case, however, the Board did not find unlawful a rule that prohibited employees from “leaving Company premises during working shifts without permission of management.” The Board majority found that this rule was not unlawful on its face and would not be reasonably construed by employees as prohibiting Section 7 activity, such as engaging in a strike. The language in question was distinguishable from the illegal language in Labor Ready, 331 NLRB 1656 (2000) that prohibited employees from “walking off” the job – which was viewed as a synonym for a strike. Chairman Pearce, however, dissented from the majority and would have found the instant language to be coercive and would lead employees to believe they could not strike.3

3 See another case from late 2011 cited in this decision, 2 Sisters Food Group, Inc., 357 NLRB No. 168 (December 29, 2011), where a rule subjecting employees to discipline for the “inability or unwillingness to work harmoniously with other employees” was found unlawful.
In the second case recently issued, **Knauz BMW**, 358 NLRB No. 164 (Sept. 28, 2012), the Board found the following policy to be in violation of the Act:

Courtesy is the responsibility of every employee. Everyone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership.

The Board found such language unlawful “because employees would reasonably construe its broad prohibition against “disrespectful” conduct and “language which injures the image or reputation of the Dealership” as encompassing Section 7 activity, such as employees’ protected statements – whether to coworkers, managers, supervisors, or third parties who deal with Respondent – that object to their working conditions and seek the support of others in improving them.”

The Board noted first that there is nothing in the language that would suggest that lawful Section 7 activity is beyond the reach of this policy. Second, an employee reading the policy “would reasonably assume that the Respondent would regard statements of protest or criticism as “disrespectful” or “injurious to the image or reputation of the Dealership.” Ambiguous rules will be construed against the employer.

Member Hayes dissented from this decision. He accused his colleagues of expanding the reach of Section 7 and substituting its own sense of “reasonable construction” of a rule for that of an employee.

Purporting to apply an objective test of how employees would reasonably view rules in the context of their particular workplace and employment relationship, the analysis instead represents the views of the Acting General Counsel and Board members whose post hoc deconstruction of such rules turns on their own labor relations “expertise.” In other words, the test now is how the Board, not affected employees, interprets words and phrases in a challenged rule.

*   *   *   *   *   *   *   *   *

Reasonably construed and read as a whole, the rule [here] is nothing more than a common sense behavioral guideline for employees. … Nothing in this rule suggests a restriction on the content of conversations (such as a prohibition against discussion of wages); rather the rule concerns the tenor of any conversation. In short, by its “courtesy” rule the Respondent sought to promote civility and decorum in the workplace and prevent conduct that injures the dealership’s reputation — purposes that would have been patently obvious to Respondent’s employees, who depend on the dealership’s image for their livelihood.

Member Hayes also claimed that while the Board majority cited the right standard of whether employees could “reasonably” interpret a rule as prohibiting Section 7 activity, they have really construed it to mean whether the rule “arguably could” in theory
be construed as prohibiting Section 7 activity. He notes that that approach was the dissenting view in the Lutheran Heritage Village-Livonia case.

Member Hayes also rejected the assumption that “ambiguous employer rules” should always be construed against the employer. He notes that such a construct has only been utilized in solicitation rule cases- where Section 7 rights are directly involved. And he notes that many lawful policies that have been upheld by the Board in earlier cases with terms like “abusive,” “injurious,” “offensive,” or “intimidating,” might also be deemed ambiguous on their face.

The third case in this area involved the discharge of employees for engaging in Facebook postings. In Hispanics United of Buffalo, Inc., 359 NLRB No. 37 (2012), an employee (Cruz-Moore) of a social service agency repeatedly criticized the efforts of other employees, including Marianna Cole-Rivera. One day Cruz-Moore texted Cole-Rivera that she was going to go to the executive director of Hispanics United with her concerns. In response, Cole-Rivera posted on Facebook, “Lydia Cruz, a coworker feels that we don’t help our clients enough at [Hispanics United]. I about had it! My fellow coworkers how do u feel?” Four off-duty employees responded to this post and disagreed with Cruz-Moore’s alleged critique. Cruz-Moore saw and responded to these posts, presented them to the executive director, and he discharged Cole-Rivera and the other employees who responded to her post on Facebook.

The Board found that the employer violated § 8(a)(1) of the National Labor Relations Act in terminating the employees’ employment in response to the Facebook posts. The key question was whether the employee communications were for the purpose of mutual aid or protection. The majority found that the Facebook postings were “concerted [activity] for the ‘purpose of mutual aid or protection’” and were thus protected conduct under Section 7. The activity was concerted both because the employees were making “common cause” with each other and because they were taking a “first step towards taking group action to defend themselves” against the complaining employee’s accusations. The Board pointed out that the “object or goal” of initiating the group action does not have to be clearly stated for conduct to receive protection under the NLRA.

Dissenting Member Hayes argued that nothing suggested the posting employees were thinking of engaging in activity for mutual aid and protection. Hayes said that “the mere fact that the subject of discussion involved an aspect of performance – i.e. job performance – is not enough to find concerted activity for mutual aid and protection. There is a meaningful distinction between sharing a common viewpoint and joining in a common cause.”

A fourth case just recently issued in late January was Direct TV, 359 NLRB No. 54 (January 25, 2013). In this case, in a 3-0 decision (Chairman Pearce, Members Griffin and Block), the NLRB struck down various provisions of an employer’s employee handbook and two corporate policies maintained by the employer on its
intranet system. The Board said generally that the policies under review could reasonably be construed by employees as prohibiting Section 7 activity.

a. The first policy directly stated: “Do not contact the media.” The Board noted it was “settled” law that Section 7 encompasses employee communications about labor disputes with newspaper reporters.

b. The second policy statement struck down was: “Public Relations. Employees should not contact or comment to any media about the company unless pre-authorized by Public Relations.” The Board explained that any rule that requires employees to secure permission from their employer as a precondition to engaging in protected concerted activity on an employee’s free time and in non-work areas is unlawful. *Brunswick Corp.* 282 NLRB 794 (1987)

c. Also struck down: “If law enforcement wants to interview or obtain information regarding a DIRECTV employee, whether in person or by telephone/email, the employee should contact security department in El Segundo, CA who will handle contact with law enforcement agencies and any needed coordination with DIRECTV departments.” This was struck down because it could be construed to force employees to contact security before cooperating with an NLRB investigation. An employee might reasonably construe Board agents as “law enforcement.”

d. Also struck down. “Confidentiality. “…never discuss details about your job, company business or work projects with anyone outside the company and never give out information about customers or DIRECTV employees.” The rule also interpreted “company information” to include “employee records.” The Board said this would reasonably be understood to restrict discussion of their wages and working conditions. Also, the rule does not exempt protected communications with third parties such as union representatives, Board agents or other government officials.

e. On the intranet policy, the Board struck down the following: “Employees may not blog, enter chat rooms, post messages on public websites or otherwise discuss company information that is not already disclosed as a public record.” The ambiguity of the term “company information” could lead an employee to believe information about employee wages, discipline or performance records might be included. Ambiguity will be construed against the company.
c. Advice Memoranda on Social Media Policies issued by General Counsel

In addition to the cases cited, the General Counsel for the NLRB has also issued Advice Memoranda on these subjects. All these Advice Memos can be found on the Board’s web site. www.nlrb.gov

The first Memo was issued in 2011, the second in January of 2012, and the most recent was on May 30, 2012. General Counsel’s Memorandum OM 11-74, issued in August of 2011, was the first report from the General Counsel’s office on emerging issues triggered by today’s extensive use of social media and a review of fourteen cases that were decided by the General Counsel upon a request for advice from a regional director. In it, the GC discusses a variety of social media cases and how Advice ruled.

A second memo, Memorandum OM-12-31, issued on January 24, 2012, supplemented the first Memo with additional cases.

These first two Memoranda centered more on individual conduct cases. The facts were laid out and the Division of Advice indicated how it viewed the conduct, the policy under which the employee was disciplined and whether or not a violation of the Act occurred. The Division was careful to note that conduct to be protected must be concerted, and thus the individual complaints of an individual employee cannot, by themselves, rise to the level of protected concerted activity.

In the latest Advice Memo, OM-12-59, issued on May 30, 2012, the General Counsel did not address individual discipline situations but instead discussed seven different cases dealing with social media policies and particularly whether or not the policies on their face violated the Act, even if no one had yet been disciplined under them. In this Advice Memo, the General Counsel reiterated the principles of two lead NLRB cases on Section 7 rights, noted above, Lafayette Park Hotel, supra and Lutheran Heritage Village-Livonia, supra.

He also submitted that rules that are “ambiguous” as to their application and contain no limiting language or context that would clarify to employees that the rule is not meant to restrict Section 7 rights are unlawful. University Medical Center, 335 NLRB 1318 (2001) enf. denied in pertinent part, 335 F. 3d 1079 (D.C. Cir., 2003)

In contrast, rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such that they would not reasonably be construed to cover protected activity, are not unlawful.
There are many examples in this Advice Memo of unlawful conduct, but here are a few takeaways:

1. **General prohibitions about employees being prohibited from releasing or discussing “confidential” information about the employer, in the absence of any further clarification, will be deemed too broad, as employees may construe such sweeping policies as prohibiting discussion of wages and working conditions.**

Examples of illegal policy statements noted in the Advice Memo in some cases include policies that have the following provisions:

- “Don’t release confidential guest team member or company information”
- “Make sure someone needs to know [about confidential information]. Don’t share information with other team members unless they have a need to know to do their job”
- “If during the course of your work you create, receive or become aware of personal information about employer’s employees, contingent workers, customers, customers’ patients, providers, business partners or third parties, don’t disclose that information in any way via social media or other on line activities. You may disclose personal information only to those authorized to receive it in accordance with employer’s privacy policies.”

2. **Social Media policies will be treated no differently from regular work rules or employee handbook policies.** A few examples of improper policy statements include:

- “Be sure your [social media] posts are completely accurate and not misleading and that they do not reveal non-public company information on any public site.”
- “Adopt a friendly tone [on social media sites]. Don’t pick fights … Remember to communicate in a professional tone. This includes not only the obvious (no ethnic slurs, personal insults, obscenity, etc) but also proper consideration of privacy and topics that may be considered objectionable or inflammatory”
- “Employees are prohibited from posting information that could be deemed material non-public information or any information that is considered confidential or proprietary. … Employees should avoid harming the image and integrity of the company.”
- “Employees who receive unsolicited or inappropriate electronic communications from persons within or outside the employer
should contact the President or the President’s designated agent.”

■ “Think carefully about friending co-workers on external social media sites. Report any unusual or inappropriate internal social media activity.”

3. **Attempts to restrict employees from discussing their working conditions with the outside world will be deemed illegal.** Examples:

■ “Employees are permitted to express personal opinions regarding the workplace, work satisfaction or dissatisfaction, wages, hours or working conditions with other employees of the Employer through personal electronic communication, *provided* that access to such discussions is restricted to other employees of the Employer and not generally accessible to the public.”

■ “You may not engage in any of the following unless you have prior authorization: All public communication including but not limited to any contact with media and members of the press; print, broadcast and the respective electronic versions and associated web sites. Certain blogs, forums and message boards are also considered media.”

■ “Only those officially designated by the employer have the authorization to speak on behalf of the company through such media (blogs, forums, wikis, social and professional networks, virtual worlds, use-generated videos or audio)… You may not make disparaging or defamatory comments about the employer, its employees, officers, directors, vendors, customers, partners, affiliates or our, or their, products/services. Remember to use good judgment.”

4. **Statements that the policy is not intended to restrict Section 7 rights can be helpful in close cases but cannot otherwise make legitimate an unlawful policy.**

5. **The more examples of what is permissible and impermissible under the policy, the less likely the Board will find that a policy is ambiguous and construed against the employers.**

6. **Broad bans on not sharing “confidential” material will be struck down.**

7. Some policies found to be lawful and could not be reasonably construed as interfering with Section 7 rights.

■ “Use your best judgment and exercise personal responsibility. Take your responsibility to heart. Integrity, accountability, and respect are core employer values. As a company, employer
trusts- and expects – you to exercise personal responsibility whenever you participate in social media or other online activities. Remember there can be consequences to your actions in the social media work, both internally, if your actions violate company policies, and with outside entities and/or individuals. If you’re about to publish, respond or engage in something that makes you even the slightest bit uncomfortable, don’t do it.”

- “Any harassment, bullying, discrimination or retaliation that would not be permissible in the workplace is not permissible between co-workers on line, (sic) even it is done after hours, from home computers.”

- “No unauthorized postings: Users may not post anything on the Internet in the name of the employer or in a manner that could reasonably be attributed to employer without prior written authorization from the President or President’s designated agent.”

- “Unless you are specifically authorized to do so, you may not represent any opinion or statement as the policy or view of the employer or of any individual in their capacity as an employee or otherwise on behalf of employer.”

8. **Walmart policy.** Originally found to be illegal, the company re-drafted its social media policy and is now considered legal by the NLRB. The General Counsel explains why:

- The new policy provides specific examples of prohibited conduct so that, in context, employees would not reasonably read the rules to prohibit section 7 activity. For example, rule prohibits “inappropriate postings that may include discriminatory remarks, harassment and threats of violence or similar inappropriate or unlawful conduct.” Rule is lawful because “it prohibits plainly egregious conduct, such as discrimination and threats of violence, and there is no evidence that the employer has ever used the rule to discipline section 7 activity.

- The policy section on “Be respectful” is an exhortation to be respectful, fair and courteous“ in postings of comments, etc. and could be deemed overly broad. **However,** examples are given so that employees would not reasonably see the rule as prohibited Section 7 conduct.

  o For example, rule says to avoid posts that “could be viewed as malicious, obscene, threatening or intimidating.” Prohibited “harassment or bullying” would include offensive posts “that could contribute to a hostile work environment on the basis of race, sex, disability, religion or any other status protected by
law or company policy. Employer has a legitimate basis to prohibit such workplace communications and has done so without burdening protected communications about terms and conditions of employment.

- Maintaining confidentiality of employer’s trade secrets and private and confidential information is also lawful.
  - Employees have no protected right to disclose trade secrets.
  - Sufficient examples are given of confidential or private information (e.g. systems development, processes, products, technology, internal reports, etc.) so that employees would know it does not include information about working conditions.


Finally, and most recently, in another Advice Memorandum issued by the NLRB’s General Counsel’s office on February 28, 2013, it was found that Boeing Co. did not interfere with Section 7 rights by maintaining a business ethics policy that forbids workers from questioning the company's honesty, impartiality, or reputation, or causing embarrassment to the aircraft manufacturer.

Associate General Counsel Barry J. Kearney rejected a charge by Society of Professional Engineering Employees in Aerospace Local 2001 that the company's policy interferes with the right of employees to organize and engage in concerted activity for their mutual aid or protection. Kearney concluded that reasonable employees would understand that Boeing's “Ethical Business Conduct Guidelines” do not interfere with the exercise of rights guaranteed by Section 7 of the National Labor Relations Act.

Kearney explained that the code is distributed to new employees, who are required to attend a day-long training and orientation program where the company’s business ethics policies are discussed.

The code informs employees that they are expected to adhere to the “highest standards of ethical business conduct.” In addition to requiring that employees “not engage in conduct or activity that may raise questions as to the company's honesty, impartiality, reputation or otherwise cause embarrassment to the company,” the Boeing policy requires employees to pledge that they will avoid “any activity that may create a conflict of interest for me or the company,” and will “follow all restrictions on use and disclosure of information.”

Boeing’s code is followed by about 20 pages explaining business ethics policies, including Boeing policies on marketing, recruiting, hiring, insider trading, procurement integrity, antitrust compliance, and anti-bribery legislation. Boeing refers employees
seeking guidance on the ethical guidelines to an online “frequently asked questions” page which includes a statement:

“The Code of Conduct does not affect an individual's ability to exercise his/her constitutional, statutory or other protected rights.”

Kearney wrote, “We conclude that the Employer's Code of Conduct does not violate Section 8(a)(1) because employees would not reasonably construe the Code of Conduct to restrict their Section 7 rights, given the context of the policy within the Employer's detailed Ethical Guidelines.”.

Kearney added that NLRB “will not find a violation simply because a rule could conceivably be read to restrict Section 7 activity.”

While it is true, he said, that ambiguous employer rules that fail to clarify that they do not restrict the exercise of Section 7 rights are unlawful, “rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such that they could not reasonably be construed to cover protected activity, are not unlawful.”

Kearney said Boeing's restriction on “conduct or activity that may raise questions as to the [Employer's] honesty, impartiality, reputation or otherwise cause embarrassment” to the company is not facially unlawful, and he concluded that employees would not reasonably view the language as restricting Section 7 activity “when viewed within the broader framework of the Ethical Guidelines.”

Observing that the aircraft manufacturer's guidelines provided numerous examples of actions such as bribery and insider trading that would violate the quoted language but not infringe on Section 7 rights, the memorandum found that employees would understand Boeing was referring only to conduct outside the protection of Section 7.

Kearney distinguished this case from both the Costco Wholesale Corp. and Knauz BMW cases cited above.

*Cf. Costco Wholesale Corp.*, 358 NLRB No. 106, slip op. at 1-2 (September 7, 2012)(finding employer’s policy prohibiting employees from making statements “that damage the Company, defame any individual or damage a person’s reputation” to be unlawful because the rule had no “accompanying language that would tend to restrict its application” to legitimate business concerns.” *Knauz BMW*, 358 NLRB No. 164, slip op at 1 (September 28, 2012)(finding employer’s ‘courtesy rule,’ which prohibited “disrespectful” conduct and “language which injures the image or reputation” of the employer to be unlawful because nothing in the rule or elsewhere in the employee handbook “would reasonably suggest… that employee communication protected by Section 7… are excluded from the rule’s broad reach.”
Similarly, the Code’s requirements that employees “protect all company, customer and supplier assets and use them only for appropriate company-approved activities” and comply with “all restrictions on use and disclosure of information… including… all requirements for protecting [Employer] information” were found to be lawful restrictions on employees’ use of certain proprietary information.

Employees would not reasonably construe this language, in context, as restricting Section 7 activity such as discussing wages and other terms and conditions of employment with other employee or union representatives. Thus, the confidentiality language does not specifically reference and restrict information concerning employees and their jobs….Therefore, when read in context with the policy concerning “Proper Use of Company, Customer and Supplier Resources” in the Ethical Guidelines, employees would reasonably understand that the Code of Conduct reflects the Employer’s legitimate concern over employees using Employer property for impermissible business or political objects while on working time rather than for Section 7 communications.

7. Solicitation cases: off-duty employee restrictions

A frequent issue in the area of solicitation policy has to do with the degree to which an employer can restrict off-duty employees from coming back to the facility to engage in solicitation activities. The Board has issued three decisions on rules governing off-duty access over the past year and has made it more difficult for employers to carry out any restrictions on off-duty employees.

In Saint John’s Health Center, 357 NLRB No. 170 (December 30, 2011), the Board majority found unlawful a rule under which off-duty employees were generally prohibited access to most of the interior of the hospital, except the cafeteria, although the rule does make exceptions for retirement parties, baby showers and other hospital-sponsored events. In the Board’s opinion, since the rule did not uniformly prohibit access by off-duty employees seeking entry to the property for any purpose, as allegedly required by Tri-County Medical Center, 222 NLRB 1089 (1976), it was unlawful interference with employees’ Section 7 rights. Member Hayes dissented claiming that Tri-County was being improperly read and the reasonable exceptions in this case did not render the rule unlawful.

This theme was continued in Sodexo America, 358 NLRB No. 79 (July 3, 2012), where the rule on off-duty access in that case stated:

Off-duty employees are not allowed to enter or re-enter the interior of the Hospital or any other work areas outside the Hospital except to visit a patient, receive medical treatment, or to conduct hospital-related business.
1. An off-duty employee is defined as an employee who has completed his/her assigned shift.
2. Hospital-related business is defined as the pursuit of the employee’s normal duties or duties specifically directed by management.
3. Any employee who violates this policy will be subject to disciplinary action.

The Board again cited *Tri-County Medical Center, 222 NLRB 1089 (1976)* and noted that the third part of the test requires a ban on off-duty access for all purposes without exception. While the Board did concede in this case that allowing exceptions to visit patients or to receive medical care were valid (because such exceptions are unrelated to the employees’ employment and access is allowed in those cases the same as other members of the public), the Board found that the exception to allow access “to conduct hospital-related business” was an impermissible exception.

Member Hayes dissented again noting that “the end result of the majority’s holding is that a hospital cannot maintain a valid off-duty access rule if it also allows employees to engage in innocuous activities such as picking up paychecks, completing employment-related paperwork or filling out patient information. This was undoubtedly not the scenario intended by the Board in *Tri-County*.

In *J.W. Marriott*, 359 NLRB No. 8 (September 28, 2012), the Board (Pearce and Block, with Hayes dissenting), struck down another rule that dealt with access by off-duty employees.

Associates are not permitted in the interior areas of the hotel more than fifteen minutes before or after their work shift. Occasionally, circumstances may arise when you are permitted to return to interior areas of the hotel after your work shift is over or on your days off. On these occasions, you must obtain prior approval from your manager. Failure to obtain prior approval may be considered a violation of Company policy and may result in disciplinary action. This policy does not apply to parking areas or other outside nonworking areas.

The majority first cited *Saint John’s, supra* and *Sodexo America LLC, 358 NLRB No. 79 (2012)*, and indicated that similar rules were struck down in those cases because they violated the third prong of *Tri-County Medical Center, 222 NLRB 1089 (1976)*, namely, that a policy barring off-duty employees from returning to the workplace should “uniformly prohibit access to off-duty employees seeking entry to the property for any purpose.” Similarly here:

The Respondent’s rule is not a uniform prohibition of access; rather, it prohibits off-duty employee access except in certain unspecified circumstances subject to a manager’s “prior approval,” giving the Respondent broad – indeed, unlimited – discretion to “decide when and why employees may access the facility.” *Sodexo America, supra*. See *Saint John’s Health Center supra* (“In effect, the respondent is telling its employees, you may not enter the premises after your shift except when we say you can.”)
The majority did not see its decision as contravening *Tri-County* in any way. But Member Hayes interpreted the majority as re-writing the third prong of the *Tri-County* test. In dissenting here, as he did in *Sodexo* and *Saint John’s*, Hayes argues that the third prong “prohibits discrimination against union activity and does not require a blanket prohibition on all off-duty access.”

Requiring employers to prohibit all access in order to prohibit any makes it virtually impossible for an employer to draft an enforceable rule restricting off-duty employee access. For example, what if an employee forgets her medication at the workplace and faces a medical emergency if she cannot retrieve it? The Act cannot reasonably be interpreted to force employers to choose between inhuman rigidity and giving off-duty employees free rein to the interior of their facilities. Here, because union activity is treated no differently from any other group activity under the access rule, I would find these rules lawful.

8. **Employment At Will: Disclaimer violates Section 7 rights**

*American Red Cross Arizona* and *Lois Hampton*: (Case No. 28-CA-23442)

An administrative law judge held that the American Red Cross Arizona Blood Services Region maintained a prohibitively “overly-broad and discriminatory” statement regarding the at-will section of the employee handbook.

On February 1, 2012, after a hearing on a complaint issued against American Red Cross Arizona Blood Services Region by the Regional Director of NLRB Region 28, an Administrative Law Judge held that requiring an employee to agree “that the at-will employment relationship cannot be amended, modified or altered in any way” was likely to have a chilling effect on employees’ exercise of their Section 7 rights and therefore violated the National Labor Relations Act. *See NLRB v. Am. Red Cross*, Case 28-CA-23443 (NLRB Feb. 1, 2012). The ALJ acknowledged that while the phrase in question did not “mention union or protected concerted activity, or even the raising of complaints involving employees’ wages, hours and working conditions” there was nevertheless “no doubt” that “employees would reasonably construe the language to prohibit Section 7 activity.” Specifically, the ALJ adopted the position advanced by the General Counsel’s Office:

[T]he signing of the acknowledgement form is essentially a waiver in which an employee agrees that his/her at-will status cannot change, thereby relinquishing his/her right to advocate concertedly, whether represented by a union or not, to change his/her at-will status. For all practical purposes, the clause in question premises employment on an employee’s agreement not to enter into any contract, to make any efforts, or to engage in conduct that could result in union representation and in a collective-bargaining agreement, which would amend,
modify, or alter the at-will relationship. Clearly such a clause would reasonably chill employees who were interested in exercising their Section 7 rights.

Recent Advice Memos on two cases issued October 31, 2012 confirmed that the General Counsel’s Division of Advice would indeed be scrutinizing such provisions. However, in those two cases from the Division of Advice, the Associate General Counsel Barry Kearney decided that handbook language in question that established employment at will status was not violative of the Act.

In Rocha Transportation, Case 32-CA-086799, the handbook language in play stated:

Employment with Rocha Transportation is employment at will. Employment at will may be terminated with or without cause and with or without notice at any time by the employee or the Company. Nothing in this Handbook or in any document or statement shall limit the right to terminate employment at will. No manager, supervisor or employee or Rocha Transportation has any authority to enter into an agreement for employment for any specified period of time or to make an agreement for employment other than at will. Only the president of the Company has the authority to make any such agreement and then only in writing.

The Division found that the provision would not reasonably be interpreted to restrict an employee’s Section 7 right to engage in concerted attempts to change his or her employment at will status.

The provision does not require employees to refrain from seeking to change their at-will status or to agree that their at-will status cannot be changed in any way. Instead, the provision simply prohibits the Employer's own representatives from entering into employment agreements that provide for other than at-will employment. Indeed, the provision explicitly permits the Employer's president to enter into written employment agreements that modify the employment at-will relationship, and thus encompasses the possibility of a potential modification of the at-will relationship through a collective bargaining agreement that is ratified by the Company president.

… The Region should therefore dismiss, absent withdrawal, the Charging Party's allegation that the Employer's employment at-will policy violates Section 8(a)(1).

The Division distinguished the American Red Cross case on the grounds since, in that case, the employee had to recognize that the employment relationship “cannot be amended, modified or altered in any way.” The ALJ had essentially seen this language as a waiver of the employee’s rights to engage in protected activity that might lead to a collective bargaining agreement and greater protections against termination. Consequently, as a waiver, the clause was illegal.

The Associate General Counsel concluded the Memo by nothing that “because the law in this area remains unsettled, the Regions should submit to the Division of Advice
all cases involving employer handbook provisions that restrict the future modification of an employee's at-will status.”

Similarly, in *Mimi’s Café*, Case 28-CA-084365 (October 31, 2012), the following language was scrutinized and deemed lawful.

**AT-WILL EMPLOYMENT**
The relationship between you and Mimi’s Cafe is referred to as “employment at will.” This means that your employment can be terminated at any time for any reason, with or without cause, with or without notice, by you or the Company. No representative of the Company has authority to enter into any agreement contrary to the foregoing “employment at will” relationship. Nothing contained in this handbook creates an express or implied contract of employment.

In finding no violation, the Division noted that the provision does not require employees to refrain from seeking to change their at-will status or to agree that their at-will status cannot be changed in any way. Instead, the provision simply highlights the Employer's policy that its own representatives are not authorized to modify an employee's at-will status.

Moreover, the clear meaning of the provision at issue is to reinforce the Employer's unambiguously-stated purpose of its at-will policy: it explicitly states “Nothing contained in this handbook creates an express or implied contract of employment.” It is commonplace for employer to rely on policy provisions such as those at issue here as a defense against potential legal actions by employees asserting that the employee handbook creates an enforceable employment contract. Accordingly, we conclude that employees would not reasonably construe this provision to restrict their Section 7 right to select a collective-bargaining representative and bargain collectively for a contract when considered in context.

9. **Update on NLRB Posting Mandate**

*National Association of Manufacturers. v. NLRB*, 2012 WL 691535 (D.D.C., March 2, 2012). District Court for D.C. ruled that the Board had the authority to require employers to post notice of NLRA rights. But the Court struck down the unfair labor practice penalty that the Board had promulgated for not posting, only to the extent that “the Board cannot make a blanket advance determination that a failure to post will always constitute an unfair labor practice.”

Contrary result: *Chamber of Commerce v. NLRB*, 2012 WL 1245677 (D.S.C., April 13, 2012). South Carolina federal district court rules that the Board lacked statutory authority to promulgate the rule requiring all employers to post the notices informing employees of their rights under the NLRA. Both cases now pending in the D.C. Circuit and Fourth Circuit respectively.
10. Expedited election rules struck down


The Board appealed to the U.S. Court of Appeals for the District of Columbia Circuit. On February 19, that Circuit issued an order holding in abeyance the appeal concerning the December 2011 adoption of amendments to its regulations on representation case procedures (Chamber of Commerce v. NLRB, D.C. Cir., No. 12-5250, 2/19/13). The case is an NLRB appeal from a lower court decision that NLRB improperly adopted amendments to its representation case regulations based on approvals of Chairman Mark Gaston Pearce (D) and then-Member Craig Becker (D). The lower court found then-Member Brian E. Hayes (R) did not participate in an electronic voting room procedure that was used to register final approval of the regulatory change, depriving the board of a three-member quorum required for action.

The U.S. Chamber of Commerce and the Coalition for a Democratic Workplace filed a statement of supplemental authorities Jan. 29 arguing that Becker was placed on the board by a recess appointment that the business groups said would be considered unconstitutional under the D.C. Circuit's recent ruling in Noel Canning, 194 LRRM 3089 (D.C. Cir. 2013). NLRB did not respond to the filing. Even if Hayes participated in approval of the rule, the business groups argued, Becker's appointment was invalid and NLRB lacked a quorum when it changed its regulations.

In a brief order that cited “consideration of” Noel Canning, the court removed the Chamber of Commerce case from an April 4 oral argument calendar and said the case would be “held in abeyance pending further order of the court.”

11. Bargaining Impasse

In Erie Brush v. NLRB, D.C.Cir, No. 11-1337 (Nov. 27, 2012), the D.C. Circuit Court of Appeals ruled that the NLRB erred when it found a Chicago manufacturer illegally withdrew recognition from the union when the parties reached a bargaining impasse and most of the union-represented employees signed a petition to oust the union. The Court, unlike the Board, found that the company had bargained in good faith and that the parties had reached a bona fide impasse over the inclusion of a union security clause and arbitration clause.

The parties met eight times over nine months and agreed on all noneconomic terms except a union security clause that would require membership and a provision for arbitration of grievances. The union negotiator said these were “make or break” items; the company negotiator was just as adamant in opposition to the proposals. The union negotiator admitted the parties were at impasse. The company refused mediation. When the union offered to meet again, the company asked if they had a change in position on
union security or arbitration. The union negotiator said he had some “give” on arbitration but not on union security. The company negotiator said it was pointless to meet unless union security was on the table.

At that point, 18 of the 21 employees represented by the union signed a statement saying that they did not want the union to represent them anymore. The company at that point withdrew recognition.

The Board, in a 2-1 decision, found that the company committed an unfair labor practice by bargaining illegally and withdrawing recognition.

The Court, observing that impasse had been reached over a single issue, noted that a party claiming the existence of an impasse based on a single issue “must show that: first, a good faith bargaining impasse actually existed; second, the single issue involved was critical; and third, the impasse on this critical issue led to a breakdown in the overall negotiations.” (citing CalMat Co., 331 NLRB 1084 (2000)). Here, neither side proposed any compromises whatsoever on either arbitration or union security for 10 months of bargaining.

All record evidence supports the proposition that the parties’ diametrically opposed positions on union security “presented…. an insurmountable obstacle to an agreement.” Richmond Electrical Services, 348 NLRB 1001, 1003 (2006). Because ‘the parties’ failure to agree on this issue destroyed any opportunity for reaching a … collective bargaining agreement.’ CalMat at 109, the impasse on union security led to a breakdown in overall negotiations. Therefore, the record evidence clearly demonstrates that Erie met its burden of showing that the parties were at an impasse on the critical issue of union security on March 31, 2006.

While the union asked for mediation, the Court said that a vague request for meetings will not break an impasse where the other party has clearly stated a final position. Further, there was never an indication that the union had softened its stance on union security.

12. Union dues checkoff survives contract expiration

In WKYC-TV, 359 NLRB No. 30 (December 12, 2012), the NLRB overturned 50 years of precedent by ruling that an employer’s obligation to check off union dues continues after the expiration of a collective bargaining agreement. In a 3-1 decision, the Board reversed Bethlehem Steel, 136 NLRB 1500 (1962) which established that an employer had no obligation to continue a dues-check off provision after the contract expired. This had been basic labor law for half a century.

In reversing this long-standing precedent, the Board majority (Pearce, Griffin and Block) found that the 1962 Board had no rational basis for ever saying that the provision should expire and that instead the dues check off clause, like any other term and
condition of employment, should continue as part of the status quo, even if the agreement itself has expired.

The Board began by noting that “it has long been established that an employer violates Section 8 (a) (5) when it unilaterally changes represented employees’ wages, hours and other terms and conditions of employment without providing their bargaining representative prior notice and a meaningful opportunity to bargain about the changes. NLRB v. Katz, 369 U.S. 736, 742 (1962).

Under this rule, an employer’s obligation to refrain from unilaterally changing these mandatory subjects of bargaining applies both where a union is newly certified and the parties have yet to reach an initial agreement, as in Katz, and where the parties’ existing agreement has expired and negotiations have yet to result in a subsequent agreement… Litton Financial Printing Division v. NLRB, 501 U.S. 190, 198 (1991).

The Board then stated:

An employer’s decision to unilaterally cease honoring a dues-checkoff arrangement established in an expired collective bargaining agreement plainly contravenes these salutatory principles. Under settled Board law, widely accepted by reviewing courts, dues checkoff is a matter relating to wages, hours and other terms and conditions of employment within the meaning of the Act and is therefore a mandatory subject of bargaining…. The status quo rule, then, should apply to dues checkoff, unless there is some cogent reason for an exception. We see no such reason.

It is true, the Board acknowledged, that some contract clauses do indeed expire with the contract. Thus, no-strike, arbitration, union security, management rights clauses do not survive the expiration of a collective bargaining agreement, even though they are mandatory subjects of bargaining.

In agreeing to each of these arrangements, however, the parties have waived rights that they otherwise would enjoy in the interest of concluding an agreement, and such waivers are presumed not to survive the contract.

The rationale behind these narrowly drawn exceptions to Katz does not apply to dues checkoff. Unlike no-strike, arbitration and management rights clauses, a dues-checkoff arrangement does not involve contractual surrender of any statutory or nonstatutory right. Rather, it is simply a matter of administrative convenience to a union and employees whereby an employer agrees that it will establish a system where employees may, if they choose, pay their union dues through automatic payroll deduction.
The Board then rejected an argument that section 302(c) of the Act pertained, whereby employers are prohibited from making payments to unions, with the exception of certain payments, including dues checkoff, as long as the employer had received a written authorization which shall not be irrevocable for a period of more than one year or beyond the termination date of the applicable collective bargaining agreement, whichever occurs sooner. This language does not, in the Board’s view, require that dues checkoff end with the contract. It only has to do with the employee’s individual right to revoke such authorization, not the employer’s right to end it.

In addressing the Bethlehem Steel decision itself, the Board explained that the decision in that case made it clear that union-security clauses do not survive the expiration of a contract, and that was appropriate, but that the prior Board erred by then ruling that dues checkoff was so inextricably bound up with union security that it, too, had to expire with the end of the collective bargaining agreement.

The Board apparently reasoned that because the checkoff provision in the contract “implemented” the union-security provisions, the proviso to Section 8(a)(3) dictated that dues checkoff, as well as union security, expired upon contract termination. If so, the Board’s finding is a non sequitur. Although the contracts in Bethlehem Steel contained both union-security and dues-checkoff provisions, that is by no means true of all, or even nearly all, collective bargaining agreements. Parties have the option of negotiating either without the other; they may agree to union security, but not dues checkoff, and vice versa.

The best example of this, the Board explained, was in right-to-work states where contracts cannot have union-security clauses but often have dues-check off provisions.

The Board also stressed that dues checkoff, unlike union-security clauses, is a voluntary matter. An employee does not have to have his or her dues checked off; the employee has the right to select or reject dues checkoff as the method by which to pay union dues.

Finally, the Board opined that if dues checkoff ends with the contract, then “presumably it would be as unlawful for an employer, postcontract expiration, to continue to honor a dues checkoff arrangement as it would be to continue to honor a union-security arrangement.” But, they underlined, no cases since Bethlehem have so held, and indeed the Board has held quite the contrary and allowed employers to continue dues checkoff if they so desired without running afoul of the Act.

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4 The rationale for the expiration of union security clauses with the expiration of the contract can be found in Section 8(a)(3), which states that even though an employer cannot discriminate against employees because they refrain from union activity (as well as support it), “nothing in this Act.. shall preclude an employer from making an agreement with a labor organization.. to require as a condition of employment membership therein.” The Board has interpreted this language to mean that the maintenance of union membership as a condition of employment can only be required under a contract that comports to the proviso. Once the contract expires, once no agreement is in place, then the employees should be free to refrain from union membership and not be penalized with loss of employment.
Lastly, the Board did not apply the new rule retroactively, but only prospectively, given the fact that Bethlehem Steel has been good law for 50 years and employers should have been able to reasonably rely upon it.

In dissent, Member Hayes tries to link the existence of a dues checkoff provision with the existence of a union security provision. Both should stand or fall together, and he cites various federal circuit court decisions to support that view. The Board has long understood that a union security clause operates as “a powerful inducement for employees to authorize dues checkoff, and that it is unreasonable to think that employees would generally wish to continue having dues deducted from their pay once their employment no longer depends on it.”

Further, he notes that the elaborate language that sometimes accompanies employees’ rights to revocation can be confusing and employees may not understand their limited ability to revoke, whereas the expiration of the contract is a clean line under which the obligation ceases. Employees need to be protected in their rights to refrain, as well as engage in, union activity and support.

Member Hayes also argues that dues checkoff should be in that special grouping of clauses that are not part of the status quo and must be seen in the context of economic power of the parties and not just whether or not a particular statutory right is being waived. In the end, he contends that the majority’s decision to upset 50 years of settled law was based on another agenda.

My colleagues know well that an employer’s ability to cease dues checkoff upon contract expiration has long been recognized as a legitimate economic weapon in bargaining for a successor agreement. The ability of parties to wield such weapons is an integral part of the system of collective bargaining that the Wagner Act and the Taft-Hartley Act envisioned for the peaceful resolution of industrial disputes. To strip employers of that opportunity would significantly alter the playing field that labor and management have come to know and rely on. Indeed, even in times of union boycott and other economic actions in opposition to an employer’s legitimate bargaining position, the employer will be forced to act as the collection agent for dues to finance this opposition. This is the unspoken object of today’s decision, and it contravenes the well-established doctrine that the Board may not function “as an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands.”

13. Duty to bargain with union over disciplinary actions prior to first contract

In Alan Ritchey Inc., 359 NLRB No. 40 (December 14, 2012), the NLRB ruled that an employer must bargain with a union before imposing disciplinary action on a unit employee after the union has been certified but before a first contract has been negotiated. A Board panel of Chairman Pearce and Members Griffin and Block ruled that, like other terms and conditions of employment, discretionary discipline is a
mandatory subject of bargaining and employers cannot impose certain types of discipline unilaterally.

The Board first explained that once a union is chosen as the representative of employees, an employer cannot continue to act unilaterally with respect to terms and conditions of employment, even where it had previously done so routinely or at regularly scheduled intervals. However, the Board notes that it

...has never clearly and adequately explained whether (and to what extent) this established doctrine applies to the unilateral discipline of individual employees. We now conclude that it does, and that an employer must provide its employees’ bargaining representatives notice and the opportunity to bargain with it in good faith before exercising its discretion to impose certain discipline on individual employees.

In the particular case before the Board, the employer imposed the discipline at issue for absenteeism, insubordination, threatening behavior and the failure to meet efficiency standards. Sanction ranged from formal warning to discharge and was imposed pursuant to a five step progressive disciplinary system. For the period in question, many employees were disciplined for one or more offenses with varying degrees of discipline. In all cases, company witnesses testified that some discretion was involved as to what discipline was imposed. The General Counsel for the Board argues that each act of discipline was a unilateral change because it did not represent an automatic execution of established policy (e.g. a standard wage increase on the anniversary of an employee’s employment.)

In analyzing whether bargaining was required in each case, the Board first noted that, to be bargainable, a unilateral change must have a “material, substantial and significant impact on the employees’ terms and conditions of employment.” Toledo Blade Co., 343 NLRB 385 (2004).

Disciplinary actions such as suspension, demotion and discharge plainly have an inevitable and immediate impact on employees’ tenure, status or earnings. Requiring bargaining before these sanctions are imposed is appropriate because of this impact on the employees and because of the harm caused to the union’s effectiveness as the employees’ representatives if bargaining is postponed.

On the other hand, lesser forms of discipline – like oral and written warnings – have less impact on employees, and, the Board held, “bargaining over these lesser sanctions – which is required insofar as they have a ‘material, substantial and significant impact’ on terms and conditions of employment – may properly be deferred until after they are imposed.”

The Board summarized its basic conclusions as follows:
Accordingly, where an employer’s disciplinary system is fixed as to the broad standards for determining whether a violation has occurred, but discretionary as to whether or what type of discipline will be imposed in particular circumstances, we hold that an employer must maintain the fixed aspects of the disciplinary system and bargain with the union over the discretionary aspects (if any), e.g. whether to impose discipline in individual cases, and, if so, the type of discipline to impose. The duty to bargain is triggered before the suspension, demotion, discharge or analogous sanction is imposed, but after the imposition for less sanctions, such as oral or written warnings.

While this seems clear in concept upon first reading, the Board’s remaining explanations are anything but clear when trying to explain what the nature of that pre-imposition bargaining will look like:

At this stage, the employer need not bargain to agreement or impasse, if it does so afterward. In exigent circumstances, as defined, the employer may act immediately, provided that, promptly thereafter, it provides the union with notice and an opportunity to bargain about the disciplinary decision and its effects. Finally, if the employer has properly implemented its disciplinary decision without first reaching agreement or impasse, the employer must bargain with the union to agreement or impasse after imposing discipline.

In elaborating on what this means, the Board explained that this duty would involve “sufficient advance notice to the union to provide for “meaningful discussion concerning the grounds for the form of discipline chosen, to the extent that this choice involved an exercise of discretion.”

It will also entail providing the union with relevant information, if a timely request is made, under the Board’s established approach to information requests….. The aim is to enable the union to effectively represent employees by providing exculpatory or mitigating information to the employer, pointing out disparate treatment, or suggesting alternative courses of action. But the employer is not required to bargain to agreement or impasse at this stage; rather, if the parties have not reached agreement, the duty to bargain continues after the imposition of the discipline.

Moreover, the Board said there will be some “exigent circumstances” where the employer has “a reasonable, good faith belief that an employee’s continued presence on the job presents a serious, imminent danger to the employer’s business or personnel and in these cases, no pre-imposition bargaining need occur.

Finally, the Board said that the employer “need not await an overall impasse in bargaining before imposing discipline so long as it exercises its discretion within existing standards.”
After fulfilling its pre-imposition duties as described above, the employer may act, but must continue to bargain concerning its action, including the possibility of rescinding it, until reaching agreement or impasse.

Among its other reasoning, the Board stated that bargaining over such decisions make sense because “to hold otherwise and permit employers to exercise unilateral discretion over discipline after employees select a representative … would render the union that purportedly represents the employees impotent.”

14. Duty to disclose witness statements to union

In Stephens Media d/b/a Hawaii Tribune-Herald, 359 NLRB No. 39 (December 14, 2012), the Board ruled that a newspaper company that fired a union steward for alleged insubordination had an obligation to turn over to union representatives a witness statement by the steward’s co-worker that described the confrontation they had had. In this case, the Board noted that the employee involved had indeed reviewed her statement—had been written up by a company official – and signed it. However, she had not been given any assurances that the statement would remain confidential. As a result, the Board said the document was not a witness statement entitled to be kept from disclosure.

In addition, the Board found that the document was not protected from disclosure because it was a document prepared in anticipation of litigation. While the Board did agree that the work-product privilege applies to documents that are specifically created in anticipation of litigation, that privilege does not apply to documents produced in routine investigations.

…the work-product privilege does not apply to documents produced pursuant to routine investigations conducted in the ordinary course of business, as it is limited to those documents specifically created in anticipation of foreseeable litigation.

In this case, management did meet with the witness “on advice of counsel” and the manager’s handwritten note on the document states that it was “prepared at the advice of counsel in preparation for arbitration.” However, that was insufficient to create a privilege.

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While this case seemed significant when issued, it was dwarfed by the Board’s subsequent decision in American Baptist Homes of the West d/b/a Piedmont Gardens, 359 NLRB No. 46 (December 21, 2012). In Piedmont, the Board officially overruled Anheuser-Busch, Inc., 237 NLRB 982 (1978) and stated that unions were not to be automatically denied access to witness statements obtained by the employer but instead the Board would utilize a “balancing test” in assessing union requests for the names and statements of witnesses interviewed during a company investigation.
In this case, a charge nurse (Berg) had seen a certified nursing assistant (Bariuad) sleeping while on duty. The HR director told the charge nurse to prepare a written statement and further told her that her statement would be confidential. Meanwhile, another charge nurse (Hutton) saw the same CNA sleeping, wrote up the incident and slipped it under the HR Director’s door. She later clarified the statement at the request of the HR Director.

In investigating the case, the HR Director asked another CNA who was on duty with the employee under investigation to write up a statement as to how often she had seen him sleeping while on duty. She did so. After reviewing all the statements, the HR Director fired the employee. The union asked for “any and all statements that were used as part of your investigation.” The request was denied, citing Anheuser-Busch.

In 1978, the Board, in Anheuser-Busch, Inc., supra had held that an employer did not have to turn over to the union “witness statements” obtained during investigations into allegations of misconduct. But here in the Piedmont case, the Board majority (Pearce, Griffin and Block) found that “the rationale of Anheuser-Busch is flawed.” The Board majority noted that unions are entitled to “relevant information necessary to the union’s proper performance of its duties… including information that the union needs to determine whether or not to take a grievance to arbitration.” However, if an employer asserts that the relevant information is ‘confidential,’ then the Board balances the union’s need for the information against any legitimate and substantial confidentiality interests established by the employer. Detroit Edison Co. v. NLRB, 440 U.S.301 (1979).

In Anheuser-Busch, the Board then had decided that “witness statements are fundamentally different from the type of information contemplated in Acme and disclosure of witness statements involves critical considerations that do not apply to requests for other types of information.” The current Board, however, rejected this premise.

We are not persuaded that there is some fundamental difference between witness statements and other types of information that justifies a blanket rule exempting such statements from disclosure.

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We find no basis to assume that all witness statements, no matter the circumstances, warrant exemption from disclosure. Rather we find it more appropriate to apply the same flexible approach that we apply in cases involving witness names. That test requires that if the requested information is determined to be relevant, the party asserting the confidentiality defense has the burden of proving that a legitimate and substantial confidentiality interest exists, and that it outweighs the requesting party’s need for the information. See Detroit Edison, 440 U.S. 301, 318-320 (1979); Jacksonville Area Association for Retarded Children, 316 NLRB 338, 340 (1995). The Board considers whether the information withheld is sensitive or confidential based on the specific facts of
each case. See Northern Indiana Public Service Co., 347 NLRB 210, 211 (2006). As stated above, the party asserting the confidentiality defense may not simply refuse to furnish the requested information but must raise its confidentiality concerns in a timely manner and seek an accommodation from the other party. Detroit Newspaper Agency, 317 NLRB 1071, 1072 (1995)

Member Hayes (whose term ended in December) dissented from the opinion, finding no rationale for upsetting a 34 year precedent. He noted that withholding witness statements from unions would not and had not hindered a union’s ability to investigate grievances or prepare for arbitration. Unions are free to obtain summaries of such statements without the statements themselves.

The bright rule of Anheuser-Busch has for over 30 years supported employer efforts to assure employee participation in the employer’s investigatory process, protected participating witnesses from intimidation, retaliation or harassment by the union or coworker, enabled employers to effectively conduct investigations of workplace misconduct and facilitated the quick resolution of misconduct in private collectively bargaining grievance-arbitration systems.

15. Unions may in some cases charge dues objectors fees for lobbying activities

In United Nurses & Allied Professionals (Kent Hospital), 359 NLRB No. 42 (December 14, 2012), the Board ruled that a union may charge non-member dues objectors an amount for union lobbying expenses that “are germane to collective bargaining, contract administration or grievance adjustment.” Such an analysis will be done on a case by case basis to see whether the particular lobbying activity for which the non-member is being charged is germane or not. The Board allowed interested parties to file amicus briefs on the question of “germaneness.”

In analyzing this case, the Board declined to hold that no lobbying expenses of private sector unions can ever be charged to dues objectors. Instead, the Board noted that certain lobbying and legislative proposals often involve “core employee concerns such as wages, hours and working conditions which all clearly raise issues that related to a union’s most essential representative functions.” The Board distinguished this case from the Supreme Court’s decision in Lehnert v. Ferris Faculty Association, 500 U.S. 507 (1991) where it appeared the Court limited appropriate lobbying expense charges in the public sector to those activities designed to secure “implementation or ratification of a collective bargaining agreement.” The Board said, however, that the high court was concerned about First Amendment issues in that case, which do not pertain to the private sector.

The Board also said that lobbying expenses may be charged in some settings even if the unit employees would not benefit from the legislation. In this case, for example, some of the lobbying activities were for the passage of Vermont legislation, even though the
unit was based in Rhode Island. To rationalize this, the Board observed that the “pooling”
approach of some unions meant that other unions in other states might someday send
money to support Rhode Island initiatives.

In sum… we hold today that (1) lobbying expenses may be charged to objectors,
but only if they are germane to the union’s role in collective bargaining, contract
administration or grievance adjustment, and (2) extra-unit lobbying expenses may
be charged only if they were incurred for services that are otherwise chargeable and
that may ultimately inure to the benefit of employees in the objector’s bargaining
unit because of the union’s participation in expense-pooling arrangement. This
latter requirement can be established by showing that the lobbying charge is
reciprocal in nature.

Some examples given of “presumptively germane” lobbying activities offered by the
Board would include:

■ Lobbying for or against minimum wage legislation
■ Professional licensing requirements
■ State supplements to WARN Act

On the other hand, something like lobbying for general economic stimulus or for
environmental policies might be difficult to view as germane.

16. Other Cases of Interest

a. D.R. Horton and class action arbitrations

In D.R. Horton, Inc., 357 NLRB 184 (January 6, 2012), the question presented
was whether an employer violates Section 8(a)(1) of the National Labor Relations Act by
requiring its employees as a condition of employment to agree to submit all employment
disputes to arbitration on an individual basis rather than proceeding before a judicial
forum and precluded employees from engaging in class or collective action. The NLRB
held that an employer may not require its employees to agree to arbitrate on an individual
basis without violating Section 8(a)(1) of the NLRA and that such agreements
impermissibly restrict employees’ rights under Section 7 of the Act to engage in
“concerted action for mutual aid or protection.”

The case is currently on appeal to the Fifth Circuit. (D.R. Horton v. NLRB, Case No. 12-
60031)

b. Duplicative Proceedings clause struck down by Oregon court
In *Portland State University, AAUP Chapter v. Portland State University*, 116 FEP Cases 1087 (November 27, 2012), the Oregon Supreme Court ruled that a collective bargaining clause that allows the employer to halt the grievance process if the employee files a discrimination charge with the agencies violated Title VII and state law anti-retaliation provisions. The clause in question read:

**Resort to Other Procedures.** If, prior to seeking resolution of a dispute by presenting a grievance hereunder, or while the grievance proceeding is in progress, a member seeks resolution of the matter through any agency outside the University, whether administrative or judicial, the University shall have no obligations to entertain or proceed further with the matter pursuant to this grievance procedure or pursuant to Division C (Arbitration) of this Article.

When a faculty member pursued both a grievance and a discrimination charge following her non-renewal, and the University refused to process the grievance, the Union filed an unfair labor practice charge with the state ERB claiming that the University violated the contract by not following the grievance procedure.

The ERB was persuaded by federal court decisions that held that an employer engages in unlawful discrimination against a bargaining unit member if it denies that member access to a contractual grievance procedure solely because she made a complaint to the EEOC. See *EEOC v. Board of Governors*, 957 F.2d 424 (7th Cir.), cert denied, 506 U.S. 906 (1992). Also, *Wedding v. University of Toledo*, 884 F. Supp. 253 (ND Ohio, 1995); *Johnson v. Parma*, 931 F. 2d 203 (2nd Cir., 1991); *Fasold v. Justice*, 409 F. 3d 178 (3rd Cir., 2005).

c. **Improving employee-employer communications as objectionable election conduct**

*Newburg Eggs, Inc*, 357 NLRB No. 171 (December 31, 2011). During the pre-election period, the employer announced it had hired a bilingual HR manager. The President, in announcing it, first identified the lack of communication as a problem for employees and then presented the hiring as a solution to the problem by conveying that it would enhance the employees’ ability to communicate with managers and thereby improve their working conditions. The Board said this was an announcement of “improved working conditions” and was a violation of Section 8(a)(1), citing *Parts Depot, Inc.*, 332 NLRB 670, 672 (2000)(adopting the judge’s finding that employer violated Section 8(a)(1) by asking employee whether terminating the warehouse manager would “stop” the union, as it constituted an unlawful offer to improve working conditions.)

On the other hand, certain statements by management officials were not unlawful, including a statement by the President to “give me one more chance… everybody should vote no to make sure they don’t come again.” The Board said that this was not an implied promise of benefits, citing *Noah’s New York Bagels*, 324 NLRB 266, 267.
Chairman Pearce dissented from this finding, claiming that it was an implied promise of benefits.

The Board also did not find unlawful a speech by the company’s labor relations manager in which he said the following concerning collective bargaining:

The operation remains in the hands of the company. No outside organization can impact that operation if I am owner of this operation, and an organization comes in, my only obligations is to try and reach an agreement but if I want to make changes in my operation, change departments, change different things in the schedule, they are changes in production, in operations – they are the company’s. No organization has the right to change this or tell the company they have to change this or do that.

No one says how to manage the company; it is always the owner. Don’t forget that negotiating is asking for something. It is all asking; so this is coming here and asking the company, and the company always has the right to say yes or no.

The majority did not find that such a speech expressed the futility of collective bargaining. Rather, the manager was conveying descriptions of “some of the parameters of good faith bargaining. Thus, Rosado correctly pointed out to employees that there are operational matters that fall outside the scope of an employer’s duty to bargain.” Member Pearce, again, would have found the speech objectionable and a threat that the employees would not gain anything from collective bargaining.

d. Data requests by unions


In this case, the Board held that a transportation company violated its duty to bargain with the union when it failed to give the union a timely response to a request for information. The Board ultimately found the request data irrelevant to the union's representation of employees, but Chairman Pearce and Member Block explained that the union requested information about union-represented drivers that was presumptively relevant, but the company waited more than four months before it responded that the information was irrelevant and declined to produce it. Ultimately, as noted, the requested data was indeed found to be irrelevant, but the Board said the Act “requires a timely response even when an employer may have a justification for not actually providing requested information.”

As explained, the duty to provide information is a component of the broader duty to bargain in good faith under Section 8(a)(5) of the Act. The issue in this case must be decided in that context. The question here is not whether the Respondent had a duty to provide the information sought by the Union, but rather whether it had a duty to respond to the Union’s request in a timely way. Board precedent, cited above, requires a timely response even when an employer
may have a justification for not actually providing requested information. Our colleague would distinguish those cases on the ground that they involved requests for relevant information. But where, as here, the information sought is presumptively relevant, that distinction is immaterial.

Member Hayes dissented. Arguing that “requested information is either legally relevant to a union's representative duties, or it is not,” Hayes said the majority's ruling would give unions latitude to “hector employers with information requests for tactical purposes that obstruct, rather than further, good-faith bargaining relationships.”

e. Protected Activity; Clash with Title VII interests

_Fresenius USA Manufacturing Inc._, 358 NLRB No. 138 (September 19, 2012)

This case involved the activity of a pro-union employee during a decertification campaign; the activity was deemed lawful and not subject to discipline. In this setting, there were twelve employees in the bargaining unit, seven male, five female. The employee in question left leaflets in the lunch room, with a handwritten anonymous comment on three of them that read:

“Dear Pussies, Please Read”
“Hey cat food lovers, how’s your income doing?”
“Warehouse workers, RIP.”

The female workers complained that these comments were “vulgar, offensive and threatening.” Management investigated, pursuant to its sexual harassment policy. Due to similarities of penmanship between the writings on the leaflets and other work documents, management called in Dale Grosso as part of the investigation. He did not admit writing the comments.

The next day, however, Grosso attempted to call the union representative, but unwittingly called the Company Vice President. Mistakenly thinking he was speaking with a union representative, Grosso admitted to writing the statement on the union newsletters. The VP then identified himself and informed Grosso that he and other managers had heard his confession. Grosso then unsuccessfully tried to deny his identity. The VP suspended him on the spot, pending investigation. After further review the next day, the company fired him for the leaflet comments as well as his dishonesty during the investigation. He filed charges.

Board found that the company did not violate Section 8(a) (1) of the Act by investigating the matter and questioning Grosso, as it may be appropriate for an employer to question employees about facially valid claims of harassment and threats, even if that conduct took place during the employee’s exercise of Section 7 rights.
However, the Board found that the discharge itself violated the Act. First, it found that Grosso was engaged in Section 7 activity in making comments on the leaflets and, second, that his comments were not so egregious to cause him to lose the protection of the Act, using the factors in *Atlantic Steel*, 245 NLRB 814 (1979), where the Board stated that an employee engaged in concerted activity may nonetheless lose the protection of the Act due to opprobrious conduct. The factors involved in making this analysis are: 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 the employer’s unfair labor practice.

In finding that the conduct was protected, the Board noted that 1) the location of his comments “generally favor continued protection” because it was in the lunch room, a non-work area; 2) the subject matter of the comments was clearly protected activity and thus weighs in his favor; 3) the nature of the outburst was impulsive and vulgar, but not so bad as to lose protection.

Grosso’s use of the term “pussy” did not weigh against continued protection. In addition to serving as a crude anatomical reference, the term is also commonly employed to refer to a weak or ineffectual person – someone who is not a “man.” That clearly was the sense in which Grosso used the term in his attempt to encourage all warehouse employees to “man up” and support the Union.

Moreover, there was evidence of profane language being used before in this particular workplace; nor was his use of the term “RIP” considered threatening. For such reasons, Grosso’s conduct remained protected.

On the issue of his lying during the investigation, the Board also found no basis for termination, noting:

Fresenius’ questioning of Grosso put him in the position of having to reveal his protected activity, which Board precedent holds an employee may not be required to do where, as here, the inquiry is unrelated to the employee’s job performance or the employer’s ability to operate his business. See *Tradewaste Incineration*, 336 NLRB 902, 907 (2001). As a result, although Fresenius has a legitimate interest in questioning Grosso and lawfully did so, Grosso had a Section 7 right not to respond truthfully. We therefore find that Grosso’s refusal to admit responsibility for the comments cannot serve as a lawful basis for imposing discipline. (emphasis added)

Member Hayes dissents, noting:

I specifically dispute [his colleagues] implication that greater latitude must be accorded to misconduct occurring in the course of organizational activity than for other Section 7 activity, that profanity in the course of labor relations is the presumptive and permissible norm in any workplace, that remarks by one employee to another which would be unprotected on the shop floor should be
protected if made in the break room, that comments which coworkers reasonably view as harassing and sexually insulting are not disruptive of productivity, and that threatening speech alone cannot warrant loss of statutory protection. My colleagues impermissibly fetter the ability of employers to comply with the requirements of other labor laws and to maintain civility and order in their workplace by maintaining and enforcing rules nondiscriminatorily prohibiting abusive and profane language, sexual harassment and verbal, mental and physical abuse.

Finally, Member Hayes takes direct issue with the majority excusing Grosso from the requirement of telling the truth during the investigation.

I find that sexual harassment by an employee in the workplace is clearly related to an employee’s job performance and an employer’s ability to operate its business within the requirements of Federal law.

Reiterating Hayes’ previously indicated comments, he noted:

My colleagues impermissibly fetter the ability of employers to comply with the requirements of other labor laws and to maintain civility and order in their workplace by maintaining and enforcing rules nondiscriminatorily prohibiting abusive and profane language, sexual harassment and verbal, mental and physical abuse.