



## The Evolving NLRB: Developing Social Media Concerns and Further Changes Affecting Employers

*A compilation of blog posts from Employer Law Report*



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*This eBook is a compilation of timely articles from [www.employerlawreport.com](http://www.employerlawreport.com), with the first series of articles discussing the developing perspectives of the NLRB on social media followed by a series of articles on other NLRB issues affecting employers.*

### NLRB General Counsel's Advice Memorandum in Schulte Offers a New Twist on the Old Facebook Firing Theme

Posted on November 16, 2011 by [Brian Hall](#)

Just when I started to think that I might have the answers regarding the NLRB's obsession with social media, the NLRB starts changing the questions. Not that that is always a bad thing. Just ask Schulte, Roth & Zabel.

In [Schulte](#), the charging party alleged that he was terminated for his role in employee discussions about the employer's allegedly unlawful overtime policy. Schulte, however, contended that it had terminated the charging party for referring to his job title as "fucktard" in response to a LinkedIn invitation from a supervisor in the firm's IT department in violation of the firm's electronic communications policy, which prohibited using the firm's electronic communication systems to communicate "obscene, defamatory, harassing or abusive" material to any person or entity associated with the company. (Sorry for the profanity, but I assume you already have clicked on our link to the General Counsel's Advice Memorandum, where the word is used twice.)

In his Advice Memorandum to the Regional Director, the Board's Associate General Counsel recommended

dismissal of the charge since there was no way to argue that the charging party's use of that word was concerted protected activity and there apparently was no evidence that the employer had any knowledge of the employee unrest regarding the overtime policy. Consistent with [Knauz BMW](#), the Advice Memorandum concluded that because the employer's policy was not enforced in a manner that restricted the charging party's Section 7 rights, the discharge was valid. Certainly, this portion of the Advice Memorandum is not surprising.

What was a little more unexpected (to me at least), however, was the General Counsel's Office's failure to go ahead and also consider whether the policy itself was overbroad. I mean, this decision comes directly on the heels of the ALJ's decision in [Knauz BMW](#) to find a similar policy – requiring employees to be courteous and polite – unlawful despite upholding a discharge for Facebook posts based in part on that policy. In [Schulte](#), however, the Advice Memorandum simply states, "In any event, there is no allegation that the rule here is unlawful."

Huh? Don't get me wrong. I'm not looking this gift horse in the mouth, but for those of us looking for some semblance of consistency from the Board on these issues, the General Counsel's position in [Schulte](#) is a bit of a head scratcher. Granted, all of these cases are very factually dependent, but this Advice Memorandum not only seems inconsistent with [Knauz BMW](#), it also seems contrary to the position the General Counsel's office took in the initial Facebook firing case, [American Medical Response of Connecticut, Inc.](#), where it alleged that policies prohibiting "disparaging remarks" about the employer violated Section 7 of the NLRA. Again, I welcome this favorable outcome for employers, but going forward, prudent employers should strongly consider including a disclaimer in their social media and electronic

communications policies stating that those policies will not be enforced in a manner that would interfere with employees' rights to communicate regarding working conditions. Not a cure-all, for sure, but hopefully it will help the policies withstand NLRB scrutiny until the Board and its counsel's office find some consistency on these issues.

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## NLRB Issues Complaint In Facebook Firing Case

Posted on November 3, 2010 by [Brian Hall](#)

On November 2, 2010, the NLRB issued a [press release](#) reporting that its Hartford, Connecticut, regional office had issued a Complaint alleging that American Medical Response of Connecticut, Inc., (“AMR”) had published an overly broad blogging and Internet posting policy that violated employee Section 7 rights, and then illegally fired an employee for negative posts about a supervisor.

As described in the Complaint, the AMR policy prohibited employees from making disparaging remarks when discussing the company or supervisors and from depicting the company “in any way” over the Internet without company permission. Such provisions, according to the NLRB’s Complaint, constitute a violation of 8(a)(1) of the National Labor Relations Act because they interfere with employees’ right to engage in protected concerted activity under Section 7 of the NLRA. (The NLRB and courts typically interpret Section 7 as protecting employees’ right to discuss the terms and conditions of their employment with other employees or even non-employees.) The NLRB also alleged that the employer illegally fired an employee pursuant to that policy for posting negative remarks about a supervisor on Facebook, which the NLRB said drew supportive remarks from her co-workers.

Back in December 2009, the NLRB’s Office of the General Counsel issued an Advice [Memorandum](#) that addressed the circumstances under which an employer’s social media policy might violate Section 8(a)(1) of the NLRA because it might chill employee participation in concerted activities. Though the Memorandum does not constitute binding precedent,

the General Counsel’s office concluded that the policy at issue, published by Sears Holdings, did not violate Section 8(a)(1) because, read as a whole, the policy could not be reasonably viewed by an employee as chilling union activity. The disputed provision in the policy prohibited “Disparagement of company’s or competitors’ products, services, executive leadership, employees, strategy, and business prospects.” The prohibition against disparaging the company, while perhaps read by itself might tend to discourage employees from engaging in concerted activity, was included among several other provisions that clearly did not violate Section 8(a)(1). In addition, there was no evidence that the employer has used the policy to discipline any employee for engaging in protected activity, nor that the Policy was promulgated in response to any other concerted or union activity.

It is in this context that the NLRB likely will evaluate the AMR policy and termination. Keep in mind that the issuance of this Complaint is not a final decision of the NLRB. It is the first step in the processes that might lead to a hearing before an Administrative Law Judge (ALJ) and a decision. As a result, if this Complaint goes to an ALJ hearing, we can expect the ALJ to carefully evaluate the context in which the policy was enacted and enforced. Right now, we do not know any of the other provisions in the AMR policy, but the provisions cited by the regional office generally prohibiting disparaging comments and requiring approval for any posts of any kind regarding AMR have the potential by themselves to discourage concerted or union activity. In addition, the NLRB’s press release also suggests that the employee was terminated after she was denied union representation at a disciplinary meeting.

The NLRB’s press release and its recent embracing of social media for its own communications – I obtained the press release from an NLRB “tweet” – suggests that social media may be becoming a point of emphasis for the Board. Regardless of whether they are unionized or not, employers should be reviewing their social media policies to ensure that any restrictions on communications about the Company are tailored to things that the company can legitimately restrict, like violations of the company harassment policy, or disclosure of confidential or trade secret information. But those restrictions

should not be so broad as to prohibit all employee discussion of the company on their social media pages because the NLRB will likely consider that overbroad and a violation of Section 7 rights.

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## NLRB Upholds Facebook Firing but Finds Employer Policies Overbroad

Posted on October 3, 2011 by [Brian Hall](#)

Last week, another ALJ for the National Labor Relations Board issued a decision on a case involving an employee claim that he was unlawfully fired for comments made on a personal Facebook page. Though the ALJ upheld the employee's termination, he also concluded that multiple employer policies were impermissibly over broad.

In [Knausz BMW](#), the charging party, a salesman at a BMW dealership, posted two comments regarding his employer on the same day. The first post expressed concerns he had expressed at work regarding the inadequacy of food being served to customers at a sales event and included photos of the event. The second related to an incident that occurred at a sister dealership in which he posted a photo of an accident that occurred when a salesperson apparently left a 13 year old behind the wheel of a vehicle. Both posts were delivered in a sarcastic mocking tone. After a meeting between management and the charging party at which both posts were discussed, the charging party was terminated.

The ALJ first considered whether either or both of these posts were protected concerted activity under Section 7 of the National Labor Relations Act. Looking first at the sales event post, the ALJ concluded that the post was protected because the charging party's concerns about the food included concerns that the food would reflect negatively on the dealership and its sales force and prompt potential customers to purchase another type of luxury vehicle from a dealer that provided more gourmet fare at its sales event. The fact that the post was sarcastic and mocking in the ALJ's opinion did not deprive the post of its protection.

The accident post, however, presented a different situation entirely for the ALJ, who concluded that the charging party posted it "apparently as a lark, without any discussion with any other employee of the Respondent, and had no connection to any of the employees' terms and conditions of employment."

The question then became one of credibility for the ALJ. Did the dealership terminate the charging party due to the protected sales event post, the unprotected accident post, or both? On behalf of the charging party, the Board's General Counsel presented evidence that, at the meeting, the dealership's vice president and general manager crumpled both printed Facebook postings in his hand, tossed them at the charging party and asked, "What were you thinking?" The charging party also testified that at the June 16 meeting, the general manager told him that his posting embarrassed his co-workers and everybody working at BMW, and that another member of management said, "The photos at Land Rover are one thing, but the photos at BMW, that's a whole different ball game."

On the other hand, dealership witnesses testified that they viewed the sales event post as being "comical" and that the charging party was terminated solely due to the accident post, which was viewed as making fun of as something that could have caused serious injury and damaged the dealership reputation.

Fortunately for the dealership, the ALJ found it's witnesses more credible than the charging party's and therefore upheld his termination.

The ALJ then moved on to consider whether certain company policies were over broad because they would tend to deter employees from discussing their working conditions with each other. The policies at issue were as follows:

1. **Bad Attitude:** Employees should display a positive attitude toward their job. A bad attitude creates a difficult working environment and prevents the Dealership from providing quality service to our customers.

2. **Courtesy:** Courtesy is the responsibility of every employee. Everyone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership.
3. **Unauthorized Interviews:** As a means of protecting yourself and the Dealership, no unauthorized interviews are permitted to be conducted by individuals representing themselves as attorneys, peace officers, investigators, reporters, or someone who wants to "ask a few questions." If you are asked questions about the Dealership or its current or former employees, you are to refer that individual(s) to your supervisor. A decision will then be made as to whether that individual may conduct any interview and they will be introduced to you by your supervisor with a reason for the questioning. Similarly, if you are aware that an unauthorized interview is occurring at the Dealership, immediately notify the General Manager or the President.
4. **Outside Inquiries Concerning Employees:** All inquiries concerning employees from outside sources should be directed to the Human Resource Department. No information should be given regarding any employee by any other employee or manager to an outside source.

The ALJ considered all but the "Bad Attitude" policy to be over broad. Consistent with what we have seen to date in NLRB General Counsel advice memoranda, the ALJ considered each of the other policies to curtail employee ability to communicate with co-workers, union representatives, lawyers, or Board agents. The ALJ did, however, believe that the dealership had the right to require its employees not to display a bad attitude towards customers.

The dealership had rescinded each of the challenged policies prior to the ALJ hearing so it was necessary for the ALJ to order this remedy. On the other hand, because the offending provisions were rescinded, without a further explanation and without telling the employees that in the future it would not interfere with

their Section 7 rights, the ALJ ordered the dealership to post a notice indicating that it would not violate its employees Section 7 rights.

### **Take Aways for Employers**

Understand that the NLRB General Counsel's Office and ALJ's will make very extended logical connections to find Facebook postings to be protected activity. Therefore, before firing employees for what they say on Facebook, consult with your labor and employment counsel to determine whether there is any work-connectedness that might prompt a finding of protected, concerted activity and make sure that the postings truly are damaging to business before pulling the trigger.

1. Do not leave it to an ALJ to make credibility determinations on the real reason for termination. Document the lawful reasons for termination.
2. Note that the policies at issue here were not specifically designated as social media policies. Nevertheless, the NLRB will address the legality of any policy that the employer applies in a social media context to determine whether, in its opinion, the policy impermissibly tramples on worker rights.

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## **First "Facebook Firing" Case Decided by NLRB Administrative Law Judge**

*Posted on September 14, 2011 by [Brian Hall](#)*

Earlier this year, speculation and educated guesses gave way to NLRB General Counsel Advice Memoranda on how the NLRB will address unfair labor practice charges challenging so-called Facebook firing cases. Now we have our first charge that actually has gone to hearing and resulted in an Administrative Law Judge decision.

In [Hispanics United of Buffalo, Inc.](#), the employer, a not-for-profit corporation that renders social services to economically deprived residents of Buffalo, New

York, terminated five employees for their comments on Facebook after a co-worker had raised concerns about the job performance of other HUB employees. Apparently concerned that the co-worker would bring her concerns to management, one of the five employees posted the following on her Facebook page:

*[Co-worker] feels that we don't help our clients enough at HUB I about had it!  
My fellow coworkers how do u feel?*

Thereafter, the others followed with comments suggesting how difficult their jobs actually were. The co-worker mentioned in the posts complained to management about the Facebook posts. The manager then met with each of the employees that posted on Facebook and terminated them.

The Administrative Law Judge (ALJ) concluded that the Facebook "communications ... in reaction to a co-worker's criticisms of the manner in which HUB employees performed their jobs are protected" under Section 7 of the National Labor Relations Act (NLRA). According to the ALJ, the terminated employees were "taking a first step towards taking group action to defend themselves against the accusations they could reasonably believe [the co-worker] was going to make to management." By discharging the employees, the ALJ concluded, the employer prevented them from taking further action. In short, the ALJ stated,

*"Employees have a protected right to discuss matters affecting their employment amongst themselves. Explicit or implicit criticism by a co-worker of the manner in which they are performing their jobs is a subject about which employee discussion is protected by Section 7."*

The ALJ went on to hold that the terminated employees did nothing to forfeit the protections of the NLRA. There was no evidence that the terminated employees violated any employer policies or rules. The Facebook posts were not made at work or during working hours and the postings contained no abusive "outbursts" that overrode the right to protection under the NLRA.

Though employers should recognize that this decision is only the decision of a single ALJ and not a decision of the entire Board, the decision does follow naturally from the Advice Memoranda that recently have been generated by the Board's General Counsel's Office. Employers should continue to use caution before taking disciplinary action against employees for what they post on their social media sites when those posts relate to the terms and conditions of their employment. As we have noted in the past, posts that do not implicate working conditions and reflect more of a personal gripe as opposed to an effort to enlist co-worker assistance will be less likely to garner protection from the Board.

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## NLRB's Acting General Counsel Issues Report on Social Media Cases

Posted on August 25, 2011 by [Brian Hall](#)

As you have probably noticed, the interaction between social media and federal labor law has been one of this blog's favorite topics, which we have addressed on multiple occasions. On August 18, 2011, the National Labor Relations Board's Acting General Counsel ("AGC") issued [a report](#) that summarizes the General Counsel's Office's view on a variety of cases in which Regional Directors sought advice on social media issues and therefore provides excellent guidance to employers. With one exception, the topics addressed in the Report fall into two broad categories:

1. First, the Report addresses when an employee's social media activity is protected concerted activity under the National Labor Relations Act ("NLRA"), which may not be restricted by the employer.
2. Second, the Report addresses the extent to which employers' social media policies in general are so overly broad that they could be reasonably construed to prohibit employee rights to engage in concerted activity. The one exception addressed the question of union coercion of employees of a non-union employer. In that case, the union attempted to coerce the employees by making them believe

that they were in danger of being deported for immigration violations. The union videotaped these interrogations and then posted edited versions on Youtube and Facebook. The AGC concluded that the threats and videotaping themselves violated the employees rights to refrain from union activity and that the postings on Youtube and Facebook unlawfully conveyed the same coercive message to any employees who may have viewed them.

The remainder of the AGC's Report addressed the more common issues that we have been discussing in recent months. With respect to the discipline line of cases, the AGC's Report seems to confirm that employee social media posts that are related to terms and conditions of employment and that can be reasonably be interpreted as acting with or on behalf of other employees will be protected, regardless of any otherwise offensive content. Those posts that lack a sufficient connection to work conditions and/or are more personal gripes than common employee issues likely will find no protection under the NLRA.

The AGC Report also extensively discusses the permissible scope of employer social media policies. Read literally, the Report would gut most employer policies as it found general prohibitions against the following provisions to be overbroad:

- Any communication or post that constitutes embarrassment, harassment or defamation of the employer or any employee, officer, board member, representative, or staff member;
- Any statements that lack truthfulness or that might damage the reputation or goodwill of the employer, its staff, or employees;
- Talk about company business, anything that the employee would not want their manager or supervisor to see or that would put their job in jeopardy,
- Disclosing inappropriate or sensitive information about the employer;
- Posting pictures or comments involving the company or its employees that could be construed as inappropriate;

- Use of the company name, address, or other information on social media site personal profiles;
- Revealing, including through the use of photographs, personal information regarding coworkers, company clients, partners, or customers without their consent; and
- Using the employer's logos and photographs of the employer's store, brand, or product, without written authorization.

Despite its conclusions, the AGC Report does suggest that narrower prohibitions that provide definition to or examples of prohibited conduct that disclaim any intent to limit an employee's right to engage in concerted activity would be lawful.

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## **NLRB General Counsel Recommends Dismissal of Three Charges Contesting Discipline for Facebook Comments, Finding No Concerted Activity**

*Posted on July 29, 2011 by [Brian Hall](#)*

On July 7 and 19, 2011, the NLRB's Office of the General Counsel issued a series of three advice memoranda recommending the dismissal of unfair labor practice charges filed by employees who were disciplined for comments made on Facebook. In each of these charges, the employee alleged that their discipline violated Section 8(a)(1) of the National Labor Relations Act, but in each the NLRB's General Counsel's Office concluded that there was insufficient evidence that the employee engaged in concerted activity.

In the first Memorandum, [JT's Porch Saloon & Eatery, Ltd.](#), the employee was a bartender who took issue with and complained to another bartender about the employer's tip policy. Several months later he engaged in a conversation on Facebook with a family member who had asked how his night at work went. He responded with a variety of complaints about not having had a raise and the tip policy. He also called

the bar's customer's "rednecks" and said that he hoped they "choked on glass as they drove home drunk." He didn't discuss this posting with any of his co-workers either before or after posting it. Not surprisingly, when one of the managers discovered the post, he was fired. The NLRB's General Counsel concluded that the Facebook posting did not constitute concerted activity. Although the posting addressed terms and conditions of employment, there was no evidence that the posting was a "logical outgrowth of concerns expressed by the employees collectively." Instead, the charging party's comment was in response to a family member's innocuous question about how his night of work had gone. The Memorandum also noted that there had been no efforts to initiate group action over the tipping policy or the lack of raises and no effort to make these complaints known to management. Interestingly, the Memorandum does not address – because it did not need to – whether the comments about the bars customers might have separately supported the charging party's discipline.

The second Memorandum, [Martin House](#), in my mind addressed an even simpler set of facts. In this charge, the employer was a non-profit residential facility for homeless people, many of whom suffer from mental illness and substance abuse. While at work, the charging party engaged in a Facebook conversation with two friends, neither of whom were co-workers. In the conversation, she made fun of and was insensitive to the circumstances of the employer's client base. A former client of the facility, who was a "friend" of the charging party on Facebook, saw the charging party's comments and called the employer to report her concerns. As a result, the charging party was fired. Again, the General Counsel's office found no concerted activity. Similar to the facts in JT's Porch Saloon, the charging party was merely communicating with personal friends about what was happening at work. The charging party did not discuss her posts with co-workers and none of her co-workers responded to her posts. In fact, the charging party's comments here were even further removed from work because there was no discussion of the terms and conditions of her employment.

Finally, in [Wal-Mart](#), after an interaction with an assistant manager regarding misplaced and/or mispriced products, the charging party wrote "Wuck Fal-Mart" on her Facebook page. After a couple of co-workers responded, the charging party then began a profane rant about the incident that gave rise to her original post. The charging party also said that two other co-workers expressed support for him. After another co-worker brought the post to management's attention, the charging party was disciplined, but not terminated. The General Counsel's Office again concluded that there was insufficient evidence that the charging party had engaged in concerted activity. Instead, he noted that the charging party's Facebook postings were simply an expression of an individual gripe. "They contain no language suggesting the charging party sought to initiate or induce co-workers to engage in group action; rather they express only his frustration regarding his individual dispute" with the assistant manager. The General Counsel's then went on to analyze the responses to the charging party's postings, which suggested that two of the co-workers found the charging party's initial posting amusing. The third co-worker admitted telling the charging party to "hang in there." The General Counsel's Office interpreted this remark as merely showing that she viewed the postings as a plea for emotional support.

Little by little, the Board is providing employers with guidance on how to address disciplinary issues relating to Facebook postings. It seems clear from these three Memoranda that the Board should seek dismissal of any charge that does not show that the charging party's Facebook postings demonstrate that he or she:

- is acting with or on the authority of other employees;
- is seeking to initiate, induce, or prepare for group action;
- is bringing truly group complaints to the attention of management.

On the other hand, comments made solely by and on behalf of the employee him or herself are not concerted. In this regard, however, it is clear that the Board will look to any co-worker responses to see whether they interpreted the charging party's

statements as being individual gripes or an effort at concerted activity. Finally, it is clear that the Board will also look to whether the Facebook comments are a logical outgrowth of concerns expressed by employees collective. Therefore, employers contemplating discipline of an employee for social media comments must take all of the circumstances into consideration and cannot focus solely on the employee's comment in a vacuum.

(Hat tip to [Labor Relations Today Blog](#))

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## NLRB'S Office of General Counsel Issues New Advice Memorandum on Social Media

Posted on May 12, 2011 by [Brian Hall](#)

The NLRB's General Counsel's Office's approach to employer social media policies and the discipline of employees pursuant to such policies has been a frequent topic of this blog. In fact, just [last month](#), I called on both the NLRB and employers to take a step back from the rhetoric on this controversial topic. Yesterday, the NLRB's General Counsel's Office issued another Advice Memorandum (dated April 21, 2011), which again addresses the social media topic but this time upholds the employer's discipline of an employee for posting offensive tweets on Twitter. In [Lee Enterprises, Inc., d/b/a Arizona Daily Star](#) the charging party was the public safety reporter for the **Arizona Daily Star** newspaper in Tucson. The newspaper had no social media policy, but began urging its reporters to begin using social media, including twitter. In early 2010, the charging party posted a tweet that ridiculed a headline in the newspaper's sports section. He was called into a meeting with the human resources director, who encouraged him to discuss any concerns he had rather than tweeting about them. About a week later, he met with the managing editor, who "prohibited [him] from airing his grievances or commenting about **the Daily Star** in any public forum. The charging party then refrained from tweeting about the newspaper itself, but in August and September 2010, he tweeted the following:

- August 27 - "You stay homicidal, Tucson. See Star Net for the bloody deets."
- August 30 - "What?!?!? No overnight homicide? WTF? You're slacking Tucson."
- September 10 - "Suggestion for new Tucson-area theme song: Droening [sic] pool's 'let the bodies hit the floor'."
- September 10 - "I'd root for daily death if it always happened in close proximity to Gus Balon's."
- September 10 - "Hope everyone's having a good Homicide Friday, as one Tucson police officer called it."
- September 14 - "[**FOIA Exemptions 6, 7(C)**]."
- September 15 - "[**FOIA Exemptions 6, 7(C)**]."
- September 19 - "My discovery of the Red Zone channel is like an adolescent boy's discovery of h...let's just hope I don't end up going blind."

Finally, on September 21, Tucson area television news station posted the following tweet on its Twitter feed: "Drug smuggler tries to peddle his way into the U.S." The Charging Party saw the tweet, reposted it on his Twitter site, and tweeted the following: "Um, I believe that's PEDAL. Stupid TV people."

When the television station took issue with this response, the Daily Star's managing editor again called him into the office and this time told him that his tweets were inappropriate and that he was to refrain from any tweeting until she had had an opportunity to meet with the executive editor and human resources. In prohibiting him from tweeting, the managing editor noted that the charging party's Twitter screen name and biography referenced that he worked at **the Daily Star** and had a link to **the Daily Star's** website, she considered this to be a work Twitter account, and that he was drawing negative attention to the Daily Star when he made the various tweets about homicides in Tucson. The charging party promptly changed his screen name, deleted some of his supervisors from his list of followers and changed

his account settings so that he had to approve anyone before they could view his tweets. Later in September, the charging party was advised of his termination. He also told a couple of co-workers to be careful about what they write on Facebook and Twitter.

The charging party then filed a charge with the NLRB contending that he was disciplined pursuant to an unlawful rule that prohibited certain Section 7 activities. The General Counsel's office disagreed and recommended that the charge be dismissed. In reaching this conclusion, the General Counsel's Office noted that *The Daily Star* did not implement an unlawful rule. Though the General Counsel's Office acknowledged that "in warning the Charging Party to cease his inappropriate tweets, and then discharging him for continuing to post inappropriate tweets, the Employer made statements that could be interpreted to prohibit activities protected by Section 7, he also noted that those statements did not constitute orally promulgated, overbroad "rules." Instead, the statements were made solely to the Charging Party in the context of discipline, and in response to specific inappropriate conduct, and were not communicated to any other employees or proclaimed as new "rules." For example, after the Human Resources Director had met with the Charging Party and warned him to stop making inappropriate comments, and the Charging Party persisted, the Managing Editor called him in and warned him to stop airing his grievances or commenting about the Employer in any public forum. And after the Charging Party persisted in writing his offensive messages, the Managing Editor told him that he was not allowed to tweet about anything work related. Finally, the Charging Party's termination letter refers to the fact that he was told "to refrain from using derogatory comments in any social media forums that may damage the goodwill of the company." The General Counsel's Office stated that "although the statements arguably constituted unlawful restrictions on the Charging Party's own Section 7 activities, it would not effectuate the purposes and policies of the Act to issue a complaint where the statements were directed to a single employee who was lawfully discharged."

With respect to the actual discipline and termination of the charging party, the Advice Memorandum states:

*We have found no case in which the Board held discipline pursuant to an unlawful rule to be unlawful where the underlying conduct was itself unrelated to protected, concerted activity. In this case, even if the Employer implemented an unlawful rule, the Charging Party was terminated for posting inappropriate and unprofessional tweets, after having been warned not to do so, i.e. for engaging in misconduct. The Charging Party's conduct was not protected and concerted: it did not relate to the terms and conditions of his employment or seek to involve other employees in issues related to employment. Specifically, after opening a Twitter account and linking it to the Employer's website, the Charging Party began tweeting inappropriate comments. The Employer warned the Charging Party that his comments were inappropriate, but he ignored the warning and continued to post additional inappropriate tweets while covering his beat as a public safety reporter. Those tweets included: "What?!?!?! No overnight homicide? WTF? You're slacking Tucson" and "[Exemptions 6 and 7(C)]." The Charging Party's discharge did not violate the Act because he was discharged for this misconduct, which did not involve protected activity.*

The NLRB's General Counsel's Advice Memorandum in *Lee Enterprises* injects a bit of fresh air into the social media controversy. Here, the Advice Memorandum correctly puts the employer's discipline of the employee in a proper context. Clearly, there was no effort on the employee's part to grieve about working conditions and there was no effort on his part to involve other employees in such a grievance. In addition, the employer in this case certainly had the right to protect its reputation from its employee's inappropriate tweets. As a result, the Lee Enterprises Advice Memorandum should be viewed as positive news and hopefully is a sign that cooler heads will prevail in this controversy.

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## An Appeal for Cooler Heads on NLRB's Social Media Policy Enforcement

Posted on April 25, 2011 by [Brian Hall](#)

Several days ago, I read [the New York Times article](#) reporting that the NLRB's Manhattan Regional Director was threatening to file a complaint against Thomson-Reuters for allegedly reprimanding an employee who had criticized management on Twitter. At the time, I flagged the article because I wanted to use it to highlight **my** – emphasis on the word, *MY* – views on the NLRB's recent assault on social media policies: When it comes to social media, it is time for cooler heads to prevail, both at the NLRB and within the employer community.

So, what happened at Thomson-Reuters? According to the article in the Times, the company on one of its Twitter outlets had invited employees to post suggestions on Twitter about how to make Reuters the best place to work. In response, an employee, who was also the head of the Newspaper Guild at Reuters, tweeted: "One way to make this the best place to work is to deal honestly with Guild members." The next day, her supervisor contacted her at home to advise her about Reuters policy of not saying things that would damage the company's reputation. Though Reuters denies that it disciplined the employee, she complained that she felt threatened and intimidated. A source at the NLRB apparently confirmed to the Times that it would be filing a complaint against Thomson-Reuters accusing the company of violating the employee's right to engage in concerted, protected activity with co-workers to improve working conditions.

Here we go again... In February, the NLRB's Region 34 settled its complaint against a Connecticut ambulance company for having an allegedly overbroad social media policy and disciplining an employee for criticizing a supervisor. The settlement required the company to revise its policy to "ensure that they do not improperly restrict employees from discussing their wages, hours and working conditions with coworkers and others while not at work." The

employer also agreed that it "would not discipline or discharge employees for engaging in such discussions."

My initial reaction is that the NLRB is making the proverbial mountain out of a molehill in this case – but perhaps not before Thomson-Reuters did. While I agree with those who question whether the NLRB is being unnecessarily aggressive in these discipline cases, I also have to believe that Thomson-Reuters is questioning whether its manager's response to this particular tweet was worth the trouble it now is causing. I'm certain that far more people have become aware of this tweet than if they had simply ignored it – thus exponentially increasing any disparagement Reuters may have felt. This added negative publicity, of course, is separate and apart from whether the tweet really amounts to protected concerted activity under Section 7. So, employers: think twice before reprimanding, disciplining or terminating an employee because his or her tweet hurt your feelings. If there truly is serious damage to the company's reputation either as a result of disloyalty, product disparagement or other acts that are contrary to the company's interests, this is where I believe the NLRB needs to back off. But, based on what I've seen, I don't think that either the AMR case or the Thomson-Reuters case reached this threshold.

On the other hand, I'm hoping that the NLRB's aggressive stance towards social media policies does not suggest an intent to gut the framework that is contained in the December 2009 Advice Memorandum in Sears Holdings. In Sears Holdings, the General Counsel's office announced a reasonable and workable framework for analyzing whether a social media policy was improperly overbroad because it would tend to chill employees' Section 7 activities. The policy at issue in Sears Holdings prohibited employees from, among many other things, disparaging the company's "products, services, executive leadership, employees, strategy, and business prospects." The General Counsel's office advised that this policy would not be considered overbroad because there was no evidence that Sears has used the Policy to discipline any employee for engaging in protected activity, nor that the Policy was promulgated in response to any Section 7 activity. Finally, the General Counsel concluded that, when

read in the context of the entire social media policy, no reasonable employee could have construed the non-disparagement provision to prohibit lawful Section 7 activities. In short, the Sears Holdings Advice Memorandum would require consideration of the entire policy in the context under which it was enacted before concluding whether the policy was overbroad.

In my opinion, Sears Holdings provides a reasonable and workable framework for analyzing social media policies and any abandonment of this framework, would be a mistake. But we are at a point where the NLRB's Acting General Counsel should either reaffirm the Sears Holdings framework or provide some additional guidance so that employers will at least know how to tailor their social media policies to avoid the Board's ire. Any additional guidance should continue to permit employers to include non-disparagement provisions in their social media policies, particularly if the policy contains some notice to employees that the policy is not intended to prevent them from discussing terms and conditions of employment.

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## NLRB to Vote on "Quickie Election" Rules

Posted on November 21, 2011 by [Mike Underwood](#)

The [NLRB announced on Friday](#) that the three-member Board will vote on November 30 on "whether to adopt a small number of the amendments to its election procedures that the Board proposed earlier this year." The [controversial NLRB proposed rule](#) included various measures that would significantly shorten the time between when a petition for a representation election is filed and when the election occurs.

Republican NLRB appointee Hayes, who has expressed strong opposition to the proposed rules, estimates that, under the new timeframes, elections might occur in 10-21 days after a petition is filed, as opposed to the average current time of 38 days. Because the proposed "quickie elections" could significantly hamper an employer's opportunity to communicate to workers before the election, the business community has also expressed significant concern about the proposed rules.

The November 30 vote is timed to occur before the expiration in January of the appointment of Democratic-appointee Becker. When Member Becker's term expires, Democrats will lose their majority on the current three member Board. Member Hayes has contacted Congress, arguing that the two Democratic members are trying to push the rule-making through without giving him adequate opportunity for dissent. Even if the vote goes forward as scheduled, we expect further legal challenges to the propriety of the action.

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## Update: Legal Challenges to NLRB Posting Rule

Posted on November 15, 2011 by [Mike Underwood](#)

We [reported recently](#) that motions for summary judgment had been filed in the United States District Court for the District of Columbia in the case challenging the NLRB's rule requiring that all employers post a notice about union organizing rights. Now summary judgment motions have also been filed by both sides in the other case in which the NLRB rule is being challenged. In ***Chamber of Commerce of the United States, et al. v. National Labor Relations Board, et al.*** (U.S.D.C., South Carolina, Case No. 2:11-cv-02516), the Chamber of Commerce and the NLRB have filed motions with the Court making arguments essentially the same as those made in the D.C. district court case.

The U.S. Chamber did raise one interesting argument not made in the D.C. district court case. The Chamber argued that the NLRB rule requiring employers to post notices about union organizing rights is "forced speech" violating the First Amendment of the United States Constitution. The Chamber argues that requiring employers to post the notice effectively forces employers to communicate to their employees about labor relations in a manner dictated by the NLRB. In response, the NLRB argues that the notice is not forced speech by the employer, but, rather, is the government communicating to the workforce.

With the current effective date of the posting requirement looming at January 31, 2012, we will keep close watch on further developments in both of these cases.

## Arguments Begin In Legal Challenges to NLRB Posting Rule

Posted on November 1, 2011 by [Mike Underwood](#)

As we [reported previously](#), the National Labor Relations Board ("NLRB") issued a rule in August requiring all employers to post workplace notices about employee rights to join a union. This effort by the NLRB to require posting about union organizing rights in all workplaces has caught the attention of the employer community more than any NLRB action in recent memory. The rule reaches into the workplace of all employers except for those few which are outside of the NLRB's jurisdiction. [See [our earlier post](#) that outlines NLRB jurisdiction]. Briefly, if you are wondering if you are covered, you probably are covered. The original effective date for the rule was to have been November 14, 2011, but that effective date was delayed when lawsuits were filed in two federal district courts challenging the NLRB's authority to issue such a rule. The new effective date is January 31, 2012 and the arguments in the lawsuits challenging the posting rule are beginning to take shape.

In a case before the federal District Court for the District of Columbia, all of the parties filed motions for summary judgment on October 26, 2011. (*National Ass'n. of Mfrs. v. NLRB*, D.D.C., No. 11-CV-1629). In addition to the National Association of Manufacturers, others challenging the NLRB rule in this case include the National Right to Work Legal Defense and Education Fund, Inc., the Coalition for a Democratic Workplace, the National Federation of Independent Businesses, and several specific employers. The primary arguments being made by those challenging the posting rule include:

- The NLRB's jurisdiction is limited to specific cases where unions are trying to organize employees (representation cases) and cases where an employer has been charged with committing an unfair labor practice ("ULP"). The law does not allow the NLRB to impose obligations on employers which are not the subject of a representation case or being

charged with a ULP. Therefore, the NLRB cannot require all employers to post the notice.

- The NLRB has exceeded its authority by stating in its rule that the failure to post will be considered a ULP. The NLRB cannot create new ULP's which are not found in the National Labor Relations Act and that law does not include a posting requirement.

The primary arguments made by the NLRB in support of its posting requirement are:

- The NLRB has authority to enforce employee rights, such as the right to engage in union organizing activity without fear of punishment by their employers. The NLRB argues that "... full and free exercise of NLRA rights depends on employees knowing those rights and that the Board protects those rights."
- Employees must be made aware of their rights to file ULP charges with the NLRB and of the time deadlines that apply for filing charges.
- It is appropriate to charge employers with a ULP if they fail to post because employee knowledge of their rights is essential to a full and free exercise of those rights and an employer's intentional refusal to post constitutes interference with employee rights.

The Judge has scheduled oral arguments for December 19, 2011. The other case which challenges the NLRB's right to require posting was filed by the United States Chamber of Commerce and others and is pending in the U.S. District Court for the District of South Carolina. Also, Senator Thune (R-S.D.) has introduced legislation that would block the NLRB's posting rule, but the Senate has not taken any action on that Bill.

We will continue to post future developments that may impact the NLRB's posting rule and the current January 31, 2012 effective date.

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## NLRB Posting Requirement Delay - New Date - January 31, 2012

Posted on October 5, 2011 by [Mike Underwood](#)

[We reported earlier](#) about the NLRB notice-posting rule, which was to take effect on November 14, 2011. The rule applies to all companies subject to NLRB jurisdiction. (See discussion below of NLRB jurisdiction.) The rule requires companies to post in the workplace notices to employees about their rights to join a union. Not surprisingly, the proposed rule has generated a great deal of attention and some controversy. Recently, [we reported on the first lawsuit](#), filed by the National Association of Manufacturers, to challenge the NLRB's right to impose this rule. Since then, a number of other lawsuits have been filed, including lawsuits filed by the U.S. Chamber of Commerce, the National Right to Work Foundation and the National Federation of Independent Business.

Possibly in response to those lawsuits, the NLRB earlier today [issued a notice](#) on its web site saying that the posting requirement is now postponed to January 31, 2012. The Board's stated reason is to allow time for "enhanced education and outreach to employers, particularly those who operate small and medium-sized businesses." Indeed, we have received a number of questions regarding the scope of the posting requirement. For instance, many are asking whether the Board's posting requirement will apply to a particular company or industry. To put it briefly, just about every company in the private sector outside of a few very specific industries is covered by NLRB jurisdiction. For example, certain employers in the railroad, airline, and agricultural industries and federal, state, and local municipal government entities are not covered by the NLRA. Some religious institutions are not covered. But most employers in all other industries are covered.

Another question we are being asked is: "Are there any exemptions for small businesses?" There is no specific exemption from NLRB jurisdiction for a small business. However, to be covered by NLRB jurisdiction, a company has to have enough volume of business to have some impact on interstate commerce. But, the standards for determining that

are very broad. For example, in most industries, a company is considered to have an effect on interstate commerce as long as it either sells goods or provides services to out of state customers valued at least \$50,000 in a year or purchases goods or services from out of the state valued at at least \$50,000 in a year. For some industries, jurisdiction is based on gross annual volume of business. The requisite volumes are contained in the [Frequently Asked Questions](#) in the Board's postponement announcement under the question: "What if I operate a small business?"

Finally, keep in mind that the Board's posting requirement will apply to all covered businesses regardless of whether they are currently unionized. Therefore, unless it is successfully challenged, the NLRB's posting requirement will apply to all but a very few private sector employers. If the NLRB's posting requirement is upheld, non-unionized employers can expect that their managers and supervisors will begin receiving a questions from their employees about their rights. As a result, non-unionized employers should strongly consider management and supervisory training on how to respond to those questions.

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## NLRB Takes Another Big Step to Make Union Organizing Easier

Posted on September 29, 2011 by [Mike Underwood](#)

We have reported in recent months about steps that the National Labor Relations Board ("NLRB") has been taking that will make it far more easy for a Union to win and keep the right to represent a group of workers. The most recent NLRB decision to support union organizing rights opens the door for unions to target a smaller group of employees at a workplace, rather than having to organize a larger group of workers. This will make it much easier for a union to "cherry-pick" a group of workers, gain a foothold, and then try to expand from there to other groups in the same company.

To appreciate how important this can be, consider this example. Presume a union is interested in organizing the workers at a manufacturing plant where there are 300 hourly-paid production and maintenance workers. To get representation rights, the union has to target and gain support among a proper group of workers and then win a secret ballot election. But what group of workers? Is it all 300 production and maintenance workers? Until the NLRB's most recent decision on the topic, that would have been the group that the union would typically have had to try to organize. Now, presume that in this hypothetical manufacturing plant, there is substantial dissatisfaction for one reason or another among the 40 employees in the maintenance department, but not so among the rest of the workers. The union would have a much better chance at gaining enough support to win an election among just that group of 40. Now they can target that group, hope to win the right to represent them, and then begin a plan to expand later to organize other groups in the same workplace.

In [Specialty Healthcare & Rehab Ctr.](#), 357 NLRB No. 83, the Board had to decide the appropriate group of employees for the United Steelworkers Union to target at a non-acute care nursing facility. The Union targeted the 53 certified nursing assistants (CNA's). The Employer argued that the only appropriate group for a union representation vote would have to include 33 additional non-professional service and maintenance employees. Under long-standing NLRB precedent for determining what group of employees share a sufficient community of interest to be in a voting group, the Employer argument would have carried the day. As it has done in other ways in recent months, the NLRB used this case to change its approach and give organized labor another tool for organizing. The NLRB held that the United Steelworkers could attempt to organize just the CNA's. Most important, the NLRB announced a new approach to cases like this, shifting to employers a heavy burden when they want to argue that a union should have to target a larger group. All a union has to do now is show that the group they target is a "readily identifiable" group, based on a list of factors including job classifications. If the employer argues that there are additional employees appropriate for the organizing effort, the employer will have a burden to

show that the employees in the larger group "share an overwhelming community of interest" with the group being targeted by the union.

In his dissenting opinion, NLRB Member Hayes concludes that the majority decided the case the way they did for the purpose of "reversing the decades-old decline in union density in the private American workforce" and to "encourage unions to engage in incremental organizing in the smallest units possible."

If you are keeping a scorecard on NLRB efforts to support union organizing, consider each of the following things that have occurred recently:

Mandatory posting in all workplaces effective November 14, 2011 advising employees of their right to engage in union organizing.

The Specialty Healthcare case described above, giving unions the opportunity to target small groups of employees for organizing.

A currently pending proposal to significantly shorten the period of time between when a union petitions for an election and when the election occurs, making it very difficult for employers to effectively communicate their position before the election.

Administrative action by the NLRB to call for stiffer penalties of employers found to have engaged in unfair labor practices to combat organizing.

A series of cases strengthening the protection of unions to continue to represent employees after a business is purchased or after an employer voluntarily recognizes the union without an election.

We will follow closely further developments on the Board's proposed rules to shorten the period before representation elections. An employer facing a potential union election among a small group of employees in a short period of time will face an especially difficult challenge.

## UPDATE: NLRB Releases Union Organizing Rights Poster on Website; Challenges to Rule Begin

Posted on September 19, 2011 by [Brian Hall](#)

As we noted last month, most private sector employers – regardless of whether they are unionized – will be required, beginning November 14, 2011, to post a notice advising employees of their rights under the National Labor Relations Act. Copies of the poster are now available for downloading and printing on the NLRB website [here](#). But, don't put that poster up a second before you have to. A lawsuit filed by the National Association of Manufacturers against the Board seeks to enjoin enforcement of the rule on the ground that it exceeds the Board's statutory authority. We will keep you posted on any new developments relating to this new rule.

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## Unions Get Another Boost From NLRB

Posted on September 6, 2011 by [Mike Underwood](#)

Once a union has established majority support among a group of employees, the union's right to represent those employees continues as long as the majority support continues. Employees can demonstrate they no longer want a union to represent them in a variety of ways. They can file a decertification petition with the NLRB to have an election conducted to see if the union still has majority support. Also, if a majority of the represented employees demonstrate clearly that they no longer want the union to represent them, such as by signing an uncoerced petition that was not initiated or supported by the employer, then the employer might be justified in no longer recognizing the union.

However, certain presumptions exist that protect a union for specified periods of time from any attack on their majority status. For example, the typical method by which unions establish majority support is in an NLRB-conducted certification election. If the union wins the election, the union enjoys an irrebuttable

presumption of majority support for one year from the date the election results are certified. Also, if a collective bargaining agreement ("CBA") is signed between the employer and the union, the union enjoys a presumption of continued majority support for the length of the collective bargaining agreement, up to a maximum of three years. In two recent decisions, the NLRB reversed existing law in a way to give unions even greater protections from challenges to their majority support.

In [UGL-UNICCO Service Company](#) (NLRB Case 1-RC-22447), the Board considered how long a union should have a presumption of majority status when the company whose employees they represent is purchased by a new owner. Under certain circumstances, the purchaser of a business becomes a "successor" to the bargaining relationship and must recognize and bargain with the union. The successor does not always have to adopt the existing CBA and, in many cases, has the right to establish its own initial terms and conditions of employment and then bargain with the union for a new CBA. In *UGL-UNICCO*, the NLRB considered whether the union should enjoy any period of presumed majority support in a successorship situation.

The NLRB reversed existing law established in 2002, which was that in a successorship situation, the union enjoys only a rebuttable presumption of majority support. Under the old law, clear evidence that the union no longer had majority support justified the successor employer refusing to recognize and bargain further with the union. The *UGL-UNICCO* decision reverses that precedent and re-establishes a "successor bar" doctrine which gives the union in a successorship situation an irrebuttable presumption of majority support for a specified period of time. The union will be presumed to have continued majority support for "a minimum of six months and a maximum of one year, measured from the date of the first bargaining meeting between the union and the [successor] employer." In situations where the successor employer chooses to continue the existing terms and conditions of employment as the starting point for bargaining, the presumed majority support will be for six months. In situations where the successor employer exercises its right to reject existing terms and conditions and implement its own

initial terms and conditions while bargaining proceeds, the presumed period of majority support will be no less than six months and no more than one year.

To determine in those cases when the presumption of majority support elapses between six months and one year, the Board will consider:

- the complexity of the issues being negotiated; the time elapsed since bargaining began and the number of bargaining sessions;
- the amount of progress made in the negotiations and how near the parties are to concluding an agreement; and
- whether the parties are at impasse.

With this decision, unions will enjoy a longer period of time of protection against any effort to unseat them due to a lack of majority support after a new owner buys the business.

In another decision issued the same day, the NLRB strengthened the presumption of union majority support in cases where there has been a voluntary recognition of the union. An employer has the right to recognize a union as a majority representative of a group of employees even without an NLRB election if the union has presented evidence of uncoerced majority support, such as a petition or authorization cards signed by a majority of employees. Few employers agree to voluntary recognition based on signed petitions or cards. Most invoke their right to insist instead that the union pursue a secret ballot election conducted by the NLRB. Nevertheless, voluntary recognition sometimes occurs. In 2007, the Bush NLRB ruled in [Dana Corp.](#), 351 NLRB 434 (2007) that when an employer extends voluntary recognition, for a period of 45 days, the employees must be given the opportunity to challenge the majority support by a 30% showing of interest in a petition for an NLRB-conducted election.

In [Lamons Gasket Company](#) (NLRB Case 16-RD-1597), the Board reversed *Dana Corp.* Specifically, under *Lamons Gasket Company*, after voluntary recognition by an employer, a union enjoys a presumption of continued majority support for a

"reasonable period of time." What is a "reasonable period of time"? Not surprisingly, the *Lamons Gasket Company* decision applies the very same standard adopted in *UGL-UNICCO*. Therefore, when an employer voluntarily recognizes a union, the union will enjoy a presumption of continued majority status for no less than six months and no more than a year, measured by the same principles described above from the *UGL-UNICCO* case.

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## NLRB Issues Final Rule Requiring All Employers to Post Notice About Union Organizing Rights

Posted on August 26, 2011 by [Mike Underwood](#)

On December 27, we [wrote a blog post](#) regarding the NLRB proposed rule-making to require all employers to post notices advising employees of their rights to engage in union organizing. After a period of public comment, during which about 7,000 responses were submitted to the NLRB, the NLRB has now issued its final rule requiring the posting.

Effective November 14, 2011, all private sector companies covered by the National Labor Relations Act are required to post in the workplace a specific notice advising employees of their rights under the National Labor Relations Act to engage in union organizing, to bargain through a union with their employers, and to refrain from those activities. The notice also gives examples of employer and union conduct which is considered illegal and tells employees of actions they can file with the NLRB to enforce their rights. Here is a link to [the NLRB announcement](#), which includes a copy of the required posting (as an Appendix.) The NLRB promises that by November 1st, the posting will be available for downloading from the NLRB web site and that hard copies will be available from NLRB Regional Offices. All employers will be required to post the notices in conspicuous areas of the workplace where other employment notices are posted. Also, employers that routinely post notices regarding personnel rules or policies on an Internet or intra-net site will be required to post the new NLRB notice on those sites. However, employers are not required to distribute the

notice to employees by email or other technological means. In workplaces where at least 20% of the workforce are not proficient in the English language, translated copies must be posted. The NLRB has indicated they will make copies available in various languages.

There are various possible consequences if an employer fails to post the required notice. A failure to post could result in an extension of the normal six-month statute of limitations for filing an unfair labor practice charge. In other words, if an employer has failed to post the notice, the employer might lose the opportunity to have a charge dismissed based on the regular six-month time limit to file a charge. Second, if an employer fails to post the notice, the NLRB has indicated it might take that into consideration as evidence of an employer's motive against unionization. That could be a relevant fact in an unfair labor practice charge, such as if an employee were claiming that he or she had been fired because of union activity.

Employers should recognize the potential impact of this notice. At a minimum, the notice places the rights to union organizing very prominently in front of employees who perhaps have not thought of the issue on their own. The notice certainly increases the possibility for interest in union organizing and make employees aware of specific employer conduct that is illegal, increasing the possibility of unfair labor practice charges. Between now and the November 14 required posting date, employers should consider their overall measures for staying union-free. Are workplace policies, benefits, and management/supervisor behavior of the sort that employees are less likely to feel a need for union representation? Have supervisors been made aware of the critical role that they play in providing a workplace where employees will be less likely to feel a need for union representation? Are supervisors aware of the proper, legal way to respond if union organizing activity does happen? Now is an opportune time for companies to re-examine their commitment to these things and establish or continue best measures for union avoidance.

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## Obama Administration Issues Two Proposed Regulations Designed to Promote Pro-Union Agenda

Posted on June 22, 2011 by [Franck Wobst](#)

It's only Wednesday and already this is proving to be a potentially huge week for organized labor. In moves long sought by organized labor and opposed by business groups, the Obama Administration issued two proposed federal regulations this week that could significantly impact union elections.

First, on Monday, The Department of Labor ("DOL") issued a proposed regulation that would require employers to disclose more information about consultants they hire in response to union organizing campaigns. According to the DOL, the Labor-Management Reporting Disclosure Act which was enacted in 1959 currently is being applied too narrowly, because it only requires reporting of consultants who communicate directly with employees. Under the DOL's proposed new expanded definition of "advice," an employer would be required to report any arrangements with consultants who issue communications on behalf of the employer designed to "directly or indirectly" persuade workers concerning their rights to organize or bargain collectively. Under the proposed new rule, indirect persuasion could be construed so broadly as to require disclosures of attendance at "union avoidance" seminars and conferences offered to employees by lawyers or labor consultants. The proposed regulation is open for public comment until August 22, and the DOL will then decide whether to make the new rule official.

In the second, bigger coup for organized labor this week, the NLRB yesterday issued proposed regulations that are intended to substantially shorten the time period between when a union files a petition for a union election and the time the election is held. The proposed "quickie elections" regulation, as they are referred to by the lone Republican Board Member Hayes, would give unions an advantage in organizing

by giving management less time to respond to a union campaign. If adopted after a public notice-and-comment process, the proposed rules would include changes in the union election process such as:

- Allowing for electronic filing of election petitions and other documents
- Requiring parties to identify issues and describe evidence soon after an election is filed to facilitate resolution and eliminate unnecessary litigation
- Deferring litigation of most voter eligibility issues until after the election
- Requiring the employer to provide a final voter list in electronic form soon after the scheduling of an election, including voters' phone numbers and email addresses when available
- Making Board review of post-election decision discretionary, rather than mandatory

Currently, the median time between when a union files a petition and when an election is held is 38 days. The NLRB says it cannot calculate how much shorter the time could be under the new rules. However, dissenting Member Hayes predicts that elections would be held within 10 to 21 days after the petition's filing. "Make no mistake, the principal purpose for this radical manipulation of our election process is to minimize, or rather, to effectively eviscerate an employer's legitimate opportunity to express its views about collective bargaining," Member Hayes wrote.

The DOL's and NLRB's proposed regulations are sure to be the center of heated debates between organized labor and business groups during the next 60 days. Given the Obama Administration's distinctly pro-labor bent, however, the debate will likely fall on deaf ears.

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## NLRB Befriends Unions Again, and Again

Posted on June 10, 2011 by [John M. Stephen](#)

No, this is not another comment on the much-publicized and highly politicized complaint filed by the National Labor Relations Board ("Board" or "NLRB") against Boeing for allegedly moving work from Washington to South Carolina in retaliation for protected union activity. Rather, it pertains to *Sheet Metal Workers Local 15 (Brandon Medical Center)* and *Auto Workers Local 376 (Colt's Mfg. Co.)*, decisions issued by the Board on May 26 and May 27, 2011, respectively.

Although these cases involved entirely different fact situations, in each instance a panel of the NLRB rejected findings of an administrative law judge who, after hearing the evidence, concluded that a union had violated the National Labor Relations Act ("NLRA" or "Act"). Both panels included Members Liebman and Pearce, while Member Hayes dissented in both cases.

In *Sheet Metal Workers* the question was whether a 16' x 12' rat balloon with a sign attached to its abdomen along with a union member displaying a leaflet with outstretched arms to incoming and outgoing traffic constituted unlawful picketing under Section 8 (b)(4)(ii)(B) or was simply lawful handbilling.

Based upon the evidence, including the union organizer's admission to the hospital safety and security director that the union was "picketing" and that the rat balloon "would probably get the attention of the public more than just regular handbills," the administrative law judge found this conduct to be unlawful picketing. Expanding upon a 2010 decision which had held that large, stationary banners did not constitute pickets, however, Members Liebman, Pearce and Becker rejected this conclusion. According to them, the giant, sign-holding rat and union supporter "entailed no element of confrontation, as they were stationary and located at sufficient distances (between 100 and 170 feet) from the

vehicle and building entrances to the hospital" so "visitors were not confronted by an actual or symbolic barrier as they arrived at, or departed from, hospital."

By contrast, Member Hayes would have upheld the ALJ's determination, reasoning:

*"For pedestrians or occupants of cars passing in the shadow of the rat balloon, which proclaims the presence of a 'rat employer' and is surrounded by union agents, the message is unmistakably confrontational and coercive... Such displays, now frequent in labor disputes, constitute a signal to third parties that there is, in essence, an invisible picket line that should not be crossed."*

The following day, in *Auto Workers*, Members Liebman and Pearce again rejected an ALJ's finding that a union had violated the Act; and Member Hayes again disagreed. This time the issue was whether a union could require that employees objecting to union dues being used for activities other than collective-bargaining, contract administration and grievance adjustment renew such objection annually.

The ALJ concluded that there was no valid business justification for the annual renewal requirement, especially since the union did not have similar requirements for "union membership cards, dues authorization checkoff cards or notice of resignation from the union" and could not satisfactorily explain such inconsistency. The Board majority, however, concluded that there was no showing that the union's actions were "arbitrary, discriminatory, or in bad faith" and therefore "conclude[ed] that the Unions' procedures comport with the duty of fair representation."

Dissenting, Member Hayes would have found the annual renewal requirement to be a substantial and arbitrary burden, as well as discriminatory. Moreover, in addition to upholding the ALJ, he would have addressed whether the standard duty of fair representation standard used by the majority was too deferential when the conduct arguably involved a

union's interference with an employee's Section 7 rights.

Although the NLRB undoubtedly tries to apply and interpret the Act correctly, its members each bring a certain perspective to that process. And, while these holdings are limited to somewhat unique facts and narrow legal issues, they provide a warning which all employers should heed: currently the Board majority has a decidedly more pro-union perspective than it did under the previous administration.

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## NLRB Continues To Support Harsh Remedies

Posted on March 1, 2011 by [Mike Underwood](#)

A recent advice memo from the Acting General Counsel for the National Labor Relations Board (NLRB) shows once again that the agency is stepping up the nature of the remedies it will go after when employers are accused of unfair labor practices.

In GC Memo 11-06 the General Counsel authorizes NLRB Regional Offices to seek certain extraordinary remedies where the employer is accused of bad faith bargaining with a union over initial collective bargaining agreement terms. The Regions are now authorized to pursue directly:

- notice reading (requiring a management representative to read a statement in front of employees saying the company will not violate the National Labor Relations Act);
- a minimum six-month extension of the certification year (unions enjoy a one-year period of time after they become certified to represent a group of employees during which they cannot lose their representation rights, even if a majority of the employees no longer want them. This remedy allows the NLRB to extend that protection for the union for a minimum of an additional six months. Although the GC Memo states that an extension of 12 months is "normally" best, it allows the Region to seek less time, but no

less than six months. Interestingly, no maximum time is set for the extension); and

- a mandatory schedule for bargaining meetings of no less than 24 hours total per month and no less than six hours per session (the theory for this remedy is that employer's sometimes refuse to meet on a sufficiently frequent basis and/or refuse to provide information needed by the union).

In the past, Regional Offices could pursue these remedies only after asking for approval from the NLRB Division of Advice in Washington. The GC memo also mentions, as additional appropriate remedies, requiring the employer to reimburse the expenses the union incurs in the bargaining process allegedly caused by the employer's misconduct and to reimburse the union for its related litigation expenses. However for those remedies, the Regions must still seek approval from the Division of Advice.

This GC memo is just the most recent in a very clear pattern of actions by the NLRB to strengthen its tools of enforcement in ways that make it easier for unions to organize workers and to obtain first contract terms. These were among the main objectives in the ill-fated Employee Free Choice Act proposed in the early days of the current administration and supported fervently by organized labor. When it became clear there was not sufficient support in Congress for that law to pass, the NLRB began its efforts to support the same objectives through administrative measures like this most recent GC memo.

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## NLRB Continues Aggressive Campaign

Posted on February 14, 2011 by [Mike Underwood](#)

As we have been noting recently, the NLRB and its Acting General Counsel (AGC) have embarked on an aggressive campaign to increase NLRB influence and control over labor-management relations. At hearings on Friday, February 11, 2011 before the House Committee on Education and the Workforce, the employer community raised concerns about a number

of those initiatives, including two recent AGC Memoranda, which are enforcement directives from the NLRB General Counsel to NLRB Regional Offices around the country. In GC 11-04, the AGC issued a controversial direction to the Regional Offices to include mandatory default language in settlement agreements. In GC 11-05, the AGC announced a significant change in the way the NLRB will proceed when issues brought before the NLRB could also be brought in front of an arbitrator under a labor contract grievance procedure.

Memorandum GC 11-04 instructs the NLRB's Regional Offices to include certain language in all settlement agreements over unfair labor practice charges. The new language says that if an employer fails to comply with any aspect of the settlement, the employer will automatically be deemed to have admitted all of the allegations in the underlying unfair labor practice complaint. This language means that employers entering into settlement agreements with the NLRB will have to be very cautious not to do anything that might be construed a violation of its obligations under the settlement agreement because violating the settlement will make the employer automatically liable for the underlying allegations.

Memorandum GC 11-05 revises the NLRB's long-standing practice of deferring to arbitration awards and grievance settlements. Up until now, if a union that represented an employee covered by a labor contract with a grievance/arbitration procedure filed a charge with the NLRB claiming unfair treatment, the NLRB would usually defer to the grievance arbitration procedure if the conduct complained about could be pursued under those procedures. In Memorandum GC 11-05, the AGC says that the NLRB's current policy is "overly deferential" and does not adequately protect employee rights. The AGC urges Regional Directors to investigate charge allegations and make a decision whether the charge has "arguable merit" before deferring to arbitration. In cases where an arbitration decision has already been issued, the NLRB Regional Directors are told to determine whether the parties presented to the arbitrator the statutory right that the charging party sought to enforce and whether the statutory right was incorporated into the arbitrator's decision. The Regional Director is also to consider whether the arbitrator correctly recognized the

statutory principles and applied them in issuing his or her decision. Only then will the Board defer to the arbitrator's award. Also, the AGC urges Regional Directors not to defer to grievance settlements unless it is clear the parties intended for the settlement to resolve the unfair labor practice issues. Regional Directors are also encouraged to consider whether the settlement is "reasonable," whether it appears any fraud, duress, or coercion occurred and whether the respondent has a history of unfair labor practices or of violating settlement agreements.

All of the hurdles set out in Memorandum GC 11-05 will make it far less likely that the NLRB will defer to grievance arbitration procedures. This means that employers with union contracts can expect much more often to be required to battle before the NLRB regarding the very same issues that are being pursued under the union contract grievance arbitration procedures.

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## NLRB Creates Pre-emptive Strike Unfair Labor Practice

Posted on February 4, 2011 by [Brian Hall](#)

Over the past few weeks, we have documented the NLRB's efforts to expand worker rights through [rule-making and General Counsel directives](#). On January 28, 2011, however, the Board went back to its traditional means of fashioning federal labor policy by issuing its decision in [Parexel International, LLC., 356 NLRB No. 82 \(January 28, 2011\)](#).

In *Parexel*, the charging party had a conversation with a co-worker about whether he received a wage increase after he had left and then returned to work for the company. He indicated (apparently falsely) that in fact he had received a raise and so did his wife who also had left and returned. The charging party then went to her supervisor, repeated the tale from her co-worker and then suggested that her entire unit should quit and return so they could get raises. The supervisor then told management about the conversation, which resulted in the charging party

being summoned to discuss the matter. The charging party reiterated her conversation with the co-worker and stated her belief that the company, which had a significant number of employees from South Africa, was favoring the South Africans when it came to wages. When questioned, the charging party denied having spoken with any of her co-workers regarding her concerns. A few days later, the employee was terminated.

Section 8(a)(1) of the National Labor Relations Act makes it illegal to terminate an employee for engaging in "protected concerted activity." One form of protected concerted activity is to talk to co-workers to raise issues of mutual concern about wages or other working conditions. The NLRB Judge (ALJ) in this case concluded that the company had not violated the National Labor Relations Act because the employee, who had not discussed her concerns with any co-workers, had not yet engaged in any protected activity. In reaching this conclusion, the ALJ noted:

*In some respects, [the charging party's] termination was a pre-emptive strike to prevent her from engaging in activity protected by the Act. See Compuware Corp., 320 NLRB 101, 102-103 (1995). However, I have not encountered any precedent for the proposition that I can find a violation on this basis without evidence that the alleged discriminate (sic.) had in fact engaged in concerted protected activity. Therefore, I decline to affirm the complaint on this basis.*

On appeal, a three-member panel of the NLRB, however, disagreed, adopting a "pre-emptive strike" theory that expands the scope of protected activity for employees by rejecting any requirement that actual concerted activity take place prior to finding a Section 8(a)(1) violation. Specifically, the Board stated, "If an employer acts to prevent concerted protected activity – to 'nip it in the bud' – that action interferes with and restrains the exercise of Section 7 rights and is unlawful without more." "What is critical," the Board concluded, was "the employer's intent to suppress protected concerted activity." On the specific facts of this case, the Board noted:

*[The charging party's] discharge had the obvious effect of restricting her own further protected discussions of wages and possible discrimination with other employees, thus interfering with her Section 7 rights. As discussed above, the discharge also had the effect of keeping other employees in the dark about these matters, thus preventing them from discussing, and possibly inquiring further or acting in response to, substandard wages or perceived wage discrimination. We therefore find that the Respondent's discharge of [the charging party] violated Section 8(a)(1).*

Non-unionized employers frequently lose track of the fact that employees' Section 7 rights under the NLRA include the right to discuss their wages with each other and that the right extends to non-union as well as union workers. Many non-union employers, however, still enforce policies, often unwritten, that forbid or at least discourage employees from comparing wage information with each other. On this count, the Board noted:

*[W]e have often found that maintenance or enforcement of a rule against discussing wages effectively interferes with employee rights and violates Section 8(a)(1) even if no employee has yet engaged in protected activity and been disciplined under the rule ... If maintenance of such a rule violates the Act, a fortiori, the discharge of an employee to prevent her from engaging in such conduct violates the Act. When an employee is discharged on that basis, both she and the employees with whom she would have spoken are denied the opportunity to compare their wages and other terms of employment and to determine whether to take further concerted action.*

The Board's *Parexel* decision unmistakably provides yet another shot in the arm to union organizing efforts. In fact, the Board noted the significance of wage discussions to unionization by stating:

*The Board has long held that Section 7 'encompasses the right of employees to ascertain what wages are paid by their employer, as wages are a vital term and condition of employment.' In fact, wage discussions among*

*employees are considered to be at the core of Section 7 rights because wages, 'probably the most critical element in employment,' are the 'grist on which concerted activity feeds.' Discussions about wages are often the precursor to organizing and seeking union assistance. But whether such discussions lead to union activity or not, our precedents provide that restrictions on wage discussions are violations of Section 8(a)(1) (Citations omitted.)*

Employers, whether unionized or not, therefore should understand that their motivation in chilling concerted activity, not whether actual concerted activity has already taken place, will determine whether Section 8(a)(1) has been violated. Employers can also be sure that unions will be using the *Parexel* decision to their advantage to encourage employee discussions about wages and other terms and conditions of employment in order to potentially spark union interest.

In the next few days, we will address other recent NLRB pronouncements that have been somewhat lost in the shuffle, but nevertheless could have significant impact on federal labor policy. Stay tuned...