JONES DAY

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RECENT DEVELOPMENTS IN TRADITIONAL LABOR LAW

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I. Introduction

For better or worse, few Federal agencies have elevated their profile more than the National Labor Relations Board ("NLRB" or "the Board") during the current Administration. The Board has, for the last 15 years, developed a trend of revisiting recent and not-so-recent controversial Labor issues to align Board law with the particular Board's labor-management philosophy. That trend continued over the past year. More than ever, however, the Board's active reversals of precedent and other initiatives have raised the agency's public and political profile, particularly before the current U.S. House of Representatives. With the upcoming Presidential election, there is no reason to think that the attention that the Board receives will decrease.

In the midst of this increased attention, the Board has also attempted to make the Board and the National Labor Relations Act ("NLRA" or "the Act") appear more relevant to today's workplace. For example, the agency is intensely focused on employee activities on social media and e-mail platforms, in both unionized and non-unionized settings—not just activities in the factory or mine. By focusing on protected activity on social media platforms, the Board has put a new, fresh gloss on the activities that it and the Act protect.

Despite all of the changes at the Board, certain constants remain. The Board remains a forum where controversy abounds. Labor and management advocates continue to fight over the scope of the Act's protections. The scope of an employer's obligations to bargain—with whom, when, over what, for how long—constantly evolves. Labor litigants continue to argue issues in briefs, and Board members continue to decide hotly contested issues in opinions, with passion and fervor. Whatever can be said of the Board (and much is said), one thing is clear: the agency that had once been referred to as "the Rip Van Winkle" of Federal agencies is awake and quickly working to make up for lost time.

II. Significant Developments At The National Labor Relations Board

A. The Board's Return To A Full Complement – President Obama's Recess Appointees And The Ensuing Challenges

As the first session of the 112th Congress drew to a close at the end of 2011, so too ended Member Craig Becker's recess appointment to the Board. When Member Becker left the Board, the Agency again found itself with only two Members and thus unable to operate under *New Process Steel v. NLRB*, 130 S. Ct. 2635 (2010). The lack of quorum was quickly addressed, however, when President Obama announced his decision to recess appoint Sharon Block, Terence Flynn, and Richard Griffin to the Board on January 4, 2012. But, as with nearly every recent Board development, the decision was not without controversy.

Both the Speaker of the House and the Senate Minority Leader quickly claimed that the Senate was not in recess and thus the President could not exercise his recess appointment power. *See* Press Release, Office of John Boehner, President Obama's Unprecedented Power Grab is Bad for Jobs (Jan. 4, 2012), *available at* http://www.johnboehner.house.gov/News/DocumentSingle.aspx?DocumentID=273741; Brendan Buck, *Unprecedented "Recess" Appointment Contradicts Obama Justice Department*, Office of

John Boehner Blog (Jan. 4, 2012), http://www.speaker.gov/Blog/?postid=273766 (last visited Apr. 2, 2012); Press Release, Office of Mitch McConnell, Arrogantly Circumventing the American People with an Unprecedented "Recess Appointment" of an Unaccountable Czar (Jan. 4, 2012), *available at* http://www.mcconnell.senate.gov (click "News" hyperlink, then "Press Releases," then browse by "January 2012"). (President Obama also recess appointed a director to the new Consumer Financial Protection Bureau on the same day.) The statements from Congress noted that both the House and Senate had been in session on January 3 to open the second session of the 112th Congress.

Two days later, the Department of Justice's Office of Legal Counsel ("the Office" or "OLC") issued a Memorandum Opinion entitled *Lawfulness of Recess Appointments During A Recess of The Senate Notwithstanding Periodic Pro Forma Sessions*, http://www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf (Jan. 6, 2012) (hereinafter "OLC Opinion"), defending the legality of the recess appointments. The Opinion summarized that on December 17, 2011, the Senate agreed by unanimous consent to "adjourn and convene for pro forma sessions only, with no business conducted" on every Tuesday and Friday through January 23, 2012. During those pro forma sessions, which lasted only a few minutes, the Senate would come to order and quickly adjourn until the next pro forma session. The practice, first invoked in late 2007, was meant to break a longer recess into a series of shorter breaks, each of which would be too short to be considered a "recess" for the purposes of the Recess Appointments Clause. OLC Opinion at *2.

The OLC Opinion first concluded that when the Senate is in an intrasession recess of twenty days (from January 3, 2012 until January 23, 2012), the President has the authority to make recess appointments. *Id*. at *5-9. The Office had little trouble concluding that a twenty-day recess was of sufficient length to justify a Presidential recess appointment, given that past practice had approved of numerous appointments during intrasession recesses of similar lengths. *Id*.

The second and more novel issue addressed whether a twenty-day recess broken into three-day recesses between pro forma sessions prevented the President from exercising his appointment power. *Id*. at *9-23. The OLC Opinion focused on *The Federalist Papers* and other contemporaneous writings suggesting "that the recess appointment power is required to address situations in which the Senate is unable to provide advice and consent on appointments." *Id*. at *10-12. The Office explained that "the touchstone [of a recess] is its *practical effect: viz.,* whether or not the Senate is *capable of exercising its constitutional function* of advising and consenting to executive nominations." *Id*. at *12 (internal quotation and citation omitted).

In light of those principles, the Office noted three considerations that supported its conclusion that pro forma sessions did not prevent the use of the recess appointment power. First, pro forma sessions had previously lasted only a few seconds, usually with only three or four senators present. *Id*. at *13. The OLC also noted that the sessions were avowedly *not* for conducting business, suggesting that they were "unavailable" for the purposes of receiving and considering appointees. *Id*. at *13-15. Second, the Office found that allowing the Senate to prevent the President from exercising his power to make recess appointments would be inconsistent with the purpose of the recess appointment clause. *Id*. at *15. Finally, the OLC considered the interplay between the Branches and expressed concern that allowing the Senate to

prohibit recess appointments through pro forma sessions could raise constitutional separation of powers concerns. *Id*. at *16-17.

While the validity of the recess appointments raises mostly constitutional issues, the validity of the appointments—and thus whether the Board has a valid quorum—has been raised as a defense in a number of cases. The Board has "declined to determine the merits of claims attacking the validity of President appointments to positions involved in the administration of the Act." *Center for Social Change, Inc.*, 358 N.L.R.B. No. 24 (Mar. 29, 2012). The Board majority of Chairman Pearce and Members Griffin and Block "applied the well-settled presumption of regularity of the official acts of public officers in the absence of clear evidence to the contrary," while Members Hayes and Flynn simply noted that they found no jurisdictional basis to decide the validity of the appointments. *Id*. at *1 & n.2.

Challenges to Board actions based on the participation of recess-appointed Members have also been raised in cases before both federal District Courts and U.S. Courts of Appeals. The employer in *Paulsen v. Renaissance Equity Holdings LLC*, --- F. Supp. 2d ----, 2012 WL 1033339 (E.D.N.Y. Mar. 27, 2012), argued that the Board could not institute Section 10(j) proceedings because the recess appointments were invalid, meaning that the Board lacked a quorum necessary to authorize the filing of a Section 10(j) petition. *Id*. at *5-6. The Court, however, focused on the fact that the Board could delegate prosecutorial powers, including the power to seek 10(j) relief, and that even after *New Process Steel*, multiple circuit courts had held that the Board's ability to delegate its Section 10(j) powers survived the Board's loss of a quorum. *Id*. at *13-14. Because the delegation would be valid even in the absence of a quorum, the Court declined to address the question regarding the validity of the recess appointments. *Id*. at *14; *see also Fernbach v. 3815 9th Ave. Meat & Produce Corp.*, No. 12 Civ. 00823, 2012 WL 992107 (S.D.N.Y. Mar. 21, 2012) (Slip Op.) (denying motion to dismiss for lack of authority on similar grounds to those articulated in *Paulsen*).

The validity of the recess appointments has also reached the D.C. Circuit in a case currently pending on a petition for review of a Board Order issued by two recess-appointed Members. *See Noel Canning Div. of Noel Corp. v. NLRB*, No. 12-1115 (D.C. Cir. Appeal Docketed Feb. 24, 2012). In addition to seeking review on the merits of the Board's decision, Noel Canning also raised the validity of the recess appointments and thus whether the Board had authority to decide the case against Noel Canning. *See* Statement of Issues To Be Raised, *Noel Canning Div. of Noel Corp. v. NLRB*, No. 12-1115 (filed Mar. 29, 2012). The Chamber of Commerce of the United States of America and the Coalition for a Democratic Workplace filed a motion for permission to intervene on the recess appointment issue.

Congress, too, remains focused on the recess appointments as demonstrated by a House Resolution that "[e]xpress[ed] the sense of the House of Representatives that the President exercised the recess appointment power despite the fact that neither the House of Representatives nor the Senate have been adjourned for a period in excess of three days during the Second Session of the 112th Congress." *See* H. R. Res. 604, 112th Cong. (as referred to H. Comm. on the Judiciary, Mar. 29, 2012).

Although the Board has declined to address the issue, it is certainly not going away any time soon. The constitutional issues underlying the validity of the recess appointments are

complex issues that will require decision, either now or in the future, given the increasingly acrimonious confirmation process in Congress and the likely need for future recess appointments to the Board.

B. The Board's Return To Rulemaking

Few issues have generated more controversy over Board action than its recent return to rulemaking. Prior to last year, the Board had only once successfully promulgated a rule and only then after a years-long rulemaking process that included over 140 witnesses and four public hearings held across the country. *See* Second Notice of Proposed Rulemaking on Collective Bargaining Units in the Health Care Industry, 53 Fed. Reg. 33,900 (Sept. 1, 1988). The recently-enacted rules, promulgated over a period of a few months, make sweeping changes to requirements for notice posting and representation case ("R-Case") procedures that will apply to millions of U.S. employers.

1. The Board's Notice Posting Rule

The Board's re-entry into the rulemaking realm began with its rule requiring employers to post notices informing employees of their rights under the NLRA. The Final Rule on notice posting provoked a strong response from the employer community through legal challenges filed by the National Association of Manufacturers, *see National Ass'n of Manufacturers v. NLRB*, No. 1:11-cv-01269 (D.D.C. filed Sept. 8, 2011); the National Right to Work Legal Defense & Education Foundation, Inc. and the National Federation of Independent Business, *see National Right to Work Legal Defense & Education Foundation, Inc. v. NLRB*, No. 1:11-cv-01683 (D.D.C. filed Sept. 16, 2011); and the Chamber of Commerce of the United States of America, *see Chamber of Commerce v. NLRB*, No. 2:11-cv-02516 (D.S.C. filed Sept. 19, 2011). Based on those legal challenges, the U.S. District Court for the District of South Carolina struck down the rule in its entirety, and the U.S. District Court for the District of Columbia invalidated the rule in part. After these successful challenges, the D.C. Circuit has enjoined the Board from implementing the rule until the disputes can be resolved. *See Nat'l Ass'n of Manufacturers v. NLRB*, No. 12-5068, Injunction Pending Appeal (D.C. Cir. Apr. 17, 2012); *Chamber of Commerce v. NLRB*, --- F. Supp. 2d ----, 2012 WL 1245677 (D.S.C. Apr. 13, 2012); *Nat'l Ass'n of Manufacturers v. NLRB*, --- F. Supp. 2d ----, 2012 WL 691535 (D.D.C. Mar. 2, 2012).

The Board's August 30, 2011 Final Rule required employers subject to the Act to post notices informing their employees of their rights under the NLRA. Member Hayes dissented from the final rule, which will be published in a new part 104 of 29 C.F.R. chapter 1. The rule applies to all employers subject to the Act, regardless whether their employees are organized by any labor organization. Member Hayes's dissent estimates that the rule will cover nearly 6,000,000 private employers.

The rule requires "[a]ll employers subject to the NLRA [to] post notices to employees, in conspicuous places, informing them of their NLRA rights, together with Board contact information and information concerning basic enforcement procedures." Notification of Employee Rights Under the National Labor Relations Act, 76 Fed. Reg. 54,006, 54,046 (Aug. 30, 2011). The required posting details numerous protected statutory rights including the right to (1) join or assist a labor union; (2) engage in collective bargaining with respect to wages, benefits,

hours and working conditions; (3) discuss wages, benefits and other working conditions with co-workers or union representatives; (4) raise work-related complaints directly with an employer or a governmental agency regarding their working conditions; (5) engage in strikes or picketing; and (6) refrain from engaging in such activities. The required notice was included as Appendix A to the final rule and may be obtained from the Board's website at http://www.nlrb.gov/poster.

Employers are required to post the notice at all of their workplaces as well as on intranet or internet sites if the employer customarily communicates with its employees about personnel rules or policies by such means. *Id*. at 54,047. Further, if 20 percent or more of an employer's workforce is not "proficient" in English, the employer must post the notice in the language spoken by the employees. *Id*. The rule does not provide any criteria for determining whether an employee is or is not "proficient" in English. If an employer's workforce includes two or more groups constituting at least 20 percent of the workforce who speak different languages, the employer must either physically post the notice in each of those languages or, at the employer's option, it may post the notice in the language spoken by the largest group and provide copies to each other group in their respective languages. *Id*.

Two additional provisions of the Final Rule drew strong responses from the employer community and, at present, have been invalidated. *See generally Nat'l Ass'n of Manufacturers*, 2012 WL 691535, at *22. In the Final Rule, the NLRB majority stated that failure to post the notice could result in both unfair labor practice liability and/or waiver of defenses in unfair labor practice proceedings before the agency. 76 Fed. Reg. 54,007, 54,031-33. Specifically, the Board stated that employers who fail to post the mandatory notice commit an unfair labor practice. The NLRB's Final Rule explains that "[f]ailure to post the employee notice may be found to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by NLRA Section 7, 29 U.S.C. § 157, in violation of NLRA Section 8(a)(1), 29 U.S.C. § 158(a)(1)." *Id*. at 54,049. While the Board cannot impose fines or monetary penalties for failing to post the notice, it could order an employer to post the notice along with a further notice concerning the employer's violation of the Act. Further, in situations where an employer is charged with other unfair labor practices, the failure to post a notice may result in an adverse inference against the employer. For example, if an employer is charged with discharging an employee based upon union activity, the failure to post the notice may be used as evidence of anti-union animus. The Final Rule specifies that knowing and willful failure to post the notice may be used as evidence of an unlawful motive. *Id*.

The Board's Rule also provides that the Section 10(b) six month statute of limitations period for unfair labor practice charges may be tolled for charges filed against employers who failed to post the notice. *Id*. at 54,033. The Final Rule states that "[w]hen an employee files an unfair labor practice charge, the Board may find it appropriate to excuse the employee from the requirement that charges be filed within six months after the occurrence of the allegedly unlawful conduct if the employer has failed to post the required employee notice unless the employee has received actual or constructive notice that the conduct complained of is unlawful." *Id*. at 54,049.

The two legal challenges to the notice posting rule have produced differing results. Judge Norton of the U.S. District Court for the District of South Carolina struck the rule down in its entirety, finding that the Board exceeded its Section 6 rulemaking authority and, as a result,

violated the Administrative Procedure Act. *Chamber of Commerce*, 2012 WL 1245677. The Court noted that the Board's rulemaking authority was limited to "such rules and regulations as may be necessary to carry out the provisions of the Act." *Id*. at *2. The Court also heavily relied on the Board's limited authority to act only on cases that are brought before it, citing a General Counsel Memorandum stating that "[t]he agency has no authority to initiate proceedings." *Id.*

In light of those constraints, the Court concluded that the Board had failed to establish that notice posting was "necessary" to carry out the other sections of the Act, instead establishing only that it "is simply useful" to the Act's purposes. *Id.* at *9. The Court distinguished the rulemaking upheld in *American Hospital Ass'n v. NLRB*, 499 U.S. 606, 609 (1991), as a rule that was "necessary to carry out" Section 9(b), which required the Board to make unit determinations in each case. *Id*. The Court noted that the notice posting rule was not necessary to any provision of the Act and that the Act was unique in that it did not require notice posting, despite that Congress had included notice posting in numerous other statutes since the Act's passage. *Id.* at *3, 12-14.

Finally, Judge Norton rejected the Board's argument that its rulemaking was "gap filling" to give meaning to the Act where it was otherwise ambiguous. *Id.* at *14-15. While other statutes had used a term that was undefined, such as the term "stationary source" that led to the *Chevron USA, Inc. v. Nat'l Res. Def. Council, Inc.*, opinion, *see* 467 U.S. 837 (1984), here, Congress's total silence was indicative of its intent on the notice posting issue. *Id.* at *14. As a result, the Court invalidated the rule in its entirety. *Id.* at *15.

The *National Association of Manufacturers* litigation in the U.S. District Court for the District of Columbia produced a much lengthier, detailed analysis that invalidated the rule only in part. On March 2, 2012, Judge Jackson issued an opinion in which she held that the Board validly promulgated the notice posting requirement, but was without authority to declare that failure to post was a *per se* unfair labor practice or that the failure to post would always warrant tolling of the statute of limitations. *National Ass'n of Manufacturers*, 2012 WL 691535. Applying the *Chevron* two-step analysis for review of agency rulemaking decisions, the Court rejected Plaintiffs' argument that Congress had prohibited the Board from requiring notice posting by Congress's deliberate choice to exclude a penal notice posting requirement in the NLRA—the argument adopted by the U.S. District Court for the District of South Carolina. *Id*. at *6. Instead, Judge Jackson described the Board's Section 6 rulemaking authority as "broad . . . authority to make rules necessary to carry out any of the provisions of the Act." *Id*.

The Court addressed the second step of the *Chevron* analysis and concluded that the Board's rationale for the notice posting requirement—that in order for employees to fully exercise their NLRA rights, they must know what they are—was a reasonable interpretation of the Act. *Id*. at *9. Specifically, the Court found that the Board's rulemaking record supported conclusions that employees lack awareness of their rights, *id*. at *10-11, and that requiring notice posting was a reasonable method of promoting awareness. *Id*. at *12-13. Accordingly, the District Court concluded that the Final Rule's notice posting requirement was a valid exercise of the Board's rulemaking authority. *Id*. at *12.

Judge Jackson reached a different conclusion as to the unfair labor practice and tolling provisions. The Court concluded that the Final Rule's provision holding that the failure to post

was an unfair labor practice under Section 8(a)(1) failed as a matter of law under *Chevron* step one. Describing the Final Rule's provision on the failure to post as an unfair labor practice, the Court noted that "[u]nder the NLRB Rule, a mere failure to post a generic notice of employee rights, no matter what the context, would qualify as 'interference' with the exercise of those rights." *Id*. at *15.

In finding the Rule invalid, Judge Jackson focused on the nature of the actions prohibited by Section 8(a)(1), specifically, "interference," "restraint," and "coercion," each of which "prohibits employers from getting in the way—from doing something that impedes or hampers an employee's exercise of the rights guaranteed by section 157 of the statute." *Id*. at *14. The Court also noted that Section 8(c) prohibited the Board from construing employer speech to be an unfair labor practice and that, "[s]ince Congress prohibited the Board from considering an employer's express statement of its views to be an unfair labor practice, it follows that it did not intend that an employer's mere failure to supply information would be designated as one." *Id*.

The Court's opinion stresses that the mere failure to post a notice, alone, does not mean that an employer has engaged in "some act of meddling or interposition" with employee rights. *Id*. Judge Jackson noted, however, that her decision did not foreclose the possibility that a failure to post could constitute a violation of Section 8(a)(1), but that, in such a case, "the Board must make a specific finding based on the facts and circumstances in the individual case before it that the failure to post interfered with the employee's exercise of his or her rights." *Id*.

The District Court reached a similar conclusion as to the provision providing for equitable tolling in any cases where the employer failed to post a notice. *Id*. at *16-18. Noting that equitable tolling is "an exceptional defense, which courts grant only in extraordinary and carefully circumscribed instances," Judge Jackson wrote that the Final Rule "turns the burden of proof on its head" by making equitable tolling the rule and forcing the employer to prove that tolling should *not* apply. *Id*. at *16, 18. As with the unfair labor practice provision, the District Court noted that the Board could toll the statute of limitations in an appropriate case. *Id*. at *17.

The changes proposed in the Board's Notice Posting Rule, while they have received a fervent opposition, are simple: employers are required to post a pre-approved notice in their workplaces. The potential impact of the Rule, however, is great. The Final Rule on notice posting, in conjunction with the Board's initiative on social media matters, furthers what appears to be one of the current Board's key goals: expanding the awareness of the Act, including its protections, to non-unionized workplaces. That expansion may well reverse the trend in declining case intake at the Board (which affects budgetary matters). Whatever the goal, the result is clear: employers, unionized or not, should pay attention to the current Board's actions.

2. The Board's Final Rule on Election Procedures

While the Board's Final Rule on Notice Posting has garnered much attention, it pales in comparison to the sweeping changes contemplated by the Board's Final Rule on Representation Case Procedures. *See* 76 Fed. Reg. 80,138 (Dec. 22, 2011). Like the Notice Posting Rule, the Final Rule on Representation Case Procedures has been challenged in the U.S. District Court for the District of Columbia. *See Chamber of Commerce, et al. v. NLRB*, Case No. 1:11-cv-02262 (filed Dec. 20, 2011).

The Board's Notice of Proposed Rulemaking, published on June 22, 2011, proposed a number of changes to current representation case procedures, with the goals of decreasing the amount of time between the filing of a representation petition and the holding of an election, and limiting the number of issues that an employer can raise at the pre-election hearing. *See* 76 Fed. Reg. 36,812-13. For instance, the Notice required that pre-election hearings be held within seven days of the filing of a petition. *Id.* at 36,821. Prior to the hearing, the non-petitioning party—almost always the employer—would be required to complete a Statement of Position form taking a position on all issues or risk waiving those issues at a later date. *Id*. at 36,841. Regarding the appropriateness of the petitioned-for unit, if the non-petitioning party objects to the petitioned-for unit, it must not only state the objection but must also state what it would concede to be the most similar appropriate unit. *Id*.

Under the NPRM, parties to a hearing would be prohibited from offering evidence or cross-examining witnesses on any issue that was not raised in its Statement of Position or joined in response to another party's Statement of Position. *Id*. at 36,823. Further, the NPRM proposed that parties would not be allowed to raise issues related to whether an individual employee was eligible to vote. *Id*. at 36,815. Instead, the NPRM proposed deferring resolution of all such issues until an election had been held and, even then, they would only be addressed if they could determine the outcome of the election. *Id*. at 36,826-27.

The proposed rule contemplated that "if, at any time during the hearing, the hearing officer determines that the only genuine issues remaining in dispute concern the eligibility or inclusion of individuals who would constitute less than 20 percent of the unit if they were found to be eligible to vote, the hearing officer will close the hearing." *Id*. at 36,823. The NPRM explained that the Board had previously upheld elections where as much as 20 percent of the unit was altered post-election. *Id*. at 36,824. The NPRM opined that adopting a "bright-line" 20 percent rule "best serves the interests of the parties and employees as well as the public interest in efficient administration of the representation case process." *Id*. at 36,825.

After a hearing and direction of an election, the employer would be required to produce voting lists within 48 hours including the full names, home addresses, telephone numbers, e-mail addresses, work locations, shifts, and job classifications of all eligible voters. *Id*. at 36,838. The election would then be held with up to 20 percent of the bargaining unit voting despite unresolved disputes over their eligibility. *See id*. at 36,824-25, 36,841. In the event that the 20 percent of disputed ballots could be determinative, the eligibility issues would be addressed. However, if they are not determinative, the unit placement of those individuals would have been left to bargaining of the parties or a unit clarification petition under the proposed rule. *Id*. at 36,824.

The proposed rule also significantly restricted the rights of parties to seek Board review of representation decisions after an election has been held. The Board's proposed rule allowed parties only seven days to identify and investigate potential objections to the election, requiring that the party file an offer of proof supporting the objection at the end of the seven-day period. *Id*. at 36,844. Under the prior rules, parties had seven days to file the objections and an additional seven days to gather the evidence and submit the offer of proof. 29 C.F.R. § 102.69(a). The proposed rules also provided that the regional director would review the objections and offer of proof and, based on that evidence alone, if he or she determined that there

was no evidence to support overturning the election, the objections would be denied and the results certified without a hearing ever being held. 76 Fed. Reg. 36,844. Even if a hearing were held, Board review would not be available as a matter of right and would only be granted where there is a substantial question of law, clearly erroneous factual determinations, or other compelling reasons for review. *Id*. at 36,842-43, 36,845.

Member Hayes dissented from the NPRM on the grounds that the proposed rulemaking process was neither appropriate nor necessary, stating that the comment period was too rushed for informed debate. *Id*. at 36,830-31. The purpose of the rule's changes, he opined, was "to minimize, or rather, to effectively eviscerate an employer's legitimate opportunity to express its views about collective bargaining." *Id*. at 36,831. He also stated that the Board majority was "act[ing] in apparent furtherance of the interests of a narrow constituency . . . at the great expense of undermining public trust in the fairness of Board elections." *Id*. at 36,833.

After the Board issued the NPRM, it held two days of hearings in Washington, D.C., and heard testimony from 66 witnesses representing various constituents including labor and management practitioners, business owners, employees, and union organizers. *See id*. at 80,142. Additionally, the Board received 65,958 comments on the proposed rules. *Id*.

On November 18, 2011, the Board announced that it had scheduled a November 30, 2011 public meeting at which the Board would vote on whether to proceed with a Final Rule that adopted a subset of the amendments contained in the NPRM. *See* Press Release, National Labor Relations Board [NLRB], NLRB sets votes on portions of proposed election rule (Nov. 18, 2011), *available at* http://www.nlrb.gov/news/nlrb-sets-vote-portions-proposed-election-rule. At the meeting, Chairman Pearce and Members Becker and Hayes considered a resolution for the Board to (1) "[p]repare a final rule to be published in the Federal Register containing [eight] significant elements" that were identified in the resolution and (2) to "[c]ontinue to deliberate on the remainder of the amendments proposed in the NPRM." *See* NLRB, Bd. Res. No. 2011-1 (Nov. 28, 2011), https://www.nlrb.gov/sites/default/files/documents/3089/final_rule_resolution_11-28.pdf. The Board voted 2-1 to approve the resolution and proceed to a Final Rule.

The Final Rule, approved by Chairman Pearce and Member Becker, abandoned a number of the provisions in the NPRM that accelerated the time between petition and election. *See* 76 Fed. Reg. 80,138 (Dec. 22, 2011). As summarized in the Final Rule, the Board adopted eight rule changes:

- *First*, the Board decided to amend § 102.64 in order to expressly construe Section 9(c) of the Act and to state that the statutory purpose of a pre-election hearing is to determine if a question of representation exists.

- *Second*, the Board decided to amend § 102.66(a) and eliminate § 101.20(c) in order to ensure that hearing officers presiding over pre-election hearings have the authority to limit the presentation of evidence to that which supports a party's contentions and which is relevant to the existence of a question concerning representation.

- *Third*, the Board decided to amend § 102.66(d) to afford hearing officers presiding over pre-election hearings discretion over the filing of post-hearing briefs, including over the subjects to be addressed and the time for filing.

- *Fourth*, the Board decided to amend §§ 102.67 and 102.69 to eliminate the parties' right to file a pre-election request for review of a regional director's decision and direction of election, and instead to defer all requests for Board review until after the election, when any such request can be consolidated with a request for review of any post-election ruling.

- *Fifth*, the Board decided to eliminate the recommendation in § 101.21(d) that the regional director should ordinarily not schedule an election sooner than 25 days after the decision and direction of election in order to give the Board an opportunity to rule on a pre-election request for review.

- *Sixth*, the Board amended § 102.65 to make explicit and narrow the circumstances under which a request for special permission to appeal to the Board will be granted.

- *Seventh*, the Board decided to amend §§ 102.62(b) and 102.69 to create a uniform procedure for resolving election objections and potentially outcome-determinative challenges in stipulated and directed election cases and to provide that Board review of regional directors' resolution of such disputes is discretionary.

- *Eighth*, the Board decided to eliminate part 101, subpart C, which it determined was redundant.

See id. at 80,141. Two of the most controversial changes involve restricting the ability of parties to appeal issues to the Board prior to election and prohibiting the litigation of individual eligibility issues in pre-election hearings. The Board noted that preventing pre-election Board review brings the Board in line with procedures in federal and state courts prohibiting interlocutory review. *Id*. at 80,172. While the Board noted that the rule change "does not eliminate any party's right to request review" and simply consolidates issues into "a single, more efficient post-election request for review," the Rule will "significantly reduce the total amount of litigation." *Id*.

With respect to the issues to be litigated at a pre-election hearing, the Final Rule "makes clear that, while the regional director must determine that a proper petition has been filed in an appropriate unit in order to find that a question of representation exists, the regional director need not decide all individual eligibility and inclusion questions . . . and the hearing officer need not permit introduction of evidence relevant only to disputes concerning the eligibility and inclusion of individuals." *Id*. at 80,164. The Final Rule, however, abandoned the Board's proposed 20-percent rule, instead allowing the hearing officer to prohibit *any* evidence on individual eligibility issues.

The restrictions on the pre-election hearing have been one primary focus of the Chamber of Commerce's litigation over the validity of the lawsuit. Specifically, *amici* American Hospital

Association, HR Policy Association, and the Society for Human Resource Management have explained that the Final Rule's significant limitation on the pre-election hearing renders the hearing "inappropriate" in violation of Section 9(c)(1). *See* 29 U.S.C. § 159(c)(1). *Amici* asserted that the legislative history of the Act, as well as Board precedent, indicate that the Act requires the Board to address those individual eligibility issues prior to holding an election.

Additionally, the amended complaint filed by the Chamber of Commerce and Coalition for a Democratic Workplace alleges that the Final Rule violates parties' due process rights by restricting parties' ability to file briefs and eliminating the process for pre-election requests for review. *See* Am. Compl., *Chamber of Comm., et al. v. NLRB*, Case No. 1:11-cv-02262 (D.D.C. Dec. 21, 2011). Plaintiffs also assert First Amendment violations as a result of the Final Rule's substantial shortening of the election period, which prevents employers from exercising their Section 8(c) and First Amendment rights to communicate their views prior to an election. *Id*. Finally, Plaintiffs allege that the Rule is arbitrary and capricious, based on the rushed rulemaking process and by issuing a rule without allowing Member Hayes any reasonable opportunity to consider the text of the Final Rule or circulate a draft dissent. *Id*.

As seen in the litigation regarding the Board's Notice Posting Rule, it is highly likely that any decision will be appealed for consideration by the D.C. Circuit. But beyond the litigation, Board practitioners should anticipate further changes from the Board, consistent with Chairman Pearce's resolution to continue considering proposed, but unadopted, amendments that were included in the Board's NPRM.

C. *D.R. Horton, Inc.* – Invalidating Arbitration Agreements Requiring Wavier of Class or Collective Claims in Judicial and Arbitral Forums

While recess appointments and rulemaking have dominated the Board's 2012 news cycle, 2012 has also produced at least one highly-anticipated decision from the Board. Chairman Pearce and Member Becker wasted no time in issuing one of the most anticipated decisions from the Board in the last 12 months when, on January 3, they issued their opinion in *D.R. Horton, Inc.*, 357 N.L.R.B. No. 184 (Jan. 3, 2012). Chairman Pearce and Member Becker held that *D.R. Horton*'s Mutual Arbitration Agreement ("MAA"), which, as a condition of employment, prohibited employees from bringing employment disputes in a class or collective proceeding in a judicial or arbitral forum, violated the NLRA. *Id*. at 1. Member Hayes was recused and did not participate in the case. *Id*. at n.1.

The MAA required all disputes and claims relating to employment to be decided by final and binding arbitration—thus restricting the individual's ability to file suit in court—and, once in arbitration, prohibited the arbitrator from consolidating claims or fashioning a proceeding as a class or collective action—limiting the issues in arbitration to individual disputes. *Id*. at 1. After D.R. Horton attempted to invoke the agreement as a defense to an employee's putative class action under the Fair Labor Standards Act, the employee filed an unfair labor practice charge with the Board. *Id*. The General Counsel issued a complaint alleging a violation of Section 8(a)(1) because the agreement interfered with, restrained, or coerced employees' Section 7 rights to proceed as a class. *Id*. The complaint also alleged that the Agreement violated Section 8(a)(4) of the Act by threatening employees with discharge for filing complaints in forums other than arbitration—i.e., at the Board. *Id*. at 1-2.

The ALJ found that the MAA violated Section 8(a)(4) and 8(a)(1) because its language would lead employees to believe that they were prohibited from filing charges with the Board, and the Board affirmed. *Id*. at 2 n.2. The ALJ, however, found that the class-action waiver provision did not violate Section 8(a)(1). *Id*. at 2. Specifically, he noted precedent from both U.S. Courts of Appeals and the U.S. Supreme Court favoring the use of arbitration agreements and the absence of any Board precedent prohibiting arbitration clauses that foreclose class actions. *Id*. at 16.

Chairman Pearce and Member Becker reversed the ALJ with respect to the class-action waiver and found that the MAA violated Section 8(a)(1). Their decision addresses both the waiver's legality under the Act and tension with Federal labor policy as well as the employer's contention that there was a conflict between any finding that the MAA violated the Act and the language or policies of the Federal Arbitration Act ("FAA"). *Id*. at 7-14.

Addressing the Act and Federal labor policy, the Board majority stressed that collective action, including litigation in both arbitral and judicial fora, has repeatedly been considered to be protected under the Act. *Id*. at 3 (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-66 (1978); *NLRB v. City Disposal Sys., Inc.*, 456 U.S. 822 (1984); *Clara Barton Terrace Convalescent Ctr.*, 225 N.L.R.B. 1028, 1033 (1976)). The Board considered concerted legal action to be "not peripheral but central to the Act's purposes." *Id*. at 3. Because the MAA explicitly prohibited employees from proceeding in a class or collective fashion, the Board concluded that the Agreement violated the Act. *Id*. at 4-6.

The Board also noted that, even prior to the passage of the NLRA, the Norris LaGuardia Act of 1932 was intended "to prevent employers from imposing contracts on individual employees requiring that they agree to forego engaging in concerted activity," including "yellow dog" contracts prohibiting employees from joining unions. *Id*. at 5. The Board concluded that not only did the MAA violate the Act by interfering with or restraining the exercise of Section 7 rights, but it also "implicate[d] prohibitions that predate the NLRA and are central to modern Federal labor policy." *Id*. at 6.

The majority also addressed the alleged conflict between Section 2 of the FAA, which states that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," and the Board's decision to invalidate class action waivers. *Id*. at 8-9 (quoting 9 U.S.C. § 2). D.R. Horton and *amici* participating in the case advocated that invalidating class-action waivers would conflict with the FAA's policies favoring enforcement of private agreements to arbitrate disputes. *Id*. at 7.

The Board found that there was no conflict between the FAA and the Board's *D.R. Horton* holding for three reasons. *Id*. at 9-12. *First*, the FAA only requires that arbitration agreements be treated as favorably as any other contract. *Id*. at 9. The Board noted that it would invalidate any other contract that violated the NLRA and Federal labor law policy and that its holding did not rely on the arbitral nature of the MAA. *Id*. at 9 (citing *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1746 (2011)).

Second, the Board noted that the Supreme Court had held that arbitral agreements "may not require a party to 'forgo the substantive rights afforded by the statute.'" *Id*. (quoting *Gilmer*

v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991)). Because the Board viewed the MAA as requiring employees to "forgo the substantive rights" of the NLRA—concerted legal activity—they found that there was no conflict with the FAA. *Id*. at 9-10.

Third, the Board noted that Section 2 of the FAA required that agreements to arbitrate be enforced "save upon such grounds as exist at law or in equity for the revocation of any contract." *Id*. at 9. Here, the Board not only invalidated the MAA based on its violation of the NLRA, but also as a contract contrary to Federal labor law public policy. *Id*. at 11-12. Accordingly, the Board concluded that voiding a contract as contrary to public policy was "grounds as exist at law or equity for the revocation of any contract." *Id*. at 11.

The Board's opinion also responded to the contention of Respondent and *amici* that the right to bring an action as a class was a procedural, rather than substantive, right and thus did not violate a substantive Section 7 right. *See id*. at 10. The Board rejected that argument, noting that "[t]he right to engage in collective action—including collective *legal* action—is the core substantive right protected by the NLRA." *Id*. The Board concluded that while Federal Rule of Civil Procedure 23 may be procedural, "the Section 7 right to act concertedly by invoking Rule 23, Section 216(b) [of the FLSA], or other legal procedures is not." *Id*.

D.R. Horton is an opinion that is sweeping in its reach because it applies to all Section 2(3) employees regardless of whether they are represented for the purposes of collective bargaining. *Id*. at 12 & n.27. The opinion, however, is unlikely to be the last word in the case—it is presently on appeal—or from the Board on the issue of arbitration. The Board noted that it did not reach "the more difficult questions" of whether an employer can require waiver of class or collective claims in a judicial forum, limiting them only to arbitration, or whether the employer can enter into an agreement with an individual waiving all class-based remedies *if* the agreement is not a condition of employment. *Id*. at n.28.

D. The Board, Social Media, and New Issues With Protected Concerted Activity

The Board's foray into social media has done more than any of its other initiatives, except perhaps for its suit against Boeing Co., to increase public awareness of the Board and its mission and to modernize its image as an agency associated as much with Facebook and Twitter as with the picket line and bargaining table. The real impact of the Board's social media initiative, however, is in its reach to non-represented employees. As with the notice posting rule, the Board's social media initiative reaches the nearly 6,000,000 employers covered by the Act, regardless of whether their employees are represented for the purposes of collective bargaining.

Over the past year, the Acting General Counsel's office has published two Operations Management memos summarizing the social media cases that have been addressed by the General Counsel's office and the Division of Advice. *See* Report of the Acting General Counsel Concerning Social Media Cases, Operations-Mgmt. Mem. 11-74 (Aug. 18, 2011), *available at* http://www.nlrb.gov/publications/operations-management-memos ("OM 11-74"); Report of the Acting General Counsel Concerning Social Media Cases, Operations-Mgmt. Mem. 12-31 (Jan. 24, 2012), *available at* http://www.nlrb.gov/publications/operations-management-memos ("OM 12-31"). Without referencing specific employers or case numbers, the memoranda provide an inside look as to the views of the General Counsel and the Division of Advice on what is, and is

not, protected conduct. Particularly with OM 12-31, the Acting General Counsel also focuses on what are lawful and unlawful social media policies. Although the cases referenced in the memoranda are only the Acting General Counsel's views on the matter, NLRB ALJs have put those views to the test in at least three "social media" decisions in recent months.

1. Protected Concerted Activity On Social Media

In *Hispanics United of Buffalo, Inc.*, the Acting General Counsel alleged that an employer violated the Act by discharging five employees for comments made on Facebook. The ALJ found that the employees' Facebook postings and comments, which were made in reaction to a co-worker's criticisms of their job performance, were protected. *See Hispanics United of Buffalo, Inc.*, No. 3-CA-27872, 2011 WL 3894520 (N.L.R.B. Div. of Judges, Sept. 2, 2011). Because the employer admittedly terminated the employees based on their Facebook postings, the ALJ found that the termination was interference with and a restraint on protected, concerted activity in violation of Section 8(a)(1). *Id*. at *5 Both parties filed exceptions with the Board. *See generally* Dkt., *Hispanics United of Buffalo*, Case No. 3-CA-027872 (filed Nov. 18, 2010), *available at* http://www.nlrb.gov/category/case-number/03-ca-027872.

The Acting General Counsel's theory was not successful, however, in *Knauz BMW*, No. 13-CA-46452, 2011 WL 4499437 (N.L.R.B. Div. of Judges, Sept. 28, 2011). There, an ALJ found that while an employee had engaged in some protected activity on his Facebook page, he was terminated for other *unprotected* postings. Specifically, the employee initially posted pictures of food provided at a client event, noting that he thought the food quality was not appropriate for high-end clientele. *Id*. The ALJ found that the posting was arguably related to the employee's terms and conditions of employment because the food could turn customers away and, in turn, affect the employee's commission-based compensation. The ALJ also found that the posting was concerted because it was a logical outgrowth of prior conversations between the employee and his colleagues regarding the food selection for the event. *Id*.

The employee also posted other photos showing a Land Rover that a customer of an adjacent dealer had crashed into a pond while test driving the vehicle, which the ALJ found was not protected conduct. *Id*. The employer asserted that the employee was fired for posting these photos, not for posting the pictures of the reception food. The ALJ concluded that the employer established that the employee was only terminated for posting the unprotected photos and not for his protected conduct. *Id*. The case is currently before the Board on review of exceptions filed by both parties. *See generally* Dkt., *Karl Knauz BMW, Knauz Auto Group*, Case No. 13-CA-046452 (filed Nov. 30, 2010), *available at* http://www.nlrb.gov/category/case-number/13-ca-046452.

Finally, in *Triple Play Sports Bar & Grille*, No. 34-CA-12915, 2012 WL 76862 (N.L.R.B. Div. of Judges, Jan. 3, 2012), an ALJ found that two employees were engaged in protected concerted activity when they discussed complaints regarding their employer's tax treatment of their earnings. *Id*. at *7. The judge noted that the Facebook discussion was a continuation of prior discussions regarding the tax treatment of their wages and that employees who posted comments on Facebook indicated an intent to raise issues at upcoming meetings. *Id*.

The ALJ also found that one employee whose only involvement was clicking the "Like" button participated in the discussion in a way "that was sufficiently meaningful as to rise to the level of concerted activity." *Id*. He noted that the Board had never required a certain level of engagement or enthusiasm for activity to rise to the level of protected concerted activity. *Triple Play Sports Bar & Grille* is currently before the Board on review of exceptions filed by both parties. *See generally* Dkt., *Triple Play Sports Bar*, Case No. 34-CA-12915 (filed Feb. 16, 2011), *available at* http://www.nlrb.gov/case/34-CA-012915.

Based on the decisions in *Hispanics United of Buffalo*, *Knauz BMW*, and *Triple Play Sports Bar & Grille*, as well as the other cases outlined in the Operations Management Memos, trends can be identified in the Board's social media cases. Initially, the Board appears to be applying the same concerted protected activity analysis that it applies in non-social media cases. That is, the Board is asking whether an employer interfered with, restrained, coerced, discriminated against, or retaliated against an employee's exercise of protected activity. There are, however, a few trends to monitor.

First, the ALJ's holding in *Triple Play Sports Bar & Grille* that merely clicking the "Like" button, without more, constituted protected concerted activity is a novel issue of how protected concerted activity may appear in social media. And, despite the ALJ's statement that the Board has not parsed the engagement or enthusiasm for alleged concerted activity, the Acting General Counsel—even in social media cases—has looked at the substance of the conversation. For instance, one case included in OM 12-31 concluded that, while a commenting individual offered sympathy and some general dissatisfaction with the work place, "she did not engage in any extended discussion with the Charging Party over working conditions or indicate any interest in taking action with the Charging Party." *See* OM 12-31 at 7.

The unique feature of the "Like" button is that it only expresses that someone "Likes" a comment or post, without more. There will undoubtedly be cases where a coworker "Likes" a comment that is clearly focused on protected concerted activity (i.e., someone "Likes" a comment saying that employees should "march on the boss" regarding overtime), or a party who "Likes" a comment subsequently provides a substantive comment that could be protected concerted activity. However, without additional context, *Triple Play Sports Bar & Grille*'s holding that merely clicking the "Like" button can be protected concerted activity seems to be a potentially substantial new development.

Second, other developments that continue to expand what is protected concerted activity in non-social media cases have potentially vast reach when applied to social media cases. For instance, the Acting General Counsel has noted the application of *Parexel International LLC*'s "preemptive strike" theory to social media cases. *See* OM 12-31 at 18-20. Under *Parexel*, the Board held unlawful an employer's discharge of an employee for conduct that is not yet "concerted" in order to prevent future protected, concerted discussions. *See Parexel International LLC*, 356 N.L.R.B. No. 82 (Jan. 28, 2011). Under the facts of *Parexel*, evidence strongly suggested that the employer actually terminated the employee to prevent further protected, concerted activity. *Id.* at 2.

OM 12-31 included a case in which the employer had previously warned the employee "not to get emotionally involved" in work issues, specifically the termination of employees and

complaints of sexism. *See* OM 12-31 at 18-19. After that conversation, the employee posted a series of comments on Facebook indicating that it had been a bad day, one of her friends had been fired because he asked for help, and that she had been scolded for caring. *Id*. at 19. The employee was terminated later that afternoon. The Acting General Counsel concluded that the employee "was discharged for her protected concerted activity of engaging in discussions with her coworkers about working conditions and as a 'pre-emptive strike' because of the Employer's fear of what those discussions might lead to." *Id*. at 20.

Likewise, the Board's decision in *Wyndham Resort Development Corp.*, 356 N.L.R.B. No. 104 (Mar. 2, 2011), held that an employee who, in front of coworkers, complains to management regarding a rule change, without more, engages in protected concerted activity. *See id*. at 2. The Board explained that "[t]he concerted nature of an employee's protest may (but need not) be revealed by evidence that the employee used terms like 'us' or 'we' when voicing complaints, even when the employee had not solicited coworkers' views beforehand." *Id*. Member Hayes dissented, noting that *Wyndham Resort* and *Parexel*, in conjunction, "reduce[] to meaningless the *Meyers* distinction between unprotected individual activity and protected concerted activity." *Id*. at 4.

As Member Hayes noted, the Board's recent decisions in *Wyndham Resort* and *Parexel* minimize the need for proof of a coworker's actually concerted conduct. When applied to the social media context, where nearly every communication is arguably "in front of other coworkers," much protected activity could be considered concerted activity. Practitioners should be watchful for further developments expanding the scope of what is protected concerted activity on social media.

2. Lawful and Unlawful Social Media Policies

The second social media memo from the Acting General Counsel's office addresses a number of cases where the Board reviewed the lawfulness of social media policies. As with other work rules, the Board applies *Lutheran Heritage Village-Livonia*, 343 N.L.R.B. 646 (2004), to determine whether the policy is lawful. Under *Lutheran Heritage*, a policy is clearly unlawful if it explicitly restricts Section 7 protected activities. If there is no explicit restriction, the policy will only be found unlawful if (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. *See id*. at 2. The Board also consistently looked at the context of the policy as a whole and refused to read particular phrases in isolation.

OM 12-31 addressed 14 social media cases that the Division of Advice ("Advice") reviewed in 2011. Advice reviewed the lawfulness of policies in eight of those cases, finding six unlawful, one lawful, and one unlawful as drafted, but lawful as amended. The clear theme of the memorandum, together with OM 11-74, is that the Board believes most social media policies fail *Lutheran Heritage*'s test asking whether employees could reasonably construe the language of the policy to prohibit Section 7 activity. The attached chart illustrates the point.

One ALJ recently found unlawful a social media policy that prohibited placing "photographs, images and videos of G4S employees in uniform (whether yourself or colleague)

or at a G4S place of work" on social media without express permission from the employer. *See G4S Secure Solutions (USA) Inc.*, Case No. 28-CA-23380, 2012 WL 1065721, at *5-6 (N.L.R. B. Div. of Judges, Mar. 29, 2012). The policy also prohibited commenting on "work-related legal matters without express permission of the Legal Department." *Id*. at *6. The policy concluded by stating that "[t]his policy will not be construed or applied in a way that interferes with employees' rights under federal law." *Id*. at *19.

The ALJ found that the provision prohibiting the discussion of "work-related legal matters" could reasonably be construed as prohibiting protected activity and was thus unlawful. *Id*. Among other terms and conditions of employment or work-related employee complaints, the judge noted that the rule would reasonably be read to prohibit the sending of messages regarding work complaints and related Equal Employment Opportunity Commission ("EEOC"), NLRB, or other agency charges. *Id*. The judge did not address the impact of the policy's savings clause on the allegedly unlawful prohibition on discussing "work-related legal matters."

The ALJ found, however, that the restriction on placing photographs on social networking websites did not violate the Act, noting that the rule only restricted posting photographs of the worksite and uniformed employees, rather than all photographs of the employer, its property, or equipment. *Id*. at *19-20. Additionally, the rule was justified by privacy concerns for the EMT services provided by G4S. *Id*. at *20. Finally, the judge noted that the rule did not prohibit taking or posting of photographs, but only posting them on social networking sites. *Id*.

Additionally, the ALJ in *Triple Play Sports Bar & Grille* also rejected the Acting General Counsel's argument regarding the validity of an internet/blogging policy. *See* 2012 WL 76862, at *17-19. Triple Play's policy noted that employees could be disciplined for "engaging in inappropriate discussions about the company, management, and/or co-workers." *Id*. at *18. The judge found that the policy was lawful in that it was similar to restrictions on speech having a potentially detrimental impact on the company, which the Board has previously found to be a permissible rule. *See id*. (collecting cases). The policy's lawfulness may have been based on the context of the policy as a whole, which promoted "the free exchange of information," and a requirement that employees identify statements as their own, and not of their employer. *Id*. at *19. Finally, the ALJ noted the policy's savings clause, which stated that it would have no effect to the extent it conflicts with state or federal law. *Id*. at *19.

Both *G4S Secure Solutions* and *Triple Play Sports Bar & Grille* reject theories that the Board repeatedly relied upon in OM 12-31 to establish the unlawfulness of policies. *G4S*'s holding regarding the lawful prohibition on posting pictures of employees in work uniforms seems to contradict the Board's position on a number of policies in the Operations Management memo. However, it is likely that the Acting General Counsel will appeal these issues to the Board and, given its current composition, they may be more receptive to the arguments that the policy could reasonably be construed to chill protected conduct.

E. 2011: The Year of the Bar

Two of the most prominent decisions to come from the Board in 2011 involved the reversal of precedent in voluntary recognition and successorship cases. In both cases, the Board used bars to an election in order to protect bargaining relationships when the Board deemed the relationship to be most fragile. The Board in both cases also—for the first time—defined what is a "reasonable period of time" for a recognition bar and gave detailed instructions on how long bars last in successorship cases.

1. *Lamons Gasket Company* – Use Of The Recognition Bar To Prevent Employee Choice In Voluntary Recognition Relationships

In *Lamons Gasket Co.*, 357 N.L.R.B. No. 72 (Aug. 26, 2011), a divided Board issued the long-expected reversal of the Board's 2007 *Dana I* decision, *Dana Corp.*, 351 N.L.R.B. 434 (2007) ("*Dana I*"), which implemented procedures to protect employees' freedom to select their representatives in cases where their employer recognizes a union based on a card-check agreement instead of a Board-conducted election. Less than four years after the *Dana I* procedures were adopted, *Lamons Gasket* concluded that the *Dana I* procedures were "flawed, factually, legally, and as a matter of policy," and had served no real purpose, despite evidence that the procedures had protected employees' representational choices in a number of cases. *Id.* Accordingly, the Board voided them retroactively, holding that an election petition filed by an employee or rival union will be barred for a "reasonable period of time" after voluntary recognition.

In *Dana I*, two NLRB Regions, relying on then-existing Board policy to impose an immediate post-recognition bar on petitions for a reasonable period of time, dismissed properly-supported decertification petitions that employees filed within 22 and 34 days after their employers recognized the United Auto Workers Union ("UAW") based on neutrality and card-check agreements. On review, the Board reconsidered the recognition bar doctrine in light of the significant growth of neutrality and card-check arrangements, noting the competing interests of protecting employee choice and promoting stability of newly-formed bargaining relationships. Relying on the statutory preference for Board-conducted secret-ballot elections, the *Dana I* majority concluded that "the immediate post-recognition imposition of an election bar" after a card-based recognition "does not give sufficient weight to the protection of the statutory rights of affected employees to exercise their choice on collective bargaining representation through the preferred method of a Board-conducted election." *Dana Corp.*, 351 N.L.R.B. 434 (2007). Thus, the Board in *Dana I* adopted procedures to address that concern prospectively:

> In order to achieve a "finer balance" of interests that better protects employees' free choice, we . . . modify the Board's recognition-bar doctrine and hold that no election bar will be imposed after a card-based recognition unless (1) employees in the bargaining unit receive notice of the recognition and of their right, within 45 days of the notice, to file a decertification petition or to support the filing of a petition by a rival union, and (2) 45 days pass from the date of notice without the filing of a valid petition.

Id. at 434. Where both conditions were satisfied, "the recognized union's majority status will be irrebuttably presumed for a reasonable period of time to enable the parties to engage in negotiations for a first collective-bargaining agreement." *Id*. at 441. However, if 30 percent or more of the unit employees filed a valid petition within 45 days of the notice, the Board would find that a question concerning representation exists and the petition would be processed under *Dana I*.

Overturning *Dana I*, the Board in *Lamons Gasket* characterized *Dana I* as being "grounded on a suspicion that the employee choice which must precede any voluntary recognition is often not free and uncoerced, despite the law's requirement that it must be so." 357 N.L.R.B. No. 72 at 2. The Board, however, stressed that the Act "expressly recognizes" voluntary recognition, which is only lawful if it is based on an uncoerced showing of majority support. *Id*. at 2-3. The Board considered the *Dana I* procedures to be unnecessary, noting that, where there is doubt about the validity of the majority support showing, anyone could file unfair labor practice charges alleging either unlawful coercion or unlawful recognition of a minority union. *Id*. at 8-9.

The *Lamons Gasket* Board relied on its own statistics to refute the purported concern of the *Dana I* majority that "voluntary recognition is often not free and uncoerced." Citing statistics as of May 13, 2011, the Board had directed 62 elections out of 1,333 requests for *Dana I* notices. The voluntarily-recognized union lost 17 of those 62 elections. *Id*. at 4. Because employees decertified the voluntarily-recognized union in only 1.2 percent of the total *Dana I* cases (using the 1,333 figure), the Board concluded that "the proof of majority support that underlay the voluntary recognition during the past 4 years was a highly reliable measure of employee sentiment." *Id*.

Reversing *Dana I*, the Board returned "to the previously settled rule that an employer's voluntary recognition of a union, based on a showing of the union's majority status, bars an election petition for a reasonable period of time." *Id*. at 10. The Board further concluded that "a reasonable period of time" for bargaining will be "no less than 6 months after the parties' first bargaining session and no more than 1 year." *Id*. The General Counsel bears the burden of proving that further bargaining should be required. In assessing whether a reasonable period of time has elapsed, the Board will apply *Lee Lumber & Building Material Corp.*, 334 N.L.R.B. 399, 402 (2001), which considers "'(1) whether the parties are bargaining for an initial contract; (2) the complexity of the issues being negotiated and of the parties' bargaining processes; (3) the amount of time elapsed since bargaining commenced and the number of bargaining sessions; (4) the amount of progress made in negotiations and how near the parties are to concluding an agreement; and (5) whether the parties are at impasse.'" *Id*.

Member Hayes, dissenting, characterized the Board's decision as "a purely ideological policy choice, lacking any real empirical support and uniformed by agency expertise." 357 N.L.R.B. No. 72 at 11. The dissent stressed that the Board's Notice and Invitation for Briefs invited empirical evidence of parties' experiences under *Dana I* and that the invitation "yielded a goose egg." *Id*. at 13. Member Hayes also objected to the Board's interpretation of its own statistics, stressing that the relevant data showed that out of the 62 elections actually held, the voluntarily-recognized union lost 17 times, or 25 percent of the elections held. *Id.*

Lamons Gasket has the clearest and most immediate impact for parties who relied on *Dana I* in cases currently pending before the Board, as it voids the *Dana I* procedures retroactively. Prospectively, the decision creates a minimum period of bargaining or, if unfair labor practices are filed, a longer period of uncertainty, where the employer will be prohibited from making unilateral changes without risking unfair labor practice liability. Given that there were over 1,300 *Dana I* notices requested in the last four years, it is clear that *Lamons Gasket* alters the legal landscape in a frequently occurring recognition scenario.

2. The Return of the Successor Bar Doctrine – *UGL-UNICCO Service Co. & Grocery Haulers, Inc.*

In another decision announced on August 26, 2011, the Board returned to a modified version of the short-lived "successor bar doctrine" that it adopted in 1999 in *St. Elizabeth Manor, Inc.*, 329 N.L.R.B. 341 (1999), and overruled three years later in *MV Transportation*, 337 N.L.R.B. 770 (2002). In a 3-1 decision in *UGL-UNICCO Service Co. & Grocery Haulers, Inc.*, 357 N.L.R.B. No. 76 (Aug. 26, 2011), the Board majority held that an incumbent union is entitled to an "irrebuttable presumption" of continued majority support among employees of a successor employer, requiring the employer to bargain with the incumbent union for a reasonable period of time despite any doubts about the union's majority status in the changed business setting. Over the strong opposition of employer groups participating as *amici* in the case, the Board's decision accords significant protection to unions in successorship cases, giving them blanket immunity from petitions challenging their representational status for up to a year.

In its third policy reversal on this issue in 12 years, the Board in *UGL-UNICCO* overruled its *MV Transportation* holding that "an incumbent union in a successorship situation is entitled to—and only to—a *rebuttable* presumption of continuing majority status, which will not serve as a bar to an otherwise valid decertification, rival union, or employer petition, or other valid challenge to the union's majority status." 337 N.L.R.B. at 770. In *MV Transportation*, the Board concluded that this position "represents the appropriate balance between employee freedom of choice and maintenance of stability in bargaining relationships." 337 N.L.R.B. at 773. The *MV Transportation* Board thus rejected the "irrebuttable presumption" adopted in *St. Elizabeth Manor, Inc.*, and returned to the position that had applied since the Board's 1975 decision in *Southern Moldings, Inc.*, 219 N.L.R.B. 119 (1975).

The Board in *UGL-UNICCO* explained its latest policy reversal on the successorship bar by noting that the issue required the Board to consider "competing[] goals of the statute" and to "strike a balance between preserving employee freedom of choice and promoting stable collective-bargaining relationships." 357 N.L.R.B. No. 76 at 4. The Board described a successorship situation as a "threat[] to seriously destabilize collective bargaining, even when the new employer is required to recognize the incumbent union," and noted that "successorship places the union 'in a particularly vulnerable position.'" *Id*. at 5 (quoting *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 39-40 (1987)). As a result, the Board held that new successor relationships between an employer and an incumbent union "'must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed.'" 357 N.L.R.B. No. 76 at 6 (quoting *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 705 (1944)).

UGL-UNICCO held that "[t]he 'successor bar' will apply in those situations where the successor has abided by its legal obligation to recognize an incumbent union, but where the 'contract bar' doctrine is inapplicable, either because the successor has not adopted the predecessor's collective-bargaining agreement or because an agreement between the union and the successor does not serve as a bar under existing rules." 357 N.L.R.B. No. 76 at 8. In those cases, the Board will not process a petition for an election, nor may the employer withdraw recognition, for a reasonable period of time. *Id*.

While the Board rejected all of dissenting Member Hayes's arguments, it acknowledged that "the strongest argument against a 'successor bar' is the burden that it places on the Section 7 rights of employees." *Id*. To accommodate those rights, the Board modified the "successor bar" doctrine in two ways.

First, to determine what constitutes a "reasonable period of time" for protecting the union's status, the Board will distinguish between a successor employer that unilaterally sets initial terms and conditions of employment and a successor employer that adopts the existing terms and conditions of employment as the starting point for bargaining. *See id*. at 9. The Board described the former as creating a relationship akin to bargaining a first contract and, in the Board's view, presenting the greatest threat to the relationship. In those cases, the Board defines a "reasonable period of time" as "a minimum of 6 months and a maximum of 1 year, measured from the date of the first bargaining meeting." *Id.* In reviewing the reasonableness of the bargaining period, the party that invokes the "successor bar" bears the burden of establishing that a reasonable period *has not* elapsed. *Id*. at 9. The Board will review the facts under the multifactor test of *Lee Lumber*, 334 N.L.R.B. 399 (2001). 357 N.L.R.B. No. 76 at 9. Where the employer adopts the existing terms and conditions of employment as the starting point for bargaining, the Board views the relationship as akin to bargaining a renewal contract and less of a threat to the bargaining relationship. In those cases, the reasonable period will be a bright-line 6-month time period that is not subject to *Lee Lumber*. 357 N.L.R.B. No. 76 at 9.

Second, the Board recognized that the "successor bar" doctrine combined with the "contract bar" doctrine—which prevents an election for up to three years after reaching a valid bargaining agreement—could deny employees the opportunity for an election for multiple years. Accordingly, the Board held:

> [W]here (1) a first contract is reached by the successor employer and the incumbent union within the reasonable period of bargaining during which the successor bar applied, and (2) there was no open period permitting the filing of a petition during the final year of the predecessor employer's bargaining relationship with the union, the contract-bar period applicable to election petitions filed by employees or by rival unions will be a maximum of 2 years, instead of 3.

Id. at 10.

Member Hayes dissented, objecting primarily to the Board's analogy between voluntary recognition scenarios, where a bar protects a wholly new relationship between a union and an

employer, and successorship situations, where a union has been established as the historical bargaining representative. *Id*. at 10-11. Member Hayes stressed that in *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972), where the Supreme Court found that an incumbent union was entitled to an irrebuttable presumption of majority status, the union had been certified through a Board-supervised election only a few months prior to the successorship. 357 N.L.R.B. No. 76 at 11. In *Fall River*, however, where there had been a longstanding bargaining relationship prior to the change in employers, the Court held that there was only a rebuttable presumption of majority status. 357 N.L.R.B. No. 76 at 11. Member Hayes concluded that "a union's continuing majority status with a *Burns* successor is entitled to no more protection than it would have had with the predecessor employer in the absence of a contract or certification year bar." *Id*. at 12. Finally, Member Hayes rejected the majority's concerns regarding destabilizing relationships, writing that "an election does nothing to disturb stability since it merely either affirms the majority upon which stability must be based, or reveals that there is no real relationship to be stabilized or maintained." *Id*. at 13.

As exhibited by the Board's decisions in *Lamons Gasket* and *UGL-UNICCO*, the Board is clearly seeking to protect bargaining relationships when they are perceived to be most vulnerable, such as in voluntary recognition or successorship situations. While *UGL-UNICCO* will protect incumbent unions—at least for a period of time—it may have the unintended consequence of discouraging employers from becoming successors. Likewise, even if the employer, employees, or rival union had a good faith basis to doubt the existence of majority support, their hands would be tied and the employer required to bargain with a representative that may not have majority support of the unit employees.

F. Application of *Specialty Healthcare* and the Overwhelming Community of Interest Test

While cases such as *Lamons Gasket* or *UGL-UNICCO* will apply only in unique circumstances—i.e., a voluntary recognition or successorship case—the Board's decision in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 N.L.R.B. No. 83 (Aug. 26, 2011), *appeal filed sub nom. Kindred Healthcare v. NLRB*, Case No. 12-1027 (6th Cir. filed Jan. 11, 2012), redefined the unit appropriateness standard applicable in nearly every representation case. As discussed below, *Specialty Healthcare* seems to represent a significant shift in the way the Board approaches appropriateness determinations, but the real impact of the decision will be seen as it is developed and applied by regional directors.

1. The *Specialty Healthcare* Decision

Specialty Healthcare is widely considered one of the most controversial Board decisions in 2011. *See Specialty Healthcare*, 357 N.L.R.B. No. 83. The Board in *Specialty Healthcare* decided 3-1 to reverse *Park Manor Care Center*, 305 N.L.R.B. 872 (1991), which had defined the standard for determining units in nonacute health care facilities for 20 years. Despite the Congressional policy against proliferation of units in the health care industry that informed the *Park Manor* standard, the Board potentially made it easier for unions to petition for smaller units consisting of employees in the same job classification in nonacute facilities—and simultaneously harder for employers to argue that a larger unit is appropriate—by putting the burden on

employers to show that employees in the proposed larger unit share an "overwhelming community of interest" with those in the petitioned-for unit. 357 N.L.R.B. No. 83 at 1.

The Board majority of Chairman Liebman and Members Becker and Pearce addressed the showing necessary "to demonstrate that a proposed unit consisting of employees readily identifiable as a group who share a community of interest is nevertheless *not* an appropriate unit because the smallest appropriate unit contains additional employees." *Id*. at 10. After reciting settled Board law permitting more than one appropriate unit, holding that size alone is not a factor in unit determinations, and stating that "the statute requires only *an* appropriate unit," *see id*., the Board articulated the new standard to be applied when an employer seeks to add other employees.

Initially, the Board recognized that it had recently stated that in order for a petitioned-for unit to be appropriate, it must be "sufficiently distinct" from employees excluded from the unit. *See id*. at 12 (citing *Wheeling Island Gaming*, 355 N.L.R.B. No. 127 at 1 n.2 (Aug. 27, 2010) and *Seaboard Marine Ltd.*, 327 N.L.R.B. 556, 556 (1999)). In *Specialty Healthcare*, however, the Board held that in order for an employer to successfully oppose a petitioned-for unit on the basis that other employees must be included in the unit, it must show "that the included and excluded employees share an overwhelming community of interest." 357 N.L.R.B. No. 83 at 11. The Board explained its unit appropriateness analysis after *Specialty Healthcare* as follows:

> [W]hen employees or a labor organization petition for an election in a unit of employees who are readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors), and the Board finds that the employees in the group share a community of interest after considering the traditional criteria, the Board will find the petitioned-for unit to be an appropriate unit, despite the contention that employees in the unit could be placed in a larger unit which would also be appropriate or even more appropriate, unless the party so contending demonstrates that employees in the larger unit share an overwhelming community of interest with those in the petitioned-for unit.

Id. at 12-13 (footnotes omitted). Applying the test to the petitioned-for unit, the Board found that (1) the unit was appropriate, (2) there was no "overwhelming community of interest" compelling the inclusion of other employees, and (3) there was no undue unit proliferation by approving the unit.

Member Hayes dissented from the majority's decision to overturn *Park Manor*, accusing the majority of continuing a trend of "initiating a purported empirical inquiry into the effects of extant precedent, only to end by overruling that precedent in the absence of any factual justification, for the purely ideological purpose of reversing the decades-old decline in union density in the private American work force." *Id*. at 16. He objected to the Board's decision to overturn *Park Manor*, given that no party asked for *Park Manor* to be overturned and instead only asked the Board to review whether the standard was correctly applied. Member Hayes also objected to the Board's decision to overturn *Park Manor* without being asked to do so "in order

to get to the issue they really want to address, that is, a reformulation of the community-of-interest test." *Id*. at 18.

As to the merits of the decision, Member Hayes stressed that the "overwhelming community of interest" test adopted by the Board is properly used in accretion cases where employees will be added to a previously recognized unit without affording those employees the opportunity to exercise their Section 7 rights to vote. In those cases, the Board applies the heightened standard "to assure that those employees are not unfairly deprived of their right to vote on the question of representation." *Id*. at 18. Such concerns are not present in the run-of-the-mill unit determinations where any employee included in the unit will have a right to vote. *Id*. He also voiced concern that the Board was committing the same error the Fourth Circuit reversed in *NLRB v. Lundy Packing Co.*, 68 F.3d 1577 (4th Cir. 1995), where the Board presumed that petitioned-for units were appropriate unless there was "an overwhelming community of interest" with other excluded employees. *See* 357 N.L.R.B. No. 83 at 18 (citing 68 F.3d at 1581). The *Specialty Healthcare* majority rejected this argument, however, stressing that there would be no presumption of appropriateness and that the "overwhelming community of interest" test would only be applied *after* the Board had engaged in the required appropriateness analysis. *Id*. at 11 n.25.

The Board's decision is currently on review to the U.S. Court of Appeals for the Sixth Circuit. *See Kindred Healthcare v. NLRB*, Case No. 12-1027. The briefing schedule runs through the summer.

2. Application of *Specialty Healthcare*

In the months after *Specialty Healthcare*, the Board has decided at least three cases applying *Specialty Healthcare* in unit determinations. In *Odwalla, Inc.*, 357 N.L.R.B. No. 132 (Dec. 9, 2011), the Board issued a 3-0 decision applying *Specialty Healthcare* to find that a recommended unit was inappropriate because it excluded employees who shared an "overwhelming community of interest" with other included employees. *See* 357 N.L.R.B. No. 132 at 5. The parties entered into a stipulated election agreement for a unit including all employees other than the disputed merchandisers, whom the employer wanted included and the Union wanted excluded. *Id*. at 1. After the election, the challenged ballots—including one merchandiser's ballot—were determinative, requiring the Board to address the merchandisers' unit placement. To resolve the challenge, the Board addressed whether the employer had proven that merchandisers had such an overwhelming community of interest with the other stipulated unit members that they were required to be included under *Specialty Healthcare*.

The Board articulated the *Specialty Healthcare* standard, stating that the burden was on the employer to prove that there was "no legitimate basis upon which to exclude" the merchandisers because their traditional community-of-interest factors "overlap almost completely" with the included employees. 357 N.L.R.B. No. 132 at 4 (citation & quotation marks omitted). The majority of the unit's included employees were route service representatives ("RSRs") who, the Board noted, could have themselves been an appropriate unit. *Id*. at 6. However, because the stipulated election agreement included all other employees except for the merchandisers, the Board could not identify a legitimate basis for excluding the merchandisers from the unit. For instance, the Board noted that the unit was not structured along

"lines drawn by the Employer, such as classification, department, or function"; "functional lines"; "lines of supervision"; or "in accordance with methods of compensation." *Id*. at 5. In the absence of any legitimate justification to exclude the merchandisers, the Board concluded that the employer had carried its *Specialty Healthcare* burden. 357 N.L.R.B. No. 132 at 6.

Member Hayes concurred, but adhered to his dissent in *Specialty Healthcare*. 357 N.L.R.B. No. 132 nn. 9, 29. Instead, he concluded that by seeking to represent all employees except the merchandisers, the petition was seeking "an arbitrary segment" of an otherwise appropriate unit, making the unit a fractured unit and inappropriate as a matter of law. *Id*. at n.29.

While it may have been a surprise that the Board's first application of *Specialty Healthcare* produced a "win" for the employer, *Odwalla* does not mean that *Specialty Healthcare*'s impact was overstated. The Board in *Odwalla* noted that had the Union sought only the RSRs, it would have been an appropriate unit, requiring the employer to show that the interests of excluded employees "overlap almost completely" with the RSRs' interests. Instead, by including additional employees, the Union allowed the employer to successfully show that the exclusion of other employees was irrational. To the extent that *Odwalla* teaches anything regarding the application of *Specialty Healthcare*, it might be read as again encouraging petitioners to seek the narrowest unit possible or risk widening the unit's interests to a point that the employer can meet its *Specialty Healthcare* burden.

Two other Board decisions produced the opposite result, concluding that the employer failed to carry its *Specialty Healthcare* burden. *See Northrop Grumman Shipbuilding, Inc.*, 357 N.L.R.B. No. 163 (Dec. 30, 2011); *DTG Operations, Inc.*, 357 N.L.R.B. No. 175 (Dec. 30, 2011).

First, in *DTG Operations*, the Union sought a unit of all rental service agents and lead rental service agents (RSAs and LRSAs, respectively), whose primary job functions were to greet customers, process rental contracts, sell optional services, answer and receive telephone calls, and respond to customer questions and complaints. 357 N.L.R.B. No. 175 at 1. The Regional Director agreed with the employer that the smallest appropriate unit was a unit of all hourly employees, including a host of other classifications that added 78 employees to the petitioned-for unit of 31 RSAs and LRSAs. *Id*. at 1-2. The Regional Director expressly found that the RSAs and LRSAs and all other hourly employees shared an overwhelming community of interests and, accordingly, they must be included in the petitioned-for unit. *Id*. at 5.

The Board reversed the Regional Director's conclusion, again noting that *Specialty Healthcare* required that the traditional community of interest factors of included and excluded employees "overlap almost completely." 357 N.L.R.B. No. 175 at 4. Among other factors, the Board noted that the RSAs and LRSAs were distinct in multiple aspects, including that only the RSAs and LRSAs work behind sales counters, separate from all other hourly employees; have distinct functions; wear separate uniforms; are required to have at least nine months of car rental or sales experience; and "[o]f critical importance," only the RSAs' and LRSAs' compensation included "a potentially punitive incentive program." *Id*. at 6. To the extent that some of the other hourly employees shared infrequent and limited employee interchange with RSAs and LRSAs or common daily supervision, those factors did not outweigh the factors demonstrating that there was no overwhelming community of interest. *Id*. at 7.

Member Hayes, in dissent, claimed that *DTG Operations* was one of "the predictable effects of [the Board's] outcome-driven *Specialty Healthcare* test," observing that "it is difficult to imagine a multiclassification, multifunction workplace where the jobs of all workers are nevertheless so homogeneous" that distinctions such as those drawn by the *DTG Operations* majority cannot be found. *Id*. at 8. Citing to *Odwalla*, Member Hayes noted that "[a]s long as a union does not make the mistake of petitioning for a unit that consists of only part of a group of employees . . . it will be impossible for a party to prove that an overwhelming community of interests exists within excluded employees." 357 N.L.R.B. No. 175 at 8-9.

Second, the Board's decision in *Northrop Grumman Shipbuilding, Inc.*, demonstrated one of the likely evolving issues in unit appropriateness cases: whether "presumptions and special industry and occupation rules" developed during prior Board adjudications, and unaltered by *Specialty Healthcare*, controlled the analysis. *See* 357 N.L.R.B. No. 163 at 5-6. While the Regional Director found that a unit of the 223 technicians working in the E85 radiological control department was an appropriate unit, the employer argued that all of the approximately 2,400 technicians had to be included in the unit, either because (1) they shared an overwhelming community of interest with the E85 technicians or (2) the Board's standard for appropriate units of technical employees required that all technical employees be included in the unit.

The Board rejected both contentions. Applying *Specialty Healthcare*, Chairman Pearce and Member Becker found that the technicians in E85 were "readily identifiable as a group" because they all worked in the same department under common supervision and performed functionally integrated work with a shared purpose. 357 N.L.R.B. No. 163 at 3. The Board rejected the fact that all other technicians had a shared salary structure, were controlled by the same personnel policies, shared break facilities, and enjoyed the same benefits platform, noting that those similarities were outweighed by the fact that the job function of most E85 technicians was "a task distinct from the production-oriented jobs of technical employees outside of E85." *Id*. at 4.

The Board then addressed whether there was a special standard applicable to unit determinations affecting technical employees. In *Specialty Healthcare*, the Board noted that it had "'developed various presumptions and special industry and occupation rules in the course of adjudication'" and that the holding in *Specialty Healthcare* was "'not intended to disturb any rules applicable only in specific industries'" other than the non-acute care industry covered by *Park Manor*. 357 N.L.R.B. No. 163 at 4 (quoting 357 N.L.R.B. No. 83 at 13 n.29). The Board in *Northrop Grumman Shipbuilding* acknowledged that a rule for technical employees held that "when technical employees work in similar jobs and have similar working conditions and benefits, the only appropriate unit for a group for technicals must include all such employees similarly employed." *Id*. at 4 (citing *TRW Carr Div.*, 266 N.L.R.B. 326, 326 (1983)). The Board also noted that, if a subset of technical employees share a community of interest that is "sufficiently distinct" from other technical employees, separate representation may be appropriate. 357 N.L.R.B. No. 163 at 4.

The Board initially questioned the justifications for a general preference for single units of technical employees, but did not reach the issue of whether to retain the preference, finding that even if the test were valid, a unit of only E85 technical employees was still an appropriate unit. *Id*. at 4-5. The majority distinguished two cases in which prior Boards had held that

technicians performing the same functions as those in E85 were properly included in a unit of all technicians. *Id*. at 5-6. In those cases, however, the technicians frequently provided direct support and had close contact with technicians outside of their own departments. *Id*. at 6. Northrop Grumman Shipbuilding's E85 technicians, however, had "little or no working contact with a majority of the other technical employees," according to the Board majority. *Id*. Further, the Board noted that the E85 employees were in their own department, also distinguishing the case from prior Board cases. *Id*.

Member Hayes's dissent noted that the decision "illustrate[s] the degree to which *Specialty Healthcare* has elevated the extent of organizing as the definitive factor in determining the appropriateness of units," explaining that "[t]he newly-fashioned *Specialty Healthcare* standard . . . gives the petitioner's views on unit scope nearly dispositive weight, thereby abnegating the role Congress envisioned for the Board in determining appropriate bargaining units." 357 N.L.R.B. No. 163 at 7, 9. He dissented on the merits of the Board's decision in light of the Board's "longstanding policy" applicable to technical employees, concluding that the majority failed to meaningfully distinguish prior Board cases including radiological control technicians with all other technicians. *Id*. at 7-8.

As cases litigated after *Specialty Healthcare* make their way to the Board for review, the Board can expect to see more employers arguing that special industry or occupation rules, rather than *Specialty Healthcare*, govern the appropriateness analysis. Employers raising those arguments, however, should be prepared to defend the existence of those rules in the event that the Board takes the opportunity to abolish the rules, as it signaled in *Northrop Grumman Shipbuilding*.

One additional case pending before the Board has attracted the attention of labor practitioners for its application of *Specialty Healthcare* to a dispute between two unions, rather than a union and an employer. In *Grace Industries, LLC*, 29-RC-12031 & 29-RC-12043 (Dec. 28, 2011) (Second Supplemental Decision), two rival unions filed election petitions for Grace Industries' employees. While LIUNA Local 1010 sought a unit of laborers who perform "site and ground improvement, utility, paving and road building work and all related work . . . *regardless of material used*," the United Plant and Production Workers Local 175 sought only those employees who performed asphalt paving. *Id.* at 2.

The Regional Director's initial Decision and Direction of Election concluded that a unit of only asphalt paving employees was not an appropriate unit and that the larger unit including both asphalt and concrete pavers was an appropriate unit. After the election was held and objections filed, the Board issued its *Specialty Healthcare* decision and, in light of that decision, remanded the case for the Regional Director to determine why the unit of asphalt workers was not appropriate or, if it was, whether concrete pavers shared an "overwhelming community of interest" with asphalt pavers requiring their inclusion.

On remand, the Regional Director concluded that *Specialty Healthcare*'s holding did not apply to cases like *Grace Industries* where two unions petitioned for two different units, one larger and one smaller. The Regional Director explained:

> [I]n a hypothetical case where one union seeks a wall-to-wall unit and another union seeks a smaller unit, I do not believe that the Board would require the former union to show that the additional employees in the wall-to-wall unit share an overwhelming community of interest with the smaller unit, *for such a requirement would eliminate the presumptive appropriateness of a wall-to-wall unit and would likely increase litigation*.

Id. at 6. In light of his conclusion that *Specialty Healthcare* did not apply, the Regional Director adhered to his prior conclusion that the unit of only asphalt pavers was inappropriate. The Regional Director noted that, among other factors, individuals from both groups frequently worked side-by-side under common supervision, overlapped in the work they performed, and that the parties no longer agreed that the historical practice justifying units limited to only asphalt pavers was based on LIUNA internal procedures, rather than any analysis of a disparity of interests. The Regional Director thus recommended that certifications be issued based on the results of the election held for the larger unit.

On February 8, 2012, the Board granted Local 175's Request for Review, finding that it raised substantial issues warranting review. The case is currently pending before the Board.

G. Employer-Initiated Lawsuits As Unfair Labor Practices – *Allied Mechanical* and *Milum Textile Service Company*

Two Board decisions issued late in 2011 interpret the Supreme Court's decision in *BE&K Construction v. NLRB*, 536 U.S. 516 (2002), to find that employers violated Section 8(a)(1) of the Act by filing and maintaining unsuccessful litigation against a union. *See Allied Mech. Servs., Inc.*, 357 N.L.R.B. No. 101 (Oct. 25, 2011); *Milum Textile Servs. Co.*, 357 N.L.R.B. No. 169 (Dec. 30, 2011). The Board's decisions in these cases demonstrate the degree of scrutiny the Board will give to employer-initiated litigation over potentially-protected activity. The Board in both cases addresses whether an employer-initiated suit was filed with a reasonable basis and, if not, whether the suit was filed with a retaliatory motive. The Board in both cases found that employers had violated the Act.

In *Allied Mechanical*, a 2-1 Board found that an employer filed a lawsuit without a reasonable basis to believe that the suit had merit. Allied Mechanical's lawsuit against the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada ("UA") and the Sheet Metal Workers International Association ("SMWIA") included multiple counts based on the NLRA's secondary boycott provisions. Specifically, Allied Mechanical alleged that UA violated the Act by threatening or coercing the SMWIA to deny Allied Mechanicals' requests for job-targeting funds. 357 N.L.R.B. No. 101 at 2. Another count alleged that SMWIA breached its collective bargaining agreement with Allied Mechanical by refusing to provide the funds. *Id.*

While the Board had previously held that a suit's dismissal alone was not enough to find that a suit lacked a reasonable basis, *see BE&K Construction Co.*, 351 N.L.R.B. 451, 456 (2007) ("*BE&K II*"), it indicated that it would nonetheless be guided by the Supreme Court's decision in *Bill Johnson's Restaurants, Inc.*, 461 U.S. 731 (1983), which had noted that the Board's

"reasonably based lawsuit" analysis could "draw guidance from the summary judgment and directed verdict jurisprudence." *Allied Mech.*, 357 N.L.B. No. 101 at 7 (quoting 461 U.S. at 745 n.11).

Applying those standards to Allied Mechanical's suit, the Board majority found that the suit lacked a reasonable basis. The majority relied in large part on the fact that a federal district court dismissed the suit, and the U.S. Court of Appeals for the Sixth Circuit affirmed, finding that the complaint failed to state a claim upon which relief could be granted. 357 N.L.R.B. No. 101 at 7-12. Specifically, the majority found that the secondary activity claims could not succeed as pled because there was no neutral third party involved. Regarding the contractual claim against SMWIA, the majority found that the claim had been decided by an arbitrator subject to a grievance and arbitration process and Allied Mechanical could not allege that the decision should be set aside under the highly deferential standard of review for arbitral awards.

The Board then proceeded to the second prong of the *BE&K* and *Bill Johnson's Restaurants* analysis to determine whether the suit was filed with a retaliatory motive in violation of Section 8(a)(1). In so finding, the majority relied upon the following factors: (1) a long history of union animus between the filing party and one of the defendant unions; (2) the lawsuit was "retaliatory on its face" because "[i]t sought . . . money damages from the union based on their statutorily protected conduct"; and (3) the suit's baseless nature alone suggests retaliatory motives. 357 N.L.R.B. No. 101 at 10-12. While the majority recognized that baselessness alone could not prove motive, the majority would "continue to consider it one factor in our analysis." *Id*. at 12

Member Hayes, dissenting, would have found that there was no subjective retaliatory purpose and thus would not have reached the question of whether the suit had a reasonable basis. He particularly objected to the majority's reliance on ill will, history of unfair labor practice charges, and baselessness alone to build a case of retaliatory motive. Instead, Member Hayes read *BE&K* to require subjective evidence of retaliatory motive in filing the suit. He described the Board majority's decision in *Allied Mechanical* as an attempt to revive a previously-discredited theory defining retaliatory lawsuits as anything filed "directly-in-response-to" union activity. *Id.* at 14. The majority, however, rejected Member Hayes's reading of *BE&K*, noting that "the question of what evidence would suffice to prove retaliatory motive—and, particularly, what evidence would suffice to prove retaliatory motive when an action is baseless—was not germane to the Court's analysis in *BE&K*, and the Court did not rule on that issue. *Id*. at 12.

The Board revisited the *BE&K* analysis soon after *Allied Mechanical* in its *Milum Textile* decision. *See* 357 N.L.R.B. No. 169 (Dec. 30, 2011). Milum Textile, like Allied Mechanical, filed a suit against a union alleging illegal secondary boycott and interference with economic relations as well as claims for libel and fraud. *Id*. at 2. However, Milum Textile also filed a request for a temporary restraining order ("TRO"), claiming that the union's communications with their customers constituted an unlawful secondary boycott. *Id*. The TRO sought an order enjoining picketing, distributing leaflets to customers, and distribution of false materials. *Id*.

Chairman Pearce and Member Becker concluded that *BE&K* required a separate analysis for the filing of the TRO and the filing of the remainder of the litigation, calling a TRO "a distinct phrase of a lawsuit" that, alone, could be a basis for sanctions under Federal Rule of

Civil Procedure 11 if filed baselessly or with an improper purpose. 357 N.L.R.B. No. 169 at 3. The majority concluded that the motion for a TRO under Section 303(b) of the Labor Management Relations Act was baseless because Section 303 does not authorize private parties to seek injunctive relief. *Id*. Rather, the Board has exclusive jurisdiction under the NLRA to seek injunctive relief against secondary activity. *Id*.

Regarding the speech-related aspects of the TRO, the Board noted the employer did not even attempt to satisfy an "actual malice" standard under *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). 357 N.L.R.B. No. 169 at 4. The Board, like the district court, also noted that there was no justification for making a prior restraint on the union's speech. *Id*. Finally, the Board noted that the relief sought by the TRO request was so overbroad by seeking to enjoin all communication with its customers, including lawful communication, that the TRO would have been baseless even if the employer had set forth a colorable ground for relief. *Id*. at 5.

With regards to retaliatory motive, the Board cited *Allied Mechanical*, with the Board noting that the TRO motion "by its very terms" was retaliatory because it "sought to enjoin protected activity," 357 N.L.R.B. No. 169 at 5, just as Member Hayes, in dissent in *Allied Mechanical*, predicted when he noted that the Board was returning to the rule that suits seeking to enjoin protected activity are inherently retaliatory, a position rejected by *BE&K*. The majority noted that "a genuine desire to obtain an injunction on baseless grounds barring clearly protected conduct is a retaliatory, not proper motive." *Id*. at 5 n.17. In addition to the nature of the lawsuit, the Board also noted that the employer had a history of union animus and, based on that evidence, found that the TRO was filed with a retaliatory purpose. *Id*. at 5-6.

The majority remanded for further consideration the question of whether the remainder of the lawsuit violated Section 8(a)(1). *Id*. at 6. For purposes of remand, the Board explained that the General Counsel must "prove that the Respondent, when it filed its complaint or during the time before it voluntarily dismissed the action, did not have and could not reasonably have believed it could acquire through discovery or other means evidence needed to prove essential elements of its causes of action." *Id*. at 7. The Board also instructed the administrative law judge to apply the standards for retaliatory motive as articulated in *Allied Mechanical*. 357 N.L.R.B. No. 169 at 7.

While Member Hayes disagreed with the majority's application of *BE&K* to Milum Textile's lawsuit, he most strongly objected to the Board's decision to analyze the TRO separately from the rest of the litigation, which he described as "unprecedented." *Id*. at 12. His dissent expressed concern that "[i]f a plaintiff's failure to adequately argue a motion in the course of litigation can be fodder for an unfair labor practice complaint even where the overall lawsuit is not unreasonable, that would turn all litigation—meritorious and not—into a potential minefield of Board complaints and would have precisely the deterrent effect on protected petitioning that the Supreme Court mandates that we avoid." *Id*. at 13.

While employers have routinely gone to federal court to protect their rights, whether based in contract, tort, or property law, they now must be mindful of potential Section 8(a)(1) liability. Given the Board's clear interest in litigation as a means of restraint, and the Supreme Court's stated interest in protecting the First Amendment right to petition for a redress of

grievances, it is likely that *Allied Mechanical* and *Milum Textile* are only the beginning of the renewed discussion on this topic.

H. Impact of the Board's *Boeing* Litigation

Recent versions of this traditional labor update have noted an increase in tension between Congress and the Board, with one attempting to exercise its governmental oversight function while the other attempts to act as an independent executive agency. That tension undoubtedly increased because of animosity over the nominations process, Board oscillations in decisions including *Lamons Gasket*, *UGL-UNICCO*, and *Specialty Healthcare*, and the significant changes included in the Board's rulemaking initiatives. But no issue elevated the tension in the Congress-NLRB relationship more than the Acting General Counsel's *Boeing* complaint.

1. The Board's Legal Theory For The *Boeing* Litigation

On April 20, 2011, the Regional Director for Region 19, covering the northwest United States, filed a complaint against Boeing Company. Employees in Boeing's Washington and Oregon facilities at issue in the case have been represented by the International Association of Machinists ("IAM") since at least 1975 and, since that time, have engaged in five strikes, as recently as 2005 and 2008. These employees worked jobs including the manufacturing of 787 Dreamliner jets. Around 2009, Boeing decided to open a second production line of 787 Dreamliners in South Carolina. The decision to place the new work in South Carolina rather than the northwest facilities was apparently based on a number of factors including the northwest facilities' labor costs and vulnerability to strikes.

The Board recently released its memorandum from the Division of Advice to Regional Director Richard Ahearn summarizing the theory for filing a complaint against Boeing. *See* Div. of Advice Mem., *The Boeing Co.*, Case No. 19-CA-32431 (Apr. 11, 2011), *available at* http://www.nlrb.gov/node/516 (last visited Apr. 24, 2012) (the "Advice Memorandum"). The memorandum recommended issuing a complaint against Boeing for violating Sections 8(a)(1) and (3) of the Act. As to the Section 8(a)(1) violation, the Division of Advice found that Boeing unlawfully threatened to place the second assembly line at a nonunion facility unless the Union agreed to a long-term no-strike clause and unlawfully and repeatedly stated that its decision to place the second line elsewhere was based on the history of labor unrest. As to the Section 8(a)(3) violation, Division of Advice found that Boeing unlawfully decided to place the second line at a nonunion facility because of the union's strike history, even though no unit employees had lost their jobs because of the placement of the second line. *Id*. at 1.

With respect to the alleged violation of Section 8(a)(1), the Advice Memorandum relied on statements about "diversifying our labor pool" and placing work in South Carolina because of "strikes happening every three or four years in Puget Sound"; strategies to reduce vulnerability to delivery disruptions caused by strikes, among other things; reference to a "dual-sourcing" system; and an executive's statements expressly attributing the decision to locate the line in South Carolina to employee strikes and threatened loss of future work opportunities. *Id*. at 16-17. The Board equated these statements to telling employees that they would lose their jobs if they engaged in protected activity. *See id*. at 1.

The alleged violation of Section 8(a)(3) was based on the decision to locate the second 787 line in South Carolina "and to establish a dual-sourcing program to support that line, [which] violated Section 8(a)(3) because the Employer acted in retaliation for the employees' Union activity and not for a legitimate business reason." *Id*. at 17. The Board noted that Boeing had originally planned to place the second line of 787 work in Puget Sound. *Id*. at 17-18. While Division of Advice noted that no unit employees had been harmed, Division of Advice concluded that "it is merely because Boeing's retaliatory decision has not yet been implemented." *Id*. at 18. Specifically, Division of Advice voiced concern that Boeing would fill its remaining 787 orders in South Carolina rather than Puget Sound, meaning that Puget Sound employees would likely be transferred to less desirable aircraft assembly lines or subject to demotions or layoffs. *Id*.

The Advice Memorandum recommended that the Region dismiss the Union's charge that Boeing violated Section 8(a)(5) by refusing to bargain over the decision to locate the second 787 line in South Carolina. First, Division of Advice concluded that the decision to locate the second 787 line in South Carolina was a mandatory subject of bargaining because the move did not involve a basic change in Boeing's operations or the scope or direction of the enterprise. *Id*. at 25. However, Division of Advice recommended that the charge be dismissed because the Union had waived its right to bargain over decisions to offload work to a facility not covered by the Agreement. *Id*. at 27.

The remedy sought was perhaps the most controversial aspect of the case. The Division of Advice noted that Boeing intended to assemble seven 787s per month in Washington and three additional aircraft each month in South Carolina. *Id*. at 29. However, at the time the Memorandum was issued, the Washington line was not producing up to capacity. *Id*. Division of Advice recommended that the Region seek an order requiring Boeing to produce the first ten aircraft assembled each month in Puget Sound. *Id*.

Boeing unsuccessfully sought to have the case dismissed. *See Boeing Co.*, 19-CA-32431 (N.L.R.B. Div. of Judges June 30, 2011) (order denying motion to dismiss or strike injunctive relief). As to the Section 8(a)(1) allegations, the ALJ determined that, while Boeing may contest the accuracy or legal import of the statements attributed to Boeing executives, whether the statements were violations of the Act could only be determined after a factual investigation, making dismissal improper. Regarding the Section 8(a)(3) allegations, the ALJ held that the General Counsel could prove an 8(a)(3) violation even if there was no actual loss of work in the Washington and Oregon units. He relied on *Adair Standish Corp.*, 290 N.L.R.B. 317, 318-19 (1988), which found an 8(a)(3) violation where new work that was intended for one location was redirected to another location because of union activity. Even though the work in *Adair Standish Corp.* had never been at the union location and thus was not "taken away" from that location, the Board found a violation.

The ALJ also denied Boeing's motion to strike the complaint's requested remedy of returning the work to the Washington area. The Acting General Counsel defended the requested remedy on the basis that it was the traditional remedy for "runaway shop" cases—cases involving the relocation of work motivated by an anti-union non-business reason. The ALJ refused to decide whether the remedy would ultimately be appropriate, instead noting that

determination of appropriate remedies was "highly fact intensive" and that he could not limit or prohibit the mere request for a remedy before evidence had been taken.

While the case was pending but before trial, Boeing and the IAM reached an agreement on a four-year contract extension that included a commitment from Boeing to build a new line of 737 MAX jetliners in Washington state. *See* Lawrence E. Dubé, *NLRB's Controversial Boeing Case Closed; Lafe Solomon Praises "Win-Win" Settlement*, 237 Daily Lab. Rep. (BNA) AA-1 (Dec. 9, 2011). The IAM soon thereafter requested withdrawal of its unfair labor practice charge, which the Board granted. *Id*.

2. The Interaction Between The Board And Congress Regarding *Boeing*

Throughout the litigation of the *Boeing* case, tension between Congress and the Board seemed continually to escalate, with various House and Senate committees and subcommittees alleging that the Board had become a rogue agent for unions, while the Board attempted to maintain its independence, claiming that it was only exercising its authority to enforce the Act. The Board's website contains over twenty pieces of correspondence regarding subpoenas issued by the House Committee on Oversight and Government Reform, field hearings held by the same committee, and other pieces of correspondence from representatives and senators offering support for the positions of the Board and the House committees. On May 26, the House Committee on Oversight and Government Reform requested that Acting General Counsel Solomon testify at a field hearing in South Carolina entitled "Unionization Through Regulation: The NLRB's Holding Pattern on Free Enterprise." *See* Ltr. from Rep. Darrell Issa to Acting General Counsel Solomon (May 26, 2011), *available at* http://www.nlrb.gov/node/967 (last visited Apr. 24, 2012). Though Acting General Counsel Solomon twice declined the invitation to appear at the hearing, he eventually agreed to testify at the field hearing—an unusual occurrence given that the subject matter of the hearing related to an ongoing case.

At the hearing, the Committee determined that it would be appropriate for Acting General Counsel Solomon to disclose only discoverable information related to the *Boeing* administrative hearing. In subsequent letters producing such information, Acting General Counsel Solomon has described that agreement as "an appropriate and fair balance between the Committee's legitimate informational needs and the Agency's legitimate needs to secure the due process rights of parties to a fair trial." *See* Ltr. from Acting General Counsel Solomon to Chairmen Issa, Ross and Gowdy (June 29, 2011), *available at* http://www.nlrb.gov/node/967 (last visited Apr. 24, 2012).

However, on August 5, 2011, the Committee issued a subpoena for further documents related to the *Boeing* litigation. While Acting General Counsel Solomon offered to discuss the production of documents, his letter touched on the central concern in the ongoing debate, highlighting the need to balance Congressional oversight with Agency independence: "[T]he subpoena threatens to undermine the Agency's independence. Congress delegated the authority to enforce the National Labor Relations Act to the Board and structured it as an independent agency so that the enforcement of the Act would not be subject to undue political pressure." *See* Ltr. from Acting General Counsel Solomon to Rep. Darrell Issa (Aug. 12, 2011), *available at* http://www.nlrb.gov/node/967 (last visited Apr. 24, 2012). Acting General Counsel Solomon continued to produce documents throughout October 2011.

While the *Boeing* litigation has ended, the House Oversight and Government Reform Committee has stated that the "NLRB's decision to end its action against Boeing does not end the Oversight Committee's investigation into the agency." *See* Dubé, 237 Daily Lab. Rep. at AA-1. And, the so-called *Boeing* bill—which would deprive the Board of the authority to order an employer to restore or reinstate work, rescind a transfer of work, or change a location of work— remains pending in Congress. *See* Protecting Jobs From Government Interference Act, H.R. 2587, 112th Cong. (2011). While the bill passed the House along party lines, it is unlikely to gain traction in the Senate, meaning that the debate over the Board's *Boeing* complaint is likely at an end.

I. Other Issues Where The Board Has Issued Notices and Invitations to File Briefs

While the Board has issued opinions in most of the cases in which it invited parties to participate as *amici*, the Board has yet to decide three cases where *amicus* briefs were solicited. *First*, in *Roundy's Inc.*, 30-CA-17185, the Board proposes to return to a line of cases twice rejected by a United States Court of Appeals. Specifically, the Board is considering a return to the rule of *Sandusky Mall Co.*, 329 N.L.R.B. 618 (1999), *enforcement denied, Sandusky Mall Co. v. NLRB*, 242 F.3d 682 (6th Cir. 2001), that "an employer that denies a union access while regularly allowing nonunion organizations to solicit and distribute on its property unlawfully discriminates against union solicitation." 329 N.L.R.B. at 618. Further, the Board invited comments regarding what effect, if any, the Board's decision in *Register Guard*, 351 N.L.R.B. 1110 (2007), *enforcement denied in part*, 571 F.3d 53 (D.C. Cir. 2009), has on the issues in the *Roundy's, Inc.* case. In *Register Guard*, the Board applied a narrow discrimination test, requiring proof of discrimination along Section 7 lines. That approach appears at risk in *Roundy's, Inc.*, where the Board seems poised to adopt a rule that prohibits employers from denying access to unions for solicitation purposes if it allows other non-union solicitations.

Second, the request for briefing in *Hawaii Tribune-Herald*, 37-CA-17185 addresses whether, and if so, when, an employer has an obligation to provide a union with statements it obtains during an investigation into employee misconduct. The Board's Notice explains that current Board precedent does not require employers to produce "witness statements" obtained during an investigation. *Hawaii Tribune-Herald*, however, has caused the Board to seek a clearer definition of what constitutes an exempt "witness statement."

Finally, in *Chicago Mathematics & Science Academy Charter School*, 13-RM-1768, the Board will address whether a charter school is a "political subdivision" and exempt from the Board's jurisdiction. Chicago Mathematics & Science Academy seeks to be covered by the Board's jurisdiction so that its employees may have a Board-conducted election, rather than having the proceeding covered by the Illinois Educational Labor Relations Board.

Briefing in these cases has been closed for months. Many practitioners expected the Board to issue its *Roundy's, Inc.* decision prior to the end of Chairman Liebman's term, but the Board has yet to do so in this significant matter. When it does issue, employers will need to revisit their policies on allowing access to their premises for solicitation and distribution to ensure compliance with whatever discrimination rule the Board decides to adopt.

III. Developments In Case Law From The Federal Courts Of Appeals

A. D.C. Circuit Decisions on Impasse and Implementation

In late 2011 and early 2012, the D.C. Circuit issued a number of decisions involving impasses in labor negotiations. In one case, *Comau, Inc. v. NLRB*, 671 F.3d 1232 (D.C. Cir. 2012), the Court reversed the Board in a decision that had posed significant concerns to employers seeking to implement benefit plan changes after reaching an impasse. In the other cases, the Court assessed the Board's impasse determinations in three opinions involving SEIU 1199 advocating the same benefit plan proposal with three different employers. *See Monmouth Care Ctr. v. NLRB*, 672 F.3d 1085 (D.C. Cir. 2012); *Laurel Bay Health & Rehab. Ctr. v. NLRB*, 666 F.3d 1365 (D.C. Cir. 2012); *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341 (D.C. Cir. 2011).

The D.C. Circuit's decision in *Comau* represented a significant development and a reversal of the Board on an issue of law. The Board's decision in *Comau, Inc.*, 356 N.L.R.B. No. 21 (Nov. 5, 2010), summarily adopted an ALJ's ruling that Comau unlawfully implemented its health insurance plan after reaching impasse in negotiations with the Union. In December 2008, Comau declared impasse and notified the Union that it would impose its last best offer on December 22. *Id*. at 4. A letter identifying the imposed terms included a new health insurance plan to take effect on March 1, 2009. *Id*. Between December 22 and March 1, the employer began making the transition to the new health insurance plan to be implemented in March; in the meantime, the parties resumed negotiations, including subcommittee meetings on health insurance, thus breaking the earlier impasse. *Id*. at 5.

The ALJ held that, assuming the parties were at impasse on December 22, the parties were not at impasse on March 1, 2009, when the new health insurance plan took effect. *Id*. at 9-10. He then concluded that the effective date of the new plan—rather than the date implementation was announced—was the relevant date for the impasse analysis, stating that "[a] change in terms of employment cannot reasonably be viewed as 'implemented' for unit employees at a time when that change is not being applied to a single one of those employees and the employer has not passed a 'point of no return' committing it to make the change at all." *Id*. at 10. Because he concluded that the plan was not "implemented" until March 1, when the parties were no longer at impasse, he concluded that Comau violated Sections 8(a)(1) and 8(a)(5), and the Board affirmed. *Id*. at 1, 10-11.

The D.C. Circuit rejected the "point of no return" analysis and instead held that the health insurance plan was implemented on the date that Comau announced its implementation. *See Comau , Inc. v.* NLRB, 671 F.3d 1232, 1239-40 (D.C. Cir. 2012). The Court reviewed the implementation communications and found it "clear that the changes were 'being implemented' as part of its last best offer, which . . . expressly provided for implementation on December 22, 2008." *Id*. at 1238. The Court also concluded that cases relied upon by the ALJ for his "point of no return" theory were different because, in one of the cases, the employer only announced an *intention* to implement a change at a future date, whereas Comau announced the implementation of a term and condition with a later effective date. *Id*. at 1239. Because the parties admitted that they were at impasse on December 22 when Comau announced that it was implementing a new health plan, the Court found that the Board's decision was arbitrary and capricious.

The Board's decision in *Comau* presented real and practical problems for employers that found themselves at impasse over benefit plans. As benefits administrators are aware and as the ALJ recognized, the implementation of a new health plan, or even making changes to benefits provided under a current plan, requires a considerable amount of lead time and administrative effort. The Board's effort to pin the impasse analysis on the date the change becomes "effective," as opposed to the date of the announced implementation, puts employers in a Catch 22—they either have to decline union overtures to resume negotiations while transitioning to the new plan to avoid breaking the impasse (and risk an unfair labor practice charge) or begin the transition before reaching a bona fide impasse so that there would be little or no delay between announcement and implementation (again risking a bad faith bargaining charge). It remains to be seen how the Board will respond in future cases, but at least in the D.C. Circuit, *Comau* reaches a result that leaves the proper impasse analysis intact and provides guidance to employers in terms of the specificity of any announced implementation of final contract proposals

The D.C. Circuit also issued a series of opinions underscoring the fact-intensive nature of the impasse analysis, with the Court upholding the Board's findings of no impasse in *Monmouth Care Center* and *Wayneview Care Center*, while concluding that an impasse existed in *Laurel Bay Health & Rehabilitation Center* on strikingly similar facts.

In each of the negotiations, SEIU 1199, New Jersey Health Care Union, sought to achieve bargaining objectives that were similar or identical to terms it had obtained in agreements with nearly two dozen other employers. Among those terms was a provision that called for the employer to participate in the Union's own health insurance plan, contributing at a rate of 22.33 percent of gross unit payroll as set by the plan's trustees. While at least two of the negotiations also involved substantial issues over the use of per diem or agency employees, the health insurance proposals were a major issue in each negotiation.

The employer in *Wayneview Care Center* bargained for a successor contract over the course of approximately six months. *See Wayneview Care Ctr.*, 664 F.3d at 344-45. During bargaining sessions on August 18 and 19, the Union abandoned its request that the employer participate in the Union's health plan and agreed that the Union would participate in the employer's health plan. *Id*. at 345. It also changed its position with regard to the number of per diem employees. *Id*. The following session produced what the Union described as "a roadmap to a deal," including offers to bargain through the weekend to conclude the negotiations. *Id*. However, the employer made an allegedly regressive "last best offer" on August 22, refused to bargain further, and implemented the terms of the last best offer during the first week of September. *Id*.

The *Wayneview* panel held that the Board's finding that the parties were not at impasse "easily satisfies our deferential standard of review" for Board determinations on questions of fact. *Id*. at 348. Specifically, the Court noted that the Union's willingness to agree to continue on the employer's health insurance plan, rather than requiring a 22.33 percent contribution to the Union's plan, was "significant movement on major economic items of importance to both sides" achieved during the August 18 and 19 sessions immediately prior to the declaration of impasse. *Id*. (citation & quotation marks omitted). The Court rejected the employer's argument (made in

all three cases) that the Union's insistence on "pattern" terms similar to those it had achieved in other negotiations amounted to bad faith bargaining. *Id*. at 348-49.

The Court reached a similar result in *Monmouth Care Center*, 672 F.3d 1085, finding no impasse. There, after the Union made the same health insurance proposal and initially described it as non-negotiable, three employers stopped bargaining and implemented terms and conditions of employment after only a few bargaining sessions for each employer. *Id*. at 1086. Some of the employers made actual "final offer[s]" and declared impasse, while one employer simply stopped bargaining and implemented its terms. *Id*. at 1087. While the Union may have initially presented some of its proposals as "non-negotiable," *id*. at 1091 n.3, the Court noted that bargaining had barely begun at the time of implementation and that the Union had recently indicated a willingness to revise its position on economics and the use of agency employees. *Id*. at 1089.

In addition to finding that the parties were not at impasse based on the bargaining history, the Court also found that the employer's admitted refusal to provide requested information prevented the parties from reaching impasse. *Id*. at 1089-90. The information requests covered a number of "key bargaining issues," including the use of agency employees. *Id*. at 1093. The Court agreed with the Board's conclusion that the refusal to provide information on those issues "frustrated the parties' effort to reach an agreement and precluded a finding of genuine impasse." *Id*.

A different panel of the D.C. Circuit reached a different conclusion in *Laurel Bay Health & Rehabilitation Center*, denying enforcement to the Board's decision that the parties had not reached impasse. *See* 666 F.3d 1365. Laurel Bay and the Union held eight bargaining sessions over the course of six months. *Id*. at 1368-71. During the initial bargaining sessions, Union negotiators presented some of their proposals, including the health contribution requirement, as "not . . . negotiable" and stated that they "would not even hear any discussions about" the proposal. *Id*. at 1369. In subsequent sessions, the Union described its 22.33 percent contribution requirement as a proposal "set in stone." *Id*. at 1370. As of the parties' final session on August 23, there had been no movement on the issue of the health contributions.

However, during the August 23 session, the Union negotiator indicated that if Laurel Bay could not pay the 22.33 percent contribution, the Union would have "to look for other health insurance," asking the employer what insurance it provided for non-Union employees and suggesting that the negotiators should "look at other plans." *Id*. at 1371. After an unproductive off-the-record session between the negotiators, the employer returned and made a last, best and final offer. *Id*. The Union negotiator expressed surprise and stated that he did not believe they were at impasse on this issue because "[t]here's wiggle room on the proposal." *Id*. A week later, the Union wrote the employer, indicating that it was preparing a comprehensive counterproposal and requesting information on benefits provided to non-Union employees. *Id*. However, Laurel Bay implemented its proposals on September 1. *Id*. The parties did not meet again. *Id*.

The *Laurel Bay* panel focused on the evidence showing that the Union had demonstrated no flexibility or willingness to compromise prior to the final August 23 session, when it suggested that it might be willing to move on its proposals. *Id*. at 1374-75. Specifically, the Court noted that while the Union had, during that session, suggested that it would be willing to

look at other plans, the employer had "emphatically rejected" that last-minute suggestion. *Id*. at 1375. The Court further observed that the Union's "twelfth-hour protestations and posturing did nothing to negate the culmination in impasse of 6 months' fruitless bargaining," citing cases requiring that the Union "actually commit" to a new position. *Id*.

The Court in *Laurel Bay* distinguished *Wayneview Care Center* by noting that the Union had actually made "major concessions" on "two principal stumbling blocks in the way of a collective bargaining agreement" in that case—unlike *Laurel Bay*, where the Union, at least until the August 23 session, had made no movement. *Id*. at 1376 n.16. The Court in *Monmouth Care Center* in turn distinguished *Laurel Bay*, where "neither party had budged" and "had not once come even close to accord on the major sticking point" in their negotiations. 672 F.3d at 1092 (citation & quotation marks omitted). These cases highlight the fact-specific nature of impasse determinations but, more importantly, underscore that at least the D.C. Circuit may not be persuaded by "twelfth-hour" union efforts to evade impasse with promises of movement that never materialize into formal proposals.

B. The Intersection Between Obligations To Provide Information and Protect Confidential Employee Information – *NLRB v. United States Postal Service*

The First Circuit in *NLRB v. United States Postal Service*, 660 F.3d 65 (1st Cir. 2011), denied enforcement to a Board order finding that the U.S. Postal Service ("USPS") violated Sections 8(a)(1) and 8(a)(5) by refusing to provide the Union with psychological aptitude test scores of 22 employees without first obtaining the employees' consent. *Id*. at 66. USPS had provided its employees with notices that their test scores could be disclosed to labor organizations under an exception in the Privacy Act allowing for disclosures "as required by applicable law." *Id*. at 67-68. USPS, however, declined to give the test scores to the Union without employee consent.

The Board found that USPS employees had no reasonable expectation of privacy in their test scores because they had received notice that the scores could be disclosed. *Id*. at 68. The Board distinguished *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979), which held that the NLRA does not require unconditional disclosure of psychological aptitude test scores and that an employer met its NLRA obligations by offering to provide the scores for employees who gave their consent. 660 F.3d at 68. The Board noted that the employer in *Detroit Edison* had explicitly promised confidentiality while the Board viewed USPS's notices to employees as a warning that their test scores could be disclosed. *Id*. As a result, the Board issued an order finding that it was an unfair labor practice for USPS to condition disclosure of the test scores on the Union obtaining the employees' consent. *Id*. at 66. The Board's order directed USPS to furnish the Union with the test scores for the twenty-two applicants it hired. *Id*. at 68.

The First Circuit denied enforcement of the Board's order, concluding that USPS's offer to provide the information with employee consent satisfied the NLRA. *Id*. at 71-72. The Court noted that the Privacy Act notices reaffirmed that information would be kept private, except in possible, limited cases of disclosures. *Id*. at 71. The Court then found that the disclosure at issue in this case—disclosures "required by applicable law"—did not apply because "the NLRA does not require automatic, unconditional release of personally sensitive information in all instances," as *Detroit Edison* recognized. *Id*.

Because the NLRA permitted, but did not mandate, the disclosure of personal test scores, the First Circuit concluded that employees had a sufficient confidentiality interest in their test scores to require the Board to engage in a balancing of the need for confidentiality and the Union's right to relevant information. *Id*. at 72. The Court remanded the case for the Board to apply *Detroit Edison* to balance (1) the interest of the employees in confidentiality, (2) the burden placed upon the Union by conditional disclosure, and (3) any evidence that the company was using employee privacy as a pretext to avoid its statutory obligations to bargain collectively. *Id*. at 69 (citing *Detroit Edison*, 440 U.S. at 319-20).

C. *Shelter Distribution* – Allowing Employers and Unions To Contract For Indemnification From Multiemployer Pension Plan Withdrawal Liability

Addressing a question of first impression, the U.S. Court of Appeals for the Sixth Circuit recently issued a decision that has significant implications for bargaining parties who have agreed to participate in multiemployer pension plans, particularly in light of the widespread underfunding of those plans. The Court held that a collective bargaining agreement provision requiring a union to indemnify an employer for contingent liability arising from participation in or withdrawal from an underfunded multiemployer pension plan is not contrary to public policy. *Shelter Distrib., Inc. v. Gen. Drivers, Warehousemen & Helpers Local Union No. 89*, --- F.3d ---, 2012 WL 880601 (6th Cir. Mar. 16, 2012).

The collective bargaining agreement between Shelter Distribution, Inc. ("Shelter") and General Drivers, Warehousemen & Helpers Local Union No. 89 ("Local No. 89") contained a provision requiring Shelter to contribute to a multiemployer pension plan, but stating that "[t]he Union shall indemnify the Company for any contingent liability which may be imposed under the Multi-employer Pension Plan Amendments Act of 1980." *Id*. at *1. After Local No. 89 disclaimed its representation of Shelter's employees and terminated the bargaining relationship, Shelter withdrew from the multiemployer pension plan covering the previously-represented employees. The Plan informed Shelter of its withdrawal liability under the Multiemployer Pension Plan Amendments Act ("MPPAA"). Shelter demanded indemnification from the Union, eventually filing suit in district court and being ordered to arbitrate. *Id*. at *1-2. At arbitration, the Union asserted that the MPPAA established a public policy against shifting withdrawal liability away from employers, making the collective bargaining agreement provision unenforceable for public policy reasons. *Id*. at *2. The arbitrator applied *Pittsburgh Mack Sales & Services, Inc. v. IUOE, Local Union 66*, 580 F.3d 185 (3d Cir. 2009), which held that there was no public policy preventing enforcement of indemnification provisions, and ordered the Union to reimburse Shelter. *Id*.

The Sixth Circuit upheld the arbitrator's rejection of the Union's public policy argument. 2012 WL 880601, at *2. Rather than relying on *Pittsburgh Mack*, the Court relied on its own precedent in *Pfahler v. National Latex Products Co.*, 517 F.3d 816 (6th Cir. 2007). While noting that Section 410(a) of ERISA states that "an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy," the Court in *Pfahler* also noted that Section 1110(b) allows fiduciaries to purchase insurance to cover potential contingent liability. 2012 WL 880601, at *4 (citing 517 F.3d at 837). The Court in *Pfalher* thus concluded that an employer's indemnification agreement with a third party did not prevent the fiduciary from being held liable,

but instead only required the third party to compensate the fiduciary for the liability, similar to the permissible insurance agreements under Section 1110(b).

The Court concluded that the agreement between Shelter and the Union was no different from a third party indemnification agreement or an insurance contract because Shelter, as the fiduciary, was still financially liable in the first instance, but then had a right to obtain reimbursement from the Union. 2012 WL 880601, at 4. The Court noted that the goals of ERISA and the MPPAA could still be served if indemnification agreements between employers and unions are allowed, so long as the employer retains primary liability. *Id.*

IV. Other Developments From The Board

As reviewed in Sections II, *supra*, the Board has addressed a number of significant topics through adjudication, rulemaking, and the exercise of its enforcement powers. The Board also has issued scores of decisions in the last few months, particularly as the Board prepared to lose its quorum in late December 2011. While many decisions involve the application of settled law to unique facts, the Board issued a number of noteworthy decisions on, among other issues, election misconduct, eligibility, access, and bargaining obligations.

A. Representation Case Issues

1. Election Logistics: Timing and Location

Three 2011 Board decisions reaffirmed the "well settled" rule that the mechanics of an election, such as the date, time, place, and method are left to the direction of the Regional Director. *Manchester Knitted Fashions, Inc.*, 108 N.L.R.B. 1366, 1367 (1954). With respect to the date of an election, the Board in *CEVA Logistics U.S., Inc.*, 357 N.L.R.B. No. 60 (Aug. 24, 2011), found that the Regional Director acted within his discretion when he scheduled an election on a nonworking day on which the employer held a mandatory employee meeting. The Regional Director selected this date—the only date on which all employees were scheduled to be at the employer's facility—to maximize the possibility for all eligible employees to vote in the election. The Regional Director chose to hold the election when all employees would be present based in part on the fact that six of the nineteen putative bargaining unit members did not regularly work at the facility and lived out of state.

The Board rejected the Union's argument, which was embraced by Member Becker's dissent, that holding an election on a date the employer chose to hold a mandatory meeting gave the impression that the employer controlled the election process. The Board's conclusion was supported by the lack of any evidence that employer's requirement to attend the meeting coerced or pressured the employees to vote. Member Becker's dissent argued that holding the election on a date all employees were required to be present threatened the employees' right to choose not to vote. Given that nearly one-third of the unit lived out of state, he suggested that the Regional Director should have scheduled a mail ballot election. The Board, however, noted that this suggestion ran counter to "longstanding Board policy" that gave the Regional Director "discretion as to which type of election to conduct." *Id.* at 2.

The Board also issued two potentially important decisions regarding the location of an election, each time remanding the case to a regional director with instructions to exercise discretion over whether to hold the election at a neutral site rather than on the employer's premises. In *Austal USA, LLC*, 357 N.L.R.B. No. 40 (Aug. 2, 2011), the Union challenged the Regional Director's decision to hold a second re-run election on the employer's premises, instead requesting that the election be held either in a neutral location or by mail ballot. The request for a neutral site stemmed from the employer's multiple unfair labor practices and other objectionable conduct during the previous two elections, all of which occurred on the employer's premises and much of which involved the employer exercising its authority over those premises.

The Board remanded the case to the Regional Director because she failed to explain her decision denying the request for a neutral site. According to the Board's non-binding Casehandling Manual, a Regional Director may deviate from the preferred practice of holding elections on the employer's premises in order to protect employees' right to exercise free choice in the face of employer misconduct. In doing so, however, the Regional Directors should consider various factors, including the unit size, the ongoing nature of the misconduct, employee knowledge of employer unfair labor practices, and how moving the election off premises would impact voter participation. The Board found that if the Regional Director considered these factors, she failed to articulate the basis for her decision.

On remand, the Board required the Regional Director to consider four factors in exercising her discretion over election sites. *Id*. at 3. Specifically, the Board required consideration of the following:

> First, the Petitioner's objection to holding the third election on the Employer's premises, the Employer's request that it be held there, and the grounds therefor. [sic] Second, the extent and nature of the Employer's prior unlawful and objectionable conduct and the fact that the Petitioner has made a request to proceed despite the fact that the compliance period relating to the prior unlawful conduct has not yet closed. Third, the advantages available to the Employer over other parties to this proceeding if the election is conducted on premises it owns or otherwise controls. Finally, the Regional Director must evaluate the alternative site proposed by the Petitioner, as well as other readily available sites. In evaluating these sites, the Regional Director shall consider their accessibility to employee-voters, the ability of the Board to conduct and properly supervise the election on the site, whether the parties to this proceeding have equal access to and control over the site, and the cost of conducting the election on the site.

Id. (internal citation omitted). Consistent with Board precedent, the Board remanded these fact-intensive considerations to the Regional Director, finding that it would be "administratively unfeasible" for the Board to undertake that analysis in each case. *Id*. at 2-3.

The Board again revisited the issue of neutral site elections in *2 Sisters Food Group, Inc.*, 357 N.L.R.B. No. 168 (Dec. 29, 2011), where Chairman Pearce and Member Becker expanded

on the factors announced in *Austal USA, LLC*. The union in *2 Sisters* asked the Board to order that the election be held somewhere other than the employer's premises. *Id*. at 4. The Board refused to limit the Regional Director's discretion to order an election at the employer's premises if, in his discretion, he deemed it appropriate. *Id*. It did, however, "elaborate further on the considerations that should guide the Regional Director's exercise of discretion" when evaluating a request for neutral sites. *Id*. at 5-7.

With respect to the first factor—the requests of the parties—the Board noted that the petitioner's objection to a rerun election being held on the employer's premises, without more, was a relevant consideration. *Id*. at 5. The majority rejected the dissent's assertion that the petitioner's preference was dispositive, instead stressing that it was only one consideration. *Id*. at n.17. The Board held that the Union's "generally applicable" objection to holding the election on the employer's premises based on the allegation that the employer was "decided[ly] not neutral" was a factor "entitled to weight[]" without regard to prior employer misconduct. *Id*. However, where the employer had engaged in prior misconduct, that evidence could be considered in the second factor articulated in *Austal USA, LLC*. *Id*.

The majority also discussed the third factor: "the advantages available to the Employer over other parties . . . if the election is conducted on premises it owns or otherwise controls." *Id*. at 6. After noting that employers could lawfully exclude non-union representatives from its premises, even on election day, and campaign up to the "last, most telling word," the Board stated that "holding an election on the employer's premises raises questions about the parties' relative opportunities to campaign." *Id*. The Board required the Regional Director, on remand, to consider these concerns and the fairness of the election. *Id*. at 7. Finally, the Board reiterated the fourth factor to be considered, including whether an alternative site provided accessibility to employee-voters and equal access to and control over the site. *Id*. at 7-8.

Member Hayes, in dissent, stated that "[t]he longstanding Board preference for holding on site *any* representation election—not just rerun elections—has now been eliminated by the vote of two Board Members responding to a single paragraph argument by the Petitioner's counsel." *Id*. at 15. The dissent also described the majority's opinion as "surpassingly strange to premise a change in the requirements for resolving disputes about where to hold a Board election on the prospect that an employer might exercise *its legal right* to communicate with employees on a question concerning representation." *Id*. (emphasis added).

It is doubtful that we have heard the last word on how regional directors should exercise their discretion over requests to hold elections on neutral sites. While both *Austral USA* and *2 Sisters* arose in the context of rerun elections, as Member Hayes notes, the majority opinion in *2 Sisters* does not limit its concerns with employer participation in elections to issues that arise in only rerun elections. And, as unions continue to seek neutral sites for elections, the issue is likely to find its way back to the Board in the near future.

2. Eligibility Issues

Few issues are before the Board as consistently as questions over eligibility of individual employees or classes of employees to vote in elections. Though the most groundbreaking decisions on eligibility issues involve the election rule and the Board's new unit appropriateness

standard in *Specialty Healthcare*, *see* Sections II.B.2, II.F, *supra*, the Board has addressed independent contractor issues, supervisor issues, and the eligibility of seasonal employees in the last few months.

a. Independent Contractor Issues

In *Lancaster Symphony Orchestra*, 357 N.L.R.B. No. 152 (Dec. 27, 2011), a Board majority reversed the Regional Director and found that the musicians in the petitioned-for bargaining unit were "employees" of the Orchestra under Section 2(3) of the Act, rather than independent contractors. Applying the multi-factor common-law agency test, the majority found that the factors either weighed in favor of employee status or pointed in no clear direction. Therefore, the Orchestra was unable to meet its burden under *BKN, Inc.*, 333 N.L.R.B. 143, 144 (2001), of proving that the musicians should be excluded from the Act's protections.

Of all the factors the majority considered, the one most heavily weighing in favor of employee status was the Orchestra's right to control the musicians' job performance. Not only did the Orchestra determine which music was played and how it would be performed, it also determined which musicians would play the music and how those musicians would prepare. The Orchestra also imposed behavior and dress guidelines, which were enforced on the musicians through discipline. The majority rejected the position—taken by the Regional Director and Member Hayes in dissent—that the musicians' ability to decide which performances to accept equated to control over their own schedules. Though the musicians could sign up for certain performances, they had no control over their work or time after they sign up because "the music director has complete and final authority over how the musicians perform at both rehearsals and concert performances." *Lancaster Symphony Orchestra*, 357 N.L.R.B. No. 152 at 4.

Three other factors influenced the majority's conclusion that the Orchestra was unable to show that the musicians were independent contractors. First, the musicians enjoyed no entrepreneurial opportunity as a result of their relationship with the Orchestra because the Orchestra unilaterally established a set fee and paid the musicians that fee for a set number of rehearsals and performances. The majority's analysis was not altered by the musicians' ability to earn more by requesting to work more performances or to work for other orchestras. The majority likened the former to employees volunteering for overtime and the latter to part-time and casual employees, all of whom are covered employees under the Act. *Id*. at 5. Second, the musicians' services were part of the Orchestra's regular business, the success of which depended on those services. Without the musicians, the Orchestra would not be able to conduct its business. *Id*. Third, because the musicians' pay was based on the time they spent in rehearsal and performance, rather than simply on completing a job, their "payment scheme approximate[d]" a traditional hourly wage. *Id*. at 6 (citing *Roadway Package Sys.*, 326 N.L.R.B. 842, 852 (1998); *Am. Broad. Co.*, 117 N.LR.B. 13, 18 (1957)).

Because the remaining factors (including the fact that the musicians signed a one-year agreement indicating their status as independent contractors) pointed "in no clear direction," *id*., the majority found that the overall weight of factors established an employer-employee relationship between the musicians and the Orchestra.

Member Hayes's dissent disagreed with the majority's "strained application" of the multi-factor test because the majority failed to consider "nuances" in Board treatment of the "creative professions," as well as certain "practical realities" inherent in the musical performance industry. *Id*. at 7. His disagreement centered on the control factor, arguing that the Orchestra's artistic control was merely "related to the end product" rather than evidence of control over the creative process. *Id*. at 8.

b. Supervisory "Authority" Issues

In *Entergy Mississippi, Inc.*, 357 N.L.R.B. No. 178 (Dec. 30, 2011), the Board affirmed the Acting Regional Director's decision to deny an employer's unit clarification petition, holding that the electric utility dispatchers at issue were not statutory supervisors under the standard articulated in *Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686 (2006). Though *Oakwood Healthcare* clarified definitions vital to the Section 2(11) supervisory analysis, the employer in *Entergy* argued that the Board should return to the standard from *Big Rivers Electric Corp.*, 266 N.L.R.B. 380 (1983). The Board rejected this argument, stating that "a reversion to *Big Rivers* . . . is unwarranted," as it would "ignore the significant doctrinal developments in this area of law." *Entergy*, 357 N.L.R.B. No. 178 at 5.

Applying *Oakwood Healthcare*'s definition of "responsibly to direct," the Board found that the dispatchers were accountable only for their own work, rather than the work of the field employees they directed. *Id*. at 5–7. Applying *Oakwood Healthcare*'s definition of "assign," the Board found that the dispatchers failed to exercise independent judgment in assigning employees to a place, that the employer's testimony was speculative as it concerned the dispatchers' ability to require field employees to perform overtime work, and that the dispatchers' ability to reassign work was merely "ad hoc instruction" rather than the assignment of "significant overall duties." *Id*. at 7–8. Thus, the employer's evidence was insufficient to establish that the dispatchers were supervisors under the Act.

In *DirecTV U.S. DirecTV Holdings LLC*, 357 N.L.R.B. No. 149 (Dec. 22, 2011), a Board majority of Chairman Pearce and Member Becker held that field supervisors lacked the authority to "effectively recommend" discipline and thus were not supervisors within the meaning of Section 2(11) of the Act. Although the field supervisors possessed the authority to initiate the disciplinary process for performance issues or infractions, this first step was subject to three levels of management review during which reviewers could change a field supervisor's language, alter the level of recommended discipline, or decide that discipline was unwarranted entirely.

The majority noted that "[t]he authority to 'effectively recommend' an action generally means that the recommended action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed." *Id*. at 3 (internal quotation marks and citation omitted). Furthermore, a supervisor's involvement "must not only initiate, or be considered in determining future disciplinary action, but also it must be the basis of later personnel action without independent investigation or review by other supervisors." *Id*. at 3 (quoting *Phelps Cmty. Med. Ctr.*, 295 N.L.R.B. 486, 490 (1989)). Even assuming that the field supervisors' recommendations were usually followed, the majority found that the three-level review included independent investigation by management and that the field supervisors' recommendations impacted neither employee job status nor tenure. As a result, the majority

concluded that the employer failed to meet its burden under *Oakwood Healthcare* of establishing that the field supervisors possessed any statutory indicia of supervisory authority.

In dissent, Member Hayes stated that the mere existence of a three-level review process "does not negate that the field supervisor 'effectively recommends' discipline." *Id*. at 4. The majority responded by emphasizing that the employer failed to produce any evidence that the reviewing managers simply accepted, without investigation, the field supervisors' disciplinary recommendations. This "absence of evidence . . . warrants a conclusion that the field supervisors do not effectively recommend discipline." *Id*. at 3 n.11.

c. Seasonal Employees

In *Flat Rate Movers, Ltd.*, 357 N.L.R.B. No. 112 (Nov. 16, 2011), the Board adopted the ALJ's recommendation to sustain challenges to the representation election ballots of 57 seasonal employees. The seasonal employees were foreign college students who worked for Flat Rate Movers during the summer of 2009 as part of the J1 Visa program. Though the seasonal employees performed the same work under similar conditions of employment as Flat Rate's permanent employees, the ALJ found that the seasonal employees did not share a community of interest with the bargaining unit employees. The ALJ's conclusion stemmed from "the principle test" concerning whether seasonal employees are eligible to vote: whether they have "a reasonable expectation o[f] reemployment in the foreseeable future." *Id*. at 12 (citing *L & B Cooling, Inc.*, 267 N.L.R.B. 1 (1983)).

Multiple circumstances surrounding the foreign college students' employment established that reemployment was not reasonably foreseeable. The work was the type that university students would temporarily perform to pay for school or for a trip to the United States but not the type they would likely seek as permanent employment upon graduation. Even if the students had intended to return to work for Flat Rate, the rules of the visa program permitted them to visit and work in the United States only if they had a sponsor and even then for no more than four months. The J1 Visa was not even available to them after graduation; they would need to obtain a green card to work for Flat Rate again. Flat Rate also had a high rate of turnover among its seasonal employees. Therefore, the Board adopted the ALJ's recommendation that the seasonal employees' ballots remain unopened and uncounted because they did not share a community of interest with other employees in the unit and thus were excluded from the election.

3. Interference with Elections

The Board in late 2011 issued a number of decisions setting aside elections based on employer misconduct, including implied promises of benefits and promises to remedy grievances. In *G & K Services, Inc.*, 357 N.L.R.B. No. 109 (Nov. 7, 2011), a Board majority set aside a decertification election based on the employer's communication with employees, shortly before the election, telling them that employees at another facility received family health insurance coverage shortly after voting to decertify their union. The Board reasoned that the letter conveyed an implied promise of benefit and was not merely a benefit comparison or report of a historical fact. In particular, the majority reasoned that the letter drew a direct parallel between the two decertification votes so that employees "would reasonably interpret the paragraph as a

promise that they too would receive the option to elect family coverage if they similarly voted to decertify the Union." *Id*. at 2.

Contrary to the ALJ's finding, the Board concluded that the paragraph was not in response to employee questions because the employer presented only "vague testimony" that employees asked "a lot of questions around specific benefit coverages." *Id.* The Board also rejected the employer's attempt to disclaim "any promises," finding that such a disclaimer is "immaterial" where an employer expressly or impliedly indicates that specific benefits will be granted. *Id.* at 3.

The Board distinguished *Viacom Cablevision*, 267 N.L.R.B. 1141 (1983), in which the Board held that an employer lawfully responded to specific requests for wage information by providing only wage comparisons. In addition, the *Viacom* letters that did mention benefits compared benefits to a third, unionized location, rather than to the voting employees' benefits. *Id*. at 3. Member Hayes, in dissent, concluded that the paragraph in issue did not contain an implied promise because it was merely a recitation of "historical fact." *Id*. at 4.

In *Sweetwater Paperboard*, 357 N.L.R.B. No. 142 (Dec. 19, 2011), the Board set aside an election where, during the weeks preceding the vote, the employer solicited employee grievances and promised to remedy them. The employer, after learning of the upcoming vote, hired a labor consultant who began a process of holding weekly, mandatory meetings for small groups of all employees. During one of the meetings, the consultant told employees that the company would address an unpopular manager, who was then terminated two weeks before the election. The Board concluded that, "in the absence of a previous practice of doing so, an employer's solicitation of grievances during an organizational campaign is objectionable when the employer expressly or impliedly promises to remedy those grievances." *Id*. at 2.

The Board may continue to consider the permissibility of employer statements during unionization regarding an employee's right to directly file grievances. In *Dish Network Corp.*, 358 N.L.R.B. No. 29 (Apr. 11, 2012), the Board affirmed an ALJ's decision that the employer did not violate Section 8(a)(1) by informing employees that if they selected a union, they would be limited in bringing concerns to management. *Id*. at n.1. Members Hayes, Flynn, and Block concluded that the employer's statement was permissible under current Board law as reflected in *Tri-Cast, Inc.*, 274 N.L.R.B. 377 (1985), which held that "there is no threat, either explicit or implicit, in a statement which explains to employees that, when they select a union to represent them, the relationship that existed between the employees and employer will not be as before." *Id.*

Member Block, in a concurring opinion, encouraged the Board to revisit *Tri-Cast* in an appropriate case. 358 N.L.R.B. No. 29 at 1. She noted that "*Tri-Cast* has come to stand for the proposition that almost any employer statement involving the impact of unionization on employees' ability to individually pursue grievances is permissible." *Id*. Member Block noted that prior to *Tri-Cast* the Board had "consistently held" unlawful employer statements indicating that employees would lose their existing right to speak directly to management if they selected a union. *Id*. at 2. When the Board issued its *Tri-Cast* decision, it relied in part on *Eagle Comtronics*, 263 N.L.R.B. 515 (1982), which set the standard for employer statements regarding strike replacements. Member Block observed that while *Eagle Comtronics* held that employer

statements were permitted, it contained a qualification that "the employer may not threaten to deprive employees of existing rights as a consequence for striking." *Id*. Member Block encouraged the Board to revisit *Tri-Cast* and consider including a similar qualification for employer statements with respect to grievances. *Id*.

The Board also addressed the potentially-unlawful impact of management hiring during an election period. In *Newburg Eggs, Inc.*, 357 N.L.R.B. No. 171 (Dec. 31, 2011), the Board agreed with the ALJ that the employer violated the Act by announcing prior to an election the hiring of a bilingual human resources manager to improve workplace communication. Importantly, the employer's president and CEO presented the bilingual human resources manager to the employees as "a solution to the problem." *Id*. at 2. The Board concluded that employees could reasonably construe the comments as an announcement of improved working conditions in violation of Section 8(a)(1). Member Hayes dissented, stating that employers may lawfully hire someone to improve communication within the workplace.

The Board disagreed with the ALJ in *Newburg Eggs* on two other contentions. First, the Board rejected the finding that the employer engaged in objectionable conduct by promising employees future unspecified benefits if they voted against representation. In particular, the Board reasoned that the president and CEO did not make any specific promises of benefits and emphasized that no additional benefits would be forthcoming. *Id*. at 3. Second, the Board rejected the ALJ's interpretation of employer comments that, regardless of union representation, "[t]he operation [of the company] remains in the hands of the company." *Id*. The Board found that the comments did not express any futility of collective bargaining. Rather, the statements "conveyed descriptions of some of the parameters of good-faith bargaining." *Id*.

4. Obligations to Provide *Excelsior* Lists

Excelsior lists have received renewed attention from both the public—largely as a product of the discussions surrounding the election rulemaking—and from the Board in three opinions issued since August 2011. In perhaps the most controversial decision, the Board set aside an election where the employer timely filed the *Excelsior* list with the Region, but the Region failed to provide the list to the Union in a timely fashion. *See Ridgewood Country Club*, 357 N.L.R.B. No. 181 (Jan. 3, 2012).

In *Ridgewood*, the Board's inquiry focused on whether the Union's late receipt of the list interfered with the purpose behind the *Excelsior* rules. Because the Region's error resulted in the Union having the list for less than the ten days required by *Mod Interiors, Inc.*, 324 N.L.R.B. 164 (1997), the Board presumed the Union suffered prejudice. Because "prejudice will exist in almost every case" where a union does not have the list for at least ten days, the Board held that the Union was not required to show prejudice. 357 N.L.R.B. No. 181 at 1. Member Hayes's dissent disagreed with this automatic presumption, arguing that the Union should bear the "ultimate burden" of proving "objectionable interference" with its ability to communicate with potential bargaining unit employees. *Id*. at 4. Member Hayes would have required the Union to show that it took affirmative steps to procure the list in time, that it attempted to postpone the election once it received the list, and that the delay significantly impacted its communications with employees.

The Board countered the dissent in dicta by stating that, even if a showing of prejudice were required, the Union was indeed prejudiced by its late receipt of the list. It found that the Board had already "explicitly rejected" the requirement that a Union show "tangible evidence" that it was prejudicially prevented from taking certain actions because of the time it received the list. *Id*. at 2 (citing *Alcohol & Drug Dependency Servs.*, 326 N.L.R.B. 519 (1998)). Also in dicta, the Board rejected requirements that would have made the objecting party (1) prove that it took reasonable steps to timely obtain the list, and (2) request that the election be delayed to preserve its objection.

The Board in another case upheld an election where a region again failed to provide the list in a timely manner but the Union had possession of the *Excelsior* list for at least ten days. *See CEVA Logistics U.S., Inc.*, 357 N.L.R.B. No. 60 (Aug. 24, 2011). In *CEVA Logistics*, as in *Ridgewood*, the employer complied with the *Excelsior* requirement but the Region failed timely to provide the list to the Union. However, the Union still had full use of the list for thirteen days before the election. Because the Union "had ample time to communicate" with the members of the bargaining unit, the Board agreed with the Regional Director that there was no evidence of interference or prejudice. *Id*. at 4.

Finally, in *Automatic Fire Systems*, 357 N.L.R.B. No. 190 (Jan. 3, 2012), the Board set aside another election because the employer submitted an incomplete *Excelsior* list. The election was conducted pursuant to a Stipulated Election Agreement that established voting eligibility requirements including a *Steiny/Daniel* formula. The employer's list omitted eight *Steiny/Daniel* employees, an amount that equaled 36 percent of all eligible voters. The Board's analysis followed the approach set forth in *Woodman's Food Markets*, 322 N.L.R.B. 503, 504 (2000), which articulated a non-exclusive list of factors to consider before setting aside an election.

Because application of this approach should be "comprehensive" and "flexible," the Board rejected the employer's argument that an election should be set aside only if the number of omitted employees could be determinative. *Automatic Fire Sys.*, 357 N.L.R.B. at 1-2. Instead, the majority found that a high percentage of employees were omitted, that the number of omitted employees combined together with the challenged voters was potentially outcome-determinative, and that the employer's decision to intentionally breach a binding agreement by omitting the *Steiny/Daniel* voters raised "a serious question of bad faith." *Id*. at 2. Member Hayes concurred with the majority's result but disagreed on the issue of employer bad faith.

5. Misrepresentations In Election Materials

In *Somerset Valley Rehabilitation & Nursing Center*, 357 N.L.R.B. No. 71 (Aug. 26, 2011), a Board majority held that a union campaign flyer did not amount to unlawful misrepresentation even though it contained quoted statements that no employee had actually made or authorized. The front and back of the flyer included the words "We're Voting Yes for 1199SEIU!" between group photographs of employees. *Id.* at 1. The Union had obtained signed releases and statements from employees authorizing the use of their pictures and comments. Though many employee comments included the phrase, "I'm voting yes," none included the exact phrase quoted on the flyer. As a result, the employer argued that the quotes were unlawful misrepresentations that deceived voters and warranted a new election.

Applying the "well-established standard" from *Midland National Life Insurance Company*, 263 N.L.R.B. 127 (1982), the Board rejected the employer's argument. It found neither forgery nor "pervasive misrepresentation" or "artful deception" that would have misled employees. *Somerset Valley*, 357 N.L.R.B. at 1–2. A reasonable employee would not be tricked into thinking that all of the employees depicted on the flyer literally said "We're voting yes" in unison.

Member Hayes dissented from what he viewed as the majority's speculative reasoning. He would have set aside the election results because the Union used "fabricated quotes" with no prepublication efforts to verify them. *Id*. at 3. He also saw this as an impingement on the misquoted employees' rights to refrain from making those statements. The majority rejected this "unrealistic burden" and pointed out that the Union's collection of signed releases amounted to prepublication verification. *Id*. at 2.

The Board again applied *Midland National Life* in *Enterprise Leasing Company—Southeast, LLC*, 357 N.L.R.B. No. 159 (Dec. 29, 2011), and again found no unlawful misrepresentation. A union campaign flyer included photographs of multiple employees. The Union did not obtain authorization to use the photograph of one of the employees depicted. The employer objected to this unauthorized use but presented no evidence that the employee objected to the use of his photograph or that he opposed the Union. However, the Board found no forgery or pervasive misrepresentation and found that voters "could easily identify the flyer as union campaign propaganda." *Id*. at 2. In light of these findings, and even assuming that a "reasonable" employee would understand that the flyer suggested the depicted employees authorized the use of their images, the Board concluded that this misrepresentation was not objectionable. *Id*. at 1. Member Hayes's dissent relied on two cases involving employer campaign videos, but the Board found these to be inapposite because Board case law establishes different standards for union and employer coerciveness in this context.

B. Protected Activity

While prior Boards, particularly under Chairman Liebman, used Board decisions to expand the reach of protected concerted activity, the Board's recent decisions seem to take a more passive approach to expanding the scope of *what* is considered protected activity. As discussed elsewhere in this paper, the current Board seems more interested in addressing *where* protected activity can occur, *see* Sections II.D (social media), IV.C (access), *who* can engage in protected activity, *see* Sections II.B.2 (notice posting), IV.C.3 (discussions of contractors rights as "employees"), and *how* and *when* the Board can protect the relationships in which protected activity occurs. *See* Sections II.E (2011: Year of the Bar), IV.D (obligations to bargain).

1. Policies Restraining Protected Activity

In *The Roomstores of Phoenix, LLC*, 357 N.L.R.B. No. 143 (Dec. 20, 2011), the Board adopted the ALJ's conclusion that an employer's policies prohibiting, among other things, "any type of negative energy or attitudes" among employees violated Section 8(a)(1) of the Act. Management used this policy to prohibit employees from complaining about mandatory discounts that reduced the employees' sales commissions. Other policies found to violate the

Act included prohibitions against: colluding with another employee to violate company policy; attempting to encourage a fellow employee to terminate his or her employment; and outside activity that conflicted with the company's interests, could cause criticism of the company, or could adversely affect the company. The ALJ concluded that these rules were overbroad, ambiguous, and chilled the employees' exercise of their Section 7 rights. *Id*. at 14-17.

In adopting the ALJ's conclusions, the Board emphasized that such policies or rules "cannot be considered in isolation," a phrase frequently seen in the Acting General Counsel's memoranda on social media policies. *See* Section II.D, *supra*. Rather, the Board noted that the relevant inquiry applies *Lutheran Heritage* to determine "how a reasonable employee would interpret the action or statement of her employer." 357 N.L.R.B. No. 143 at 1. For example, an employee would reasonably interpret the "negativity" rule as banning protected activity because the employer had repeatedly used it to warn employees against discussing mandatory discounts, which affected wages. The Board distinguished this case from *Hyundai America Shipping Agency*, 357 N.L.R.B. No. 80 (Aug. 26, 2011), where "there was no evidence . . . that the employer had previously linked the requirements . . . with workplace discussions." *Id*. at 1 n.3.

2. Restrictions on Wearing Union Insignia

In *Saint John's Health Center*, 357 N.L.R.B. No. 170 (Dec. 30, 2011), the Board concluded that a hospital violated the Act by prohibiting nurses from wearing ribbons that stated "Saint John's RNs for Safe Patient Care." While the ALJ applied the general rule that a hospital's restriction on solicitation or insignia in immediate patient care areas is presumptively valid, the Board reversed because of the selective nature of the hospital's ban. *See id*. at 2. Specifically, the hospital had previously allowed employees to wear ribbons and buttons, including other union ribbons, reading "Respect and Dignity," "Saint John's Nurses—the Heart of Healthcare," and "Saint John's mission is patient safe care" in immediate patient care areas. *Id*. at 1. The Board refused to apply the presumption of validity, holding that the presumption does not apply to "selective" bans, and required the employer to justify the ban given its practice of allowing other buttons or ribbons. *Id*. at 2.

Because the rule was not presumptively valid, the hospital could only justify the ban on union ribbons if it could show "special circumstances," meaning that the ban was "'necessary to avoid disruption of health-care operations or disturbance of patients.'" *Id*. (quoting *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 507 (1978)). The hospital was unable to prove that patients were aware of the union campaign or disturbed by the buttons and, as a result, the Board found that the restriction violated Section 8(a)(1) of the Act. Member Hayes dissented in part, finding that the ban was presumptively valid because it applied only to ribbons that criticized the safety of patient care and only in immediate patient care areas. *Id*. at 7-8.

3. Threats to Lock Out and Permanently Replace Employees For Failing To Accept Bargaining Positions

The Board in *Harborlite Corp.*, 357 N.L.R.B. No. 151 (Dec. 22, 2011), found that an employer did not violate Sections 8(a)(3) and (1) when it locked out its employees and threatened them with permanent replacement, where the employer later informed the Union that the replacements were temporary. After the parties had engaged in bargaining, the employer

submitted a final offer and informed employees that, unless they accepted the offer, the employer would lock the employees out and permanently replace them.

The employees subsequently rejected the final offer and the employer initiated its lockout, again stating that it planned to hire permanent replacements. *Id*. at 2. Two days after the lockout began, the employer informed the Union that its replacements would only be hired temporarily "to show that the Company is being more than reasonable." *Id*. Although the Board noted that *permanent* replacements are impermissible in a lockout, the employer effectively withdrew its unlawful threat to hire permanent replacements by informing the employees that all replacements would be temporary. *Id*. Given the withdrawal of the threat and the fact that the employer clearly stated that employees were not being permanently replaced, the Board majority of Members Becker and Hayes concluded that the employer did not engage in conduct inconsistent with a lawful lockout. *Id*. at 3.

Chairman Pearce dissented, noting that the employer attempted to make "a gesture of good will" and "an effort to [be] more than reasonable" by foregoing the option to hire permanent replacements, which would have been unlawful. *Id*. at 4-5. He also noted that the letter could have been interpreted to perpetuate, rather than withdraw, the threat. *Id*. at 5.

C. Access Issues

1. Access for Off-Duty Employees

The Board reaffirmed its *Tri-County Medical Center* standard for maintaining access rules barring off-duty employees from accessing the employer's property in *Saint John's Health Center*, 357 N.L.R.B. No. 170 (Dec. 30, 2011). There, the Board found that an access policy was facially invalid under the Act and also found a violation of the Act in the application of the unlawful policy to two off-duty employees. *Id*. at 3-5.

Saint John's Health promulgated a policy that generally prohibited off-duty employees from accessing the hospital's property, but contained an exception for attendance at "Health center sponsored events, such as retirement parties and baby showers." *Id*. at 3. The Board found that the policy violated the Act based on its holding in *Tri-County*, which held that an off-duty access policy will only be lawful if it: "(1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off duty employees seeking access to the plan *for any purpose* and not just to those employees engaging in union activity." 357 N.L.R.B. No. 170 at 3-4 (quoting *Tri-County Med. Ctr*., 222 N.L.R.B. 1089, 1089 (1976)) (emphasis added).

The Board found that the exception for "retirement parties and baby showers" meant that the policy did not prohibit access "for any purpose" and thus failed *Tri-County*'s third prong. The Board majority stressed that "any purpose" meant *any* purpose, explaining that "if off-duty employee access is not sufficiently prejudicial to 'production and discipline' to warrant, in the employer's judgment, a uniform ban, neither does it warrant the infringement of a fundamental statutory right." *Id*. at 5. Accordingly, the Board found that the policy was unlawful under the Act. *Id*. Member Hayes dissented to the Board's decision, which he noted penalized employers for allowing exceptions to rules barring access. *Id*. at 10.

2. Repromulgation and Enforcement of Access Policies

The Board's *Fremont-Rideout Health Group* decision should serve as an important reminder to employers who have, but fail to enforce, a policy regarding access to private property. *See Fremont-Rideout Health Group*, 357 N.L.R.B. No. 158 (Dec. 30, 2011). Fremont Medical Center had maintained for over twenty years a policy forbidding solicitation and distribution of literature on company property at any time for any purpose by individuals not employed by Fremont. *Id*. at 4. Like many employers, however, Fremont Medical Center failed to uniformly apply the policy and, up until August 2007, had regularly allowed union representatives to access the property to conduct union business. *Id*. at 5.

Fremont Medical Center and the Union representing its nurses bargained for a new agreement during most of 2007 and, when bargaining failed, the Union went on strike in August 2007 and again in October 2007. *Id*. The Board majority of Chairman Pearce and Member Becker concluded that in August 2007—around the same time that union activity intensified at Fremont Medical Group—the employer "repromulgated" its access policy, including ejecting a number of non-employee representatives and notifying the Union of new requirements the Union must meet before being granted access to the property. *Id*. at 5. Member Hayes dissented on the basis that the changes to the access policy were not as significant as described by the majority. *Id*. at 10.

The Board majority considered the repromulgation and increased enforcement of the access policy to be "an unlawful attempt to retaliate against employees' stepped-up union activity leading up to and following the August strike." *Id*. at 5. The Board noted that it was unlawful to both (1) promulgate an otherwise valid rule to interfere with employees' right to self-organization and (2) repromulgate a rule that was not previously enforced in retaliation for employees' union or other protected Section 7 activity. *Id*. Fremont Medical Center failed to provide a legitimate explanation for the timing of the change in enforcement. *Id*.

As a result of *Fremont-Rideout*, employers should review the ways in which they are currently enforcing their policies. Unfortunately, such a review is often conducted only after union activity has begun, prohibiting the employer from modifying or increasing enforcement of the policy absent "a legitimate explanation for the timing of the change in enforcement." *Id*.

3. Contractor Employee Access to Private Property

Few cases have been pending at the Board as long as the *New York New York* litigation that addressed the rights of contractor employees to access the private property of non-employer owners. *See New York New York, LLC*, 356 N.L.R.B. No. 119 (Mar. 25, 2011). Last spring, while the case was on remand to the Board from the D.C. Circuit, the Board announced "an accommodation between the contractor employees' rights under Federal labor law and the property owner's state-law property rights and legitimate managerial interests." *Id*. at 1. The accommodation reached by the Board in *New York New York* provides:

> [T]he private property owner may lawfully exclude such employees only where the owner is able to demonstrate that their activity significantly interferes with his use of the property or

> where exclusion is justified by another legitimate business reason, including, but not limited to, the need to maintain production and discipline . . . . Thus, any justification for exclusion that would be available to an employer of the employees who sought to engage in Section 7 activity on the employer's property would also potentially be available to the nonemployer property owner, as would any justification derived from the property owner's interests in the efficient and productive use of the property.

Id. at 13.

The Board concluded that this was the appropriate balance because the employees were exercising their own Section 7 rights, rather than exercising derivative rights of other employees, minimizing the concerns applicable to nonemployee organizers or "strangers" that justified the Supreme Court's holding in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). The Board also voiced concern that restricting the employees' access to their regular worksite would impinge their ability to engage in Section 7 activity without any consideration of whether the limitation was necessary to protect the landowner's property interests. 356 N.L.R.B. No. 119 at 6.

The Board also considered the rights of New York New York, but concluded that it could protect its operational and property interests through its contractual relationship with Ark, the employees' employer. *Id*. at 11. The Board went on to note that "such a relationship ordinarily permits the property owner to quickly and effectively intervene, both through the employer and directly, to prevent any inappropriate conduct by the employer's employees on the owner's property." *Id*.

New York New York sought review in the D.C. Circuit, but the Court denied the petition for review and enforced the Board's order. *See New York-New York, LLC v. NLRB*, --- F.3d ----, 2012 WL 1292568 (D.C. Cir. Apr. 17, 2012) ("*NYNY*"). The Court reiterated that both the Supreme Court and the NLRA gave the Board the discretion to decide how to treat employees of onsite contractors for purposes of balancing employee rights and private property interests. *Id*. at 2. The Court concluded that the Board properly exercised its discretion and that New York New York's "beef is really with this Court's prior panel decision" by which the panel was bound, absent *en banc* review. *Id*.

The Board recently applied its *NYNY* decision in *Simon DeBartolo Group*, 357 N.L.R.B. No. 157 (Dec. 30, 2011), where the Board concluded that Simon violated Section 8(a)(1) by prohibiting its maintenance contractor's employees from engaging in organizational handbilling at two of Simon's shopping malls. *Id*. at 1. Simon, on multiple occasions, excluded off-duty contractor employees from handbilling on sidewalks, parking lots and other exterior, nonworking areas around Simon's malls. *Id*. at 1, 2. The Board noted that under *NYNY*:

> [T]o prevent contractors' employees from engaging in otherwise protected conduct on its property under circumstances when it could not lawfully restrict comparable conduct by its own employees, the owner must demonstrate that the greater restrictions are justified by a heightened risk of disruption or

> interference with its use of the property created by the fact that contractors' employees, rather than its own employees, are engaged in the conduct.

Id. at 2.

Simon asserted that it had legitimate interests in being concerned with activities on mall property that "could" interfere with tenant rights or lead to accidents or property damage. *Id*. at 3. It also asserted that, while it was not required to show that handbilling causes actual disruption, "[c]ommon sense" demonstrated that the mall's "reputation would be impacted" by the allegations contained on the Union's handbills. *Id*. The Board, however, rejected "[t]he abstract and generalized concerns expressed by Simon." *Id*. It also rejected Simon's argument that the multi-tenant, mixed-use nature of the facility could pose a heightened risk of disruption if multiple entities sought to engage in handbilling in nonwork areas. *Id*. The Board noted that there was no evidence that Simon had actually excluded the employees on that basis and that, in any event, such a "blanket prohibition" would not be reasonable or narrowly tailored. *Id*.

Dissenting Member Hayes reiterated his objections to the Board's decision in *NYNY* and the effect of that decision as applied to Simon. He noted that *Simon* "illustrates the fallacy of defining the majority's *NYNY* decision as a 'balancing test'" because there is no consideration given to the availability of alternative means for communicating the contractor employees' message. *Id*. at 7.

The Board also applied *NYNY* in *Reliant Energy*, 357 N.L.R.B. No. 172 (Dec. 30, 2011), where it found that Reliant violated Sections 8(a)(1) and (3) of the Act by removing a subcontractor's employee, who was a well-known union official, from its property for engaging in union activity. Employees frequently consulted with the union-official employee while he was onsite working, but the official had kept his conversations brief and never allowed the union activity to interfere with his working time. *Id*. at 1-2. When Reliant received reports that the employee was engaging in solicitation and distribution, it had him removed from the property. *Id*. at 2.

The Board applied *NYNY*'s holding that employees of subcontractors are still "employees" for purposes of the Act and that "'a statutory "employer" may violate [the Act] with respect to employees other than his own.'" *Id*. at 3 (quoting *Hudgens v. NLRB*, 424 U.S. 507, 510 n.3 (1976)). The Board, however, noted that Reliant's property rights were not implicated because the employee was not seeking access to the worksite to engage in organizational activity. Rather, the employee was excluded from the property while he was already on site to perform work. *Id*. at 3.

The Board found that Reliant had no rule prohibiting solicitation and concluded that, even if it did, the employee had not engaged in solicitation and had not actually interfered with or disrupted work. *Id*. at 4 (citing *Cal Spas*, 332 N.L.R.B. 41, 56 (1996)). Accordingly, the Board concluded that Reliant violated Sections 8(a)(1) and (3) of the Act when it removed the subcontractor's employee.

Member Hayes, in dissent, noted that while he dissented in *New York New York*, he "could not have anticipated that [the Board] would travel so far and so fast" as to require a

property owner to "permit a contractor's *on-duty* employee to engage in organizational solicitation of *the property owner's employees*." *Id*. at 7. He described the opinion as a "substantial erosion of the meaningful distinction between a property owner's employees and nonemployees and the relative rights of each to access private property to engage in Section 7 activity." *Id*. The majority, in response, stressed that this was not an access rights case because the employee already had access to the property and did not allow protected activity to interfere with his work. *Id*. at 3-4

D. Developments in the Duty to Bargain

1. Obligation to Bargain Over Effects of Merger

In *Naperville Jeep/Dodge*, 357 N.L.R.B. No. 183 (Jan. 3, 2012), a Board majority of Chairman Pearce and Member Becker held that an employer failed to engage in effects bargaining in violation of Section 8(a)(5) when it closed an automobile dealership employing union mechanics and merged the mechanics into a larger non-unionized workforce of mechanics at another dealership. As a result of the merger, the previously-represented mechanics worked side-by-side with the unrepresented mechanics, and had the same supervision, terms and conditions of employment, uniforms, work assignments, skill set, training, and job functions as the unrepresented mechanics. *Id*. at 1. The employer assumed that the merger of the smaller union group into the larger nonunion group extinguished its bargaining obligation, arguing that the former union mechanics lost their separate identifiable community of interest.

The Board disagreed. The Board noted that, when analyzing whether an existing unit remains appropriate in light of changed circumstances, the Board gives significant weight to the parties' bargaining history and will presume that a unit remains appropriate absent compelling circumstances. *Id*. at 2. The Board also noted that where, as here, the employees shared supervision, terms and conditions of employment, work assignments, and skill sets, those factors would normally constitute compelling circumstances justifying departing from bargaining history. *Id*.

However, the Board noted that the similar terms and conditions of employees after the merger resulted from the employer's unlawful decision to make a number of unilateral changes to the unionized employees' terms and conditions of employment without bargaining over those changes. *Id*. The Board concluded that "[i]n determining whether an established bargaining unit retains its distinct identity, we do not consider the effects of the Respondent's unlawful, unilateral changes to the existing unit employees' terms and conditions of employment, as giving weight to such changes would reward the employer for its unlawful conduct." *Id*. Accordingly, the Board found the failure to bargain unlawful and thus the withdrawal of recognition was unlawful as well.

Member Hayes dissented on the basis that the Board's consolidation and relocation precedent did not require an employer to continue to recognize a union where the unit's separate identity was extinguished after a consolidation. *Id*. at 5. He concluded that by requiring the employer to recognize and bargain over a unit that was now inappropriate, the Board majority exceeded its authority conferred under the Act. *Id*. at 8.

2. Mandatory Subjects and Unilateral Changes

Two Board decisions in late 2011 addressed unilateral changes to terms and conditions of employment. First, in *Omaha World-Herald*, 357 N.L.R.B. No. 156 (Dec. 30, 2011), a Board majority of Members Becker and Hayes held that an employer did not violate the Act by changing its pension plan because the Union clearly and unmistakably waived its right to bargain over those changes during the term of the contract. However, a different majority of Chairman Pearce and Member Becker held that the Union did not waive its right to bargain over changes made to the 401(k) plan after the contract expired.

In regard to the pension plan, the Becker-Hayes majority reasoned that four factors supported the conclusion that the Union waived its right to bargain. First, the plan documents included reservation of rights language, which expressly provided that the "Employer shall have the right at any time to amend the Plan," including the right to "determine all questions relating to the eligibility of Employees to participate or remain a Participant . . . and to receive benefits under the Plan." *Id*. at 2. Second, language existed in the collective bargaining agreement that expressly excluded changes to the retirement plan from the parties' grievance and arbitration procedure. Third, the collective bargaining agreement provided that the employer "will advise the Union of proposed changes [to the pension plan] and meet to *discuss* and *explain* changes if requested." *Id*. (emphasis added). The majority reasoned that if the parties had intended to include a bargaining obligation, they would have used the term "bargain," as they did elsewhere in the agreement. Finally, the majority reasoned that the Union did not object to a similar, prior unilateral change by the employer during the term of the contract, suggesting that past practice was consistent with a waiver of the right to bargain.

In regard to the 401(k) plan, the Pearce-Becker majority stated that, under "well-settled" law, "the waiver of a union's right to bargain does not outlive the contract that contains it, absent some evidence of the parties' intentions to the contrary." *Id*. at 3 (quoting *Ironton Publ'ns*, 321 N.L.R.B. 1048, 1048 (1996)). Because the employer presented no evidence indicating that the parties intended the reservation of rights in the 401(k) plan documents to continue after contract expiration, the majority concluded that the Union had not waived its right to bargain over changes made to the 401(k) plan.

Second, the Board in *Smurfit-Stone Container Enterprises*, 357 N.L.R.B. No. 144 (Dec. 22, 2011), concluded that an employer's conditioning its acceptance of a plant-closure effects agreement on the Union's acceptance of a non-mandatory mid-term contract cancellation proposal violated Section 8(a)(5). The employer argued that the mid-term cancellation provision, which is usually a non-mandatory subject, was so intertwined with a mandatory subject that it became a mandatory subject. The Board disagreed, finding that the subjects were neither sufficiently intertwined nor inseparable as to "establish the requisite nexus" between mandatory and non-mandatory subjects. *Id*. at 3. Therefore, the mid-term cancellation provision was a non-mandatory subject without a reopener provision and the employer's insistence on the provision constituted a failure to bargain in good faith about the effects of the plant closure. The Board also rejected the ALJ's application of the impasse factors set forth in *Taft Broadcasting*, 163 N.L.R.B. 475 (1967), because these factors are appropriate where the parties have been bargaining in good faith. Because "conditioning agreements regarding mandatory subjects on

acceptance of a nonmandatory proposal is not good faith bargaining," the Board held that *Taft* was inapplicable. *Id*. at 4–5.

3. Impermissible Withdrawal of Recognition

In *Comau, Inc*., 357 N.L.R.B. No. 185 (Jan. 3, 2012), the Board held that an employer unlawfully withdrew recognition from the Union as the exclusive collective bargaining representative of unit employees because the disaffection petition was tainted by the employer's prior unfair labor practice. Prior to accepting the disaffection petition, the employer allegedly violated Section 8(a)(5) and (1) of the Act by implementing a healthcare plan in its final offer, even though the parties had made significant progress in the negotiations over alternative healthcare plans proposed by the union. (The Board's holding on the unlawful implementation was reversed by the D.C. Circuit. *See* Section III.A, *supra*. With regards to the withdrawal of recognition, the Board concluded that there was a substantial causal connection between the employer's unremedied unfair labor practice and the Union's loss of majority support reflected in the disaffection petition.

The Board utilized the factors announced in *Master Slack Corp*., 271 N.L.R.B. 78, 84 (1984), which directed the Board to consider (1) the length of time between the unfair labor practice and the withdrawal of recognition; (2) the nature of the illegal acts, including the possibility of their lasting effect on employees; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the conduct on employee morale, organizational activities, and membership in the union. As to the first factor, the Board noted that even though nine months had passed between the unfair labor practice and the circulation of the disaffection petition, the ongoing nature of the violation "reminded" employees throughout the nine-month period of the violation. *Id*. at 3. As to the second and third factors, the Board reasoned that the unfair labor practice affected nearly all unit employees and directly impacted their compensation, which undermined the employees' confidence in the Union. Finally, the Board found sufficient evidence to demonstrate that implementation of the new insurance plan appeared to directly impact employees' support for the Union.

In rejecting the employer's contention that disaffection arose prior to, and independent of, the unlawful conduct, the Board noted that it will "only examine the factors that were actually relied upon by an employer when determining the adequacy of an employer's defense to a withdrawal of recognition allegation." *Id*. at 5. As a result, the existence of prior decertification petitions was of no consequence because the notice to employees that the employer was withdrawing recognition from the Union was not based on other evidence of disaffection arising prior to the employer's unfair labor practice.

In a partial dissent, Member Hayes stated that he would have found insufficient evidence that the employer's unfair labor practice caused the Union's subsequent loss of majority support, and that it is at least as likely that the Union's loss of support was caused by its poor performance as a bargaining representative. It is unclear what impact the D.C. Circuit's reversal in *Comau I* will have on the Board's decision regarding the withdrawal of recognition.

4. Obligations to Provide Information

The Board in *Piggly Wiggly Midwest, LLC*, 357 N.L.R.B. No. 191 (Jan. 3, 2012), addressed a union's obligation to demonstrate to an employer that requested information that was not presumptively relevant was necessary for and relevant to the union's performance of its statutory duties. The Union in *Piggly Wiggly* requested information regarding the store's sale of two unionized grocery stores to franchisees. *Id*. at 1. The Union requested the information because it believed that the franchised stores could be an alter-ego of the existing stores. *Id*. at 1. The Board majority of Chairman Pearce and Member Becker held that where a union requests information pertaining to a suspected alter-ego relationship, the General Counsel must demonstrate that, at the time of the request, the union had a reasonable belief that an alter-ego relationship existed. *Id*. However, the union is under no obligation to disclose to an employer the facts underlying their belief at the time the request is made. *Id*.

The Board majority noted that, at the time of the request, the Union informed the employer that it was investigating whether an alter-ego relationship existed, but did not disclose the facts that the Union believed supported such a relationship. *Id*. at 2. Relying on the Respondent's own statements regarding the sale, the majority concluded that "it should have been apparent to the Respondent that the Union had a reasonable basis to suspect that the franchisees and the Respondent had sufficiently similar business purposes, management, operations, equipment, supervision, and ownership to constitute alter egos." *Id*.

Member Hayes, in dissent, relied on Third Circuit precedent requiring that "a union must . . . 'do more than state the reason . . . for its request for information;' the union must instead 'apprise [an employer] of *facts* tending to support' its request for nonunit information by communication those facts to the employer in its information request.'" *Id*. at 3 (quoting *Hertz Corp. v. NLRB*, 105 F.3d 868, 874 (3d Cir. 1997)) (alteration in *Piggly Wiggly*; emphasis in *Hertz Corp*.). Member Hayes noted that many of the facts relied on by the majority and Union were facts that were routine to business transactions, including franchise agreements, and did not make it "apparent" that there could be an alter ego relationship. *Id*. at 4 & n.3.

E. Discharge and "Reemployment" of Former Strikers

In *Douglas Autotech Corp.*, 357 N.L.R.B. No. 111 (Nov. 18, 2011), a Board majority of Chairman Pearce and Member Becker held that an employer violated Sections 8(a)(3) and (1) by discharging strikers for their participation in an unlawful strike. The strike was unlawful because the Union failed to timely file a notice with the FMCS pursuant to Section 8(d)(3). After the Union offered unconditionally to return to work, the employer imposed a lockout in support of its bargaining position without reserving its rights under Section 8(d). It then continued bargaining with the Union over a successor agreement. During this bargaining process, the employer referred often to the former strikers as "employees" and assured the Union that the former strikers would return to work once a new contract was reached.

Because the strike was unlawful, the workers who participated lost their protected status as "employees" under the Act pursuant to the loss-of-status provision in Section 8(d)(4). However, "loss of status under Section 8(d)(4) is not irrevocable;" it terminates when an individual is "reemployed" by the employer. *Id*. at 4. The main issue for the Board, then, was

whether the employer's actions constituted "reemployment." Because the Board had previously found statutory reemployment where employers and unions had reached strike settlement agreements returning strikers to work, the employer argued that the absence of such an agreement here meant that the strikers had not regained their status as statutory employees.

The majority thought it "beyond dispute" that workers could be reemployed without an enforceable agreement and without actually resuming labor for the employer. *Id*. at 6. Because "a lockout presupposes the existence of an employment relationship," the majority found that the strikers' reemployment occurred—and the strikers regained the protection of the Act—at the moment the employer locked them out. *Id*. at 7. "By declaring the employees locked out, the [employer] was necessarily, as a matter of Board law, declaring them to be its employees, i.e., it was reemploying them." *Id*. at 8. The employer's post-strike conduct supported this conclusion because, up until it discharged the former strikers, the employer "evinced a clear intention to continue the employment relationship." *Id*. at 5. Because the discharges were unlawful, the majority also found that the employer violated Sections 8(a)(5) and (1) by refusing to bargain with the Union after the discharges. The majority made clear, however, that its holding was not intended broadly to expand the meaning of the "reemployment" but was rather confined "to the particular facts of this case." *Id*. at 5 n.12 & 8 n.23.

Member Hayes argued in dissent that the majority "contort[ed] the term 'reemployed.'" *Id*. at 13. He would have applied a "plain meaning" of the term, limiting it to situations where illegal strikers either resume actual work for the employer or accept an employer's express offer of reinstatement. *Id*.

F. Developments Regarding Remedies

The Board continues to find creative ways to attempt to remedy unfair labor practices. First, in *Camelot Terrace*, 357 N.L.R.B. No. 161 (Dec. 30, 2011), the Board affirmed the ALJ's order requiring employers to reimburse the Union for collective bargaining expenses, as well as reimburse both the Union and Board for investigation, preparation, and litigation expenses. The employers' exception focused exclusively on this reimbursement issue.

In connection with the bargaining expenses, the Board stated that it may impose reimbursement when "unusually aggravated misconduct" has "infected the core of a bargaining process to such an extent that their effects cannot be eliminated by the application of traditional remedies." *Id*. at 3 (internal quotation and citation omitted). Here, the employers' owner and chief negotiator severely restricted the dates and length of bargaining sessions; repeatedly cancelled and abruptly ended bargaining sessions; reneged on tentative agreements without asserting good cause; and unilaterally changed, among other things, employees' hours and wages. The Board found that this conduct was sufficiently egregious to warrant reimbursement and that traditional remedies could not adequately restore the Union's finances. *Id*. at 4.

In connection with the litigation expenses, the Board acknowledged that the "American Rule" generally requires parties to pay their own fees. Nonetheless, the employer's bad faith conduct (abrogation of settlement agreements, reliance on "transparently nonmeritorious defenses," and "outright lies under oath") convinced the Board to deviate from the general rule

and rely on its "inherent power" to protect the integrity of Board proceedings. *Id*. at 4–7. Member Hayes dissented in part, stating that the Board lacks statutory authority to impose fee shifting and, because the Board is not an Article III court, cannot invoke "inherent authority" to impose fee shifting. *Id*. at 11.

Second, in *Domsey Trading Corp.*, 357 N.L.R.B. No. 180 (Dec. 30, 2011), the Board pierced an employer's corporate veil to hold the owners personally liable for their unfair labor practices. The employer had appealed an adverse backpay judgment but ceased operations while the appeal was pending. Because the owners sold their property and transferred the proceeds to their personal accounts, no money was left for the employer to satisfy the backpay award. *Id*. at 1-2.

Applying the two-pronged test established in *White Oak Coal Co.*, 318 N.L.R.B. 732 (1995), *enforced mem*. 81 F.3d 150 (4th Cir. 1996), the Board found that (1) the employer failed to maintain a separate identity from its owners, and (2) adhering to corporate formalities would have the "foreseeable consequence" of diminishing the employer's ability to satisfy the backpay award. *Id*. at 3. Though, under the first prong, the employer operated distinctly from the owners prior to liquidation, the rapid transfer of proceeds after liquidation constituted a commingling of funds, after which the employer was "left undercapitalized and without the ability to satisfy its legal obligations." *Id*. Thus, the Board found it to be evidence of "a lack of separation" between the employer and its owners. *Id*. Member Hayes dissented, stating that the relevant inquiry should focus on whether the employer adequately maintained corporate formalities before, rather than after, it ceased operations. *Id*. at 6-7.

Finally, in *Flaum Appetizing Corp.*, 357 N.L.R.B. No. 162 (Dec. 30, 2011), the Board again addressed *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) and the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a ("IRCA"). In *Hoffman Plastic*, the Supreme Court held that IRCA "barred the Board from awarding backpay to an employee who was not authorized to work in this country." *Flaum*, 357 N.L.R.B. No. 162 at 4. The Board had previously addressed *Hoffman Plastic* in *Mezonos Maven Bakery, Inc.*, 357 N.L.R.B. No. 47 (Aug. 9, 2011). There, the Board conveyed its frustrations with the *Hoffman Plastic* decision, finding it "compelling" to deny an employer the opportunity to escape backpay, particularly where the employee had never proffered false documents and the employer knowingly employed ineligible workers. *Id*. at 4. The Board noted the possibility of creating a new remedy to address these cases, including requiring employers to contribute the backpay into a general fund that the Board could then use to make whole discriminatees where the Board had otherwise been unable to collect the backpay.

In *Flaum Appetizing*, however, the Board held that an employer asserting an affirmative defense under *Hoffman Plastic* was required to provide factual support for the affirmative defense or, at a minimum, establish a reasonable belief that it could obtain such factual support relating to specific employees. 357 N.L.R.B. No. 162 at 6. Fearing open-ended inquiries and invasive employer investigations that could undermine the policies underlying the NLRA and the IRCA, the Board concluded that a party must articulate facts supporting its affirmative defense rather than merely pleading "an affirmative defense with the mere hope of discovering evidence to support it." *Id*. at 4. Therefore, it struck the employer's affirmative defenses against various discriminatees, finding that the employer provided insufficient facts to support them. *Id*. at 7.

The Board noted a number of other contexts in which parties are required to only plead matters for which they have a reasonable belief and imposed that requirement on the *Hoffman Plastic* defense in an attempt to avoid "subjecting every employee whose rights have been violated to such an intrusive inquiry" as one regarding their immigration status. *Id*. at 7.

Member Hayes dissented, noting that while the Board may disagree with *Hoffman Plastic*, its attempt to minimize the decision through *Flaum Appetizing* is something better left for Congress through amendments to the IRCA. *Id*. at 8. Member Hayes concluded that the employer's affirmative defense was sufficient to "warrant a hearing, where a judge can determine the appropriate scope of inquiry into the discriminatees' legal resident status." *Id*. at 8.

APPENDIX
SOCIAL MEDIA POLICIES:
THE NLRB GENERAL COUNSEL'S PURSUIT OF UNLAWFUL POLICIES

LAWFUL POLICIES	UNLAWFUL POLICIES
ALJ Decisions	
ALJ found lawful a sports bar's policy supporting free exchange of information on social media but prohibiting employees from revealing "confidential or proprietary information about the employer or engaging in inappropriate discussions about the company, management, and/or coworkers." ALJ relied on Board law upholding restrictions on inappropriate statements that have a detrimental impact on a company or its reputation. *Triple Play Sports Bar & Grille*, 34-CA-12915 (Jan. 3, 2012).	
Cases Addressed in Division of Advice Memos	
Policy prohibiting use of social media "to post or display comments about coworkers or supervisors or the Employer that are vulgar, obscene, threatening, intimidating, harassing, or a violation of the Employer's workplace policies against discrimination, harassment, or hostility on account of age, race, religion, sex, ethnicity, nationality, disability, or other protected class, status, or characteristic." OM 12-31 at 16.	Hospital policy prohibiting employees from using "any social media that may violate, compromise, or disregard the rights and reasonable expectations as to privacy or confidentiality of any person or entity." OM 11-74.
Drugstore policy allowing employer to request employees "to confine their social networking to matters unrelated to the company if necessary to ensure compliance with securities regulations and other laws," and prohibiting employees from "using or disclosing confidential and/or proprietary information, including personal health information about customers or patients" and "embargoed information" on, e.g., launch or release dates. OM 12-31 at 17.	Hospital policy prohibiting "any communication or post that constitutes embarrassment, harassment or defamation of the hospital or of any hospital employee, officer, board member, representative, or staff member." OM 11-74.

LAWFUL POLICIES	UNLAWFUL POLICIES
Drugstore policy restricting communications referring to employer by name and publication of "promotional content" on social media, including content "designed to endorse, promote, sell, advertise, or otherwise support" employer's products and services, in light of FTC regulations. OM 12-31 at 17-18.	Hospital policy prohibiting statements "that lack truthfulness or that might damage the reputation or goodwill of the hospital, its staff or employees." OM 11-74.
Supermarket policy guideline precluding employees from harassing and pressuring co-workers to communicate with them on social media. OM 11-74.	Collection agency's policy prohibiting employees from making "disparaging comments about the company through any media, including online blogs, other electronic media or through the media." OM 12-31 at 4.
	Home improvement chain's policy restricting use of employer's confidential and/or proprietary information in social media communications and providing that employees should not identify themselves as the employer's employees unless they had a legitimate business need or were discussing terms and conditions of employment "in an appropriate manner." "Appropriate" not defined, and savings clause insufficient to cure the ambiguity. OM 12-31 at 7-8.
	Restaurant chain's policy prohibiting "insubordination or other disrespectful conduct" and "inappropriate conversation," as applied to Facebook postings. OM 12-31 at 9-10,
	Laboratory's policy prohibiting employees from using social media to engage in "unprofessional communication that could negatively impact the Employer's reputation or interfere with the Employer's mission or unprofessional/inappropriate communication regarding members of the Employer's community." Policy provided examples of unprotected communications (e.g., revealing trade secrets) but also included protected communications (e.g., sharing confidential business information and personnel actions). OM 12-31 at 12.

LAWFUL POLICIES	UNLAWFUL POLICIES
	Testing lab policy prohibiting employees from "disclosing or communicating information of a confidential, sensitive, or non-public [nature] concerning the company on or through company property to anyone outside the company without prior approval of senior management or the law department." OM 12-31 at 13.
	Testing lab policy prohibiting use of "company's name or service marks outside the course of business without prior approval of the law department." OM 12-31 at 14.
	Testing lab policy prohibiting employees from publishing any representation about the company, including statements to the media, media advertisements, e-bulletin boards, weblogs and voice mail, without prior approval by senior management and the law department. OM 12-31 at 14.
	Testing lab policy requiring social media communications to be made in an "honest, professional, and appropriate manner, without defamatory or inflammatory comments regarding the employer" and its officers, employees, customers, suppliers, contractors and patients. OM 12-31 at 14-15.
	Testing lab policy requiring approval for employees to identify themselves as the employer's employees in social media, and requiring employees to state expressly that their comments are their personal views and not the employer's opinions. OM 12-31 at 15.

LAWFUL POLICIES	UNLAWFUL POLICIES
	Testing lab policy allowing employer to request employees to suspend posted communications if necessary or advisable to comply with securities regulations and other laws or if in the best interests of the company, but further requiring employees to discuss any work-related concerns first with their supervisor. OM 12-31 at 15.
	Policy prohibiting "discriminatory, defamatory, or harassing web entries about specific employees, work environment or work-related issues on social media sites." OM 12-31 at 16.
	Ambulance service policy prohibiting employees from making "disparaging remarks when discussing the company or supervisors" on social media, and from "depicting the company in any media, including but not limited to the internet, without company permission" (including posting pictures with company logo or uniform). OM 11-74.
	Sports bar policy supporting free exchange of information on social media but prohibiting employees from revealing "confidential and proprietary information about the employer, or engaging in inappropriate discussions about the company, management, and/or coworkers." OM 11-74. ***But see Triple Play Sports Bar & Grille,* 34-CA-12915 (Jan. 3, 2012) (ALJ rejecting GC's argument and finding policy lawful).**
	Policy prohibiting employees on their own time from blogging on company business on personal accounts, posting anything that they would not want a manager to see or that would jeopardize their jobs, disclosing "inappropriate or sensitive" information about the employer, and posting "inappropriate" pictures or comments involving the company or its employees. OM 11-74.

LAWFUL POLICIES	UNLAWFUL POLICIES
	Supermarket guideline prohibiting employees from revealing "personal information regarding coworkers, company clients, partners, or customers without their consent." OM 11-74.
	Supermarket guideline prohibiting employees from using company's logos and photographs of the company's store, brand or products, without written authorization. OM 11-74.