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RECENT DEVELOPMENTS IN TRADITIONAL LABOR LAW

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I. INTRODUCTION

In recent years, this paper has focused on summarizing the major decisions handed down by the National Labor Relations Board ("NLRB" or "Board") and the effect those opinions will have on employers and the unions that organize their workforces. But the past two years in traditional labor have been unlike other recent years. While the NLRB has handed down cases that merit note, it has been operating with only two of a possible five Members. This has created both a backlog and an issue as to the validity of opinions rendered by only two Members. While the Board continues to issue decisions, the real developments have occurred in Congress, federal agencies, federal courts, the states, and the unions themselves. That is, despite the Board's relative inactivity, traditional labor law continues to evolve through other venues.

Labor's continued development has been caused, in part, by a shift in power and momentum. During the prior administration, Labor was largely frozen out from participation at the national level. For instance, during those eight years, AFL-CIO President John Sweeney was only invited to the White House once, and even then it took a request from Pope Benedict that Sweeney be added to a guest list. *See* Alec MacGillis, *New AFL-CIO Leader Richard Trumka Takes More Aggressive Stance*, WASH. POST, Sept. 6, 2009. As a result, Labor focused its attention elsewhere, increasing its attempts at organizing through the corporate or top-down campaign and winning legislative and executive battles in labor-friendly states and municipalities.

But under the Obama Administration the White House is once again familiar territory for Labor, in part due to Labor's work on the 2008 elections. For instance, the Service Employee's International Union ("SEIU") alone estimates that it spent $60,000,000 on President Obama's campaign and had 100,000 volunteers, 3,000 of whom worked on the election full time. *See* Peter Nicholas, *Obama's Curiously Close Labor Friendship*, L.A. TIMES, June 28, 2009. One may not be surprised, then, that SEIU head Andy Stern estimates his White House visits as weekly. *Id.*

Of course, access to the White House is only one indicator of an Administration more hospitable to Labor. On January 30, 2009, President Obama signed three Executive Orders, reversing course from the Bush Administration and strengthening the rights of employees of federal contractors. The first, entitled "Notification of Employee Rights Under Federal Labor Laws," requires federal contractors holding contracts in excess of $100,000.00 to post a notice of employees' rights under the National Labor Relations Act ("NLRA" or "the Act"). The Notification Order expressly revokes Executive Order 13201, the order issued by President George W. Bush that required government contractors to post a notice informing employees of their right not to join a union.

The second Order, entitled "Economy in Government Contracting," prevents federal contractors from being reimbursed for costs associated with the contractor's efforts to "persuade employees . . . to exercise or not to exercise, or concerning the manner of exercising, the right to organize and bargain collectively through representatives of the employees' own choosing." Section 4 of the Order sets forth a non-exhaustive list of costs that are not reimbursable when undertaken to persuade or deter organizing activities, including "hiring or consulting legal

counsel," and "planning or conducting activities by managers, supervisors, or union representatives during work hours."

The third Order, entitled "Nondisplacement of Qualified Workers Under Service Contracts," requires that successor federal contractors performing the "same service . . . at the same location" offer the predecessor federal contractor's employees (excluding managerial and supervisory personnel) a "right of first refusal of employment under the contract in positions for which they are qualified." The Nondisplacement Order expressly revokes Executive Order 13204, issued by President George W. Bush, and returns to the rule in place during the Clinton Administration.

Finally, on February 6, 2009, President Obama signed an Executive Order entitled "Use of Project Labor Agreements for Federal Construction Projects," aimed at encouraging federal agencies to "consider requiring the use of project labor agreements in connection with large-scale construction projects in order to promote economy and efficiency in Federal procurement." "Large-scale construction projects" are defined in the Order as construction projects having a total cost to the federal government of $25 million of more. As used in the February 6, 2009 Order, a project labor agreement is a "pre-hire collective bargaining agreement with one or more labor organizations that establishes the terms and conditions of employment for a specific construction project . . . ." The February 6, 2009 Project Labor Agreement Order expressly revokes Executive Orders 13202 and 13208, issued by President George W. Bush, and returns to the rule in place during the Clinton Administration. The February 6, 2009 Order stops short, however, of mandating that federal agencies require the use of project labor agreements for all federally funded large-scale construction projects.

Beyond that, President Obama has indicated his willingness to use the appointment power to further support Labor interests. On April 24, 2009, he announced his intention to appoint Mark Pearce and Craig Becker to two of the open NLRB positions. Mr. Pearce has been a labor practitioner for all of his career, including 15 years as an attorney and District Trial Specialist for the NLRB, before becoming a private practice labor lawyer representing unions. Prior to Mr. Becker's nomination, he served as Associate General Counsel to both the AFL-CIO and the SEIU. *See* Apr. 24, 2009 White House Press Release. On July 9, 2009, President Obama sent these nominations to the Senate, along with the nomination of Brian Hayes, the Republican Labor Policy Director for the Senate Committee on Health, Education, Labor and Pensions. The committee approved the nominations of Pearce and Hayes by a voice vote. The committee also approved Becker's nomination, though Senator John McCain called Becker "the most controversial nominee I've seen in a long time" and promised to "do anything I can to block his nomination," including eventually placing a hold on the nomination. *See President Again Nominates SEIU's Becker to Serve a National Labor Relations Board*, 13 DAILY LABOR REP. (BNA) A-17 (Jan. 22, 2010).

When the first session of the 111th Congress closed in December 2009, all three nominations were still awaiting approval. There was unanimous consent to hold the nominations of Pearce and Hayes over until the second session of Congress, but Becker's nomination was sent back to the White House because at least one senator objected to holding his nomination. *See id.* On January 20, 2010, however, President Obama again nominated Mr. Becker. The U.S. Chamber of Commerce called for a hearing on the Becker nomination, which is also opposed by

the National Association of Manufacturers, the *Wall Street Journal* editorial board, and others. *See Chamber Seeks Senate Hearing on Becker, as 66 Labor Law Professors Express Support*, 14 DAILY LABOR REP. (BNA) A-1 (Jan. 25, 2010). In response, over 60 labor law professors have voiced their support for Becker's nomination. *Id.* At Mr. Becker's hearing, he described the Employee Free Choice Act's card check provisions, *see* Section II.A.1, *infra*, as an "alternate route" to board certification of representatives, rather than the current requirement of a secret ballot election. He also described his statements in a 1993 law review article that "employers should be stripped of any legally cognizable interest in their employees' election of representatives" as part of an article that was "intended to be provocative" and that "employers clearly have the right to express their views" on union representation. *Help Committee Questions Becker Over Past Statements in Articles*¸ 21 DAILY LABOR REP. (BNA) A-15 (Feb. 3, 2010).

On February 9, 2010, Senate Democrats fell eight votes short of the 60 votes necessary to invoke cloture and move to a final vote on Mr. Becker's nomination. Although the failure to obtain cloture is not the same as a vote rejecting Becker's nomination, it strongly suggests that his nomination will not be confirmed in this current Senate, particularly given that moderate Democrat Senators Nelson and Lincoln voted with Republicans in opposing cloture. While the other two nominations remain pending before the Senate, at the time of publication it is unclear whether Messrs. Pearce and Hayes would be confirmed, given that the Senate had considered all three nominees to be a "package deal." Nor is it certain that Mr. Becker's chance at a Board seat has passed. After failing to obtain cloture on Mr. Becker's nomination, President Obama threatened to appoint individuals by recess appointment, if necessary. And, while he has since gained the Senate's approval of numerous other federal nominees, it is still possible that he could use the Senate's recess to fill the vacant Board seats.

But despite the Executive Orders and appointments of several individuals within the Administration who will likely aid Labor's cause, 2009 was not close to the resounding success for Labor that some predicted. In the spring, for example, Labor and the Administration placed a great deal of effort into passage of the Employee Free Choice Act which, in the face of resounding employer—and even some Democratic—opposition, is unlikely to pass as initially proposed.

Beyond getting its initiatives through Congress, Labor faced other challenges in 2009, including a severe economic downturn that cost millions of Americans jobs including 771,000 unionized jobs, lowering the percentage of organized workers in the private sector to 7.2%. Further, fissures continue to deepen in the Labor movement, perhaps a product of Labor's recent difficulty in attracting and retaining members. Last year was particularly difficult for UNITE HERE, which left the AFL-CIO in 2005 to form the Change to Win coalition, along with SEIU and other organizations. In March 2009, UNITE HERE voted to leave Change to Win based on allegations that SEIU had interfered in UNITE HERE's internal affairs. After a subsequent break between the joint leaders of UNITE HERE, Bruce Raynor and John Wilhelm, Raynor eventually followed 150,000 members who left UNITE HERE to form Workers United, which then affiliated with SEIU. In September 2009, UNITE HERE rejoined the AFL-CIO. Undoubtedly, the infighting has been a distraction for Labor's biggest coalitions.

This paper reviews recent developments in Labor Law in two sections. First, we discuss major developments in Congress, including the Employee Free Choice Act as well as other legislation with potential impact on traditional labor law issues. This section also discusses forums where Labor can seek change, including federal agencies (such as the Department of Labor and the Occupational Safety & Health Administration), and state and local governments; developments at the Board, including the validity of two-Member opinions and key issues that are either pending before the Board or that the Board may visit to reverse current law; and other major developments in traditional labor law. In the second portion of this paper, we briefly summarize, by topical area, other developments from the Board and the federal courts.

II. Major Developments in Traditional Labor Law

A. Developments in Congress

1. The Employee Free Choice Act

For the first time in years, debate over national labor policy has gone beyond practitioners and has been a part of the national discussion. And, without comparison, the central piece of this debate has been the Employee Free Choice Act ("EFCA"), sometimes referred to as the "Card Check" bill. H.R. 1409, S. 560, 111th Cong. (2009). Though EFCA failed to receive a vote in the first session of the 111th Congress, we can be certain that its proponents will not give up the fight for reform from Congress, though they may also expand their efforts to other jurisdictions, such as the Board, other federal agencies, or state and local governments.

What Labor seeks in the way of reform, and what was proposed in the Employee Free Choice Act, is a tightly wrapped package that makes the organizational process easier for unions and more costly for employers by rewriting the NLRA in several significant ways. *First*, EFCA, at least as initially proposed, would authorize the use of a card-check procedure in situations where the union presents authorization cards signed by a majority of employees, thus obviating both the need for secret ballot elections and the need for labor unions to extract card check promises via corporate campaigns. *Second*, it stiffens employer, but not union, sanctions for labor law violations that occur during organizing campaigns and first contract negotiations. And *finally*, by mandating interest arbitration for first contracts, EFCA strips employees and employers of the fundamental right underlying collective bargaining that allows the parties to establish the terms of their own initial collective bargaining agreements, by giving one party the power to request arbitration where there is a failure to reach agreement within a short time period. In other words, it makes it easier for a union to organize an employer's workforce; riskier, and likely more costly, for the employer to resist those efforts; and easier for a union, regardless of actual bargaining power, to obtain a contract that it will find acceptable.

EFCA proponents claim that reform is imperative to safeguard employee rights and fix a broken system. In reality, though, EFCA is not about employee choice. Rather, it is an effort to dismantle the key underpinnings of the NLRA in an attempt to generate greater reliance on unions and resuscitate declining union membership rosters. Unions plead for majority card check rules and increased penalties for alleged discrimination because they claim that employees suffer at the hands of employers as a result of Board elections. However, unions continue to enjoy just about the same rate of victory in Board elections – approximately 60% – as they did in

1965. *Compare NLRB Election Report; Six Months Summary – April 2006 through September 2006 and Cases Closed September 2006*, at 18, *available at* http://www.nlrb.gov/nlrb/shared_files/brochures/Election%20Reports/Sept.%202006.pdf (noting that unions won 59.6% of all elections involving new organizing) *with Thirtieth Annual Report of the National Labor Relations Board*, at p. 198 (1965) (noting that unions won 61.8% of elections); *see also* Statement of Peter J. Hurtgen, Senior Partner, Morgan Lewis & Bockius LLP, before the U.S. Senate, at 9 (Mar. 27, 2007), *available at* http://help.senate.gov/Hearings/2007_3_27_a/Hurtgen (noting that "unions' election win rate declined before rising back to the level where it is today"). This relatively constant success rate suggests that Labor's disappointment with election results likely has more to do with the waning desire of employees to be union members than with disenfranchisement or discrimination by employers – a theory the Board's own Chairman acknowledges. *See* Wilma B. Liebman, *Labor Law Inside Out*, 11 WorkingUSA: The Journal of Labor & Society 9 n.22 (2008) (quoting Orly Lobel, *Between Solidarity and Individualism: Collective Efforts for Social Reform in the Heterogeneous Workplace*, in DIVERSITY IN THE WORKFORCE, RESEARCH IN SOCIOLOGY OF WORK, 131, 132 (2004) ("In many ways, the weakening of the labor movement and the increasing tension between workers of different identities echoes a wider crisis – that of fragmentation and self-interest in the political process, in which interest groups struggle to achieve the most for the individuals they represent rather than debating substantive ideological differences of social justice and reform.")).

While EFCA's public debate focuses largely on the card check provision, the arbitration and punitive amendments are equally – if not more – important and fully integrated parts of the legislative whole, particularly as amendments seem less likely to include card check as proposed. When those provisions are considered, it becomes clear that EFCA is about more than organizing or "free choice." It more severely punishes employers that, in the view of the NLRB or the union, fail to follow the new rules of the game. And most significantly, EFCA creates – for the first time – a timetable for first contract negotiation, and backs that timetable with the threat of a never-before-tested system of mandatory first contract arbitration, effectively abandoning the NLRA's longstanding fundamental tenet that, while a party must negotiate in good faith, it need not agree to any particular contractual provision, or make any specific concession. 29 U.S.C. § 158(d); *see, e.g., H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970); *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 348-49 (1958). By putting a first contract in the hands of an arbitrator, EFCA would force the employer to either accept a contract it would not otherwise accept or submit its business decisions to a yet-to-be-defined system of arbitration that, under a yet-to-be-determined standard, will produce a contract binding the parties for two years. Thus, EFCA changes not just organizing and elections, it undermines the careful balance between labor and management that Congress, the Board, and the courts have spent decades creating.

While an identical 2007 version of EFCA passed the House in the 110th Congress by a vote of 241-185, it failed to garner the Senate votes necessary for cloture, with only 51 votes rather than the required 60. H.R. 800, 110th Cong., 1st Session, U.S. Senate Roll Call Votes, June 26, 2007. Even in a Senate with a larger Democratic majority, the same cloture battle looms again. As the 2009 bill was introduced, Democrats openly admitted that they lacked the number of Senate votes necessary to invoke cloture, but were confident that they would have the needed support by the time of a vote. Kasie Hunt, *Despite Introduction of Card-Check, Senate*

Lacks 60 Votes, CONG. DAILY, Mar. 9, 2009. However, Senator Arlen Specter (D-PA), who, before leaving the Republican caucus, was expected to be a key source of compromise, announced that he would not support EFCA as initially proposed and, in his floor statement, offered instead a series of NLRA amendments. 155 CONG. REC. S3635 (daily ed. Mar. 24, 2009) (statement of Sen. Specter); *see* Section II.A.1.a, *infra*. Subsequently, the proposed version of EFCA continued to lose support among conservative Democrats, particularly those facing difficult reelection battles in 2010. As a result, compromises have been discussed to attract the necessary votes, one of which reportedly included modifying authorization cards to allow an employee to either express his or her support for union representation by checking one box, or to check another box requesting a secret ballot election to be conducted by mail. *See Senate EFCA Supporters Likely to Draft Compromise Legislation, Aide Says*, 63 DAILY LAB. REP. (BNA) A-14, (Apr. 6, 2009). Of course, this does not address EFCA's fundamental flaw; just as an employee may be intimidated into signing an authorization card, he or she may be intimidated into checking a particular box on the card presented. It is for this reason that the right to a secret ballot election should not be taken away. Regardless, while the prospects of EFCA as initially proposed may look bleak, alternatives abound. Among the proposed legislative alternatives to EFCA, two proposals and a rumored potential compromise merit additional discussion.

Legislative Alternatives to EFCA

First, because Senator Specter seems likely to be a key figure to any compromise on ECFA, his proposals for reform, as explained in statements on the Senate floor as well as a recent law review article, deserve special attention. A second proposal, offered by a coalition of Starbucks Corporation, Costco Wholesale Corporation, and Whole Foods Market Incorporated, proposes offering union organizers equal access to employees during organizing in exchange for dropping card check and first contract arbitration. And finally, a potential compromise was discussed by Senator Specter after his September 15, 2009 speech to the AFL-CIO convention that included yet other details. While these proposals eliminate some of the problems with EFCA as initially proposed, they create other problems, and are thus far from perfect solutions.

a. The Specter Proposal

Senator Specter presented his proposal for labor reform on the Senate floor at the same time that he announced that he would not support EFCA; he also discussed it more generally in a 2008 article on labor reform in the *Harvard Journal on Legislation*. *See* 155 CONG. REC. S3635; Senator Arlen Specter & Eric S. Nguyen, *Representation Without Intimidation: Securing Workers' Right to Choose Under the National Labor Relations Act*, 45 HARV. J. ON LEGIS. 311, 313 (2008). In their article, Specter and Nguyen indicated their

> hope that common ground can be found in supporting new legislation that addresses three problems that hinder the ability of employees to choose union representation without intimidation: (1) toothless remedies that fail to deter abuses by both unions and employers; (2) administrative procedures that cause inordinate delays; and (3) an ineffectual NLRB.

Id. Senator Specter advocates addressing these issues by amending the NLRA to require quicker elections, faster resolutions of charges, and increased penalties for both union and employer violations. And, his proposals are not merely cosmetic: he is clear that "meaningful labor law reform requires changing *the background legal environment* in order to reduce employers' opportunities to engage in illegitimate interference with their employees' choices," and that "[e]ffective reform" requires "a radical change" in our current understanding of organization. *Id.* at 331 (emphasis added).

Specifically, Senator Specter's proposal seeks to remedy the "inordinate delays" of an election by requiring an election within ten days of a filing of a joint petition and, if there is no joint petition, requiring the NLRB to resolve bargaining unit and eligibility issues within 14 days from the filing of a petition, with an "election 7 days thereafter." 155 CONG. REC. 53634-02, S3636 (daily ed. Mar. 24, 2009) (appendix to statement of Sen. Specter). While the Board may extend the time for an election, it could only do so if there were the "factual or legal issues of exceptional complexity justifying the extension." *Id.* And after election, all challenges must be filed within five days, and resolved within 15 days, or up to 25 days for issues of "exceptional complexity." *Id.* The proposal also makes it an unfair labor practice for: a union to visit an employee at his or her home for purposes of a representation campaign without prior consent, an employer to hold a "captive audience" speech without providing a union equal access "under identical circumstances," and for either an employer or union to engage in "campaign related activities aimed at employees within 24 hours prior to an election." *Id.* After recognition, the Specter Proposal requires negotiations to begin within 21 days after certification and provides that, if no agreement is reached after 120 days from the first meeting, either party may call for mediation by the Federal Mediation and Conciliation Service. *Id.*

Senator Specter's proposal also addresses his concerns of an "ineffectual NLRB" by proposing new administrative procedures, including creating a certiorari-type process giving the Board discretion whether or not to review challenges to the decisions of administrative law judges or regional directors and requiring dissenting opinions to be completed within 45 days after the majority opinion is filed. *Id.* He also proposes treble backpay without reduction for mitigation in unlawful firing cases, civil penalties up to $20,000 per violation on an NLRB finding of willful and repeated violations of statutory rights by an employer or union during an election campaign, and broadening the provisions for injunctive relief when a party fails to negotiate in good faith, all in an attempt to supplement what Senator Specter views as the Board's current "toothless" remedial scheme. *Id.*; Specter & Nguyen, *supra*, at 313.

Finally, Senator Specter proposes "[m]odify[ing] the NLRA to give the court broader discretion to impose a *Gissel* order on a finding that the environment has deteriorated to the extent that a fair election is not possible." 155 Cong. Rec. at S3636. In *NLRB v. Gissel Packing Co.*, the Supreme Court approved the Board's practice of issuing a bargaining order when an employer committed an unfair labor practice serious enough that it would "interfere with the election processes and tend to preclude the holding of a fair election." 395 U.S. 575, 594 (1969), *reh'g denied*, 396 U.S. 869 (1969). In the over 40 years since *Gissel*, the Board and the Courts have addressed, on a case by case basis, what labor practices warrant a *Gissel* bargaining order. While there are no *per se* rules, as a general matter, invasive employer conduct, including discharge based on section 7 activity, plant closure, subcontracting, unlawful discipline, and lockout have been found sufficient for an order, as have threats, promising or granting benefits to

dissuade union support, interrogation, and other offenses. *See, e.g.*, THE DEVELOPING LABOR LAW, 543-49 (3d ed. 1992) (Patrick Hardin, ed.). But, despite the breadth of violations sufficient to warrant a *Gissel* order, because such orders are only appropriate when the application of a traditional remedy would not reopen the pathway to a fair election, 395 U.S. at 614, and because the Board determines when to use the remedial order on a case by case basis, it is difficult to classify which types of practices are safe from a *Gissel* order. *See* THE DEVELOPING LABOR LAW, *supra*, at 549-52 (discussing practices where no order was issued). And, as the *Gissel* Court noted, not every unfair labor practice related to an election warrants a bargaining order: those that are "minor or less extensive . . . [with] minimal impact on the election machinery" do not warrant such an order. 395 U.S. at 615.

It is important to examine Senator Specter's broad statement that a "court" should have "broader discretion to impose a *Gissel* order on a finding that the environment has deteriorated to the extent that a fair election is not possible," in its appropriate context. *Gissel* orders effectively elevate the rights of unions over the section 7 rights of employees by requiring an employer to bargain with a union that has not been selected as representative by a majority of employees. Neither the Board nor the courts should have *greater* discretion to ignore employee choice; instead, *Gissel* orders should be issued only narrowly, and only in situations where it is evident that the holding of a fair election will not be possible.

Similarly, Senator Specter's suggestion to make the denial of equal access an unfair labor practice is very troublesome. As noted *infra* at Section II.A.1.d, the need for greater access is questionable. Nonetheless, given Senator Specter's role in the Senate, and the Democrats' need for 60 votes to invoke cloture, his proposal will likely receive significant attention, and parts of it may surface in an effort to increase support for labor law reform.

b. The Starbucks Proposal

Proposals for EFCA alternatives have come from beyond the Senate well. Starbucks Corporation, Costco Wholesale Corporation, and Whole Foods Market Incorporated have suggested their own compromise, allowing for increased penalties for employer violations of the Act and equal access for unions during organizing campaigns, in exchange for eliminating EFCA's card check and mandatory arbitration provisions. *See* Alec MacGillis, *Executives Detail Labor Bill Compromise*, WASH. POST, Mar. 22, 2009, at A2. The companies also formed an ad hoc "Committee for a Level Playing Field for Union Elections," and, with the assistance of former President Clinton's Special Counsel Lanny Davis, have solicited support from other employers. *See* Kris Maher, *Retailers' Labor-Bill Proposal Fails to Gain Support*, WALL ST. J., Mar. 23, 2009, at A3. Aside from the offer of equal access, few other details about the proposal were released. And, in the months since it was first discussed, there has been relatively little attention paid to the Starbucks Proposal.

c. Rumored Details of a Potential Compromise

After speaking at the AFL-CIO's annual convention in September 2009, Senator Specter predicted (incorrectly, of course) that EFCA would be achieved by the end of 2009 and unveiled some details of an allegedly agreed-upon compromise. *See Specter Says Compromise Reached On EFCA, But AFL-CIO Says No Deal Yet*, 177 DAILY LAB. REP. (BNA) AA-1 (Sept. 16, 2009).

He indicated that the compromise did not include card check, but provided for quicker elections by limiting the time between the presentation of a petition and the actual election; allowing increased union access to the work place; greatly increasing penalties for labor law violations; and clarifying that the mandatory interest arbitration for first contracts would involve "last best offer arbitration," where the chosen arbitrator would have the discretion only to choose between the company's and the union's final offers, rather than to create a contract from scratch. While no official compromise has been announced, it is quite possible that some compromise will receive a vote in 2010.

d. A Major Flaw – Equal Access

To the extent that any compromise includes equal access, and the Specter Proposal would make it an unfair labor practice to deny equal access, the proposals would significantly impact employer rights without any showing that the current law on access disadvantages labor organizations. The business community would thus be well advised to refuse to embrace any such provision. Increased, or even equal, access operates on the idea "that if an employer chooses to address his employees on company property about union representation, a union should have equal access to the employer's property to convey its message to employees in an equivalent manner." Andrew M. Kramer, *Labor Law Reform: A Management Perspective*, B.C. L. REV., Vol. XX, No. 4 (1978).

Forcing employers to open their doors to union organizers and to allow them to come on company property poses more problems than solutions to any claims of union disadvantage. First, there are practical concerns. If the access is to be truly "equal," meaning that organizers may speak with employees on company time, then would the employer or the union be forced to pay the employees for that time? Further, what degree of employer speech would trigger the required equal access? Proposals for labor law reform in the 1970s would have given unions the right to equal access as soon as any supervisor discussed unionization with employees, regardless of whether the speech was done on working time. *See id.* at 8; S. Rep. No. 658, 95th Cong., 2d Sess. 26 (1978). How would an employer even know that such a conversation had taken place, if triggered unilaterally by an employee asking a question of his supervisor? Moreover, how would one address the issue of union salts that may purposely raise such questions in order to trigger the union's rights to equal access?

Second, in addition to the practical concerns, there are significant legal concerns about an equal access requirement. Congress, the Board, and the courts have for decades carefully balanced union rights to access to employees for organizing and other section 7 purposes with employer property rights. Indeed, the Supreme Court has held that, in the case of non-employee organizers, employer property rights are paramount unless union organizers have no other reasonable means to communicate with the affected employees. *See, e.g.*, *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956); Kramer, *supra*, at 7 (noting that post-*Babcock* cases "indicat[e] that employer property rights take on much greater vitality in the context of a claim for access by outside organizers"). The proposed equal access provisions would upend this careful balance – something that, as discussed below, the Board is already poised to do in the context of employer equipment. *See* Section II.F, *infra*.

More specifically, as *Lechmere* and *Babcock* make clear, employer property rights must give way only out of necessity, in situations where there is no alternative means to communicate with employees. Why upset the balance currently struck by Congress, the Board, and the courts, when there is no such need? With the rapid increases in methods of communication – even since *Lechmere* – the likelihood that there is no alternative method of communication rapidly decreases. Of course, employees may solicit union membership and campaign materials on an employer's property. Currently, union officials may visit employees in their homes. With increased internet availability, unions can spread their message across the globe, including by using mailing lists to personal e-mails. Once an election has been ordered, unions have access to the names and addresses of all eligible voters, providing them contact either in person or through the mail. And the possibilities go on. The "[c]lassic examples" of inaccessibility cited in *Lechmere* – logging camps, mining camps, and mountain resort hotels – involving "employees who, by virtue of their employment, are isolated from the ordinary flow of information that characterizes our society," *see* 502 U.S. at 539-40, are the very rare exception, rather than the rule, to the average organizing campaign. Indeed, in today's world of instant texting and Twitter, even those locations can be accessed. Thus, the well-settled *Lechmere* doctrine is the preferable option for balancing employer and employee rights, at least when compared to a blanket equal access rule discarding years of jurisprudence.

An equal access requirement also raises multiple unanswered questions under the First Amendment. The Supreme Court has recognized that an employer's right to free speech "is firmly established and cannot be infringed by a union or the Board" and that section 8(c) "merely implements the First Amendment." *Gissel Packing Co.*, 395 U.S. at 617. An equal access requirement places these rights at risk. If, for example, a short speech by an employer could trigger equal time for a labor organization, an employer's exercise of its free speech would become costly, and thus surely chill employer speech and eviscerate section 8(c)'s protections in the process. Moreover, under a blanket equal access rule, an employer required to yield his property to a union's organizational message would be forced to foster points of view which he finds distasteful by allowing his property to be used as a forum for the publication of the message he opposes, or refrain from exercising his own First Amendment rights.

Furthermore, questions of who pays for employee time – the union or the company – have not yet been answered. Nor is it clear whether, if multiple unions seek recognition, an employer would have to allow all of them equal, potentially company-paid, time. Each of these issues has the potential to infringe upon employer speech rights, and would thus subject an equal access requirement to strict scrutiny under the First Amendment.

EFCA's Prospects

While the initially-proposed version of EFCA seems to be off the table for now, there will certainly by other attempts to pass labor law reform legislation, whether through a significantly compromised EFCA or through other legislation. Multiple factors, however, limit the ability of Democrats to push through an aggressive piece of reform. First, with the election of Scott Brown (R-MA) as the replacement for the late Senator Ted Kennedy, Democrats no longer have their 60 member caucus. Second, for Democratic senators from conservative states, the backlash experienced by senators such as Ben Nelson (D-NE), who voted with the party on the healthcare bill, may chill the willingness of those individuals to support a controversial pro-

labor measure. This is particularly so in a year when 16 Senate seats currently held by Democrats are at stake in the November election, with four of them in the conservative or "battleground" states of Arkansas, Indiana, Colorado, and North Dakota. And, one of those 16 seats is held by Senator Specter, who himself faces a tough re-election battle in Pennsylvania. But even if EFCA as proposed or amended could gather sufficient support to be passed, there are many other issues – the national economy, a further stimulus bill, healthcare reform, financial services reform, civil rights reform, immigration reform, military deployment abroad, and other vital issues – that will prevent EFCA from being the sole or even the most important item considered by the 111th Congress. The chances of EFCA, as originally drafted, being adopted by the current Congress appear smaller now than at any time since President Obama's election.

2. The Secret Ballot Protection Act

In an attempt to pre-empt the card check provisions of the Employee Free Choice Act, Republicans, led by Representative John Kline (R-MN) and 103 House cosponsors, introduced the Secret Ballot Protection Act (H.R. 1176; S. 478) ("SBPA") on February 25, 2009, when it was referred to the House Committee on Education and Labor. The corresponding Senate version was introduced by Senator Jim DeMint (R-SC) and 18 cosponsors.

This Act proposes amending the National Labor Relations Act, which currently gives employers the option of either voluntarily recognizing unions based on card checks or insisting upon a secret ballot election administered by the National Labor Relations Board. As introduced, the Act would amend the NLRA to prohibit union recognition based on a card check and provide that a union may only be recognized by an employer following certification by the NLRB that the organization has won majority support in a secret ballot election conducted by the NLRB.

Given Republicans' minority status in both chambers, it is difficult to see how the Secret Ballot Protection Act could be passed. As discussed *supra*, a mandatory card check procedure may be dropped to obtain passage of EFCA. However, it is hard to imagine that this Congress would enact legislation that *restricts* the voluntary recognition that has traditionally been a feature of labor law.

While the Secret Ballot Protection Act eliminates an employer's ability voluntarily to recognize a bargaining organization, passage would protect employers from the possibility of "quiet" card check campaigns that, under EFCA-as-proposed, could result in unionization without any warning to the employer. While some SBPA proponents suggest that passage would free employers and their employees from the burdens and harassment of corporate campaigns and other organizing tactics associated with card check, it is more likely that labor organizations would, rather than abandoning organization efforts, refocus those efforts on winning the secret ballot election, likely by obtaining neutrality agreements through a corporate campaign. Further, every organizing effort would bring government oversight through NLRB election supervision into the workplace. And, whether the increased NLRB involvement would mean further extending the election and organizing process would remain to be seen, though it is realistic to expect that the increased workload would cause increased delays—which is one reason that passage is unlikely.

3. The RAISE Act

The RAISE Act (H.R. 2732; S. 1184), introduced by Senator David Vitter (R-LA) and Representative Tom McClintock (R-CA) on June 4, 2009, would amend the National Labor Relations Act to permit employers to pay individual employees who work under a collective bargaining agreement higher wages than those set forth in the labor contract. In statements made at the time of the legislation's introduction, it was explained that the National Labor Relations Board had repeatedly struck down individual raises and bonuses given to employees covered by a collective bargaining contract. A joint statement from Vitter and McClintock explained that, while employers would still be required to pay the wage-and-benefit schedules negotiated under collective bargaining agreements, employers "could add bonuses for those workers who go the extra mile, combining the benefits of collective bargaining with the rewards of individual achievement." The bill specifically states that nothing in sections 8(a)(1) or 8(a)(5) of the NLRA, or any collective bargaining agreement renewed or entered after the date of the RAISE Act's enactment, "shall prohibit an employer from paying an employee in the unit greater wages, pay, or other compensation for, or by reason of, his or her services as an employee of such employer . . . ."

These bills give employees working under a collective bargaining agreement an opportunity to earn more pay, and gives employers the opportunity to offer incentives for and reward superior performance. However, these bills may be subject to opposition as they would create the potential for competition within units and thus may erode unit morale. If passed, employers would need to review and revise pay policies as well as any currently effective collective bargaining agreements, given that the proposed legislation does not alter any agreement already in effect.

4. The Labor Relations First Contract Negotiations Act of 2009

Representative Green (D-TX) introduced the Labor Relations First Contract Negotiations Act of 2009 (H.R. 243) on January 7, 2009. The bill was referred to the House Committee on Education and Labor and, on March 16, to the Subcommittee on Health, Employment, Labor, and Pensions.

Prior to the reintroduction of the Employee Free Choice Act, this bill reintroduced as a stand-alone bill the first contract negotiations portions of the previously introduced version of EFCA. Specifically, this stand-alone bill would amend the National Labor Relations Act to add provisions requiring that if a collective bargaining agreement is not entered within 60 days of recognition, the parties must mediate the outstanding issues and, if no agreement is reached after an additional 30 days, the disputes are referred to the Federal Mediation and Conciliation Service for binding arbitration.

The forecast and impact of this stand-alone bill are unclear given the uncertain status of EFCA.

5. The National Labor Relations Modernization Act

The National Labor Relations Modernization Act (H.R. 1355), introduced in April 2009, proposes various amendments to the National Labor Relations Act meant to accelerate the first

contract bargaining process, increase penalties against employers for violations of the Act, require employers to inform unions of their organization opposition campaigns, and allow equal access to unions. First, the bill includes a provision similar to the arbitration provision contained in EFCA, with the exception that the contract imposed on the parties by an arbitrator would be binding for 18 months, rather than two years. Second, the bill proposes amending section 10(*l*) to require that charges of employer violations during organizing drives or initial contract bargaining be given the same preliminary investigation priority currently given to charges alleging violations of sections 8(b)(4)(A)-(C), 8(b)(7), or 8(e). The bill also increases both the backpay and civil penalty violations against employers. Finally, the bill proposes adding a new subsection to section 9 that would (1) require an employer to inform a union of its intentions regarding organizational opposition communications within 30 days of the NLRB directing an election; (2) require the employer to provide the union the opportunity to hold an equal number of meetings and to engage in other communications in the same manner as the employer does; and (3) make it an unfair labor practice to fail to provide notice and equal access.

Like other pieces of legislation, the prospects of this bill are difficult to predict, though it does contain many of the provisions that Senator Specter and others have mentioned as part of a potential EFCA compromise in the Senate. Passage of this bill, the also-pending Labor Relations First Contract Negotiations Act of 2009, or EFCA would have significant and far-reaching effects on employers, vastly decreasing first contract negotiation leverage and emboldening unions to assert extreme demands in order to gain more favorable mediation and arbitration resolutions.

6. The National Right to Work Act

The National Right to Work Act (H.R. 4107), introduced on November 18, 2009 by Representative Steve King (R-IA) and without any cosponsors, proposes amending the National Labor Relations Act and the Railway Labor Act to eliminate language allowing union security agreements or "closed shops," in which an employee must join a union as a condition of employment. The bill would also remove language from the Railway Labor Act that permits railroad carriers to require, pursuant to a security agreement, payroll deduction of union dues as a condition of employment.

This bill is unlikely to pass, as evidenced by the fact that a version of the National Right to Work Act has been introduced in every Congress since the 104th Congress in 1995 without success. If passed, union security agreements would no longer be permissible and union membership would drop, although the amount of the drop is difficult to predict.

7. The Teaching and Research Assistant Collective Bargaining Rights Act

The Teaching and Research Assistant Collective Bargaining Rights Act (H.R. 1461; S. 813), introduced in spring 2009, seeks to codify that students working for colleges and universities may be organized as employees under the National Labor Relations Act, an issue that the National Labor Relations Board has addressed in recent years. For instance, in 2000, the Board held that a group of graduate students were employees under section 2(3) of the Act because they were paid to perform a service. *See N.Y. Univ.*, 332 N.L.R.B. 1205 (2000). However, in 2004, the Board reversed course, holding that graduate student assistants were not

employees within the meaning of section 2(3) because their relationship with the employer was "primarily educational." *See Brown Univ.*, 342 N.L.R.B. 483 (2004). The proposed legislation would settle the issue by adding an amendment to section 2(3) of the NLRA clarifying that "[t]he term 'employee' includes a student enrolled at an institution of high education (as defined in . . . (20 U.S.C. §§ 1001, 1002), other than an institution of a State or political subdivision) who is performing work for remuneration at the direction of the institution, whether or not the work relates to the student's course of study."

One area of labor law reform that received little attention in 2009 is the attempt to expand the categories of individuals who may be organized under the Act. While the RESPECT Act was introduced in the previous Congress, it has yet to be reintroduced in the 111th Congress. The Teaching and Research Assistant Collective Bargaining Rights Act, however, is another piece of labor law reform that could be enacted during the current Administration. And, while the employers affected would be limited to higher education institutions, the impact on those institutions would be significant, given the important role that graduate students generally play within higher education. Educational institutions and other employers should also monitor developments at the National Labor Relations Board for expansions in the scope of NLRA coverage.

8. Truth in Employment Act of 2009

The House and Senate are considering identical bills (H.R. 2808; S. 1227) introduced in June 2009 that seek to protect an employer's right to terminate the employment of union organizers who "salt" the company in an attempt to organize the workforce from within. The bills include a finding that salting is a "tactic of using professional union organizers and agents to infiltrate a targeted employer's workplaces [that] has evolved into an aggressive form of harassment not contemplated when the National Labor Relations Act was enacted and [that] threatens the balance of rights which is fundamental to our system of collective bargaining." In response, the bills propose amending section 8(a) of the NLRA to make clear that the Act does not "requir[e] an employer to employ any person who seeks or has sought employment with the employer in furtherance of other employment or agency status."

The proposed amendment would allow an employer to terminate an employee suspected of working at the employer for purposes of salting. Despite the language of the bill, an employer that terminated an employee on the suspicion of salting would likely face an unfair labor practice charge, which may only further the union's organizing efforts. Given the current activity of pro-union groups on the Hill, and the Democratic majorities in both chambers, passage of the Truth in Employment Act is unlikely.

Other Avenues

While Congress has been active in introducing legislation that would affect traditional labor issues, legislation is only one method that Labor may use to bring about changes in traditional labor law. Due to the lack of progress on its initiatives before Congress, Labor may shift its attention to more receptive federal audiences, including a newly-appointed Obama NLRB or other agencies, or even to labor-friendly state or local governments. As discussed in

this paper, those decision makers could quickly and drastically alter current labor law in many key areas.

B. Developments At The National Labor Relations Board

While the Board has not handed down the kinds of decisions such as *Oakwood Healthcare*, *Dana Corp.*, *Toering Electric*, or *Oil Capitol Sheet Metal Inc.*, that, in years past, have made important changes to labor law, there have been significant developments. Most importantly, the Supreme Court has agreed to resolve a split among the circuits regarding the validity of orders signed by only two Members of the Board operating under a delegation of authority. Further, we can expect that once the Board is back to an operational capacity, there are numerous issues that likely will be reversed from the Bush Administration Board's eight years.

1. Validity of Two-Member Orders

Over the past year, six circuits have addressed the validity of Board orders issued under a delegation of quorum authority. Though five circuits found the delegation valid, the D.C. Circuit—where an appeal from any order of the Board may be filed—found the delegation invalid. As of January 2009, it was estimated that over 500 opinions, both published and unpublished, had been issued by the two-Member quorum. *See New Process Steel, L.P. v. NLRB*, 564 F.3d 840, 845 (7th Cir. 2009), *cert. granted*, 130 S. Ct. 488 (Nov. 2, 2009) (No. 08-1457).

By statute, the Board consists of five Members appointed by the President with the advice and consent of the Senate. 29 U.S.C. § 153(a). Each Member serves for a five-year term. *Id.* Section 3(b) of the Act describes the Board's ability to delegate powers to a group of three Members and then to further delegate powers to a two-Member group of the three-Member group. *See* 29 U.S.C. § 153(b). The statute reads:

> The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise . . . . A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof.

Id.

As 2007 closed, the Board's membership quickly changed. Former Chairman Robert J. Battista's (R) five-year term expired on December 16, 2007. Former Members Dennis P. Walsh (D) and Peter N. Kirsanow (R) both held recess appointments that expired at the *sine die* adjournment of the 110th Congress on December 31, 2007. On December 28, 2007, the Board temporarily delegated its powers to Members Liebman, Schaumber, and Kirsanow, with the intention that Members Schaumber and Liebman, whose terms ran into 2010 and 2011, respectively, could operate as a quorum of the three-Member group, able to issue decisions and orders in unfair labor practice and representation cases.

a. Circuits Holding Delegation Valid

Of the six circuits to have addressed the question, five have held that the delegation of quorum authority was valid. These circuits can be arranged into two groups: those holding the delegation valid based on the plain and unambiguous language of section 3 and those finding the language ambiguous but that the Board's interpretation of the language was a reasonable interpretation under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1987).

The First, Fourth, and Seventh Circuits have all found that opinions and orders issued by the two-member Board are valid based on the plain language of section 3 without the need to reach the second step of the *Chevron* deference analysis. *See Ne. Land Servs., Ltd. v. NLRB*, 560 F.3d 36 (1st Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3098 (Aug. 18, 2009) (No. 09-213); *New Process Steel, L.P.*, 564 F.3d 840; *Narricot Indus., L.P. v. NLRB*, 587 F.3d 654 (4th Cir. 2009). The First Circuit was the first circuit court to address the issue and found the delegation valid, with relatively little analysis. *See Ne. Land Servs., Ltd.*, 560 F.3d 36. In *Northeastern Land Services*, the issue arose as an ancillary issue to the employer's appeal from the NLRB's finding that it violated the Act by maintaining an overbroad confidentiality provision and subsequently discharging an employee for violating the provision. *See id.* at 37.

Noting that the Board had delegated its power to three Members, one of whom subsequently vacated the Board, the court found the delegation valid because of the Act's plain language that "'[a] vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board.'" *Id.* at 41 (quoting 29 U.S.C. § 153(b)) (alteration in original). The court also cited with approval a memorandum prepared by the Office of Legal Counsel of the Department of Justice, on which the Board relied in making its delegation, that supported the view that a delegation to two Members would be valid. *See* 560 F.3d at 41 (citing Quorum Requirements, Memorandum from M. Edward Whelan III, Principal Deputy Assistant Attorney Gen., Office of Legal Counsel, (Mar. 4, 2003), *available at* 2003 WL 24166831 ("Whelan Memo")).

The Seventh Circuit came to the same conclusion on May 1, 2009. *See New Process Steel, L.P.*, 564 F.3d 840. The delegation issue in *New Process Steel* also arose as a jurisdictional objection to the Board's finding that the employer had violated the Act by repudiating the collective bargaining agreement and wrongfully withdrawing recognition from the union. *See id.* at 845, 849-51, 851-52. The court began its analysis with a plain reading of section 3(b) of the Act and concluded that:

> [a]s we read it, § 3(b) accomplished two things: first, it gave the Board the power to delegate its authority to a group of three members, and second, it allowed the Board to continue to conduct business with a quorum of three members but expressly provides that two members of the Board constitutes a quorum where the Board has delegated its authority to a group of three members. The plain meaning of the statute thus supports the NLRB's delegation procedure.

Id. at 845-46. The court found support in *Northeastern Land Services*, in the Whelan Memo, and in analogous law from other contexts, such as a two-Member order being held valid when a third Member participated in the underlying decision. *See id*. at 846; *Photo-Sonics, Inc. v. NLRB*, 678 F.2d 121 (9th Cir. 1982).

The court rejected arguments regarding the statute's legislative history and other analogous cases, given that the plain meaning of section 3(b) was unambiguous. *See* 564 F.3d at 846. Further, the court rejected New Process's argument that the NLRB's delegation process could not operate when the Board's total membership fell below a certain level—an argument that the D.C. Circuit found compelling in an opinion handed down on the same day as *New Process Steel*. *See id.* at 847; *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. May 1, 2009), *petition for cert. filed*, (July 1, 2009) (No. 09-377).

The Fourth Circuit in *Narricot Industries* likewise adopted a plain language rationale for upholding the validity of two-Member opinions. *See* 587 F.3d at 658-60. The court found that the statutory phrase "except that" indicated that an exception followed, meaning that the section 3(b) quorum requirement did not need to be satisfied where the Board had delegated its authority to a three-Member group. *Id.* at 660.

In contrast, both the Second and Tenth Circuits have found the delegation valid, but only as a reasonable interpretation of an ambiguous statute entitled to *Chevron* deference. *See Snell Island SNF LLC, v. NLRB*, 568 F.3d 410 (2d Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3130 (Sept. 11, 2009) (No. 09-328); *Teamsters Local Union No. 523 v. NLRB*, Nos. 08-9568, 08-9577, 2009 WL 4912300 (10th Cir. Dec. 22, 2009). In *Snell*, which was decided after the D.C. Circuit's decision in *Laurel Baye*, see Section II.B.1.b, *infra*, the Petitioners sought to invalidate the Board's orders arguing that "because . . . 'the Board knew [that the third Member] would not be around to exercise the powers being delegated' . . . delegation of all powers to the three-member panel of Liebman, Schaumber, and Kirsanow was 'an acknowledged *sham*.'" 568 F.3d at 415 (quoting Petitioners' Br.) (emphasis added by court). Proceeding under the caveat that "[t]he question regarding the jurisdiction of the NLRB's two-member panel is one ultimately to be resolved by the Supreme Court," the Second Circuit held that the NLRB panel was initially duly constituted. 568 F.3d at 419. The court rejected the argument that "the NLRB knew that the membership of the panel would soon be reduced from three to two—and that the Board's membership would also decrease to two" because that fact "has no bearing on the fact that the panel was lawfully constituted in the first instance." *Id.*

Turning to the "more difficult question [of] whether the NLRB panel lost its authority once the NLRB as a whole lost its quorum," the court found that the delegation remained valid. *Id.* at 419. Though agreeing with the D.C. Circuit that "the Board quorum requirement must be satisfied *at all times*," the Second Circuit found the statute silent on what happened to a valid delegation made before the quorum requirement was not satisfied. *Id.* at 420 (internal quotation marks & citations omitted). And, while the legislative history of the Taft-Hartley Act, which expanded the Board's membership, suggested that efficiency of the Board was a key motive for expansion, the court found Congressional intent unclear on the point and, as such, was required to give deference to the NLRB's interpretation of the delegation provision under the second step of the *Chevron* analysis. *Id.* at 423; *see also Chevron U.S.A., Inc. v. Natural Res. Def. Council,*

Inc., 467 U.S. 837, *reh'g denied*, 468 U.S. 1227 (1984). Because the court found the Board's interpretation of the provision to be reasonable, it upheld the delegation. 568 F.3d at 424.

Similarly, the Tenth Circuit's opinion in *Teamsters Local Union No. 523* noted that the court was "hard-pressed in the wake of [the Circuit] split of opinion in our respected sister circuits to find that the statutory language is clear on its face." 2009 WL 4912300, at *3. Then, as did *Snell Island*, the court found that the NLRB's interpretation of section 3(b) was a permissible interpretation under *Chevron* and upheld the validity of the delegated authority. *Id.*

b. D.C. Circuit Holds Delegation Invalid

While the D.C. Circuit stands alone in holding invalid the Board's exercise of the quorum provision in section 3(b), that court's opinion has a significant impact given that any party dissatisfied with a Board order or opinion has the right to appeal to the United States Court of Appeals for the D.C. Circuit. *See* 29 U.S.C. § 160(f).

In *Laurel Baye*, the petitioner did not challenge the merits of the underlying order but only the Board's authority to enter the order at all. *See* 564 F.3d at 470. Laurel Baye based its invalidity argument on two rationales. First, "it contend[ed] that the Board has no authority to delegate its power to a three-member group that it knows will be acting as a two-member group due to expected term expiration." *Id.* at 472. And second, Laurel Baye argued that "even if the Board could make the initial delegation, that delegation cannot survive the loss of a quorum on the Board itself." *Id.* Because the court agreed on the second argument, it did not reach the first. *Id.*

Based on the plain language of section 3(b), the court focused on the requirement that "the Board quorum requirement must be satisfied '*at all times*'" and that, if a quorum is delegated to a delegee group, the quorum for that group is two, rather than three. *Id.* (quoting 29 U.S.C. § 153(b) (emphasis added by court)). The court then concluded that:

> Reading the two quorum provisions harmoniously, the result is clear: a three-member Board may delegate its powers to a three-member group, and this delegee group may act with two members so long as the Board quorum requirement is, "at all times," satisfied.

Id. at 472-73 (citation omitted). Based on this plain reading, the court concluded that:

> It . . . defies logic as well as the text of the statute to argue, as the Board does, that a Congress which explicitly imposed a requirement for a three-member quorum "at all times" would in the same sentence allow the Board to reduce its operative quorum to two without further Congressional authorization.

Id. at 473. The court also found support for its reading of the statute based in agency law, noting that "[a]n agent's delegated authority is . . . deemed to cease upon the resignation or termination of the delegating authority," and that, in this case, "[i]f the Board has no authority [because it has fallen below the quorum requirement], it follows that the committee has none." *Id.* at 473.

c. Potential Impact

With the Supreme Court's decision to hear the matter, set for argument on March 23, 2010 the question will not be in doubt much longer. However, even if the Court were to hold that opinions issued by only two Members were invalid, those decisions and orders issued by a two-Member Board may be ratified or otherwise reinstated by a properly constituted panel once Board vacancies are filled. *See* 564 F.3d at 476. While any new Member would hopefully review each opinion before voting, which would take a considerable amount of time, it is not unreasonable to think that this option would be considered for at least some of the opinions issued.

Finally, inasmuch as Board efficiency has been a central theme of Senator Specter's proposals for reform, and Congress is considering labor law reform, some alteration or clarification of the quorum delegation provision may come from Congress. While this option for resolution would be the most cumbersome to obtain, given the labor law reform currently under consideration, it is, nonetheless, a possibility.

2. Key Issues Currently Pending Before The Board

Once the Board returns to a full complement, we expect to see an increase in the number of significant cases decided by the Board, given the backlog of important issues presumably being held for a full panel. Specifically, issues relating to pre-recognition negotiation, handbilling, and unlawful secondary activity are all issues that the Board could quickly decide.

a. Negotiating Principles of Organization and Initial Collective Bargaining

One area in which the Board could clarify the legal landscape related to union organizing arises in the currently pending *Dana Corp.*, Nos. 7-CA-46965, 7-CB-14803, 7-CA-47078, 7-CB-14119, 7-CA-47079, 7-CB-14120 ("*Dana II*"). *Dana II* involves the right of an employer and a union to negotiate the principles by which a union may seek to organize the employer's employees should the union choose to do so, and to negotiate the general principles that would guide collective bargaining in the event that bargaining authority is obtained from an uncoerced majority of these employees. The administrative law judge that heard *Dana II* determined that the employer and union did not violate the Act by agreeing that, only following proof of majority status, certain principles would inform future bargaining. *Dana Corp.*, 7-CA-46965, 2005 WL 857114 (N.L.R.B. ALJ Apr. 11, 2005). These principles included, for example, the union's willingness to support co-payments for health care and other similar items that the General Counsel alleged amounted to pre-recognition negotiation of terms and conditions of employment. *Id.* To support his argument, the General Counsel relied principally on *Majestic Weaving Co.*, 147 N.L.R.B. 859 (1964), *op. supplemented*, 149 N.L.R.B. 1523 (1964), *enforcement denied on other grounds*, 355 F.2d 854 (2d Cir. 1966), where recognition preceded majority support and the parties executed a completed collective bargaining agreement in an effort to give the appearance of majority support – a very different case than *Dana II*.

The reality of union organizing in 2010 is much different than it was at the time of *Majestic Weaving* in 1964 – the top-down or corporate campaign was virtually unheard of at that

time. Given the increasing use of the corporate campaign and card check and neutrality agreements, the kind of agreements that are at issue in *Dana II* and those prohibited by *Majestic Weaving* have the potential to facilitate relationships between employers and unions, without interfering with employee rights, so long as two conditions are met. First, of course, any framework must be contingent (as it was in *Dana II*), upon proof that an uncoerced majority of employees wish to be represented by the union. And second, employees should be notified of the terms negotiated within the framework. Indeed, this would likely assist employees in making an informed choice about unionization, as they could do so with relatively accurate information about the terms that the union may be able to achieve in bargaining, rather than simply promises of the sort that unions are now permitted to offer when organizing a workplace.

It is likely that the Board will recognize these realities and affirm the ALJ decision in *Dana II*. By doing so, it would provide both employers and unions a way to reach agreements that will inform employees of what they can expect if they choose to be represented. Employers would then be allowed to condition neutrality/card check agreements on reaching understandings on what will be negotiated, which may make employers more receptive to such agreements. Overall, such a system would give unions broader ability to organize an employer's employees, employers more certainty regarding what would happen if employees selected a union representative, and would give employees more information from which to decide the representation question. Finally, and as importantly, it would streamline the always difficult first contract negotiation process, and thus lead to quicker contracts. Of course, if EFCA passes, the need for a union to enter into a neutrality agreement—let alone a *Dana II* agreement—would disappear, given that the union could make its promises and then, if the employer does not yield, put those demands before an arbitrator in mandatory interest arbitration. But the Board in *Dana II* has an opportunity to approve a system with the potential to benefit all stakeholders: employees, unions, and employers.

b. Access to Employer Property for Organizational Activities by Off-Duty Employees or Employees of Contractors

In a matter that has bounced between the Board and courts for over eight years, it is possible that a full Board may address the rules regarding consumer hand-billing activities on an employer's property by off-duty employees and whether an employer may prohibit those activities. *See New York New York Hotel, LLC*, 334 N.L.R.B. 762 (2001); *New York New York, LLC v. NLRB*, 313 F.3d 585 (D.C. Cir. 2002). The Board's opinion drew a distinction between (1) "individuals who do not work regularly and exclusively on the employer's property" and who "may be treated as trespassers," and (2), as involved in this case, employees of contractor Ark, who operated a restaurant on New York New York's ("NYNY") premises, "who work regularly and exclusively in the Respondent's facility," and therefore "may engage in protected solicitation and distribution [when off-duty] in nonwork areas of the owner's property unless the owner can show that prohibiting that sort of activity is necessary to maintain production and discipline." 334 N.L.R.B. at 762-63.

On review, the D.C. Circuit reversed and remanded for further consideration, given that "[t]he Supreme Court has never addressed the § 7 rights of employees of a contractor working on property under another employer's control, and the Board's *New York New York* decisions shed

little light on the important issues this factual pattern raises." 313 F.3d at 588. The court noted that a number of questions were left unanswered, including:

- "[w]ithout more, does the fact that the Ark employees work on NYNY's premises give them *Republic Aviation* rights [to engage in organizing activity on the employer's premises in non-work areas during off-duty hours] throughout all of the non-work areas of the hotel and casino?"

- whether the Ark employees are "invitees of some sort but with rights inferior to those of NYNY's employees?"

- whether the Ark employees should "be considered the same as nonemployees when they distribute literature on NYNY's premises outside of Ark's leasehold?", etc.

See 313 F.3d at 590. These matters remain unresolved before the Board. If employees of contractors are held to have the equivalent of *Republic Aviation* rights, or anything more than the rights of non-employee union organizers under *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), employers will need to carefully reconsider the ways in which they police their property for union activity, given the expanded range of permissible activity by individuals not directly employed by the property owner.

c. Bannering

Another issue developing before the Board is the use of banners at the sites of neutral employers and the limits of permissible conduct under section 8(b)(4)(ii)(B). Various decisions by administrative law judges are split on whether the use of banners announcing a "labor dispute" or stating "shame on [neutral employer]" on the neutral employer's premises are unlawful secondary picketing, or protected by the publicity exception to section 8(b)(4). *See Sw. Reg'l Council of Carpenters*, NLRB ALJ Case No. 31-CC-2113 (Feb. 18, 2004) (20 x 4 feet banner stating "labor dispute" and "shame on [neutral employer]" is protected free speech); *Local Union No. 1827, United Bhd. of Carpenters & Joiners of Am.*, No. 28-CC-933, 2003 WL 21206515 (N.L.R.B May 9, 2003) (given the fact that banners were fixed and in a place where customers of neutral employer could see them, bannering constituted unlawful picketing).

If an Obama Board were to take up the issue, it is likely that they would find the activity a protected exercise of free speech. However, even if so, the Board should carefully consider and provide guidance about what factors would shift the bannering from protected speech into unlawful picketing, such as placement, duration, text, and objective of the bannering.

3. Key Issues Likely To Be Revisited By The Board

Aside from the issues currently pending at the Board, it is likely that the new Board would look to reverse some of the key cases handed down by the Bush Board, particularly in areas that could expand the pool of the employees who could be organized. While the Board's ability to take on these cases may be delayed while it waits for the ideal case to come before it, it is likely that these issues are all on the Board's radar for change.

a. Definition of Independent Contractor Status

In recent remarks delivered at Cornell University, Chairman Liebman indicated that one area that should be revisited is the definition of independent contractors, an issue that has developed in both Federal courts and Congress. The Board's concern primarily relates to the D.C. Circuit's opinion in *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 495 (D.C. Cir. 2009), where the court reversed a Board decision that FedEx Home Delivery ("FedEx Home") violated sections 8(a)(1) and (5) by refusing to bargain with unions certified as bargaining representatives, based on the Board's finding that the employees in the units were employees, not independent contractors. *Id.*

In reversing the Board, the court found that the drivers were independent contractors and emphasized the proper weight and focus that should be given to the entrepreneurial opportunity factor in the common law test. *See id.* at 496-97, 502-03. The court acknowledged that the independent contractor test initially operated "in terms of an employer's right to control" but that eventually "a verbal formulation emerged that sought to identify the essential quantum of independence that separates a contractor from an employee." *Id.* at 496, 497. The development became "as explicit as words can be," *id.* at 497, when the court "'shift[ed the] emphasis' away from the unwieldy control inquiry in favor of a more accurate proxy: whether the 'putative independent contractors have "significant entrepreneurial opportunity for gain or loss."'" *Id.* (quoting *Corp. Express Delivery Sys. v. NLRB*, 292 F.3d 777 (D.C. Cir. 2002) (quoting *Corp. Express Delivery Sys.*, 332 N.L.R.B. No. 144, at 6 (Dec. 19, 2000))).

As the court explained the law after *Corporate Express*, "while all the considerations at common law remain in play, an important animating principle by which to evaluate those factors in cases where some factors cut one way and some the other is whether the position presents the opportunities and risks inherent in entrepreneurialism." 563 F.3d at 497. Given that FedEx Home drivers, among other things, work multiple routes or hire their own employees for their single routes, make use of their vehicles for other commercial or personal uses, set their own hours of work and breaks, and assign contractual rights to routes, the court reversed the Board, finding that because "the indicia favoring a finding the contractors are employees are clearly outweighed by evidence of entrepreneurial opportunity, the Board cannot be said to have made a choice between two fairly conflicting views." *Id.* at 498-500, 503-04. Accordingly, because the employees were independent contractors and thus not covered by the Act, the court reversed the Board's decision that FedEx Home violated the Act by refusing to bargain.

While *FedEx Home Delivery* is an important case for independent contractor status under the Act, it is not clear to what degree *FedEx Home Delivery* actually changed the test. While the dissent suggests that entrepreneurial opportunity is given a sense of primacy for the first time, *see id.* at 509-10, 518-19 (Garland, dissenting), the role of entrepreneurial opportunity clearly existed and received increased emphasis in *Corporate Express*. *See id.* at 502-03; *see also* 292 F.3d 777. Accordingly, application of *FedEx Home Delivery* in subsequent cases—both at the Board and in the courts—will determine how large of a role entrepreneurial opportunity will play in balancing other factors recognized at common law.

Despite the D.C. Circuit's attempt to provide more guidance on this topic, the decision may have little impact on cases not under the NLRA. In another case, although not a labor case,

the Seventh Circuit noted the variety of tests for determining independent contractor status. *See Estate of Suskovich v. Anthem Health Plans of Va.*, 553 F.3d 559 (7th Cir. 2009). There, the court applied the 10-factor test from the Restatement (Second) of Agency, but noted that claims were also made under ERISA, which uses a 12-factor common law standard, and the FLSA standard that "determine[s] whether an arrangement is an employment or independent contractor relationship with a six-factor test to determine the 'economic reality' of the situation." *See id.* at 565. Entrepreneurial opportunity was not a factor in any of these tests. Yet another test is the 20-factor test applied by the IRS, also termed the "right-to-control test," but different from either the 10-factor Restatement test, the 12-factor ERISA test, or the six-factor FLSA test. And, despite the inclusion of twenty factors, entrepreneurial opportunity is not considered under the test commonly used by the IRS. So, while *FedEx Home Delivery* may cast itself as an application of *Corporate Express* in the context of NLRA coverage, it appears that this development may significantly affect the independent contractor test only under the NLRA. The IRS has set aside its twenty factor test and adopted a bright line test in certain circumstances, which has been subject to ongoing litigation. *See Mayo Foundation for Medical Educ. v. IRS*, 568 F.3d 675 (8th Cir. 2009) (affirming IRS regulation requiring that medical residents be treated as employees and not students), *petition for certiorari filed*, Jan. 14, 2010 (No. 09-837).

b. Expanding the Definition of Supervisors

In response to the Supreme Court's criticism of the manner in which the Board had previously defined the term "supervisor" and its interpretation of the phrase "independent judgment," *see NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706 (2001), the Bush Board issued *Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686 (2006) and its companion cases, *Golden Crest Healthcare Ctr.*, 348 N.L.R.B. 727 (2006), and *Croft Metals, Inc.*, 348 N.L.R.B. 717 (2006), which expanded the number of individuals classified as "supervisors" under the NLRA. Specifically, in the *Oakwood* cases, the Board reexamined and clarified its interpretation of the phrase "independent judgment," as well as the section 2(11) terms "assign" and "responsibly to direct." The Board defined "assign" as the act of "designating an employee to a place (such as a location, department, or wing), appointing an individual to a time (such as a shift or overtime period), or giving significant overall duties, *i.e.* tasks, to an employee." 348 N.L.R.B. at 689. The Board defined "responsibly to direct" with the following example: "If a person on the shop floor has men under him, and if that person decides what job shall be undertaken next or who shall do it, that person is a supervisor, provided that the direction is both responsible . . . and carried out with independent judgment." *Id.* at 691. And, consistent with the Supreme Court's direction in *Kentucky River*, the Board adopted an interpretation of "independent judgment" that "applies irrespective of the Section 2(11) supervisory function implicated, and without regard to whether the judgment is exercised using professional or technical experience." *Id.* at 692. The Board defined "independent judgment" in relation to two concepts: first, independent judgment cannot be effectively controlled by any other person, and second, the degree or discretion must rise above the "routine or clerical." *Id.* at 693. Taken together, these definitional clarifications expanded the number of individuals who may be deemed supervisors under the Act, and concomitantly narrowed the pool of workers who may potentially be organized.

These decisions, which did not move the compass very far, are unlikely to survive for long. In a dissenting opinion, Member (now Chairman) Liebman and Member Walsh argued that the majority's definition of "assign" was improper. According to the dissent, the term

"assign" should not include the act of assigning overall tasks to employees because assigning employee tasks is a "quintessential function of the *minor supervisors* whom Congress clearly did *not* intend to cover in Section 2(11)." *Id.* at 702 (emphasis added). Accordingly, "assign" should be defined as "designating work site" or "work hours." *Id.* Members Liebman and Walsh also argued that the majority incorrectly defined the term "responsibly to direct," because, in the dissent's opinion, section 2(11) is intended to cover only those "persons who were effectively in charge of a department-level work unit, even if they did not engage in the other supervisory functions identified in Section 2(11)." *Id*. (emphasis omitted).

The dissenting opinion filed by Members Liebman and Walsh may well foreshadow the approach likely to be taken by an Obama-appointed Board, or by Congress. Indeed, on March 22, 2007, in response to the Board's decision in *Oakwood Healthcare Inc.*, Rep. Robert Andrews (D-NJ) and 164 co-sponsors introduced H.B. 1644 – the Re-Empowerment of Skilled and Professional Employees and Construction Tradesworkers Act – "to amend the National Labor Relations Act to clarify the definition of 'supervisor' for purposes of such Act," *available at* http://www.opencongress.org/bill/110-h1644/show (last visited Feb. 6, 2010). While the so-called RESPECT Act stalled in the prior Congress, if reintroduced and passed, the Act would amend section 2(11) of the NLRA in three ways. First, it would require that an individual spend the majority of his or her time as a supervisor in order to qualify for supervisory status. Second, it would eliminate the word "assign" from the statutory definition, meaning that the individuals who can assign work will no longer, on that basis alone, be statutory supervisors. And, third, it would strike the phrase "or responsibly to direct them." These changes would significantly narrow the definition of a supervisor, and consequently expand the number of employees subject to unionization. Although this bill has not yet been reintroduced, one can expect that it will be. And, regardless of Congressional action, the Board will likely revisit *Oakwood* and related decisions, thus potentially expanding once more the pool of workers available to be organized.

While these changes would clearly impact the number of individuals available to be organized, the potential consequences of excluding "minor supervisors" from the Act's definition of supervisor has further implications in the organizing context. In *Harborside Healthcare, Inc.*, 343 N.L.R.B. 906 (2004), the Board set forth the test for when a supervisor's speech regarding organizing – either prounion or antiunion – justifies setting aside an election. In *Harborside*, the majority noted that the "proper inquiry . . . is whether supervisory prounion [or antiunion] conduct reasonably tends to have a coercive effect on or is likely to impair an employee's choice." *Id*. at 909 (internal quotation marks and alterations omitted). More specifically, the inquiry includes "consideration of the nature and degree of supervisory authority possessed by those who engage in the [challenged] conduct," and "an examination of the nature, extent, and context of the conduct in question." *Id.* The Board then went on to hold that a supervisor's speech to three employees – one of whom the supervisor directed for one day, and two of whom she never specifically supervised – was sufficiently coercive, in part because of the possibility that the supervisor might someday supervise those employees and the "three employees could reasonably fear that [the supervisor] would eventually exercise charge nurse authority over them." *Id*. at n.13.

Member Liebman dissented, noting that the Board's definition of supervisor "sweeps in many workers whose authority is quite limited and whose legal status is highly debatable." *Id.* at 916. She then noted that "[t]o the extent that it inhibits workers who fall near, but not over, the

supervisory line, the majority's approach threatens to deprive unions of their natural leaders in the workplace." *Id.* The dissent criticized the majority opinion for shifting the focus away from a showing of coercion, and ignoring an employer's anti-union stance in assessing a supervisor's pro-union conduct. *Id.*

Limiting the definition of "supervisor" to exclude those whom now-Chairman Liebman characterized as "minor supervisors" would have the additional consequence of permitting these "minor supervisors" to influence employee choice by speaking in favor of unionization without fear that doing so would be considered supervisory coercion. It would thus severely limit the impact of *Harborside*'s limitations on pro-union supervisory speech. As with many of the other areas that may change, altering the definition of "supervisor" is likely to have consequences beyond those immediately intended. Accordingly, careful consideration should be given to not only whether a change is necessary, but also to the less-obvious ramifications of such a change.

c. Expanding Opportunities For Organizing Temporary Employees

One of the fastest growing segments of the American workforce is temporary workers. *See, e.g., United States Department of Labor Bureau of Labor Statistics Career Guide to Industries: Employment Services, available at* http://www.bls.gov/oco/cg/cgs039.htm (last visited Feb. 6, 2010). As U.S. businesses struggle to compete in a global economy and face the often seasonal ups and downs of business, they turn to agencies that are able to supply workers for short periods when needed, rather than constantly adjusting the size of their permanent workforce. The conditions under which these individuals work present unique organizing challenges, because they are formally employed by the temporary agency, but may do work in a number of different employers' worksites. Organizing the temporary agency makes little sense when the employer at the worksite controls many of the day-to-day working conditions. And the Board has held that these individuals cannot be included in an appropriate collective bargaining unit with permanent employees of the host employer even where a joint employer relationship exists, absent the consent of both employers. *H.S. Care LLC d/b/a Oakwood Care Ctr.*, 343 N.L.R.B. 659 (2004).

Specifically, in *Oakwood Care Center*, the Board considered a proposed collective bargaining unit made up of permanent employees of a long-term residential care center, and employees of a personnel staffing agency who also worked at the center. The Board held that the latter group of employees was jointly employed by the center and by the staffing agency because the center and the agency jointly determined pay and benefits, while the center supervised their work on a day-to-day basis. Existing Board law at the time the case arose suggested that a unit comprised of employees solely employed by the center and jointly employed by the center and the agency was nonetheless a "single employer" unit that could be maintained without the consent of both employers. *See M.B. Sturgis, Inc.*, 331 N.L.R.B. 1298 (2000), *overruled by* 343 N.L.R.B. 659 (2004). In *Oakwood*, the Board suggested that the *Sturgis* decision applied a "novel definition of 'employer' fashioned for the purpose of deciding the case," when it held that the two groups of employees worked only for a single employer. *Oakwood*, 343 N.L.R.B. at 660. The *Oakwood* majority thus reasoned that because one of the groups was jointly employed, the proposed unit was a multiemployer unit that could not be entered into without consent. *Id.* at 662-63.

As with many of the now vulnerable cases, Member – now Chairman – Liebman and Member Walsh dissented, accusing the majority of barring "yet another group of employees – the sizeable number of workers in alternative work arrangements – from organizing labor unions, by making them get their employers' permission first." *Id.* at 663. Describing the case as "involving the rights of temps, part-timers, and other contingent workers to improve their working conditions through union representation," and calling the majority's opinion "mistaken in every critical respect," the dissent accused the majority of ignoring the context in which such arrangements have been created, which purportedly includes companies' "strategic decision to pursue a low-wage, low-skill, high-turnover path to profit-making." *Id.* at 664-65 (internal quotation marks omitted). In the dissent's view, the existence of a joint employer and a single employer makes for an appropriate unit so long as the employees share an appropriate community of interest, inasmuch as such units "facilitate . . . collective bargaining." *Id.* at 665, 667-68.

In these difficult economic times, it is clear that the issue of temporary workers is not going away. It is equally clear that a new Board majority will look for ways to facilitate organizing these workers, whether based in the language of the statute or in those Members' views of appropriate social policy. Should the Board move back to *Sturgis*, it will then face a number of important and unanswered questions. How is an employer, for example, to negotiate a contract with a group of employees that may have vastly different interests? Permanent employees may be interested not only in wages, but in longer term benefits such as a retirement plan and/or health insurance, and may be willing to accept lower wages in exchange for richer benefits in these areas. Temporary employees, on the other hand, are not likely to be employed long enough at any one host site to take full advantage of these programs (and, indeed, may be better served by participating in any such programs offered by the temporary agency itself), and thus will be less willing to compromise wage rates and non-economic terms and conditions of employment in exchange for such programs. And these problems exist not just for employers, but for unions as well. Unions, after all, owe a duty of fair representation to *all* unit employees; substantial conflicts among employee interests often place the union in an untenable position. (Indeed, in *Sturgis* it was the union, not the employer, that opposed including temporary employees in the collective bargaining unit). And finally, conflicts among the permanent employer and the temporary agency are also possible. Unlike traditional multiemployer bargaining units, which typically focus on obtaining uniform terms and conditions of employment for an industry, these employers operate in two vastly different businesses, with differing cost and competitive structures, and are thus likely to have very different bargaining objectives.

Regardless of these concerns, the Board is likely to revisit this issue in the coming years. And, should it seek to return to the *Sturgis* rule, the Board should address and resolve these issues. It is unlikely to do so, however; indeed, these very issues were raised in *Sturgis*, where they were disregarded by the majority. *See Sturgis*, 331 N.L.R.B. at 1307 (noting, in response to concerns about its holding, that the Board is "confident that the collective-bargaining process encouraged by the Act . . . is capable of meeting the changing conditions and challenges posed by bargaining in these units."). The Board's confidence in this regard may be misplaced and, in any event, should not substitute for careful analysis of the very real practical problems that the *Sturgis* rule has the potential to create.

d. Developments in Laws on Union Salts: Definition of "Employee" and Backpay Rules

The new Board is also likely to revisit issues relating to the protection of union organizers, known as "union salts," who pose as job applicants for the purpose of organizing a workplace. For instance, the Board may alter the proper definition of "employee" in the union salting context. The Board in *Toering Electric Co.*, 351 N.L.R.B. 225 (2007), held that union salts may not always be considered employees within the meaning of the Act, noting that "a Section 2(3) employee is someone genuinely interested in seeking to establish an employment relationship with the employer." *Id.* at 228. For this reason, the Board abandoned the previous implicit "presumption that any individual who actually applies for a job is entitled to protection as a Section 2(3) employee." *Id.* at 231. Prior to *Toering Electric*, the Board presumed that an individual who submitted an application for employment was a section 2(3) employee and thus entitled to protection against discriminatory hiring practices. *See, e.g.*, *Progressive Elec., Inc. v. NLRB*, 453 F.3d 538, 551-53 (D.C. Cir. 2006), *enforcing* 344 N.L.R.B. 426 (2005). Finally, the Board imposed on the General Counsel the ultimate burden of proving an individual's "genuine interest in seeking to establish an employment relationship with the employer" in order to establish a valid discrimination claim.

Dissenting, Members Liebman and Walsh began by claiming that *Toering Electric* "continues the Board's roll-back of statutory protections for union salts who seek to uncover hiring discrimination by non-union employers and to organize their workers." 351 N.L.R.B. at 238. The dissent characterizes *Toering Electric* as contrary to the NLRA, its policies, and Supreme Court precedent. *Id.* Revisitation of the issue decided in *Toering Electric* is likely given that now-Chairman Liebman dissented, recalling that "[t]he Board, with the approval of the courts, has long treated salting as a legitimate tactic. But that era seems to be ending." *Id.* Thus, it is unlikely that *Toering Electric* is the final word on the definition of "employee" under section 2(3) in the salting context.

Additionally, the Board may revisit its prior opinion in *Oil Capitol Sheet Metal, Inc.*, 349 N.L.R.B. No. 118 (May 31, 2007), which held that "the traditional presumption that the backpay period should run from the date of discrimination until the [employer] extends a valid offer of reinstatement" would, in the context of union salts, "resul[t] in backpay awards that bear no rational relationship to the period of time a salt would have remained employed with a targeted nonunion employer." *Id.* Accordingly, the Board "decline[d] to apply a presumption of indefinite employment and instead . . . require[d] the General Counsel, as part of his existing burden of proving a reasonable gross backpay amount due, to present affirmative evidence that the salt/discriminate, if hired, would have worked for the employer for the backpay period claimed." *Id.* On appeal to the D.C. Circuit, the court rejected the appeal as unripe for review, given that the compliance proceedings in which the new rule would apply had not yet taken place, so that the court "d[id] not know whether the new rule will have any impact on the ultimate remedy." *Sheet Metal Workers Int'l Ass'n, Local 270 v. NLRB*, 561 F.3d 497, 501 (D.C. Cir. 2009). Considering the likely difficulty in meeting that burden, a new Board could revisit the rule in *Oil Capitol Sheet Metal*.

e. Expanding Protected Concerted Activity – A Possible Return to *Alleluia Cushion*

One additional area the Board may revisit is the area of "protected concerted activity" under the NLRA. Section 7 guarantees that employees may engage in concerted activity for mutual aid and protection. *See* 29 U.S.C. § 157. This area of law could be expanded in at least two ways.

First, as discussed *infra*, Section III.A.1.b, the Fourth Circuit recently reversed a Board decision involving protected concerted activity in *Media General Operations Inc., d/b/a/ The Tampa Tribune v. NLRB*, 560 F.3d 181 (4th Cir. 2009). As explained more fully below, the Fourth Circuit stated that the employee's conduct "skirt[ed] the outer bounds of that which can be considered concerted activity under the Act's auspices." However, the Board's decision was reversed on the basis that the conduct, even though protected concerted activity, lost its protection based on its egregious and flagrant nature. Thus, one way the Board could expand the activities considered as protected concerted activity would be to use the behavior in *The Tampa Tribune* as the "outer bounds" of the Act's protections for determining what other conduct would be protected.

A second and broader manner in which the Board may be poised to expand the definition of protected concerted activity is to return to the *Alleluia Cushion* doctrine. *See Alleluia Cushion Co., Inc. & Jack G. Henley*, 221 N.L.R.B. 999 (1975), *overruled by Meyers Indus. (Meyers II)*, 281 N.L.R.B. 882 (1986). *Alleluia Cushion* involved the termination of an employee who complained to both management and California OSHA about alleged safety violations at his place of work. Addressing the employer's arguments that the employee was not representing other employees, the Board noted that "the absence of any outward manifestation of support for [the employee's] efforts is not, in our judgment, sufficient to establish" that other employees did not support him or share his concerns. The Board concluded that in raising OSHA safety and health concerns, "the consent and concert of action emanates from the mere assertion of such statutory rights." 221 N.L.R.B. at 1000. As a result, the Board held that "where an employee speaks up and seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees, in the absence of any evidence that fellow employees disavow such representation, we will find an implied consent thereto and deem such activity to be concerted." *Id.*

This doctrine was reversed by the Board, first in *Meyers I*, 268 N.L.R.B. 493 (1984), and, on remand, *see Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), and reversed again in *Meyers II*. 281 N.L.R.B. 882 (1985), *aff'd*, 835 F.2d 1481 (D.C. Cir. 1987). As the Board explained in *Meyers II*, in order for activity to be protected concerted activity, it is not enough for an employee to assert a statutory right; rather, the employee must be acting "with or on the authority of" fellow workers. 281 N.L.R.B. at 885. The Board noted that the single employee acting on behalf of fellow workers, or based on discussions with fellow workers, seeking to bring about group action, or raising group concerns would be engaged in protected concerted activity, even under their revised definition. *Id.* at 887. However, *Meyers II* would not recognize an individual's activity as protected concerted activity simply because he or she asserted statutory rights; while "invocation of employee contract rights is a continuation of an ongoing process of employee concerted activity . . . invocation of statutory rights is not." *Id.* at 888.

Under a new Obama-Board, a return to *Alleluia Cushion* is not out of the question. The doctrine's roots were founded in the objectives and protective purposes of section 7, and based on dissents in other cases discussed in this article. Once a full Board is seated, Chairman Liebman will likely seek to reverse what she considers to be years of erosion of employee protections under the Act. Given the potentially wide-reaching effect of a return to the *Alleluia Cushion* doctrine, reversing *Meyers II* would allow the Board to quickly increase the Act's protection of concerted activity.

C. Developments in Arbitration

Recent developments in arbitration have come from Congress, the Supreme Court, and the lower federal courts. As arbitration continues to be used more frequently as a means of dispute resolution, it is no surprise that the law is quickly developing as a result.

1. The Supreme Court's Decision in *Pyett*

On April 1, 2009, the Supreme Court issued its ruling in *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, holding that a collective bargaining agreement that clearly and unmistakably requires union members to arbitrate their claims under the Age Discrimination in Employment Act ("ADEA"), and by extension other antidiscrimination laws, is enforceable as a matter of federal law. The case clarifies and expands an area for collective bargaining and removes the obstacle, stemming from *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), that has hindered the use of arbitration for individual statutory claims of union-represented employees.

The case involved three employees who were reassigned from their night watchmen positions to "less desirable positions as night porters and light duty cleaners." *Pyett v. Pa. Bldg. Co.*, 498 F.3d 88, 91 (2d Cir. 2007), *rev'd and remanded*, 129 S. Ct. 1456 (2009). The employees filed grievances with the union, claiming that, because they were the only employees over fifty years of age, the employer violated the CBA provision prohibiting age discrimination when it reassigned them to less desirable positions and denied overtime. *Id.* at 90. The union, however, opted not to process the employees' claims of wrongful reassignment and age discrimination, electing to pursue only the overtime claims. *Id.*

The employees were covered by the collective bargaining agreement between the union and the multi-employer bargaining association of the New York City real estate industry, of which their employer was a member. *Id.* at 90. The CBA contained a mandatory arbitration provision for discrimination claims, stating that "[t]here shall be no discrimination against any . . . employee by reason of . . . age . . . including, but not limited to claims made pursuant to . . . the Age Discrimination in Employment Act, the New York State Human Rights Law, the New York City Human Rights Code . . . or any other similar laws, rules or regulations. All such claims shall be subject to the grievance and arbitration procedure . . . as the sole and exclusive remedy for violations. . . . Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination." *Id.*

While the parties continued to arbitrate the employees' overtime claims, and after the union elected not to pursue the employees' wrongful reassignment and age discrimination claims,

the employees filed suit against the employer in the United States District Court for the Southern District of New York, alleging that they had been "transferred from their positions" as night watchmen "and replaced by younger security officers in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et. seq.*, the New York State Human Rights Law, N.Y. EXEC. LAW § 290 *et. seq.*, and the New York City Administrative Code, N.Y.C. ADMIN. CODE § 8-107." The employer moved to compel arbitration pursuant to the explicit CBA provision requiring arbitration of statutory discrimination claims. *See Pyett v. Pa. Bldg. Co.*, No. 04-7536, 2006 WL 1520517 (S.D.N.Y. June 1, 2006). Denying the employer's motion, the district court held that, pursuant to *Rogers v. N.Y. University*, 220 F.3d 73 (2d Cir. 2000), "even a clear and unmistakable union-negotiated waiver of a right to litigate certain federal and state statutory claims in a judicial forum is unenforceable." *Id*. (relying, in part, on *Gardner-Denver Co.*, 415 U.S. 36). The employer appealed.

On appeal, the employer argued that the Second Circuit had not resolved the issue of whether a collectively bargained arbitration provision that clearly waives a covered employee's right to a judicial forum for the resolution of statutory employment discrimination claims is enforceable. 498 F.3d at 92. The employer further argued such waivers are enforceable under *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). 498 F.3d at 92. While conceding that *Gilmer* addressed only arbitration provisions contained in individual contracts, the employer nonetheless argued that *Gilmer* overturned *Gardner-Denver*. *Id.* The Second Circuit rejected these arguments.

First, the Second Circuit noted that it had "squarely decided that a union-negotiated mandatory arbitration agreement purporting to waive a covered worker's right to a federal forum with respect to statutory rights is unenforceable" in *Rogers v. New York University*, that *Rogers* continues to bind the Second Circuit, and that the employer had failed to persuade the court that its holding in *Rogers* was incorrect. *Id.*

The Second Circuit then discussed the trilogy of Supreme Court decisions addressing the interplay between collectively bargained arbitration provisions and the statutory employment discrimination claims of individual bargaining unit members. *Id*. at 92-93. In *Gardner-Denver*, the Court held that a collective bargaining agreement cannot require that bargaining unit members submit Title VII claims to arbitration. *Id*. at 92 n.3. Seventeen years later, in *Gilmer*, the Court held that an employee who had individually agreed to waive his right to process statutory employment discrimination claims in a federal forum *could* be compelled to arbitrate such claims. *Id*. And, finally, in *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998), the Court held that a collectively bargained arbitration clause could not waive an individual employee's right to a judicial forum for statutory employment discrimination claims unless such waiver is "clear and unmistakable." In *Wright*, however, the Court elected not to resolve the clear tension between *Gardner-Denver* and *Gilmer*, stating that it would "not reach the question whether such a [clear and unmistakable] waiver would be enforceable." *Id.* at 82.

In reversing the Second Circuit, Justice Thomas's opinion for the five-member majority reasoned that unions have the authority as the collective bargaining agent under the NLRA to negotiate final, binding dispute resolution procedures for the employees they represent, even if the disputes in question arise under federal or state antidiscrimination statutes. *Pyett*, 129 S. Ct. 1456. Like any other provision negotiated by the exclusive representative, "the CBA's

arbitration provision must be honored unless the ADEA itself removes this particular class of grievances from the NLRA's broad sweep." *Id.* at 1465. Finding that the ADEA does not exclude such claims from the labor arbitration process, the Court concluded that "there is no legal basis . . . to strike down the arbitration clause in this CBA, which was freely negotiated by the Union and the [Employer], and which clearly and unmistakably requires [the union-represented employees who filed suit] to arbitrate the age-discrimination claims at issue in this appeal." *Id.* at 1466.

The plaintiffs-respondents, as well as the dissenting opinions, emphasized the importance of stare decisis given their view that *Gardner-Denver* resolved the issue in this case. For the majority, however, *Gardner-Denver* rested "on the narrow ground that the arbitration was not preclusive because the collective-bargaining agreement did not cover statutory claims." *Id.* at 1467. Because the arbitrator in that case simply lacked the authority to resolve statutory claims, arbitration could not preclude a lawsuit on those claims. In *Pyett,* by contrast, the arbitrator did have such authority.

The Court did offer some limiting principles. First, its opinion suggests that the CBA must clearly empower the arbitrator to decide statutory claims in accordance with statutory requirements and must clearly state that the union is relinquishing the employees' right to go to court on such claims. Respondents made a number of arguments about the clarity of the CBA on this score, but these arguments were not properly preserved. *Id.* at 1473. Second, the Court did not indicate how it would have ruled if the Union had exercised its customary authority "to block arbitration of these claims." *Id.* It noted that the record evidence was disputed and this issue "was not fully briefed to this or any court and is not fairly encompassed within the question presented . . . ." *Id.* at 1474. Third, the Court made clear that any arbitration award was subject to judicial review (albeit limited) under the Federal Arbitration Act. Finally, the Court was unwilling to assume that the Union would not fairly represent unit employees in arbitration, noting that unions are subject to suit for breach of their duty of fair representation.

2. Congressional Developments in Arbitration

While *Pyett* only limited, without explicitly overturning, *Gardner-Denver*, it is possible that Congress might take legislative action regarding arbitration of statutory claims. Currently pending in Congress is the Arbitration Fairness Act of 2009, which is a reintroduced version of the Arbitration Fairness Act of 2007 that stalled in the 110th Congress (H.R. 3010, S. 1782). The House version was introduced on February 12, 2009 by Representative Henry C. Johnson, Jr. (D-GA) with 36 cosponsors. Senator Russ Feingold (D-WI) introduced the Senate version on April 29, 2009, with seven cosponsors. While there are minor differences between the bills, the Act would render pre-dispute arbitration clauses invalid if they required arbitration of (1) an employment dispute or (2) a dispute arising under any statute intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power. In doing so, the bill would reverse the Supreme Court decision in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), which held that employer policies could lawfully mandate that employees enter into binding pre-dispute arbitration agreements as a condition of employment. However, the legislation explicitly does not apply to arbitration provisions in collective bargaining agreements, the subject matter at issue in *Pyett*.

3. Second-Generation Interest Arbitration

In August 2009, a federal district court vacated an interest arbitration award binding the parties, over the employer's objection, to a second-generation interest arbitration provision. *Globe Newspaper Co. v. Int'l Ass'n of Machinists, Local 264*, No. 08-cv-11945, 2009 WL 2425798 (D. Mass. Aug. 5, 2009). After eight bargaining sessions without reaching an agreement on a new collective bargaining agreement, the parties submitted to interest arbitration the issue of "[w]hat should be the collective bargaining agreement between the parties for the years January 1, 2005 – December 31, 2007." While the Globe initially sought concessions related to wages, it eventually agreed to be bound by those provisions. At the fourth hearing, the Globe indicated for the first time that it objected to including any provision in the new agreement obligating the parties to submit future bargaining disputes to interest arbitration. Agreements between the Globe and the union had included arbitration provisions for nearly fifty years, including the most recent agreement, which read "[a]ny disagreement relative to a succeeding contract which cannot be settled through negotiations or conciliation shall be arbitrated . . . ."

Over the Company's objection, the arbitrator included the interest arbitration provision in his award on the terms of the parties' collective bargaining agreement. He did so based on the Globe's "belated challenge" and his view that it was "fundamentally unfair" and "disruptive and inconsistent with the orderly conduct of labor negotiations and interest arbitration." The Globe petitioned in federal court to have the arbitration clause portion of the award vacated.

Citing First Circuit precedent holding that "because 'an interest arbitration provision bears only a remote relation, if any, to wages, hours or other terms or conditions of employment [it] is not a mandatory subject of bargaining,'" the court held that an arbitrator could not re-impose an interest arbitration provision from a prior agreement over the Company's objection. *See id.* at *3-4 (quoting *NLRB v. Mass. Nurses Ass'n*, 557 F.2d 894, 898 (1st Cir. 1977) (alteration in original)). The court noted that numerous other courts had either refused to enforce second-generation interest arbitration provisions as contrary to public policy or, more broadly, had refused to enforce any portions of arbitral awards "insofar as they apply to *any* non-mandatory subjects of bargaining." Accordingly, the court vacated that portion of the arbitral award.

4. Other Developments in Arbitration

Aside from these developments from the Supreme Court and potential developments in Congress, various federal courts also issued important decisions in the field of arbitration.

On June 29, 2009, the Supreme Court granted certiorari in *Granite Rock Co. v. International Brotherhood of Teamsters*, 546 F.3d 1169 (9th Cir. 2008), *cert. granted*, 129 S. Ct. 2865 (June 29, 2009) (No. 08-1214). The Court accepted two issues for review: (1) whether a federal court has jurisdiction to determine whether a collective bargaining agreement was formed, when it is disputed whether any binding contract exists, but no party makes an independent challenge to the arbitration clause apart from claiming it is inoperative before the contract is established; and (2) whether section 301(a) of the Labor Management Relations Act ("LMRA"), which generally preempts otherwise available state law causes of action, provided Granite Rock a cause of action for tortious interference with contract against the International Brotherhood of

Teamsters that, while not a signatory, effectively displaced its signatory local union and caused a strike, for its own benefit, in breach of a collective bargaining agreement.

Granite Rock involves the circumstances surrounding the renegotiation and ratification of a collective bargaining agreement between Granite Rock Company ("Granite Rock") and the Local 287 of the International Brotherhood of Teamsters. *See* 546 F.3d at 1171-72. Prior to the April 30, 2004 expiration of their collective bargaining, the parties began negotiations for a new contract but, in June 2004, with no agreement reached, Local 287 members went on strike. *Id.* at 1171. On July 2, 2004, the parties eventually reached a tentative four-year agreement containing a broad arbitration clause requiring the arbitration of "'[a]ll disputes arising under this agreement.'" *Id.* Local 287 members allegedly ratified this agreement, which also contained a "no strike" clause, on July 2, 2004. *Id.* at 1172. Nonetheless, on July 5, 2004, an administrative assistant to the General President of the International Union ("IBT") called Local 287 workers and instructed them not to return to work on July 6, 2004. *Id.* The members complied, and the administrative assistant "played an active leadership role" in the ensuing strike, including offering both encouragement and financial support, in addition to the International Union providing benefits for workers as long as they did not return to work. *Id.*

Granite Rock sued Local 287 and the IBT in federal district court under section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), alleging that Local 287 breached its July 2, 2004 contract with Granite Rock and that IBT engaged in tortious interference with that contract. *Id.* The district court granted IBT's Rule 12(b)(6) motion to dismiss for failure to state a claim, but denied Local 287's motion to compel arbitration of the entire dispute under the broad arbitration clause included in the July 2, 2004 agreement. *Id.*

The Ninth Circuit affirmed the dismissal of IBT but reversed the district court on the arbitration issue and remanded with instructions to compel arbitration. *Id.* at 1178-79. As to the dismissal of IBT, the court concluded that "the district court was correct to dismiss Granite Rock's claim against IBT because a claim for tortious interference cannot be said to 'arise under' the new CBA between Granite Rock and Local 287," as required for a claim under section 301(a). *Id.* at 1173.

Surveying law from other circuits, the court noted that "[t]he majority of our sister circuits to have considered the question have declined to find a section 301(a) cause of action against parties not governed by the relevant agreement." *Id.* at 1174 (collecting cases). Similarly, under Ninth Circuit precedent, a claim could not "arise under" section 301(a) merely because the case would require interpretation or reference to a collective bargaining agreement. *Id.* at 1173 (discussing *Carpenters S. Cal. Admin. Corp. v. Majestic Housing*, 743 F.2d 1341 (9th Cir. 1984)). Noting that the Third Circuit was the only court to have adopted Granite Rock's position that a federal court had jurisdiction under section 301(a) because an essential element of the tortious interference claim would be breach of the collective bargaining agreement, the court rejected that case as inadequate, alone, to confer jurisdiction. *Id.* at 1174-75 (discussing *Wilkes-Barre Publ'g Co. v. Newspaper Guild Local 120*, 647 F.2d 372 (3d Cir. 1981)).

As to Granite Rock's breach of contract and damages claim against Local 287, the court noted that "'a party generally may not sue in federal court under a contract that, by its terms, requires arbitration.'" *Id.* at 1176 (quoting *Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404 (9th Cir.

1989)). However, two years after *Teledyne*, the court recognized an exception when it held that "a party who disputes the formation of a contract may not be forced to arbitrate the issue of contract formation." *Id.* at 1176-77 (citing *Three Valleys Municipal Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136, 1140 (9th Cir. 1991)). Reversing the district court and compelling arbitration, the court noted that Granite Rock did not fit under this exception, because it did not dispute the efficacy of the contract itself; Granite Rock had brought an action under section 301(a) of the LMRA based on the July 2, 2004 contract that contained an arbitration clause and did not independently contest the validity of the clause itself, other than to argue that it was not operative at the time of the dispute. *Id.* at 1177-78. Said differently, the court found that Granite Rock "consented to arbitration . . . implicitly by suing under the contract containing the arbitration clause." *Id.* at 1178.

By granting certiorari, the Supreme Court may resolve two issues. First, as to the International, the Supreme Court may clarify what degree of connection to a CBA is necessary to bring suit against a non-party for disputes allegedly arising under the agreement. Were the Court to reverse the Ninth Circuit on this point, it could vastly expand section 301(a) liability to parties and claims tangentially related to a collective bargaining agreement. Second, as to Local 287 and claims regarding federal jurisdiction over contracts allegedly subject to arbitration, it is reasonable to suspect that, given the recent trend of both the Court and Congress to favor arbitration, the Ninth Circuit might be affirmed on this point. Oral argument was held on January 19, 2010.

In another case involving arbitration, the Fourth Circuit addressed both the timeliness of arbitration claims as well as the effect that expiration of a collective bargaining agreement has on an arbitration clause. *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied-Industrial & Serv. Workers Int'l Union AFL-CIO/CLC v. Cont'l Tire N. Am., Inc.*, 568 F.3d 158 (4th Cir. 2009). In September 1999, the union and Continental Tire North America ("CTNA") entered into a collective bargaining agreement and an agreement on pension and insurance benefits ("P & I Agreement"). *Id.* at 161. The CBA contained a broad grievance and arbitration procedure for "settlement of any and all disputes arising between the parties during the life of said Agreement," which was cross-referenced and adopted by the P & I Agreement. *Id.* But in addition, after each paragraph on the amounts of pension and health care benefits to which an employee was entitled, the P & I Agreement included the additional clause that "[t]ermination of the Labor Agreement shall not invalidate the use of its grievance procedure for the purposes of this paragraph." *Id.*

In 2006, CTNA was forced to lay off individuals at one of its facilities and, around the same time, the collective bargaining agreement and P & I Agreement expired. *Id.* After negotiating to impasse, CTNA lawfully unilaterally implemented its last, best, and final offer, which did not include an arbitration provision. *Id.* at 161-62. When the union grieved both the payment of health benefits and pension payments, CTNA refused to arbitrate, causing the union to file suit to compel arbitration under section 301 of the LMRA. *Id.* at 162. The district court granted summary judgment to the union, *see United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied-Industrial & Service Workers Int'l Union AFL-CIO/CLC v. Continental Tire North America Inc.*, 562 F. Supp. 2d 677 (W.D.N.C. 2008), and CTNA appealed.

On appeal, CTNA first argued that the union's suit was untimely under section 301 and the six-month statute of limitations from section 10(b) of the NLRA, which governs the time to file suit to compel arbitration. *Id.* at 162. While the court agreed that the six-month statute of limitations was the proper time period, it found that the time period only begins to run after an unequivocal refusal to arbitrate and that CTNA's August 9, 2006 refusal was not sufficiently unequivocal. *Id.* at 162-63. Specifically, the court found that the statement that "'it was CTNA's position that the grievances were not arbitrable under the current grievance procedure' and that [the employee responding on behalf of CTNA] would 'give the grievances to . . . CTNA's Vice President, Human Resources for a written response'" was not "[a] refusal to arbitrate [that was] unequivocal so that it puts the other party on notice that the statute of limitations period has begun." *Id.* at 163. Accordingly, the court rejected CTNA's timeliness argument.

On the merits, CTNA argued that the claims were not arbitrable because the arbitration agreements were no longer in force. *Id.* While agreeing that the scope of arbitration was contractual, the court found that the contractual language between the parties specifically contemplated that disputes over pensions and health insurance benefits would continue to be resolved by the dispute resolution procedures in the collective bargaining agreement, even after its expiration. *Id.* at 164-65. Further, the Fourth Circuit relied upon the Supreme Court's opinion in *Litton Financial Printing Division v. NLRB*, 501 U.S. 190 (1991), to suggest that the matter might be arbitrable even absent the P & I Agreement's language, writing that "'if a collective bargaining agreement provides in explicit terms that certain benefits continue after the agreement's expiration, disputes as to such continuing benefits may be found to arise under the agreement, and so become subject to the contract's arbitration provisions.'" *Id.* at 165 (quoting 501 U.S. at 207-08). Either way, the court found that "[a]ll of the contractual roads here lead to Rome, with Rome in this case being arbitrability." *Id.* Having resolved the arbitrability of the claims, the court left the merits for the arbitrator to decide. *Id.* at 165-66.

In a final case from the circuit courts, the Second Circuit issued a potentially important opinion on a successor's obligation to arbitrate whether it is bound to a predecessor's collective bargaining agreements. *Local 348-S, UFCW, AFL-CIO, v. Meridian Mgmt. Corp.*, 583 F.3d 65, (2d Cir. 2009). The court, over strong dissent, held that while an employer's status as a successor does not automatically bind the successor to the substantive terms of the predecessor's CBA, the successor "is required to arbitrate the issue of whether and to what extent it is bound by the terms of that agreement." *Id.* at 66. Meridian Management, a contractor for janitorial and other services, terminated its subcontract for janitorial services and eventually hired a majority of the subcontractor's employees to perform the janitorial services itself. *Id.* At 66-67. Those employees were previously represented by Local 348-S under a CBA with the former subcontractor that included a clause requiring the subcontractor to contribute to the local union's health and welfare fund. *Id.* at 66. After Meridian hired a majority of the subcontractor's employees, the local union sought recognition as the bargaining representative for those employees and Meridian refused. *Id.* at 67. Local 348-S subsequently filed suit under the LMRA and ERISA, seeking to compel arbitration over whether Meridian, as a successor employer, was liable for the health and welfare fund contributions required by the subcontractor's CBA. *See id.* The district court found that Meridian was a successor, given the "obvious continuity in the workforce," and compelled arbitration. *See id.*

On appeal, the Second Circuit agreed with the district court, purportedly based "on the unique facts of this case." *Id.* at 68. The court reviewed Supreme Court precedent on successor obligations including *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964); *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972); *Howard Johnson Co. v. Detroit Local Joint Executive Board*, 417 U.S. 249 (1974); and *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987). Though Meridian did not dispute that it was a successor and thus obligated to recognize and bargain with the local union, the court did a lengthy analysis on whether there existed a substantial continuity of the workforce. *See* 583 F.3d at 74-75. Based on the "key factor" that the employees represented by Local 348-S were "at all times . . . essentially working" for the successor, the court found that "[e]nforcing a duty to arbitrate the issue of [the successor's] obligation to comply with the substantive terms of the agreement is the most effective way to balance those interests recognized by the Supreme Court in *Wiley*, as well as *Burns* and *Howard Johnson*." *Id.* at 74-75. And though "the case law clearly establishes that a successor is not automatically obligated by the substantive terms" of a predecessor's agreement, the court concluded that "requiring arbitration on this issue is the most efficient and fair means" for resolving a dispute over an obligation to comply with a particular term. *Id.* at 76. The majority cautioned that it did not intend to "bin[d] all successor employers to the substantive terms of preexisting agreements" but that "where there are sufficient indicia of substantial continuity of identity of the workforce, it is possible that a successor employer will be bound at least by some of the substantive terms of a pre-existing CBA." *Id.*

The dissent believed that the majority confused circumstances in which a successor had a duty to recognize and bargain with those rarer cases in which a successor was actually bound by the pre-existing terms. *Id.* at 79 (Livingston, dissenting). According to the dissent, the majority's opinion would either be limited to its "unique facts," making it an aberration in the case law, *id.*, or impose upon "*all* successor employers who hire the bulk of a predecessor's employers . . . a duty not only to bargain with and recognize a union but also to arbitrate with it the extent to which it is bound by the previous CBA." *Id.* at 80.

As the dissent noted, the true impact of *Meridian Management* remains to be seen through its application in other cases, assuming the opinion is not reversed. On October 23, 2009, Meridian Management filed a petition for rehearing and petition for rehearing en banc before the Second Circuit. However, the petition was denied on December 11, 2009. Given that there is a potential split among the circuits, if a petition for certiorari is filed, the Supreme Court may intervene. Judge Livingston noted that "until today's decision, the circuit courts appear to have been in accord in interpreting the law" in a manner requiring arbitration only where the successor could be bound to the terms of the contract, collecting cases from the Third, Sixth, Ninth, Eleventh, and D.C. Circuits. *See id.* at 82. Further, a case relied upon by Meridian Management, *AmeriSteel Corp. v. International Brotherhood of Teamsters*, 267 F.3d 264 (3d Cir. 2001), may directly conflict with *Meridian Management*. *See id.* at 274 (refusing to compel arbitration given that "because AmeriSteel cannot be bound by the substantive terms of the CBA, no arbitration award to the Union—which, of course, would be based on the substantive terms of the CBA—could receive judicial sanction," making arbitration futile). The dissent also cited *AmeriSteel* in its criticism of the majority's decision to treat "substantial continuity" as sufficient alone to require arbitration. *See id.* at 82; 74 ("the issue is whether there exists a 'substantial continuity of identify [sic] of the work force'") (majority opinion); *AmeriSteel Corp.*, 267 F.3d at 269 (describing the "'substantial continuity' concept . . . as a *necessary* but not a *sufficient*

condition for the imposition of arbitration on an unconsenting successor."). As a result, practitioners should monitor this area for continuing developments.

Finally, a federal district court, which has now been affirmed by the Third Circuit, *see Rite Aid of Pa. Inc. v. United Food & Comm. Workers Union Local 1776*, --- F.3d ----, No. 09-1989, 2010 WL 521102 (3d Cir. Feb. 16, 2010), addressed the scope of arbitration provisions contained in collective bargaining agreements as they relate to after-acquired facilities. *Rite Aid of Pa. Inc. v. United Food & Comm. Workers Union Local 1776*, No. 1:08-cv-0033, 2009 WL 890943 (M.D. Pa. Mar. 31, 2009). The employer and the union had three collective bargaining agreements covering stores in 24 Pennsylvania counties, with each agreement containing a basic recognition clause, observation clause, and privileges clause. *Id.* at *1-2. Additionally, each agreement contained an arbitration clause that did not require the maintaining of any grievance "that does not involve the interpretation of any provision of this Agreement." *Id.* at *2 (emphasis omitted).

During the life of the agreements, Rite Aid completed the purchase of a drugstore chain formerly operated by Brooks Eckerd. *Id.* at *1. Shortly after the stores were acquired, Local 1776 attempted to enter six of these newly-acquired stores for the purposes of organizing and were excluded by Rite Aid. *Id.* After Rite Aid refused to arbitrate grievances over access, it brought a declaratory judgment action to determine the arbitrability of the grievances. *Id.* at *2.

Granting Rite Aid's motion for summary judgment, the district court rejected Local 1776's argument that the access claims to the newly-acquired stores "involve[d] the interpretation of any provision of" the collective bargaining agreements, and thus the claims were unarbitrable. *Id.* at *3-10. The court classified recognition clauses as those identifying or excluding employees from a bargaining unit or defining the matters subject to collective bargaining; noted that the observation clause only applied to ensure that an agreement was being satisfied, and that no agreement was in effect with Local 1776 at any of the six newly acquired stores; and held that the privileges clause, which stated that "[o]nly privileges which have been granted by the present Employer since its acquisition of the establishments covered by this Agreement shall be continued," applied to the daily rules, regulations, and working conditions, rather than broad provisions normally subject to negotiation, such as access. *Id.* at *3-7. Further, the agreements indicated that the parties were aware of the possibility of adding new stores, yet did not include an access provision. Because Local 1776 could not use any of these terms to invoke the arbitration provision, the court concluded "that the parties have not contractually agreed to arbitrate the instant dispute." *Id.* at *8-10.

D. Developments in the Law Pertaining to "Perfectly Clear" Successors

In addition to a whole host of developments in arbitration, the law regarding "perfectly clear" successor status also received new attention from the D.C. Circuit. *See S&F Market St. Healthcare LLC, d/b/a Windsor Convalescent Ctr. of Long Beach v. NLRB*, 570 F.3d 354 (D.C. Cir. 2009). There, the D.C. Circuit reversed the Board's determination that S&F was not only a successor to the prior owner of health care facilities that S&F acquired, but was also a "perfectly clear" successor bound to the substantive terms of the collective bargaining agreements in place at the time the facilities were acquired. *Id.*

The dispute arose from S&F's purchase of the Candlewood Care Center, which had collective bargaining agreements with SEIU Local 434B covering two bargaining units at Candlewood. *Id.* at 356. While S&F initially intended to replace the entire Candlewood workforce, prior to taking over the facility on July 1, 2004, S&F decided that it would hire some of the Candlewood employees for up to 90 days until it could find new employees. *Id.* As a result, in June 2004, S&F distributed applications including, among other statements, a cover sheet indicating that S&F "intends to implement significant operation changes," informing applicants that hiring was contingent on passing certain tests and background checks, and that S&F "can change benefits, policies and conditions at any time." *Id.* On July 1, 2004, of the approximately 120 employees hired, only 10 to 12 had not been employed by Candlewood; seventeen former Candlewood employees were not hired, either because they did not apply or they were not selected. *Id.* at 356-57. The next week, on July 9, 2004, S&F distributed employee handbooks and its terms and conditions of employment. *Id.* at 357.

Meanwhile, on July 1, the SEIU requested bargaining, which S&F refused on July 7 on the basis that it had not yet hired a substantial and representative complement of employees, making recognition and bargaining premature. *Id.* Upon the union's filing an unfair labor practice charge, the Board's General Counsel issued a complaint alleging that S&F was "a successor to Candlewood" as of July 1, 2004 and that its refusal to bargain violated sections 8(a)(1) and (5) of the Act. *Id.* The General Counsel further alleged that certain unilateral changes, including removing union materials from bulletin boards, prohibiting union posting, and implementing new policies, also violated sections 8(a)(1) and (5). *Id.*

An administrative law judge found that because the Candlewood employees rehired for up to 90 days were more like probationary employees than temporary employees, they counted towards the complement, making S&F a successor as of July 1, 2004, and thus obligated to bargain with SEIU Local 434B. *Id.* However, based upon the pre-employment communications, the ALJ found that S&F was not a "perfectly clear" successor, meaning that it was free to establish its initial terms and conditions of employment. *Id.*

The Board agreed with the ALJ that S&F was a successor—an issue apparently not appealed to the D.C. Circuit—but then found that S&F was also a "perfectly clear" successor. *See Windsor Convalescent Ctr. of N. Long Beach*, 351 N.L.R.B. 975 (2007). In so holding, the Board stated that "there is no evidence that [S&F], prior to the takeover, informed Candlewood employees that those who were retained would be working under different core terms and conditions of employment." *Id.* at 981. In a footnote, the Board noted that even if S&F were not a "perfectly clear" successor, it "still had an obligation to bargain over any unannounced specific changes to terms and conditions of employment occurring after July 1, including dismantling the bulletin board and issuing new handbooks." *Id.* at 982 n.31.

Focusing primarily on the issue of whether S&F was a "perfectly clear" successor, the D.C. Circuit reversed. *See* 570 F.3d 354. Relying on the Supreme Court's opinion in *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972), the court set forth the general rule that "'although successor employers may be bound to recognize and bargain with the union . . . they are not bound by the substantive provisions of a collective-bargaining contract negotiated by their predecessors but not agreed to or assumed by them," except in the rare "'instances in which it is perfectly clear that the new employer plans to retain all of the employees in the

[bargaining] unit." *S&F*, 570 F.3d at 358 (quoting *Burns*, 406 U.S. at 284, 294-95). Summarizing the Board's subsequent application of the "perfectly clear" successor rule, the court stated that "at bottom the 'perfectly clear' exception is intended to prevent an employer from inducing possibly adverse reliance upon the part of employees it misled or lulled into not looking for other work." *Id.* at 359 (discussing *Spruce Up Corp.*, 209 N.L.R.B. 194 (1974)).

Applying the law to S&F's acquisition of Candlewood, the court found that the Board "misread *Burns* to require more from the successor employer than a portent of employment under different terms and conditions," which was all that *Burns* required. *Id.* at 360. Simply stated, in order to avoid the "perfectly clear" exception, an employer need only "signal its intent . . . to establish new terms and conditions of employment under which some of the predecessor's employees may be hired." *Id.* The court also addressed two inaccuracies in the Board's statement focusing on the "core terms" of employment. First, while trivial changes may not suffice to avoid "perfectly clear" successor status, neither is an announcement of a change to the "core terms" required to avoid "perfectly clear" successor status. Rather, the rule is that "the successor employer must simply convey its intention to set its own terms and conditions rather than adopt those of the previous employer." *Id.* at 361. Second, the Board had reversed the presumption from *Burns* and *Spruce Up*: where as those cases allow an employer to set its own terms *unless* it has misled the employees into believing that the terms and conditions would continue, under the Board's rule below, an employer *may not* change the terms *unless* it clearly announces an intention to change the "core terms" of employment. *Id.* By doing so, "the exception in *Burns* swallow[s] the rule in *Burns*." *Id.*

Finally, the court rejected the Board's footnote observation that regardless of "perfectly clear" successor status, S&F was prohibited from implementing unilateral changes. *Id.* at 362-63. While prior Board precedent held that "once an employer has hired its predecessor's employees under any specified terms and conditions of employment—its own or those in its predecessor's CBA—it must bargain over subsequent changes," *see id.* at 362 (discussing *Banknote Corp. of Am.*, 315 N.L.R.B. 1041 (1994)), S&F "did not change any terms it previously established but merely replaced its predecessor's terms with its own," meaning that it was not obligated to bargain over those subjects. *Id.* at 363.

E. Collective Bargaining Agreement Rejection in Municipal Bankruptcy

In a significant development for municipalities facing increasing budgetary concerns during a slumping economy, a Bankruptcy Court in the Eastern District of California held that municipalities may use the chapter 9 bankruptcy procedures, including the ability to reject collective bargaining agreements under 11 U.S.C. § 365 without needing to satisfy the requirements of 11 U.S.C. § 1113. *See In re City of Vallejo*, 403 B.R. 72 (Bankr. E.D. Cal. 2009).

Discussing the interplay of the Supremacy Clause, the Contracts Clause, and the Tenth Amendment's reservation of rights to the States, the court noted that Congress harmonized these provisions through section 903, retaining the right of a State to control a municipality's political or governmental powers, notwithstanding the remainder of chapter 9. *See id.* at 75; 11 U.S.C. § 903. But while that section "ensures the constitutionality of Chapter 9, it does not provide an independent substantive limit on the application of Chapter 9 provisions." 403 B.R. at 75. Thus,

once "a municipality is authorized by the state to file a Chapter 9 petition," *id.* at 76, as California did in the "broadest possible . . . authorization," *see* Cal. Gov't Code § 53760, the municipality "is entitled to fully utilize 11 U.S.C. § 365 to accept or reject its executory contracts." 403 B.R. at 76.

Addressing the proper standard to apply to rejection under section 365, the court rejected both state law and the standards applied to contract rejection under 11 U.S.C. § 1113. *See id.* at 76-78. First, state law could not be the source of the standard because both the Supremacy Clause and the Contracts Clause prohibited state law from controlling chapter 9 proceedings, particularly when Congress had enacted section 365 to provide debtors the ability to reject executory contracts. *Id.* at 76-77. Second, the court also rejected the argument that the standard for rejecting a collective bargaining agreement in a chapter 9 matter came from 11 U.S.C. § 1113, which "imposes on chapter 11 debtors procedural and substantive requirements that must be met prior to rejection of collective bargaining agreements." *Id.* at 77-78. Because Congress neither incorporated section 1113 into chapter 9, nor did it adopt a proposed 1991 amendment that would have required chapter 9 debtors to first exhaust state law procedures for bargaining, implementation, and amendment before rejecting or modifying a collective bargaining agreement, the court refused to look to section 1113. *Id.* at 78.

Instead, the court applied the standard for section 365 cases developed in *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 526 (1984). Under that standard, "a debtor may . . . reject an unexpired collective bargaining agreement if the debtor shows that: (1) the collective bargaining agreement burdens the estate; (2) after careful scrutiny, the equities balance in favor of contract rejection; and (3). [sic] 'reasonable efforts to negotiate a voluntary modification have been made, and are not likely to produce a prompt and satisfactory solution.'" 403 B.R. at 78 (quoting *Bildisco*, 465 U.S. at 526) (footnote omitted).

The court initially delayed determining whether the City had satisfied the *Bildisco* standard, *see id.*, but eventually reached that question in August 2009, granting the City's motion for contract rejection of its collective bargaining agreement with the IBEW. *See In re City of Vallejo*, No. 08-26813-A-9 (Bankr. E.D. Cal. Aug. 31, 2009). After having found that the contract with IBEW was burdensome because of salary increases and costs related to health benefits, that the balance of equities favored rejection, given that it was necessary for Vallejo to emerge from bankruptcy, and that the City had made reasonable efforts to reach voluntary modification, the court granted the motion for total rejection.

F. *Register-Guard* Overturned

In the continually evolving field of employee access to employer property, particularly e-mail, and the proper standards governing discriminatory application of union activity policies, the D.C. Circuit in *Guard Publishing Co., d/b/a/ the Register-Guard v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009) ("*Register-Guard*"), reversed a Bush Board opinion. There, the D.C. Circuit reviewed a Board opinion regarding discriminatory discipline over use of company e-mail systems for union-related purposes. In the opinion below, a closely divided Board held that an employer did not violate the NLRA by maintaining a workplace rule prohibiting the use of its e-mail system for "non-job related solicitations" and enforcing that policy when an employee/union president sent two e-mails to employees urging that they support the union. *Guard Publ'g Co., d/b/a*

Register-Guard, 351 N.L.R.B. 1110, 1111 (2007). The Board majority reasoned that employers have a basic property right to regulate and restrict employees' use of company computer systems, servers, and e-mail, and, therefore, it did not violate the Act to restrict use of such property to business purposes. On appeal, the union did not challenge the lawfulness of a company policy that bars union access to e-mail on a neutral basis. *See Register-Guard*, 571 F.3d at 58.

The Board also modified the standard used to determine whether an employer discriminatorily enforced a workplace policy against union activity. Adopting the analysis used by the Seventh Circuit in *Fleming Co., Inc. v. NLRB*, 349 F.3d 968 (7th Cir. 2003), the Board explained that to be unlawful "discrimination must be along Section 7 lines." 351 N.L.R.B. at 1118. The majority explained that "unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7 protected status." *Id.* Further describing the Seventh Circuit analysis, the Board stated:

> [A]n employer may draw a line between charitable solicitations and non-charitable solicitations, between solicitations of a personal nature (*e.g.*, a car for sale) and solicitations for the commercial sale of products (*e.g.*, Avon products), between invitations for an organization and invitations of a personal nature, between solicitations and mere talk, and between business-related use and non-business-related use.

Id. In a dissenting opinion, Members Liebman and Walsh criticized that "by focusing on what types of activities are 'equal' to Section 7 activities, the majority misses the point." *Id.* at 1129. The dissenters suggested that "[i]n [section] 8(a)(1) cases, the essence of the violation is not 'discrimination.' Rather, it is interference with employees' Section 7 rights." *Id.* In their opinion, "[d]iscrimination, when it is present, is relevant simply because it weakens or exposes as pretextual the employer's business justification [for the interference]." *Id.* Relying heavily on the view that e-mail has replaced the watercooler discussion as the "'natural gathering place' for employees to communicate in the workplace," the dissent concluded that "[w]here, as here, the employer has given employees access to e-mails in the workplace for their regular use, we would find that banning all non-work related 'solicitations' is presumptively unlawful, absent special circumstances." *Id.* at 1124, 1127.

On appeal, the D.C. Circuit dodged most of these questions based on the facts of the case, stating that "[w]hatever the propriety of drawing a line barring access based on organizational status, the problem with relying on that rationale here is that it is a post hoc invention." *Register-Guard*, 571 F.3d at 60. While noting that both August 2000 e-mails sent through the Company system by the union president were solicitations for employees to take part in activities in support of the union, the court rejected the Board's rationale that it was not discriminatory to discipline her for those e-mails because they were solicitations on behalf of a group or organization, rather than on behalf of an individual. *Id.* at 59-60. The court noted that the non-solicitation policy banned "*all* 'non-job-related solicitations,'" not just those on behalf of organizations, and that when the union president was disciplined, she was told to "'refrain from using the Company's systems for union/*personal* business,' . . . the reference to 'personal' making it clear that the offense did not depend on whether an organization was involved." *Id.* at

60. Accordingly, the court rejected the organizational rationale and set aside the Board's determination that Register-Guard did not violate the Act.

In other portions of the opinion, the D.C. Circuit affirmed the Board's determination that Register-Guard violated the Act for disciplining the union president for sending a third, but non-solicitous, e-mail "setting it straight" regarding a union rally occurring around the facility. *Id.* at 55-56, 58-59. The court found that disciplining her for the e-mail could not have been a neutral application of the Company's e-mail policy because the May e-mail was not a solicitation, and thus was not prohibited by the policy. *Id.* at 58-59. The court also affirmed the Board's finding that Register-Guard violated the Act by requesting an employee to stop wearing an arm band indicating union support. The court rejected Register-Guard's argument that it was maintaining a public image by regulating employees who interact with the public, but the court noted that "customer exposure to union insignia alone is not a special circumstance allowing an employer to prohibit display of union insignia by employees." *Id.* at 61.

On the property question that was not presented to the D.C. Circuit, an Obama Board is likely to find that employees who regularly use e-mail for work may also use it to communicate about unions, particularly where employers provide an exception for incidental personal use – exceptions that are provided in recognition of the reality that a complete ban simply cannot be enforced as a practical matter. And with respect to discrimination, an Obama Board can be expected to return to the rule of *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), which adopted a Board rule applying a presumption that broad bans restricting oral solicitation on nonworking time were unlawful, absent special circumstances. Given the ever-increasing importance of e-mail communications in today's workplace, and the limited effort with which they will allow unions to communicate with employees that they wish to organize, it is unlikely that *Register-Guard* will be the last word on the subject.

G. Dues Issues

The federal courts have addressed dues issues in various contexts. Early in 2009, the Supreme Court addressed the "uncertainty among the Circuits as to whether, or when, the [First Amendment to the] Constitution permits charging nonmembers for the costs of national litigation." *Locke v. Karass*, 129 S. Ct. 798, 803 (2009). The Court held that "costs of [national] litigation are chargeable provided the litigation meets the relevant standards for charging other national expenditures that the *Lehnert* [*v. Ferris Faculty Assn.*, 500 U.S. 507 (1991)] majority enunciated. Under those standards, a local union may charge a nonmember an appropriate share of its contribution to a national [union's] litigation expenses if (1) the subject matter of the national litigation bears an appropriate relation to collective bargaining and (2) the arrangement is reciprocal—that is, the local's payment to the national affiliate is for 'services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization.'" *Id.* at 800 (quoting *Lehnert*, 500 U.S. at 524).

Under review was a collective bargaining agreement between the State of Maine and the Maine State Employees Association ("the local union" or "the union") requiring nonmembers to pay a service fee, which includes an affiliation fee the local pays to the national union, which in turn includes "an amount that helps the national pay for litigation activities, some of which do not *directly* benefit Maine's state employees' local but rather directly benefit other locals or the

national organization itself." *See id.* at 802. Nonmembers sued, challenging various aspects of the service fee, including the national litigation fee, on the basis that it violated the First Amendment, an argument rejected by both the district court, *Locke v. Karass*, 425 F. Supp. 2d 137 (D. Me. 2006), and the appeals court, 498 F.3d 49 (1st Cir. 2007).

The Supreme Court acknowledged precedent stating that, while a local union could charge nonmembers for litigation expenses incidental to negotiation and bargaining, "'expenses of litigation not having such connection with the bargaining unit are not to be charged to the objecting employees.'" *See Locke*, 129 S. Ct. at 804 (quoting *Ellis v. Bhd. of Ry., Airline, & S.S. Clerks*, 466 U.S. 435, 453 (1984)) (emphasis omitted). The Court also discussed the plurality opinion in *Lehnert*, which characterized the union's argument as "'clearly correct that precedent established through litigation on behalf of one unit may ultimately be of some use to another unit,' [but] nonetheless found 'extraunit litigation to be more akin to lobbying in both kind and effect.'" *Id.* at 805 (quoting *Lehnert*, 500 U.S. at 528).

Adopting its own rule that charges were permissible as long as they related to collective bargaining and were reciprocal, the Court distinguished *Ellis* and *Lehnert* on the basis that reciprocity was either not considered or not before the Court in those cases. *See id.* at 806-07. Applying its rule to the Maine agreement, the Court found the litigation fee to be an appropriate charge, based on the fact that it related to collective bargaining or contract administration and that by payment of the fees locals receive general access to the national's financial resources. *Id.* at 807. Justices Alito, Scalia, and Chief Justice Roberts concurred but noted their understanding that the decision "does not reach the question of what 'reciprocity' means." *Id.* at 808 (Alito, J., concurring).

In another case, the Supreme Court denied certiorari to an opinion from the United States Court of Appeals for the Ninth Circuit regarding the discharge of an employee for failure to pay union dues, when his only acquiescence to membership was a one-time dues payment. *Mackay v. Aircraft Mechs. Fraternal Ass'n*, 129 S. Ct. 2159 (2009) (Den. Cert.). Through the course of three opinions from the Ninth Circuit, *see Mackay v. Aircraft Mechs. Fraternal Ass'n*, 297 F. App'x 695 (9th Cir. 2008), *Mackay v. Aircraft Mechs. Fraternal Ass'n*, 214 F. App'x 677 (9th Cir. 2006), *Mackay v. Aircraft Mechs. Fraternal Ass'n*, 85 F. App'x 605 (9th Cir. 2004), the court affirmed the trial court's determination that the Aircraft Mechanics Fraternal Association-Seattle Local 14 did not violate either the Railway Labor Act or the First Amendment by requesting Alaska Airlines to terminate Bernard Mackay, a mechanic in its employ, for failure to pay union dues. *See* 297 F. App'x at 696. Though noting that the "evidence . . . could have gone either way," *id.*, the court found that while the Union's constitution listed the requirements for membership as "(1) submission of an application form, (2) the receipt of a membership card, (3) receipt of the Union's constitution and taking of the Union loyalty oath, and (4) an investigation by the local secretary," 85 F. App'x 605, those formalities were uniformly ignored. Further, Mackay, who was "twice told that he could be either a Union member who paid dues, or a nonmember who paid agency fees," elected to write a check for past dues after being warned that he could be terminated under the union security clause, without ever telling union officials that he either did not want to pay dues or be a member. 297 F. App'x at 696. Accordingly, because Mackay accepted the offer of membership by a one-time payment of dues, his subsequent failure to pay dues justified his termination under the union security clause. The Supreme Court refused to hear Mackay's argument that the Ninth Circuit's opinion contravened the principles of

voluntary unionism and "sanctioned a regime of 'membership by osmosis,' in which a union can conscript silent nonmembers into 'union membership' without their knowledge or consent." *See* Pet. for Cert., *Mackay v. Aircraft Mechs. Fraternal Ass'n*, No. 08-939, 2009 WL 191773 (Jan. 23, 2009), *cert. denied*, 129 S. Ct. 2159 (2009).

In *Laborers International Union*, the Tenth Circuit Court of Appeal found the union violated federal labor law when it failed to give an employee adequate notice of his outstanding dues before requesting that the employer discharge the employee pursuant to the union security clause. *Laborers Int'l Union v. NLRB*, Nos. 08-9564, 08-9569, 2010 WL 348036 (10th Cir. Feb. 2, 2010). In this case, Lopez, a Shaw Stone employee, fell several months behind in his union dues. On October 12, 2006, the Union sent Lopez a letter addressed to Shaw Stone requesting that Shaw Stone dismiss Lopez for failure to pay $145 in late dues and reinstatement fees. The Union sent Lopez a second notice on November 1, 2006. This notice specified that Lopez owed $415 and that he would be discharged if he failed to pay, but it did not explain how the amount was calculated. On November 14, 2006, the Union contacted Shaw Stone and requested that it dismiss Lopez for failing to pay his union dues, and shortly thereafter Lopez was dismissed.

Lopez filed an unfair labor practice charge with the NLRB, and the Board determined that the union violated section 8(a)(3), by failing to provide Lopez adequate notice before moving for discharge. The collective bargaining agreement in place between Shaw Stone and the union contained a union security clause that allowed the union to obtain the discharge of any employee who fails to pay dues owed to the union. Before invoking this provision against an employee, however, the union was required to: (1) provide the employee with the precise amount due; (2) provide the employee with a complete accounting, explaining how it computed the amount due; (3) give the employee a reasonable deadline for payment; and (4) explain to the employee that failure to reconcile the outstanding amount will result in discharge. The Tenth Circuit affirmed the Board's decision that the union breached its fiduciary duty owed to Lopez by failing to give him adequate notice of his dues deficiency before requesting his discharge. The court found that the union's November 1 notice was inadequate, as the letter failed to explain how the union calculated the outstanding amount, failed to give Lopez a deadline for payment, and yet still called for Lopez's immediate discharge. The October 12 letter was also deficient, as it too failed to explain how the union calculated the outstanding dues.

H. Other Forums for Traditional Labor Law Development

With labor law reform stalled in Congress and with only two-Members on the Board, Labor has not received the boon it expected as a result of the 2008 elections. Based on Labor's response to similar frustrations during the years of the Bush Administration, it is likely that Labor will seek other forums for labor law reform. And while these forums may not have the reach or authority of Congress or the NLRB, they can, nonetheless, have a profound impact on employers.

1. Other Federal Agencies

In addition to remedies from the Board, Labor may look to other federal agencies for national reform in the workplace. As he has done with the NLRB nominees, President Obama

has placed friends of Labor in the leadership positions of these agencies. Further, he has significantly increased the budgets for these agencies over the Bush years, giving them the financial tools to help Labor achieve reform.

a. Department of Labor

President Obama appointed former California U.S. Representative Hilda L. Solis as the Secretary of Labor. In recent months, Secretary Solis has been clear that she supports Labor reform, including the passage of EFCA. *Unions Lost 771,000 Members in 2009, as Recession Eliminated Jobs, BLS Says*, 14 DAILY LABOR REP. (BNA) AA-1 (Jan. 25, 2010). While in Congress, one of Solis's priorities included improving the lives of working families. Based on her statements in support of EFCA and reform of the Department of Labor, it appears that wage issues and other issues of worker protections will be a focus of the Department.

The Department's FY 2010 discretionary funding was approved at $13.3 billion, which is an increase of approximately $431,000,000 over FY 2009 levels. Of the $13.3 billion, $1.6 billion is for "worker protection" agencies that regulate pensions, mine safety, occupational safety and health, and, among other fields, wage and hour issues. Of the $431,000,000 increase, $121,000,000 is intended to support the hiring of approximately 1,465 new employees in these "worker protection" agencies.

President Obama's budget request for FY 2011, released on February 1, 2010, includes $13.9 billion in discretionary funding for the Department of Labor, including a 4% increase in work protection programs above the already increased FY 2010 levels. The Department will have the ability to hire 350 new employees, including 177 investigators. The FY 2011 budget also plans for shifting ERISA compliance to employers through an aggressive rulemaking agenda, allowing the DOL's Employee Benefits Security Administration to become more aggressive in enforcement. *See DOL 2011 Budget Calls for Shifting Burden of Compliance to Employees*, 20 DAILY LABOR REP. (BNA) AA-6 (Feb. 2, 2010).

In a January 22, 2010 statement, Solis discussed wages earned by union-represented employees and concluded that "coupled with data showing that union members have access to better health care, retirement and leave benefits, these numbers make it clear that union jobs are good jobs." *Unions Lost 771,000 Members in 2009, as Recession Eliminated Jobs, BLS Says*, 14 DAILY LABOR REP. (BNA) AA-1 (Jan. 25, 2010). In light of these and other statements, and the increased budget aimed at escalating compliance and enforcement, Labor definitely has an ally in Solis and the Department of Labor.

b. OSHA

President Obama also gave Labor a strong ally in his nominee to lead OSHA. On December 3, 2009, the Senate confirmed Dr. David Michaels as Assistant Secretary of Labor for Occupational Safety and Health. Dr. Michaels is a public health advocate, a Professor at The George Washington University School of Public Health and author of the anti-business DOUBT IS THEIR PRODUCT: HOW INDUSTRY'S ASSAULT ON SCIENCE THREATENS YOUR HEALTH. An advocate of "regulation by shaming," *i.e.*, issuing negative press releases to encourage employers to change their practices, Dr. Michaels has constantly advocated in favor of increased regulation.

During the Clinton Administration, for example, Dr. Michaels served as Assistant Secretary of Energy for Environment, Safety, and Health, in which position he advocated for stringent workplace health and safety standards and a generous compensation program for nuclear workers.

Although Dr. Michaels has only been in his position a short time, it is clear that big changes are coming at OSHA. Even prior to Dr. Michaels' confirmation, OSHA had begun to implement significant changes from the Bush Administration's emphasis on outreach and cooperative programs. OSHA's 2010 budget of $558.6 million – an increase of $45 million from FY 2009 – includes an additional $25 million for enforcement and $2.5 million for standard setting. In addition, OSHA has announced plans to divert resources from voluntary and cooperative programs, such as the Voluntary Protection Program, to enforcement programs. OSHA's FY 2011 budget request further emphasizes this shift, as it includes a 2.7% increase in total funding, to $573 million, but also includes a 4.1% cut in compliance assistance programs. Dr. Michaels explained that OSHA "recognize[s] that Voluntary Protection Program companies do an excellent job," but that "OSHA resources need to be focused on employers who don't understand the importance of protecting their workers, particularly small employers." *Obama Proposes $573 Million for OSHA in 2011, with Cut for Voluntary Program*, 20 DAILY LABOR REP. (BNA) AA-4 (Feb. 2, 2010). The FY 2011 budget also allows for increased enforcement even over FY 2010 levels. OSHA expects to conduct 42,250 investigations in FY 2011, 6,250 of which will be done by agency new hires. *Id.*

To that end, the Agency has announced that it will hire approximately 130 new compliance safety and health officers and increase the pace of standard setting. It has also launched several emphasis programs, including one covering employer recordkeeping. Its ramped up enforcement efforts have resulted in a significant number of high dollar citations over the past year. The highest of these was the $87 million proposed penalty against BP, Inc. issued last year, a substantial portion of which resulted from alleged failures to comply with a prior settlement agreement between BP and OSHA.

OSHA under President Obama will also bring renewed focus on rulemaking and including on ergonomics. The Agency is taking steps to move a number of long-pending rules – such as those relating to crystalline silica – forward and is working on several other high profile issues, such as combustible dust and diacetyl. OSHA is again focusing on organized labor's signature issue, ergonomics. On January 29, 2010, the Agency issued a Notice of Proposed Rulemaking seeking to require so-called musculoskeletal disorders to be separately accounted for on injury and illness logs. This is widely-viewed as a first step towards resurrecting the Clinton Administration's failed efforts to promulgate binding ergonomics standards. However, given that the Clinton-era rule was nullified under the little-used Congressional Review Act, which prevents the Agency from issuing a similar rule in the future, OSHA likely needs Congressional legislation to regulate the issue directly. It is more likely, therefore, that OSHA will attempt to regulate the issue indirectly via a Safety and Health Program standard, which Dr. Michaels advocates.

While its precise contours are unclear at this point, a Safety and Health Program Standard would likely contain many of the same elements as the failed Clinton ergonomics rule, including management commitment and employee involvement, worksite analysis, hazard prevention and control, and training for employees, supervisors, and managers. But the standard likely would

apply more broadly than the ergonomics rule, requiring remediation of all workplace hazards including those claimed to result in recorded musculoskeletal disorders. Such a rule would be enforced using the usual OSHA inspection procedure. Dr. Michael's has succinctly described what he sees as the value of such programs in discussing his experience at the Department of Energy: "[w]hen I sent inspectors out following a report of an accident . . . the first thing the inspector did was to determine whether the managers were meeting the facility's own plan. If not, they were in violation. End of discussion." *Doubt is Their Product* 259. In other words, OSHA would hope to use such a standard as a broad enforcement tool, even for situations in which no specific OSHA standard exists. Organized labor will clearly support such a standard and, if promulgated, will use it to their advantage. The business community should be prepared to carefully review and to respond to any OSHA proposals to broadly regulate the workplace in such a manner.

c. National Mediation Board

Labor has exhibited a willingness to go beyond the NLRA and traditional federal agencies of the Board, Department of Labor, and OSHA to achieve labor reform. In late 2009, at the request of the Transportation Trades Department of the AFL-CIO, the National Mediation Board ("NMB"), an administrative agency responsible for facilitating labor-management relations in the railroad and airline industries, issued a proposed rule that would amend its current representation election procedures. Under the existing rule, which has been in place for the past seventy-five years, representation decisions in the railroad and airline industries have required a majority of eligible voters in the particular craft or class of employees to cast valid ballots in favor of representation in order for a representative to be certified; those who are eligible to vote but decline to do so are therefore deemed to oppose union representation. The proposed new rule – a rare step by the NMB – would require that elections be decided by a majority of the ballots cast, even if they represent only a small fraction of the total number of employees in a craft or class. If enacted, the proposed rule could expand unions' ability to gain members in the railroad and airline industries.

While decisions of the NMB are typically done on a consensus basis without dissent, in this matter Republican Chairman Elizabeth Dougherty wrote a letter of dissent, expressing concern not only over her exclusion from the drafting process, but also about the timing of the rule's promulgation: the NMB recently received requests to commence representation proceedings involving 40,000 airline employees at two major airlines, which will be the largest group election proceedings in the NMB's history.

While resort to the NMB only affects two industries, it is clear that the impact of Labor's resort to NMB rulemaking could affect a great number of employees. The activity on minority representation is a classic example of Labor's ingenuity of evolving, finding a little known, and previously relatively inactive, federal agency to further the agenda of Labor and the Administration, with very little fanfare.

2. States and Local Governments

In addition to attempting to achieve change at the national level via congressional, court, or agency action, unions have re-started lobbying efforts at union-friendly state and local

governments to adopt laws easing organizing efforts. Two particular methods of state action—meeting laws and labor peace agreements—have become particularly popular developments in local labor reform.

a. State Meeting Laws

In recent years, Labor has lobbied various state legislatures to pass bills frequently referred to as "Meeting Laws" or "Workplace Fairness Bills" that prohibit an employer from requiring an employee to attend meetings that communicate opinions on religious or political matters. While the bills often do not include any reference to labor issues, the intent is to limit an employer's current right to require attendance at meetings in which the employer conveys its view on organizing, or so-called "captive audience" meetings. Workplace Fairness Bills, allegedly drafted and circulated by the AFL-CIO, have been introduced into legislatures in several states, including Arizona, Massachusetts, Michigan, Minnesota, New Hampshire, Pennsylvania, Tennessee, Washington, and West Virginia.

Though these bills have been introduced in several states, as of early 2010, Oregon is the only state to have passed such a bill, which was signed into law on June 30, 2009. However, that bill is now under attack by Associated Oregon Industries—an Oregon business group—as well as the U.S. Chamber of Commerce. *See Associated Or. Indus. v. Avakian*, (D. Or. No. 09-1494). These organizations argue that the Oregon law violates an employers' First Amendment rights and is preempted under both the *Garmon* doctrine, which prohibits States from regulating "activity that the NLRA protects, prohibits, or arguably protects or prohibits," and the *Machinists* doctrine, which forbids the State or NLRB from regulating "conduct that Congress intended be unregulated because left to be controlled by the free play of economic forces." *Chamber of Commerce v. Brown*, 128 S. Ct. 2408, 2412 (2008) (describing doctrines) (internal quotation and citation omitted); *see generally Machinists v. Wis. Employment Relations Commission*, 427 U.S. 132 (1975); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). A similar argument was successful in voiding a California law that restricted the use of state funds to assist, promote, or deter union organizing. *See Brown*, 128 S. Ct. 2408.

b. Local Labor Peace Agreements

Labor organizations have sought the assistance of state and local governments in obtaining labor peace agreements, which require employer cooperation with unions attempting to organize their workers, while Labor promises to refrain from taking job actions that would interrupt the flow of business. For example, both the Los Angeles World Airports and the Port Authority of New York & New Jersey adopted policies requiring concession vendors, as a condition precedent to operating within the airport, to enter into a labor peace agreement that recognizes a representative for the employees at that premises and, in return, promises that the employees will not engage in labor disruption including striking, picketing, work stoppages, and boycotts. Los Angeles World Airports, *Summary of Board of Airport Commissioners Resolution 23437*, at http://www.lawa.org/welcome_LAWA.aspx?id=1796 (last visited Feb. 8, 2010); The Port Authority of New York & New Jersey, *Minutes of October 18, 2007 Meeting*, at http://www.panynj.gov/corporate-information/pdf/1007_minutes.pdf (last visited Feb. 8, 2010). Some state and local governments have passed or considered statutes and ordinances allowing public entities (including legislatively created authorities and state agencies) with a proprietary

interest in a project to insist on labor peace agreements between the employer and the representative organization. A proposed New Jersey law (New Jersey Senate Bill S817), provides that a public entity may insist, on a project-by-project basis, on a labor peace agreement that includes provisions guaranteeing against strikes or lock-outs, promising employer neutrality, and providing for card check recognition on a showing that a majority of workers have signed authorization cards. A less drastic example is the February 3, 2010 Executive Order No. 22 signed by Iowa Governor Chet Culver (D), which requires all Iowa state departments and agencies to consider using project labor agreements on construction projects over $25,000,000. As another example of local labor developments, a resolution passed by the Minneapolis City Council (Minneapolis City Council Resolution 2007R-454), requires similar agreements for contracts in excess of $250,000 in which the City has a financial interest. While the ordinance is couched in terms of protecting the continuation of the city's contracted services, its purpose in application may be different. As a member of the Teamsters Local 120 explained relating to two companies that dropped out of a public contract rather than comply with the ordinances: "[w]e effectively drove them out of the market." Steve Share, *Under "labor peace ordinance," Teamsters begin organizing Minneapolis waste haulers*, Twin Cities Daily Planet, Jan. 07, 2009 at http://www.tcdailyplanet.net/article/2009/01/06/under-labor-peace-ordinance-teamsters-begin-organizing-minneapolis-waste-haulers (last visited Feb. 8, 2010).

As Labor continues to look for ways to grow its numbers and achieve labor reform, one might expect that they will continue to seek these agreements from state and local entities. However, whenever state or local entities engage in regulation of labor relations and employer speech, employers should have the same preemption arguments that were successful in *Brown*. While preemption questions are complex and their outcome is often uncertain, it is clear that state and/or local legislation will remain a front in the battle between labor and management.

III. Other Developments in Traditional Labor Law

While the recent developments that are the most news worthy and had the biggest impacts are discussed above, this paper has traditionally attempted to compile, by topical area, other significant recent developments in traditional labor law. Though the Board's inactivity has decreased the volume of cases to review, below are a few of the cases from the Board and federal courts with significance for traditional labor law.

A. Developments in Protected Employee Activity

1. Scope of Protection

a. Coverage Issues

(1) Reclassification of Federal Express through the Federal Aviation Administration Reauthorization Act of 2009

Beyond coverage issues from the definition of independents contracts decided in *FedEx Home Delivery*, *see* Section II.B.3.a, *supra*, Federal Express—encompassing overnight deliveries and the associated network of airplanes and trucks—faces coverage issues from Congress as well. *See* FAA Reauthorization Act of 2009, H.R. 915, 111th Cong. § 1451 (1st Sess. 2009). On May

21, the House passed H.R. 915, reauthorizing the Federal Aviation Administration for five years, and including several Labor-backed provisions affecting airline and FAA employees. Perhaps most significantly, the bill removes language defining "express carrier" from the Railway Labor Act ("RLA"), which governs labor relations in the railway and aviation industries, and generally makes organizing more difficult than under the NLRA. As a result of the language change, Federal Express, currently covered by the RLA, would now be governed by the NLRA—a move supported by the International Brotherhood of Teamsters (which represents most workers at FedEx's primary competitor, UPS) and other unions. However, in late September the Senate Commerce, Science, and Transportation Committee approved a version of the bill that did not include the clause affecting Federal Express. Accordingly, if the bill as reported out of committee is passed by the Senate, the difference will need to be resolved in Joint Committee.

(2) Religious Educational Institutions

In an area of law that has continued to develop over the last few years, the D.C. Circuit again clarified its test for religious educational institutions and their coverage under the Act. *See Carroll Coll., Inc. v. NLRB*, 558 F.3d 568 (D.C. Cir. 2009). Carroll College, a private college affiliated with the Synod of Lakes and Prairies of the United Presbyterian Church of the U.S.A., appealed a Board order finding violations of sections 8(a)(5) and (1) for Carroll's refusal to bargain with the UAW, the certified representative for Carroll's faculty. *See id.* at 570-71. Before the Regional Director and the Board, Carroll argued that the Board lacked jurisdiction because requiring bargaining "would substantially burden [Carroll's] free exercise rights in violation of the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-1 (2000)." *Id.* at 570. Both the Regional Director and the Board rejected this argument.

On appeal before the D.C. Circuit, Carroll abandoned its RFRA argument and asserted, for the first time, that the NLRB lacked jurisdiction under *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). The court summarized the history of *Catholic Bishop*, which prohibited the Board from inquiring "into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission." 440 U.S. at 502. The court also discussed the Board's subsequent development, and the D.C. Circuit's subsequent rejection, of the "substantial religious character" test for jurisdiction as "just 'the sort of intrusive inquiry that *Catholic Bishop* sought to avoid.'" 558 F.3d at 572-73 (quoting *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341-42 (D.C. Cir. 2002)). *Carroll College* restated the Circuit's *Great Falls* "bright-line rule" that:

> [a] school is exempt from NLRB jurisdiction if it (1) holds itself out to students, faculty and the community as providing a religious educational environment, (2) is organized as a "nonprofit," and (3) is affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion.

Id. at 572 (internal quotation and citation omitted). Carroll College's organization as a nonprofit and affiliation with the Synod satisfied the second and third factors. *Id.* at 572-74.

Applying the first factor, the court recognized various documents such as the Article of Incorporation, mission statement, Statement of Christian Purpose, and an agreement between Synod and the Board of Trustees preserving Carroll's "origin and heritage in the concern of the Church for the intellectual and spiritual growth of its students, faculty, administration, and staff," all of which supported the conclusion that Carroll held itself out as a religious education environment. *Id.* at 572-73. The court rejected, as contrary to *Catholic Bishop*, the Regional Director's observation that Carroll's documentary attempts to hold itself out as a religious education environment were not accompanied with evidence of actual religious influence or control. *See id.* at 573.

The court finally noted that Carroll did not raise its *Catholic Bishop* argument before the Board, instead relying on its now-abandoned RFRA argument. *See id.* at 574. However, the court determined that the jurisdictional challenge was not waived because "[a] court can always invalidate Board action that is patently beyond the Board's jurisdiction, even if the jurisdictional challenge was never presented to the Board." *Id.* (citation omitted). Given the facts of the case and *Great Falls*' bright-line rule, the Board "should have known immediately that the college was entitled to a *Catholic Bishop* exemption from the NLRA's collective bargaining requirements." *Id.*

b. Protected, Concerted Activity

(1) Testing the Limits of Protected Activity

In a case involving conduct that "skirts the outer bounds" of protected activity, the Fourth Circuit reversed a Board decision finding a violation for the termination of an employee who initiated a conversation with supervisors and used profanity regarding his employer while discussing the employer's accurate and legal letters describing bargaining, which the employee admittedly had never read. *Media Gen. Operations, Inc., d/b/a/ The Tampa Tribune v. NLRB*, 560 F.3d 181, 182-83 (4th Cir. 2009).

Gregg McMillen, a pressman at *The Tampa Tribune*, published by Media General Operations, Inc. ("the Tribune"), was terminated for statements he made regarding the "rancorous" ongoing negotiations between the Tribune and the Graphic Communications Conference of the International Brotherhood of Teamsters, Local 180 ("the union"). *Id.* at 183. During the negotiations, Tribune Vice President Bill Barker sent employees a series of letters describing the situation from his perspective and, importantly, "there [wa]s no dispute in this case that the letters were *legal and accurate*." *Id.* In response to a November 4, 2005 letter from employees, including McMillen, conveying their dissatisfaction with Barker's letter-writing campaign, Barker wrote a November 9, 2005 letter expressing his opinion that the union was the major source of the delay in negotiations. *Id.* It is McMillen's reaction to this letter that forms the basis of his termination.

When McMillen arrived for his November 10 shift, he spoke with two supervisors and stated, in response to a question about how he was doing, "that he was 'stressed out' as a result of the latest letter from Barker," though he admitted that he had not read the letter. *Id.* at 183-84. When informed that the latest letter was likely a response to the employees' November 4 letter, "McMillen then said: 'I hope that fucking idiot [Barker] doesn't send me another letter. I'm

pretty stressed, and if there is another letter you might not see me. I might be out on stress.'" *Id.* at 184. One of the supervisors reported the comment to management. *Id.*

McMillen did not show up for his November 11 shift, claiming he missed work due to taking a sleeping pill in order to calm down after reading Barker's November 9 letter when he got home on November 10. *Id.* at 184. As a result of missing his shift, McMillen was suspended without pay and signed the resulting disciplinary report, adding a note that "it was Barker's 'lieing [sic] discrimination, harassing and threatening letters'" that caused him to miss work. *Id.* He also said that he was sorry if his November 10 comments were inappropriate but "that Barker 'gets to [him].'" *Id.* Upon return from his suspension, the Tribune decided to fire McMillen for his statement, based on the Tribune's rule prohibiting threatening, abusive, harassing language, and/or disorderly conduct. *Id.* At the meeting to inform McMillen of his termination, the Tribune would not allow another pressman to attend the meeting on the basis that it was not for the purpose of investigation, and therefore McMillen had no right to union representation. *Id.* When the pressroom manager confronted McMillen about the derogatory comments about Barker, McMillen admitted the comments and was terminated. *Id.*

The Board General Counsel filed charges against the Tribune alleging violations of section 8(a)(1) for refusing McMillen union representation during his meeting, and violations of sections 8(a)(1) and (3) for terminating McMillen as a result of protected concerted activities. *Id.* at 183. The ALJ dismissed both charges, finding, on the second charge, that while McMillen engaged in concerted activity, his statement was "so 'profane, offensive and personally denigrating' as to be unprotected by the Act." *See id.* at 184-85. While the Board agreed that McMillen was not entitled to representation, it reversed the ALJ on McMillen's termination, finding that his concerted activity was protected by the Act as part of the collective bargaining dialogue between the employer and the unit employees regarding the substance and process of the negotiations. *See id.* at 185-86.

Reversing, the Fourth Circuit noted "that the conduct in question skirts the outer bounds of that which can be considered concerted activity under the Act's auspices" given that the comment was made in a conversation initiated by McMillen, was not temporally associated with the negotiations or actions that prompted it, and could not have been directly responsive to a Tribune negotiating position "since McMillen prefaced the remark by stating that he had not yet read Barker's letter." *Id.* at 186. Analyzing whether the concerted action lost the protection of the Act based on its "'egregious or flagrant'" nature, *id.* (quoting *Care Initiatives, Inc.*, 321 N.L.R.B. 144, 151 (1996)), the court applied the four-factor balancing test from *Atlantic Steel Co. v. Chastain*, 245 N.L.R.B. 814 (1979): "(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice." *Id.* (quoting 245 N.L.R.B. at 816).

The ALJ, Board, and court all agreed that the first and second factors weigh in favor of protection, given that the comment was made in a private office away from the pressroom floor and that it was in the context of a discussion of Barker's letters, which dealt with ongoing contract negotiations. *Id.* at 187. All three tribunals also agreed that the fourth factor weighed against protection, given that there was no claim of an unfair labor practice inciting McMillen's statements. *Id.*

The court disagreed with the Board over the third factor: the nature of the employee's outburst. *Id.* The Board found the third factor only moderately prejudicial to McMillen retaining the Act's protection based on the facts that the remark was not made directly to Barker, that it was isolated, that McMillen apologized, and that it was not a direct challenge to Barker. *Id.* The court disagreed, finding that McMillen's statements were not spontaneous outbursts but were ad hominem attacks based on admittedly lawful letters that McMillen had not read. *Id.* at 187-88. The court cited Board precedent holding that "'[i]nsulting, obscene personal attacks by an employee against a supervisor need not be tolerated,' even when they occur during otherwise protected activity." *Id.* at 188 (quoting *Care Initiatives*, 321 N.L.R.B. at 151). The court emphasized the importance of the lawful nature of Barker's letters because it distinguished other Board cases where employees "reacting to patently unlawful actions by their employers" were "extended much greater latitude." *Id.* As a result, the court denied the cross-petition for enforcement and reversed the Board's order.

(2) Protected Activities and Uniform Accessories

In *Cintas Corp. v. NLRB*, the Eighth Circuit Court of Appeals affirmed an NLRB decision that Cintas interfered with protected union activity. In doing so, the court rejected Cintas' assertion that the employees' activities were unprotected and part of a nationwide campaign of "economic extortion." *Cintas Corp. v. NLRB*, 589 F.3d 905 (8th Cir. 2009). In 2004, several employees donned stickers that said "Uniformed Justice!" the name of the union campaign. Cintas issued disciplinary warnings to the employees for wearing the stickers. Cintas argued that wearing the stickers violated the company's employee dress code and nonsolicitation policy. Further, Cintas insisted that local activity by UNITE HERE sympathizers at several different work sites was unlawful, unprotected, and designed to support a national effort to "coerce Cintas into signing" a neutrality and card check agreement with the union. The NLRB dismissed Cintas' argument, asserting that UNITE HERE's actions at a national level provided no defense for the charges against Cintas, as the acts or objectives of the national union could not be "imputed to an individual employee." The NLRB noted that Cintas could properly raise such concerns by filing a charge against the national union itself. *Id.* at 913-14.

In November 2009, the NLRB found that Starbucks violated federal labor law by unlawfully restricting protected activity. *In Re Starbucks Corp.*, 354 N.L.R.B. No. 99 (Oct. 30, 2009). In March 2006, Starbucks entered an agreement with the union, and approved by the NLRB, that allowed baristas to wear reasonably sized pins or buttons that identify an employee's support for a particular union. Starbucks management instructed employees that they could only wear one pin. The NLRB rejected Starbucks' position and affirmed the ALJ's decision ordering Starbucks to allow its employees to wear more than one pro-union pin. *Id.*

(3) Unauthorized Media Contact

The NLRB recently upheld a ruling declaring that it is unlawful to maintain and enforce a policy prohibiting an employee from speaking to the media. In *Trump Marina Associates*, Spina, a Trump Marina employee, granted an interview to a union representative and commented on the Board's decision to set aside the results of a union representation election. 354 N.L.R.B. No. 123 (Dec. 31, 2009). Spina believed that his comments would be used in a union publication. Subsequently, the Union issued a press release regarding the judge's decision to set aside the

union representation election. As a result of the Union's press release, an Associated Press article appeared in the local paper. In providing comments published in the local newspaper, Trump Marina management believed Spina violated its policy prohibiting employees from speaking to the media without prior authorization. A Trump Marina manager spoke to Spina, reminded him of Trump Marina's policy against unauthorized media contact, and encouraged him to obtain prior approval before speaking to the media in the future.

Shortly thereafter, the Union filed a charge against Trump Marina, alleging the employer had violated section 8(a)(1) by maintaining a policy prohibiting employees from speaking to the media about protected activities. The NLRB agreed with the ALJ's finding that the policy interfered with the section 7 right of employees to communicate with the public about an ongoing labor dispute. Moreover, the NLRB declared that Trump Marina's "interrogation" of Spina about his possible violation of the rules was coercive. The ALJ ordered Trump Marina to rescind its policy prohibiting unauthorized contact with the media and to cease and desist from interrogating employees about the rules that infringe on protected section 7 activities. *Id.*

c. Strike/Lockout

(1) Section 8(g) Cases

The federal courts issued three notable opinions addressing strikes or pickets at healthcare facilities and the notice requirements of section 8(g). As healthcare facilities continue to be targeted for organizing, other developments in the field are likely.

Perhaps the most significant development in section 8(g) cases was in *NLRB v. Special Touch Home Care Services, Inc.*, 566 F.3d 292 (2d Cir. 2009), where the court remanded the case to the Board for consideration of the interaction of section 8(g) and the plant rule doctrine. *See id.* at 301. After Special Touch received notice from the SEIU that a three day strike would occur, the Company surveyed its employees to determine who would not be working during the strike in order to schedule replacement workers. *Id.* at 295. While many employees responded that they would not work, forty-eight employees engaged in the strike without either responding to the survey or "calling in" to notify Special Touch that they would not be working. *Id.* As a result, Special Touch informed these employees that they had violated the company's call-in policy and would be disciplined, but not discharged. *Id.* at 296. Some of these employees were eventually reassigned to their original positions after the strike, while others were reassigned to other positions or found other work. The Board found that the failure to immediately reinstate the workers violated the Act, though there was no discussion of the plant rule doctrine, which "permits an employer to enforce neutral 'reasonable rules covering the conduct of employees on company time.'" *Id.* at 296-97 (quoting *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 n.10 (1945)).

The real issue, according to the Second Circuit, was whether an employee who violated a reasonable company call-in policy, but whose union had complied with the relevant notice requirements of section 8(g), lost the protections of the Act. *Id.* at 297. Because this was an issue of first impression in the Circuit, the court asked the Board to decide it in the first instance. *Id.* While the plant rule would seem to control the case, the court noted other cases holding that

individual employees need not give notice before going on strike, even in the section 8(g) context. *See id.* at 298-99 (discussing *Montefiore Hosp. & Med. Ctr. v. NLRB*, 621 F.2d 510, 516 (2d Cir. 1980)). But conversely, the court also noted that *Montefiore Hospital* suggested that individual notice might be required if the employee's absence would create a danger or risk of harm to a patient. *Id.* at 300. Remanding, the court suggested that the Board consider the employer's attempts to maintain a regulated workforce, the employees' interest in striking, and what risk the failure to provide individual notice posed to clients, including the nature of care services provided by the aides. *Id.*

In a second section 8(g) case from the Second Circuit, the court reversed a Board decision upholding an employer's termination of non-union employees for participation in an unlawful picket. *See Civil Serv. Employees Ass'n, Local 1000 v. NLRB*, 569 F.3d 88 (2d Cir. 2009). There, the court drew a distinction between employees who lose the Act's protections for engaging in an unlawful strike versus employees who retain the Act's protections despite engaging in picketing that is unlawful for failure to meet section 8(g)'s notice requirements. Without providing the notice required by section 8(g), AFSCME organized a peaceful picket of Correctional Medical Services, Inc., which operated a New York correctional facility. When five non-union employees participated in the picket on their own time, they were fired on the basis that "'[e]mployees who participate in an unlawful picket lose their protection under the Act.'" *Id.* at 90.

A divided panel of the Board adopted that rationale, finding that even though section 7 protected employees who picketed, an "'employee who pickets in violation of section 8(g) is engaged in unprotected conduct, and is thus vulnerable to employer discipline.'" *Id.* Reversing, the court noted that section 8(g) only makes it a violation for a labor organization to fail to provide the required notice, and says nothing about an employee's obligation to provide notice. The court observed that "Congress intended a clear distinction" by writing section 8(d) to make participation in an unlawful *strike* under section 8(g) sufficient to lose the section 7 protections without mentioning participation in unlawful *picketing*. *Id.* at 93.

The court noted that these five employees participated off-duty and that it "caused no disruption to the operation of the clinic." *Id.* at 95. The court also cited *Montefiore Hospital* for the proposition that "health care facilities confronted with strikes or union-inspired disruptive behavior are not without potent remedies in appropriate cases." *Id.* But this case raises significant concerns about the ability of an employer to discipline an employee who engages in unlawful picketing, as it appears that a union could violate section 8(g) with impunity and, as long as the employees participate off-duty, or perhaps even on duty but "caus[e] no disruption" to the employer's operation, they could not be disciplined. *Id.* And, if the Board on remand in *Special Touch* favors employee protection over the plant rule doctrine, as an Obama Board is likely to do, healthcare employers will lose even more control of their workforce.

The one notable management victory in recent section 8(g) cases came from the Ninth Circuit. *See SEIU, United Healthcare Workers-West v. NLRB*, 574 F.3d 1213 (9th Cir. 2009). There, the court affirmed a Board order finding that the union, responsible for orchestrating and supporting the decisions of active employees to refuse to work overtime, violated the Act by failing to give ten days' notice. Rejecting the union's argument that notice was not required because the CBA provided employees could not be forced to work overtime, the court held that

while "there would not necessarily be a concerted refusal to work in the event all employees, acting independently, were unwilling to volunteer for overtime," where the "action was 'concerted' because it was orchestrated by the Union," notice was required. *Id.* at 1217-18.

(2) Job Abandonment During a Strike

In *KSM Industries, Inc.*, 353 N.L.R.B. No. 117 (Mar. 26, 2009), the Board addressed the circumstances of job abandonment in order to obtain benefits during a strike. The Board affirmed an administrative law judge's finding that striking employees who were unlawfully denied recall or whose recall was delayed did not voluntarily abandon their jobs when they tendered resignations in order to receive payouts from retirement funds and for accrued vacation pay. The ALJ noted "a fairly well developed body of Board precedent" holding that "'a striker's resignation in order to . . . obtain pension funds will not of itself be evidence of abandonment of the struck job. Rather, the board will examine the relevant circumstances to determine whether the striker has expressed an unequivocal intention not to return to his former job.'" *Id.* at 9 (quoting *Alaska Pulp Corp.*, 326 N.L.R.B. 522, 524 (1998)). While the judge noted that evidence suggested that KSM "engaged in a course of conduct designed to encourage strikers to abandon employment" and the "consistent alacrity with which [KSM] suggested that [strikers] would need to resign in order to obtain their funds," he was "unable…to find that employees have been discriminated against because the Respondent began following the plan's rules concerning the provision of hardship withdrawals." *Id.* at 10, 11. While the "unseemly aspect" of KSM's dealings with employees "factors into [the] assessment of employees' intentions when they resigned," that fact was "not dispositive of any issue and does not preclude the Respondent from demonstrating an intent to abandon employment by any employee" which the ALJ judge reviewed in a fact-intensive employee-by-employee analysis. *Id.* at 12. Nonetheless, the ALJ found that, with one exception, the Respondent failed to carry its burden as to any employee. *Id.* at 12-20.

On an additional issue, the Board affirmed the ALJ's ruling that strikers who responded "no" to a recall interest questionnaire sent by KSM did not abandon their job, given that the interest questionnaire was not a valid offer of reinstatement. *See id.* at 1. Even though KSM's interest questionnaire clearly stated that "'I understand that a "NO" choice voluntarily terminates my employment with KSM Industries,'" the Board discounted the language because it could not say that an employee "would have responded the same way to an actual reinstatement offer." *Id.* The Board also noted that *Alaska Pulp* had "'consistently discounted statements, prior to a valid offer of reinstatement, indicating a lack of interest in returning to work.'" *See id*. (quoting 326 N.L.R.B. at 527). Member Schaumber stated that he applied *Alaska Pulp* only for institutional reasons and did not pass on whether it was correctly decided. *See id.* at 2 n.8.

2. Restraint or Coercion by Employers, Refusal to Hire and Refusal to Consider

In *Legacy Health Systems*, 354 N.L.R.B. No. 45 (July 13, 2009), the Board found that the employer's policy prohibiting employees from holding dual part-time jobs, one of which is in a unit represented by a union and the other of which is in a non-represented unit, discriminated on the basis of section 7 and violated sections 8(a)(3) and (1). Based on this policy, the employer refused to hire three employees working in a represented unit for positions in a non-represented

unit. While the ALJ found that the policy was "inherently destructive" to the employees' section 7 rights under *NLRB v. Great Dane Trailers*, 338 U.S. 26, 33-34 (1967), the Board instead held that even assuming the impact on section 7 rights was only "comparatively slight," the employer failed to prove a "legitimate and substantial justification for the policy." *Legacy Health Sys.*, 354 N.L.R.B. No. 45 at 1. While the Company suggested the policy was driven by the need to avoid "legal uncertainties" that would arise if an employee was both represented and unrepresented, the Board noted that Legacy Health employees are allowed to hold two different jobs in two different bargaining units, even if those units are represented by different unions. *Id.* at 5. Because the Board found that the "comparatively slight" impact on the employees' section 7 rights was not supported by the employer's proffered business justification, it found that the employer had violated section 8(a)(3).

In *Allstate Power Vac, Inc.* the Board affirmed the ALJ's dismissal of an allegation that the Respondent violated section 8(a)(3) and (1) by failing to hire or consider for hire seven union sponsored applicants. 354 N.L.R.B. No. 111 (Nov. 30, 2009). The Board highlighted the General Counsel's failure to establish that the applicants had the relevant training or experience required for the open positions. The General Counsel also failed to establish that the Respondent was hiring for positions for which the union sponsored applicants would have been qualified. The Board also emphasized that the General Counsel failed to demonstrate that the Respondent excluded the applicants from the "hiring process" for the open positions.

3. Restraint or Coercion by Union

a. Union Misconduct

Two cases regarding union misconduct deserve mention, one for the Supreme Court's failure to grant certiorari and the other illustrating a union's restraint and/or coercion of section 7 rights.

First, on March 23, 2009, the Supreme Court denied certiorari in *Union of Needletrades, Industrial & Textile Employees, AFL-CIO (UNITE) v. Pichler*, 129 S. Ct. 1662 (2009). In the underlying case, *Pichler v. UNITE*, 542 F.3d 380 (3d Cir. 2008), plaintiffs, individually and on behalf of a class, sued UNITE for violations of the Driver's Privacy Protection Act ("DPPA"), 18 U.S.C. §§ 2721-2725, when the union obtained plaintiffs' addresses for organizing purposes by recording the license plate numbers on cars in the parking lot of Cintas, who was being targeted for organization. While the court also dealt with various damages issues, the court rejected UNITE's cross-appeal as to liability under the DPPA. Regardless of whether UNITE may have had a permissible use for obtaining the information, the court held that obtaining home addresses through vehicle registration records for the purpose of union organizing was an impermissible use, and thus violated the DPPA.

Second, the Board in *Teamsters Local 886 (United Parcel Service)*, 354 N.L.R.B. No. 52 (July 24, 2009), reversed an ALJ's decision that the union had not committed an unfair labor practice based on statements made about its grievance decisions in the presence of another union member. In a meeting between the grievant, a union steward, and a non-officer union member, the union steward told the grievant that his grievance was not processed by the union because (1)

the Company did not like the grievant and (2) the grievant had recently launched an unsuccessful campaign for election to an internal union position. The ALJ found that, based on the circumstances and the grievant's knowledge of the union's workings, the grievant could not have reasonably believed that the steward was speaking with union authority. But the Board reversed because of the ALJ's failure to assess the steward's statements from the point of view of the other present union member, who, unlike the grievant, had not been a union officer and did not have knowledge of the union's inner workings. While grievance processing was within the duties of a steward, the court found no evidence indicating that the other member, like the grievant, knew or should have known that the steward was speaking without authority when he made the statement. The court found that "telling an employee, in the presence of other employees, that the Respondent dropped his grievances because he had opposed the Respondent's leadership in an internal union election and because the Company did not like him" was an act of restraint or coercion in the exercise of section 7 rights. *Id.* at 4. Accordingly, the Board reversed the ALJ.

b. Unlawful Secondary Activity

In *NLRB v. Metropolitan Regional Council of Carpenters*, 316 F. App'x 150 (3d Cir. 2009), the court affirmed a broad cease and desist order, *see* Section III.C.2.a, *infra*, as a remedy for violations of section 8(b)(4)(ii)(B) by the Regional Council of the United Brotherhood of Carpenters and Joiners of America ("union"). Specifically, a union officer asked the developer of a condominium building "to use some of your juice" to convince a non-union contractor working in the building to use union workers. *Id.* at 152. The union official indicated that if things did not change with the contractor, "'the building is going to have a problem,'" by which he meant "'[p]rotests, work stoppages, and problems with deliveries.'" *See id.* In a separate conversation, the same union official told a field superintendent on another construction project that if an agreement was not reached with a non-union subcontractor on that project, the truck delivering the subcontractor's product would not be unloaded because of pickets and work stoppages.

A violation of section 8(b)(4)(ii)(B) requires first that "a labor organization threaten, coerce, or restrain any person" and, second, that "an object of this conduct be to force one person to cease doing business with another person." *See id.* at 157 (citing *Sheet Metal Workers Local* 27, 321 N.L.R.B. 540, 547 (1996)) (internal quotations omitted). Regarding the conversations between the union and the property developer, the court noted that this was not a case where only "problems" were discussed, but that protests, work stoppages and the like were specifically mentioned, making it clear that a threat was made. And it was further clear that the threat was to pressure the developer to quit using the contractor. Accordingly, the court affirmed the finding of a violation based on this conduct. Regarding the conversation with the construction field superintendent, while it would not be a threat to merely state that a valid picket line would be established, a valid picket line becomes unlawful if it has an unlawful secondary objective. *See id.* at 158-59. Given that the union sought to exert pressure on the construction company to obtain an agreement with the subcontractor, the court affirmed the Board's finding a violation of the Act. For a discussion of the remedy imposed, see Section III.C.2.a, *infra*.

c. Section 8(e) / Hot Cargo Agreements

In *Local 917, International Brotherhood of Teamsters v. NLRB*, 577 F.3d 70 (2d Cir. 2009), the Second Circuit affirmed a Board decision that Local 917 violated the NLRA's "hot cargo" agreement when it attempted to enforce the work preservation clause in its collective bargaining agreement with Peerless, a New York liquor distributor. But under a separate agreement, an exclusive distribution contract between Peerless and Diageo, a wine and spirits supplier, Diageo retained the right to control sales terms, traditionally including method of delivery. While Local 917 initially delivered products from Diageo to Peerless, Diageo later unilaterally increased prices to Peerless and began delivering the product directly to Peerless, cutting out a large amount of work for Local 917, who grieved the matter with Peerless and prevailed at arbitration. As a result, Peerless filed an unfair labor practice charge alleging that the union's grievance—an attempt to protect its work—was unlawful under section 8(e). The Board agreed, finding "that the Union's effort to enforce the work preservation clause amounted to a boycott in violation of Section 8(e) of the [Act]." *See id.* at 73.

Affirming the Board's decision, the Second Circuit found it "clear enough that the Union seeks to preserve work that its members have traditionally performed," requiring the court to determine whether Peerless "had a 'right to control' over the disputed work." *Id.* at 76. The court rejected the union's arguments that Peerless had a right to control, finding that the right belonged to Diageo under the distribution contract, and also rejected the argument that Peerless was an "offending employer" by either actively bargaining away, or failing to negotiate to preserve, work belonging to Local 917 when Peerless entered into the distribution agreement. *See id.* at 77-78. Finally, the court concluded that while it may appear that Local 917's disagreement was with Peerless, the union's desired objective—protecting work—would require Peerless to either breach its contract with Diageo or cease doing business with Diageo completely, and that "[b]oth scenarios violate Section 8(e)'s bar on agreements that effect the cessation of business, and both are in tension with Section 8(e)'s aim of eliminating anti-competitive conduct." *Id.* at 78. Accordingly, the court affirmed the Board's decision on section 8(e), but reversed on the Board's award of fees and expenses to Peerless, finding that Peerless prolonged the matter by resisting certain discovery orders. *Id.* at 78-79.

4. Campaign & Election Activity – Promises of Benefits/Threats of Reprisals During Campaign

In *Community Medical Center & New York State Nurses Association*, 354 N.L.R.B. No. 26 (May 29, 2009), the Board affirmed an administrative law judge's decision that the Center's promise to implement, and its later implementation of, a "shared governance" plan was an attempt to undermine the organizing drive of the New York State Nurses Association. In addition to numerous other violations, the judge found that the announcement of the implementation of the shared governance plan, which would give nurses a voice in practice issues and allow them to raise concerns, was done with the express purpose of attempting to dissuade nurses from selecting the union as their representative. Thus, the Center violated section 8(a)(1) of the Act. Because the union lost a representation election three months later, the judge order, and the Board affirmed, that a second election take place.

5. Journalistic Freedom and Section 10(j) Injunctions

Recently, the Ninth Circuit Court of Appeals tackled the delicate issue of journalistic freedom during union organizing campaigns. In *McDermott*, several reporters and editors resigned after clashes with Ampersand Publishing over newspaper content. *McDermott v. Ampersand Publ'g, LLC*, -- F.3d --, No. 08-56202, 2010 WL 276208 (9th Cir. Jan. 26, 2010). The resignations prompted other employees to pursue union representation. During the union organizing campaign, the employees attempted to increase their editorial control through a subscription cancellation campaign. The regional director of the NLRB requested a temporary injunction compelling Ampersand Publishing to offer reinstatement to eight employees discharged during the organizing campaign. The Ninth Circuit affirmed the district court's decision denying the petition for section 10(j) relief. The Ninth Circuit applied the heightened equitable relief standard established in *Overstreet ex rel. NLRB v. United Brotherhood of Carpenters & Joiners of America, Local Union No. 1506*, 409 F.3d 1199 (9th Cir. 2005) and found that granting the injunction would likely infringe Ampersand Publishing's First Amendment rights to publish the content that it desired. With that finding, the court denied the injunction. *McDermott*, 2010 WL 276208.

B. Board Developments in The Duty To Bargain

1. Mandatory Subjects of Bargaining

Two recent federal court decisions address the issue of mandatory subjects of bargaining, with one addressing the obligation to bargain over dues checkoff provisions while the other concerns bargaining over layoff decisions driven by multiple factors. First, in *Tribune Publishing Co. v. NLRB*, 564 F.3d 1330 (D.C. Cir. 2009), the United States Court of Appeals for the D.C. Circuit enforced an order of the NLRB finding that Tribune Publishing violated sections 8(a)(1) and (5) of the Act by unilaterally discontinuing the deduction and direct deposit of union dues. *Id.* at 1335. A 1997 CBA between Tribune Publishing and the Graphic Communications International Union allowed dues checkoff from an employee's wages upon the employee's written request. *Id.* at 1331. When the CBA expired on November 30, 2001, Tribune Publishing continued the checkoff for three weeks, and then sent each employee a letter stating that the company was exercising its right to unilaterally discontinue the deductions because of the CBA's expiration. *Id.* After the union secretary-treasurer collected dues himself for a few months while a new agreement was being negotiated, he eventually had employees complete direct deposit forms and presented them to a Tribune Publishing administrative manager. That manager had been involved in negotiations and thought "it was 'a good idea' to use direct deposit for the payment of union dues and, [sic] accepted the direct deposit forms for processing." *Id.*

Almost six months after contract termination, Tribune Publishing began the direct deposit of union dues and provided the union with a list of employees for whom dues were deducted and the amount of each deduction. *Id.* at 1331-32. However, after making only one dues payment to the union, the manager sent each employee a letter telling them that direct deposit of union dues was being discontinued "because dues checkoff had 'been previously discontinued by the Company and the direct deposit transactions reinstated dues checkoff. Establishing direct deposit for dues was a mistake." *Id.* at 1332. The Board subsequently filed an unfair labor

practice charge against the Company alleging violations of sections 8(a)(1) and (5) of the Act for unilaterally discontinuing the direct deposit of dues.

The ALJ, the Board, and the D.C. Circuit all found the Company in violation of the Act. *See id.* The D.C. Circuit first noted that "dues checkoff is a matter related to 'wages, hours, and other terms and conditions of employment' within the meaning of the Act and therefore is a mandatory subject for collective bargaining." *Id.* at 1333 (citing *Quality House of Graphics, Inc.*, 336 N.L.R.B. 497, 511 & n.42 (2001) (collecting cases)); *Sw. Steel & Supply v. NLRB*, 806 F.2d 1111, 1114 (D.C. Cir. 1986). Further, the expiration of a collective bargaining agreement imposing a checkoff obligation on an employer gives the employer the option to either discontinue or maintain checkoff. *See id.*

The D.C. Circuit rejected Tribune Publishing's argument that when it instituted direct deposit, it was as though dues checkoff had never been discontinued. The court held that when the practice of dues deduction was discontinued, it could not be reinstituted without a new agreement because the subject of checkoff was a mandatory subject of bargaining. *Id.* And, again, because the checkoff was a mandatory subject, once the Company had agreed to reinstitute the practice, it could not then unilaterally discontinue the practice. *See id.* at 1332, 1334. The court also rejected the Company's argument that any agreement to reinstate checkoff violated section 302 of the LMRA because, as the Company argued, (1) a checkoff provision required a valid CBA and (2) the agreement had to be reduced to writing. *Id.* at 1334-35. Finding no support for either argument, the court granted the NLRB's cross-application for enforcement of its order. *Id.* at 1335.

In another case, the First Circuit also addressed mandatory subjects of bargaining, holding that "an employer must bargain over a multiple-motive layoff based partially on labor costs." *Pan Am. Grain Co. v. NLRB*, 558 F.3d 22, 27 (1st Cir. 2009). As a result of modernization work done in 1996, Pan American's staffing needs decreased, leading to a loss of one or two employees per year. *Id.* at 25. During a 2002 strike, without bargaining, the company decided to lay off fifteen strikers and sent the employees a letter informing them that the layoffs were "'due to economic reasons and as a result of a substantial decrease in production and sales.'" *Id.* at 24. However, before the administrative law judge, the company claimed that the results of modernization were another factor causing the layoff. *Id.* at 25. While recognizing that one factor leading to the layoff decision may have been an economic factor as a result of modernization, the Board held that the layoffs were at least partially motivated by labor costs and thus bargaining was required. The court found the Board's holding reasonably defensible and affirmed. In reviewing the remedy of reinstatement and full backpay, however, the court noted that Pan American should be allowed to present evidence at the compliance stage regarding the viability of rehiring individuals, given that no one had been hired since the 2002 layoff.

2. Duty to Provide Information

In a two-Member Board opinion in *PDK Investments, LLC*, 354 N.L.R.B. No. 1 (Apr. 24, 2009), Member Schaumber and Chairman Liebman disagreed over the degree of factual basis a requesting party needed to provide to establish the relevance of an information request. Though agreeing that the union had provided a sufficient factual basis to establish relevance in this case, Member Schaumber noted his disagreement with Board precedent holding that a requester may

simply state a reason for its information request without a factual basis, citing *Dodger Theatrical Holdings, Inc.*, 347 N.L.R.B. 953, 953 n.3 (2006). *See* 354 N.L.R.B. No. 1 at 1 n.2.

3. Obligations to Bargain Over Discipline

The Board in *Alan Ritchey, Inc.*, 354 N.L.R.B. No. 79 (Sept. 25, 2009), reversed an administrative law judge's finding that the employer violated sections 8(a)(5) and (1) of the Act by failing to notify the union and afford it an opportunity to bargain before disciplining unit members for failing to meet minimum efficiency standards, for absenteeism, and before discharging other employees for insubordination and threatening comments. *See id.* at 1. According to the judge, because the employer's progressive discipline policy allowed for some degree of discretion to be exercised in deciding discipline, bargaining was required. However, relying on *Fresno Bee*, 337 N.L.R.B. 1161 (2002), the Board held that there was no obligation to bargain, particularly where the Respondent's discretion operated within the bounds of its progressive discipline scheme, as the employer's did.

On the related issues of whether the employer violated sections 8(a)(5) and (1) of the Act by unilaterally changing the efficiency standards upon which discipline was based, the Board severed the issue and remanded the matter for consideration of the policy's post-election enforcement. The Board noted that a violation of section 8(a)(5) might be established if the evidence proved "the existence of a preelection established past practice of permitting inspectors to avoid additional discipline by gradually improving their performance over time, and (2) a postelection change [in the practice] . . . and (3) that the change . . . constituted a material and substantial change in employees' terms and conditions of employment." *Id.* at 6 (emphasis omitted).

4. Employer Withdrawal of Recognition

Employer withdrawal of recognition is another area of traditional labor law that kept both the Board and federal courts busy during this last year. From the Board, *Narricot Industries, L.P.*, 353 N.L.R.B. No. 82 (Jan. 30, 2009) stresses the risks inherent in assisting with the preparation of a decertification petition and then relying solely on that petition for immediate withdrawal. Where a Human Resources manager and supervisor prepared a decertification petition, told employees how many signatures were needed, collected and requested more at the end of each day, and told employees that decertification would result in an increase in pay, those actions went beyond "the permissible 'ministerial aid' in the initiation and circulation of the decertification petition" and "was 'aimed specifically at causing employee disaffection with their union.'" *Id.* at 2. Because Narricot Industries withdrew recognition relying only on a petition it assisted in preparing, when the petition was found tainted and could not serve as a basis for withdrawing recognition, Narricot had nothing left on which to rely. *See id.* at 1. As a remedy, the Board affirmed the judge's issuance of a bargaining order, discussed in Section III.C.2.d, *infra*. The Fourth Circuit affirmed the Board's finding on withdrawal of recognition. *See Narricot Indus.*, 587 F.3d 654.

Similarly, the Eastern District of California discussed the risk in declaring immediate withdrawal of recognition as part of the court's analysis before issuing a section 10(j) injunction. *See Norrelli v. Fremont-Rideout Health Group*, 632 F. Supp. 2d 993 (E.D. Cal. 2009); Section

III.C.2.c, *infra*. When Fremont Medical Center relied on a petition suggesting that 51.8% of the bargaining unit favored decertification, the company sent a letter to the California Nurses Association the next day announcing immediate withdrawal of recognition. Though aware that the union was soliciting revocation cards, the company did not receive the cards revoking petition signatures until the day of the hearing. However, because the company did not give the union time to present conflicting evidence regarding majority status prior to withdrawal, the delay was irrelevant, given that the employer bears the burden of proving a lack of majority status. The court stated that employers who withdraw recognition do so "at [their] peril" and that "[g]ood faith is not a defense." *Id.* at 998. And even then, the court noted that it would have rejected some of the signatures on the petition given that they were, in some cases, executed seven months before the withdrawal, because "such stale evidence is not a reliable indicator of the employees' union sentiments at the time recognition was withdrawn." *Id.* at 1001 (citation omitted).

The Ninth Circuit penned two opinions discussing the certification year and when an employer may withdraw recognition. First, the court held that the certification year did not begin until the first bargaining meeting occurred, and not when the election occurred or when the first request for information was made. *Va. Mason Med. Ctr. v. NLRB*, 558 F.3d 891, 895 (9th Cir. 2009). While this rule likely has general applicability, the case may be distinguishable based on the fact that an underlying Board remedial order specifically stated that the Board would construe "the initial period of the certification as *beginning the date the Respondent begins to bargain in good faith with the Union*." *See id.* (emphasis supplied by court). Further, the court rejected the medical center's argument that it should be excused from penalty given that its withdrawal was only four days premature. The court stated that "[t]here is no *de minimis* exception for technical noncompliance with Board orders." *Id.* at 895.

Second, in *Laborers' International Union of North America, Local 872 v. NLRB*, 323 F. App'x 523 (9th Cir. 2009), the Ninth Circuit overturned an NLRB decision holding that an employer legally withdrew recognition from the union. In that case, the Board held that six months of bargaining was a "'reasonable period of time'" to negotiate before withdrawing recognition given that the parties had previously negotiated a new contract for nearly eight months before walking away, therefore, the parties did not "start from scratch" when they bargained for only six months. While the court "assume[d] that the Board correctly concluded that the parties' earlier negotiations could be relevant under *Lee Lumber* [*& Building Material Corp.*, 334 N.L.R.B. 399 (2001)] in determining whether a 'reasonable period of time' for post-remedial bargaining had elapsed," the record before the Board was devoid of any evidence concerning the prior negotiations. *Id.* at 525. Accordingly, the court found the Board lacked a basis in substantial evidence for its decision, and granted the union's petition for review.

The issue of union recognition also arose in *Crete Cold Storage*, where the Board adopted the ALJ's finding that Crete Cold Storage violated section 8(a)(5) and (1) of the Act by withdrawing union recognition and failing to provide the Union with information. *Crete Cold Storage, LLC*, 354 N.L.R.B. No. 114 (Dec. 9, 2009). Crete Cold Storage presented evidence that the union's collective bargaining agreement covered five or six employees, but only one employee, Garcia, had union dues deducted from his paycheck. Cold Crete Storage received information leading it to believe that Garcia no longer wanted to be represented by the Union. With that knowledge, Crete Cold Storage announced its intent to withdraw recognition from the

Union. The Board rejected Crete Cold Storage's assertion that the evidence demonstrated a decrease in union membership, making withdrawal permissible. The Board noted that the determination of majority support turns on whether a majority of the unit employees wish to be represented by that Union, not on whether the unit employees choose to become union members or pay union dues. *Id.*

5. The Right to Bargain Over Compensation for Donning and Doffing Time

The Fourth Circuit Court of Appeals recently held that under the Fair Labor Standards Act employers and unions may agree that employees will not be compensated for time spent donning and doffing protective gear. *Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209 (4th Cir. 2009). The dispute arose when an Allen Family Foods employee filed a putative class action against Allen Family Foods challenging a collective bargaining agreement providing that employees would not be paid for time spent changing into protective gear. The employee argued that, while the parties agreed that employees would not be paid for time spent changing clothes, changing clothes did not include donning and doffing protective gear. The Fourth Circuit disagreed and deferred to FLSA section 203(o), which allows employers and unions to agree to exclude "any time spent in changing clothes . . . at the beginning or end of each workday" from compensable work time. The court noted that it would not engage in a fact-intensive determination that traditionally is tackled during collective bargaining. The plaintiff may well seek Supreme Court review of the case, as the circuit courts disagree on whether a collective bargaining agreement may exclude donning and doffing time from the compensable workday. The Fourth, Fifth and Eleventh Circuits have held that an employer and the union may agree not to compensate employees for time spent donning and doffing protective gear, while the Ninth Circuit as held that they can not. *Id.*

C. Developments in Procedural Issues

1. Preemption

In *Barbour v. International Union*, the Fourth Circuit Court of Appeals addressed whether Barbour and her fellow retirees' state law claims that the union provided them with false information regarding their eligibility to receive retirement incentive packages was completely preempted by the NLRA. *Barbour v. Int'l Union*, No. 08-1740, 2010 WL 398121 (4th Cir. Feb. 4, 2010). The court differentiated complete preemption, which provides a basis for removal jurisdiction, with ordinary preemption, which does not. For a court to find that complete preemption exists, the moving party must demonstrate that "Congress clearly intended the federal claim to provide the exclusive cause of action for claims of overwhelming national interest." *Id*. at *13 (internal quotation, citation and emphasis omitted). In *Barbour*, the court found that the district court had conflated the two types of preemption. Barbour pled typical state law causes of action for breach of fiduciary duty against the union. The union, in arguing for complete preemption, failed to identify any statutory language in section 9(a) of the NLRA demonstrating a clear intent by Congress that all state law claims relating to fiduciary duties owed by unions to employees represented by them are exclusively federal claims under the NLRA. Accordingly, the court held that Barbour and the retirees' state breach of fiduciary duty claims were not completely preempted by the NLRA. As a result, the case was remanded back to state court.

2. Remedy Issues

a. Cease and Desist Orders

On the facts of *NLRB v. Metropolitan Regional Council of Carpenters*, 316 F. App'x 150 (3d Cir. 2009), discussed *supra* at Section III.A.3.b, the court affirmed the entry of a broad cease and desist order. After finding a violation of section 8(b)(4)(ii)(B), the court noted that the union had twelve complaints filed against it between the summer of 1999 and June 2007, 11 of which were for violations of section 8(b)(4)(ii)(B). The court also noted that many of these alleged violations occurred either while litigating or shortly after litigating other similar complaints, which "clearly constitutes substantial evidence of the need for a broad order." *Id.* at 160.

b. Backpay Orders

Three cases involving backpay—two ordering backpay and one denying backpay—deserve mention. First, in *NLRB v. Consolidated Bus Transit, Inc.*, 577 F.3d 467 (2d Cir. 2009), the Second Circuit held that an employer who illegally targeted and then discharged a bus driver for participation in union activity must pay backpay covering a period of time when he was unauthorized to drive a school bus because of failing driving tests. While the driver was not scheduled to take his next driving test until October 31, 2004, Consolidated required him to take the test in March 2003 and, when he failed and failed the retest, resulting in his disqualification from driving, Consolidated terminated his employment. After being found in violation of the Act, Consolidated objected to paying backpay for the time during which the driver could not have worked as a bus driver because he had failed his tests. However, the court noted that the backpay must run from the date of his termination until his next regularly scheduled test because, were it not for being singled out on the basis of union activity, it is presumed that he would have remained employable as a driver.

The Board also rejected reasons for avoiding backpay in *Jackson Hospital Corp.*, 354 N.L.R.B. No. 42 (July 9, 2009). There, the Board rejected an employer's argument that its backpay should be cut off because the employee was later convicted of a felony, left an interim job because of problems with child care, and took an eight-month medical leave. The Board found that the employer could not prove that the former employee's felony would have ended her employment because the Center continued to employ other felons. Nor could the hospital prove that it would have terminated her for taking an eight-month leave. Finally, the Board held that the employee acted reasonably in leaving a job for child care reasons, making her entitled to backpay for that period. The Board affirmed the ALJ's decision not to award backpay for an eight month period in which the employee was living in another state and did not seek work.

Finally, the Ninth Circuit denied a union backpay and a bargaining order despite an employer's failure to comply with its obligation to bargain over the effects of merging two business units together. *Int'l Bhd. of Elec. Workers, Local 21 v. NLRB*, 563 F.3d 418 (9th Cir. 2009). After Lucent's purchase of AG Communication Systems, Lucent decided to merge the businesses together, folding the IBEW 250-person telephone equipment installers unit from AG into the similar 2,700 person unit at Lucent represented by CWA. Though IBEW Local 21 requested bargaining over the effects of the merger, neither Lucent nor AG responded. The court

agreed that while the merger was the kind of "core business decision" that was exempt from the obligation to bargain, Lucent violated the Act by failing to bargain over the effects of that merger. *Id.* at 422-23.

Regarding the remedy, the court noted that while the standard *Transmarine Navigation Corp.*, 170 N.L.R.B. 389 (1968) remedy for a failure to bargain over the effects of a core business decision includes backpay and an order requiring the parties to bargain over the effects of the decision, "the Board still has broad discretion, and must consider the particular circumstances of the case before deciding exactly what remedy to prescribe." 563 F.3d at 423-24. The court concluded that, in this case, the Board did not abuse its discretion in refusing to impose the *Transmarine* remedy. Specifically, the court found that "AG installers suffered no detriment from the failure to bargain over effects, and even if there was some detriment, that harm is outweighed by the disruption that would likely be caused by forcing retroactive bargaining with Local 21 when all of the employees are now represented by CWA." *Id.* at 424. Accordingly, the court denied the petition for review. *Id.* at 425.

c. Section 10(j) and 10(*l*) Injunctive Relief

The circuit courts continued to wrestle with the proper test to apply in deciding whether a section 10(j) injunction was warranted. In *Muffley ex rel. NLRB v. Spartan Mining Co.*, 570 F.3d 534 (4th Cir. 2009), the court noted that "[s]ection 10(j) provides that a district court shall award temporary injunctive relief 'as it deems just and proper,'" but that the Supreme Court had never defined the language, which "has vexed the courts and spawned three competing standards for judging the propriety of § 10(j) relief." *Id.* at 541. The court then summarized the three tests. The majority approach, followed by the Third, Fifth, Sixth, Tenth, and Eleventh Circuits, applies a two-step approach "determining whether (1) 'reasonable cause' exists to believe a violation of the NLRA has occurred, and (2) injunctive relief is 'just and proper.'" *Id.* (collecting cases). Yet some Circuits reject this approach for a traditional four-factor standard applicable to any preliminary injunction, balancing "(1) the possibility of irreparable injury to the moving party if relief is not granted; (2) the possible harm to the nonmoving party if relief is granted; (3) the likelihood of the moving party's success on the merits; and (4) the public interest." *Id.* *Muffley* identified the Fourth, Eighth, and Ninth Circuits as following this approach. *Id.* Though phrased differently, this is the test applied to grant a section 10(j) injunction against Fremont Medical Center in *Norrelli v. Fremont-Rideout Health Group*, discussed *supra*. Finally, *Muffley* noted that the First and Second Circuits follow a hybrid standard, which "incorporate[s] the traditional four-part equitable standard into the 'just and proper' analysis, yet retain[s] a separate 'reasonable cause' step." 570 F.3d at 541 (collecting cases). The Second Circuit recently applied this analysis to grant a section 10(j) injunction in *Mattina ex rel. NLRB v. Kingsbridge Heights Rehabilitation & Care Center*, Nos. 08-4059, 08-5067, 2009 WL 1383330 (2d Cir. May 18, 2009) (affirming granting of section 10(j) injunction and affirming district court's jurisdiction to conduct hearings in connection with reinstatement order).

After a review of the circuit splits, *Muffley* determined that the traditional four-part test applied by the Fourth, Eighth, and Ninth Circuits was the proper standard. 570 F.3d at 542-43. The court relied on *Weinberger v. Romero-Barcelo*'s statement "that, unless directed otherwise by Congress, courts should exercise their traditional equitable discretion," and that Congress must speak in a clear manner to command courts to do otherwise. *See id.* at 542 (citing

Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982)). Because the court believed that the "just and proper" language required application of the traditional four-part equitable test, it adopted that approach. *Id.* The court also observed that those Circuits adopting a "reasonable cause" standard did so by, the court believed, erroneously analogizing to section 10(*l*), which is both mandatory and explicitly states the "reasonable cause" standard. *Id.*; *see also* 29 U.S.C. § 160(*l*).

d. Bargaining Orders

In *Regal Health & Rehab Center, Inc.*, 354 N.L.R.B. No. 71 (Aug. 28, 2009), the Board affirmed an administrative law judge's decision to grant a *Gissel* bargaining order in light of unlawful discharges and numerous violations of section 8(a)(1), in addition to employer Regal Health & Rehab Center's decision to alter the job duties of LPNs, as part of a scheme to make them supervisors and thus ineligible for organization, only a few days after learning of the Union's first organizational meeting. *See id.* at 1. Because these actions "had a 'tendency to undermine the majority strength and impede the election processes,'" the Board granted the order. *See id.* (quoting *Regency Manor Nursing Home*, 275 N.L.R.B. 1261, 1261 (1985)).

And, in *Narricot Industries*, the facts of which are discussed *supra*, the two-Member decision exhibited a split in opinion on the standard for issuing a *Gissel* order. The decision stated that "[w]e adhere to the view, reaffirmed in *Caterair International*, 322 N.L.R.B. 64 (1996), than an affirmative bargaining order is 'the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees.'" 353 N.L.R.B. No. 82 at 2 (quoting 322 N.L.R.B. at 68). But while Member Schaumber "recognize[d] . . . that . . . *Caterair International* . . . represents extant Board law," he does not agree with the view that an affirmative bargaining order is the "traditional, appropriate" remedy in every case. *See id.* at 2 n.12. Rather, he believed that the D.C. Circuit's view that a case-by-case analysis was required was the appropriate view. *Id.* The two-Member majority applied this analysis in light of the *Vincent Industrial Plastics* rule "that an affirmative bargaining order 'must be justified by a reasonable analysis that includes an explicit balancing of three considerations: (1) the employees' section 7 rights; (2) whether other purposes of the Act override the rights of employees to chose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act.'" *Id.* at 2-3 (quoting *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 738 (D.C. Cir. 2000)). The Board found that each factor was satisfied based on the facts of the case, *id.* at 3, a finding affirmed by the Fourth Circuit. *See Narricot Indus.*, 587 F.3d 654.

3. Elections

On March 31, 2009, the Board released two opinions dealing with pay promised to off-duty employees if they would come in to work and vote in a representation election. In both cases, an employer promised to pay employees a certain number of hours' pay if (1) they were not on call at the time of the representation election and (2) they came to work to vote in the election. *See DLC Corp.*, 353 N.L.R.B. No. 130 (Mar. 31, 2009) (employees promised four hours' pay); *Durham Sch. Servs. LP*, 353 N.L.R.B. No. 129 (Mar. 31, 2009) (employees promised two hours' pay). The Board, while noting that an employer may reimburse an employee for actual transportation services, *see Sunrise Rehabilitation Hospital*, 320 N.L.R.B.

212 (1995), found that a promise of pay to appear and vote violated the Act. Member Schaumber noted that he did not participate in *Sunrise Rehabilitation Hospital* and applied it only for institutional reasons; he would revisit the area of reimbursement at the appropriate time for increased clarity and uniformity in the standards. *See* 353 N.L.R.B. No. 130 at 2 n.4.

On January 22, 2010, the NLRB Regional Director for Region 19 directed a decertification election among 140 AT&T Mobility employees. *AT&T Mobility LLC*, No. 19-RD-3854, slip op. (N.L.R.B. Jan. 22, 2010). The Regional Director directed this election after finding that AT&T Mobility and the union did not give the employees proper notice of the 45-day window to file a decertification petition, pursuant to the Board's decision in *In re Dana Corp.*, 351 N.L.R.B. 434 (2007). In September 2009, AT&T Mobility voluntarily recognized the Communications Workers of America as the exclusive representative for 140 employees in 11 locations throughout Washington State. On October 9, 2009, AT&T Mobility posted a *Dana* notice in several locations, and October 12, 2009, it posted the notices at the remaining locations. The 45-day notice period was to elapse on November 26, 2009. By November 2, 2009, however, the *Dana* notice was no longer posted on the bulletin board at AT&T Mobility's Willows 3 location. The company representative that posted the notice admitted that he did not check the notice after he posted it, until December 31, 2009, when he realized the notice had disappeared and replaced it. Some of the AT&T Mobility employees filed a petition for decertification on December 22, 2009, well after the notice period was to elapse. The union objected to the petition as untimely. The Regional Director determined that the *Dana* notice was not posted for the required 45-day notice period. As a result, the Regional Director rejected the union's objection to the petition and ordered a decertification election. On February 4, Communication Workers of America appealed the decision to the NLRB in Washington, D.C., asking the Board to review the Regional Director's factual determination that the notice was inadequate and to reconsider its 2007 decision in *Dana Corp.*