THEODORE ROOSEVELT
AMERICAN INN OF COURT

December 14, 2015 – 5:30 p.m. to 8:30 p.m.

Nassau County Bar Association

PRESENTED BY:

Gregory S. Lisi, Esq.
Paul F. Millus, Esq.
Scott Druker, Esq.
Alexander Leong, Esq.

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AGENDA

1. Opening Remarks – 5 minutes
2. Overview of the NLRB – 20 minutes
3. Gameshow and Case Discussion -75 minutes

COUNSELORS AT LAW
Forchelli, Curto, Deegan, Schwartz, Mineo & Terrana, LLP
FORCHELLILAW.COM

ATTORNEY PROFILES
PARTNERS

Gregory S. Lisi, Esq.
glisi@forchellilaw.com
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Gregory S. Lisi (Georgetown University Law Center, Washington, District of Columbia, J.D., 1992) is Head of the Firm's Employment and Labor Department concentrating in the areas of labor and employment law, sexual harassment and discrimination law, overtime and wage law, immigration and naturalization law, corporate law, commercial transaction law and real estate law. He has represented Plaintiffs, Defendants, publicly traded and private companies, the United States Government and New York State government entities.

Mr. Lisi was a contributing author to the treatise, Sex Discrimination and Sexual Harassment in the Work Place, Solotoff and Kramer, Law Journal Press, and authored a note published in the Georgetown Immigration Law Journal entitled, Intracircuit Nonacquiescence by the INS, 5 G.I.L.J. 325 (1991). Further, Mr. Lisi has lectured extensively on Labor and Employment, Sexual Harassment, Discrimination, Wage and Hour, Equal Employment Law, Immigration and Federal Litigation topics.

Mr. Lisi is currently on the Board of Directors of the Nassau County Bar Association and is the past Chair of the Nassau County Bar Association's Labor and Employment Law Committee. He is a former Regional Counsel of the United States Customs Service where he defended the United States Government before the Equal Employment Opportunity Commission as well as in labor/union matters. He is currently a member of the New York State Bar, Washington, D.C. Bar, New York State Bar Association, National Employment Lawyers Association, New York State Bar Association's Labor and Employment Law Committee, Nassau County Bar Association's Labor and Employment Law Committee and Immigration Committee, and the Anti-Defamation League's Civil Rights Committee.

Mr. Lisi is admitted to practice law before the courts of New York State and Washington, D.C., the United State Court of Appeals for the Second Circuit, and the federal courts of the Eastern and Southern Districts of the State of New York. Mr. Lisi has further practiced before the National Labor Relations Board, the Equal Employment Opportunity Commission, New York State and Nassau County Divisions of Human Rights, the New York City Commission on Human Rights, the Immigration and Naturalization Service, labor and corporate arbitrations and mediations and the Courts of New York City, Nassau, Suffolk and Westchester Counties.

Mr. Lisi received his Bachelors, *Magna Cum Laude*, from the State University of New York at Buffalo.

Practice Areas: Employment & Labor Group, Real Estate, Litigation

« Back to Partner Index

Related Information

October 21, 2015
Partners Gregory S. Lisi and Peter B. Skelos Presents at the Hofstra University Department of Professional Development

February 9, 2015
Gregory S. Lisi, Head of the Firm's Employment & Labor Practice on 90.3 FM Discussing Labor Law Issues

November 17, 2014
Partners Gregory S. Lisi and Keith J. Frank Present a CLE to the Firm's Long Island General Counsel Network

June 3, 2014
Nassau County Bar Association Names Head of the Firm's Employment & Labor Practice Gregory S. Lisi to Board

March 1, 2014
Touro College Jacob D. Fuchsberg Law Center Honors Head of the Firm's Employment & Labor Practice Gregory S. Lisi As Pro Bono Attorney of the Year

March 13, 2013
Nassau Bar Association Names Head of the Firm's Employment & Labor Practice Greg Lisi Pro Bono Attorney of the Month for March 2013

September 20, 2012
Forchelli, Curto, Deegan, Schwartz, Mineo & Terrana LLP Congratulates 9 Partners Who Have Been Chosen by their Peers as 2012 New York Super Lawyers®

February 24th, 2012
Partner Gregory S. Lisi

Named a 2012, "Who's Who in Labor Law," by *Long Island Business News*

November 3, 2011
Gregory S. Lisi Profiled in *Long Island Business News Newsmakers* Section

October 17, 2011
Gregory S. Lisi Joins Forchelli, Curto, Deegan, Schwartz, Mineo & Terrana LLP as Head of the Employment & Labor Practice

The OMNI • 333 Earle Ovington Blvd. • Suite 1010 • Uniondale, New York 11553
Phone: 516-248-1700 • Fax: 516-248-1729
Email: info@forchellilaw.com

Paul F. Millus

Member of the Firm

990 Stewart Avenue
Garden City, New York 11530
(516) 592-5707
pmillus@msek.com

Practice Areas

Litigation and Dispute Resolution

Employment Law

Education

Creighton University School of Law
J.D., 1986

Creighton University
B.A., 1983

Fordham University

Memberships

Nassau County Bar Association (NCBA) Federal Courts Committee, Former Chair

NCBA Labor Employment Committee

Eastern District Association of former Assistant and Special Assistant U.S. Attorneys

American Inns of Court Executive Board, Theodore Roosevelt Chapter, President

Jacob D. Fuchsberg Touro Law Center

Admissions

New York State

New Jersey

U.S. District Court, Southern and Eastern Districts of New York

U.S. District Court of New Jersey

U.S. District Court of Minnesota

U.S. Court of Appeals, Second, Third, and Eighth Circuits

Paul Millus is a Member to Meyer, Suozzi, English & Klein, P.C. and practices in the Litigation and Employment Law Departments located in both Meyer Suozzi's Garden City, Long Island and New York City Office. Mr. Millus has been involved in all aspects of state and federal litigation throughout his legal career handling a variety of litigated matters from inception, motion practice, trial and appeals. Mr. Millus has tried both jury and non-jury matters dealing with a wide range of issues from civil rights, commercial, constitutional, real estate, employment, tort and Surrogate's Court matters. If the matter needs to be tried before a judge or a jury in state or federal court, Mr. Millus stands ready to do so in almost any area of the law. Mr. Millus regularly provides advice to employers and employees concerning their rights and obligations in the workplace including consultation on employee handbooks, HR training, discrimination policies, FMLA, FLSA, employment contracts, wage and hour concerns and all manner of workplace issues.

Notable experience includes:

- Successfully represented multiple Long Island municipalities in upholding the constitutionality of a variety of Town Ordinances
- Obtained favorable resolutions for several corporate clients who were subjected to claims by plaintiffs who claimed that the clients' building violated the ADA
- Obtained dismissal in Federal Court by summary judgment of claims brought by teachers against the school district where they worked that their First Amendment rights of free speech had been violated by the district
- Successfully tried numerous cases to verdict in the Federal Court in the Eastern District of New York involving claims of discrimination in the workplace based on race, national origin, sex, gender and age
- After trial in Kings County, successfully obtained dismissal of claims by the Public Administrator, valued in excess of 2 million dollars, that his clients had received monies form the estate based on undue influence
- Served as the Receiver for Atlas Park shopping mall located in Glendale, New York a 377,924 sq. ft. mixed use neighborhood center

- Obtained favorable resolution of Trademark infringement suits in Federal Court brought against national internet retailer

Mr. Millus began his litigation career as a former Special Assistant United States Attorney for the Eastern District of New York from 1987 through 1989. There he worked with elite attorneys representing the U.S. Government in commercial matters; false claims act cases, civil forfeiture to name a few. He joined the firm of Snitow & Pauley in 1989 and became a partner in Snitow & Cunningham LLP in 1998 which became known as Snitow Kanfer Holtzer & Millus LLP. Mr. Millus has represented many municipalities on Long Island including the Towns of Brookhaven, Hempstead, and North Hempstead, the City of Long Beach, and the Counties of Nassau and Suffolk trying numerous cases in state and federal courts. He continued to successfully represent municipalities throughout Long Island as a partner in addition to expanding his private client base.

Mr. Millus is rated “AV” by Martindale-Hubbell which is the highest level of professional excellence and ethics and confirms that Mr. Millus is recognized for the highest levels of skill and integrity in the practice of law. Mr. Millus has also been named as a "Super Lawyer" in the 2010, 2014 and 2015 editions of "Super Lawyers" magazine in its Corporate Counsel Edition for Top Attorneys in Employment and Labor Law.

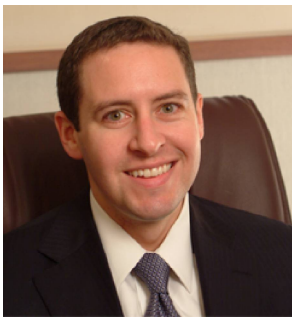
Mr. Millus is active with various bar organizations in and around New York City and Long Island. He is the Former Chair of the Federal Courts Committee of the Nassau County Bar Association, a Master, Executive Board Member and current President of The Theodore Roosevelt American Inn of Court and a member of the Eastern District Association of former Assistant and Special Assistant U.S. Attorneys. Mr. Millus also served as an Adjunct Professor of Law at the Jacob D. Fuchsberg Touro Law Center teaching Sales. Mr. Millus has lectured on cutting edge issues affecting the Bar focusing on employment law, federal practice, trial practice and civil rights law for the Nassau County Bar Association, Lorman Continuing Legal Education, the New York City Bar Association and Theodore Roosevelt American Inn of Court.

Mr. Millus has written extensively on many aspects of the law publishing articles in the *New York Law Journal*, *Nassau Lawyer*, *Suffolk Lawyer* and *New York State Bar Journal*. Recent publications include:

- Author, “Browning–Ferris: A Potential Game Changer for the Union Movement,” *Nassau Lawyer*, January 15, 2015
- Co-Author, ""Misclassification and the “Fluctuating Work Week”: A Potential Schism in Wage and Hour Litigation,” *New York State Bar Association*, December 30, 2014
- Author, "Executive Orders: Constitutional Underpinnings and Legality," *New York Law Journal*, November 18, 2014
- Co-Author, "Cannabis Conundrum: Medical Marijuana Law and Employers," *New York Law Journal*, August 6, 2014
- Author, "New Avenue for Payment of Medical Care: the Prompt Pay Law," *New York Law Journal*, May 8, 2014.
- Co-Author, "Social Media: Changing the Face of Employment Law," *New York Law Journal*, March 10, 2014.
- Author, "Faragher and Ellerth: Revisited 12 Years Later," *New York Law Journal*, May 9, 2013.
- Co-Author, “Court’s Discretion in Changing Venue, Counsel’s Obligation to Act Promptly”, *New York Law Journal*, Vol. 245-No.: 33, February 18, 2011.
- Co-Author, “Caution on Whistleblowing: Not All Reporting Is Protected,” *New York Law Journal*, August 23, 2010.
- Co-Author, “Getting Paid: the Interplay Between the Judiciary Law and Part 137,” *New York Law Journal*, June 17, 2010.
- Author, “An Employer’s Guide to the FMLA,” *Nassau Lawyer*, October 1, 2007.

phone: (516) 746-4300
fax: (516) 742-9415
1325 Franklin Avenue, Suite 225
Garden City, New York 11530

Scott Druker, Associate



Admitted
New York State Bar, Southern District of New York, Eastern District of New York

Law School
Touro Law School, J.D., 2006

College
Bucknell University, B.A., 2002

Membership
New York City and New York State Bar Associations; American Bar Association; Theodore Roosevelt American Inn of Court.

Biography
Former Associate, Ivan Fisher Law Firm, 2006-2009- Worked on several high profile cases at both the state and federal levels.

Currently- Works on all levels of defense cases ranging from minor violations to major felony indictments.

Reported Cases
Matter of Vinluan v. Doyle, 60 AD3d, 237 (2d Dept., 2009).

Born
N.Y., New York, July 2, 1980

Contact Us

Kase & Druker
1325 Franklin Avenue, Suite 225
Garden City, New York 11530
(516) 746-4300 (o)
(516) 742-9415 (f)
Scott@kaseanddrukerlaw.com
Jim@kaseanddrukerlaw.com

Latest Blogs & Press

Nassau County Supervising Judge Kase Re-Joins Kase & Druker
Cheating on the SAT: A Moral or Legal Crime?
Kase Says DSK Accuser's Actions and Timing Harmed Civil Case
She was ill – not drunk
Woman to sue for false DWI 'Shame'

COUNSELORS AT LAW
Forchelli, Curto, Deegan, Schwartz, Mineo & Terrana, LLP
FORCHELLILAW.COM

ATTORNEY PROFILES
OF COUNSEL

Alexander Leong
aleong@forchellilaw.com
Download VCard

Alexander Leong (J.D. Brooklyn Law School, 2002) is of Counsel in the Firm's Employment & Labor Practice group.

Alexander has represented employers in connection with employment discrimination cases, wage and hour and prevailing wage disputes and investigations, unemployment insurance tax audits and claims, and workers' compensation penalties matters, pending before courts, arbitrators, and government agencies, including but not limited to, the Equal Employment Opportunity Commission, United States Department of Labor and New York State Department of Labor, New York State Division of Human Rights, New York City Commission on Human Rights, and New York State Workers' Compensation Board. Additionally, Alexander, has counseled employers on matters involving employee discipline, leave, and internal investigations of misconduct. Alexander has also represented employers in unfair labor practice investigations and trials and representation hearings before the National Labor Relations Board, and unionized employers in labor arbitrations. Further, Alexander has represented businesses in matters involving trade secrets and restrictive covenants.

Some of the clients which Alexander has previously represented include, large corporations and small businesses in the financial services, construction, relocation services, retail, property management, education, manufacturing and food services industries. Alexander has represented not-for-profit organizations as well.

Prior to joining the Firm, Mr. Leong was counsel in the Employment and Labor Practice Group of a nationally recognized law firm. Alexander is also a member of the New York State Bar Association.

Mr. Leong is admitted to practice law in New York and before the United States District Courts for the Southern and Eastern Districts of New York.

Alexander is a graduate of Cornell University's School of Industrial and Labor Relations, which specializes in studies pertaining to employment and labor/management issues.

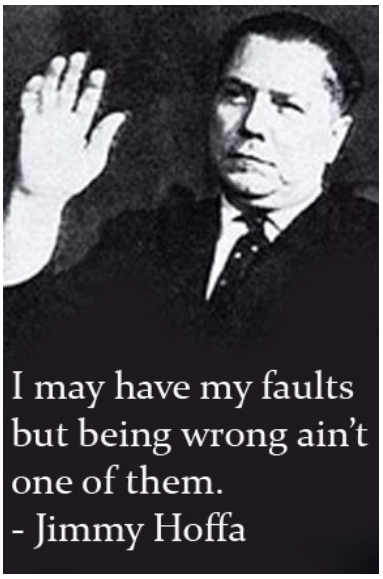
Practice Areas: Employment & Labor

« Back to Counsel Index

Related Information

August 24, 2015
Of Counsel Alexander Leong Joins Employment and Labor Department of Forchelli, Curto, Deegan, Schwartz, Mineo & Terrana LLP

The OMNI • 333 Earle Ovington Blvd. • Suite 1010 • Uniondale, New York 11553
Phone: 516-248-1700 • Fax: 516-248-1729
Email: info@forchellilaw.com



WHAT IS THE NLRB

The National Labor Relations Board is an independent federal agency vested with the power to safeguard employees' rights to organize and to determine whether to have unions as their bargaining representative. The agency also acts to prevent and remedy unfair labor practices committed by private sector employers and unions.

This includes protecting the rights of most private-sector employees to join together, with or without a union, to improve their wages and working conditions. Petitions for representation and decertification elections may also be filed at regional offices.

WHAT DOES THE NLRB DO

- Conduct Elections (to create or decertify unions).
- Investigate Charges.
- Facilitate Settlements.
- Decide Cases.
- There are 40 Administrative Law Judges along with a board whose 5 members are appointed by the President and confirmed by the Senate.
- Enforce Orders -The majority of parties voluntarily comply with orders of the Board. But, when they do not, the Agency's General Counsel must seek enforcement in the U.S. Court of Appeals. Parties to cases also may seek review of unfavorable decisions in the federal courts.

EMPLOYEE RIGHTS

Employees covered by the NLRA are guaranteed the right to form, join, decertify, or assist a labor organization and to bargain collectively through representatives of their own choosing, or to refrain from such activities. Employees may also join together to improve terms and conditions of employment without a union.

Examples of employee rights include:

- Forming or attempting to form a union in your workplace
- Joining a union whether the union is recognized by your employer or not
- Assisting a union in organizing your fellow employees
- Refusing to do any or all of these things
- To be fairly represented by a union

BUT I DO NOT OPERATE A UNION SHOP – WHY SHOULD I CARE!

Employees who are not represented by a union also have rights under the NLRA. Specifically, the National Labor Relations Board protects the rights of employees to engage in "Concerted Activity", which is when two or more employees take action for their mutual aid or protection regarding terms and conditions of employment.

A single employee may also engage in protected activity if he or she is acting on the authority of other employees, bringing group complaints to the employer's attention, trying to induce group action, or seeking to prepare for group action.

EXAMPLES OF CONCERTED ACTIVITY ARE:

- Two or more employees addressing their employer about improving their pay.
- Two or more employees discussing work-related issues beyond pay, such as safety concerns, with each other.
- An employee speaking to an employer on behalf of one or more co-workers about improving workplace conditions.

WHO IS COVERED
(Or, specifically, who *isn't*)

Most employees in the private sector are covered by the NLRA. However, the Act specifically excludes individuals who are:

- employed by Federal, state, or local government
- employed as agricultural laborers
- employed in the domestic service of any person or family in a home
- employed by a parent or spouse
- employed as an independent contractor
- employed as a supervisor (supervisors who have been discriminated against for refusing to violate the NLRA may be covered)
- employed by an employer subject to the Railway labor Act, such as railroads and airlines
- employed by any other person who is not an employer as defined in the NLRA

EMPLOYER/UNION RIGHTS AND OBLIGATIONS

Examples of employer conduct that violates the law:

- Threatening employees with loss of jobs or benefits if they join or vote for a union or engage in protected concerted activity
- Threatening to close the plant if the employees select a union to represent them.
- Questioning employees about their union sympathies or activities in circumstances that tend to interfere with, restrain or coerce employees in the exercise of their rights under the Act.
- Promising benefits to employees to discourage their union support
- Transferring, laying off, terminating, assigning employees more difficult work tasks, or punishing employees because they engaged in union or protected concerted activity or because they filed unfair labor practice charges, or participated in an investigation conducted by the NLRB

EXAMPLES OF LABOR ORGANIZATION CONDUCT THAT VIOLATES THE LAW

- Threats to employees that they will lose their jobs unless they support the union
- Seeking the suspension, discharge or other punishment of an employee for not being a union member even if the employee has paid or offered to pay a lawful initiation fee and periodic fees thereafter.
- Refusing to process a grievance because an employee has criticized union officials or because an employee is not a member of the union in states where union security clauses are not permitted
- Fining employees who have validly resigned from the union for engaging in protected concerted activities following their resignation or for crossing an unlawful picket line
- Engaging in picket line misconduct, such as threatening, assaulting, or barring non-strikers from the employer's premises
- Striking over issues unrelated to employment terms and conditions or coercively enmeshing neutrals into a labor dispute

RULES GOVERNING COLLECTIVE BARGAINING ROOM

After employees choose a union as a bargaining representative, the employer and union are required to meet at reasonable times to bargain in good faith about wages, hours, vacation time, insurance, safety practices and other mandatory subjects. Parties are required to bargain with each other in good faith, but they will not be compelled to reach an agreement or to make concessions.

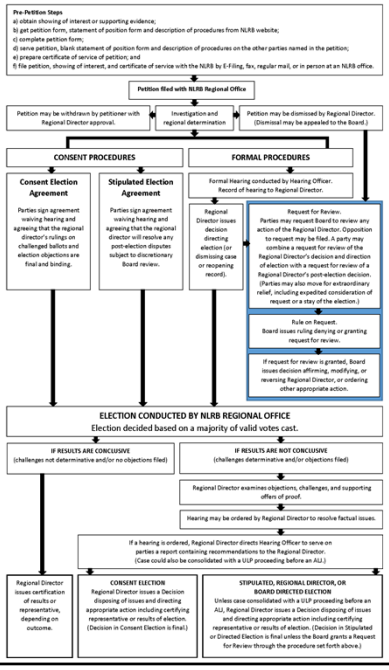
If no agreement can be reached, the employer may declare an impasse and then implement the last offer presented to the union. The NLRB will determine whether a true impasse was reached based on the history of negotiations and the understandings of both parties.

JURISDICTIONAL STANDARDS

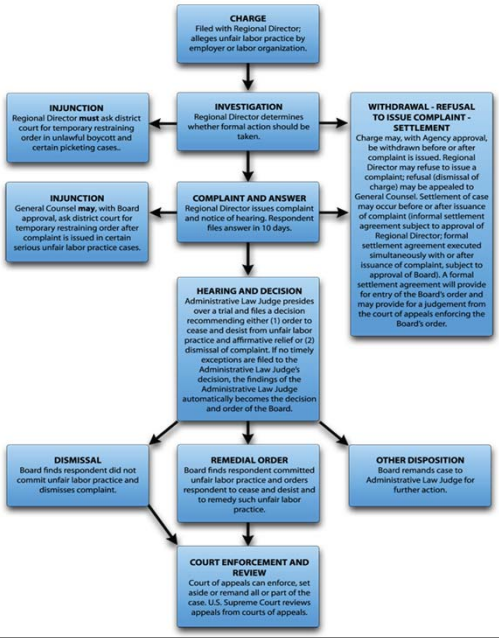
The Board has statutory jurisdiction over private sector employers whose activity in interstate commerce exceeds a minimal level. Over the years, it has established standards for asserting jurisdiction.

Generally, the Board's jurisdiction is very broad and covers the great majority of non-governmental employers with a workplace in the United States, including non-profits, employee-owned businesses, labor organizations, non-union businesses, and businesses in states with "Right to Work" laws.

CONDUCT ELECTIONS



INVESTIGATE CHARGES OF UNFAIR LABOR PRACTICES



INVESTIGATE CHARGES

- The NLRB receives about 20,000 to 30,000 charges per year from employees, unions, and employers covering a range of unfair labor practices.
- Each charge is investigated by Board agents who gather evidence and may take affidavits from parties and witnesses. Their findings are evaluated by the Regional Director, and in certain novel or significant cases, reviewed by NLRB attorneys at the Division of Advice in Washington DC.
- Typically, a decision is made about the merits of a charge within 7 to 12 weeks, although certain cases can take much longer. During this period, the majority of charges are settled by the parties, withdrawn by the charging party, or dismissed by the Regional Director.

INVESTIGATE CHARGES

- When sufficient evidence is found to support the charge, every effort is made to facilitate a settlement between the parties. If no settlement is reached in a meritorious case, the agency issues a complaint.
- Common allegations against employers include threats, interrogations and unlawful disciplinary actions against employees for their union activity; promises of benefits to discourage unionization; and, in the context of collective bargaining relationships, refusals to provide information, refusals to bargain, and withdrawals of recognition.
- Common allegations against unions include failure to represent an employee and failure to bargain in good faith.

HEARING BEFORE THE NLRB

The issuance of a complaint leads to a hearing before an NLRB Administrative Law Judge. After issuing a complaint, the NLRB becomes a representative for the charging party throughout settlement discussions and the Board process. Board attorneys help gather and prepare materials, and keep parties apprised of case developments.

It is illegal for an employer or union to retaliate against employees for filing charges or participating in NLRB investigations or proceedings.

REMEDIES

Under its statute, the NLRB cannot assess penalties. The agency may seek make-whole remedies, such as reinstatement and back pay for discharged workers, and informational remedies, such as the posting of a notice by the employer promising to not violate the law.

TEMPORARY INJUNCTIONS

While the case proceeds through the Board process, the Regional Director may petition the appropriate U.S. District Court for temporary injunction orders to restore the status quo where rights have been violated, under Section 10(j) of the Act. The General Counsel must first approve the petition and the Board must authorize it. If granted by the Court, and injunction may, among other things, require a party to return to bargaining, or reinstate unlawfully discharged employees, or stop the unlawful subcontracting of union jobs.

OFFICE OF APPEALS

Decisions to dismiss a charge may be appealed to the Office of Appeals in Washington DC within two weeks of the dismissal. The Office handles about 2,000 cases a year. Each appeal is assigned to an attorney and a supervisor for review of all documents in the case, including new information submitted by the charging party. All cases in which it is proposed to reverses the Regional Director's determination are presented to the General Counsel for decision.

Significant cases may be presented for General Counsel review even where the recommendation is to uphold the Regional determination.

Because such decisions are not reviewable in court, there is no further recourse for parties who believe that a charge has been unfairly dismissed.

FACILITATE SETTLEMENTS

The NLRB encourages parties to resolve cases by settlement rather than litigation whenever possible. In fact, more than 90% of meritorious unfair labor practice cases are settled by agreement at some point in the process, either through a Board settlement or a private agreement.

DECIDE CASES

When complaints of Unfair Labor Practices issued by regional directors do not lead to settlement, they typically result in a hearing before an NLRB Administrative Law Judge. As in any court proceeding, both parties prepare arguments and present evidence, witnesses, and experts. After evaluating the evidence, the judges issue initial decisions. ALJ decisions are subject to review by the Board in Washington DC. Any party may appeal by filing exceptions.

In considering an appeal, the Board reviews the case record, including all documents presented by the regional investigation. Often a panel of three Board members will decide a case, but the full Board usually considers novel or potentially precedent changing cases. The Board issues several hundred decisions per year. Board decisions may be appealed to an appropriate U.S. Court of Appeals, and ultimately the U.S. Supreme Court.

ENFORCE ORDERS

In reviewing cases, the Circuit Courts evaluate the factual and legal basis for the Board's Order and decide, after briefing or oral argument, whether to enter a judicial decree commanding obedience to the Order. The Court may also enter an Order on the grounds that the responding party failed to oppose or had no legal basis to oppose the Board's action.

In recent years, Circuit Courts have decided about 65 cases a year involving the NLRB. The majority – nearly 80% - have been decided in the Board's favor.

FINAL REVIEW BY THE U.S. SUPREME COURT

Any Circuit Court decision can be subject to final review by the US Supreme Court, if the parties or the Board seek it. Before presenting a petition asking the high court to consider a case, or grant certiorari, the Board must first receive permission for the US Solicitor General.

15	$1 MILLION
14	$500,000
13	$250,000
12	$125,000
11	$64,000
10	$32,000
9	$16,000
8	$8,000
7	$4,000
6	$2,000
5	$1,000
4	$500
3	$300
2	$200
1	$100

N.L.R.B. STANDS FOR

A. National Labor Reporting Agency

B. National League Running Backs

C. National Labor Requires Bravery

D. National Labor Relations Board

The NLRB recently decided not to exercise jurisdiction over a petition filed by football players at Northwestern University seeking to collectively bargain. The NLRB's reasoning was

A. College football players should thank their lucky stars that they have a scholarship to play football

B. Asserting jurisdiction would not effectuate policy under this Act

C. Football players in college are already compensated through the scholarship system and exempt under the Nation Labor Relations Act

D. Vast majority of the NCAA are public universities over which the NLRB cannot assert jurisdiction

Northwestern University and College Athletes Players Association (CAPA), Case 13-RC-121359
August 17, 2015

Relief Sought: Northwestern Players requested that the Board find that they are employees within the meaning of Section 2(3) of the National Labor Relations Act (NLRA) and to direct an election in a unit of players who received grant and aid scholarships.

Regional Directors' Decision: Found that the grant and aid scholarship players are employees within the meaning of Section 2(3) and directed an election.

Board Holding: Upholding the Regional Director's Decision would not "effectuate the policies of the Act to assert jurisdiction in this case." The Board further stated that "asserting jurisdiction in this case would not serve to promote stability in labor relations" while limiting the decision to grant in aid scholarship players covered by the Petition in the particular case.

- In other words, the Board **"punted."**

***Northwestern University and College Athletes Players Association (CAPA)*, Case 13-RC-121359**
August 17, 2015

The Board's final note is telling:

> The Board's decision not to assert jurisdiction does not preclude a reconsideration of this issue in the future. For example, if the circumstances for Northwestern's players or NCAA Division I football bowl subdivision football changes such that the underpinnings of our conclusions regarding jurisdiction warrant reassessment the Board may revisit its policy in this area.

You run a law office and to save money and time in terms of employee paperwork you hire temporary secretaries, support staff and receptionists. You give direction to these workers on the job, pay the temp. agency and it pays them. You have no worries about a wage and hour claim by the temps because -

A. These workers are not your employees so it is not your problem.

B. Most people do not want to challenge the people they work for so you are in the clear.

C. A joint employer relationship can exist whether or not a party exercises direct control over an employee; rather, indirect control may suffice – so you are in a heap of trouble.

D. Considering you give them a skinny chicken at Christmas who would sue you?

Browning-Ferris Industries of California, Inc.
362 NLRB No. 186
(Aug. 27, 2015).

- In the past, employers receiving services through temp agencies were not responsible for agency workers' organization, collective bargaining, and other NLRB-based rights unless the employers exercised "direct and immediate" control over their working terms and conditions.
- the NLRB has now concluded that "indirect control" is enough to qualify for joint-employer status – and thus share unfair labor practice liability and bargaining obligations – upending decades of established law.
- The NLRB concluded that "the Board's [current] joint-employment jurisprudence [was] increasingly out of step with changing economic circumstances," referencing the increasing tendency of employers to subcontract out work in order to avoid organization and potential employment issues. The NLRB therefore held that a joint-employer relationship can exist whether or not a party exercises "direct" control over an employee; rather, "indirect control" may suffice.

In Fresenius USA Manufacturing Inc. v. International Brotherhood of Teamsters Local 445 (Case 02-CA-039518) Kevin Grosso, an actual union supporter wrote on three union newsletters in the employee breakroom (1) "Dear Pussies please read;" (2) "Hey cat food lovers, how's your income doing;" and (3) "Warehouse Workers R.I.P." Female employees complained, the company investigated and terminated Grosso. The NLRB ruled:

A. Grosso was a fitting name for this clod and, of course, he could be terminated

B. Grosso's handwritten comments encourage workers to support the union and were then protected activity

C. Grosso may have engaged in animal abuse but nothing more and should be reinstated

D. Grosso's comments were protected activity but were not so egregious as to cause him to lose protection under the Act.

***Fresenius USA Manufacturing, Inc. and International Brotherhood of Teamsters, Local 445* Case 02-CA-039518**
June 24, 2015

- Original Case was before the Board which issued a decision on September 19, 2012.
- In that case the Board found that Fresenius' investigation and questioning of Grosso did not violate the NLRA but, contrary to the ALJ, found that the suspension and discharge of Grosso did.
- The Board had concluded that Grosso had engaged in protected union activity.
- And the Board found that Grosso's comments were not so egregious as to cause him to lose protection of the Act.

***Fresenius USA Manufacturing, Inc. and International Brotherhood of Teamsters*, Local 445 Case 02-CA-039518 (June 24, 2015)**

- The employer filed a petition for review in the United States Court of Appeals for the D.C. Circuit. Based on the decision in *NLRB v. Noel Canning,* 134 S.Ct. 2550 (2014) which held that the challenge appointments to the Board were not valid, the D.C. Circuit vacated the Board's decision and order and remanded the case for further proceedings.
- The Board affirmed its earlier decision since Grosso's handwritten statements constituted a protected activity and, thus, were afforded protection under the Act, and they were the motivating factor for his suspension and discharge, the suspension and discharged could not stand.

FACTS: An employee at a hotel asks a guest for a tip and when he does not get it he reacts rudely. When he is interviewed by his employer, he demands a shop steward be present. With no shop steward available, he refuses to cooperate and walks out to go back to work. The employee is suspended and told to leave the workplace. The suspension was:

A. Proper because an employee must cooperate with an employer investigating customer complaints

B. Proper because the employee continued to enjoy the rights under his union contract to challenge work discipline at a later date

C. Improper because an employee has rights when facing discipline to have a union represent present and the ensuing suspension was in retaliation for his exercising his rights

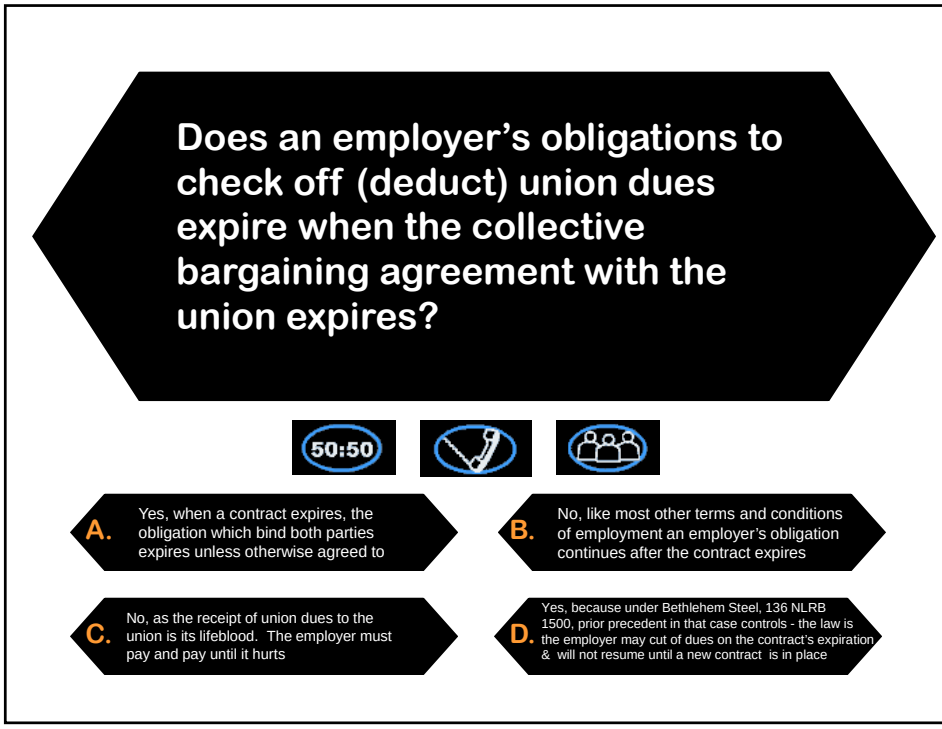
D. Improper because people who do not tip deserve what they get

Bellagio, LLC and Gabor Garner and Najia Zaidi
Cases 28-CA-106634 and 28-CA-107374
August 24, 2015

Facts: Garner was the bellman of the Bellagio hotel. On May 12, 2013 a guest filed a complaint that Garner had acted inappropriately and in an attempt to coax a tip and then reacted rudely when the guest withheld the tip. He was brought to the front services supervisor's office where he was questioned about the incident. At the beginning of the meeting he asked if he could be disciplined. When told that that was a possibility he asked for a representative permitted under the decision by the U.S. Supreme Court in *NLRB v. Jay Weingarten*, 420 U.S. 251 (1975). A shop steward could not be found and Garner was directed to fill out a statement describing his interaction with the customer. He refused to do so and returned to work. He was then instructed to leave the building.

Bellagio, LLC and Gabor Garner and Najia Zaidi
Cases 28-CA-106634 and 28-CA-107374
August 24, 2015

- Under Weingarten an employee has a right upon request to have a union representative in an investigatory interview that he or she "reasonably fears may result in his discipline." Once a union representative is requested, an employer has three lawful options (1) to grant the request; (2) discontinue the interview; or (3) offer the employee a choice of meeting without a representative or of no meeting at all.
- The Board found that Garner's suspension was not based upon the May 12th guest complaint but rather as a result of his refusal to complete a statement in a disciplinary interview without his requested representation and did suffer an "adverse employment action." Thus, the Act was violated.



***Lincoln Lutheran of Racine and Service Employees International Union Healthcare Wisconsin*, SEIU-HCWI**
Case 30-CA-111099
August 24, 2015

- **Issue**: Whether respondent unlawfully ceased checking off union dues after its contract with the charging party union expired.
- **Prior Precedent**: *Bethlehem Steel,* 136 NLRB 1500 (1962) and *Shipbuilders v. NLRB*, 320 F.2d 615 (3d Cir. 1963) *cert denied*, 375 U.S. 984 (1964) held that an employer's obligation to check off union dues ended when its collective bargaining agreement with union expired. The administrative judge dismissed the complaint citing *Bethlehem Steel* and *Shipbuilders.*
- The Board noted that it had overruled *Bethlehem Steel* and its progeny in the case of WKYC-TV, Inc., 359 NLRB No. 30 (2012).
- This is another case where the underlying decision was impacted by the pending challenges to the Board's membership which was resolved on June 26, 2015 in the *NLRB v. Noel Canning* decision.

***Lincoln Lutheran of Racine and Service Employees International Union Healthcare Wisconsin*, SEIU-HCWI**
Case 30-CA-111099
August 24, 2015

- The Board held that "like most other terms and conditions of employment, an employer's obligation to check off union dues continues after the expiration of the collective bargaining agreement" but finding it would be "unjust to apply our new holding in this case or in other pending cases, we shall apply our holding only prospectively."
- Of note is the Board's rational for overturning *Bethlehem Steel citing Autoworkers Local 1384 v. NLRB* 756 F.2d 482, 492 (7th Cir. 1985) where the court stated the Board "is free to change its mind on matters of law that are within its competence to determine, provided it gives a reasoned analysis in support of the change."
- The Board's reasoning is that the requirement that employers honor dues check off arrangements after the contract expires serves the Act's goal of promoting collective bargaining, consistent with longstanding Board precedent proscribing post-contract unilateral changes and terms and conditions of employment.

Can an employer enforce a binding arbitration clause to resolve any and all disputes relating to the individual's employment which would include a waiver of a right to pursue class or collective action in any forum?

A. Yes, courts regularly defer the employee contracts which require arbitration and waiver of certain claims

B. Yes, employee should be happy that he has a job and, therefore, should stop whining for God's sake

C. No, such a waiver and consent to arbitration is arbitrary and capricious

D. No, the employer would be violating Section 8(a)(1). Such agreement restricts an employee's right to engage in potential concerted activity

***D.R. Horton, Inc.*, 357 NLRB 184 (2012) and *Murphy Oil USA, Inc. v. National Labor Relations Board,* __ F.3d __ (October 26, 2015)**

- In *D.R. Horton*, the Board held that an employer violates Section 8(a)(1) of the NLRA by requiring employees to sign an arbitration agreement waiving the right to pursue class and protective claims in all forums. The board concluded that such an arrangement restricts an employees Section 7 right to engage in protected concerted activity in violation of the Act.
- In June 2010, employees filed a collected action against *Murphy Oil* alleging violations of the Fair Labor Standards Act. After the decision in the *D.R. Horton* matter, Murphy Oil implemented an "revised arbitration agreement" stating that employees were not barred from "participating in proceedings to adjudicate unfair labor practice charges before the Board."
- In September 2012 an Alabama district court stayed the FLSA action and compelled the employees to submit their claims to arbitration.

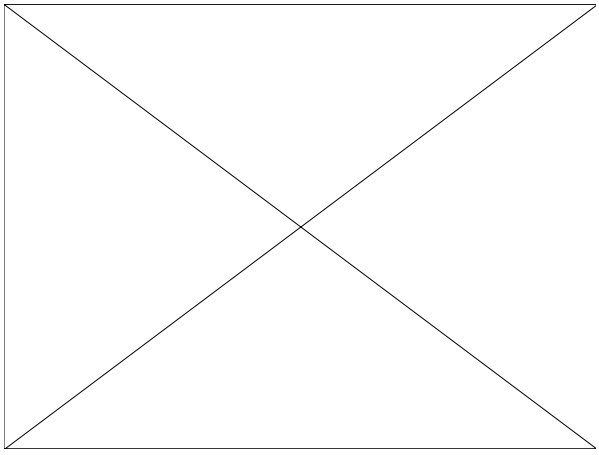
D.R. Horton, Inc., 357 NLRB 184 (2012) and *Murphy Oil USA, Inc. v. National Labor Relations Board,* __ F.3d __ (October 26, 2015)

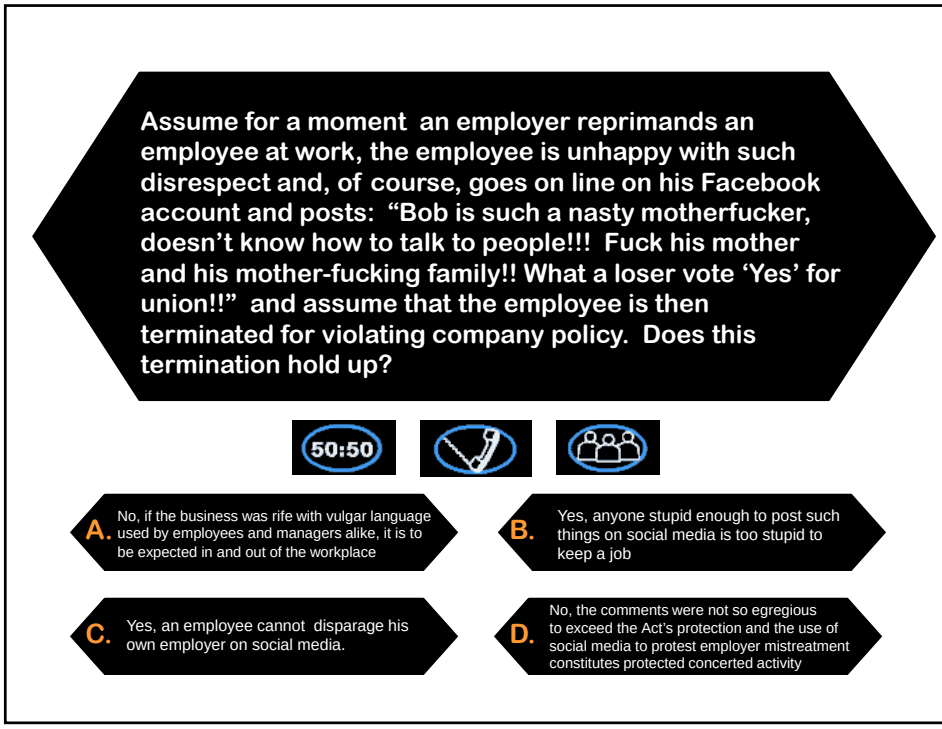
- In October 2012, the NLRB's general counsel amended its complaint before the Board alleging that Murphy Oil's motion to dismiss to compel arbitration violated Section 8(a)(1) of the NLRA.
- In December 2013, the Fifth Circuit rejected the Board's analysis for arbitration agreements holding that the NLRA does not contain a "congressional command overwriting" the Federal Arbitration Act and, the use of class action procedures is not a substantive right under Section 7 under the NLRA.
- In October 2014, ten months after the Fifth Circuit's decision in *D.R. Horton* and six months after the rehearing was denied, the Board, unpersuaded by the Fifth Circuit's analysis reaffirmed the *D.R. Horton* decision holding that Murphy Oil violated Section 8(a)(1) by requiring all employees to resolve all employment-related claims through individual arbitration.

***D.R. Horton, Inc.*, 357 NLRB 184 (2012) and *Murphy Oil USA, Inc. v. National Labor Relations Board,* __ F.3d __ , 2015 WL 6457613 (October 26, 2015)**

- In October of 2015, the Fifth Circuit held that Murphy Oil's motion to dismiss and compel arbitration did not constitute unfair labor practice but did enforce the Board's order that Section 8(a)(1) had been violated because an employer would reasonably interpret the arbitration agreement in effect for employees hired before March 2012 as prohibiting the filing of unfair labor practice charges.

COMMERCIAL BREAK





Pier Sixty LLC and Hernan Perez and Evelyn Gonsalez
Cases 02-CA-068612 and 02-CA-070797
(March 31, 2015)

- In this case the Board determined that Perez' Facebook comments directed at the employer's supervisors asserted mistreatment of employees and seeking regress through an upcoming union election constituted protected concerted activity and union activity.
- The Board also agreed that the comments were not so egregious as to exceed the Act's protection and rejected the four-factor test in *Atlantic Steel Co.,* 245 NLRB 814 (1979) citing to precedent in 2014 which held that "the Atlantic Steel framework was not well suited to address issues … involving employees off duty offsite use of social media to communicate with other employees over third parties" and rather adopted a "totality of circumstances" approach.

Confidential information includes…information that is related to: our customers, suppliers, distributors; company organization management and marketing processes, plans and ideas, processes and plans, our financial information, including costs, prices; current and future business plans, our computer and software systems and processes; personnel information and documents, and our logos, and art work. No employee is permitted to share this Confidential Information outside the organization." Is such a clause in an employee handbook valid?

A. Yes, companies are allowed to protect their confidential information

B. No, giving out the cute secretary's telephone number is just good business

C. No, all of these items are of concern to a union and could be construed as concerted activity discussions

D. No, even though it does not specifically say wages, this could be about wages which a company cannot restrict discussion of

Flex Frac Logistics, LLC v. NLRB (March 24, 2014)

- This is a case of twists and turns.
- 2012 - NLRB affirmed judge's finding that the respondent violated Section 8(a)(1) of the Act by maintaining an overly broad confidentiality rule but remanded the case for further analysis to determine whether the employee's discharge pursuant to the confidentiality rule violated Section 8(a)(1) of the NLRA.
- January 2013 – the ALJ issued a supplemental decision that found that the employee's discharge was lawful, which was upheld by the Board.
- March 2014 – Fifth Circuit affirmed the NLRB's order that Flex Frac employer's confidentiality policy was an unfair labor practice in violation of Section 8(a)(1) of the NLRA.

Did an employer violate Section 8(a)(1) of the Act by terminating an employee who transferred hundreds of business emails from his company email account to his and another employee's personal email accounts?

A. Yes, the employee was at will and can be fired for anything

B. No, the discharge was unlawful because the employee was discharged for violating an unlawful confidential policy

C. Yes, since the employee's termination was based on her deliberate betrayal of her employer's confidential interest

D. The Board was undecided as a new golf course opened in Washington and they had an outing

Food Services of America, Inc.
360 NLRB No. 123 (2014)

- May 30, 2014 the NLRB struck down a non-solicitation policy containing the employee handbook of Food Services of America, Inc.
- Even though the Board affirmed most of the Administrative Law Judge's conclusions which dismissed virtually all of the claims against the employer, the Board took the opportunity to strike down the employer's solicitation policy.
- The handbook policy stated "solicitation discussions of non-commercial nature, by associates, are limited to non-working hours of the solicitor as well as the person being solicited and in non-work areas" (working hours did not include meal breaks or designated break periods).
- The Board found this policy restricted Section 7 activity because it prohibited solicitation, including union solicitation, in work hours during non-work time. Of note is the Board's discussion of its continually expanding jurisprudence on protected concerted activity.

Where, in a discussion about his wages, an employee called his manager a “f***ing crook” and an “a***hole”; told the owner of the company that he was “stupid” and that nobody liked him; and shoved his chair, was the employer allowed to terminate the employee?

A. No, he made all these statements in Italian so no one understood it anyway

B. No, discussions about pay are concerted activity and protected

C. Yes, the nature of the outburst weighed against protection

D. No, the employee’s conduct was not menacing or physically aggressive, and or belligerent, was behind closed doors, so it was protected

Plaza Auto Center, Inc.
360 NLRB No. 117 (2014)

- On May 28, 2014, after a remand by the Ninth Circuit for the Board to reapply the four factor *Atlantic Steel* test determining when an employee’s outburst during protected activity crossed the employer’s protection under the Act, the Board determined that the employee did not lose the protection under the Act by his outburst and, accordingly, was unlawfully discharged for engaging in protected concerted activity.
- In issuing the decision in the face of the Ninth Circuit determination that the Board “had erred in its initial assessment” that the nature of the outburst factor weighed in favor of protection, the Board determined that the conduct was not so “menacing, physically aggressive or belligerent” as to warrant the lose of protection under the Act.

Can an employee discipline an employee for violating its policy of "[i]nsubordination to a manager or lack of respect and cooperation with fellow employees or guests" might result in discipline up to and including terminating, based on her threatening and obscene comments accusing a co-worker of "rigging" a bikini contest at Hooters?

A. Yes, an employer has the right to monitor the work environment

B. No, Hooters is great and anything goes

C. No, the lack of policy is too broad and subjective, it does not define insubordination" or "lack of respect." Enforcement would have a chilling effect on Section 7 rights

D. Yes, how can something be obscene at Hooters?

Hoot Wing, LLC and Ontario Wings LLC d/b/a Hooters of Ontario Mills
Cases 31-CA 104872, et al.
(May 19, 2014)

- May 19, 2014 ALJ found that employer violated Section 8(a)(1) of the act by maintaining mandatory arbitration provision that would be reasonably read by employee for filing of unfair labor practices of the Board.
- The definition of claims was the primary problem as it included "any claim of discrimination, sexual or other type of harassment, retaliation, wrongful discharge, any claim for wages, costs, interest, attorney's fees or penalties." The Board agreed in a decision dated September 1, 2015 stating that, although the arbitration agreement did not explicitly prohibit employees from filing claims with the Board, employees could reasonably read the agreement to do so in light of the breadth of the provision in terms of its reference to "any claim" and under "federal law" or "under a statute" and its specific inclusion of discrimination, retaliation or discharge or for wages.
- A petition for review has been filed with the Clerk's Office of the United States Courts of Appeal for the Ninth Circuit.

Can an employee terminate two employees for saying on Facebook, "Maybe someone should do the owners of Triple Play a favor and buy it from them. They can't even do the tax paperwork correctly!!! Now I OWE money …Wtf!!!" Specifically, Spinella "liked" the post and Sanzone commented "I owe too. Such an asshole." At least two Triple Play customers were on the same threat.

A. Yes, the employer has a legitimate business interest in addressing an employee's use of profanity in front of customer

B. No, pressing the "like" makes this a concerted activity

C. Yes, the employer can regulate its employees speech on the Internet

D. No, truth is a defense and Triple D is an asshole

Three D, LLC v. NLRB
2d Circuit

- In this matter before the Second Circuit, the August 22, 2014 Decision and Order of the National Liberations Board was affirmed, wherein, the NLRB found that the employer had violated Section 8(a)(1) of the Act by taking certain actions against its employees including discharge for their Facebook activity. The employer had also appealed the Board's finding that the employer violated Section 8(a)(1) of the Act by maintaining an overbroad internet/blogging policy.
- The ALJ and the Board had found below that the Facebook activity in this case was "concerted" under the standard set forth in *Meyer Industries*, 41 NLRB 882, 887 (1986) *enforced sub nom Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987) *cert. denied* 487 U.S. 1205 (1988) because it involved four current employees and was part of an "ongoing sequence of discussions that began in the workplace about 'the employer's] calculation of tax withholding."

Can a private employer rescind the teaching contracts of two employees who conversed on Facebook saying "I don't want to ask permission…;" "Let's do some cool shit, and let them figure out the money;" "field trips all the time to wherever the f*** we want!" [We'll] "play music loud;" "teach the kids how to graffiti up the wall," "we'll take advantage;" "I AIN'T GONE NEVER BE THERE;" Let's Fit up."

A. Yes, this conduct is so egregious as to take it outside the protections of the NLRA.

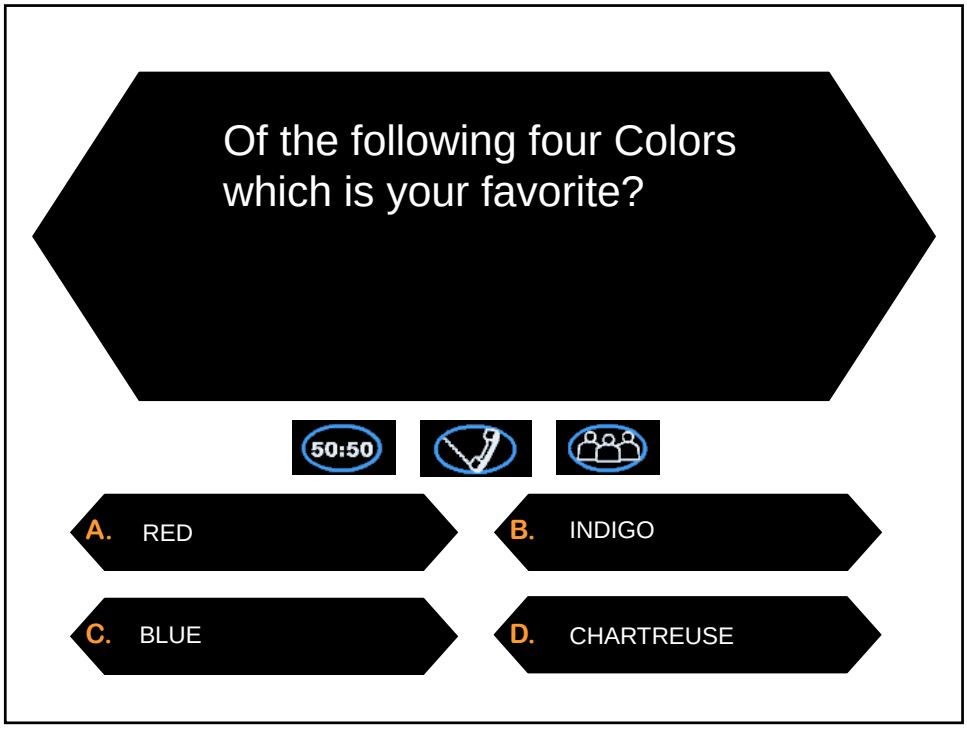
B. No, this is concerted activity about the conditions of employment

C. No, this is what all employees really want to say, so it's okay

D. Yes, as long as the employer always disciplines profanity from its teachers

Richmond District Neighborhood Center, 361 NLRB No. 74 (2014)

- The employer operated the Beacon Teen Center at San Francisco George Washington High School, providing afterschool activities to students.
- After the employer sent rehire letters, following the school year, to both employees offer one employee a demotion because her supervisor had rated her performance negatively the previous year, the two employees went on Facebook.
- The following day a Beacon employee sent screenshots of the conversation to management. On August 13, 2012, relying solely on the Facebook posts, the employer rescinded the employment offers to these two employees.
- The Board determined that it could lawfully conclude that the actions proposed in the Facebook conversations were not protected under the Act and the employees were unfit for further service upholding their dismissal.


Of the following four Colors which is your favorite?
50:50
A. RED
B. INDIGO
C. BLUE
D. CHARTREUSE

Browning–Ferris: A Potential Game Changer for the Union Movement

By: Paul F. Millus

Originally printed for the Nassau Lawyer

Much has been made of the ruling on July 29, 2014 by the National Labor Relations Board's General Counsel, which authorized complaints to go forward with regard to alleged unfair labor practice violations of the National Labor Relations Act by McDonald's, USA, LLC and some of its franchisees. The result of that decision – in a case that is a long way off from being presented to the Board for decision – is the General Counsel found enough merit in the argument that McDonald's, USA, LLC is a joint employer that the complaints will be issued with McDonald's, USA, LLC named as a joint-employer respondent in connection with alleged unfair labor practices.[1] However, there is a far more immediate concern for employers, unions, and employees just below the horizon.

Who is a Joint Employer?

Since 1984, a pair of rulings by the NLRB set the standard for what constitutes a joint employer for purposes of enforcement of the NLRA. In *Laerco Transportaion* and *TLI*, Inc. the Regional Director was determined to have correctly ruled that joint-employer status is established when there is a "showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and directions."[2] That ruling was later interpreted by the NLRB to require "direct and immediate" control by the putative employer over employment matters.[3]

The impact of this definition of a joint employer is significant. It affects collective bargaining because, instead of allowing for larger collective bargaining units with the power of numbers behind it, a more narrow definition of a joint employer limits opportunities for unionization as potential members are splintered among hundreds of small companies.

Likewise, as the NLRB is charged with investigating and prosecuting unfair labor practices under the NLRA, employers who believed they had no involvement with certain terms and conditions of employment are suddenly and potentially liable for violations. Finally, in a world where franchising[4] has exploded and more and more business are using contingent or temporary employees,[5] the expansion of the joint-employer doctrine could result in the largest increase of private union membership in decades. The stakes are indeed high.

Browning-Ferris

In the case of *Browning-Ferris Industries of California, Inc. and FRRII, LLC d/b/a Leadpoint Business Services and Local 350, International Brotherhood of Teamsters*, Case 32-RC-109684, which will be argues before the Board as it considers seventeen amicus briefs, the issue will be whether the Board should adopt a different standard for what constitutes a joint employer.

In this case, Petitioner, Local 350, International Brotherhood of Teamsters ("Local 350") seeks to represent all fulltime and regular part-time employees jointly employed by FRR-II, LLC d/b/a Leadpoint Business Services ("Leadpoint"), a temporary staffing agency, and Browning-Ferris Industries of California, INC. (BFI"), the client to whom Leadpoint supplies employees. The Regional Director rejected Local 350's claim that Leadpoint and BFI were joint employers, and the sole issue on appeal is whether BFI jointly employs Leadpoint's workers.

The Unions Perspective: Time for a Broader Standard

Local 350 argues that, while the facts support a finding that the employers are joint employers even ender the present standard, the Board should adopt a broader standard to effectuate the purposes of the NLRA and to conform to prior case law and "industrial realities." Local 350 maintains that "requires the Board to consider not merely the indicia of control exerted over the employees by each employing entity, but also the relationship, and the extent of control as between the two employing entities," which, it concludes, "requires consideration of the indirect control."[6]

Next, Local 350 contends that the Board's current analysis ignores the "industrial realities" of today's workplace.[7] From Local 350's standpoint, the Board's narrow view of employment "makes even less sense in our current economy" where "the modern worker is awash in a sea of multi-layered and dependent relationships, and the current joint employment standard leaves him or her bereft of meaningful resort to the protections and processes of the Act."[8]

Local 350 is not alone in its quest to change the employment landscape for millions of workers. In addition to multiple amicus briefs supporting its position, the General Counsel of the NLRB has submitted a supporting amicus brief. While stating that the General Counsel "expresses no view of the merits of the case" because representation proceedings are "non-adversarial in nature," it does assert that it maintains an interest in the outcome. The General Counsel states unequivocally that the Board should not adhere to its existing joint-employment standard and should adopt a new standard, where under the "totality of circumstances" and joint-employer relationship exists where "the putative joint employer wields sufficient influence over the working conditions of the other entity's employees such that meaningful bargaining could not occur in its absence.[9]

According to the General Counsel, this approach would ensure that the Board would return to its traditional standard where "industrial realities" make an entity essential for meaningful bargaining. In making its case, the Board analogizes to the way "employer" is defined by the Federal courts in Title VII matters, which often utilize a "hybrid" right to control/economic realities or the traditional joint-employer standard.[10]

The General Counsel makes it plainly clear what is at stake. In an economy where (i) the contingent workforce has increased steadily, and (ii) franchising is ever expanding, it is the General Counsel's position that these commercial forms undermine meaningful collective bargaining and thus negatively impact union participation.[11]

Management: A Broader Standard is No Standard

BFI's opposition is based on the argument that the joint-employer standard is, in reality, no standard at all and thus fails to satisfy due process. BFI posits that "standard" proposed by the Union and the General Counsel provides no guidance for businesses about how they can structure their business operations to provide certainty that they are, or are not, joint-employers under the NLRA.

Using its own version of the "industrial realities" standard, BFI and Leadpoint point out that business relationships typically involve agreements that indirectly, but necessarily, impact the terms and conditions of employment, providing as an example that service contracts "often involve significant control the customer over the service provider and, when services are performed on the customer's property, the amount of control is even greater."[12]

Likewise, the same argument can be applied to franchises, since franchises succeed not only because the public wants the products they provide, but also because of the consistency with which they provide them. Successful franchises generally dictate many things that could impact the employer-employer relationship, such as how to perform certain tasks, how franchisees can budget for a successful operation, and how many work hours are needed to perform certain tasks.

Moreover, BFI argues that the standard proposed by Local 350 would violate the NLRA by failing to give ordinary meaning to the term "employee" which it contends, citing to Supreme Court precedent, would lead to the conclusion that "an employment relationship does not exist unless the worker is directly supervised by the putative employer."[13]

Finally, BFI argues that adoption of the new standard would violate the Taft Hartly Act of 1947, which directed the Board to apply common law agency principles when interpreting the NLRA provisions.[14] Those principles are that joint employer status requires "a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision and direction." [15]

Conclusion

While the principle of stare decisis plays a role in Board decision making, the Board has demonstrated on several occasions its willingness to chart a different course.[16] Thus, whatever the precedent may be, it is unlikely to be a persuasive factor in the Board's decision in *Browning-Ferris*. The fact is that private union membership has declined significantly over the past fifty years.

Some argue that unions have become unnecessary, while others fervently believe that the structure of today's business operations has thwarted a worker's ability to organize and form collective bargaining units to their economic detriment. If it is the later, then the decision in *Browning-Ferris* will send shockwaves through the temporary staffing and franchise industries. One can expect that workers at establishments such as McDonald's, given the opportunity to better their economic lives by having McDonald's USA, LLC on the other side of the bargaining table as opposed to their relatively small franchise owner, will fervently seek to organize and secure the right to collectively bargain.

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[1]Nat'l Labor Relations Bd., NLRB Office of the General Counsel Authorizes Compaints Against McDonald's Franchisees and Determines McDonald's, USA, LLC is a joint Employer, available at http://www.nlrb.gov

[2]*Laerco Transportation*, 269 NLRB 324 (1984); TLI, Inc. 271 NLRB 798 (1984).

[3]Airborne Freight Co., 338 NLRB 597 (2002).

[4]The Entrepreneur's Source, Franchise Industry Expected to Grow Faster than Rest of the Economy in 2014, http://www.entrepreneurssource.com/blog/("Franchises are expected to add nearly 200,000 new jobs in 2014…[and] will continue to outpace total private sector employment growth by 0.3 percent. The number of franchise businesses in 2014 is expected to increase by 12,915 in 2014, bringing total establishments to 770,368").

[5]Steven Greenhouse, N.Y. Times, The Changing Face of Temporary Employment, Available at http://www.nytimes.com (The number of workers employed through temp agencies has climbed to a new high — 2.87 million, according to the Bureau of Labor Statistics, and they represent a record share of the nation's work force, 2 percent).

[6]Brief for Petitioner Local 350's Opening Brief: http://www.nlrb.gov/case/32-RC-109684, *Browning-Ferris Indus. Of California*, Inc., & Fpr-II, LLC & Sanitary Truck Drivers & Helpers Locals 350, Int'l Bhd. Of Teamsters, available at http://www.nlrb.gov/case/32-RC-109684.

[7]*Jewell Smokeless Coal Corp*., 170 NLRB 392 (1968).

[8]Brief for Petitioner Local 350's Opening Brief at page 33: , *Browning-Ferris Indus. Of California, Inc., & Fpr-II, LLC & Sanitary Truck Drivers & Helpers Locals 350, Int'l Bhd. Of Teamsters*, available at http://www.nlrb.gov/case/32-RC-109684.

[9]Amicus Brief of the General Counsel at pp. 16-17, , Browning-Ferris Indus. Of California, Inc., & Fpr-II, LLC & Sanitary Truck Drivers & Helpers Locals 350, Int'l Bhd. Of Teamsters, available at http://www.nlrb.gov/case/32-RC-109684.

[10]*Lopez v. Johnson*, 333 F3d 959 (9th Cir. 2003); *Bristol v. Bd. of county Comm'rs*, 312 F3d 1213 (10th Cir. 2002).

[11]The General Counsel noted in its brief that "some scholars have posited that franchisors consider an avoidance of unionization . . .to be the 'prime advantage of franchising.'" Amicus Brief of the General Counsel at 15, *Browning-Ferris Indus. Of California, Inc., & Fpr-II, LLC & Sanitary Truck Drivers & Helpers Locals 350, Int'l Bhd. Of Teamsters*, available at http://www.nlrb.gov/case/32-RC-109684.

[12]Brief for Employer BFI at 16, *Browning-Ferris Indus. Of California, Inc., & Fpr-II, LLC & Sanitary Truck Drivers & Helpers Local 350, Int'l Bhd, of Teamsters*, available at http://www.nlrb.gov/case/32-RC-109684.

[13]Id at 18 (citing *Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburg Plate Glass Co.,* 404 U.S. 157 (1971)

[14]*Id*. at 21; Taft- Hartley Act , Pub. L. no. 80-101, 61 Stat. 137 (1947) amending 29 U.S.C. 157 (rejecting the Supreme Court's decision in *NLRB v. Hearst Publications*, 322 U.S. 111 (1944) to the extent that it held that the Court held that the Board could ignore common law agency principles in distinguishing employees form independent contractors).

[15]*Lacero Trans. & Warehouse*, 269 NLRB 324, 325 (1984) and TLI, Inc. 271 NLRB 798 (1984).

[16]*See e.g. WKYC TV, Inc. and National Association of broadcast Employees and Technicians, Local 42 a/w/ Communications Workers of America, AFL-CIO*, 359 NLRB 30 (2012); American Baptist Homes of the West, 359 NLRB 46 (2012); Pressroom Cleaners, Inc. and Service Employees International Union, Local 32BJ, 361 NLRB 57 (2014).