Applying NLRA Section 7 to Company Policies and Related Discipline

By Henry H. Robinson

This article describes how to evaluate whether major subjects in handbooks and policies violate § 7 of the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. §§ 151 *et seq.* This topic is important because the National Labor Relations Board ("NLRB" or "Board") has ruled, and will continue to rule, that company handbooks, policies, agreements and related discipline unlawfully interfere with, restrain or coerce[1] the § 7 right of employees to engage in concerted activities for mutual aid or protection.[2]

This article applies to union and non-union companies but should be especially useful with respect to the non-union companies that employ 93.3 percent of the workforce.[3] For 75 years, non-union employers and their employees have been subject to the NLRA.[4] But typically non-union employers are unaware that they are subject to the Act until served with an unfair labor practice charge. This oblivion is understandable since historically non-union employers have – without regard to the NLRA – set the terms of handbooks, policies and agreements, employees have acquiesced to those terms, and courts have relied on and enforced those terms. This oblivion needs to be corrected since the Board is increasingly reviewing and ruling on non-union employers' handbooks, policies, agreements and related practices.

Section I describes the scope of § 7 rights. This knowledge is prerequisite to understanding the employee rights which a company's handbook and policy language is not supposed to chill. Section II describes the current status of the Board's application of § 7 to employer policy language regarding nine major subjects. Section III describes Board law applicable to employee discipline based on handbook and policy language that infringes § 7 rights.

I. Foundational Knowledge: Section 7 Rights

Section 8(a)(1) of the NLRA prohibits covered employers[5] from interfering, restraining or coercing with § 7 rights of covered employees.[6] Employer handbooks, policies and disciplinary decisions must not interfere, restrain or coerce employee activities within the scope of § 7. Knowledge of § 7 rights is a prerequisite to understanding what subjects and activities are off limits to handbooks, policies, agreements and disciplinary decisions. Once this knowledge is gained, it then

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becomes possible to evaluate handbook and policy language, to modify it if necessary, and to evaluate whether disciplinary decisions will violate the NLRA.

Aside from self-organizing and bargaining collectively, § 7 gives covered employees[7] the right to engage in "other concerted activities . . . for mutual aid or protection." The word "activity" is undefined but generally applied in reference to wages, hours and working conditions of covered employees or "terms and conditions of employment."[8]

Several fact patterns of activities may qualify as "concerted." Activity engaged in by two or more persons is "concerted," but two or more actors are not always required. Individual activity may qualify as "concerted" when "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."[9] Also, individual activity is "concerted" when the individual seeks "to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management."[10] When an individual seeks to improve terms and conditions of employment, the activity is concerted provided he/she intends to induce group activity or to act as a representative of at least one other employee.[11] This intent that causes individual activity to qualify as "concerted" need not be expressly articulated, and discussions about terms and working conditions may qualify as "concerted" without expressly or clearly stating that the intent is to induce group action.[12] For example, employees' discussion of a co-worker's discharge is concerted activity.[13] As another example, concerted activity occurs when two truck drivers have a radio conversation about safety concerns.[14]

Under § 7, the "mutual aid or protection" element is satisfied when the concerted activities "seek to improve the terms and conditions of employment or otherwise improve their lot as employees . . . ."[15] Employees may seek mutual aid and protection by engaging in oral and/or written communication about a broad range of subjects relating to terms and conditions of employment.[16] Section 7 protection is not limited to mass employee meetings or walkouts and may extend to causal conversations. For example, the mutual aid and protection element is satisfied when one employee warns a second employee that he/she may lose his/her job unless his/her performance improves[17] or even when an employee asks co-workers to verify the correctness of the first employee's written record setting forth the verbatim language of a whiteboard message about working conditions.[18]

Employees' § 7 rights are not dependent on whether the employer authorizes the "activity" or concurs with the "aid or protection" being pursued. For decades, courts and the Board have interpreted § 7 as including a right of employees to communicate and engage in robust debate among themselves and with the company, to complain to government agencies, and to attempt to bring about change by engaging in public and private communications. Section 7 rights may include activities that the employer has not authorized and goals with which the employer does not concur. Indeed, the scope of § 7 may potentially include employee letters to customers[19] and employee public criticism of the company.[20]

Section 7 rights are not dependent on whether the activities are carried out politely and professionally. In various contexts, the Board and courts have ruled that § 7 encompasses concerted activity involving communications that mock the company,[21] use vulgar, offensive remarks,[22] or disrespectful language.[23] By the same token, as discussed in section III.B., an employee's behavior may go too far and lose § 7 protection,[24] as demonstrated by the Fifth Circuit's opinion that harassment and intimidation are not protected.[25]

II. Evaluating Whether Employer Handbooks and Policies Chill Employees' Section 7 Rights

Language of an employer's handbook or policy is not supposed to interfere with, restrain or coerce the exercise of employees' rights guaranteed by § 7. A § 8(a)(1) violation arises when language interferes with, restrains or coerces § 7 rights.

The courts and Board have already resolved the legal question of whether a § 8(a)(1) violation arises from a handbook or policy that standing alone chills § 7 rights, or does a violation also require proof that employees were in fact engaged in concerted activity. The courts have affirmed Board rulings that handbooks and policies that chill § 7 rights are unlawful standing alone.[26]

The NLRB administers unfair labor practices alleging that the § 7 right of non-management employees have been subjected to interference, restraint or coercion in violation of § 8(a)(1).[27] In examining whether an employer's handbook or policy language, standing alone, chills[28] § 7 rights, the Board focuses on one or more of five analytical points:

Explicitness. Does the language of the handbook or policy explicitly restrict activities within the scope of § 7? If yes, the language violates § 8(a)(1) and is unlawful.[29] For example, banning union activity would be an unlawful explicit restriction.[30]

Employee Interpretation. May employees reasonably construe the handbook or policy's language as, among other

things, interfering with, restraining or coercing communications and efforts to engage in concerted activities for mutual aid or protection? If no, the language is lawful, but if yes, the language chills the employee's § 7 rights and is unlawful. It is not a defense that the employer's language may be ambiguous and subject to a second reasonable interpretation that would not chill § 7 rights.[31] Similarly, was the language of the handbook or policy a response to actual or anticipated employee behavior constituting concerted activity for mutual aid and protection?[32] If yes, the policy is probably unlawful since employees will likely interpret the language as applicable to the behavior.

Application. Has the language been applied to discipline an employee for his/her § 7 activity? If yes, the language is unlawful.

External Environment and Over Breadth. Employers are subject to statutes and regulations. These include, for example, laws addressing anti-discrimination, protected health information, and insider trading. The Board is not oblivious to such laws and generally upholds employer adoption of handbook or policy language implementing restrictions and rules designed to achieve compliance with these laws. The Fifth Circuit has advised that an employer may require confidentiality for employee-specific information like social security numbers, medical records, background criminal checks, drug test results and other similar information.[33] However, handbook and policy language should not proscribe acts beyond the minimum necessary for compliance with these laws. Overbroad language may violate § 8(a)(1).

Justification for Limited Exceptions and Over Breadth. Should a limited exception to employees' § 7 rights be recognized, based on the employer's legitimate interest in limiting specific employee behavior and communication?[34] To justify an exception, the Board will expect facts, not conclusory desires. If the evidence substantiates a legitimate interest justifying an exception for specific employee behavior and communication, then a follow-up question may become whether the language of the handbook or policy exceeds the scope of the legitimate interest.[35] Overbroad language may infringe § 7 rights and be unlawful. It is not a defense that language is partially lawful.

The most prevalent and important NLRA issues over policy and handbook language may be grouped into nine categories serving as starting blocks for compliance.

A. Non-Disclosure and Confidentiality Language

Employees have the § 7 right to communicate about "their terms and conditions of employment."[36] Companies often draft non-disclosure and confidentiality documents that impose restrictions on employee communications and related activities. The restrictions must be evaluated to determine whether they violate § 8(a)(1).

1. Broad Restraints: Risky and Generally Should be Avoided

Broad restraints are risky. They restrict the right of employees to communicate about working conditions and generally violate § 8(a)(1). For example, the Board has held that it is unlawful for language to impose non-disclosure requirements that employees not discuss the details of their job or company business, not give out information about customers, and not discuss company information unless it is already public.[37] The Board has also ruled that it is unlawful for an employer to maintain a rule that prohibits employees from disclosing "company information" without written authorization.[38]

Many employers use a definition of "confidential information" to define what information may not be disclosed, and broad definitions may need to be modified to achieve compliance with the NLRA. Multiple examples from court cases illustrate definitions that are overbroad. Some agreements or policies contain "confidential information" definitions so broad that they even include information that is public.[39] Some agreements or policies do not even define "confidential information."[40] Other handbooks, policies and agreements restrict disclosure of "confidential information" and define the term to generally encompass any "information related to the business . . . ."[41]

Such broad language may potentially give rise to two violations. One potential violation is whether such broad language – standing alone – chills employees' § 7 right. In a union context, the Board has already held that language prohibiting employees from discussing "company business with our clients" is "unlawfully vague and overbroad" because "[e]mployees would reasonably construe this prohibition to restrict discussion about union-related matters."[42] It follows that, in a non-union environment, the Board would probably find the same language to be overbroad because employees would interpret it as prohibiting discussions about wages, hours and working conditions. The second potential violation may arise in the event the employer sues in state court to enforce handbooks, policies and/or agreements containing overbroad non-disclosure or confidentiality language. Before filing such a suit, the employer should evaluate whether the act of filing suit may constitute a second, independent violation of the NLRA. The act of seeking judicial enforcement of an overbroad provision constitutes an independent violation of the NLRA.[43]

2. Specific Restraints: Less Risky But Careful Drafting Required

Specific restraints are less risky but must not infringe the right of employees to communicate about subjects within the scope of § 7, as described in section I. Logically, a strong argument can be made in support of the lawfulness of confidentiality language on similar illustrative specific subjects such as security, blueprints, investments, profits and losses, technical manuals, operating manuals, market studies, research and development, analyses of competitors and protected health information. When reviewing which categories of information may be restricted, the Board has not disapproved "drug and alcohol screening results, personal/bereavement/family leave information, insurance/workers compensation, customers lists (address, telephone number, medical/health related), investigations by outside agencies (formal and informal), financial, supplier lists and prices, fee/pricing schedules, methods, processes or marketing plans."[44]

A specific or narrow restriction on communication still must not chill communications about subjects within the scope of § 7. For example, counseling and discipline forms that state that the matter is confidential and should not be discussed are unlawful under § 8(a)(1) because they chill employee communications about discipline, which is a subject within the scope of the employees' § 7 right.[45] As another example, employers often prohibit disclosure of personnel information, and the Board has ruled that a prohibition against disclosure of "personnel file information" is unlawful.[46] These rulings are logical since communications about discipline and personnel information have long been held to be within the scope of § 7. Consistent with this reasoning, the Board has held it is unlawful for a policy or handbook to prohibit employees from disclosing personnel information, including addresses and telephone numbers, and the content of handbooks.[47] Likewise, a prohibition against disseminating "personal or financial information" is overbroad and unlawful.[48] In the same vein, an employer may regard coaching and counseling documents as "extremely confidential" but it is unlawful to forbid employees from discussing, coaching and counseling with co-workers and people outside the company.[49]

The NLRB's general counsel has provided examples of what he deems to be lawful restrictions on employee communications about the workplace. Some of the examples involve limitations that are specific in scope, encourage compliance with other laws, and/or are objectively justifiable. These examples are as follows:

- If necessary to comply with securities regulations, employer may request employees to confine social media networking to matters related to the company.[50]
- "Respect financial disclosure laws. It is illegal to communicate or give a 'tip' on inside information to others so that they may buy or sell stocks or securities. Such online conduct may also violate the Insider Trading Policy."[51]
- "Respect all copyright and other intellectual property laws . . . it is critical that you show proper respect for the laws governing copyright, fair use copyrighted material owned by others, trademarks and other intellectual property."[52]
- Do not reveal non-public information consisting of "Secret, Confidential or Attorney-Client Privilege information."[53]

Other examples are relatively broad, but according to the general counsel, would not be construed by employees as limiting § 7 rights. These other examples include:

- Postings must "Maintain the confidentiality of [Employer] trade secrets and private or confidential information. Trade secrets may include information regarding the development of systems, process, products, know-how, and technology. Do not post internal reports, policies, procedures or other internal business-related confidential communications."[54]
- No unauthorized disclosure of "business 'secrets' or other confidential information."[55]
- "Misuse or unauthorized disclosure of confidential information not otherwise available to persons or firms outside [Employer] is cause for disciplinary action, including termination."[56]
- "Do not disclose confidential data, or other non-public proprietary company information. Do not share confidential information regarding business partners, vendors or customers."[57]

3. Justification for Limited Exceptions

In some contexts an employer may argue that considerations such as confidentiality or privacy justify recognition of an exception to the employees' § 7 right. This may arise, for example, in the context of internal, government and/or accident investigations. Section 7 includes the right of employees to discuss internal investigations, government investigations, and causes of an accident. Thus, the Board has ruled that: (1) a blanket requirement – that employees may not discuss investigations – infringes the § 7 right of employees,[58] (2) a restriction on disclosure of information related to "investigations by outside agencies" is unlawful,[59] and (3) it is unlawful for language in an employer's handbook to prohibit employees involved in accidents from "mak[ing] any statements about an accident to anyone except the police or [employer] officials. . . ."[60]

However, limited exceptions may be permissible. The Board's general counsel has advised that, under

§ 7, employees have a right to discuss investigations and discipline, except that, on a case-by-case basis, an employer may demonstrate a substantial and legitimate business justification for restricting employee discussions. A generalized blanket need to protect the integrity of investigations will not qualify as objective evidence justifying a limited exception. In providing guidance, the general counsel listed examples of exigencies he deems sufficient to justify an exception. The exigencies are that, in a particular case, a witness has a specific need for protection, testimony is in danger of being fabricated, and/or there is a need to prevent a cover-up.[61] Thus, handbook or policy language may lawfully state that, on a case-by-case basis, the company may decide in some circumstances that confidentiality about an investigation must be maintained, and an employee's failure to maintain confidentiality, when required, will result in discipline.[62] To date, the law governing limited exceptions is relatively undeveloped.

B. Language Imposing Standards for Behavior and Communication Content

Employees have the § 7 right to criticize the company's wages, hours and working conditions and to seek improvement. Some of these communications may be loud or strongly worded. Yet employers have a right to maintain discipline and production and often adopt policies or require agreements establishing behavioral and communication content standards. In reconciling these two competing rights, the Board may examine whether the employer's language is vague and ambiguous, and if so, project how employees might interpret the language in the context of the particular issue in the particular workplace.

Projection of how particular employees in a particular workplace are likely to interpret particular language has left some uncertainty about whether language standing alone will likely be held lawful or unlawful. On the one hand, as explained in the following subsection "1," many examples demonstrate opinions that prior behavior and communication restraints generally chill § 7 rights. On the other hand, as explained in the following subsection "2," many other examples demonstrate opinions that prior behavior and communication restraints do not chill § 7 rights. Most of the opinions in the lawful/unlawful camps are reconcilable. A few have not been adequately reconciled (e.g., accuracy, respect and courtesy), and for these, risk minimization may lead to consideration of tracking language held lawful.

1. Unlawful Standards

The Board and/or its general counsel have indicated it is unlawful for a policy to provide (1) that employees are prohibited from posting statements "that damage the Company, defame an individual, or damage any person's reputation,"[63] (2) that employees are prohibited from making "false, fraudulent or malicious statements,"[64] (3) that employees are prohibited from engaging in disrespectful conduct,[65] (4) that "inappropriate" discussions about the company, management, and/or co-workers" are prohibited,[66] (5) that "courtesy" is required,[67] (6) that "disparaging comments about the company through any media, including online blogs, other electronic media, or through the media" are prohibited,[68] (7) that employees may not use social media to engage in communications that could negatively impact the employer's reputation or interfere with the employer's mission,[69] or (8) that communications must be completely accurate and not misleading.[70] These restrictions and standards of behavior and content may be interpreted by employees as applying to criticism of wages, hours and working conditions.[71] As such, the restrictions and standards chill protected § 7 rights and are unlawful.

In line with this reasoning, the general counsel has indicated that he deems it unlawful for an employer's policy to warn that, "Offensive, demeaning, abusive or inappropriate remarks are as out of place online as they are offline."[72] The general counsel has also written that he deems the following employer language to be unlawful:

- "Don't pick fights" online.[73]
- Do not make "insulting, embarrassing, hurtful or abusive comments about other company employees online."[74]
- Avoid "the use of offensive, derogatory, or prejudicial comments."[75]
- Do not send "unwanted, offensive, or inappropriate emails."[76]
- Material that is . . . embarrassing . . . defamatory, or otherwise inappropriate may not be sent by email."[77]

The Board has ruled that it is unlawful for a work rule to prohibit "[d]iscourteous or inappropriate attitude or behavior to passengers, other employees, or members of the public. Disorderly conduct within working hours."[78] According to the Board, the language is too imprecise and could be interpreted by employees as limiting § 7 communications concerning the terms and conditions of employment. Additionally, the Board has ruled that it is unlawful for a work rule (1) to prohibit participation "in outside activities that are detrimental to the Company's image or reputation, or where a conflict of interest exists,"[79] or (2) to prohibit "conducting oneself during non-working hours in such a manner that the conduct would be detrimental to the interest or reputation of the Company."[80]

2. Lawful Standards

The Board has ruled that the following language is lawful:

- A handbook rule prohibiting "[p]oor work habits including loafing, wasting time, loitering, or excessive visiting"[81]
- A handbook rule prohibiting "[p]rofane or abusive language where the language used is uncivil, insulting, contemptuous, vicious or malicious"[82]
- A handbook rule prohibiting "fighting, violence, threats, harassment, intimidation, horseplay, and other disruptive behavior in the workplace"[83]

In one case, the Board ruled that the following language was unlawful because it was in the disjunctive: making "false, vicious or malicious statements concerning the Company or its services, a client, or another employee." Presumably, if the "or" had been "and," then the rule would have been lawful since the Board reasoned that rules against "merely false statements" are unlawful, whereas rules against "maliciously false statements" are lawful.[84]

The Board has ruled that the following anti-gossip prohibition is lawful and does not infringe employees' § 7 right: "Gossiping about other Team Members (including supervisors, manager, directors, etc.)."[85] The Board concluded that employees would not reasonably construe this rule to restrict § 7 activity.

In another case, the employer's workplace civility policy provided, "Treat all co-workers and individuals with respect, patience and courtesy . . . Never engage in abusive or disruptive behavior . . . [I will] not tolerate any threats of harm . . . or any conduct that harasses, disrupts, or interferes with another workforce member's work performance or that creates a hostile work environment."[86] The Board did not rule that this civility rule, *standing alone*, violated § 8(a)(1) by interfering with the § 7 rights of employees. Instead, the Board relied only on the third prong of *Lutheran Heritage Village-Livonia*,[87] and thus ruled that the employer had unlawfully *applied* the civility rule. From this, an inferential argument may be made that the rule, standing alone, is not unlawful.

The NLRB's general counsel has provided examples of behavioral and content-type language he deems not to violate § 8(a)(1). The examples are as follows:

- Always be fair and courteous to fellow associates, customers, members, suppliers or people who work on behalf of [Employer].[88]
- If you decide to post complaints or criticism, avoid using statements . . . that reasonably could be viewed as malicious, obscene, threatening or intimidating, that disparage customers, members, associates or suppliers, or that might constitute harassment or bullying.[89]
- Make sure you are always honest and accurate when posting information or news.[90]
- When using social media to post comments about supervisors and co-workers, employees may not make comments that are vulgar, obscene, threatening or harassing.[91]
- When using social media, employees may not make comments that are a violation of the company's policy against discrimination, harassment or hostility on account of age, race, religion, sex, ethnicity, nationality, disability or other protected class, status or characterization.[92]
- "Making inappropriate gestures, including visual staring."[93]
- Any logos or graphics by employees "must not reflect any form of violent, discriminatory, abusive offensive, demeaning or otherwise unprofessional image."[94]
- "Threatening intimidating, coercing, or otherwise interfering with the job performance of fellow employees or visitors."[95]
- No "harassment of employees, patients or facility visitors."[96]

C. Language Threatening Litigation

Some employer handbooks and policies couple threats of legal action to non-disclosure or confidentiality language and to behavior and content language.[97] Such a coupled threat violates § 8(a)(1) if the referenced or underlying non-disclosure or confidentiality language is overbroad and violates § 7.[98] If the referenced or underlying language is lawful, then logically the threat, too, should be lawful.

D. Language Restricting Non-Work Time Use of Company Computers for Concerted Activity

In December 2014, the Board issued its decision in *Purple Communications*.[99] The opinion adopted the presumption "that employees who have rightful access to their employer's email system in the course of their work have a right to use the email system to engage in Section 7-protected communications on nonworking time."[100] To rebut the presumption, the employer must demonstrate that, in order to maintain production or discipline, special circumstances are necessary to restrict the right to use the email system during non-working hours. According to the Board, total bans will rarely be justified, and employers may "apply uniform and consistently enforced controls" to the extent necessary to maintain production and discipline.[101]

Many non-union employers have electronic communications policies which totally prohibit employees from using the company email system for any purpose except

company business. Under the Board's *Purple Communications* opinion, these policies will be unlawful unless the employer qualifies as one of the "rare" employers that can factually prove that a total ban is necessary to maintain production and discipline.

If a total ban can be justified or if the employer imposes partial restrictions, then that is not the end of the legal risk analysis because a follow-up issue will become whether the ban or restrictions are uniformly and consistently enforced. For example, a total ban might be enforced against employees who use company computers to complain about low wages but not enforced against other employees who, during non-work time, use the company computers to send out birthday notices, to communicate with family members, to send out softball schedules, to collect donations for children's athletic teams, or to communicate about a football or basketball pool. Such evidence would show disparate treatment – the ban is enforced against § 7 activities but not against other activities – causing the ban's application to violate the Act.

E. Language Regarding Strikes and Walkouts

Fundamental to § 7 is the right to go on strike or walk off the job. Some walkouts and other strike activity are protected whereas other strikes and walkout activities have not been historically protected (e.g., intermittent strike activity).[102] The Board has announced the general guideline that an employer's policy, handbook or rule will be treated as lawful if it makes no mention of "strikes," "walkouts," "disruptions" or the like, but the policy, handbook or rule will be unlawful if it mentions these subjects.[103] According to the Board, when an employer's policy, handbook or rule omits mention of these specific subjects, employees will understand the rule to pertain to employees leaving their posts for reasons unrelated to protected concerted activity. The Board's opinion does not specifically discuss intermittent strike activity and the protected/unprotected distinction for strikes and walkouts.

Accordingly, the general counsel has expressed the opinion that the following rules are unlawful:

- "Walking off the job . . . is prohibited.[104]
- "Failure to report to your scheduled shift for more than three consecutive days without prior authorization or 'walking off the job' during a scheduled shift" is prohibited.[105]

In contrast, the general counsel has expressed the opinion that it is lawful for a rule to state that "leaving Company property without permission may result in discharge."[106]

F. Language Imposing Restrictions on Whom and Under What Conditions an Employee May Communicate for the Company

Policy or handbook language intending to clarify who does and does not speak for the company is lawful. A policy may lawfully provide that "employees are prohibited from representing employee opinions or statements as being those of the employer,[107] that an employee must expressly state that his/her postings are "my own and do not represent [Employer's] positions, strategies or opinions,"[108] and that "Users may not post anything on the Internet in the name of [Employer] or in a manner that could reasonably be attributed to [Employer] without prior written authorization from the President or the President's designated agent."[109] Moreover, a policy may lawfully state, "Express only your personal opinions. Never represent yourself as a spokesperson for [Employer]."[110]

In contrast, company policies may contain language providing that no one except an official representative is authorized to speak to the media or other outsiders about company business. The language may go on to provide that any employee must obtain approval before speaking to the media or other outsiders about company business or even prohibit employees from speaking to the media. These policies explicitly limit the § 7 right of non-management employees to publicize and seek public support for issues relating to wages, pay and working conditions and for this reason chill § 7 rights and violate § 8(a)(1).[111]

G. Language Requiring Arbitration

A substantial number of non-union employers have adopted arbitration and other alternative dispute resolution policies. Some of these apply to all or nearly all disputes. Policies providing for arbitration should exclude NLRB proceedings. It is unlawful for a document to require arbitration of unfair labor practices that the Board processes. If employees may reasonably interpret the employer's language as precluding or restricting access to the NLRB and/or its processes, then the policy chills employees' exercise of their § 7 rights and violates § 8(a)(1).[112]

H. Class Action Waiver Language

The NLRB has reaffirmed its position that class action waivers, imposed as a condition of employment, are incompatible with the policy underlying the NLRA and therefore unlawful.[113] Although the Fifth Circuit has rejected the NLRB's position,[114] the Board continues to enforce its ruling outside the Fifth Circuit.

I. Savings Clause

A "savings clause," sometimes referred to as a disclaimer, is a term referring to a statement that the handbook or policy should not be interpreted in such-and-such a way. Theoretically, the savings clause guards against an unlawful interpretation and will "save" the handbook or policy from being declared unlawful.

The NLRB and its general counsel have issued several opinions about savings clauses.[115] According to the Board, a savings clause (1) must be sufficiently broad to address the broad panoply of rights protected by § 7, (2) the clause's placement in a handbook must be prominent and proximate to the rules it purports to save and/or refer to them, and (3) the non-union employer must not commit unfair labor practices that contradict the savings clause's purpose.[116]

The NLRB's Office of general counsel has issued an Advice Memorandum[117] stating that the following language in a social media policy is lawful:

> Nothing in Cox's social media policy is designed to interfere with, restrain, or prevent employee communications regarding wages, hours, or other terms and conditions of employment. Cox Employees have the right to engage in or refrain from such activities. . . .
>
> DO NOT make comments or otherwise communicate about customers, coworkers, supervisors, the Company, or Cox vendors or suppliers in a manner that is vulgar, obscene, threatening, intimidating, harassing, libelous, or discriminatory on the basis of age, race, religion, sex, sexual orientation, gender identity or expression, genetic information, disability, national origin, ethnicity, citizenship, marital status, or other legally recognized protected basis under federal, state, or local laws, regulations, or ordinances. Those communications are disrespectful and unprofessional and will not be tolerated by the Company. . .
>
> DO respect the laws regarding copyrights, trademarks, rights of publicity and other third-party rights. To minimize the risk of a copyright violation, you should provide references to the source(s) of information you use and accurately cite copyrighted works you identify in your online communications. Do not infringe on Cox logos, brand names, taglines, slogans, or other trademarks.

The first paragraph quoted above demonstrates language sufficiently broad to address the broad panoply of § 7 rights, and its location in conjunction to the second and third paragraphs demonstrates placement.

III. Discipline Based on Handbooks and Policies That Violate Section 7 Rights

Before imposing discipline based on handbook or policy language, the employer should evaluate whether the contemplated discipline may violate the NLRA. The evaluative steps are outlined in the following four sections.

A. Has the Employee Engaged in Concerted Activity?

The first evaluative step is to inquire whether the employee in question has engaged in acts within the scope of § 7, *i.e.,* concerted activity for mutual aid or protection. The question and its answer are vital to evaluating the legal risk. Some subjects qualify as concerted activity within the scope of § 7. For example, in one case, the employee had discussed salaries, which violated an employer rule. However, discussion of salaries qualifies as concerted activity protected by § 7, and the discharge was unlawful.[118] Other subjects do not qualify as concerted activity within the scope of § 7. For example, a company discharged an employee because her Facebook comments spoke about population control and thinning out the population by picking people off. The posting was not about working conditions and did not qualify as concerted activity.[119]

B. Has the Concerted Activity Lost Legal Protection?

The second evaluative step inquires whether the employee's acts have lost legal protection or whether they remain legally protected. Opprobrious or extreme acts lose legal protection.[120] In determining whether an act loses protection, the Board focuses on (1) the nature of the communication or act, (2) its subject, (3) the nature of the employee's outburst, and (4) whether the employer provoked the outburst.[121]

In the context of *labor disputes between unions and employers*, the Board has historically given employees considerable latitude for concerted activity before legal protection is lost. For example, the Board ruled that protection has not been lost when an employee mocked the company,[122] used disrespectful language,[123] called the company's president a "son of a bitch," encouraged customers to give work to another company,[124] said a manager was "a NASTY MOTHER FUCKER" and "Fuck his mother and his entire fucking family,"[125] and demanded qualified supervision.[126]

In non-union contexts, the Board's articulated legal standard is that legal protection is lost when the concerted activity has been opprobrious and extreme. In practice, behavior that may be protected in the context of a labor dispute between a union and company may not necessarily be protected in a non-union context. For example, the Board has ruled that protection is lost when on Facebook employees give detailed descriptions of specific insubordinate acts that were planned.[127] As another example, protection is lost when the employee's comment on a private Facebook group message dares the employer to fire her.[128]

The Board generally examines vulgarity, profanity and name calling among co-workers in light of the context of what is or is not pervasive and generally tolerated in the particular workplace. If vulgarity, profanity and name calling among co-workers are pervasive and generally accepted, then that profanity and derogatory name calling generally will not cause the concerted activity to lose protection.[129] If vulgarity, profanity and name calling among co-workers are not pervasive and/or generally accepted, then such activity may lose § 7 protection. [130]

C. Is the Discharge Based on a Rule, and if So, Is it Lawful or Unlawful?

A third evaluative step inquires whether the employee has been discharged for violation of a rule, and if so, is the rule unlawful under the NLRA. A rule may be lawful because it does not apply to concerted activity. If an employee has violated the rule, and the rule is not being applied to concerted activity, then there should not be a risk of a § 8(a)(1) violation. But, if the employer's rule applies to concerted activity and is unlawful, the discharge generally is unlawful. For example, one employee made a Facebook post complaining she performed more work than co-workers, and five co-workers angrily replied.[131] The company fired the five employees for harassment and bullying. The discharges were held to violate § 8(a)(1) because the co-workers were engaged in concerted activity.

An exception exists to the Board's ruling that a discharge based on an unlawful rule is also unlawful. The exception arises when the employer discharges an employee based on a rule that violates § 8(a)(1), but the employee's act was egregious or gross misconduct that actually interfered with the work of employees or with the employer's operations, and that interference was the reason for discipline.[132] For example, in one case,[133] an agreement ("pledge") prohibited employees from disclosing confidential matters such as "financial information, including costs," as well as personnel information. The agreement was unlawfully overbroad and chilled § 7 rights. The employee disclosed the disparity between rates paid to the company's driver and the rates charged to clients, which caused customer-relations problems and an eventual loss of business. Although the employee was discharged for violation of a rule that in turn violated the NLRA, the discharge was lawful because the gross misconduct interfered with the employer's operation. The Board explained that the employee deliberately "betrayed" the company's confidentiality interest. Sustaining the discharge would not chill the § 7 rights of co-workers because they knew the employee had been discharged for gross misconduct.

D. If the Case is "Mixed Motive," Can the Employer Sustain its Burden?

The final evaluative step applies when a mixed motive analysis is required. Circumstances may include multiple acts, one of which is "protected" and another of which is unprotected. For example, in one case, a worker installed insulation. He (1) discussed or complained about wages with co-workers, which was "protected," concerted activity that violated a company rule against disclosing wages (the rule was unlawful), and (2) he was not a good "fit" for the job, as demonstrated by the fact that he repeatedly engaged in acts causing holes in the ceilings of customers.[134] The company discharged the employee. This presented a "mixed motive" case.

The Board follows the *Wright Line* analysis.[135] A *prima facie* is established by (1) the employee's protected activity, (2) the employer's knowledge of it, and (3) the employer's *animus*. If a *prima facie* case is established, it becomes the company's burden to establish that it would have taken the adverse action in the absence of the employee's protected activity.[136] The employer must show that it actually relied on the legitimate reason.[137]

In the case of the insulation worker who had stepped through ceilings, the employer needed to show that it discharged employees who stepped through ceilings. But the evidence did not show that the employer discharged all employees who stepped through ceilings. The evidence established that many employees who stepped through ceilings were not discharged. Therefore, the employer failed to sustain its burden, and the discharge was unlawful.

IV. CONCLUSION

The lawfulness or unlawfulness of employer policies and handbooks is gaining increased practical importance. Employees of non-union employers are becoming increasingly aware of their rights under the NLRA. In organizing campaigns and during labor disputes, unions

are increasingly filing unfair labor practices challenging provisions in employer policies and handbooks.

At one time, compliance was delayed due to uncertainty over the validity of some of the Board's decisions, but today that uncertainty has largely dissipated.[138] From a jurisprudence perspective, a few of the rulings in the behavior/content grouping cannot be completely reconciled, as some predictability is inherently lacking due to the Board's non-objective but understandable focus on how employees in the specific workplace will probably interpret the specific language at issue. Today, however, there is more than ample Board precedent to enable attorneys to give meaningful advice.

It would not be prudent to ignore Board law based on the hope that it will change upon the next presidential election cycle. The current NLRB members and the general counsel will hold office for at least several more years and beyond the date of the next presidential election.[139] The outcome of the 2016 presidential election is uncertain. Congress continues to fund the NLRB. An amendment to NLRA § 7 is unlikely, as is a broad-based judicial reversal of the current Board decisions. Hence, the Board's current direction probably will not materially change for at least several years.

ENDNOTES

1 Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), makes it an unfair labor practice for an employer "to interfere with, restrain or coerce employees in the exercise of rights guaranteed by section 157 of this title." An unwritten policy may, like a written policy, violate § 8(a)(1). *See Philips Electronics of North Am. Cop.,* 361 NLRB No. 16 (Aug. 14, 2014).

2 Section 7 of the NLRA, 29 U.S.C. § 157, provides, in part, that "Employees shall have the right to self-organization, . . . to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."

3 Dept. of Labor, Bureau of Labor Statistics, Union Members Summary, USDL-14-0095, p. 2 (Jan. 24, 2014).

4 An early opinion is *Fort Wayne Corrugated Paper Co. v. NLRB*, 111 F.2d 869, 871 (7th Cir. 1940) (applying § 7 to a non-union company)

5 The NLRA covers employers engaged in interstate commerce. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). 29 U.S.C. § 152(2) provides that in the NLRA, the word "employer" does not include federal or state employers or their political subdivisions and does not include any person subject to the Railway Labor Act, 45 U.S.C. §§ 151, *et seq*. The Board has elected not to exercise jurisdiction over various small employers who do not meet certain monetary tests. Retailers must have a gross annual volume of business of $500,000 or more. Shopping centers and office buildings have a threshold of $100,000 per year. For non-retailers, annual inflow or outflow must be at least $50,000. The Board has established specific rules for the categories of transportation, health care and childcare institutions, law firms, cultural and educational centers, federal contractors, religious organizations and Indian tribes.

6 29 U.S.C. § 152(3) defines "employees" as "employees," excluding agricultural laborers, persons employed in domestic service of any person or family in a home, an individual employed by a parent or spouse, independent contractors, supervisors, or any person employed by an employer subject to the RLA.

7 Management employees do not have § 7 rights. *See Miller Electric Co.,* 301 NLRB No. 41 (Jan. 24, 1991).

8 *Latino Express Inc.,* 361 NLRB No. 137 (Dec. 15, 2014).

9 *Meyers Indus., Inc.,* 268 NLRB 493, 497 (1984), *rev'd sub nom, Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985) (Meyers I), *on remand,* 281 NLRB 882, 885 (1986), *aff'd sub nom, Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987).

10 *Id.,* 281 NLRB at 886.

11 *NLRB v. City Disposal Sys., Inc.,* 465 U.S. 822, 831 (1984).

12 *Timekeeping Sys, Inc.,* 323 NLRB 244, 247 (1997); and *Bowling Transp., Inc.,* 336 NLRB 393, 394 (2001).

13 *NLRB v. RELCO Locomotives, Inc.,* 734 F.3d 764, 790 (8th Cir. 2013).

14 *Lou's Transport, Inc.,* 361 NLRB No. 158 (Dec. 16, 2014).

15 *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978).

16 The terms and conditions may include, for example, wages, bonuses, pay increases, clothing allowances, health and dental insurance, holidays and holiday pay, starting and quitting times, hours of work per day and per week, jury duty pay, overtime and overtime rates, training, promotions, demotions, personnel files, safety, retirement plans, rest and lunch periods, transfers, use of company equipment and facilities for non-business purposes, vacation and vacation pay, sick leave and pay, workloads, job security, work rules concerning subjects such as on-the-job and off-the-job conduct, confidentiality, non-disclosure of information, interpersonal interaction, contact with customers, discipline, and contact with vendors or competitors. *See New River Indus., Inc. v. NLRB,* 945 F.2d 1290, 1294 (4th Cir. 1991). Also see *Alternative Energy Applications, Inc.,* 361 NLRB No. 139 (Dec. 16, 2014) (instructing employee not to discuss wages constitutes interference with a § 7 right).

17 *Food Services of America, Inc.,* 360 NLRB No. 123 (May 30, 2014).

18 *Fresh and Easy Neighborhood Market, Inc.,* 361 NLRB No. 12 (Aug. 11, 2014).

19 *Allied Aviation Services Co. of NJ, Inc.,* 248 NLRB 229 (1980) (§ 7 protects employees' letters to customers about safety matters at the company).

20 *Alaska Pulp Corp.,* 296 NLRB 1260 (1989) (§ 7 protects employees' letters to a newspaper criticizing the employer).

21 *Karl Knauz Motors, Inc.,* 358 NLRB No. 164 (Sept. 28, 2012) (§ 7 protects Facebook postings that use irony and satire to mock the employer).

22 *Fresenius USA Mfg Inc.,* 358 NLRB No. 138 (Sept. 19, 2012) (§ 7 protects vulgar and offensive remarks made in the context of an employee's protected concerted activities).

23 *Woodlawn Cemetery,* 305 NLRB 640, 643 (1991) (§ 7 protects employees who, in speaking to the company's president, use language like "sneaky," "hostile," and "incompetent.").

24 *Atlantic Steel Co.,* 245 NLRB 814 (1979) (an employee's opprobrious behavior may reach the point of losing protection).

25 *NLRB v. Arkema, Inc.,* 710 F.3d 308, 316 (5th Cir. 2013).

26 *NLRB v. Northeastern Land Services, Ltd.,* 645 F.3d 475, 481-82 (1st Cir. 2011); *NLRB v. Southern Maryland Hospital Center,* 916 F.2d 932, 940 n. 7 (4th Cir. 1990); *Cintas Corp. v. NLRB,* 482 F.3d 463, 468 (D.C. Cir. 2007).

27 The NLRA limitations apply insofar as handbooks or policies apply to employees who are not supervisors or managers. The limitations do not apply to handbooks or policies that apply only to supervisors and managers or insofar as handbooks and policies are used in disciplining supervisors and managers.

28 *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998), *enforced,* 203 F.3d 52 (D.C. Cir. 1999).

29 *Martin Luther Memorial Home, Inc. d/b/a Lutheran Heritage Village-Livonia,* 343 NLRB 646, 647 (2004).

30 *See* Memorandum 15-04, Report of the General Counsel Concerning Employer Rules (Mar. 18, 2015) ("Memorandum GC 15-04") p. 4.

31 *Direct TV U.S. DirecTV Holdings, LLC,* 359 NLRB No. 54 (Jan. 25, 2013).

32 *Ampersand Publishing, LLC,* 358 NLRB No. 141 (Sept. 27, 2012), decision initially *set aside by* 2014 WL 2929809 (NLRB June 27, 2014), and later *adopted by* 362 NLRB No. 26 (March 17, 2015).

33 *Flex Frac Logistics, LLC v. NLRB,* 746 F.3d 205, 210

(5th Cir. 2014).

[34] Memorandum GC 15-04, p. 4 ("employers have a substantial and legitimate interest in maintaining the privacy of certain business information.").

[35] *Remington Lodging & Hospitality, LLC,* 359 NLRB No. 95 (Apr. 24, 2013), pursuant to Board's June 27, 2014 order decision initially *set aside by and retained* on Board's docket, 2014 WL 2929788 (NLRB June 27, 2014).

[36] *Latino Express, Inc.,* 361 NLRB No. 137 (Dec. 15, 2014).

[37] In *Direct TV U.S. DirecTV Holdings, LLC,* 359 NLRB No. 54 (Jan. 25, 2013), the NLRB held that two policies were unlawful One unlawful policy stated, "Never discuss details about your job, company business or work projects with anyone outside the company . . . Never give out information about customers . . . ." The other unlawful policy stated, "Employees may not blog, enter chat rooms, post messages on public websites or otherwise disclose company information that is not already disclosed as a public record."

[38] *First Transit, Inc.,* 360 NLRB No. 72 (Apr. 2, 2014).

[39] *Shoreline Gas, Inc. v. McGaughey,* 2008 WL 1747624, at *7 (Tex. App.—Corpus Christi 2008, *no pet.*) ("In actuality, the definitions provided in the Agreement were overly broad and included pieces of information that were publicly available . . . .").

[40] *Alex Sheshunoff Management Svcs, L.P. v. Johnson*, 209 S.W.3d 644, 647 (Tex. 2006) (to support non-compete, employer promised to provide "special training" and "access to certain confidential and proprietary information").

[41] *Texas Integrated Conveyor Systems, Inc. v. Innovative Conveyor Concepts, Inc.,* 300 S.W.3d 348, 371 (Tex. App.—Dallas 2009, *review denied*) (handbook defined confidential information to include, among other things, "reports" and "information related to the business.").

[42] *Battle's Transportation, Inc.*, 362 NLRB No. 17 (Feb. 24, 2015).

[43] *Murphy Oil USA, Inc.,* 361 NLRB No. 72 (Oct. 28, 2014) (employer's judicial action to enforce agreement that violates NLRA is itself a violation of the NLRA).

[44] *Battle's Transportation, Inc.,* 362 NLRB No. 17 (Feb. 24, 2015).

[45] *Station Casinos, LLC,* 358 NLRB No. 153 (Sept. 28, 2012).

[46] *Ahearn v. Remington Lodging & Hospitality,* 842 F. Supp. 2d 1186, 1193 (D. Alaska 2012).

[47] In *Quicken Loans, Inc.,* 361 NLRB No. 94 (Nov. 3, 2014) (adopting initial decision and order from 359 NLRB No. 141 (June 21, 2013)), on appeal at No. 14-1231 (D.C. Cir), the NLRB held that it was unlawful for an employer's policy to prohibit employees from disclosing "non-public information relating to or regarding . . . personnel . . . personnel lists . . . handbooks . . . personnel information such as home phone numbers, cell phone numbers, addresses, and email addresses."

[48] *MCPA, Inc.,* 360 NLRB No. 39 (Feb. 6, 2014).

[49] *Grand Canyon Education Inc.,* 362 NLRB No. 13 (Feb. 12, 2015).

[50] Memorandum OM 12-59, p. 23.

[51] Memorandum OM 12-59, p. 23.

[52] Memorandum OM 12-59, pp. 10-11.

[53] Memorandum OM 12-59, pp. 7-8.

[54] Memorandum OM 12-59, p. 23.

[55] Memorandum GC 15-04, p. 6.

[56] *Id.*

[57] *Id.*

[58] *Banner Health System,* 358 NLRB No. 93 (July 30, 2012).

[59] *Battle's Transportation, Inc.*, 362 NLRB No. 17 (Feb. 24, 2015).

[60] *First Transit, Inc.,* 360 NLRB No. 72 (Apr. 2, 2014).

[61] NLRB Office of the Gen. Coun. Advice Memorandum, Verso Paper, 512-5012-0133-2200 (Jan. 29, 2013).

[62] *Id.*

[63] In *Costco Wholesale Corp.*, 358 NLRB No. 106 (Sept. 7, 2012).

[64] *Lytton Rancheria of CA.,* 361 NLRB No. 148 (Dec. 16, 2014)

[65] *Id*.

[66] *Three D, LLC,* 361 NLRB No. 31 (Aug. 22, 2014).

[67] *Karl Knauz Motors, Inc.,* 358 NLRB No. 164 (Sept. 28, 2012).

[68] On January 24, 2012, the Board's Associate general counsel issued Memorandum OM 12-31, a report "Concerning Social Media Cases" ("Memorandum OM 12-31") which declared that a certain policy language is unlawful. It is unlawful for a policy to prohibit "disparaging comments about the company through any media, including online blogs, other electronic media or through the media." Memorandum OM 12-31, p. 4.

[69] Memorandum OM 12-31, p. 12.

[70] *Id.*, p. 27.

[71]

[72] Memorandum OM 12-59, p. 8.

[73] Memorandum GC 15-04, p. 10.

[74] *Id.*, p. 10.

[75] *Id.,* p. 11.

[76] *Id.*

[77] *Id.*

[78] *First Transit, Inc.,* 360 NLRB No. 72 (Apr. 2, 2014).

[79] *Id.*

[80] *Id.*

[81] *Id*.

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Lytton Rancheria of CA,* 361 NLRB No. 148 (Dec. 16, 2014).

[86] *Good Samaritan Medical Center*, 361 NLRB No. 145 (Dec. 16, 2014).

[87] *Martin Luther Memorial Home, Inc. d/b/a Lutheran Heritage Village-Livonia,* 343 NLRB 646, 647 (2004).

[88] Memorandum OM 12-59, p. 22.

[89] Memorandum OM 12-59, pp. 22-23.

[90] Memorandum OM 12-59, p. 23.

[91] Memorandum OM 12-59, pp. 22-23.

[92] Memorandum OM 12-59, p. 20.

[93] Memorandum GC 15-04, p. 11.

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Heat Shrink Innovations, LLC v. Medical Extrusion Technologies-Texas, Inc.,* 2014 WL 5307191 (Tex. App.—Fort Worth 2014, *pet. filed,* Feb. 19, 2015).

[98] Memorandum OM 11-74 (Aug. 18, 2011) ("It is well established that an employer's threat to sue employees for engaging in Section 7 activity violates the Act . . . .").

[99] *Purple Communications, Inc.,* 361 NLRB No. 126 (Dec. 11, 2014). The *Purple Communications* decision overruled *The Guard Publishing Co. d/b/a The Register Guard,* 351 NLRB 1110 (2007). The *Purple Communications* opinion is not consistent with the earlier opinion in *First Transit, Inc.*, 360 NLRB No. 72 (Apr. 2, 2014), holding that it is lawful for an employer to adopt a rule providing that employees are prohibited from using the employer's property for "activities not related to work anytime."

[100] *Id.* at p. 14. "Nonworking time" means break time, lunch time or before or after work. Whether the employee has the right to access the employer's premises after-hours is a separate issue beyond the scope of this article. *See Sodexo America LLC,* 358 NLRB No. 79 (July 3, 2012); and *Marriott International, Inc.,* 359 NLRB No. 8 (Sept. 28, 2012).

[101] *Id.* The fact pattern in *Purple Communications* involved union organizing, a protection § 7 right. Pages 1 and 14 of the opinion explicitly state that the ruling applies to "Section 7 rights" and "Section 7-protected communications . . . ." Thus, the opinion will be applied to the § 7 rights of non-management employees working for non-union employers.

[102] *See Cambro Manufacturing Company,* 312 NLRB 634 (1993).

[103] *Sisters Food Group,* 357 NLRB No. 168, slip op. at 2 (Dec. 29, 2011).

[104] Memorandum GC 15-04, p. 17.

[105] *Id.*

[106] *Id., pp. 17-18.*

[107] Memorandum OM 12-59, p. 17.

[108] Memorandum OM 12-59, p. 17.

[109] Memorandum OM 12-59, p. 15.

[110] Memorandum OM 12-59, p. 23.

[111] In *Direct TV, supra,* the Board ruled that several company's policies applicable to non-management employees were unlawful. One unlawful policy provided that, "Employees should not contact or comment to any media about the company unless pre-authorized by Public Relations." Another unlawful policy instructed employees to contact company security if "law enforcement" wants to interview an employee. A third unlawful policy instructed, "Do not contact the media."

[112] *Supply Technologies, LLC*, 359 NLRB No. 38 (Dec. 14, 2012); *Activity Specialty Products, Inc. d/b/a Zep, Inc.*, 32-CA-075221 and 32-CA-102838 (ALJ 2014); *Brinker International Payroll Co. LP,* Case No. 27-CA-110765 (ALJ 2014); and *CPS Security (USA), Inc.,* Cases 28-CA-072150, 28-CA-075432 and 28-CA-075450 (ALJ 2014).

[113] *Murphy Oil USA, Inc.,* 361 NLRB No. 72 (Oct. 28, 2014).

[114] *D. R. Horton v. NLRB,* 737 F.3d 344, 363 (5th Cir. 2013).

[115] Memorandum OM 12-59, pp. 9, 12, 14; *Costco Wholesale Corp.*, 358 NLRB No. 106 (Sept. 7,

2012); *Echostar Technologies LLC,* 2012 WL 4321039 (Sept. 20, 2012); and NLRB Office of the Gen. Coun. Advice Memorandum, Cox Communications, Inc., No. 17-CA-087612 (Oct. 19, 2012), pp. 1-2.

[116] *First Transit, Inc.,* 360 NLRB No. 72 (Apr. 2, 2014).

[117] NLRB Office of the Gen. Coun. Advice Memorandum, Cox Communications, Inc., No. 17-CA-087612 (Oct. 19, 2012), pp. 1-2.

[118] *Jones & Carter*, ALJ No. 16-CA-027969 (Nov. 26, 2012), *aff'd,* Feb. 8, 2013.

[119] NLRB Office of the Gen. Coun. Advice Memorandum, Walmart, No. 11-067171 (May 30, 2012), p. 5.

[120] *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979).

[121] *Id.*

[122] NLRB Office of the Gen. Coun. Advice Memorandum, Lockheed Martin, Case 31-CA-25021 (July 17, 2001).

[123] *Severance Tool Industries, Inc.,* 301 NLRB 1166, 1170 (1991), *aff'd,* 953 F.2d 1384 (6th Cir. 1992)

[124] *Knuth Bros., Inc.,* 218 NLRB 869 (1975).

[125] *Pier Sixty LLC,* 362 NLRB No. 59 (Mar. 31, 2015).

[126] *Senior Citizens Council Co.,* 330 NLRB 1100 (2000).

[127] *Richmond District Neighborhood Center,* 361 NLRB No. 74 (Oct. 28, 2014).

[128] NLRB Office of the Gen. Coun. Advice Memorandum, Tasken Healthcare Group, No. 04-CA-094222 (May 8, 2013).

[129] *Lou's Transports, Inc.,* 361 NLRB No. 158 (Dec. 16, 2014), p. 5.

[130] A court, in vacating a Board ruling, has ruled that an obscenity outburst in front of customers is more serious than an obscenity outburst in front of co-workers and is to be analyzed differently. The court remanded the case to the Board. *NLRB v. Starbucks Corp.,* 679 F.3d 70, 77 (2nd Cir. 2012).

[131] *Hispanics United of Buffalo, Inc.,* 359 NLRB No. 37 (Dec. 14, 2012).

[132] *The Continental Group, Inc.*, 357 NLRB No. 39 (Aug. 11, 2011).

[133] *Frac Flex Logistics, LLC,* 360 NLRB No. 120 (May 20, 2014).

[134] *Alternative Energy Application, Inc.,* 361 NLRB No. 139 (Dec. 16, 2014).

[135] *Wright Line,* 251 NLRB 1083 (1980), *enforced on other grounds,* 662 F.2d 899 (1st Cir. 1981), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[136] *Alternative Energy Applications, Inc.,* 361 NLRB No. 139 (Dec. 16, 2014).

[137] *Id.*

[138] The opinion in *Noel Canning v. NLRB,* 134 S. Ct. 2550 (2014) impacted decisions between December 2012 and August 2013. Initially, there was uncertainty about which opinions should be considered valid Board decisions. Today nearly all of that uncertainty has been resolved.

[139] Board members and their respective term expiration dates are as follows: Chair Pearce: August 27, 2018; Member Hirozanir: August 27, 2016; Member Miscimarra: December 16, 2017; Member Johnson: August 27, 2015; and Member McFerran: December 16, 2019. The general counsel operates independently from and is not appointed by the Board, and the term of the current general counsel, Richard Griffin, Jr., does not expire until November 3, 2017.