Annual Meeting 2019

Labor & Employment Law Section

January 18, 2019

New York Hilton Midtown

New York City

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This program is offered for educational purposes. The views and opinions of the faculty expressed during this program are those of the presenters and authors of the materials, including all materials that may have been updated since the books were printed or distributed electronically. Further, the statements made by the faculty during this program do not constitute legal advice.

MCLE INFORMATION

Program **2019 NYSBA Labor & Employment Law Section Annual Meeting**

Date/s: 01/18/2019 Location: New York, NY

Evaluation: www.nysba.org/am2019-lab0

This evaluation survey link will be emailed to registrants following the program.

Total Credits: **4.00**

Credit Category:

2.00	Areas of Professional Practice	0.00	Law Practice Management
1.00	Ethics and Professionalism	0.00	Skills
1.00	Diversity, Inclusion and Elimination of Bias		

This course is approved for credit for **both** experienced attorneys and newly admitted attorneys (admitted to the New York Bar for less than two years). Newly admitted attorneys participating via webcast should refer to Additional Information and Policies regarding permitted formats.

Attendance Verification for New York MCLE Credit

In order to receive MCLE credit, attendees must:

1) **Sign in** with registration staff
2) Complete and return a **Form for Verification of Presence** (included with course materials) at the end of the program or session. For multi-day programs, you will receive a separate form for each day of the program, to be returned each day.

Partial credit for program segments is not allowed. Under New York State Continuing Legal Education Regulations and Guidelines, credit shall be awarded only for attendance at an entire course or program, or for attendance at an entire session of a course or program. Persons who arrive late, depart early, or are absent for any portion of a segment will not receive credit for that segment. The Form for Verification of Presence certifies presence for the entire presentation. Any exceptions where full educational benefit of the presentation is not received should be indicated on the form and noted with registration personnel.

Program Evaluation

The New York State Bar Association is committed to providing high quality continuing legal education courses, and your feedback regarding speakers and program accommodations is important to us. Following the program, an email will be sent to registrants with a link to complete an online evaluation survey. The link is also provided above.

Additional Information and Policies

Recording of NYSBA seminars, meetings and events is not permitted.

Accredited Provider

The New York State Bar Association's **Section and Meeting Services Department** has been certified by the New York State Continuing Legal Education Board as an accredited provider of continuing legal education courses and programs.

Credit Application Outside of New York State

Attorneys who wish to apply for credit outside of New York State should contact the governing body for MCLE in the respective jurisdiction.

MCLE Certificates

MCLE Certificates will be emailed to attendees a few weeks after the program, or mailed to those without an email address on file. **To update your contact information with NYSBA**, visit www.nysba.org/MyProfile, or contact the Member Resource Center at (800) 582-2452 or MRC@nysba.org.

Newly Admitted Attorneys—Permitted Formats

In accordance with New York CLE Board Regulations and Guidelines (section 2, part C), newly admitted attorneys (admitted to the New York Bar for less than two years) must complete **Skills** credit in the traditional live classroom setting or by fully interactive videoconference. **Ethics and Professionalism** credit may be completed in the traditional live classroom setting; by fully interactive videoconference; or by simultaneous transmission with synchronous interactivity, such as a live-streamed webcast that allows questions during the program. **Law Practice Management** and **Areas of Professional Practice** credit may be completed in any approved format.

Tuition Assistance

New York State Bar Association members and non-members may apply for a discount or scholarship to attend MCLE programs, based on financial hardship. This discount applies to the educational portion of the program only. Application details can be found at www.nysba.org/SectionCLEAssistance.

Questions

For questions, contact the NYSBA Section and Meeting Services Department at SectionCLE@nysba.org, or (800) 582-2452 (or (518) 463-3724 in the Albany area).

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Labor and Employment Law Section

Friday, January 18, 2019 | 8:30 a.m. – 12:25 p.m.

New York Hilton Midtown | NYC

4.0 Credits

2.0 in Areas of Professional Practice | 1.0 in Ethics | 1.0 in Diversity, Inclusion and Elimination of Bias
This program is transitional and is suitable for all attorneys including those newly admitted.

MCLE Program | 8:30 a.m. to 12:25 p.m. | Regent Parlor, Sutton Parlor South and Center, Second Floor

Luncheon | 12:30 p.m. to 2:00 p.m. | Sutton North, Second Floor

Speaker: Professor Robert Mikos, Vanderbilt University
One of the nation's foremost experts in Cannabis Law and author of the first-of-its-kind casebook, *Marijuana Law, Policy, and Authority*, will speak on
Implications of Legalized Marijuana for Labor & Employment Lawyers

Agenda

8:30 a.m. – 8:45 a.m. **Business Meeting and Introductory Remarks**
Cara Greene, Esq., Section Chair, Outten & Golden, LLP, New York, NY

8:45 a.m. – 9:35 a.m. **Plenary One: Training's Role in Transforming Workplace Culture**
During the Transforming Workplace Culture presentation at the Section's Fall Meeting, the audience weighed in on key questions about obstacles to genuinely changing workplace culture to increase civility and prevent discrimination, harassment, and retaliation. Our speakers will springboard from the Fall Meeting's real-time polling results to explore what training strategies are most likely to promote meaningful transformation in workplace culture.

Panel Chair: **Professor Samuel Estreicher**, New York University School of Law, New York, NY
Panelists: **James L. Hallman, Esq.**, New York City Department of Transportation, New York, NY
Susan R. Ritz, Esq., Ritz Clark & Ben-Asher LLP, New York, NY

(1.0 credit in Diversity, Inclusion and Elimination of Bias)

9:35 a.m. – 9:45 a.m. **Break**

9:45 a.m. – 10:35 a.m. **Plenary Two: 2018 Legislative and Regulatory Developments in New York State Employment Law**
2018 was an eventful year in New York Employment Law, with a number of significant new laws being passed or enacted and new regulations being promulgated. These developments will impact many of our practices in important ways. Our seasoned panel members, who closely follow the legislative scene in Albany, will discuss the state's new sexual harassment laws, the Paid Family Leave Act, and other new laws and regulations.

Moderator: **Geoffrey A. Mort, Esq.**, Kraus & Zuchlewski LLP, New York New York
Panelists: **Sarah J. Burger, Esq.**, Burger Law Group PLLC, Saratoga Springs, NY
Andrew D. Bobrek, Esq., Bond, Schoeneck & King, PLLC, Syracuse, NY

(1.0 credit in Areas of Professional Practice)

10:35 a.m. – 11:25 a.m. **Plenary Three: Candor Before the Tribunal**
Does an attorney have a duty to advise the court of an unfavorable authority that an adversary might have missed? How about a fact that could change the outcome of case? Seasoned litigators will discuss the duty to balance zealous advocacy with candor, and a New York State appellate court judge will review our duty to act as officers of the court and the possible sanctions associated with neglecting that duty.

Panel Chair: **Colin M. Leonard, Esq.**, Bond, Schoeneck & King, PLLC, Syracuse, NY
Panelists: **Hon. Valerie Brathwaite Nelson**, Associate Justice, Appellate Division, Second Judicial Department, NYS Supreme Court, Jamaica, NY
Robert Schofield, Esq., Partner, Whiteman Osterman & Hanna LLP, Albany, NY
Kate M. Swearengen, Esq., Cohen, Weiss & Simon LLP, New York, NY

(1.0 credit in Ethics)

11:25 a.m. – 11:35 a.m. **Break**

11:35 a.m. – 12:25 p.m. **CONCURRENT WORKSHOPS**

Select One of the Following Workshops (and sign up for it in advance)

Workshop A: ERISA

Employee Leave of Absence Requirements That Affect New York State Employers

Learn the rules and requirements for taking a leave of absence under each of the following acts, and how the acts relate to and interact with each other: The Federal Family and Medical Leave Act; New York State Paid Family Leave; New York City Earned Sick and Safe Time Act.

Panelists: **Stanley D. Baum, Esq.**, Cary Kane, LLP, New York, NY
Paul T. Esposito, Esq., Slevin & Hart, P.C., Washington, DC
Howard T. Schragin, Esq., Sapir Schragin LLP, New York, NY
Elizabeth E. Hunter, Esq., Frumkin & Hunter LLP, West Harrison, NY

Workshop B: NLRB

NLRB Update

Representatives of labor and management, joined by a former NLRB Regional Director, will examine developing issues at the National Labor Relations Board including the Board's decision to revisit the recently amended R-case Rules, the potential use of rulemaking on standards for joint employer determinations, and the General Counsel's memoranda on the investigation of cases alleging breach of the duty of fair representation and overbroad workplace rules post-Boeing.

Panelists: **Karen P. Fernbach, Esq.**, Hofstra Law School, Former NLRB Region 2 Director, Hempstead, NY
Peter D. Conrad, Esq., Proskauer Rose LLP, New York, NY
Jae W. Chun, Esq., Freidman & Anspach, New York, NY

Workshop C: EPIC

A Road Map: Revisiting Arbitration Agreements in Light of Epic

In Epic Systems Corp. v. Lewis, the Supreme Court of the United States continued a line of authority – including AT&T Mobility v. Concepcion and American Express v. Italian Colors – to conclude, once again, that employers may require employees to enter into arbitration agreements that waive their ability to participate in class or collective actions. Examine safeguards transactional attorneys should include in negotiating arbitration clauses to ensure the enforceability of class waivers in light of Epic and its progeny in federal and state courts. Issues employers and employees will face when litigating existing agreements, and drafting future arbitration agreements will also be covered including: case management provisions to maximize the expeditious and cost-effective attributes of the arbitral forum; continued necessity of opt out clauses; collateral estoppel issues; missing "magic" words; cost concerns.

Moderator: **Ann Lesser, Esq.**, Vice President , American Arbitration Association, New York, NY
Panelists: **Theodore K. Cheng Esq.**, Arbitrator, ADR Office of Theo Cheng LLC, Princeton Junction, NJ
Melissa L. Stewart, Esq., Outten & Golden LLP, New York, NY
Amanda M. Fugazy. Esq., Ellenoff Grossman & Schole LLP, New York, NY

Workshop D: JANUS

Janus' Impacts on New York's Public Sector Employers, Employees and Unions

Practical impacts of the U.S. Supreme Court's decision in Janus v. American Federation of State, County and Municipal Employees, Council 31 on New York's public sector employers, employees and unions will be discussed, along with an overview of the Taylor Law amendments passed in early 2018 to counter Janus' impact, and how public sector employers and unions have dealt with Janus and the related Taylor Law amendments.

Moderator: **Nathaniel G. Lambright, Esq.**, Blitman & King LLP, Syracuse, NY
Panelists: **Melanie Wlasuk, Esq.**, Public Employment Practices & Representation Director, Public Employment Relations Board, Albany, NY
Seth Greenberg, Esq., Greenberg Burzichelli Greenberg PC, New Hyde Park, NY
Paul J. Sweeney, Esq., Coughlin & Gerhart, LLP, Binghamton, NY

(All workshops qualify for 1.0 credit in Areas of Professional Practice)

12:30 p.m. – 2:00 p.m. **Luncheon** | Sutton North, Second Floor *(Additional fees apply)*

Speaker: **Professor Robert Mikos**, Vanderbilt University, Nashville, TN
One of the nation's foremost experts in Cannabis Law and author of the first-of-its-kind casebook, *Marijuana Law, Policy, and Authority*, will speak on **Implications of Legalized Marijuana for Labor & Employment Lawyers**

2:00 p.m. – 3:00 p.m. **Section Committee Meetings** | Beekman Parlor, Second Floor

Section Chair
Program Co-Chairs

Cara Greene, Esq. | Outten & Golden, LLP | New York City
Robert M. Boreanaz, Esq. | Lipsitz Green Scime Cambria LLP | Buffalo
Christopher D'Angelo, Esq. | Con Edison | New York City
Abigail Levy, Esq. | New York City Office of Collective Bargaining | New York City

Lawyer Assistance Program 800.255.0569

Q. What is LAP?

A. The Lawyer Assistance Program is a program of the New York State Bar Association established to help attorneys, judges, and law students in New York State (NYSBA members and non-members) who are affected by alcoholism, drug abuse, gambling, depression, other mental health issues, or debilitating stress.

Q. What services does LAP provide?

A. Services are **free** and include:

- Early identification of impairment
- Intervention and motivation to seek help
- Assessment, evaluation and development of an appropriate treatment plan
- Referral to community resources, self-help groups, inpatient treatment, outpatient counseling, and rehabilitation services
- Referral to a trained peer assistant – attorneys who have faced their own difficulties and volunteer to assist a struggling colleague by providing support, understanding, guidance, and good listening
- Information and consultation for those (family, firm, and judges) concerned about an attorney
- Training programs on recognizing, preventing, and dealing with addiction, stress, depression, and other mental health issues

Q. Are LAP services confidential?

A. Absolutely, this wouldn't work any other way. In fact your confidentiality is guaranteed and protected under Section 499 of the Judiciary Law. Confidentiality is the hallmark of the program and the reason it has remained viable for almost 20 years.

Judiciary Law Section 499 Lawyer Assistance Committees Chapter 327 of the Laws of 1993

Confidential information privileged. The confidential relations and communications between a member or authorized agent of a lawyer assistance committee sponsored by a state or local bar association and any person, firm or corporation communicating with such a committee, its members or authorized agents shall be deemed to be privileged on the same basis as those provided by law between attorney and client. Such privileges may be waived only by the person, firm or corporation who has furnished information to the committee.

Q. How do I access LAP services?

A. LAP services are accessed voluntarily by calling **800.255.0569** or connecting to our website **www.nysba.org/lap**

Q. What can I expect when I contact LAP?

A. You can expect to speak to a Lawyer Assistance professional who has extensive experience with the issues and with the lawyer population. You can expect the undivided attention you deserve to share what's on your mind and to explore options for addressing your concerns. You will receive referrals, suggestions, and support. The LAP professional will ask your permission to check in with you in the weeks following your initial call to the LAP office.

Q. Can I expect resolution of my problem?

A. The LAP instills hope through the peer assistant volunteers, many of whom have triumphed over their own significant personal problems. Also there is evidence that appropriate treatment and support is effective in most cases of mental health problems. For example, a combination of medication and therapy effectively treats depression in 85% of the cases.

Personal Inventory

Personal problems such as alcoholism, substance abuse, depression and stress affect one's ability to practice law. Take time to review the following questions and consider whether you or a colleague would benefit from the available Lawyer Assistance Program services. If you answer "yes" to any of these questions, you may need help.

1. **Are my associates, clients or family saying that my behavior has changed or that I don't seem myself?**
2. **Is it difficult for me to maintain a routine and stay on top of responsibilities?**
3. **Have I experienced memory problems or an inability to concentrate?**
4. **Am I having difficulty managing emotions such as anger and sadness?**
5. **Have I missed appointments or appearances or failed to return phone calls? Am I keeping up with correspondence?**
6. **Have my sleeping and eating habits changed?**
7. **Am I experiencing a pattern of relationship problems with significant people in my life (spouse/parent, children, partners/associates)?**
8. **Does my family have a history of alcoholism, substance abuse or depression?**
9. **Do I drink or take drugs to deal with my problems?**
10. **In the last few months, have I had more drinks or drugs than I intended, or felt that I should cut back or quit, but could not?**
11. **Is gambling making me careless of my financial responsibilities?**
12. **Do I feel so stressed, burned out and depressed that I have thoughts of suicide?**

There Is Hope

CONTACT LAP TODAY FOR FREE CONFIDENTIAL ASSISTANCE AND SUPPORT

The sooner the better!

1.800.255.0569

NEW YORK STATE BAR ASSOCIATION

JOIN OUR SECTION

☐ As a NYSBA member, **PLEASE BILL ME $35 for Labor and Employment Law Section dues.** (law student rate is $5)

☐ I wish to become a member of the NYSBA (please see Association membership dues categories) and the Labor and Employment Law Section. **PLEASE BILL ME for both.**

☐ I am a Section member — please consider me for appointment to committees marked.

Name _____

Address _____

_____

City _____ State _____ Zip _____

The above address is my ☐ Home ☐ Office ☐ Both

Please supply us with an additional address.

Name _____

Address _____

City _____ State _____ Zip _____

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Fax number (_____) _____

E-mail address _____

Date of birth _____ /_____ /_____

Law school _____

Graduation date _____

States and dates of admission to Bar: _____

Please return this application to:

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JOIN A LABOR AND EMPLOYMENT LAW SECTION COMMITTEE(S)

On the list below, please designate, in order of preference (1, 2, 3), up to three committees to which you would like to be appointed as a member. Every effort will be made to accommodate your preferences, but each committee's composition is based on space availability and balance.

___ Alternative Dispute Resolution (LABR2600)
___ Communications (LABR3400)
___ Continuing Legal Education (LABR1020)
___ Diversity and Leadership Development (LABR3200)
___ Employee Benefits and Compensation (LABR1500)
___ Equal Employment Opportunity Law (LABR1600)
___ Ethics and Professional Responsibility (LABR2700)
___ Finance (LABR3300)
___ International Employment and Immigration Law (LABR3100)
___ Labor Arbitration (LABR2100)
___ Labor Relations Law and Procedure (LABR2200)
___ Legislation and Regulatory Developments (LABR1030)
___ Membership (LABR1040)
___ Mentoring Program (LABR4700)
___ New Lawyers (LABR4400)
___ Public Sector Labor Relations (LABR1700)
___ Technology in Workplace and Practice (LABR4500)
___ Wage and Hour (LABR4600)
___ Workplace Rights and Responsibilities (LABR1900)

2019 ANNUAL MEMBERSHIP DUES

Class based on first year of admission to bar of any state.
Membership year runs January through December.

ACTIVE/ASSOCIATE IN-STATE ATTORNEY MEMBERSHIP

Attorneys admitted 2011 and prior	$275
Attorneys admitted 2012-2013	185
Attorneys admitted 2014-2015	125
Attorneys admitted 2016 - 3.31.2018	60

ACTIVE/ASSOCIATE OUT-OF-STATE ATTORNEY MEMBERSHIP

Attorneys admitted 2011 and prior	$180
Attorneys admitted 2012-2013	150
Attorneys admitted 2014-2015	120
Attorneys admitted 2016 - 3.31.2018	60

OTHER

Sustaining Member	$400
Affiliate Member	185
Newly Admitted Member*	FREE

DEFINITIONS

Active In-State = Attorneys admitted in NYS, who work and/or reside in NYS
Associate In-State = Attorneys not admitted in NYS, who work and/or reside in NYS
Active Out-of-State = Attorneys admitted in NYS, who neither work nor reside in NYS
Associate Out-of-State = Attorneys not admitted in NYS, who neither work nor reside in NYS
Sustaining = Attorney members who voluntarily provide additional funds to further support the work of the Association
Affiliate = Person(s) holding a JD, not admitted to practice, who work for a law school or bar association
*Newly admitted = Attorneys admitted on or after April 1, 2018

NYSBA

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Plenary One:
Training's Role in Transforming Workplace Culture

Professor Samuel Estreicher
New York University School of Law, New York, NY

James L. Hallman, Esq.
New York City Department of Transportation, New York, NY

Susan R. Ritz, Esq.
Ritz Clark & Ben Asher, New York, NY

TRAINING EMPLOYERS AND LAWYERS ABOUT INTERNAL INVESTIGATIONS

By Jonathan Ben-Asher and Susan Ritz [*]

INTRODUCTION

Employers have, for some time, been under pressure to promptly and thoroughly investigate allegations of workplace misconduct. *See generally Upjohn Warnings: Recommended Best Practices When Corporate Counsel Interacts with Corporate Employees*, ABA WCCC Working Group 2-3, (October 5, 2009) http://www.acc.com/education/webcasts/upload/Upjohn-Warnings.pdf. That pressure has increased, prompted in part by the #MeToo Movement. Employees, and the press are pursuing employment claims, and stories about them, with zeal and passion. Only foolhardy employers would ignore their employees' complaints.

Investigation is one of the first steps in addressing complaints and, if handled poorly, it may exacerbate an already volatile situation. Not only may a bad investigation lead to employer liability, but it could also cause employees to conclude that their employer is whitewashing

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[*] The authors are partners at Ritz Clark & Ben-Asher LLP in New York City. They represent executives, professionals and other employees experiencing employment-related legal problems. Mr. Ben-Asher has a particular focus on representing employees concerning investigations, whistleblowing and retaliation claims, and contractual issues. Ms. Ritz represents employees with a wide range of discrimination, harassment and retaliation claims. She also advises small employers and conducts impartial investigations.

The authors wish to acknowledge the assistance of Jacob Harksen, a 2018 graduate of University of Minnesota Law School.

Earlier versions of this paper were published by the ABA in connection with the Section of Labor and Employment Law's Ninth Annual Conference in November 2015, in the ABA Journal of Labor and Employment Law and in connection with the New York City Bar Association's June 2018 program on "Sexual Harassment & the Law: A Call to Action for Lawyers in the Era of #MeToo."

This paper is written as of May 4, 2018. It is intended for educational purposes only and should not be construed as, or relied upon for, legal advice.

complaints or failing to take them seriously. Even worse, employees or witnesses who feel mistreated during the investigation are likely to harbor bitterness and consider bringing retaliation claims. An employer's use of the best training available will be for naught if employees learn that the implicit and explicit representations made during training and in employer policies are just an empty promise or window dressing.

Complaints in need of investigation may arise internally or externally. Employees may make complaints about discrimination, harassment, retaliation, bullying, financial improprieties, misconduct by management or Board members, and even boorish behavior. At the same time, with (at least until the Trump administration) an aggressive SEC, Department of Justice, and Department of Health and Human Services, companies can easily find themselves the targets of government scrutiny. *See generally* Matt Apuzzo & Ben Protess, *Justice Department Sets Sights on Wall Street Executives*, *The New York Times,* Sept. 9, 2015, https://www.nytimes.com/2015/09/10/us/politics/new-justice-dept-rules-aimed-at-prosecuting-corporate-executives.html; SEC, Division of Enforcement, Enforcement Manual (Oct. 28, 2016), https://www.sec.gov/divisions/enforce/enforcementmanual.pdf. Executives are often at the center of these investigations, either because they have lodged a complaint, or because they are the subject of a complaint.

With proper advance training, many of these complaints can be avoided because the offending behavior will cease. In some cases, training my lead to an initial increase in complaints. While no employer likes to hear that there may be problems in the workplace, receiving a complaint and doing a proper investigation – however time-consuming and expensive

– is vastly superior to having to defend litigation where costs are high and public image may be tarnished.

Employers who receive complaints can, and should, carefully hire outside consultants with investigation experience, to conduct an independent, neutral investigation. These consultants should be able to responsibly and sensitively interview witnesses, bearing in mind that the employer's reputation for fairness is at stake. The investigators must also be thorough, being sure to give ample time to interviewing the complaining party, the accused and material witnesses. In addition, it behooves the employer to fully cooperate with the investigator's requests for documents and other relevant data. At the end of the process, regardless of whether the interested parties agree with the investigator's findings, everyone should feel that they were listened to with an open mind and that a full and fair inquiry was made.

For all these reasons, in these authors' opinion, utilizing an employer's regular outside counsel or in-house counsel to perform an internal investigation is to be avoided where possible. Choosing regular counsel or in-house counsel is likely to lead to conflicts of interest down the line (think: advocate-witness rule) and a perception of bias that may be difficult to overcome with employees and a potential jury. Likewise, in-house Human Resources professionals are apt to be viewed with a jaundiced eye and may not be able to win the confidence of the witnesses – an essential component to getting to the bottom of the facts. Moreover, it is rare for overwhelmed Human Resources professionals to be well enough trained and have sufficient time to carry out the thorough investigation that is warranted.

Once an investigation is completed, it most likely will be prudent to implement the investigator's recommendations, if any, to prevent the conduct from recurring and to send a message that unlawful conduct and conduct violative of the employer's policies will not be tolerated. Moreover, it is essential for the investigation's results to be communicated to the complaining party, the accused and sometimes even the witnesses. While it may not be possible to advise everyone of all the outcomes, everyone involved will want to know that the investigation has concluded and that, if warranted, appropriate corrective action was taken as a result.

An often forgotten but very important component of an investigation is for all witnesses and parties to be assured that they will not be subjected to retaliation and encouraged to come forward immediately if they believe they are experiencing retribution. If retaliation concerns are raised, they must be addressed promptly to ensure that future complainants and witnesses will not be chilled from coming forward and cooperating. Ideally, Human Resources will check in with the appropriate people six months after the investigation's conclusion to assure that no retaliation has occurred. If the accused is supervising anyone who participated in the investigation, Human Resources should carefully scrutinize subsequent performance appraisals that the supervisor does for the participants, as well as any personnel actions the supervisor takes with respect to those witnesses. These actions could include raises, demotions, bonuses and more.

A wise investigator will understand the concerns of everyone involved in an investigation. The rest of this paper will be dedicated to discussing those concerns from the perspectives of the investigator, the accused, the accuser, the employer and counsel.

Part I discusses some best practices for solid investigations and the ways in which investigations can backfire against an employer's interests.

Part II provides practical pointers to counsel about how to protect a client during an investigation, with a special emphasis on the crucial issues of privilege that will affect much of how an investigation proceeds, including the attorney-client privilege; the Department of Justice's and SEC's instructions to federal prosecutors concerning investigations of corporate misconduct and privilege waivers; "*Upjohn* warnings" by corporate counsel to employees who are potential witnesses; the work-product privilege; and a corporation's waiver of the attorney-client privilege when relying on an investigation to defend a discrimination or harassment claim.

I. Investigations

For many years, employers have been under a duty to investigate claims of sexual harassment, and promptly remediate the harassment. After *Faragher v. City of Boca Raton,* 524 U.S. 775 (1998), and its companion case, *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), it became essential to take these steps in order to avoid corporate liability for the harassing conduct of employees. Since *Faragher-Ellerth*, the duty to investigate has been extended to claims of harassment based on other protected classes. *E.g., McPherson v. NYP Holdings, Inc.*, 227 F. App'x 51 (2d Cir. 2007)(applying *Faragher-Ellerth* to hostile work

environment based on race and national origin); *Ferraro v. Kellwood Co.*, 440 F.3d 96 (2d Cir. 2006)(applying *Faragher-Ellerth* to ADA claim).

Another source of growth in the internal investigations business has come from the enactment and expansion of whistleblowing protections, under the Sarbanes-Oxley Act (SOX)(18 U.S.C. § 1514A (2012) (protecting whistleblowers of publicly-traded companies from discrimination)) and the Dodd-Frank Act (15 U.S.C. § 78u-6(h)(1)(A) (2012) (protecting from whistleblowers who provide information to the Securities and Exchange Commission)), both of which protect employees who complain about certain corporate frauds, securities violations and financial improprieties. *See generally* Jennifer Cobb & Myra L. McKenzie-Harris, *Ethical Implications of Document Use in Whistleblower and Retaliation Litigation*, 31 A.B.A. J. Lab. and Emp. L. 471 (2016); Richard Moberly et al., *De Facto Gag Clauses: The Legality of Employment Agreements that Undermine Dodd-Frank's Whistleblower Provisions*, 30 A.B.A. J. Lab. and Emp. L. 87 (2014).

The Supreme Court has broadened the protections under SOX to cover even employees of certain non-publicly traded companies. *See Lawson v. FMR LLC*, 134 S. Ct. 1158 1176 (2014) (whistleblowing protections under the Sarbanes-Oxley Act also protect employees of private contractors and subcontractors). Until recently, the SEC Office of the Whistleblower had been aggressively pursuing securities violations, and awarding substantial bounties to whistleblowers who provide information to the SEC. *See Whistleblower Awards*, U.S. Sec. & Exch. Comm'n, https://www.sec.gov/page/whistleblower-100million (last visited Jan. 14, 2018).

In addition, federal prosecutors and the Department of Health and Human Services Office of Inspector General had ramped up their investigations and prosecutions of fraudulent billing by health care providers and other federal contractors with *qui tam* suits under the False Claims Act. *See Justice Department Recovers Over $4.7 Billion From False Claims Act Cases in Fiscal Year 2016*, U.S. Dep't of Justice (Dec. 14, 2016), https://www.justice.gov/opa/pr/justice-department-recovers-over-47-billion-false-claims-act-cases-fiscal-year-2016; False Claims Act, 31 U.S.C. §§ 3729–3733 (2012).

Employees may become witnesses in, or targets of, investigations when issues arise concerning a company's improper accounting practices, insider trading, theft, bribery, money laundering, or fraud on federal agencies. Investigations may be set off by government subpoenas, complaints from shareholders or vendors, or media inquiries.

A. How To Conduct an Effective Investigation

There is no hard science that applies to a good investigation. But there are certainly ways an investigation can provide a good bulwark against a subsequent claim, and other ways in which it can backfire, causing anger and mistrust in the workplaces, in addition to giving ammunition to litigation brought by the investigation's target or accuser. Many treatises have been written on the subject of proper investigations.[1] A full treatment goes beyond the breadth of this paper. What follows are some best practices.

[1] One excellent, all-around employment discrimination treatise which includes helpful chapters on investigations is Merrick T. Rossein, *Employment Discrimination Law and Litigation*, Thomson Reuters.

At the outset of the investigation, it is essential to make sure that no evidence will be destroyed. Proper written instructions to the employer to preserve all email and data, whether hard copy or electronic, as well as back-ups, and to disable any automatic purging should be issued at once. Regular reminders should be sent. As employees and witnesses are interviewed, they should be issued written preservation notices for all data, including information on their personal devices, as well.

One practice utilized by some investigators to good effect is to develop an Investigation Plan early on and repeatedly refer back to it, amending it as facts develop. At a minimum, an Investigation Plan should include: the witnesses to be interviewed, steps taken to secure evidence, an outline of questions to be asked/issues to be investigated, legal research to be conducted, implementation of practices to avoid retaliation, and maintaining confidentiality to the extent lawfully permissible.

It is critical to commence the investigation as reasonably quickly as possible. This will help to re-assure all the parties that the matter is being taken seriously, and will reduce the chances that memories fade or evidence goes missing. Speed in commencing an investigation will also aid in any defense of claims since the law requires prompt and effective response, *see, e.g., Cerros v. Steel Technologies, Inc.*, 398 F.3d 944, 953 (7th Cir. 2005), though thoroughness should not be sacrificed for the sake of speed.

The order in which the investigation proceeds will vary depending on the situation. Generally, applicable documents, such as any written complaints or other evidence that has already been provided by the complainant, the accused and any witnesses should be obtained and

reviewed before interviews begin. In some situations, an email search may be essential so that the relevant parties can be asked about their electronic communications.

Wherever possible, witnesses should be interviewed in person. Phone interviews deprive the investigator of the opportunity to observe demeanor, effectively question the witness about documents, and assure that a witness is not being coached by someone else. A video interview via Skype or similar app/software, can be held if an in-person interview is not practical.

One mistake often made by investigators is the failure to take sufficient time with each witness to be sure that all of the relevant facts are obtained. Many people will be nervous about meeting with an investigator, so allowing time for the witness to relax and become comfortable is key. One component of relaxation involves the location of the interview. Ideally, interviews will not take place at the employer's premises, where witnesses will fear being seen with the investigator, and may feel uncomfortable speaking candidly about the employer on its premises. Off-premises interviews should be scheduled at intervals so that the witnesses do not run into each other.

Another key component is for the investigator to be able to assure the witnesses that they will not be retaliated against for participating in the investigation. The employer should have a written policy that outlines this protection from retaliation, and the investigator should point to it early on in the interview. At times, reluctant witnesses need to be told about the non-retaliation policy as early as when the interview is arranged.

The investigator should take thorough notes of each interview, reduce those notes to a written statement, and provide that statement to the witness for review and signature. Some

investigators use a tape recorder, but that practice runs the risk of intimidating the witness. At times, a stenographer may be advisable. When providing the resulting written statement to the witness, the investigator should include written instructions that offer the opportunity to review and make revisions to the statement if the witness believes anything in the statement is inaccurate. The witness should be instructed that revisions should be handwritten (or typed and attached) in a manner that does not obscure the original statement.

Each witness statement should start with confirmation that the *Upjohn* notice (discussed below in Section II) was given, along with a description of the notice's contents, to assure there is a record that the witness received proper notice. In addition, witnesses should be instructed to initial the bottom of each page (a footer with a line and the witness's initials underneath will facilitate this), initial each change and sign and date the last page. Just above the signature, there should be a recitation along the lines of:

> I, [NAME], HAVE REVIEWED THIS STATEMENT AND MY SIGNATURE BELOW CERTIFIES THAT IT IS ENTIRELY ACCURATE. I HAD THE OPPORTUNITY TO CORRECT ANYTHING THAT IS NOT ACCURATE AND IF I HAD ANY CORRECTIONS, THEY HAVE BEEN ADDED TO THE STATEMENT.
>
> I WILL NOT DELETE, ALTER OR OTHERWISE DESTROY OR MAKE UNAVAILABLE ANY EMAILS, TEXTS, TWEETS, SOCIAL MEDIA POSTS, DOCUMENTS, PHOTOS, RECORDINGS, VOICE MAILS OR ANY OTHER COMMUNICATIONS I HAVE HAD WITH ANYONE, OR THAT I HAVE IN MY POSSESSION, CONCERNING [NAME] COMPLAINT OR ANY FACTS RELATING TO THAT COMPLAINT AND THIS INVESTIGATION.

The above practices will help ensure that witness' statements are preserved and reliable and provide a record of the *Upjohn* and preservation notices. The statements can be used in any

subsequent litigation for cross-examination purposes and any other purpose where a signed (but unsworn) statement is admissible.

Whether to start the investigation by interviewing the accuser, the victim or someone else is a matter of discretion. In general, it is difficult to interview witnesses before the investigator has heard the full story from the accuser so it is often advisable to start there. As a result, it may become necessary to circle back to the accuser, the accused and potentially even some central witnesses for a second interview after all the remaining interviews have been done, in order to, for example, fill in holes, confront with contradictory evidence, and assess credibility and differing memories. It is a good practice for the investigator to warn witnesses that they may have to return for a follow-up interview.

Witnesses who are non-unionized have no right to have someone present during the interview, and it is preferable to interview everyone alone, free from influence. (The subject of how to handle witnesses who are represented by counsel is covered below in Part II.)

After all of the documents, electronic evidence and witness statements are gathered, the investigator should review everything and make findings of fact that are informed by the employer's policies and all applicable laws. Whether the ultimate report is oral or in writing is generally a matter to be determined by the employer's counsel. Although the accused and accuser have no right to see the report, it is often a good practice to provide them with a summary so that they feel that they have been heard, and they know what results they can or cannot expect. If disciplinary action is going to be taken against an accused, certain disclosures

may be required under the Fair Credit Reporting Act. *See* Rossein, *Employment Discrimination Law and Litigation* at §5:29.

Who should conduct the investigation? Among the options are: the Human Resources Department, in-house counsel, outside counsel and an independent investigator. In these authors' opinion, the first three options present some risk that the investigator may be later accused of bias or, at a minimum, loyalty to the entity that regularly employs them. An additional risk with Human Resources personnel is that they may not be sufficiently trained in solid interview practices, assessing credibility, maintaining composure and neutrality, or the complexities of the applicable laws. Some witnesses may distrust Human Resources personnel as being loyal to the employer and not objective. This can lead to fear of providing damaging evidence against a powerful manager and result in a flawed investigation. HR staff may also be too busy with their regular responsibilities to set aside sufficient time to conduct a thorough investigation.

When in-house or regular outside counsel are used, there can be issues in future litigation where the investigator is disqualified as counsel due to the advocate-witness rule. *See* Model Rules of Prof'l Conduct R. 3.7; NY Rules of Prof'l Conduct R. 3.7(a) and Comments. An independent, neutral investigator with employment law expertise and experience provides the best service under these circumstances.

B. Investigations That Can Backfire

1. Bias By the Investigator

An investigation that is tinged with bias against the alleged wrongdoer may be the basis for the target's own claim of discrimination. In *Sassaman v. Gamache*, 566 F.3d 307 (2d Cir. 2009), the plaintiff was fired after he was accused of sexually harassing a fellow employee. He sued under Title VII, alleging that defendants pressured him to resign based on a sex stereotype concerning men's purported propensity to sexually harass female colleagues. He testified in his deposition that the investigator said "you probably did what [the female colleague] said you did because you're male and nobody would believe you anyway," and "I really don't have any choice. [The female colleague] knows a lot of attorneys; I'm afraid she'll sue me." *Id*. at 311.

Reversing the district court's grant of summary judgment, the Court of Appeals wrote that "fear of a lawsuit does not justify an employer's reliance on sex stereotypes to resolve allegations of sexual harassment, discriminating against the accused employee in the process." *Id*. at 313. The investigator's discriminatory remarks, the court found, could reasonably be construed as explaining why the defendant forced plaintiff to resign. Furthermore, if "defendants made minimal -- if any -- efforts to verify [the colleague's] accusation," that could be evidence of discriminatory intent. *Id*. at 314.

2. Involvement by the Investigator in the Conduct Which Is the Subject of the Employee's Complaint

In *McLaughlin v. National Grid USA*, No. 07-40118-FDS, 2010 U.S. Dist. LEXIS 31600 (D. Mass. Mar. 31, 2010), one of the individuals who helped run the investigation of plaintiff's failure-to-promote claim had also been involved in a challenged hiring decision. Another investigator told the plaintiff at the end of the inquiry that, "I'm just gonna tell it to you like it is. . . . [e]very time black people don't get the position that they think they deserve, the first thing they cry is discrimination." *Id.* at *13. The court ruled that these facts were evidence of discriminatory intent, and a possibly invalid, non-independent investigation, and denied defendant's summary judgment motion.

3. Failure to Investigate as Retaliation

An employer's failure to investigate a claim of discrimination does not qualify as an adverse employment action taken in retaliation for filing the same complaint of discrimination. *Daniels v. United Parcel Service*, 701 F.3d 620, 640 (10th Cir. 2012) ("[A]dopting a contrary rule and finding that a failure to investigate establishes a *prima facie* case of retaliation would open employers to retaliation claims even where they failed to investigate because of a good faith belief the complaint was meritless."); *see also Scoppettone v. Mamma Lombardi's Pizzico, Inc.*, 523 F. App'x 73 (2d Cir. 2013).

In *Fincher v. Depository Tr. & Clearing Corp.*, 604 F.3d 712 (2d Cir. 2010), the Second Circuit found that an employee whose complaint is not investigated is in the same position the employee would have been in if the employee had not filed a complaint -- and so the employer's

failure to investigate could not create any threat of future harm. At the same time, though, the employee may have a retaliation claim if the failure to investigate is in retaliation for a separate, protected act by the employee. *Id.* at 722.

4. Retaliatory Acts Toward Participants in the Investigation

Employees who participate in internal investigations of discrimination claims may be engaging in a form of "opposition" to discrimination under Title VII's anti-retaliation clause. *See Crawford v. Metro. Gov't of Nashville,* 555 U.S. 271, 276–77 (2008) (employee "opposed" discrimination by answering questions during internal investigation). Therefore employers should be careful when deciding whether to take an adverse action against someone who participated in an investigation in a manner that supported the complainant.

However, an employee's participation in an employer's internal investigation of discrimination claims is not "participation" under Title VII's anti-retaliation provision. Employees who suffer adverse employment actions based on that participation cannot sue for retaliation; what is required under the "participation" clause is participation in a formal EEOC proceeding. See *Townsend v. Benjamin Enterprises, Inc.*, 679 F.3d 41 (2d Cir. 2012) (citations omitted).

II. Counsel's Role in Investigations

In facing an investigation, employees and their counsel must navigate a difficult terrain, involving both legal and strategic challenges. Employees have to decide how they will respond to an employer's demand for information; what aspects of the investigation they will attempt to

control through negotiation; and what legal, professional and career risks they are willing to take. Counsel has to give appropriate legal advice in situations where the client's career and reputation may hang in the balance. *See* Model Rules of Professional Conduct R. 2.1(lawyer shall give "candid advice" and "may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation"). NY Rules of Prof'l Conduct R. 2.1 provides substantially the same instruction, but adds psychological factors to the list.

A. Privilege Issues

Employees who are either a witness in, or target of, an investigation need to understand the limited protections they may have concerning statements made to the employer's investigators. This news is usually a surprise.

Employees often believe they can refuse to cooperate with investigations, or can, without penalty, invoke their Fifth Amendment rights when interviewed. *See, e.g., Gilman v. Marsh & McLennan Cos.*, 826 F.3d 69, 76 (2d Cir. 2016). In reality, most executives' employment contracts, and the policies of most employers, require employees to cooperate with internal investigations, and permit employers to discipline or terminate an employee for failing to cooperate. *See, e.g., id.* at 73. Employees without contracts are generally at-will. So while refusing to cooperate might be a rational choice for some employees, it could easily cost them their jobs. In addition, pleading the Fifth is not always the best strategy, since, in the civil context, it can lead to an adverse inference. See, e.g., *Baxter v. Palmigiano*, 425 U.S. 308

(1976). Counsel representing such clients should therefore consider how best to negotiate the terms under which an employee will participate in the investigation.

Employees often wrongly assume that their statements to an investigator or corporate counsel are confidential and can only be disclosed with their consent. They may also assume that the company's lawyer is simultaneously representing them, or will somehow seek to protect them. These assumptions may not prove to be accurate. If litigation ensues, issues usually arise concerning the discoverability of the investigation, with the employer asserting attorney-client privilege and work-product privilege. If the court rules against the employer, the statements may become available to the opposing side. In addition, the company may decide to use the investigation as part of its defense. In that case, all the investigation materials will be discoverable.

1. Attorney-Client Privilege

a. The Extent of the Privilege in Internal Investigations

The attorney-client privilege protects communications between a client and the client's attorney that take place for the purpose of obtaining or providing legal assistance. The communications must be intended to be, and actually be, kept confidential. *See Brennan Ctr. for Justice at N.Y.U. Sch. of L. v. U.S. Dep't of Justice*, 697 F.3d 184, 207 (2d Cir. 2012). The privilege is designed to encourage full and frank communication between attorneys and their clients. *See Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981) ("[Attorney-client privilege] exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer…."). The party asserting the privilege has the burden of

demonstrating it should apply, and any ambiguities will be construed against the party asserting the privilege. *See In re Grand Jury Proceedings*, 802 F.3d 57 (1st Cir. 2015); *Shaffer v. Am. Med. Ass'n*, 662 F.3d 439, 446 (7th Cir. 2011); *Scholtisek v. Eldre Corp.*, 441 F. Supp. 2d 459, 462 (W.D.N.Y. 2006).

When the client is a corporation, the starting point for analyzing the applicability of the privilege is the Supreme Court's decision in *Upjohn v. United States*, 449 U.S. 383 (1981). In that case, Upjohn's General Counsel learned that a foreign subsidiary had made questionable payments to officials of a foreign government. *Id.* at 386–87. The general counsel sent questionnaires about the payments to the subsidiary's managers, and interviewed them. *Id.* at 387.

When the IRS issued an administrative subpoena for the questionnaires and the general counsel's interview notes, Upjohn resisted, and the IRS sought to enforce it. *Id.* at 388. The Supreme Court ruled that the communications between the managers and in-house counsel were protected by the attorney-client privilege, because the information was provided by the employees to counsel for the purpose of the company obtaining legal advice. *Id.* at 394.

However, under *Upjohn*, the fact that a company's employee provided information to the company's lawyer during an investigation does not, in and of itself, insulate the employee's statements from disclosure as attorney-client privileged information. *Cf. id.* at 384 (employee communications were protected because made at direction of corporate superiors to secure legal advice).Nor does the fact that an investigative report was prepared by, or for, the company's counsel automatically mean that the attorney-client privilege attaches. *See Koumoulis v. Indep.*

Fin. Mktg. Grp., Inc., 295 F.R.D. 28 (E.D.N.Y. 2013); *see also Wartell v. Purdue Univ.*, No.1:13-CV-99 RLM-APR, 2014 U.S. Dist. LEXIS 120080 (N.D. Ind. Aug. 28, 2014).

Under the *Upjohn* doctrine, the critical question is whether obtaining or providing legal advice was one of the significant purposes of the internal investigation. *See In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 758-59 (D.C. Cir. 2014). If so, the privilege applies, even if there were also other purposes for the investigation. *Id.* Courts have also required that the primary or dominant purpose of the communication be to seek legal advice. *See Alomari v. Ohio Dep't of Pub. Safety*, 626 F. App'x 558, 570 (6th Cir. 2015); *Pritchard v. Cty. of Erie*, 473 F.3d 413, 420 (2d Cir. 2007).

Courts will most readily apply the privilege to a corporate investigation when it is clear that the investigation was conducted in connection with a formal legal proceeding. For example, in *Farzan v. Wells Fargo Bank*, No. 12 Civ. 1217 (RJS) (JLC), 2012 U.S. Dist. LEXIS 183623 (S.D.N.Y. Dec. 28, 2012), the plaintiff sought to depose a non-attorney "Equal Employment Opportunity Consultant" who had conducted an investigation of the plaintiff's discrimination claims at the direction of in-house counsel, in connection with an EEOC charge. The court held that the attorney-client privilege applied, since the EEO Consultant "conducted the internal investigation on behalf of Wells Fargo's in-house counsel for the purpose of representing Wells Fargo in its proceedings before the [Equal Employment Opportunity Commission]." *Id.* at *2.

In evaluating these issues, the courts look at these factors:

- A primary purpose of the communication must be obtaining legal advice. *See In re Kellogg Brown & Root*, 756 F.3d at 758–59 (documents created in investigation of fraudulent billing not privileged because federal regulations

and company's compliance code required investigation); *see also Alomari*, 626 F. App'x at 570–71.

- A communication seeking business, as opposed to legal advice, will not be shielded by the privilege. *See Mac-Ray Corp. v. Ricotta*, No. 03-CV-524S(F), 2004 U.S. Dist. LEXIS 32023 (W.D.N.Y. June 16, 2004) (email from Human Resources to in-house counsel reciting the facts of an employee's resignation was not protected, since it did not seek legal advice). *But see also FTC v. Boehringer Ingelheim Pharm., Inc.*, 180 F. Supp. 3d 1, 33 (D.D.C. 2016) (spreadsheets prepared by company employees at request of in-house counsel for use in negotiating settlement terms were privileged, although the documents "speak to both legal and business matters.").

- In-house counsel are protected by the privilege. *See In re Kellogg*, 756 F.3d at 758.But since in-house counsel often serve both legal and business roles, courts will examine the nature of their communications before applying the privilege. *See Koumoulis v. Indep. Fin. Mktg. Grp., Inc.*, 295 F.R.D. at 36; *Jacob v. Duane Reade, Inc.*, No. 11 Civ. 0160(JMO)(THK), 2012 U.S. Dist. LEXIS 25689 at *7 (S.D.N.Y. Feb. 28, 2012) (when "in-house counsel also serves as a business advisor within the corporation, only communications 'related to legal, as contrasted with business, advice are protected'").

- Internal investigations conducted by non-attorneys who are acting as the agents for the company's attorney are privileged to the same extent as they would be if the investigator were an attorney. *See In re Kellogg*, 756 F.3d at 758.

- The privilege does not apply to communications with the client which are in furtherance of committing a fraud or other criminal act. *See In re Chevron Corp.*, 633 F.3d 153, 166 (3d Cir. 2011).

b. Cooperating with Prosecutors, the Implications of the Yates Memo, and Dealing with the SEC

For employees who are witnesses in, or targets of, investigations, the company's decision whether to claim the attorney-client privilege for the employees' statements to investigators is of crucial importance. However, there may be a divergence of interests here, because corporations

often decide to provide government investigators with information by waiving the privilege, in order to obtain "cooperation" credit under federal prosecution guidelines.

Since September 2015, the Department of Justice has required federal prosecutors investigating corporate misconduct to focus on individual wrongdoing, rather than letting corporations enter into plea agreements that dismiss charges against individual actors. The original DOJ directive, known as the "Yates Memo," was written by former Deputy Attorney General Sally Yates, who was later fired, ten days into the Trump administration, for refusing to defend its initial Executive Order on immigration. United States Department of Justice, Individual Accountability for Corporate Wrongdoing (or https://www.justice.gov/dag/file/769036/download), September 9, 2015.

The Yates memo increased the pressure on employers to provide information on, rather than shield or seek protection for, employees accused of criminal acts. It has six basic directives:

1. For corporations to receive any consideration for "cooperation credit" (a reduction in corporate sentencing), they have to identify everyone involved in misconduct, regardless of their position, and provide DOJ with all relevant facts.

2. Both criminal and civil prosecutors should focus on individual wrongdoing from the very beginning of an investigation, because that is the best way of uncovering the facts.

3. Unless there are extraordinary circumstances, no settlement with a company should include a dismissal of charges against individuals.

4. Every resolution of a case against a company should include a plan for handling possible misconduct by individuals.

5. Prosecutors with the Civil Division of the DOJ should focus on prosecuting individuals, even if those individuals could not pay civil fines.

6. Criminal and civil prosecutors should regularly communicate with each other concerning investigations.

However, in November, 2018, the Justice Department modified the Yates Memo, giving federal prosecutors more discretion in awarding cooperation credit, and allowing companies to receive cooperation credit for a lower level of disclosures. While the Yates memo required companies to disclose all facts relevant to the misconduct, and identify all individuals involved or responsible for it, the new directive requires less.

In criminal cases, companies need only identify individuals who were "substantially involved in or responsible for" the misconduct. In civil cases, companies can earn some cooperation credit by identifying wrongdoing by senior management or the board of directors; they can earn full cooperation credit by identifying everyone who was substantially involved in or responsible for the misconduct. United States Department of Justice, Principles of Federal Prosecution of Business Organizations, 9-28.000 (November 29, 2018), https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations.

Despite the DOJ policies, employers have strong incentives to thoroughly investigate allegations of misconduct and provide the results of those investigations to prosecutors. An employment attorney who is representing an employee whose alleged misconduct may have criminal implications (or might be the basis of civil prosecution), should consult capable white-collar criminal defense counsel experienced in dealing with the local U.S. Attorney's office. Counsel will also need to be mindful about the attorney-client privilege issues related to the investigation (which are more fully discussed below).

The SEC's current guidelines also give companies an incentive to cooperate and disclose information to the agency. *See generally* SEC, Division of Enforcement, Enforcement Manual (updated Nov. 28, 2017), www.sec.gov/divisions/enforce/enforcementmanual.pdf, and specifically pages 95-98. The SEC uses four broad factors to evaluate a company's eligibility for cooperation credit. Cooperation credit may range from no enforcement action to pursuing reduced charges and sanctions, depending upon:

1. The extent to which a company "self-policed" before the misconduct was discovered (for example, by having effective compliance procedures and "an appropriate tone at the top").

2. The extent to which the company reported misconduct when it was discovered, thoroughly reviewed the circumstances, and disclosed them to the public, regulatory agencies and self-regulatory agencies.

3. The company's remedial actions, such as dismissing or disciplining wrongdoers, improving internal controls and "appropriately compensating those adversely affected."

4. The company's "[c]ooperation with law enforcement authorities, including providing the [SEC] staff with all information relevant to the underlying violations and the company's remedial efforts." *Id*. at 98-99.

Similarly, counsel representing an individual subject to possible SEC prosecution, may be able to work with the SEC to reduce or eliminate a client's potential liability. The SEC evaluates the cooperation of individuals by considering:

1. The value and nature of the individual's cooperation with the agency.

2. The importance of the underlying issues, including the danger to investors.

3. The societal interest in holding cooperating individuals fully accountable for their misconduct.

4. The individual's "personal and professional profile," including their "history of lawfulness," the degree to which the individual has accepted responsibility for their misconduct, and the degree to which the individual will have an opportunity to commit future violations of the federal securities laws. *Id*. at 95-98.

2. Ethical Obligations of Corporate Counsel, and *Upjohn* Warnings

Employees who are witnesses or targets in internal investigations should expect to be given an "*Upjohn* warning" by the investigator. *See Upjohn Warnings: Recommended Best Practices When Corporate Counsel Interacts with Corporate Employees, ABA WCCC Working Group 2-3, (October 5, 2009)* *http://www.acc.com/education/webcasts/upload/Upjohn-Warnings.pdf*. An *Upjohn* warning (named for the Supreme Court decision discussed above) follows from the lawyer's ethical obligations to make clear to the witness what role the lawyer is playing.

ABA Model Rule of Professional Conduct 1.13(f) states that,

> [i]n dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

Model Rules of Professional Conduct R. 1.13(f). NY Rules of Prof'l Conduct R. 1.13(a) reads similarly:

> When a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders or other constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents.

Comment 10 to Model Rule 1.13 notes that when the company's interests may become adverse to those of a witness, the lawyer should advise the witness that the lawyer cannot represent the witness, and that the witness may want to retain their own counsel.

Central to the *Upjohn* warnings is Model Rule Comment 10's note that, "[c]are must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged."

Comment 2(A) to NY Rule of Prof'l Conduct R. 1.13(a) reads:

> There are times when the organization's interests may differ from those of one or more of its constituents. In such circumstances, the lawyer should advise any constituent whose interest differs from that of the organization: (i) that a conflict or potential conflict of interest exists, (ii) that the lawyer does not represent the constituent in connection with the matter, unless the representation has been approved in accordance with Rule 1.13(d), (iii) that the constituent may wish to obtain independent representation, and (iv) that any attorney-client privilege that applies to discussions between the lawyer and the constituent belongs to the organization and may be waived by the organization. Care must be taken to ensure that the constituent understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent, and that discussions between the lawyer for the organization and the constituent may not be privileged.

Similarly, ABA Model Rule 4.3[2] requires that, in dealing with an unrepresented person, the company's lawyer:

> shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the

[2] New York has adopted Model Rule 4.3 in its entirety.

> misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

The exact wording of an *Upjohn* warning is not set forth in the Supreme Court's opinion, but the concept is an outgrowth of the Court's interpretation of the attorney-client privilege. In a typical *Upjohn* warning, the investigating counsel will tell the witness that the lawyer represents the employer, and not the witness; that the lawyer is interviewing the witness to gather facts for the purpose of giving legal advice to the company; that the witnesses' statements to the investigator are protected by the attorney-client privilege, but the privilege belongs to the company, rather than the witness; that the company may choose to waive the privilege and disclose the witness's statements to a third party, including government authorities, without advising the witness of that; and that, to maintain the privilege for the company, the witness is expected to keep the contents of the interview confidential. *See also* the text recommended by the White Collar Crime Committee of the ABA's Criminal Justice Section, in *Upjohn Warnings: Recommended Best Practices When Corporate Counsel Interacts with Corporate Employees*, October, 2009, at 2-3, found at www.acc.com/education/webcasts/upload/Upjohn-Warnings.pdf. While confidentiality may well be important to the company, depending on the subject of the investigation, an instruction to maintain confidentiality can potentially violate a non-supervisory employee's Section 7 rights under the National Labor Relations Act, as interpreted by the NLRB. *See Banner Health System*, 362 NLRB No. 137 (June 26, 2015). By contrast, the EEOC encourages employers to maintain confidentiality. For further discussion of these conflicting

guidances, s*ee* Alice Kilborn and Patricia Wise, Society for Human Resource Management, *Rethink Requiring Confidentiality for Investigations*, https://www.shrm.org/resourcesandtools/hr-topics/labor-relations/pages/rethink-confidentiality-requirement.aspx.

Several developments have increased the pressure on employers to broaden their *Upjohn* warnings. Among them are the Yates Memo, the November, 2018 revisions to it, and 2016 SEC cooperation guidelines, which penalize employers for not fully disclosing information to prosecutors. Another is the Ninth Circuit's decision in *United States v. Ruehle*, 583 F.3d 600 (9th Cir. 2009). In *Ruehle*, the CEO of Broadcom was indicted in connection with a scheme to backdate stock options. He sought to suppress, as attorney-client privileged, the statements he had made to the company's outside counsel during the law firm's related investigation. The company's lawyers testified that they had given Ruehle an *Upjohn* warning, but Ruehle testified that he did not remember that. Reversing the district court's finding that the privilege applied, the Court of Appeals held that the statements were not privileged because they were not made in confidence but rather for disclosure to outside auditors. However, the Court of Appeals noted that the district court apparently did not believe the investigating counsel's testimony that they had given Ruehle an *Upjohn* warning, since they took no notes and did not memorialize the conversation, 583 F.3d at 604, fn. 3. The lesson from *Ruehle* is that investigators should provide witnesses with written *Upjohn* warnings and obtain signed acknowledgements that the witnesses received, read and understood them.

B. Work-Product Privilege

Even if documents generated during an investigation are not attorney-client privileged, the employer may not have to disclose them if they are protected as counsel's work product.

The work-product privilege protects materials which are "prepared in anticipation of litigation or for trial by or for another party or its representative." Fed. R. Civ. P. 26(b)(3)(A).The privilege is designed to give lawyers a zone of privacy in which they can safely formulate and prepare legal strategies without intrusion from opposing counsel. *See United States v. Adlman*, 68 F.3d 1495 (2d Cir. 1995); *SEC v. Gupta*, 281 F.R.D. 169 (S.D.N.Y. 2012); *Duran v. Andrew*, No. 09-730 (HHK/AK), 2010 U.S. Dist. LEXIS 33178 (D.D.C. Apr. 5, 2010) (company attorney's notes of interviews with witnesses during investigation of alleged sexual harassment by an employee were protected, but not the witnesses' statements, because they were recitations of facts.).

There are two varieties of work product: ordinary "fact" work product and "core" work product. *See In re Cendant Corp. Sec. Litig*., 343 F.3d 658, 663 (3d Cir. 2003) (differentiating between two different types of attorney work product). To obtain disclosure of ordinary "fact" work product, an opposing party has to show that it has a substantial need for the information, and that it could not obtain the substantial equivalent of the information without undue hardship. Fed. R. Civ. P. 26(b)(3)(A); *FTC v. Boehringer Ingelheim Pharm., Inc.*, 778 F.3d 142, 151–52 (D.C. Cir. 2015); *Appleton Papers, Inc. v. EPA*, 702 F.3d 1018 (7th Cir. 2012) (distinguishing fact work product from opinion work product); *McGrath v. Nassau Cty. Health Care Corp.*, 204 F.R.D. 240, 243–44 (E.D.N.Y. 2001).

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"Core" work product, on the other hand, consists of an attorney's mental impressions, conclusions, opinions or legal theories. Because core work product is "virtually sacrosanct," it remains privileged unless the requesting party can demonstrate a "highly persuasive showing of need." *McGrath*, 204 F.R.D at 243-44; *see also Appleton Papers*, 702 F.3d at 1023-24.Work product protection can extend to materials which were created even before the events giving rise to a litigation, if the documents were created with an eye toward expected litigation. *McGrath,* 204 F.R.D. at 244.

For example, in *Farzan v. Wells Fargo Bank*, No. 12 Civ. 1217 (RJS) (JLC), 2012 U.S. Dist. LEXIS 183623 (S.D.N.Y. Dec., 8 2012), where the plaintiff sought to depose a non-attorney "EEO Consultant" who had investigated his discrimination claims at the direction of in-house counsel, the court held that the work-product privilege protected all information obtained in the investigation. The court relied on the fact that because before the plaintiff filed his EEOC charge, he had told his supervisor that he would "consider taking legal actions" against Wells Fargo if he were not given a job as a full-time employee.

C. Waiver of the Attorney-Client and Work-Product Privileges When an Employer Puts an Investigation in Issue

In discrimination cases, employees who participate in internal investigations may find that their statements to investigators lose the protection of the company's privilege if the company defends the case by arguing that it took prompt and appropriate action to investigate and correct the discriminatory conduct. No. 09-CV-6019, 2011 U.S. Dist. LEXIS 109407 at *6 (W.D.N.Y. Sep. 26, 2011). In *Angelone v. Xerox Corp.*, the court explained, [W]hen a Title VII

defendant affirmatively invokes a Faragher-Ellerth defense that is premised, in whole or in part, on the results of an internal investigation, the defendant waives the attorney-client privilege and work product protections for not only the report itself, but for all documents, witness interviews, notes and memoranda created as part of and in furtherance of the investigation. *Id.* at *6 (citations omitted); *see also Koss v. Palmer Water Departmen*t, 977 F. Supp. 2d 28 (D. Mass. 2013) (same, but redacting materials unrelated to the investigation); *Musa-Muaremi, v. Florists' Transworld Delivery, Inc*., 270 F.R.D. 312 (N.D. Ill. 2010) (defendant waived attorney-client privilege by asserting affirmative defense relying on the adequacy of its investigation of sexual harassment complaint).

In *Angelone*, the plaintiff complained to her manager and Human Resources about sexual harassment and a hostile work environment. Xerox investigated her claims, using, among others, members of the Office of General Counsel. The general counsel concluded that there had been violations of company policies, and recommended remedial measures. In the ensuing Title VII litigation filed by Angelone, Xerox raised as affirmative defenses that it exercised reasonable care to correct any harassment, and that Angelone had unreasonably failed to take advantage of Xerox's corrective opportunities. Angelone responded by seeking disclosure of all documents relating to the investigation, but Xerox contended that the documents were protected by the attorney-client and work-product privileges.

On plaintiff's motion to compel, the court ruled that by asserting the *Faragher-Ellerth* defense, Xerox had waived both privileges. "Xerox cannot rely on the thoroughness and competency of its investigation and corrective action and then try and shield discovery of

documents underlying the investigation by asserting the attorney-client privilege or work product protections." *Angelone,* 2011 U.S. Dist. LEXIS 109407 at *8. The court ordered production of any document or communication which was "considered, prepared, reviewed or relied on" by Xerox in creating or issuing its investigative report. *Id*. However, the court found that Xerox had not waived the privileges for a number of other documents which it assumed Xerox would not refer to or rely on at trial for its *Faragher-Ellerth* defense. The court ordered that if Xerox did intend to refer to these documents at trial, it would have to immediately produce them, as well. *Id*. at *9-10.

In *Koumoulis v. Independent Financial Marketing Group, Inc*., 295 F.R.D. 28 (E.D.N.Y. 2013), *aff'd,* 29 F. Supp. 3d 142 (E.D.N.Y. 2014), the plaintiffs alleged a cornucopia of discrimination claims based on religion, national origin, race, color, disability and age, and also alleged a hostile work environment claim. One of the plaintiffs had made several internal complaints of discrimination and retaliation; the company had conducted an investigation, found the claims unfounded, and fired him. Defendants pled a *Faragher-Ellerth* affirmative defense. When plaintiffs sought documents related to the investigation, the defendant raised the attorney-client and work-product privileges.

The court found that neither privilege applied. It rejected the attorney-client privilege claim, because the company's outside counsel did not primarily act as a consultant on legal issues, but rather helped supervise and direct the internal investigation as an adjunct member of the human resources team. On work product, it found that the documents in issue were created "simply in the course of a human resources investigation," and that advice concerning

anticipated litigation "was occasionally included as an aside." 29 F. Supp. 3d at 149 (citing Magistrate's decision at 295 F.R.D. 29). The court held that even if the attorney-client privilege applied, defendants had waived it by asserting a *Faragher-Ellerth* defense, concerning any documents "related to the reasonableness of Defendants' efforts to correct the allegedly discriminatory behavior and the reasonableness of its investigative policies and practices." 29 F. Supp. 3d at 148.

C. Practical Advice for Counsel

1. Understand What's at Stake

Determine why the client is being investigated. Make contact with the employer's counsel and seek to develop a professional rapport. Determine whether the employee is a target or simply a witness, but bear in mind that it is unsafe to rely on any response that the employee is not a target. Learn as much as possible about what the issues will be, and who will be present during the interview.

2. What Are the Company's Obligations Toward a Witness?

Senior executives are normally covered by an employer's indemnification policy, either under their employment contracts, the company's bylaws, the statutes of the employer's state of incorporation and/or insurance policies. If any of these protections apply, review them carefully, since they may not be as favorable as the employee might hope. Some policies call for reimbursement of an employee's attorneys' fees only once the employee has been formally charged with a legal violation or has been subpoenaed. Others provide for the company to

advance legal fees to the employee, but the employee must repay them if the employee admits to or is found guilty of a criminal act.

3. Be There, If Possible

It is unethical for an attorney to contact a party about a subject matter on which they know the party to be represented by counsel, without the opposing party's counsel's consent. Model Rules of Prof'l Conduct R. 4.2; NY Rules of Prof'l Conduct R. 4.2. So if the investigation is being conducted by an attorney representing the employer, that may provide an argument for the employer to permit the witness' counsel to be present. The investigating counsel may say that they are not functioning as a lawyer, but rather in their role as a human resources representative. Scrutinize this claim carefully, as there is a decent chance that it is not viable.

If the investigation is not being conducted by an attorney, in most states, private sector employees do not have a right to have their attorney present. *See generally Corporate Internal Investigations: Best Practices, Pitfalls to Avoid*, Jones Day, http://www.jonesday.com/files/upload/CII%20Best%20Practices%20Pitfalls%20to%20Avoid2.pdf (last visited Jan. 14, 2018) (employee does not always have a right to have own lawyer present in internal investigation). Counsel can certainly press to be present regardless, and in some cases, that may work. But if the company won't agree to counsel's presence, counsel should make sure their client understands the consequences of refusing to be interviewed, since many employers have policies providing for discipline or termination of

employees who refuse to cooperate with an investigation. An at-will employee can be terminated even if no such policy exists.

There are some downsides to counsel's presence that should be taken into account. For example, the attorney may become a witness in subsequent litigation and, as a result, be disqualified from representing their client in court. This can be addressed by hiring separate counsel to represent the client during the investigation. In addition, thought should be given to whether counsel's presence may undermine the witness' credibility. This is especially so if counsel interrupts or appears in any way to be coaching the witness.

4. Prepare the Client for the Interview

Regardless of whether counsel will be present, the client must be prepared for the interview. It is crucial that the client understand the implications of the anticipated *Upjohn* warnings: that the interviewing lawyer is representing only the employer; that while the client's answers may be protected by attorney-client privilege; that privilege is the company's and may be waived by the company; and that the client's statements may be disclosed to the government or in litigation. *See generally Upjohn Co. v. United States*, 449 U.S. 383 (1981); *Upjohn Warnings: Recommended Best Practices When Corporate Counsel Interacts with Corporate Employees*, ABA WCCC Working Group 2–4, (Oct. 5, 2009), http://www.acc.com/education/webcasts/upload/Upjohn-Warnings.pdf.

Beyond educating the client about the consequences of the interview, employees should be counseled that an investigation is not an occasion to argue, be bellicose, assert legal

conclusions or pontificate. Many of the instructions used to prepare clients for depositions are useful here:

- Don't jump to answer a question; pause and think before answering
- Answer the questions but do not volunteer (with the possible exception of specified areas)
- Don't generalize, estimate, assume facts, guess or pick dates without a basis
- Tell the truth, and don't embellish
- Unless you are absolutely certain, qualify your answers with "as far as I recall" or an equivalent
- If you don't remember, say so
- Remain calm and professional
- Maintain eye contact to bolster your credibility
- Don't quote someone else, unless you are sure you can accurately quote them
- Don't argue with the interviewer
- If you don't understand a question, or if you need to have it clarified, say so and wait until you understand it before answering
- Don't answer questions that involve legal conclusions; just state facts
- If you're given a document, read it over slowly and carefully before answering questions about it; don't allow yourself to feel pressured to respond before you're ready
- Don't answer questions to which you don't know the answer; it's fine to say that you don't know
- Don't reveal any attorney-client privileged communications

- Don’t bring any documents to the interview unless you have been asked for them or counsel has advised you to bring them
- Don't try to please the investigator, whose agenda is very much their own
- Take periodic breaks to allow yourself to reflect and calm down

In addition, employees should be counseled to be extremely cautious if they are asked to sign a statement the investigator prepares. It may not contain the employee’s complete answers or reflect critical factual nuances.

If the company insists upon a signed, written statement, the employee can first request time at home to draft one. If the company insists that the employee sign a statement that the investigator prepared, the employee should ask to review it at home so they can propose changes. If there are relevant documents that have not been disclosed, or to which the employee does not have access, then the absence of those documents should be noted in the written statement.

The employee should keep in mind that the company may seek to characterize a refusal to go along with the company’s demand for a signed statement as a failure to cooperate and a terminable offense.

5. Review Documents in Advance

Some employers will provide documents to counsel before a witness interview. These should be reviewed carefully with the client in advance of the interview. It may be possible to request additional documents. The witness must be prepared to explain discrepancies between the documents and statements the client may have previously made, or between documents the client prepared.

6. **Be Careful About Public Disclosure Requirements**

If a client is an officer or director of a publicly-traded company, and is under threat of termination, the employer is required to file an 8-K form with the SEC within four business days of the change in status. *See* SEC Form 8-KInstructions § 5.02(b) (April 2017) https://www.sec.gov/about/forms/form8-k.pdf This requirement applies to the departure of the CEO, President, CFO, principal accounting officer, COO, any named executive officer and any director. The employer may use the threat of the filing to pressure a client to resign, in order to avoid an embarrassing public disclosure of a termination for cause. It is important to help the client think through whether this issue is critical for them, and also consider whether the client could invoke a "good reason" resignation departure instead. Laura D. Richman, *Reporting Consequences and Other Considerations for Changes in Directors or Executive Officers of a US Public Company* 3–4, Mayer Brown (June 9, 2015), https://m.mayerbrown.com/files/Publication/07ba14b6-65c1-4cb6-b06b-05098c8fc905/Presentation/PublicationAttachment/01d3bcf6-e542-4967-b666-1fea3f8c3b79/150609-UPDATE-CS.pdf.

Similarly, financial services employees who are "registered representatives" are subject to a Form U5 that the employer must file with FINRA within 30 days of the employee's departure, describing the reason for the termination. *See* Fin. Indus. Reg. Auth., FINRA Manual, Art. V, § 3(a) (2007); *see also Terminate an Individual's Registration*, Fin. Indus. Reg. Auth., http://www.finra.org/industry/terminate-individuals-registration (last visited Jan. 15, 2018).If the employer files a U5 that contains damaging information about the circumstances of the

termination, the client's career may be stalled or ended. If a termination seems likely, counsel can work to negotiate the disclosure the company will make. FINRA rules require financial firms to file truthful U5 forms, but a discussion between the employee's attorney and the company's attorney may help the company better understand the facts and circumstances so that a less damaging form can be filed.

CONCLUSION

How an investigation is handled, and how counsel represents their client will have a major impact on both an employer and an employee. For the employer, it will influence the company's potential defenses, its strategy in negotiating with an employee and/or government officials, and the possible outcome. For the employee, it may determine whether they can remain employed, the circumstances of any termination, and future career prospects.

Of course, counsel for both sides need to be mindful of the legal, financial and professional ramifications and nuances involved in an investigation and the surrounding circumstances. Attorneys representing parties and witnesses in an investigation must be focused, strategic, assertive where appropriate, and careful. These are essential elements for successfully shepherding a client to a positive resolution.

These are the micro issues. On a macro level, how an investigation is handled can make all the difference in the workforce's and public's perception of whether an employer is taking allegations seriously. Compare the handling of the Les Moonves situation with the handling of the Matt Lauer situation.

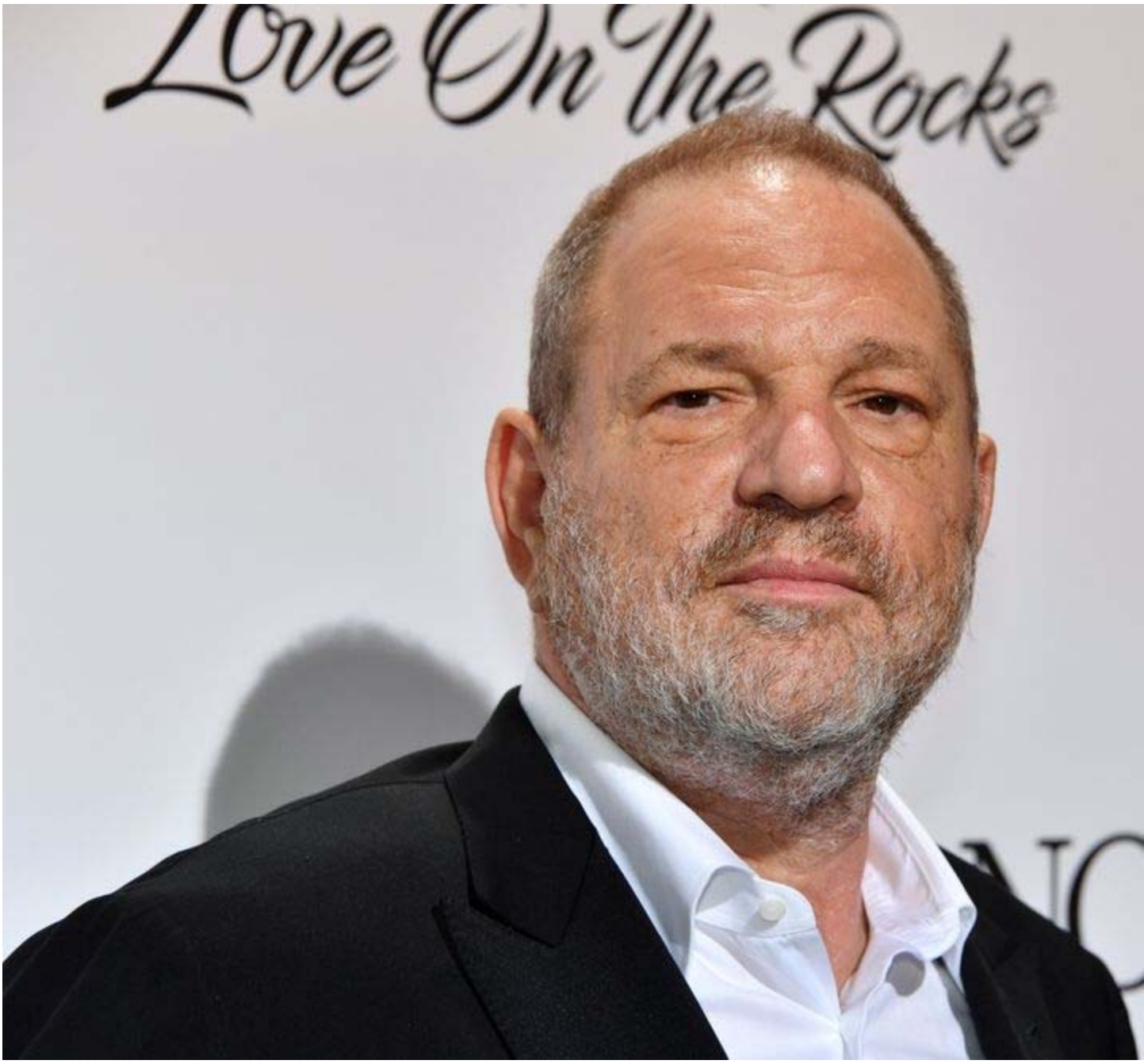
How to Stop the Next Harvey Weinstein

Regulators have the power to curb abuse of nondisclosure agreements. It's time they use it.

by

Samuel Estreicher

Bloomberg, November 12, 2017



Repeat offender.

Photographer: Yann Coatsaliou/AFP/Getty Images

In the 26 years since the Anita Hill hearings focused national attention on the issue of sexual harassment in the workplace, significant progress has been made. Most employers take seriously allegations of sexual and ethnic harassment and show little tolerance when presented with credible cases of abuse.

However, in situations where the accused are “rainmakers” -- individuals on whom the success of the business depends -- too many companies sweep allegations of predatory behavior under the rug. That's in part because of the use of nondisparagement or nondisclosure clauses in settlement agreements (called NDAs), which pay out substantial sums to accusers in exchange for their silence.

NDAs have become more common in number in recent years and are especially prevalent in the entertainment and media industries. As the cases of Harvey Weinstein, Bill O'Reilly and others show, the use of NDAs threatens workplace safety and morale, by giving repeat offenders impunity to victimize others. The federal government can help to curb these abuses -- by exercising regulatory powers it already possesses.

In the wake of the Weinstein scandal, some lawmakers have called for bans on companies' use of NDAs in harassment cases. But in and of themselves, NDAs are not necessarily harmful and should not be prohibited as such. Confidential settlements are often necessary for cases where the facts are unclear -- because there are no third-party witnesses -- or where accusers are reluctant to go public and jeopardize their careers.

In such instances, a resolution providing some compensation to the accuser may seem to be the best that can be had in the circumstances. The problem is that such resolutions also enable repeat offenders to continue their abusive, unlawful conduct.

That's why regulators must step in. The federal Equal Employment Opportunity Commission has the authority, without need for new laws, to require employers to provide data on the number of settlement agreements they have entered into involving allegations against particular employees. In the first instance, identities would not need to be revealed. When a pattern of repeated settlements emerges, the agency could intervene, by opening an investigation or filing a commissioner’s charge (which does not require the accusers themselves to file formal charges).

Companies would then face the possibility of a government lawsuit, in which the EEOC would obtain discovery of all claims of abuse involving the particular employee and seek substantial compensatory and punitive damages from the employer. The government could also pursue possible injunctive relief against patterns of misconduct. In some states, the lawsuit could seek damages against the offenders themselves.

The mere threat of government action could have a deterrent effect. Faced with the prospect of litigation, companies will be more likely to act swiftly against repeat offenders without waiting for the EEOC to get involved.

With serial offenders, the benefits of confidentiality are outweighed by the need to prevent them from violating the rights of workers to be free of sexual, racial, and ethnic harassment. If employers can't protect their workers from abuse, it's incumbent on the government to do it for them.

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To contact the author of this story:
Samuel Estreicher at samuel.estreicher@nyu.edu

To contact the editor responsible for this story:
Romesh Ratnesar at rratnesar@bloomberg.net

Plenary Two:
2018 Legislative and Regulatory Developments in New York State Employment Law

Geoffrey A. Mort, Esq. / Moderator
Kraus & Zuchlewski, LLP, New York, NY

Sarah J. Burger, Esq.
Burger Law Group PLLC, Saratoga Springs, NY

Andrew D. Bobrek, Esq.
Bond, Schoeneck & King, PLLC, Syracuse, NY

Select New York State Employment Law Developments

Andrew D. Bobrek, Esq.
Bond, Schoeneck & King, PLLC
December 2018

I. Introduction

In 2018, the New York State Legislature and state administrative agencies implemented or proposed several new compliance requirements for employers and, correspondingly, new workplace protections for employees. A summary of select new or proposed requirements and protections is set forth below.

II. New Sexual Harassment Legislation & Guidance

A. *State Contractors*

1. Bids for state contracts, including public departments or agencies thereof, where competitive bidding is required by law, will require the bidder and each signatory to certify under penalty of perjury that they have a written policy – that meets the requirements of the model sexual harassment policy promulgated by the state – addressing sexual harassment and that they provide annual sexual harassment prevention training. N.Y. STATE FIN. L. § 139-l & 163(7) (Consol. 2018). This new law is effective on January 1, 2019.

B. *State Employees*

1. Any individual elected, appointed, or employed by the State of New York and who has been subject to a final judgment of personal liability for intentional wrongdoing related to an adjudicated award that resulted in a judgment in a sexual harassment claim shall reimburse any state agency or entity that made a payment to a plaintiff on the individual's behalf for his/her share of the judgment within 90 days of such payment. N.Y. PUB. OFF. L. § 17-a (Consol. 2018). This new law became effective July 11, 2018.

2. The law contains a similar provision for commissioners, members of public boards or commissions, trustees, directors, officers, employees, or any other person holding a position by election, appointment, or employment in a public entity. N.Y. PUB. OFF. L. § 18-a (Consol. 2018). This new law became effective July 11, 2018.

C. *Mandatory Arbitration Agreements*

1. Except where inconsistent with federal law, no written contract shall contain a clause or provision requiring the parties to submit any

allegation or claim of sexual harassment to mandatory arbitration. Any such provision in a written contract will be deemed null and void. N.Y. C.P.L.R. § 7515 (Consol. 2018). This new law became effective July 11, 2018.

D. *Non-Disclosure Agreements*

1. Settlements, agreements, or resolutions of any claim – the factual foundation of which involves sexual harassment – cannot include a non-disclosure provision unless the confidentiality provision is the complainant's/plaintiff's preference. Complainants/Plaintiffs shall have 21 days to consider such terms or conditions, and, if agreed, shall be afforded at least 7 days to revoke the agreement. N.Y. GEN. OBLIG. L. § 5-336 (Consol. 2018); N.Y. C.P.L.R. § 5003-b (Consol. 2018). This new law became effective July 11, 2018.

E. *Protection for Non-Employees Against Sexual Harassment*

1. It shall be an unlawful discriminatory practice for an employer to permit sexual harassment of a non-employee who is a contractor, subcontractor, vendor, consultant or other person providing services pursuant to a contract in the workplace or who is an employee of such an entity. Employers will be held liable for sexual harassment of such non-employees when it, its agents, or its supervisors knew or should have known that the non-employee was subject to such harassment and did not take immediate and appropriate corrective action. The extent of the employer's control over the non-employee and other legal responsibility which the employer has with respect to the harasser will be considered. N.Y. EXEC. L. § 296-d & § 292(4)(Consol. 2018). This new law became effective April 12, 2018.

F. *Additional Employer Requirements for the Prevention of Sexual Harassment*

1. Mandatory Sexual Harassment Prevention Policy

a) Employers must adopt and provide to all employees either a model sexual harassment prevention policy published by the state or a written sexual harassment prevention policy that meets or exceeds the minimum standards set by the state. N.Y. LAB. L. § 201-g(1)(b)(Consol. 2018). This new law became effective October 9, 2018.

b) The sexual harassment prevention policy must be provided to all employees in writing. N.Y. LAB. L. § 201-g(1)(b)(Consol. 2018).

c) According to state guidance, an employer's own written sexual harassment prevention policy must meet the following minimum standards and therefore:

(1) Prohibit sexual harassment consistent with guidance issued by the New York State Department of Labor ("NYSDOL") in consultation with the New York State Division of Human Rights ("NYSDHR");

(2) Provide examples of prohibited conduct that would constitute unlawful sexual harassment;

(3) Include information concerning the federal and state statutory provisions concerning sexual harassment, remedies available to victims of sexual harassment, and a statement that there may be applicable local laws;

(4) Include a complaint form;

(5) Include a procedure for the timely and confidential investigation of complaints that ensures due process for all parties;

(6) Inform employees of their rights of redress and all available forums for adjudicating sexual harassment complaints administratively and judicially;

(7) Clearly state that sexual harassment is considered a form of employee misconduct and that sanctions will be enforced against individuals engaging in sexual harassment and against supervisory and managerial personnel who knowingly allow such behavior to continue; and

(8) Clearly state that retaliation against individuals who complain of sexual harassment or who testify or assist in any investigation or proceeding involving sexual harassment is unlawful.

NEW YORK STATE, *Minimum Standards for Sexual Harassment Prevention Policies* (2018), attached at Exhibit A.

2. Mandatory Sexual Harassment Prevention Training Program

a) Employers must provide annual training to all employees, by utilizing a model sexual harassment prevention training

program provided by the state or by establishing a training program for employees that equals or exceeds the minimum standards set by the state. N.Y. LAB. L. § 201-g(2)(c)(Consol. 2018) This new law became effective October 9, 2018.

b) According to state guidance, an employer's own sexual harassment prevention training program must meet the following minimum standards and therefore:

(1) Be interactive;

(2) Include an explanation of sexual harassment consistent with guidance issued by the NYSDOL in consultation with the NYSDHR;

(3) Include examples of conduct that would constitute unlawful sexual harassment;

(4) Include information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to victims of sexual harassment;

(5) Include information concerning employees' rights of redress and all available forums for adjudicating complaints; and

(6) Include information addressing conduct by supervisors and any additional responsibilities for such supervisors.

NEW YORK STATE, *Minimum Standards for Sexual Harassment Prevention Training* (2018), attached at Exhibit B.

3. New York State Sexual Harassment Prevention Model Documents and Guidance

On October 1, 2018, New York State published in final form the following model and guidance materials, which are attached as referenced.

a) Sexual Harassment Prevention Employer Toolkit, attached at Exhibit C.

b) Model Sexual Harassment Policy for All Employers in New York State, attached at Exhibit D.

c) Model Sexual Harassment Prevention Policy Notice, attached at Exhibit E.

d) Model Complaint Form for Reporting Sexual Harassment, attached at Exhibit F.

e) Model Sexual Harassment Training Program Script and Other Related Materials (October 2018 Ed.), attached at Exhibit G.

f) Model Sexual Harassment Training Program Slides and Case Study Slides (October 2018 Ed.), attached at Exhibit H.

g) Combating Sexual Harassment: Frequently Asked Questions, available at https://www.ny.gov/combating-sexual-harassment-workplace/combating-sexual-harassment-frequently-asked-questions#for-employers.

III. Proposed NYSDOL "Call-In Pay" Regulations

On December 12, 2018, the NYSDOL published proposed regulations in the State Register, addressing the so-called "on-demand" or "just-in-time" scheduling of employees. (A copy of the relevant excerpt from the State Register is attached at Exhibit I.) These proposed regulations supersede and constitute a revision to comparable regulations that NYSDOL published previously for public comment in November 2017.

The newly-proposed regulations would impose several new scheduling and pay-related obligations for employers and, correspondingly, several new rights for employees, in particular part-time employees who earn a wage at or near the state minimum.

The proposed regulations would amend both the Miscellaneous Industries Minimum Wage Order, specifically 12 N.Y. Comp. Codes R. & Regs., tit. 12 § 142-2.3, and the provisions in that Order applicable to covered employees in nonprofitmaking institutions (which have not elected to be exempt from coverage under a minimum wage order), specifically, 12 N.Y. Comp. Codes R. & Regs., tit. 12 § 142-3.3. The proposed regulations are subject to a 30-day comment period.

A. *New Scheduling & Pay Requirements*

1. Reporting to work. An employee who by request or permission of the employer reports for work on any shift shall be paid for at least four hours of call-in pay.

2. Unscheduled shift. An employee who by request or permission of the employer reports to work for any shift for hours that have not

been scheduled at least 14 days in advance of the shift shall be paid an additional two hours of call-in pay.

a) Where an employer provides a weekly schedule, the referenced 14-day period may be measured from the last day of the schedule.

3. Cancelled shift. An employee whose shift is cancelled by the employer shall be paid for at least two hours of call-in pay, if the shift is cancelled within 14 days, or for at least four hours of call-in pay if the shift is cancelled within 72 hours, in advance of the scheduled start of such shift.

4. On-call. An employee who is required by the employer to be available to report to work for any shift shall be paid for at least four hours of call-in pay.

5. Call for schedule. An employee who is required by the employer to be in contact with the employer within 72 hours of the start of the shift to confirm whether to report to work shall be paid for at least four hours of call-in pay.

B. *Calculation of Call-In Pay*

According to the proposed regulations, the above-referenced call-in pay must be calculated as follows:

1. Payments for time of actual attendance shall be calculated at the employee's regular rate or overtime rate of pay, whichever is applicable, minus any allowances permitted under the applicable Minimum Wage Order.

2. Payments for other hours of call-in pay shall be calculated at the basic minimum hourly rate with no allowances.

a) Such payments are not payments for time worked or work performed and need not be included in the regular rate for purposes of calculating overtime pay.

3. Call-in pay shall not be offset by the required use of leave time, or by payments in excess of those required under the applicable Minimum Wage Order.

4. The four hours of call-in pay under the proposed "Reporting to Work" and "Cancelled Shift" requirements may be reduced to the lesser number of hours that the employee is scheduled to work and normally works, for that shift.

C. *Exemptions from Call-In Pay Requirements*

The proposed regulations contain the following partial or full exemptions from the above call-in pay requirements:

1. The proposed regulations do not apply to employees who are covered by a valid collective bargaining agreement that expressly provides for call-in pay.

2. The proposed "Unscheduled Shift," "Cancelled Shift," "On-Call" and "Call for Schedule" requirements do not apply to employees during work weeks when their weekly wages exceed 40 times the applicable basic hourly minimum wage rate.

3. The proposed "Unscheduled Shift," "Cancelled Shift," "On-Call" and "Call for Schedule" requirements do not apply to the following employees, so long as they also receive weekly compensation that exceeds the number of compensable hours worked times the applicable basic minimum wage rate, with no allowances:

    a) Employees whose duties are directly dependent on weather conditions;

    b) Employees whose duties are necessary to protect the health or safety of the public or any person; and

    c) Employees whose assignments are subject to work orders, or cancellations thereof.

4. The proposed "Unscheduled Shift" requirement does not apply to:

    a) Any new employee during the first two weeks of employment; or

    b) Any employee who volunteers to cover a new shift or a previously scheduled shift.

        (1) For purposes of this provision, the term "new shift" shall mean the first two weeks of an additional shift that results in a net increase in staffing at a single workplace during the period of time covered by such shift.

        (2) The term "previously scheduled shift" shall mean a shift that would not have been subject to unscheduled shift call-in pay if worked by the employee who was originally assigned to work that shift.

(3) The term "volunteers" shall mean that the employee may refuse to cover the new or previously scheduled shift.

5. The proposed "Unscheduled Shift" and "Cancelled Shift" requirements do not apply when an employer responds to weather or other travel advisories, by offering employees the option to voluntarily reduce or increase their scheduled hours, so that employees may stay home, arrive early, arrive late, depart early, depart late, or any combination thereof.

6. The proposed "Cancelled Shift" requirement does not apply when an employer cancels a shift at the employee's request for time off, or when operations at the workplace cannot begin or continue due to an act of God or other cause not within the employer's control, including, but not limited to, a state of emergency declared by federal, state, or local government.

D. *Safe Harbor Provision*

The proposed regulations contain a self-described "safe harbor" provision that appears to only apply to a particular exemption from the proposed "Unscheduled Shift" requirement (described in Section III.C.4, above).

That provision states:

> [T]here shall be a rebuttable presumption that an employee has volunteered to cover a new or previously scheduled shift if the employer provides a written good faith estimate of hours to all employees upon hiring, or after the effective date of this section for previously hired employees, which may be amended at the employee's request or upon two weeks' notice by the employer, and if the request to cover a new or previously scheduled shift is either: (i) made by the employee whose shift would be covered; or (ii) made by the employer in a written communication to a group of employees requesting a volunteer from among the group and identifying a reasonable deadline for responses. If no employee volunteers prior to the deadline, the employer may assign an employee to cover the shift without the additional call-in pay required for unscheduled shifts.

IV. <u>New York Paid Family Leave Act</u>

Effective January 1, 2018, the New York Paid Family Leave ("NYPFL") program provides eligible New York employees with job-protected, paid leave to bond with a new child, to care for a covered family member with a serious health condition,

or to assist when a covered family member is called to active military service abroad.

2019 will mark the second year of a four-year phase-in of NYPFL benefits for eligible employees in New York. As part of this phase-in program, there will be several changes to the program in 2019, including the following:

A. *Up to 10 Weeks of Benefits*

Effective January 1, 2019, the number of weeks eligible employees can take to bond with a new child, to care for a sick family member, or to assist when a family member is deployed abroad on active military service increases from 8 to 10 weeks.

B. *Adjusted Weekly Benefit*

In 2019, employees taking Paid Family Leave will receive 55% (of their average weekly wage up from 50% in 2018), up to a cap of 55% of the current Statewide Average Weekly Wage of $1,357.11 (also up from 50% in 2018). The maximum weekly benefit in 2019 will be $746.41.

C. *Adjusted Contribution Rates*

In 2019, the NYPFL contribution will be 0.153% of an employee's gross wages each pay period. The maximum annual contribution will be set at $107.97. For reference purposes, the 2018 payroll contribution was set at 0.126% of an employee's weekly wage and was capped at an annual maximum of $85.56.

D. *New Guidance on Year-to-Year Transition*

New York State has published new guidance addressing potential benefit-related issues arising from the 2018-to-2019 transition, which is available at: https://paidfamilyleave.ny.gov/2019.

V. Increased Regulation of "Non-Compete" Agreements

In 2018, the Office of the New York State Attorney General ("NYSAG") continued its investigatory focus on the use of non-competition and other restrictive covenant agreements on the part of New York employers. In particular, the NYSAG's office investigated and resolved cases involving large-size employers – reportedly including the likes of Jimmy Johns, Law360, EMSI, and more – who used restrictive covenants deemed to be overly-broad and to unfairly restrict employee mobility. The NYSAG's office recently published guidance and a series of "Frequently Asked Questions" on this subject, which is available at: https://ag.ny.gov/sites/default/ files/non-competes.pdf.

EXHIBIT A

Minimum Standards for Sexual Harassment Prevention Policies

Every employer in the State of New York is required to adopt a sexual harassment prevention policy pursuant to Section 201-g of the Labor Law. An employer that does not adopt the model policy must ensure that the policy that they adopt meets or exceeds the following minimum standards. The policy must:

i) prohibit sexual harassment consistent with guidance issued by the Department of Labor in consultation with the Division of Human Rights;

ii) provide examples of prohibited conduct that would constitute unlawful sexual harassment;

iii) include information concerning the federal and state statutory provisions concerning sexual harassment, remedies available to victims of sexual harassment, and a statement that there may be applicable local laws;

iv) include a complaint form;

v) include a procedure for the timely and confidential investigation of complaints that ensures due process for all parties;

vi) inform employees of their rights of redress and all available forums for adjudicating sexual harassment complaints administratively and judicially;

vii) clearly state that sexual harassment is considered a form of employee misconduct and that sanctions will be enforced against individuals engaging in sexual harassment and against supervisory and managerial personnel who knowingly allow such behavior to continue; and

viii) clearly state that retaliation against individuals who complain of sexual harassment or who testify or assist in any investigation or proceeding involving sexual harassment is unlawful.

Employers must provide each employee with a copy of its policy in writing. Employers should provide employees with the policy in the language spoken by their employees.

* * *

The adoption of a policy does not constitute a conclusive defense to charges of unlawful sexual harassment. Each claim of sexual harassment will be determined in accordance with existing legal standards, with due consideration of the particular facts and circumstances of the claim, including but not limited to the existence of an effective anti-harassment policy and procedure.

EXHIBIT B

Minimum Standards for Sexual Harassment Prevention Training

Every employer in the State of New York is required to provide employees with sexual harassment prevention training pursuant to Section 201-g of the Labor Law. An employer that does not use the model training developed by the State Department of Labor and Division of Human Rights must ensure that the training that they use meets or exceeds the following minimum standards. The training must:

(i) be interactive;

(ii) include an explanation of sexual harassment consistent with guidance issued by the Department of Labor in consultation with the Division of Human Rights;

(iii) include examples of conduct that would constitute unlawful sexual harassment;

(iv) include information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to victims of sexual harassment;

(v) include information concerning employees' rights of redress and all available forums for adjudicating complaints; and

(vi) include information addressing conduct by supervisors and any additional responsibilities for such supervisors.

As of Oct. 9, 2018, each employee must receive training on an annual basis. Employers should provide employees with training in the language spoken by their employees.

* * *

Providing employees with training does not constitute a conclusive defense to charges of unlawful sexual harassment. Each claim of sexual harassment will be determined in accordance with existing legal standards, with due consideration of the particular facts and circumstances of the claim, including but not limited to the existence of an effective anti-harassment policy and procedure.

EXHIBIT C

Sexual Harassment Prevention EMPLOYER TOOLKIT

Introduction

New York State is a national leader in the fight against sexual harassment and is partnering with employers across the state to further our commitment to ending sexual harassment in the workplace.

This toolkit will provide you step-by-step guidance to implementing the required training and sexual harassment policy, directing you to resources available through New York State and the relevant state agencies.

These resources are all available on the State's Combating Sexual Harassment in the Workplace website: **www.ny.gov/programs/combating-sexual-harassment-workplace**.

What are the New Requirements?

The 2019 New York State Budget includes the nation's strongest and most comprehensive sexual harassment package, including new resources and requirements for employers. There are two key components under this law:

Policy (see pages 2-4)
Under the new law, every employer in New York State is **required to establish a sexual harassment prevention policy**. The Department of Labor in consultation with the Division of Human Rights has established a model sexual harassment prevention policy for employers to adopt, available at www.ny.gov/programs/combating-sexual-harassment-workplace. Or, employers may adopt a similar policy that meets or exceeds the minimum standards of the model policy (www.ny.gov/combating-sexual-harassment-workplace/employers#model-sexual-harassment-policy).

Training (see pages 5-6)
In addition, every employer in New York State is **required to provide employees with sexual harassment prevention training**. The Department of Labor in consultation with the Division of Human Rights has established this model training for employers to use. Or, employers may use a training program that meets or exceeds the minimum standards of the model training (www.ny.gov/combating-sexual-harassment-workplace/employers#training-requirements).

Policy: Implementation

All employers must adopt and provide a sexual harassment prevention policy to all employees by **October 9, 2018**.

If you want to adopt the State Model Policy:

- The State Model Policy contains fields for you to list your business name and the name/contact information for the individual(s) you have designated to receive sexual harassment complaints. Fill in those fields and apply whatever branding (e.g., logos, etc.) you like. You may choose to modify the policy to reflect the work of your organization and industry specific scenarios or best practices.

- Distribute the policy to all employees in writing or electronically. Employers are also encouraged to have employees acknowledge receipt of the policy, and to post a copy of the policy where employees can easily access it.

If you already have a policy and do NOT want to adopt the State Model Policy:

- Use the checklist on the next page to ensure your policy meets or exceeds the required minimum standards.

- If it already meets those standards, ensure it already has been or will be distributed to employees by October 9, 2018. All future new employees should receive the policy before commencing work.

- Ensure your complaint form and process are up to date and that employees are made aware of it as part of the policy.

- If you do not have a complaint form, a model is available online: www.ny.gov/combating-sexual-harassment-workplace/employers#model-complaint-form

- Review the online FAQs, which outline numerous common questions that may arise: www.ny.gov/combating-sexual-harassment-workplace/combating-sexual-harassment-frequently-asked-questions

- Distribute a copy of your finalized policy to all employees in writing. This may be done electronically, for example, by email. Employers are also encouraged to have employees acknowledge receipt of the policy, and to post a copy of the policy where employees can easily access it.

- You are also encouraged to provide the policy and training to anyone providing services in the workplace.

If you do NOT yet have a policy:

- Download the model policy, available online: www.ny.gov/combating-sexual-harassment-workplace/employers#model-sexual-harassment-policy

- Customize the document by filling in the employer name, person or office designated to receive complaints and appropriate contact information, as highlighted throughout.

- You may choose to modify the policy to reflect the work of your organization and industry specific scenarios or best practices.

- Review the online FAQs, which outline numerous common questions that may arise: www.ny.gov/combating-sexual-harassment-workplace/combating-sexual-harassment-frequently-asked-questions

- Distribute a copy of your finalized policy to all employees in writing. This may be done electronically, for example, by email. Employers are also encouraged to have employees acknowledge receipt of the policy, and to post a copy of the policy where employees can easily access it.

- You are also encouraged to provide the policy and training to anyone providing services in the workplace.

Policy: Minimum Standards Checklist

An employer that does not use the State model policy -- developed by the State Department of Labor and State Division of Human Rights -- must ensure their policy meets or exceeds the following minimum standards.

The policy **must**:

- ☐ Prohibit sexual harassment consistent with guidance issued by the Department of Labor in consultation with the Division of Human Rights;
- ☐ Provide examples of prohibited conduct;
- ☐ Include information concerning the federal and state statutory provisions concerning sexual harassment, remedies available to victims of sexual harassment, and a statement that there may be applicable local laws;
- ☐ Include a complaint form;
- ☐ Include a procedure for the timely and confidential investigation of complaints that ensures due process for all parties;
- ☐ Inform employees of their rights of redress and all available forums for adjudicating sexual harassment complaints administratively and judicially;
- ☐ Clearly state that sexual harassment is considered a form of employee misconduct and that sanctions will be enforced against individuals engaging in sexual harassment and against supervisory and managerial personnel who knowingly allow such behavior to continue; and
- ☐ Clearly state that retaliation against individuals who complain of sexual harassment or who testify or assist in any investigation or proceeding involving sexual harassment is unlawful.

Training: Instructions for Employers

All employers are required to train current employees by October 9, 2019. New employees should be trained as quickly as possible. In addition, all employees must complete sexual harassment prevention training at least once per year. This may be based on calendar year, anniversary of each employee's start date or any other date the employer chooses.

If you already have a training:

- Use the checklist on the next page to ensure your training meets or exceeds the required minimum standards.
- If your existing training does not, it should be updated to include all the listed elements. You may also provide supplemental training to employers who have already completed the training to ensure they have received training that meets or exceeds the minimum standards.
- Review the online FAQs, which outline numerous common questions that may arise: www.ny.gov/combating-sexual-harassment-workplace/combating-sexual-harassment-frequently-asked-questions

If you do NOT yet have a training:

- Download the model training, available online: www.ny.gov/combating-sexual-harassment-workplace/employers#training-requirements.
    - You may execute this training in a variety of ways, including live in person, via webinar or on an individual basis, with feedback as outlined in the training guidance document.
    - Depending on how you choose to present your training, you may utilize different available resources. For example, if you do a live presentation, you should download the PowerPoint and read the script that appears in the "Notes" of each slide.
    - If you choose to train employees with the video, you may direct them to watch it online or download it and show to a group, after which you would provide them a mechanism for feedback, as outlined in the training guidance document.
- Customize the training document(s) and modify them to reflect the work of your organization, including industry specific scenarios or best practices.
- The training should detail any internal process employees are encouraged to use to complain and include the contact information for the specific name(s) and office(s) with which employees alleging harassment should file their complaints.
- You may wish to include additional interactive activities as part of the training, including an opening activity, role playing or group discussion(s).
- Review the online FAQs, which outline numerous common questions that may arise: www.ny.gov/combating-sexual-harassment-workplace/combating-sexual-harassment-frequently-asked-questions

Training: Minimum Standards Checklist

An employer that does not use this model training -- developed by the State Department of Labor and State Division of Human Rights -- must ensure their training meets or exceeds the following minimum standards.

The training **must**:

- ☐ Be interactive (*see the model training guidance document for specific recommendations*);
- ☐ Include an explanation of sexual harassment consistent with guidance issued by the Department of Labor in consultation with the Division of Human Rights;
- ☐ Include examples of unlawful sexual harassment;
- ☐ Include information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to targets of sexual harassment;
- ☐ Include information concerning employees' rights of redress and all available forums for adjudicating complaints; and
- ☐ Include information addressing conduct by supervisors and additional responsibilities for supervisors.

EXHIBIT D

Sexual Harassment Policy for All Employers in New York State

Introduction

[*Employer Name*] is committed to maintaining a workplace free from sexual harassment. Sexual harassment is a form of workplace discrimination. All employees are required to work in a manner that prevents sexual harassment in the workplace. This Policy is one component of [*Employer Name's*] commitment to a discrimination-free work environment. Sexual harassment is against the law[1] and all employees have a legal right to a workplace free from sexual harassment and employees are urged to report sexual harassment by filing a complaint internally with [*Employer Name*]. Employees can also file a complaint with a government agency or in court under federal, state or local antidiscrimination laws.

Policy:

1. [*Employer Name's*] policy applies to all employees, applicants for employment, interns, whether paid or unpaid, contractors and persons conducting business, regardless of immigration status, with [*Employer Name*]. In the remainder of this document, the term "employees" refers to this collective group.

2. Sexual harassment will not be tolerated. Any employee or individual covered by this policy who engages in sexual harassment or retaliation will be subject to remedial and/or disciplinary action (e.g., counseling, suspension, termination).

3. Retaliation Prohibition: No person covered by this Policy shall be subject to adverse action because the employee reports an incident of sexual harassment, provides information, or otherwise assists in any investigation of a sexual harassment complaint. [*Employer Name*] will not tolerate such retaliation against anyone who, in good faith, reports or provides information about suspected sexual harassment. Any employee of [*Employer Name*] who retaliates against anyone involved in a sexual harassment investigation will be subjected to disciplinary action, up to and including termination. All employees, paid or unpaid interns, or non-employees[2] working in the workplace who believe they have been subject to such retaliation should inform a supervisor, manager, or [*name of appropriate person*]. All employees, paid or unpaid interns

[1] While this policy specifically addresses sexual harassment, harassment because of and discrimination against persons of all protected classes is prohibited. In New York State, such classes includeage, race, creed, color, national origin, sexual orientation, military status, sex, disability, marital status, domestic violence victim status, gender identity and criminal history.

[2] A non-employee is someone who is (or is employed by) a contractor, subcontractor, vendor, consultant, or anyone providing services in the workplace. Protected non-employees include persons commonly referred to as independent contractors, "gig" workers and temporary workers. Also included are persons providing equipment repair, cleaning services or any other services provided pursuant to a contract with the employer.

or non-employees who believe they have been a target of such retaliation may also seek relief in other available forums, as explained below in the section on Legal Protections.

4. Sexual harassment is offensive, is a violation of our policies, is unlawful, and may subject [*Employer Name*] to liability for harm to targets of sexual harassment. Harassers may also be individually subject to liability. Employees of every level who engage in sexual harassment, including managers and supervisors who engage in sexual harassment or who allow such behavior to continue, will be penalized for such misconduct.

5. [*Employer Name*] will conduct a prompt and thorough investigation that ensures due process for all parties, whenever management receives a complaint about sexual harassment, or otherwise knows of possible sexual harassment occurring. [*Employer Name*] will keep the investigation confidential to the extent possible. Effective corrective action will be taken whenever sexual harassment is found to have occurred. All employees, including managers and supervisors, are required to cooperate with any internal investigation of sexual harassment.

6. All employees are encouraged to report any harassment or behaviors that violate this policy. [*Employer Name*] will provide all employees a complaint form for employees to report harassment and file complaints.

7. Managers and supervisors are **required** to report any complaint that they receive, or any harassment that they observe or become aware of, to [*person or office designated*].

8. This policy applies to all employees, paid or unpaid interns, and non-employees and all must follow and uphold this policy. This policy must be provided to all employees and should be posted prominently in all work locations to the extent practicable (for example, in a main office, not an offsite work location) and be provided to employees upon hiring.

What Is "Sexual Harassment"?

Sexual harassment is a form of sex discrimination and is unlawful under federal, state, and (where applicable) local law. Sexual harassment includes harassment on the basis of sex, sexual orientation, self-identified or perceived sex, gender expression, gender identity and the status of being transgender.

Sexual harassment includes unwelcome conduct which is either of a sexual nature, or which is directed at an individual because of that individual's sex when:

- Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment, even if the reporting individual is not the intended target of the sexual harassment;

- Such conduct is made either explicitly or implicitly a term or condition of employment; or

- Submission to or rejection of such conduct is used as the basis for employment decisions affecting an individual's employment.

A sexually harassing hostile work environment includes, but is not limited to, words, signs, jokes, pranks, intimidation or physical violence which are of a sexual nature, or which are directed at an individual because of that individual's sex. Sexual harassment also consists of any unwanted verbal or physical advances, sexually explicit derogatory statements or sexually discriminatory remarks made by someone which are offensive or objectionable to the recipient, which cause the recipient discomfort or humiliation, which interfere with the recipient's job performance.

Sexual harassment also occurs when a person in authority tries to trade job benefits for sexual favors. This can include hiring, promotion, continued employment or any other terms, conditions or privileges of employment. This is also called "quid pro quo" harassment.

Any employee who feels harassed should report so that any violation of this policy can be corrected promptly. Any harassing conduct, even a single incident, can be addressed under this policy.

Examples of sexual harassment

The following describes some of the types of acts that may be unlawful sexual harassment and that are strictly prohibited:

- Physical acts of a sexual nature, such as:
    - Touching, pinching, patting, kissing, hugging, grabbing, brushing against another employee's body or poking another employee's body;
    - Rape, sexual battery, molestation or attempts to commit these assaults.

- Unwanted sexual advances or propositions, such as:
    - Requests for sexual favors accompanied by implied or overt threats concerning the target's job performance evaluation, a promotion or other job benefits or detriments;
    - Subtle or obvious pressure for unwelcome sexual activities.

- Sexually oriented gestures, noises, remarks or jokes, or comments about a person's sexuality or sexual experience, which create a hostile work environment.

- Sex stereotyping occurs when conduct or personality traits are considered inappropriate simply because they may not conform to other people's ideas or perceptions about how individuals of a particular sex should act or look.

- Sexual or discriminatory displays or publications anywhere in the workplace, such as:
    - Displaying pictures, posters, calendars, graffiti, objects, promotional material, reading materials or other materials that are sexually demeaning or pornographic. This includes such sexual displays on workplace computers or cell phones and sharing such displays while in the workplace.

- Hostile actions taken against an individual because of that individual's sex, sexual orientation, gender identity and the status of being transgender, such as:
    - Interfering with, destroying or damaging a person's workstation, tools or equipment, or otherwise interfering with the individual's ability to perform the job;
    - Sabotaging an individual's work;
    - Bullying, yelling, name-calling.

Who can be a target of sexual harassment?

Sexual harassment can occur between any individuals, regardless of their sex or gender. New York Law protects employees, paid or unpaid interns, and non-employees, including independent contractors, and those employed by companies contracting to provide services in the workplace. Harassers can be a superior, a subordinate, a coworker or anyone in the workplace including an independent contractor, contract worker, vendor, client, customer or visitor.

Where can sexual harassment occur?

Unlawful sexual harassment is not limited to the physical workplace itself. It can occur while employees are traveling for business or at employer sponsored events or parties. Calls, texts, emails, and social media usage by employees can constitute unlawful workplace harassment, even if they occur away from the workplace premises, on personal devices or during non-work hours.

Retaliation

Unlawful retaliation can be any action that could discourage a worker from coming forward to make or support a sexual harassment claim. Adverse action need not be job-related or occur in the workplace to constitute unlawful retaliation (e.g., threats of physical violence outside of work hours).

Such retaliation is unlawful under federal, state, and (where applicable) local law. The New York State Human Rights Law protects any individual who has engaged in "protected activity." Protected activity occurs when a person has:

- made a complaint of sexual harassment, either internally or with any anti-discrimination agency;
- testified or assisted in a proceeding involving sexual harassment under the Human Rights Law or other anti-discrimination law;
- opposed sexual harassment by making a verbal or informal complaint to management, or by simply informing a supervisor or manager of harassment;
- reported that another employee has been sexually harassed; or
- encouraged a fellow employee to report harassment.

Even if the alleged harassment does not turn out to rise to the level of a violation of law, the individual is protected from retaliation if the person had a good faith belief that the practices were unlawful. However, the retaliation provision is not intended to protect persons making intentionally false charges of harassment.

Reporting Sexual Harassment

Preventing sexual harassment is everyone's responsibility. [*Employer Name*] cannot prevent or remedy sexual harassment unless it knows about it. Any employee, paid or unpaid intern or non-employee who has been subjected to behavior that may constitute sexual harassment is encouraged to report such behavior to a supervisor, manager or [*person or office designated*]. Anyone who witnesses or becomes aware of potential instances of sexual harassment should report such behavior to a supervisor, manager or [*person or office designated*].

Reports of sexual harassment may be made verbally or in writing. A form for submission of a written complaint is attached to this Policy, and all employees are encouraged to use this complaint form. Employees who are reporting sexual harassment on behalf of other employees should use the complaint form and note that it is on another employee's behalf.

Employees, paid or unpaid interns or non-employees who believe they have been a target of sexual harassment may also seek assistance in other available forums, as explained below in the section on Legal Protections.

Supervisory Responsibilities

All supervisors and managers who receive a complaint or information about suspected sexual harassment, observe what may be sexually harassing behavior or for any reason suspect that sexual harassment is occurring, **are required** to report such suspected sexual harassment to [*person or office designated*].

In addition to being subject to discipline if they engaged in sexually harassing conduct themselves, supervisors and managers will be subject to discipline for failing to report suspected sexual harassment or otherwise knowingly allowing sexual harassment to continue.

Supervisors and managers will also be subject to discipline for engaging in any retaliation.

Complaint and Investigation of Sexual Harassment

All complaints or information about sexual harassment will be investigated, whether that information was reported in verbal or written form. Investigations will be conducted in a timely manner, and will be confidential to the extent possible.

An investigation of any complaint, information or knowledge of suspected sexual harassment will be prompt and thorough, commenced immediately and completed as soon as possible. The investigation will be kept confidential to the extent possible. All persons involved, including complainants, witnesses and alleged harassers will be accorded due process, as outlined below, to protect their rights to a fair and impartial investigation.

Any employee may be required to cooperate as needed in an investigation of suspected sexual harassment. [*Employer Name*] will not tolerate retaliation against employees who file complaints, support another's complaint or participate in an investigation regarding a violation of this policy.

While the process may vary from case to case, investigations should be done in accordance with the following steps:

- Upon receipt of complaint, [*person or office designated*] will conduct an immediate review of the allegations, and take any interim actions (e.g., instructing the respondent to refrain from communications with the complainant), as appropriate. If complaint is verbal, encourage the individual to complete the "Complaint Form" in writing. If he or she refuses, prepare a Complaint Form based on the verbal reporting.

- If documents, emails or phone records are relevant to the investigation, take steps to obtain and preserve them.

- Request and review all relevant documents, including all electronic communications.

- Interview all parties involved, including any relevant witnesses;

- Create a written documentation of the investigation (such as a letter, memo or email), which contains the following:
    - A list of all documents reviewed, along with a detailed summary of relevant documents;
    - A list of names of those interviewed, along with a detailed summary of their statements;
    - A timeline of events;
    - A summary of prior relevant incidents, reported or unreported; and
    - The basis for the decision and final resolution of the complaint, together with any corrective action(s).

- Keep the written documentation and associated documents in a secure and confidential location.

- Promptly notify the individual who reported and the individual(s) about whom the complaint was made of the final determination and implement any corrective actions identified in the written document.

- Inform the individual who reported of the right to file a complaint or charge externally as outlined in the next section.

Legal Protections And External Remedies

Sexual harassment is not only prohibited by [*Employer Name*] but is also prohibited by state, federal, and, where applicable, local law.

Aside from the internal process at [*Employer Name*], employees may also choose to pursue legal remedies with the following governmental entities. While a private attorney is not required to file a complaint with a governmental agency, you may seek the legal advice of an attorney.

In addition to those outlined below, employees in certain industries may have additional legal protections.

State Human Rights Law (HRL)

The Human Rights Law (HRL), codified as N.Y. Executive Law, art. 15, § 290 et seq., applies to all employers in New York State with regard to sexual harassment, and protects employees, paid or unpaid interns and non-employees, regardless of immigration status. A complaint alleging violation of the Human Rights Law may be filed either with the Division of Human Rights (DHR) or in New York State Supreme Court.

Complaints with DHR may be filed any time **within one year** of the harassment. If an individual did not file at DHR, they can sue directly in state court under the HRL, **within three years** of the alleged sexual harassment. An individual may not file with DHR if they have already filed a HRL complaint in state court.

Complaining internally to [*Employer Name*] does not extend your time to file with DHR or in court. The one year or three years is counted from date of the most recent incident of harassment.

You do not need an attorney to file a complaint with DHR, and there is no cost to file with DHR.

DHR will investigate your complaint and determine whether there is probable cause to believe that sexual harassment has occurred. Probable cause cases are forwarded to a public hearing before an administrative law judge. If sexual harassment is found after a hearing, DHR has the power to award relief, which varies but may include requiring your employer to take action to stop the harassment, or redress the damage caused, including paying of monetary damages, attorney's fees and civil fines.

DHR's main office contact information is: NYS Division of Human Rights, One Fordham Plaza, Fourth Floor, Bronx, New York 10458. You may call (718) 741-8400 or visit: www.dhr.ny.gov.

Contact DHR at (888) 392-3644 or visit dhr.ny.gov/complaint for more information about filing a complaint. The website has a complaint form that can be downloaded, filled out, notarized and mailed to DHR. The website also contains contact information for DHR's regional offices across New York State.

Civil Rights Act of 1964

The United States Equal Employment Opportunity Commission (EEOC) enforces federal anti-discrimination laws, including Title VII of the 1964 federal Civil Rights Act (codified as 42 U.S.C. § 2000e et seq.). An individual can file a complaint with the EEOC anytime within 300 days from the harassment. There is no cost to file a complaint with the EEOC. The EEOC will investigate the complaint, and determine whether there is reasonable cause to believe that discrimination has occurred, at which point the EEOC will issue a Right to Sue letter permitting the individual to file a complaint in federal court.

The EEOC does not hold hearings or award relief, but may take other action including pursuing cases in federal court on behalf of complaining parties. Federal courts may award remedies if discrimination is found to have occurred. In general, private employers must have at least 15 employees to come within the jurisdiction of the EEOC.

An employee alleging discrimination at work can file a “Charge of Discrimination.” The EEOC has district, area, and field offices where complaints can be filed. Contact the EEOC by calling 1-800-669-4000 (TTY: 1-800-669-6820), visiting their website at www.eeoc.gov or via email at info@eeoc.gov.

If an individual filed an administrative complaint with DHR, DHR will file the complaint with the EEOC to preserve the right to proceed in federal court.

Local Protections

Many localities enforce laws protecting individuals from sexual harassment and discrimination. An individual should contact the county, city or town in which they live to find out if such a law exists. For example, employees who work in New York City may file complaints of sexual harassment with the New York City Commission on Human Rights. Contact their main office at Law Enforcement Bureau of the NYC Commission on Human Rights, 40 Rector Street, 10th Floor, New York, New York; call 311 or (212) 306-7450; or visit www.nyc.gov/html/cchr/html/home/home.shtml.

Contact the Local Police Department

If the harassment involves unwanted physical touching, coerced physical confinement or coerced sex acts, the conduct may constitute a crime. Contact the local police department.

EXHIBIT E

Sexual Harassment Prevention Policy Notice

Sexual harassment is against the law.

All employees have a legal right to a workplace free from sexual harassment, and [*Employer Name*] is committed to maintaining a workplace free from sexual harassment.

Per New York State Law, [*Employer Name*] has a sexual harassment prevention policy in place that protects you. This policy applies to all employees, paid or unpaid interns and non-employees in our workplace, regardless of immigration status.

If you believe you have been subjected to or witnessed sexual harassment, you are encouraged to report the harassment to a supervisor, manager or [other person designated] so we can take action.

Our complete policy may be found: _____

Our Complaint Form may be found: _____

If you have questions and to make a complaint, please contact:

[Person or office designated]

[Contact information for designee or office]

For more information and additional resources, please visit:

www.ny.gov/programs/combating-sexual-harassment-workplace

EXHIBIT F

Model Complaint Form for Reporting Sexual Harassment

[Name of employer]

New York State Labor Law requires all employers to adopt a sexual harassment prevention policy that includes a complaint form to report alleged incidents of sexual harassment.

If you believe that you have been subjected to sexual harassment, you are encouraged to complete this form and submit it to [*person or office designated; contact information for designee or office; how the form can be submitted]*. You will not be retaliated against for filing a complaint.

If you are more comfortable reporting verbally or in another manner, your employer should complete this form, provide you with a copy and follow its sexual harassment prevention policy by investigating the claims as outlined at the end of this form.

For additional resources, visit: ny.gov/programs/combating-sexual-harassment-workplace

COMPLAINANT INFORMATION

Name:

Work Address: Work Phone:

Job Title: Email:

Select Preferred Communication Method: ☐Email ☐Phone ☐In person

SUPERVISORY INFORMATION

Immediate Supervisor's Name:

Title:

Work Phone: Work Address:

COMPLAINT INFORMATION

1. Your complaint of Sexual Harassment is made about:

   Name: Title:

   Work Address: Work Phone:

   Relationship to you: ☐Supervisor ☐Subordinate ☐Co-Worker ☐Other

2. Please describe what happened and how it is affecting you and your work. Please use additional sheets of paper if necessary and attach any relevant documents or evidence.

3. Date(s) sexual harassment occurred:

   Is the sexual harassment continuing? ☐Yes ☐No

4. Please list the name and contact information of any witnesses or individuals who may have information related to your complaint:

The last question is optional, but may help the investigation.

5. Have you previously complained or provided information (verbal or written) about related incidents? If yes, when and to whom did you complain or provide information?

If you have retained legal counsel and would like us to work with them, please provide their contact information.

Signature: _____ *Date:* _____

Instructions for Employers

If you receive a complaint about alleged sexual harassment, follow your sexual harassment prevention policy.

An investigation involves:

- Speaking with the employee
- Speaking with the alleged harasser
- Interviewing witnesses
- Collecting and reviewing any related documents

While the process may vary from case to case, all allegations should be investigated promptly and resolved as quickly as possible. The investigation should be kept confidential to the extent possible.

Document the findings of the investigation and basis for your decision along with any corrective actions taken and notify the employee and the individual(s) against whom the complaint was made. This may be done via email.

EXHIBIT G

Model Sexual Harassment Prevention Training

OCTOBER 2018 EDITION

NEW YORK STATE | Combating Sexual Harassment

Purpose of this Model Training

New York State is a national leader in the fight against sexual harassment in the workplace and the 2019 Budget includes legislation to further combat it.

Under the new law, every employer in New York State is **now required to establish a sexual harassment prevention policy** pursuant to Section 201-g of the Labor Law. The Department of Labor in consultation with the Division of Human Rights has established a model sexual harassment prevention policy for employers to adopt, available at www.ny.gov/programs/combating-sexual-harassment-workplace. Or, employers may adopt a similar policy that meets or exceeds the minimum standards of the model policy.

In addition, every employer in New York State is **now required to provide employees with sexual harassment prevention training** pursuant to Section 201-g of the Labor Law. The Department of Labor in consultation with the Division of Human Rights has established this model training for employers to use. Or, employers may use a training program that meets or exceeds the minimum standards of the model training.

An employer's sexual harassment prevention training **must be interactive**, meaning it requires some level of feedback by those being trained.

The training, which may be presented to employees individually or in groups; in person, via phone or online; via webinar or recorded presentation, should include as many of the following elements as possible:

- Ask questions of employees as part of the program;
- Accommodate questions asked by employees, with answers provided in a timely manner;
- Require feedback from employees about the training and the materials presented.

How to Use This Training

This model training is presented in a variety of formats, giving employers maximum flexibility to deliver the training across a variety of worksite settings, while still maintaining a core curriculum.

Available training elements include:

1. **Script** for in-person group training, available in PDF and editable Word formats
2. **PowerPoint** to accompany the script, available online and for download, also in PDF
3. **Video** presentation, viewable online and for download

4. **FAQs**, available online to accompany the training, answering additional questions that arise

Instructions for Employers

- This training is meant to be a model that can be used as is, or adapted to meet the specific needs of each organization.

- Training may include additional interactive activities, including an opening activity, role playing or group discussion.

- If specific employer policies or practices differ from the content in this training, the training should be modified to reflect those nuances, while still including all of the minimum elements required by New York State law (shown on Page 4).

- The training should detail any internal process employees are encouraged to use to complain and include the contact information for the specific name(s) and office(s) with which employees alleging harassment should file their complaints.

- It should also be modified to reflect the work of the organization by including, for example, industry specific scenarios.

- To every extent possible, this training should be given consistently (using the same delivery method) across each organization's workforce to ensure understanding at every level and at every location.

- It is every employer's responsibility to ensure all employees are trained to employer's standards and familiar with the organization's practices.

- All employees must complete initial sexual harassment prevention training before Oct. 9, 2019.

- All employees must complete an additional training at least once per year. This may be based on calendar year, anniversary of each employee's start date or any other date the employer chooses.

- All new employees should complete sexual harassment prevention training as quickly as possible.

- Employers should provide employees with training in the language spoken by their employees. When an employee identifies as a primary language one for which a template training is not available from the State, the employer may provide that employee an English-language version. However, as employers may be held liable for the conduct of all of their employees, employers are strongly encouraged to provide a the policy and training in the language spoken by the employee.

- On occasion, a participant may share a personal or confidential experience during the training. If this happens, the trainer should interrupt and recommend the story be discussed privately

and with the appropriate office contact. After the training, follow up with this individual to ensure they are aware of the proper reporting steps. Managers and supervisors must report all incidents of harassment.

Minimum Training Standards Checklist

An employer that does not use this model training -- developed by the State Department of Labor and State Division of Human Rights -- must ensure their training meets or exceeds the following minimum standards.

The training **must**:

- ☐ Be interactive;
- ☐ Include an explanation of sexual harassment consistent with guidance issued by the Department of Labor in consultation with the Division of Human Rights;
- ☐ Include examples of unlawful sexual harassment;
- ☐ Include information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to targets of sexual harassment;
- ☐ Include information concerning employees' rights of redress and all available forums for adjudicating complaints; and
- ☐ Include information addressing conduct by supervisors and additional responsibilities for supervisors.

NEW YORK STATE

Sexual Harassment Prevention Training

ELEMENT 1: TRAINING SCRIPT

OCTOBER 2018 EDITION

Table of Contents

Trainer Introduction

- Welcome to our annual training on sexual harassment prevention.
- My name is _____[*name*]_____ and I am the _____[*title*]____ at _____[*organization*]_____.
- In recent years, the topic of sexual harassment in the workplace has been brought into the national spotlight, bringing with it renewed awareness about the serious and unacceptable nature of these actions and the severe consequences that follow.
- The term “sexual harassment” may mean different things to different people, depending on your life experience.
- Certain conduct may seem acceptable or have seemed acceptable in the past. That does not mean it is acceptable to the people we work with.
- The purpose of this training is to set forth a common understanding about what is and what is not acceptable in our workplace.

Sexual Harassment in the Workplace

- New York State has long been committed to ensuring that all individuals have an equal opportunity to enjoy a fair, safe and productive work environment.
- Laws and policies help ensure that diversity is respected and that everyone can enjoy the privileges of working in New York State.
- Preventing sexual harassment is critical to our continued success. Sexual harassment will not be tolerated.
- This means any harassing behavior will be investigated and the perpetrator or perpetrators will be told to stop.
- It also means that disciplinary action may be taken, if appropriate. If the behavior is sufficiently serious, disciplinary action may include termination.
- Repeated behavior, especially after an employee has been told to stop, is particularly serious and will be dealt with accordingly.

- This interactive training will help you better understand what is considered sexual harassment.

- It will also show you how to report sexual harassment in our workplace, as well as your options for reporting workplace sexual harassment to external state and federal agencies that enforce anti-discrimination laws.

- These reports will be taken seriously and promptly investigated, with effective remedial action taken where appropriate.

What is Sexual Harassment?

- Sexual harassment is a form of sex discrimination and is unlawful under federal, state, and (where applicable) local law.

- Sexual harassment includes harassment on the basis of sex, sexual orientation, self-identified or perceived sex, gender expression, gender identity and the status of being transgender.

- Sexual harassment includes unwelcome conduct which is either of a sexual nature, or which is directed at an individual because of that individual's sex when:

    1. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment, even if the reporting individual is not the intended target of the sexual harassment;

    2. Such conduct is made either explicitly or implicitly a term or condition of employment; or

    3. Submission to or rejection of such conduct is used as the basis for employment decisions affecting an individual's employment.

- There are two main types of sexual harassment.

- **Hostile Environment**

- A hostile environment on the basis of sex may be created by any action previously described, in addition to unwanted words, signs, jokes, pranks, intimidation, physical actions or violence, either of a sexual nature or not of a sexual nature, directed at an individual because of that individual's sex.

- Hostile environment sexual harassment includes:

    - Sexual or discriminatory displays or publications anywhere in the workplace, such as displaying pictures, posters, calendars, graffiti, objects, promotional material, reading materials or other materials that are sexually demeaning or pornographic.

        - This includes such sexual displays on workplace computers or cell phones and sharing such displays while in the workplace.

        - This also includes sexually oriented gestures, noises, remarks, jokes or comments about a person's sexuality or sexual experience.

    - Hostile actions taken against an individual because of that individual's sex, such as:

        - Rape, sexual battery, molestation or attempts to commit these assaults.

        - Physical acts of a sexual nature (including, but not limited to, touching, pinching, patting, grabbing, kissing, hugging, brushing against another employee's body or poking another employee's body)

        - Interfering with, destroying or damaging a person's workstation, tools or equipment, or otherwise interfering with the individual's ability to perform the job;

        - Sabotaging an individual's work;

        - Bullying, yelling, name-calling.

- **<u>Quid Pro Quo Sexual Harassment</u>**

- Quid pro quo sexual harassment occurs when a person in authority trades, or tries to trade, job benefits for sexual favors.

- Quid pro quo is a legal term meaning a trade.

- This type of harassment occurs between an employee and someone with authority, like a supervisor, who has the ability to grant or withhold job benefits.

- Quid pro quo sexual harassment includes:

    - Offering or granting better working conditions or opportunities in exchange for a sexual relationship

    - Threatening adverse working conditions (like demotions, shift alterations or work location changes) or denial of opportunities if a sexual relationship is refused

    - Using pressure, threats or physical acts to force a sexual relationship

    - Retaliating for refusing to engage in a sexual relationship

<u>Who can be the Target of Sexual Harassment?</u>

- Sexual harassment can occur between any individuals, regardless of their sex or gender.

- New York Law protects employees, paid or unpaid interns, and non-employees, including independent contractors, and those employed by companies contracting to provide services in the workplace.

Who can be the Perpetrator of Sexual Harassment?

- The perpetrator of sexual harassment can be anyone in the workplace:
- The harasser can be a **coworker** of the recipient
- The harasser can be a **supervisor** or **manager**
- The harasser can be any third-party, including: a **non-employee**, **intern**, **vendor**, **building security**, **client**, **customer** or **visitor**.

Where Can Workplace Sexual Harassment Occur?

- Harassment can occur **whenever and wherever** employees are fulfilling their work responsibilities, including in the field, at any employer-sponsored event, trainings, conferences open to the public and office parties.
- Employee interactions during non-work hours, such as at a hotel while traveling or at events after work can have an impact in the workplace.
- Locations off site and off-hour activities can be considered extensions of the work environment.
- Employees can be the target of sexual harassment through calls, texts, email and social media.
- Harassing behavior that in any way affects the work environment is rightly the concern of management.

Sex Stereotyping

- Sex stereotyping occurs when conduct or personality traits are considered inappropriate simply because they may not conform to other people's ideas or perceptions about how individuals of either sex should act or look.

- Harassing a person because that person does not conform to gender stereotypes as to "appropriate" looks, speech, personality, or lifestyle is sexual harassment.

- Harassment because someone is performing a job that is usually performed, or was performed in the past, mostly by persons of a different sex, is sex discrimination.

Retaliation

- Any employee who has engaged in "protected activity" is protected by law from being retaliated against because of that "protected activity."

- "Protected activities" with regard to harassment include:

    - Making a complaint to a supervisor, manager or another person designated by your employer to receive complaints about harassment

    - Making a report of suspected harassment, even if you are not the target of the harassment

    - Filing a formal complaint about harassment

    - Opposing discrimination

    - Assisting another employee who is complaining of harassment

    - Providing information during a workplace investigation of harassment, or testifying in connection with a complaint of harassment filed with a government agency or in court

- **What is Retaliation?**

- Retaliation is any action taken to alter an employee's terms and conditions of employment (such as a demotion or harmful work schedule or location change) because that individual engaged in any of the above protected activities. Such individuals should expect to be free from any negative actions by supervisors, managers or the employer motivated by these protected activities.

- Retaliation can be any such adverse action taken by the employer against the employee, that could have the effect of discouraging a reasonable worker from making a complaint about harassment or discrimination.

- The negative action need not be job-related or occur in the workplace, and may occur after the end of employment, such as an unwarranted negative reference.

- **What is Not Retaliation**

- A negative employment action is not retaliatory merely because it occurs after the employee engages in protected activity.

- Employees continue to be subject to all job requirements and disciplinary rules after having engaged in such activity.

The Supervisor's Responsibility

- Supervisors and managers are held to a high standard of behavior. This is because:

    - They are placed in a position of authority by the employer and must not abuse that authority.

    - Their actions can create liability for the employer without the employer having any opportunity to correct the harassment.

    - They are required to report any harassment that is reported to them or which they observe.

    - They are responsible for any harassment or discrimination that they should have known of with reasonable care and attention to the workplace for which they are responsible.

    - They are expected to model appropriate workplace behavior.

- **Mandatory Reporting**

- Supervisors **must report any harassment** that they observe or know of, even if no one is objecting to the harassment.

- If a supervisor or manager receives a report of harassment, or is otherwise aware of harassment, it must be promptly reported to the employer, without exception,

    - Even if the supervisor or manager thinks the conduct is trivial

    - Even if the harassed individual asks that it not be reported

- Supervisors and managers will be subject to discipline for failing to report suspected sexual harassment or otherwise knowingly allowing sexual harassment to continue.

- Supervisors and managers will also be subject to discipline for engaging in any retaliation.

What Should I Do If I Am Harassed?

- We cannot stop harassment in the workplace unless management knows about the harassment. It is everyone's responsibility.
- You are encouraged to report harassment to a supervisor, manager or other another person designated by your employer to receive complaints (as outlined in the sexual harassment prevention policy) so the employer can take action.
- Behavior does not need to be a violation of law in order to be in violation of the policy.
- We will provide you with a complaint form to report harassment and file complaints, but if you are more comfortable reporting verbally or in another manner, we are still required to follow the sexual harassment prevention policy by investigating the claims.
- If you believe that you have been subjected to sexual harassment, you are encouraged to complete the Complaint Form and submit it to:
    - [*Person or office designated*]
    - [*Contact information for designee or office*]
    - [*How the Complaint Form can be submitted*]
- You may also make reports verbally.
- Once you submit this form or otherwise report harassment, our organization must follow its sexual harassment prevention policy and investigate any claims.
- You should report any behavior you experience or know about that is inappropriate, as described in this training, without worrying about whether or not if it is unlawful harassment.
- Individuals who report or experience harassment should cooperate with management so a full and fair investigation can be conducted and any necessary corrective action can be taken.
- If you report harassment to a manager or supervisor and receive an inappropriate response, such as being told to "just ignore it," you may take your complaint to the next level as outlined in our policy under "Legal Protections And External Remedies."
- Finally, if you are not sure you want to pursue a complaint at the time of potential harassment, document the incident to ensure it stays fresh in your mind.

What Should I Do If I Witness Sexual Harassment?

- Anyone who witnesses or becomes aware of potential instances of sexual harassment should report it to a supervisor, manager or designee.

- It can be uncomfortable and scary, but it is important to tell coworkers "that's not okay" when you are uncomfortable about harassment happening in front of you.

- It is unlawful for an employer to retaliate against you for reporting suspected sexual harassment or assisting in any investigation.

Investigation and Corrective Action

- Anyone who engages in sexual harassment or retaliation will be subject to remedial and/or disciplinary action, up to and including termination.

- [*Name of Company*] will investigate all reports of harassment, whether information was reported in verbal or written form.

- An investigation of any complaint should be commenced immediately and completed as soon as possible.

- The investigation will be kept confidential to the extent possible.

- Any employee may be required to cooperate as needed in an investigation of suspected sexual harassment.

    - It is illegal for employees who participate in any investigation to be retaliated against.

Investigation Process

- Our organization also has a duty to take appropriate steps to ensure that harassment will not occur in the future. Here is how we will investigate claims.

- [*Person or office designated*] will conduct an immediate review of the allegations, and take any interim actions, as appropriate

- Relevant documents, emails or phone records will be requested, preserved and obtained.

- Interviews will be conducted with parties involved and witnesses

- Investigation is documented as outlined in the sexual harassment policy

- The individual who complained and the individual(s) accused of sexual harassment are notified of final determination and that appropriate administrative action has been taken.

Additional Protections and Remedies

- In addition to what we've already outlined, employees may also choose to pursue outside legal remedies as suggested below.

New York State Division of Human Rights (DHR)

- A complaint alleging violation of the Human Rights Law may be filed either with DHR or in New York State Supreme Court.
- Complaints may be filed with DHR any time **within one year** of the alleged sexual harassment. You do not need to have an attorney to file.
- If an individual did not file at DHR, they can sue directly in state court under the Human Rights Law, **within three years** of the alleged sexual harassment.
- An individual may not file with DHR if they have already filed a Human Rights Law complaint in state court.
- For more information, visit: **www.dhr.ny.gov**.

United States Equal Employment Opportunity Commission (EEOC)

- An individual can file a complaint with the EEOC anytime **within 300 days** from the alleged sexual harassment. You do not need to have an attorney to file.
- A complaint must be filed with the EEOC before you can file in federal court.
- For more information, visit: **www.eeoc.gov**.
- *NOTE: If an individual files an administrative complaint with DHR, DHR will automatically file the complaint with the EEOC to preserve the right to proceed in federal court.*

Local Protections

- Many localities enforce laws protecting individuals from sexual harassment and discrimination.
- You should contact the county, city or town in which you live to find out if such a law exists.

- Harassment may constitute a crime if it involves things like physical touching, coerced physical confinement or coerced sex acts. **You should also contact the local police department**.

Other Types of Workplace Harassment

- Workplace harassment can be based on other things and is not just about gender or inappropriate sexual behavior in the workplace.

- Any harassment or discrimination based on a protected characteristic is prohibited in the workplace and may lead to disciplinary action against the perpetrator.

    - Protected characteristics include age, race, creed, color, national origin, sexual orientation, military status, sex, disability, marital status, domestic violence victim status, gender identity and criminal history.

- Much of the information presented in this training applies to all types of workplace harassment.

Summary

- After this training, all employees are should understand what we have discussed, including:

    - How to recognize harassment as inappropriate workplace behavior

    - The nature of sexual harassment

    - That harassment because of any protected characteristic is prohibited

    - The reasons why workplace harassment is employment discrimination

    - That all harassment should be reported

    - That supervisors and managers have a special responsibility to report harassment.

- With this knowledge, all employees can achieve appropriate workplace behavior, avoid disciplinary action, know their rights and feel secure that they are entitled to and can work in an atmosphere of respect for all people.

- Find the Complaint Form [*insert information here*].

- For additional information, visit: **ny.gov/programs/combating-sexual-harassment-workplace**

Sexual Harassment Case Studies

- Let’s take a look at a few scenarios that help explain the kind of behaviors that can constitute sexual harassment.

- These examples describe inappropriate behavior in the workplace that will be dealt with by corrective action, including disciplinary action.

- Remember, it is up to **all employees** to report inappropriate behavior in the workplace.

Example 1: Not Taking “No” for an Answer

Li Yan's coworker Ralph has just been through a divorce. He drops comments on a few occasions that he is lonely and needs to find a new girlfriend. Li Yan and Ralph have been friendly in the past and have had lunch together in local restaurants on many occasions. Ralph asks Li Yan to go on a date with him—dinner and a movie. Li Yan likes Ralph and agrees to go out with him. She enjoys her date with Ralph but decides that a relationship is not a good idea. She thanks Ralph for a nice time, but explains that she does not want to have a relationship with him. Ralph waits two weeks and then starts pressuring Li Yan for more dates. She refuses, but Ralph does not stop. He keeps asking her to go out with him.

Question 1. When Ralph first asked Li Yan for a date, this was sexual harassment. True or False?

FALSE: Ralph's initial comments about looking for a girlfriend and asking Li Yan, a coworker, for a date are not sexual harassment. Even if Li Yan had turned Ralph down for the first date, Ralph had done nothing wrong by asking for a date and by making occasional comments that are not sexually explicit about his personal life.

Question 2. Li Yan cannot complain of sexual harassment because she went on a date with Ralph. True or False?

FALSE: Being friendly, going on a date, or even having a prior relationship with a coworker does not mean that a coworker has a right to behave as Ralph did toward Li Yan. She has to continue working with Ralph, and he must respect her wishes and not engage in behavior that has now become inappropriate for the workplace.

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Li Yan complains to her supervisor, and the supervisor (as required) reports her complaint to the person designated by her employer to receive complaints. Ralph is questioned about his behavior and he apologizes. He is instructed by the designated person to stop. Ralph stops for a while but then starts leaving little gifts for Li Yan on her desk with accompanying love notes. The love notes are not overtly offensive, but Ralph's behavior is starting to make Li Yan nervous, as she is afraid he may start stalking her.

Question 3. Ralph's subsequent behavior with gifts and love notes is not sexual harassment because he has stopped asking Li Yan for dates as instructed. He is just being nice to Li Yan because he likes her. True or False?

FALSE: Li Yan should report Ralph's behavior. She was entitled to have effective assistance in getting Ralph to stop his inappropriate workplace behavior. Because Ralph has returned to pestering Li Yan after being told to stop, he could be subject to serious disciplinary action for his behavior.

Example 2: The Boss with a Bad Attitude

Sharon transfers to a new location with her employer. Her new supervisor, Paul, is friendly and helps her get familiar with her new job duties. After a few days, when no one else is around, Paul comes over to Sharon's work area to chat. Paul talks about what he did last night, which was to go to a strip club. Sharon is shocked that Paul would bring up such a topic in the workplace and says nothing in response. Paul continues talking and says that all the women in the office are so unattractive that he needs to get out and “see some hot chicks” once in a while. He tells Sharon he is glad she joined the staff because, unlike the others, she is “easy on the eyes.” Sharon feels very offended and demeaned that she and the other women in her workplace are being evaluated on their looks by their supervisor.

Question 1. Because Paul did not tell Sharon that she is unattractive, he has not harassed her. True or False?

FALSE: Paul has made sexually explicit statements to Sharon, which are derogatory and demeaning to Sharon and her female coworkers. It does not matter that Paul supposedly paid Sharon a “compliment.” The discussion is still highly offensive to Sharon, as it would be to most reasonable persons in her situation.

Question 2. By bringing up his visit to the strip club, Paul is engaging in inappropriate workplace behavior. True or False?

TRUE: Simply bringing up the visit to the strip club is inappropriate in the workplace, especially by a supervisor, and it would be appropriate for Sharon to report this conduct. A one-time comment about going to a strip club is behavior that Paul would be told to stop, even though it probably would not rise to the level of unlawful harassment, unless it was repeated on multiple occasions.

Question 3. Paul should be instructed to stop making these types of comments, but this is not a serious matter. True or False?

FALSE: Paul's comments about the female employees are a serious matter and show his contempt for women in the workplace. Paul is required to model appropriate behavior, and must not exhibit contempt for employees on the basis of sex or any protected characteristic. Sharon should not have to continue to work for someone she knows harbors such contempt for women, nor should the other employees have to work for such a supervisor. Management should be aware of this, even if the

other employees are not, and Paul should be disciplined and, most likely, removed from his current position.

Example 3: No Job for a Woman?

Carla works as a licensed heavy equipment operator. Some of her male coworkers think it is fun to tease her. Carla often hears comments like “Watch out, here she comes–that crazy woman driver!” in a joking manner. Also, someone keeps putting a handmade sign on the only port-a-potty at the worksite that says, “Men only.”

Question 1. Women in traditionally male jobs should expect teasing and should not take the joking comments too seriously. True or False?

FALSE: Whether Carla is being harassed depends in part on Carla's opinion of the situation; that is, whether she finds the behavior offensive. However, if at any point Carla does feel harassed, she is entitled to complain of the behavior and have it stopped, regardless of whether and for how long she has endured the behavior without complaint. Carla can always say when enough is enough.

Question 2. Carla cannot complain, because the site supervisor sometimes joins in with the joking behavior, so she has nowhere to go. True or False?

FALSE: Carla can still complain to the supervisor who is then on notice that the behavior bothers Carla and must be stopped. The supervisor's failure to take Carla's complaint seriously, constitutes serious misconduct on his or her part. Carla can also complain directly to the person designated by her employer to receive complaints, either instead of going to the supervisor, or after doing so. The employer is responsible for assuring that all employees are aware of its anti-harassment policies and procedures.

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Some of Carla's other coworkers are strongly opposed to her presence in the traditionally all-male profession. These coworkers have sometimes said things to her like, “You're taking a job away from a man who deserves it,” “You should be home with your kids,” and “What kind of a mother are you?” Also, someone scratched the word “bitch” on Carla's toolbox.

Question 3. These behaviors, while rude, are not sexual harassment because they are not sexual in nature. True or False?

FALSE: The behaviors are directed at her because she is a woman and appear to be intended to intimidate her and cause her to quit her job. While not sexual in nature, this harassment is because of her sex and will create a hostile work environment if it is sufficiently severe or frequent.

--

Carla complains about the jokes and other behaviors, and an investigation is conducted. It cannot be determined who defaced Carla's toolbox. Her coworkers are told to stop their behavior or face disciplinary charges. The supervisor speaks with Carla and tells her to come to him immediately if she has any further problems. Carla then finds that someone has urinated in her toolbox.

Question 4. There is nothing Carla can do because she can't prove who vandalized her toolbox. True or False?

FALSE: Carla should speak to her supervisor immediately, or contact any other person designated by her employer to receive complaints directly. Although the situation has become very difficult, it is the employer's responsibility to support Carla and seek a solution. An appropriate investigation must be promptly undertaken and appropriate remedial action must follow.

Example 4: Too Close for Comfort

Keisha has noticed that her new boss, Sarah, leans extremely close to her when they are going over the reports that she prepares. She touches her hand or shoulder frequently as they discuss work. Keisha tries to move away from her in these situations, but she doesn't seem to get the message.

Question 1. Keisha should just ignore Sarah's behavior. True or False?

FALSE: If Keisha is uncomfortable with Sarah's behavior, she has options. If she feels comfortable doing so, she should tell Sarah to please back off because her closeness and touching make her uncomfortable. Another option is to complain directly to a person designated by her employer to receive complaints, who will speak with Sarah. Although this may not be sufficiently severe or pervasive to create an unlawful harassment situation (unless it was repeated by Sarah after she was told to stop), there is no reason for Keisha to be uncomfortable in the workplace. There is no valid reason for Sarah to engage in this behavior.

--

Before Keisha gets around to complaining, Sarah brushes up against her back in the conference room before a meeting. She is now getting really annoyed but still puts off doing anything about it. Later Sarah "traps" Keisha in her office after they finish discussing work by standing between her and the door of the small office. Keisha doesn't know what to do, so she moves past her to get out. As she does so, Sarah runs her hand over Keisha's breast.

Question 2. Sarah's brushing up against Keisha in the conference room could just be inadvertent and does not give Keisha any additional grounds to complain about Sarah. True or False?

FALSE: Sarah is now engaging in a pattern of escalating behavior. Given the pattern of her "too close" and "touching" behavior, it is unlikely that this was inadvertent. Even before being "trapped" in Sarah's office, Keisha should have reported all of the behaviors she had experienced that had made her uncomfortable.

Question 3. Sarah touching Keisha's breast is inappropriate but is probably not unlawful harassment because it only happened once. True or False?

FALSE: Any type of sexual touching is very serious and does not need to be repeated to constitute sexual harassment. Keisha should immediately report it without waiting for it to be repeated. Sarah can expect to receive formal discipline, including possible firing.

Example 5: A Distasteful Trade

The following scenario will explain many aspects of quid pro quo sexual harassment.

Tatiana is hoping for a promotion to a position that she knows will become vacant soon. She knows that her boss, David, will be involved in deciding who will be promoted. She tells David that she will be applying for the position, and that she is very interested in receiving the promotion. David says, "We'll see. There will be a lot of others interested in the position."

A week later, Tatiana and David travel together on state business, including an overnight hotel stay. Over dinner, David tells Tatiana that he hopes he will be able to promote her, because he has always really enjoyed working with her. He tells her that some other candidates "look better on paper" but that she is the one he wants. He tells her that he can "pull some strings" to get her into the job and Tatiana thanks David. Later David suggests that they go to his hotel room for "drinks and some relaxation." Tatiana declines his "offer."

Question 1. David's behavior could be harassment of Tatiana. True or False?

TRUE: David's behavior as Tatiana's boss is inappropriate, and Tatiana should feel free to report the behavior if it made her uncomfortable. It is irrelevant that this behavior occurs away from the workplace. Their relationship is that of supervisor and supervisee, and all their interactions will tend to impact the workplace.

David's behavior, at this point, may or may not constitute quid pro quo harassment; David has made no threat that if Tatiana refuses his advance he will handle her promotion any differently. However, his offer to "pull some strings" followed by a request that they go to his hotel room for drinks and relaxation might be considered potentially coercive. Certainly, if David persists in his advances—even if he never makes or carries out any threat or promise about job benefits—then this could create a hostile environment for Tatiana, for which the employer could be strictly liable because David is a management employee.

--

After they return from the trip, Tatiana asks David if he knows when the job will be posted so that she can apply. He says that he is not sure, but there is still time for her to "make it worth his while" to pull strings for her. He then asks, "How about going out to dinner this Friday and then coming over to my place?"

Question 2. David engaged in sexual harassment. True or False?

TRUE: It is now evident that David has offered to help Tatiana with her promotion in exchange for sexual favors.

--

Tatiana, who really wants the position, decides to go out with David. Almost every Friday they go out at David's insistence and engage in sexual activity. Tatiana does not want to be in a relationship with David and is only going out with him because she believes that he will otherwise block her promotion.

Question 3. Tatiana cannot complain of harassment because she voluntarily engaged in sexual activity with David. True or False?

FALSE: Because the sexual activity is unwelcome to Tatiana, she is a target of sexual harassment. Equally, if she had refused David's advances, she would still be a target of sexual harassment. The offer to Tatiana to trade job benefits for sexual favors by someone with authority over her in the workplace is quid pro quo sexual harassment, and the employer is exposed to liability because of its supervisor's actions.

--

Tatiana receives the promotion.

Question 4. Tatiana cannot complain of harassment because she got the job, so there is no discrimination against her. True or False?

FALSE: Tatiana can be the recipient of sexual harassment whether or not she receives the benefit that was used as an inducement.

--

Tatiana breaks off the sexual activities with David. He then gives her a bad evaluation, and she is removed from her new position at the end of the probationary period and returns to her old job.

Question 5. It is now “too late” for Tatiana to complain. Losing a place of favor due to the break up of the voluntary relationship does not create a claim for sexual harassment. True or False?

FALSE: It is true that the breakup of a relationship, if truly consensual and welcomed at the time, usually does not create a claim for sexual harassment. However, the “relationship” in this case was never welcomed by Tatiana. David's behavior has at all times been inappropriate and a serious violation of the employer’s policy. As the person who abused the power and authority of a management position, David has engaged in sexual harassment.

Example 6: An Issue about Appearances

Leonard works as a clerk typist for a large employer. He likes to wear jewelry, and his attire frequently includes earrings and necklaces. His boss, Margaret, thinks it's “weird” that, as a man, Leonard wears jewelry and wants to be a clerical worker. She frequently makes sarcastic comments to him about his appearance and refers to him “jokingly” as her office boy. Leonard, who hopes to develop his career in the area of customer relations, applies for an open promotional position that would involve working in a “front desk” area, where he would interact with the public. Margaret tells Leonard that if he wants that job, he had better look “more normal” or else wait for a promotion to mailroom supervisor.

Question 1. Leonard's boss is correct to tell him wearing jewelry is inappropriate for customer service positions. True or False?

FALSE: Leonard's jewelry is only an issue because Margaret considers it unusual for a man to wear such jewelry. Therefore, her comments to Leonard constitute sex stereotyping.

--

Margaret also is “suspicious” that Leonard is gay, which she says she “doesn't mind,” but she thinks Leonard is “secretive.” She starts asking him questions about his private life, such as “Are you married?” “Do you have a partner?” ”Do you have kids?” Leonard tries to respond politely “No” to all her questions but is becoming annoyed. Margaret starts gossiping with Leonard's coworkers about his supposed sexual orientation.

Question 2. Leonard is the recipient of harassment on the basis of sex and sexual orientation. True or False?

TRUE: Leonard is harassed on the basis of sex because he is being harassed for failure to adhere to Margaret's sex stereotypes.

Leonard is also harassed on the basis of his perceived sexual orientation. It does not matter whether or not Leonard is a gay man in order for him to have a claim for sexual orientation harassment.

Leonard might also be considered a target of harassment on the basis of gender identity, which is a form of sex and/or disability discrimination prohibited by the Human Rights Law. Leonard should report Margaret's conduct, which is clearly a violation of the sexual harassment policy, to a person designated by his employer to receive complaints (i.e. his employer’s “designee”).

--

Leonard decides that he is not going to get a fair chance at the promotion under these circumstances, and he complains to the employer's designee about Margaret's behavior. The designee does an investigation and tells Margaret that Leonard's jewelry is not in violation of any workplace rule, that she is to consider him for the position without regard for his gender, and that she must stop making harassing comments, asking Leonard intrusive questions, and gossiping about his personal life. Margaret stops her comments, questions, and gossiping, but she then recommends a woman be

promoted to the open position. The woman promoted has much less experience than Leonard and lacks his two-year degree in customer relations from a community college.

Question 3. Leonard has likely been the target of discrimination on the basis of sex, sexual orientation and/or retaliation. True or False?

TRUE: We don't know Margaret's reason for not recommending Leonard for the promotion, but it is not looking good for Margaret. It appears that she is either biased against Leonard for the same reasons she harassed him, or she is retaliating because he complained, or both.

Leonard should speak further with the employer's designee, and the circumstances of the promotion should be investigated. If it is found that Margaret had abused her supervisory authority by failing to fairly consider Leonard for the promotion, she should be subject to disciplinary action. This scenario shows that sometimes more severe action is needed in response to harassment complaints, in order to prevent discrimination in the future.

EXHIBIT H

NEW YORK STATE
Sexual Harassment Prevention Training

October 2018 Edition

NEW YORK STATE | Combating Sexual Harassment

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Introduction

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Sexual Harassment in the Workplace

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Sexual Harassment in the Workplace

Sexual harassment will not be tolerated.

Today's training will:

- Help you better understand what is considered sexual harassment
- Show you how to report sexual harassment
- Show you external reporting options

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What is Sexual Harassment?

Sexual harassment:

- Is a form of sex discrimination and is unlawful
- Includes harassment on the basis of sex, sexual orientation, self-identified or perceived sex, gender expression, gender identity and the status of being transgender.

What is Sexual Harassment?

It includes unwelcome conduct, either of a sexual nature or which is directed at an individual because of that individual's sex when:

- Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment;
- Such conduct is made either explicitly or implicitly a term or condition of employment; or
- Submission to or rejection of such conduct is used as the basis for employment decisions.

Hostile Environment

Sexual or discriminatory displays or publications anywhere in the workplace

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Hostile actions taken against an individual because of that individual's sex

Quid Pro Quo Sexual Harassment

Occurs when a person in authority trades, or tries to trade, job benefits for sexual favors.

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Occurs between an employee and someone with authority, who has the ability to grant or withhold job benefits.

Who can be the Target?

Sexual harassment can occur between any individuals, regardless of their sex or gender.

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The law protects employees, paid or unpaid interns, and non-employees who work in the workplace.

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Who can be the Perpetrator?

Anyone in the workplace:

- A coworker
- A supervisor or manager
- Any third-party (non-employee, intern, vendor, customer, etc.)

Where Can Workplace Sexual Harassment Occur?

Whenever and wherever employees are fulfilling their work responsibilities, including:

- Employer-sponsored events
- Conferences
- Office parties
- Off-site or during non-work hours

Sex Stereotyping

Harassing a person because that person does not conform to gender stereotypes is sexual harassment.

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Harassment because someone is performing a job that is usually or was previously performed mostly by persons of a different sex is sex discrimination.

Retaliation

Protected Activities

Any employee engaged in "protected activity" is protected by law from being retaliated against.

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Protected activities include:

- Making a complaint about harassment or suspected harassment
- Providing information during an investigation
- Testifying in connection with complaint

What is Retaliation?

Any action to alter an employee's terms and conditions of employment *because* that individual engaged in protected activities.

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Examples:

- Sudden change in work schedule or work location
- Demotion

What is Not Retaliation

A negative employment action is not retaliatory merely because it occurs after the employee engages in protected activity.

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Supervisor's Responsibility

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The Supervisor's Responsibility

Supervisors and managers are held to a high standard of behavior. They are:

- Required to report any harassment reported to them or which they observe.
- Responsible for any harassment or discrimination they should have known about.
- Expected to model appropriate behavior.

Mandatory Reporting

Supervisors must report any harassment that they observe or know of, even if no one is objecting to it.

- Harassment must be promptly reported to the employer.
- Supervisors and managers will be subject to discipline for failing to report suspected sexual harassment.
- Supervisors and managers will also be subject to discipline for engaging in retaliation.

What Should I Do If I Am Harassed?

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What Should I Do If I Am Harassed?

We will provide you with a complaint form to report harassment and file complaints. Submit it to:

[*Person or office designated*]

[*Contact information for designee or office*]

[*How the Complaint Form can be submitted*]

You may also make reports verbally.

What Should I Do If I Witness Sexual Harassment?

Anyone who witnesses or becomes aware of potential instances of sexual harassment should report it to a supervisor, manager or designee.

It is unlawful for an employer to retaliate against you for reporting suspected sexual harassment or assisting in any investigation.

Investigation and Corrective Action

- Anyone who engages in sexual harassment or retaliation will be subject to remedial and/or disciplinary action.
- An investigation of any complaint should be commenced immediately and completed as soon as possible.
- The investigation will be kept confidential to the extent possible.
- Any employee may be required to cooperate as needed in an investigation.

Investigation Process

- [*Person or office designated*] will conduct an immediate review of the allegations, and take any interim actions
- Relevant documents, emails or phone records will be requested, preserved and obtained.
- Interviews will be conducted
- The individual who complained and the individual(s) accused of sexual harassment are notified of final determination and that appropriate administrative action has been taken.

Additional Protections and Remedies

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NYS Division of Human Rights (DHR)

A complaint alleging violation of the Human Rights Law may be filed either with DHR or in NYS Supreme Court.

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- Complaints may be filed with DHR any time **within one year** of the alleged sexual harassment.
- You do not need to have an attorney to file.
- More information: **www.DHR.ny.gov**

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United States Equal Employment Opportunity Commission (EEOC)

- An individual can file a complaint with the EEOC anytime **within 300 days** from the alleged sexual harassment.
- You do not need to have an attorney to file.
- A complaint must be filed with the EEOC before you can file in federal court.
- More information: **www.EEOC.gov**.

Local Protections

Many localities enforce laws protecting individuals from sexual harassment and discrimination.

- Contact your county, city or town to find out if laws exist.

Harassment may constitute a crime if it involves things like physical touching, coerced physical confinement or coerced sex acts.

- Contact the local police department.

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Summary

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Other Types of Workplace Harassment

Any harassment or discrimination based on a protected characteristic is prohibited in the workplace and may lead to disciplinary action against the perpetrator.

- Age, race, creed, color, national origin, sexual orientation, military status, sex, disability, marital status, domestic violence victim status, gender identity and criminal history.

Much of the information presented in this training applies to all types of workplace harassment.

Summary

- How to recognize harassment as inappropriate behavior.
- Harassment because of any protected characteristic is prohibited.
- Why workplace harassment is employment discrimination.
- All harassment should be reported.
- Supervisors and managers have a special responsibility to report harassment.

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Important Resources

Find the Complaint Form:

[*insert information here*]

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For additional information, visit:

www.ny.gov/programs/combating-sexual-harassment-workplace

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NEW YORK STATE
Sexual Harassment Prevention Training
CASE STUDIES

OCTOBER 2018 EDITION

NEW YORK STATE | Combating Sexual Harassment

Example 1

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Ex. 1: Not Taking "No" for an Answer

Li Yan's coworker Ralph has just been through a divorce. He drops comments on a few occasions that he is lonely and needs to find a new girlfriend. Li Yan and Ralph have been friendly in the past and have had lunch together in local restaurants on many occasions. Ralph asks Li Yan to go on a date with him—dinner and a movie. Li Yan likes Ralph and agrees to go out with him. She enjoys her date with Ralph but decides that a relationship is not a good idea. She thanks Ralph for a nice time, but explains that she does not want to have a relationship with him. Ralph waits two weeks and then starts pressuring Li Yan for more dates. She refuses, but Ralph does not stop. He keeps asking her to go out with him.

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Ex. 1: Not Taking "No" for an Answer

Question 1. When Ralph first asked Li Yan for a date, this was sexual harassment.

True or False?

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Ex. 1: Not Taking "No" for an Answer

Question 1. When Ralph first asked Li Yan for a date, this was sexual harassment.

FALSE: Ralph's initial comments about looking for a girlfriend and asking Li Yan, a coworker, for a date are not sexual harassment. Even if Li Yan had turned Ralph down for the first date, Ralph had done nothing wrong by asking for a date and by making occasional comments that are not sexually explicit about his personal life.

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Ex. 1: Not Taking "No" for an Answer

Question 2. Li Yan cannot complain of sexual harassment because she went on a date with Ralph.

True or False?

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Ex. 1: Not Taking "No" for an Answer

Question 2. Li Yan cannot complain of sexual harassment because she went on a date with Ralph.

FALSE: Being friendly, going on a date, or even having a prior relationship with a coworker does not mean that a coworker has a right to behave as Ralph did toward Li Yan. She has to continue working with Ralph, and he must respect her wishes and not engage in behavior that has now become inappropriate for the workplace.

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Ex. 1: Not Taking "No" for an Answer

Li Yan complains to her supervisor, and the supervisor (as required) reports her complaint to the person designated by her employer to receive complaints. Ralph is questioned about his behavior and he apologizes. He is instructed by the designated person to stop. Ralph stops for a while but then starts leaving little gifts for Li Yan on her desk with accompanying love notes. The love notes are not overtly offensive, but Ralph's behavior is starting to make Li Yan nervous, as she is afraid he may start stalking her.

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Ex. 1: Not Taking "No" for an Answer

Question 3. Ralph's subsequent behavior with gifts and love notes is not sexual harassment because he has stopped asking Li Yan for dates as instructed. He is just being nice to Li Yan because he likes her.

True or False?

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Ex. 1: Not Taking "No" for an Answer

Question 3. Ralph's subsequent behavior with gifts and love notes is not sexual harassment because he has stopped asking Li Yan for dates as instructed. He is just being nice to Li Yan because he likes her.

FALSE: Li Yan should report Ralph's behavior. She was entitled to have effective assistance in getting Ralph to stop his inappropriate workplace behavior. Because Ralph has returned to pestering Li Yan after being told to stop, he could be subject to serious disciplinary action for his behavior.

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Example 2

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Ex. 2: The Boss with a Bad Attitude

Sharon transfers to a new location with her employer. Her new supervisor, Paul, is friendly and helps her get familiar with her new job duties. After a few days, when no one else is around, Paul comes over to Sharon's work area to chat. Paul talks about what he did last night, which was to go to a strip club. Sharon is shocked that Paul would bring up such a topic in the workplace and says nothing in response. Paul continues talking and says that all the women in the office are so unattractive that he needs to get out and "see some hot chicks" once in a while. He tells Sharon he is glad she joined the staff because, unlike the others, she is "easy on the eyes." Sharon feels very offended and demeaned that she and the other women in her workplace are being evaluated on their looks by their supervisor.

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Ex. 2: The Boss with a Bad Attitude

Question 1. Because Paul did not tell Sharon that she is unattractive, he has not harassed her.

True or False?

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Ex. 2: The Boss with a Bad Attitude

Question 1. Because Paul did not tell Sharon that she is unattractive, he has not harassed her.

FALSE: Paul has made sexually explicit statements to Sharon, which are derogatory and demeaning to Sharon and her female coworkers. It does not matter that Paul supposedly paid Sharon a "compliment." The discussion is still highly offensive to Sharon, as it would be to most reasonable persons in her situation.

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Ex. 2: The Boss with a Bad Attitude

Question 2. By bringing up his visit to the strip club, Paul is engaging in inappropriate workplace behavior.

True or False?

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Ex. 2: The Boss with a Bad Attitude

Question 2. By bringing up his visit to the strip club, Paul is engaging in inappropriate workplace behavior.

TRUE: Simply bringing up the visit to the strip club is inappropriate in the workplace, especially by a supervisor, and it would be appropriate for Sharon to report this conduct. A one-time comment about going to a strip club is behavior that Paul would be told to stop, even though it probably would not rise to the level of unlawful harassment, unless it was repeated on multiple occasions.

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Ex. 2: The Boss with a Bad Attitude

Question 3. Paul should be instructed to stop making these types of comments, but this is not a serious matter.

True or False?

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Ex. 2: The Boss with a Bad Attitude

Question 3. Paul should be instructed to stop making these types of comments, but this is not a serious matter.

FALSE: Paul's comments about the female employees are a serious matter and show his contempt for women in the workplace. Paul is required to model appropriate behavior, and must not exhibit contempt for employees on the basis of sex or any protected characteristic. Sharon should not have to continue to work for someone she knows harbors such contempt for women, nor should the other employees have to work for such a supervisor. Management should be aware of this, even if the other employees are not, and Paul should be disciplined and, most likely, removed from his current position.

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Example 3

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Ex. 3: No Job for a Woman?

Carla works as a licensed heavy equipment operator. Some of her male coworkers think it is fun to tease her. Carla often hears comments like "Watch out, here she comes–that crazy woman driver!" in a joking manner. Also, someone keeps putting a handmade sign on the only port-a-potty at the worksite that says, "Men Only."

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Ex. 3: No Job for a Woman?

Question 1. Women in traditionally male jobs should expect teasing and should not take the joking comments too seriously.

True or False?

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Ex. 3: No Job for a Woman?

Question 1. Women in traditionally male jobs should expect teasing and should not take the joking comments too seriously.

FALSE: Whether Carla is being harassed depends in part on Carla's opinion of the situation; that is, whether she finds the behavior offensive. However, if at any point Carla does feel harassed, she is entitled to complain of the behavior and have it stopped, regardless of whether and for how long she has endured the behavior without complaint. Carla can always say when enough is enough.

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Ex. 3: No Job for a Woman?

Question 2. Carla cannot complain, because the site supervisor sometimes joins in with the joking behavior, so she has nowhere to go.

True or False?

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Ex. 3: No Job for a Woman?

Question 2. Carla cannot complain, because the site supervisor sometimes joins in with the joking behavior, so she has nowhere to go.

FALSE: Carla can still complain to the supervisor who is then on notice that the behavior bothers Carla and must be stopped. The supervisor's failure to take Carla's complaint seriously, constitutes serious misconduct on his or her part. Carla can also complain directly to the person designated by her employer to receive complaints, either instead of going to the supervisor, or after doing so. The employer is responsible for assuring that all employees are aware of its anti-harassment policies and procedures.

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Ex. 3: No Job for a Woman?

Some of Carla's other coworkers are strongly opposed to her presence in the traditionally all-male profession. These coworkers have sometimes said things to her like, "You're taking a job away from a man who deserves it," "You should be home with your kids," and "What kind of a mother are you?" Also, someone scratched the word "bitch" on Carla's toolbox.

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Ex. 3: No Job for a Woman?

Question 3. These behaviors, while rude, are not sexual harassment because they are not sexual in nature.

True or False?

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Ex. 3: No Job for a Woman?

Question 3. These behaviors, while rude, are not sexual harassment because they are not sexual in nature.

FALSE: The behaviors are directed at her because she is a woman and appear to be intended to intimidate her and cause her to quit her job. While not sexual in nature, this harassment is because of her sex and will create a hostile work environment if it is sufficiently severe or frequent.

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Ex. 3: No Job for a Woman?

Carla complains about the jokes and other behaviors, and an investigation is conducted. It cannot be determined who defaced Carla's toolbox. Her coworkers are told to stop their behavior or face disciplinary charges. The supervisor speaks with Carla and tells her to come to him immediately if she has any further problems. Carla then finds that someone has urinated in her toolbox.

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Ex. 3: No Job for a Woman?

Question 4. There is nothing Carla can do because she can't prove who vandalized her toolbox.

True or False?

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Ex. 3: No Job for a Woman?

Question 4. There is nothing Carla can do because she can't prove who vandalized her toolbox.

FALSE: Carla should speak to her supervisor immediately, or contact any other person designated by her employer to receive complaints directly. Although the situation has become very difficult, it is the employer's responsibility to support Carla and seek a solution. An appropriate investigation must be promptly undertaken and appropriate remedial action must follow.

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Example 4

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Ex. 4: Too Close for Comfort

Keisha has noticed that her new boss, Sarah, leans extremely close to her when they are going over the reports that she prepares. She touches her hand or shoulder frequently as they discuss work. Keisha tries to move away from her in these situations, but she doesn't seem to get the message.

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Ex. 4: Too Close for Comfort

Question 1. Keisha should just ignore Sarah's behavior.

True or False?

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Ex. 4: Too Close for Comfort

Question 1. Keisha should just ignore Sarah's behavior.

FALSE: If Keisha is uncomfortable with Sarah's behavior, she has options. If she feels comfortable doing so, she should tell Sarah to please back off because her closeness and touching make her uncomfortable. Another option is to complain directly to a person designated by her employer to receive complaints, who will speak with Sarah. Although this may not be sufficiently severe or pervasive to create an unlawful harassment situation (unless it was repeated by Sarah after she was told to stop), there is no reason for Keisha to be uncomfortable in the workplace. There is no valid reason for Sarah to engage in this behavior.

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Ex. 4: Too Close for Comfort

Before Keisha gets around to complaining, Sarah brushes up against her back in the conference room before a meeting. She is now getting really annoyed but still puts off doing anything about it. Later Sarah "traps" Keisha in her office after they finish discussing work by standing between her and the door of the small office. Keisha doesn't know what to do, so she moves past her to get out. As she does so, Sarah runs her hand over Keisha's breast.

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Ex. 4: Too Close for Comfort

Question 2. Sarah's brushing up against Keisha in the conference room could just be inadvertent and does not give Keisha any additional grounds to complain about Sarah.

True or False?

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Ex. 4: Too Close for Comfort

Question 2. Sarah's brushing up against Keisha in the conference room could just be inadvertent and does not give Keisha any additional grounds to complain about Sarah.

FALSE: Sarah is now engaging in a pattern of escalating behavior. Given the pattern of her "too close" and "touching" behavior, it is unlikely that this was inadvertent. Even before being "trapped" in Sarah's office, Keisha should have reported all of the behaviors she had experienced that had made her uncomfortable.

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Ex. 4: Too Close for Comfort

Question 3. Sarah touching Keisha's breast is inappropriate but is probably not unlawful harassment because it only happened once.

True or False?

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Ex. 4: Too Close for Comfort

Question 3. Sarah touching Keisha's breast is inappropriate but is probably not unlawful harassment because it only happened once.

FALSE: Any type of sexual touching is very serious and does not need to be repeated to constitute sexual harassment. Keisha should immediately report it without waiting for it to be repeated. Sarah can expect to receive formal discipline, including possible firing.

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Example 5

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Ex. 5: A Distasteful Trade

Tatiana is hoping for a promotion to a position that she knows will become vacant soon. She knows that her boss, David, will be involved in deciding who will be promoted. She tells David that she will be applying for the position, and that she is very interested in receiving the promotion. David says, "We'll see. There will be a lot of others interested in the position."

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Ex. 5: A Distasteful Trade

A week later, Tatiana and David travel together on state business, including an overnight hotel stay. Over dinner, David tells Tatiana that he hopes he will be able to promote her, because he has always really enjoyed working with her. He tells her that some other candidates "look better on paper" but that she is the one he wants. He tells her that he can "pull some strings" to get her into the job and Tatiana thanks David. Later David suggests that they go to his hotel room for "drinks and some relaxation." Tatiana declines his "offer."

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Ex. 5: A Distasteful Trade

Question 1. David's behavior could be harassment of Tatiana.

True or False?

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Ex. 5: A Distasteful Trade

Question 1. David's behavior could be harassment of Tatiana.

TRUE: David's behavior as Tatiana's boss is inappropriate, and Tatiana should feel free to report the behavior if it made her uncomfortable. It is irrelevant that this behavior occurs away from the workplace. Their relationship is that of supervisor and supervisee, and all their interactions will tend to impact the workplace.

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Ex. 5: A Distasteful Trade

After they return from the trip, Tatiana asks David if he knows when the job will be posted so that she can apply. He says that he is not sure, but there is still time for her to "make it worth his while" to pull strings for her. He then asks, "How about going out to dinner this Friday and then coming over to my place?"

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Ex. 5: A Distasteful Trade

Question 2. David engaged in sexual harassment.

True or False?

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Ex. 5: A Distasteful Trade

Question 2. David engaged in sexual harassment.

TRUE: It is now evident that David has offered to help Tatiana with her promotion in exchange for sexual favors.

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Ex. 5: A Distasteful Trade

Tatiana, who really wants the position, decides to go out with David. Almost every Friday they go out at David's insistence and engage in sexual activity. Tatiana does not want to be in a relationship with David and is only going out with him because she believes that he will otherwise block her promotion.

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Ex. 5: A Distasteful Trade

Question 3. Tatiana cannot complain of harassment because she voluntarily engaged in sexual activity with David.

True or False?

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Ex. 5: A Distasteful Trade

Question 3. Tatiana cannot complain of harassment because she voluntarily engaged in sexual activity with David.

FALSE: Because the sexual activity is unwelcome to Tatiana, she is a target of sexual harassment. Equally, if she had refused David's advances, she would still be a target of sexual harassment. The offer to Tatiana to trade job benefits for sexual favors by someone with authority over her in the workplace is quid pro quo sexual harassment, and the employer is exposed to liability because of its supervisor's actions.

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Ex. 5: A Distasteful Trade

Tatiana receives the promotion.

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Ex. 5: A Distasteful Trade

Question 4. Tatiana cannot complain of harassment because she got the job, so there is no discrimination against her.

True or False?

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Ex. 5: A Distasteful Trade

Question 4. Tatiana cannot complain of harassment because she got the job, so there is no discrimination against her.

FALSE: Tatiana can be the recipient of sexual harassment whether or not she receives the benefit that was used as an inducement.

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Ex. 5: A Distasteful Trade

Tatiana breaks off the sexual activities with David. He then gives her a bad evaluation, and she is removed from her new position at the end of the probationary period and returns to her old job.

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Ex. 5: A Distasteful Trade

Question 5. It is now "too late" for Tatiana to complain. Losing a place of favor due to the break up of the voluntary relationship does not create a claim for sexual harassment.

True or False?

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Ex. 5: A Distasteful Trade

Question 5. It is now "too late" for Tatiana to complain. Losing a place of favor due to the break up of the voluntary relationship does not create a claim for sexual harassment.

FALSE: It is true that the breakup of a relationship, if truly consensual and welcomed at the time, usually does not create a claim for sexual harassment. However, the "relationship" in this case was never welcomed by Tatiana. David's behavior has at all times been inappropriate and a serious violation of the employer's policy. As the person who abused the power and authority of a management position, David has engaged in sexual harassment.

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Example 6

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Ex. 6: An Issue about Appearances

Leonard works as a clerk typist for a large employer. He likes to wear jewelry, and his attire frequently includes earrings and necklaces. His boss, Margaret, thinks it's "weird" that, as a man, Leonard wears jewelry and wants to be a clerical worker. She frequently makes sarcastic comments to him about his appearance and refers to him "jokingly" as her office boy. Leonard, who hopes to develop his career in the area of customer relations, applies for an open promotional position that would involve working in a "front desk" area, where he would interact with the public. Margaret tells Leonard that if he wants that job, he had better look "more normal" or else wait for a promotion to mailroom supervisor.

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Ex. 6: An Issue about Appearances

Question 1. Leonard's boss is correct to tell him wearing jewelry is inappropriate for customer service positions.

True or False?

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Ex. 6: An Issue about Appearances

Question 1. Leonard's boss is correct to tell him wearing jewelry is inappropriate for customer service positions.

FALSE: Leonard's jewelry is only an issue because Margaret considers it unusual for a man to wear such jewelry. Therefore, her comments to Leonard constitute sex stereotyping.

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Ex. 6: An Issue about Appearances

Margaret also is "suspicious" that Leonard is gay, which she says she "doesn't mind," but she thinks Leonard is "secretive." She starts asking him questions about his private life, such as "Are you married?" "Do you have a partner?" "Do you have kids?" Leonard tries to respond politely "No" to all her questions but is becoming annoyed. Margaret starts gossiping with Leonard's coworkers about his supposed sexual orientation.

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Ex. 6: An Issue about Appearances

Question 2. Leonard is the recipient of harassment on the basis of sex and sexual orientation.

True or False?

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Ex. 6: An Issue about Appearances

Question 2. Leonard is the recipient of harassment on the basis of sex and sexual orientation.

TRUE: Leonard is harassed on the basis of sex because he is being harassed for failure to adhere to Margaret's sex stereotypes.

Leonard is also harassed on the basis of his perceived sexual orientation. It does not matter whether or not Leonard is a gay man in order for him to have a claim for sexual orientation harassment.

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Ex. 6: An Issue about Appearances

Leonard decides that he is not going to get a fair chance at the promotion under these circumstances, and he complains to the employer's designee about Margaret's behavior. The designee does an investigation and tells Margaret that Leonard's jewelry is not in violation of any workplace rule, that she is to consider him for the position without regard for his gender, and that she must stop making harassing comments, asking Leonard intrusive questions, and gossiping about his personal life. Margaret stops her comments, questions, and gossiping, but she then recommends a woman be promoted to the open position. The woman promoted has much less experience than Leonard and lacks his two year degree in customer relations from a community college.

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Ex. 6: An Issue about Appearances

Question 3. Leonard has likely been the target of discrimination on the basis of sex, sexual orientation and/or retaliation.

True or False?

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Ex. 6: An Issue about Appearances

Question 3. Leonard has likely been the target of discrimination on the basis of sex, sexual orientation and/or retaliation.

TRUE: We don't know Margaret's reason for not recommending Leonard for the promotion, but it is not looking good for Margaret. It appears that she is either biased against Leonard for the same reasons she harassed him, or she is retaliating because he complained, or both.

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EXHIBIT I

Revised Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

A revised Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement are not required because changes made to the last published rules do not necessitate revision to the previously published Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement.

Initial Review of Rule

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2021, which is no later than the 3rd year after the year in which this rule is being adopted.

Assessment of Public Comment

The NYS Justice Center for the Protection of People with Special Needs (the Justice Center) received two comments from the public in response to the Notice of Proposed Rulemaking that appeared in the August 8, 2018 edition of the State Register regarding proposed regulations governing the process by which service recipients may be interviewed when they are victims or witnesses to abuse or neglect.

One comment received by the Justice Center raised concerns that both the language allowing for an interview to proceed when it would be clinically contraindicated as well as the involvement of a personal representative lacked clarity. While the Justice Center does not believe the language has or will lead to confusion in practice, the language has been amended to more clearly specify the protocols in both of these provisions.

Another comment received by the Justice Center was that the use of the term "existing standards" when reviewing a service recipient's objection to personal representative notification could be made clearer due there being multiple standards regarding individual capacity in decision making. The language has been amended to refer to the standards utilized by the relevant state oversight agency of the program in which the individual is served.

Department of Labor

REVISED RULE MAKING NO HEARING(S) SCHEDULED

Employee Scheduling (Call-In Pay)

I.D. No. LAB-47-17-00011-RP

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following revised rule:

Proposed Action: Amendment of sections 142-2.3 and 142-3.3 of Title 12 NYCRR.

Statutory authority: Labor Law, sections 21(11) and 659(2)

Subject: Employee Scheduling (Call-In Pay).

Purpose: To strengthen existing call-in pay protections involving employee scheduling.

Text of revised rule: Sections 142-2.3 and 142-3.3 of 12 NYCRR are amended to read as follows:

§ 142-2.3 Call-in pay.

(a) Call-in pay shall be provided as set forth below.

(1) Reporting to work. An employee who by request or permission of the employer reports for work on any [day] *shift* shall be paid for at least four hours[, or the number of hours in the regularly scheduled shift, whichever is less, at the basic minimum hourly wage] *of call-in pay*.

(2) Unscheduled shift. An employee who by request or permission of the employer reports to work for any shift for hours that have not been scheduled at least 14 days in advance of the shift shall be paid an additional two hours of call-in pay. Where an employer provides a weekly schedule, 14-day period referenced in this section may be measured from the last day of the schedule.

(3) Cancelled shift. An employee whose shift is cancelled by the employer shall be paid for at least two hours of call-in pay, if the shift is cancelled within 14 days, or for at least four hours of call-in pay if the shift is cancelled within 72 hours, in advance of the scheduled start of such shift.

(4) On-call. An employee who is required by the employer to be available to report to work for any shift shall be paid for at least four hours of call-in pay.

(5) Call for schedule. An employee who is required by the employer to be in contact with the employer within 72 hours of start of the shift to confirm whether to report to work shall be paid for at least four hours of call-in pay.

(b) Calculation of call-in pay. Call-in pay shall be calculated as follows.

(1) Actual attendance. Payments for time of actual attendance shall be calculated at the employee's regular rate or overtime rate of pay, whichever is applicable, minus any allowances permitted under this Part.

(2) Minimum rate. Payments for other hours of call-in pay shall be calculated at the basic minimum hourly rate with no allowances. Such payments are not payments for time worked or work performed and need not be included in the regular rate for purposes of calculating overtime pay.

(3) Offsets. Call-in pay shall not be offset by the required use of leave time, or by payments in excess of those required under this Part.

(4) Shorter work days. The four hours of call-in pay for reporting to work and for cancelled shifts under paragraphs (1) and (3) of subdivision (a) of this section may be reduced to the lesser number of hours that the employee is scheduled to work and normally works, for that shift.

(c) Applicability. This section applies to all employees, except as provided below.

(1) This section shall not apply to employees who are covered by a valid collective bargaining agreement that expressly provides for call-in pay.

(2) Paragraphs (2) through (5) of subdivision (a) of this section shall not apply to employees during work weeks when their weekly wages exceed 40 times the applicable basic hourly minimum wage rate.

(3) In addition, paragraphs (2) through (5) of subdivision (a) of this section shall also not apply to employees whose duties are directly dependent on weather conditions, or to employees whose duties are necessary to protect the health or safety of the public or any person, or to employees whose assignments are subject to work orders, or cancellations thereof; provided, however, that such employees also receive weekly compensation that exceeds the number of compensable hours worked times the applicable basic minimum wage rate, with no allowances.

(4) Paragraph (2) of subdivision (a) of this section (unscheduled shift) shall not apply to: (i) any new employee during the first two weeks of employment; or (ii) any employee who volunteers to cover a new shift or a previously scheduled shift. For purposes of this section, the term "new shift" shall mean the first two weeks of an additional shift that results in a net increase in staffing at a single workplace during the period of time covered by such shift; the term "previously scheduled shift" shall mean a shift that would not have been subject to unscheduled shift call-in pay if worked by the employee who was originally assigned to work that shift; and the term "volunteers" shall mean that the employee may refuse to cover the new or previously scheduled shift.

(5) Paragraphs (2) and (3) of subdivision (a) of this section (unscheduled shift and cancelled shift) shall not apply when an employer responds to weather or other travel advisories by offering employees the option to voluntarily reduce or increase their scheduled hours, so that employees may stay home, arrive early, arrive late, depart early, depart late, or any combination thereof, without call-in pay for unscheduled or cancelled shifts.

(6) In addition, paragraph (3) of subdivision (a) of this section (cancelled shift) shall also not apply when an employer cancels a shift at the employee's request for time off, or when operations at the workplace cannot begin or continue due to an act of God or other cause not within the employer's control, including, but not limited to, a state of emergency declared by federal, state, or local government.

(d) Safe Harbor. For purposes of paragraph (4) of subdivision (c) of this section, there shall be a rebuttable presumption that an employee has volunteered to cover a new or previously scheduled shift if the employer provides a written good faith estimate of hours to all employees upon hiring, or after the effective date of this section for previously hired employees, which may be amended at the employee's request or upon two weeks' notice by the employer, and if the request to cover a new or previously scheduled shift is either: (i) made by the employee whose shift would be covered; or (ii) made by the employer in a written communication to a group of employees requesting a volunteer from among the group and identifying a reasonable deadline for responses. If no employee volunteers prior to the deadline, the employer may assign an employee to cover the shift without the additional call-in pay required for unscheduled shifts.

§ 142-3.3 Call-in pay.

(a) Call-in pay shall be provided as set forth below.

(1) Reporting to work. An employee who by request or permission of the employer reports for work on any [day] *shift* shall be paid for at least four hours[, or the number of hours in the regularly scheduled shift, whichever is less, at the basic minimum hourly wage] *of call-in pay*.

(2) Unscheduled shift. An employee who by request or permission of the employer reports to work for any shift for hours that have not been scheduled at least 14 days in advance of the shift shall be paid an ad-

ditional two hours of call-in pay. Where an employer provides a weekly schedule, 14-day period referenced in this section may be measured from the last day of the schedule.

(3) Cancelled shift. An employee whose shift is cancelled by the employer shall be paid for at least two hours of call-in pay, if the shift is cancelled within 14 days, or for at least four hours of call-in pay if the shift is cancelled within 72 hours, in advance of the scheduled start of such shift.

(4) On-call. An employee who is required by the employer to be available to report to work for any shift shall be paid for at least four hours of call-in pay.

(5) Call for schedule. An employee who is required by the employer to be in contact with the employer within 72 hours of start of the shift to confirm whether to report to work shall be paid for at least four hours of call-in pay.

(b) Calculation of call-in pay. Call-in pay shall be calculated as follows.

(1) Actual attendance. Payments for time of actual attendance shall be calculated at the employee's regular rate or overtime rate of pay, whichever is applicable, minus any allowances permitted under this Part.

(2) Minimum rate. Payments for other hours of call-in pay shall be calculated at the basic minimum hourly rate with no allowances. Such payments are not payments for time worked or work performed and need not be included in the regular rate for purposes of calculating overtime pay.

(3) Offsets. Call-in pay shall not be offset by the required use of leave time, or by payments in excess of those required under this Part.

(4) Shorter work days. The four hours of call-in pay for reporting to work and for cancelled shifts under paragraphs (1) and (3) of subdivision (a) of this section may be reduced to the lesser number of hours that the employee is scheduled to work and normally works, for that shift.

(c) Applicability. This section applies to all employees, except as provided below.

(1) This section shall not apply to employees who are covered by a valid collective bargaining agreement that expressly provides for call-in pay.

(2) Paragraphs (2) through (5) of subdivision (a) of this section shall not apply to employees during work weeks when their weekly wages exceed 40 times the applicable basic hourly minimum wage rate.

(3) In addition, paragraphs (2) through (5) of subdivision (a) of this section shall also not apply to employees whose duties are directly dependent on weather conditions, or to employees whose duties are necessary to protect the health or safety of the public or any person, or to employees whose assignments are subject to work orders, or cancellations thereof; provided, however, that such employees also receive weekly compensation that exceeds the number of compensable hours worked times the applicable basic minimum wage rate, with no allowances.

(4) Paragraph (2) of subdivision (a) of this section (unscheduled shift) shall not apply to: (i) any new employee during the first two weeks of employment; or (ii) any employee who volunteers to cover a new shift or a previously scheduled shift. For purposes of this section, the term "new shift" shall mean the first two weeks of an additional shift that results in a net increase in staffing at a single workplace during the period of time covered by such shift; the term "previously scheduled shift" shall mean a shift that would not have been subject to unscheduled shift call-in pay if worked by the employee who was originally assigned to work that shift; and the term "volunteers" shall mean that the employee may refuse to cover the new or previously scheduled shift.

(5) Paragraphs (2) and (3) of subdivision (a) of this section (unscheduled shift and cancelled shift) shall not apply when an employer responds to weather or other travel advisories by offering employees the option to voluntarily reduce or increase their scheduled hours, so that employees may stay home, arrive early, arrive late, depart early, depart late, or any combination thereof, without call-in pay for unscheduled or cancelled shifts.

(6) In addition, paragraph (3) of subdivision (a) of this section (cancelled shift) shall also not apply when an employer cancels a shift at the employee's request for time off, or when operations at the workplace cannot begin or continue due to an act of God or other cause not within the employer's control, including, but not limited to, a state of emergency declared by federal, state, or local government.

(d) Safe Harbor. For purposes of paragraph (4) of subdivision (c) of this section, there shall be a rebuttable presumption that an employee has volunteered to cover a new or previously scheduled shift if the employer provides a written good faith estimate of hours to all employees upon hiring, or after the effective date of this section for previously hired employees, which may be amended at the employee's request or upon two weeks' notice by the employer, and if the request to cover a new or previously scheduled shift is either: (i) made by the employee whose shift would be covered; or (ii) made by the employer in a written communication to a group of employees requesting a volunteer from among the group and identifying a reasonable deadline for responses. If no employee volunteers prior to the deadline, the employer may assign an employee to cover the shift without the additional call-in pay required for unscheduled shifts.

Revised rule compared with proposed rule: Substantive revisions were made in sections 142-2.3 and 142-3.3.

Text of revised proposed rule and any required statements and analyses may be obtained from Michael Paglialonga, Department of Labor, State Office Campus, Building 12, Room 509, Albany, NY 12240, (518) 457-4380, email: regulations@labor.ny.gov

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 30 days after publication of this notice.

Revised Regulatory Impact Statement

STATUTORY AUTHORITY:

Labor Law §§ 21(11) and 659(2).

LEGISLATIVE OBJECTIVES:

The Legislature, in adopting the New York State Minimum Wage Act, empowered the Commissioner of Labor to promulgate regulations as she "deems necessary or appropriate to carry out the purposes of this article and to safeguard the minimum wage" (L. 1960, Ch. 619, § 2, at Labor Law § 652(2) & (4)), to order "such modifications of or additions to any regulations as he may deem appropriate to effectuate the purposes of this article" (Labor Law § 659(2)), and to investigate hours worked (Labor Law §§ 660(b)(1) & 661).

The regulations to be amended. In 1960, based on the Legislature's delegation of authority, the Commissioner promulgated a new Minimum Wage Order for Miscellaneous Industries and Occupations (currently codified at 12 NYCRR Part 142) (hereinafter "the Wage Order"). The Wage Order contains "Call-in pay" regulations (12 NYCRR §§ 142-2.3 & 142-3.3) that require employers to pay employees who report to work for four hours of work or the amount of their regularly scheduled shift, whichever is less, at the applicable minimum wage rate.

Public hearings. In 2017, the Commissioner published notices of hearings pursuant to Labor Law § 659(2) soliciting public testimony regarding employer scheduling practices including ''just-in-time,'' ''call-in,'' or ''on-call'' scheduling for employees subject to the Wage Order. The Commissioner held those hearings on September 28, October 3, October 11, and October 17, 2017, in Albany, Binghamton, Buffalo, and New York City, respectively. Recordings of those hearings, and copies of written testimony received in connection with those hearings, are available online at www.labor.ny.gov/scheduling.

The proposed rule. The proposed regulation amends the Wage Order's Call-in pay regulations (12 NYCRR §§ 142-2.3 & 142-3.3) to strengthen the protections for employees who report to work, who report for unscheduled shifts, who have shifts cancelled at the last minute, who are required to be on-call, and who are required to call-in to be scheduled for work. The proposed regulation includes provisions addressing the calculation and applicability of call-in pay under various circumstances.

NEEDS AND BENEFITS:

Testimony received through the four public hearings referenced above demonstrated that work schedule unpredictability has a detrimental impact both employees and employers.

Employers. Business and industry advocates agreed that many industries require flexibility and employers need a mechanism to adjust to unpredictable circumstances like an employee calling out sick, a worker leaving unexpectedly, delays in the delivery of materials or inclement weather conditions. For businesses, testimony pointed to a decrease in employee turnover and an increase in attendance and worker loyalty as likely benefits of predictable scheduling practices. In addition, these proposed regulations still allow employers, without an unfair burden, to contend with unforeseen issues, including severe weather, fluctuations due to seasonal demand and other market conditions like material supply and emergency situations.

Employees. Many workers and advocates described the precarious nature of jobs that involve schedules with little to no worker input, schedules that vary wildly day-to-day or week-to-week, and schedules that demand around-the-clock availability. Workers said they often do not find out until hours before their shift whether they will work that day and face involuntary rotation or shift extensions with little to no notice. Even as part-time workers, they must be ready to work during the amount of time equivalent to working a full-time job, but are not compensated and, in the end, do not actually work many shifts for which they're supposed to be available. The hearings revealed that low wage workers are most likely to contend with the difficulties of unpredictable work schedules as well as be severely impacted by unpredictable work scheduling practices that commonly involve announcing schedules less than a week, or sometimes less than a day, in advance. Additionally:

• Testimony at these hearings showed that unpredictable work schedules negatively impact workers' income, leaving them without the ability to

hold a second job – potentially having to turn down all other opportunities for outside income – or receive a reliable and predictable paycheck. These scheduling practices prevent workers from working full-time or making overtime, budget for recurring expenses and large purchases, pursue further educational opportunities like attending college classes, and securing reliable and affordable transportation.

• Testimony showed that workers were unable to predict childcare with employees sometimes being forced to pay in advance and lose that money if the need never materialized. Such scheduling practices also impacted their eligibility for supportive services like childcare subsidies and limited their access to high-quality and reliable childcare.

• Testimony also pointed to the inability to achieve an appropriate work-life balance with unpredictable schedules that case stress and psychological distress, which has been shown to lead to unhealthy behaviors like smoking and excessive alcohol consumption. In addition, these practices made it more difficult for individuals trying to get their life back together (as a domestic violence survivor, for example) by eliminating dependable routines. Testimony pointed to problems workers had attending important family gatherings, buying tickets to events, and attending to their own or a family member's health needs.

• Testimony also showed that unpredictable scheduling is bad for business, resulting in high turnover, which leads to lost productivity and higher unemployment insurance contributions. This, in turn, can cause reduced morale and low customer satisfaction, which, in industries like home health care, can leave patients severely impacted. Today, sophisticated technology and algorithms has changed the nature of work and how workers are notified of work hours and require the state's regulatory framework to be updated to address and acknowledge the realities of modern working conditions.

• Testimony pointed to numerous benefits of increased predictability in scheduling, including stability in workers' lives as workers get more control and are allowed a voice in setting their own schedules. Workers would be compensated for the time they give up for the sake of the employer but retain the ability to have a flexible schedule if desired and the ability to swap shifts without employer intervention – all while participating in a transparent scheduling process.

The proposed regulation updates the Wage Order's long-established call-in pay regulations (12 NYCRR §§ 142-2.3 & 142-3.3) to protect minimum wage employees from unpredictable work schedule practices, while providing for appropriate exceptions for emergency and other unforeseen circumstances.

COSTS:

This proposed regulation does not impose any mandatory costs on the regulated community, as employers may avoid call-in pay by providing sufficient notice to employees of work schedules. Additionally, the requirements of the proposed regulation provide for exceptions for unforeseeable or unavoidable changes or delays in informing employees of their work schedule, including changes necessitated due to declared states of emergency and during the initial two weeks of an employee's employment. Furthermore, the revisions in the proposed rule provide for greater flexibility to employers who operate are subject to outside forces like weather (e.g., snow removal), at the will of customers and customer needs (e.g., funeral homes, emergency transportation, health care), or due to customer cancellations or last-minute orders, should not be required to pay employees additional money under such circumstances. Costs for employers who fail to comply with the requirements of the proposed regulation are limited to the payment of employees at their regular rate of pay for actual attendance at work and pay for other hours required by this proposed rule at the applicable minimum wage rate.

The Department of Labor also estimates that there will be no increased or additional costs to the Department, or to state and local governments to implement this regulation.

LOCAL GOVERNMENT MANDATES:

None. Employees of federal, state and municipal governments and political subdivisions thereof are generally excluded from coverage under the Minimum Wage Law and the Wage Order by Labor Law §§ 651(5)(n) and 12 NYCRR §§ 142-2.14(b) & 142-3.12(b).

PAPERWORK:

This rulemaking does not impact any reporting requirements currently required in either statute or regulation.

DUPLICATION:

This rulemaking does not duplicate, overlap, or conflict with any other state or federal requirements.

ALTERNATIVES:

There were no significant alternatives considered.

FEDERAL STANDARDS:

There are no federal standards relating to this rule.

COMPLIANCE SCHEDULE:

Employers who do not currently provide timely notice of scheduling changes will need up to 14 days to comply with this rulemaking. While no schedule has been set, any future adoption will provide businesses with sufficient time to comply with the rulemaking.

Revised Regulatory Flexibility Analysis

EFFECT OF RULE: The proposed regulation amends the Minimum Wage Order for Miscellaneous Industries and Occupations (12 NYCRR Part 142) (hereinafter "the Wage Order") to strengthen the Call-in pay regulation (12 NYCRR §§ 142-2.3 & 142-3.3) to protections for employees who report to work, who report for unscheduled shifts, who have shifts cancelled at the last minute, who are required to be on-call, and who are required to call-in to be scheduled for work. The rule includes provisions addressing the calculation and applicability of call-in pay under various circumstances, and the revisions in the proposed rule provide for greater flexibility to employers who operate are subject to outside forces like weather (e.g., snow removal), at the will of customers and customer needs (e.g., funeral homes, emergency transportation, health care), or due to customer cancellations or last minute orders, should not be required to pay employees additional money under such circumstances. The proposed rule does not apply to local governments.

COMPLIANCE REQUIREMENTS: Small businesses and local governments will not have to undertake any new reporting, recordkeeping, or other affirmative act, other than providing timely notice of scheduling changes, in order to comply with this regulation. The proposed revisions further assist small businesses and ensure that unavoidable costs can be avoided.

PROFESSIONAL SERVICES: No professional services would be required to effectuate the purposes of this regulation.

COMPLIANCE COSTS: The Department estimates that there will be no costs to the small businesses or local governments to implement this regulation, and the proposed revisions help to alleviate concerns about unavoidable costs for employers. See Regulatory Impact Statement, at Costs.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY: The regulation does not require any use of technology to comply.

MINIMIZING ADVERSE IMPACT: The Department does not anticipate that this regulation will adversely impact small businesses or local governments. Since no adverse impact to small businesses or local governments will be realized, it was unnecessary for the Department to consider approaches for minimizing adverse economic impacts as suggested in State Administrative Procedure Act § 202-b(1). Furthermore, the revised rulemaking helps to ensure that no adverse impact to small businesses will be realized by eliminating costs that could be difficult to avoid with certain types of work duties.

SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION: The Department does not anticipate that this rule will have an adverse economic impact upon small businesses or local governments, nor will it impose new reporting, recordkeeping, or other compliance requirements upon them. Nevertheless, small businesses and local governments had opportunity to participate in the rulemaking process by participating in public hearings that were held pursuant to Labor Law § 659 and by providing comment during the public comment period.

Revised Rural Area Flexibility Analysis

TYPES AND ESTIMATED NUMBERS OF RURAL AREAS: The Department anticipates that this regulation will have a positive or neutral impact upon all areas of the state; there is no adverse impact anticipated upon any rural area of the state resulting from adoption of this regulation.

REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS; AND PROFESSIONAL SERVICES: This regulation will not impact reporting, recordkeeping or other compliance requirements.

PROFESSIONAL SERVICES: No professional services will be required to comply with this regulation.

COSTS: The Department estimates that there will be no new or additional costs to rural areas to implement this regulation. Furthermore, the revisions in the proposed rule provide for greater flexibility to employers who operate are subject to outside forces like weather (e.g., snow removal), at the will of customers and customer needs (e.g., funeral homes, emergency transportation, health care), or due to customer cancellations or last-minute orders, should not be required to pay employees additional money under such circumstances. The proposed revisions further assist small businesses and ensure that unavoidable costs can be avoided. See Regulatory Impact Statement at Costs.

MINIMIZING ADVERSE IMPACT: The Department does not anticipate that this regulation will have an adverse impact upon any region of the state. As such, different requirements for rural areas were not necessary. Furthermore, the revised rulemaking helps to ensure that no adverse impact to small businesses will be realized by eliminating costs that could be difficult to avoid with certain types of work duties.

RURAL AREA PARTICIPATION: The Department does not anticipate that the regulation will have an adverse economic impact upon rural areas nor will it impose new reporting, recordkeeping, or other compliance

requirements. Nevertheless, rural areas in the state had an opportunity to participate in the rulemaking process by participating in public hearings that were held pursuant to Labor Law § 659 and by providing comment during the public comment period.

Revised Job Impact Statement

NATURE OF IMPACT: The Department of Labor (hereinafter "Department") projects there will be no adverse impact on jobs or employment opportunities in the State of New York as a result of this regulation. The nature and purpose of this regulation is such that it will not have an adverse impact on jobs or employment opportunities.

CATEGORIES AND NUMBERS AFFECTED: The Department does not anticipate that this regulation will have an adverse impact on jobs or employment opportunities in any category of employment. This regulation will apply to employees covered by the Minimum Wage Order for Miscellaneous Industries and Occupations (12 NYCRR Part 142) (hereinafter "the Wage Order") and will exclude workers who are covered by collective bargaining agreements that provide for call-in pay and workers whose weekly wages exceed 40 times the applicable minimum wage. The Wage Order covers all industries and occupations other than those that are covered by the hospitality and the building services industries. The Department's Division of Research and Statistics estimates that just under one million employees will be covered by this regulation, based on the number of employees who work in industries and occupations other than hospitality and building service whose weekly wages do not exceed 40 times the hourly minimum wage.

REGIONS OF ADVERSE IMPACT: The Department does not anticipate that this regulation will have an adverse impact upon jobs or employment opportunities statewide or in any particular region of the state.

MINIMIZING ADVERSE IMPACT: Since the Department does not anticipate any adverse impact upon jobs or employment opportunities resulting from this regulation, no measures to minimize any unnecessary adverse impact on existing jobs or to promote the development of new employment opportunities are required. Furthermore, the revised rulemaking helps to ensure that no adverse impact to small businesses will be realized by eliminating costs that could be difficult to avoid with certain types of work duties.

SELF-EMPLOYMENT OPPORTUNITIES: The Department does not foresee a measurable impact upon opportunities for self-employment resulting from adoption of this regulation.

Assessment of Public Comment

The Department received comments following publication of the proposed rulemaking in the November 22, 2017 edition of the NY Register. The following represents a summary and analysis of such comments, and the reasons why any significant alternatives were not incorporated into the rulemaking. Generally, comments were received arguing against the adoption of the present rulemaking, and comments were received commending the Department for this proposal and urging its adoption.

Comment 1:

Very few employees earn 40 times the minimum wage on an hourly basis; this should be lowered.

Response 1:

The rulemaking does not apply to employees earning 40 times the applicable minimum wage on an hourly basis, but rather only to employees who earn less than 40 times the applicable minimum wage on a weekly basis.

Comment 2:

Shifts that were cancelled due to an employee calling in (e.g., sick) should not require payment to the employee who called in sick.

Response 2:

The rulemaking does not require any additional compensation for employees who call in or otherwise notify their employer that they will not be working a shift. Rather, additional payment is only required where the cancellation is due to the action or decision of the employer. Furthermore, the rulemaking has been revised to provide employers and employees with greater flexibility to provide coverage for scheduling changes that are outside of the employer's control or through reasonable efforts by an employer to solicit volunteers to cover.

Comment 3:

Employers that operate subject to outside forces like weather (e.g., snow removal), at the will of customers and customer needs (e.g., funeral homes, emergency transportation, health care), or due to customer cancellations or last-minute orders, should not be required to pay employees additional money under such circumstances.

Response 3:

The Department has revised the rulemaking in response to this comment to provide an expanded exception for employees whose duties are (1) weather dependent, (2) necessary to protect the health or safety of the public or any person, or (3) subject to large or unpredictable orders from customers and customer needs. With regard to orders from customers, such exception is limited to orders or requests from customers outside of the traditional retail or customer service setting, such as large print shop orders or last-minute events.

Comment 4:

The cost to implement and administer the rulemaking would be cost-prohibitive and harmful, including for employers that depend on negotiated or government funding, like Medicare-funded home health care and education, or for small businesses.

Response 4:

The Department has revised the rulemaking in response to this comment to provide greater flexibility for employers and to minimize or eliminate any required costs associated with this rulemaking. Such revisions provide for greater flexibility and options to eliminate unavoidable costs through proactive compliance measures by employers.

Comment 5:

Workers who desire or require additional flexibility to accommodate their last-minute scheduling needs could be harmed by a regulatory approach that increases employers' costs and limits their flexibility.

Response 5:

As described above, the Department has revised the rulemaking in response to this comment.

Comment 6:

The exception in (c)(4) of the rulemaking (exempting employers who cease operations due to acts of god or circumstances outside of their control) should be expanded to apply to all of the scheduling requirements of the rulemaking and to include situations which could endanger the health or safety of any employee or person, or cause damage to property.

Response 6:

The Department has revised the rulemaking in response to this comment

Comment 7:

The 14-day notice requirement is too long and will require, in practice, as much a 21-day notice.

Response 7:

The Department has revised the rulemaking to measure the 14-day requirement from the last day of the schedule, rather than from the start of the workweek so as to limit the requirement to 14 days, rather than requiring as much as 21 days.

Comment 8:

The Department should clarify what "voluntary" means within the context of an employee working a shift without the requisite advanced notice. Requests for employees to volunteer should be made in writing, as should the employee's consent to such.

Response 8:

The Department has revised the rulemaking in response to this comment.

Comment 9:

The Department should reconsider the scope of employers within the coverage of this rulemaking to exclude non-profits and weather-dependent businesses.

Response 9:

The Department has revised the rulemaking in response to this comment.

Comment 10:

All employers should be required to provide a good-faith estimate of employees' work schedules.

Response 10:

The Department has revised the rulemaking in response to this comment.

Comment 11:

The rulemaking will have a negative financial impact on employers, who may not be able to avoid last-minute schedule changes.

Response 11:

The Department has revised the rulemaking in response to this comment to provide employers with greater flexibility and to limit costs where additional pay would be required at no fault of the employer.

Comment 12:

Employees who are not designated as "heads of households" on their federal tax returns should be exempt from the rulemaking.

Response 12:

The Department disagrees as such status is facially irrelevant to the need for a predictable schedule and could have a potentially disparate impact based upon gender or other protected classes.

Comment 13:

The rulemaking should be amended to include an affirmative record-keeping obligation. Conversely, the rulemaking is onerous in that employers will need to keep records of all employee schedules and the records that support compliance with the rulemaking.

Response 13:

While no affirmative rulemaking requirement is included in the revised proposed rulemaking, employers are encouraged to keep and maintain additional records that can help demonstrate their compliance.

Comment 14:

The rulemaking should apply to independent contractors as well.

Response 14:

This exceeds the Department's rulemaking authority under Article 19 of the Labor Law.

Comment 15:

The effective date of the rulemaking should be delayed providing employers with time to comply.

Response 15:

The Department agrees, and any future adoption will provide businesses with sufficient time to comply with the rulemaking.

Comment 16:

Temporary staffing agencies should be exempted as their entire business model is based around last minute scheduling.

Response 16:

The Department has revised the rulemaking in response to this comment to provide employers with greater flexibility to respond to last-minute orders and customer requests.

Comment 17:

It is not clear if the rulemaking preempts local laws, such as New York City's Fair Workweek Law.

Response 17:

The preemptive effect of the rulemaking is a matter for the courts, not the Department.

Comment 18:

Students working for schools or non-profits should be exempted from the rulemaking.

Response 18:

Students working in a not-for-profit organization or institution are exempt from the Minimum Wage Order for Miscellaneous Industries, which contains the rulemaking, so long as the organization is organized and operated exclusively for these charitable, educational, or religious purposes, and they attend an institution leading to a degree or certificate.

Comment 19:

The proposed rule is difficult for employers, many of them in the health care sector, who rely on government funding to operate.

Response 19:

The Department has revised the rulemaking in response to this comment to provide greater flexibility for employers and to minimize or eliminate any required costs associated with this rulemaking. Such revisions provide for greater flexibility and options to eliminate unavoidable costs through proactive compliance measures by employers.

Comment 20:

Employees who work shorter shifts will incur higher proportionate costs for cancelled shifts.

Response 20:

The Department has revised the rule to provide for 2 hours of call-in pay if the shift is scheduled more than 72 hours in advance of the scheduled shift, or 4 hours of call-in pay if it is cancelled with less than 72 hours in advance. This should lessen the effect on employees who work shorter shifts.

Office of Mental Health

NOTICE OF WITHDRAWAL

Children's Mental Health Rehabilitation Services

I.D. No. OMH-47-18-00003-W

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Notice of proposed rule making, I.D. No. OMH-47-18-00003-P, has been withdrawn from consideration. The notice of proposed rule making was published in the *State Register* on November 21, 2018.

Subject: Children's Mental Health Rehabilitation Services.

Reason(s) for withdrawal of the proposed rule: Did not receive sign-off from RRU.

Office for People with Developmental Disabilities

NOTICE OF ADOPTION

Telehealth

I.D. No. PDD-32-18-00003-A

Filing No. 1092

Filing Date: 2018-11-26

Effective Date: 2018-12-12

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Amendment of Subpart 635-13 and Part 679 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 13.07, 13.09(b), 16.00; Public Health Law, sections 2999-cc and 2999-dd

Subject: Telehealth.

Purpose: To authorize telehealth as a new modality for the delivery of clinical services.

Text of final rule: • New paragraph 679.1(c)(4) is added as follows, and all remaining paragraphs are renumbered accordingly:

(4) Providing access to clinical services to a person located in his/her residence or other temporary location via telehealth (see glossary) while the provider is located either at a main clinic site certified by OPWDD or at a certified satellite site (see glossary).

• New subdivision 679.2(c) is added as follows, and all remaining paragraphs are renumbered accordingly:

(c) Section 367-u of the Social Services Law provides that the commissioner shall not exclude from the payment of medical assistance funds the delivery of healthcare services through telehealth when the services are provided pursuant to section 2999-cc(3) of the Public Health Law and meet the requirements of federal law, rules and regulations.

• New subdivision 679.2(f) is added as follows:

(f) Section 2999-cc of the Public Health Law provides that health care services, which must include the assessment, diagnosis, consultation, treatment, education, care management, and/or self-management of a patient, may be provided via the use of electronic information and communication technologies between qualifying providers located at a distant site and a patient located at an originating site.

• New subdivision 679.2(g) is added as follows:

(g) Section 4406-g of the Public Health Law provides that a health maintenance organization shall not exclude from coverage a service that is covered under an enrollee contract of a health maintenance organization because the service is delivered via telehealth.

• New subdivision 679.2(h) is added as follows:

(h) Sections 3217-h and 4306-g of the Insurance Law provide that under an insurance policy that provides comprehensive coverage for hospital, medical or surgical care, said services shall not be excluded from coverage because the service is delivered via telehealth.

• Existing subdivision 679.5(c) is amended as follows:

(c) A clinic visit may include face-to-face service as defined by allowable Current Procedural Terminology (CPT)/Healthcare Common Procedure Coding System (HCPCS) and/or Current Dental Terminology (CDT) codes, *or such allowable services provided via telehealth.*

• Existing subdivision 679.6(b) is amended as follows:

(b) Each agency that operates a clinic treatment facility shall provide OPWDD information it requests, including but not limited to the following: services provided by CPT/HCPCS and/or CDT codes, where such services were delivered*, including the location of both the provider and the individual when services are delivered via telehealth,* (i.e., on-site or at a certified satellite site, or, prior to April 1, 2016, off-site) and revenues by funding source or payee. These data shall correspond to the identical time period of the cost report.

• New subdivision 679.99(w) is added as follows, and all remaining subdivisions are renumbered accordingly:

(w) Telehealth. The use of electronic information and communication technologies by a health care provider to deliver health care services to an individual while such individual is located at a site that is different from the site where the health care provider is located.

• New subdivision 635-13.4(c) is added as follows, and all remaining subdivisions are renumbered accordingly:

NEW YORK CITY LEGISLATION 2018

1. STOP SEXUAL HARASSMENT IN NYC ACT

On May 9, 2018, Mayor Bill de Blasio signed the Stop Sexual Harassment in NYC Act (the "NYC Act"), which is a package of laws designed to prevent workplace sexual harassment. The NYC Act provides for the following, among other things:

- Effective immediately upon becoming law, the New York City Human Rights Law ("NYCHRL") will apply to all employers in New York City regardless of size, with regard to claims based on gender-based harassment. The NYCHRL continues to apply only to employers with four (4) or more employees (including natural persons employed as independent contractors who are not themselves employers) for all other areas of discrimination and harassment.

- The statute of limitations for such gender-based harassment claims to be heard by the New York City Commission on Human Rights will be extended from one year to three years after the alleged harassing conduct occurred.

- Effective 120 days after the Act becomes law, the law will require all employers in New York City (a) to conspicuously display an anti-sexual harassment rights and responsibilities poster designed by the New York City Commission on Human Rights (which must be in English and Spanish), and (b) to distribute an information sheet on sexual harassment to all employees at the time of hire—such information sheet may be included in an employee handbook.

- Effective April 1, 2019, all New York City employers with 15 or more employees must conduct an anti-sexual harassment interactive training for all employees, including interns, supervisors and managerial employees. Supervisors and managers must receive additional training. New hires must receive training within 90 days after the date of initial hire (but employees who have received such training at another employer with the required training cycle are not required to receive additional training until the next cycle). The interactive training may consist of, among other things, a computer or online training program and need not be live or facilitated by an in-person instructor. Employers are required to keep a record of all trainings, including a signed employee acknowledgment (which may be electronic).

2. NYC Earned Sick Time Act Also Now Covers "Safe Time"

Effective May 5, 2018, pursuant to an amendment, the New York City Earned Sick Time Act will be known instead as the New York City Earned Safe and Sick Time Act (the "ESSTA").

- The amendment provides that employees in New York City may use earned sick time for "safe time" if the employee or the employee's family member is a victim of a family offense matter, sexual offense, stalking or human trafficking. The ESSTA defines a family offense matter generally to cover harassment, sexual abuse, sexual misconduct, reckless endangerment, assault, identity theft, grand larceny and other offenses between spouses, former spouses, a parent and child, persons who have a child in common and persons who are or have been in an intimate relationship.

- Generally, qualifying safe time leave may be used to: obtain services from a domestic violence shelter, rape crisis center, or other shelter or services program; take actions to increase the safety of the employee or a family member of the employee, including to participate in safety planning or to relocate; meet with an attorney or social service provider; file a complaint or domestic incident report with law enforcement; meet with a district attorney's office; enroll children in a new school; or take other actions necessary to maintain, improve, or restore the physical, psychological, or economic health or safety of the employee or a family member of the employee or to protect those who associate or work with the employee.

- Employers may require reasonable advance notice—not to exceed seven days—of the need to use sick or safe time, to the extent such leave is foreseeable, or as soon as practicable if not foreseeable. The Company may require written confirmation from the employee that he or she used sick time for the purposes provided under the ESSTA. If an employee takes more than three (3) consecutive work days for sick or safe time, the employer may require reasonable documentation to confirm that the use of such leave was authorized by the ESSTA. For sick time, reasonable documentation is a signed document by a licensed healthcare provider indicating the amount of sick time needed (without specifying the nature of the employee's or the employee's family member's injury, illness or condition, except as required by law). For safe time, such reasonable documentation can include (i) documentation from a victim services organization, attorney, clergy member, medical or other professional service provider from whom the employee or his or her family member sought assistance, (ii) a police or court record or (iii) a notarized statement from the employee explaining the need for safe time, in each case without specifying the details of the related matter.

- Health information about an employee or his or her family member, and information concerning an employee's or his or her family member's status or perceived status as a victim of a family offense matter, sexual offense, stalking or human trafficking, shall be kept confidential and shall not be disclosed except by the affected employee, with the written permission of the employee or as required by law.

- The ESSTA also broadens the use of sick and safe time by expanding the definition of "family members" for which such time can be used. In addition to the prior individuals covered by this definition—employee's child (biological, adopted or foster child, legal ward, child of an employee standing in loco parentis); grandchild; spouse; domestic partner; parent; grandparent; child or parent of employee's spouse or domestic partner; and sibling (including a half, adopted or step sibling)—the definition will now also cover

any other blood relative of the employee, and any other individuals whose association with the employee is the equivalent to that of a family member.

- **Employers must provide written notice to their employees of their right to safe time within 30 days of the ESSTA's effective date (on May 5, 2018). New hires starting work on or after June 5, 2018 must receive such written notice at the commencement of their employment.**

3. NYCHRL Requirement that Employers Engage in Dialogue Regarding Reasonable Accommodations

Pursuant to an amendment, effective on October 15, 2018, the NYCHRL will require employers to engage in a "cooperative dialogue" with individuals who are or may be entitled to an accommodation under the NYCHRL within a reasonable time of receiving a request for an accommodation or notice that an accommodation may be required.

- The NYCHRL requires that employers, among others, provide reasonable accommodations to victims of domestic violence as well as individuals with pregnancy, childbirth or related conditions, religious needs and/or disabilities.

- The term "cooperative dialogue" means the process of engaging in a good faith dialogue, either written or oral, regarding a person's accommodation needs. Under the amendment, employers must provide a written determination to the individual who requested the accommodation, which identifies the accommodation that has been granted or denied. A covered entity may only come to the determination that no reasonable accommodation "would enable a person to satisfy the essential requisites" of his or her job after it has engaged or attempted to engage in a cooperative dialogue. An employer's obligation to engage or attempt to engage in a cooperative dialogue need not be prompted or initiated by an accommodation request.

4. NYCHRL Expands Definitions of 'Gender' and 'Sexual Orientation'

The revised law became effective on May 11, 2018.

- Under the new law, the definition of "sexual orientation," which previously covered "heterosexuality, homosexuality, or bisexuality" was amended to include an "individual's actual or perceived romantic, physical or sexual attraction to other persons, or lack thereof, on the basis of gender" and also includes protections for individuals who identify as asexual or pansexual.

- The law also revises the definition of "gender" to clarify that it includes "a person's actual or perceived gender-related self-image, appearance, behavior, expression, or other gender-related characteristic, regardless of the sex assigned to that person at birth."

5. NYC Mandates Temporary Schedule Changes (7/18/18)

The New York City Council passed another scheduling law that provides employees with additional rights to demand changes to their work schedules, with little flexibility for employers to reject such changes.

- The law permits employees to demand two temporary schedule changes per calendar year for "personal events." The New York City Council defined the term "personal events" quite broadly to cover situations where the employee needs to provide care to specified categories of individuals or to attend certain legal proceedings or hearings, and also for any circumstance under which an employee could take sick or safe time under the Earned Sick Time Act.

STOP SEXUAL HARASSMENT ACT FACTSHEET

All employers are required to provide written notice of employees' rights under the Human Rights Law both in the form of a displayed poster **and** as an information sheet distributed to individual employees at the time of hire. This document satisfies the information sheet requirement.

The NYC Human Rights Law

The NYC Human Rights Law, one of the strongest anti-discrimination laws in the nation, protects all individuals against discrimination based on gender, which includes sexual harassment in the workplace, in housing, and in public accommodations like stores and restaurants. Violators can be held accountable with civil penalties of up to $250,000 in the case of a willful violation. The Commission can also assess emotional distress damages and other remedies to the victim, can require the violator to undergo training, and can mandate other remedies such as community service.

Sexual Harassment Under the Law

Sexual harassment, a form of gender-based discrimination, is unwelcome verbal or physical behavior based on a person's gender.

Some Examples of Sexual Harassment

- unwelcome or inappropriate touching of employees or customers
- threatening or engaging in adverse action after someone refuses a sexual advance
- making lewd or sexual comments about an individual's appearance, body, or style of dress
- conditioning promotions or other opportunities on sexual favors
- displaying pornographic images, cartoons, or graffiti on computers, emails, cell phones, bulletin boards, etc.
- making sexist remarks or derogatory comments based on gender

Retaliation Is Prohibited Under the Law

It is a violation of the law for an employer to take action against you because you oppose or speak out against sexual harassment in the workplace. The NYC Human Rights Law prohibits employers from retaliating or discriminating "in any manner against any person" because that person opposed an unlawful discriminatory practice. Retaliation can manifest through direct actions, such as demotions or terminations, or more subtle behavior, such as an increased work load or being transferred to a less desirable location. The NYC Human Rights Law protects individuals against retaliation who have a good faith belief that their employer's conduct is illegal, even if it turns out that they were mistaken.

Report Sexual Harassment

If you have witnessed or experienced sexual harassment inform a manager, the equal employment opportunity officer at your workplace, or human resources as soon as possible.

Report sexual harassment to the NYC Commission on Human Rights. Call 718–722–3131 or visit NYC.gov/HumanRights to learn how to file a complaint or report discrimination. You can file a complaint anonymously.

State and Federal Government Resources

Sexual harassment is also unlawful under state and federal law where statutes of limitations vary.

To file a complaint with the New York State Division of Human Rights, please visit the Division's website at **www.dhr.ny.gov**.

To file a charge with the U.S. Equal Employment Opportunity Commission (EEOC), please visit the EEOC's website at **www.eeoc.gov**.

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Plenary Three:
Candor Before the Tribunal

Colin M. Leonard, Esq.
Bond, Schoeneck & King, PLLC, Syracuse, NY

Hon. Valerie Brathwaite Nelson, Associate Justice
Appellate Division, Second Judicial Department, NYS Supreme Court, Jamaica, NY

Robert Schofield, Esq.
Whiteman, Osterman & Hanna LLP, Albany, NY

Kate M. Swearengen, Esq.
Cohen, Weiss & Simon LLP, New York, NY

TABLE OF CONTENTS

THE REQUIREMENT OF CANDOR, AND OTHER LIMITATIONS ON THE DUTY OF CONFIDENTIALITY, UNDER THE NEW YORK RULES OF PROFESSIONAL CONDUCT

I. BACKGROUND

The Rules of Professional Conduct ("Rules") were implemented in New York in 2009. These Rules were the culmination of a comprehensive review of New York's Code of Professional Responsibility ("Code") which began in 2003. These Rules are significant both for some of the changes that were made to the prior Code as well as for some of the changes that were not made.

The first professional conduct rules for lawyers were adopted in Alabama in 1887. These rules provided the foundation for the American Bar Association's ("ABA") initial Canons of Ethics adopted in 1908. In 1969, the ABA issued the Model Code of Professional Responsibility ("Model Code"), providing more detailed guidance to lawyers. By the early 1970's, virtually every state had adopted the Model Code, albeit sometimes with variations, with New York's Code adoption effective January 1, 1970.

In 1983 the ABA moved away from the Model Code and adopted the Model Rules of Professional Conduct ("Model Rules"), reflecting both significant substantive and format changes. New York was poised to be one of the first states to adopt the new Model Rules when they were narrowly voted down by the New York State Bar Association's House of Delegates. As of 2008, 47 states and the District of Columbia had adopted the Model Rules, although sometimes with variations, with California, Maine, and New York as the only holdouts.

In 2002, as a result of "Ethics 2000," the ABA published significant modifications to the Model Rules. Again, while a number of states adopted many of those changes, New York did not.

While there had been modifications to New York's Code over the years, with the most significant coming in 1990, 1999, and with the addition of a comprehensive set of advertising guidelines in 2007, the basic format and many of the substantive provisions of the original Code remained in place, until 2009.

In 2003, the New York State Bar Association empaneled the Committee on Standards of Attorney Conduct (COSAC) to look at a substantial reworking of the Code, both from a substantive and a formatting perspective, to determine whether it could be brought more into line with the Model Rules and the rest of the country. The Committee completed its work in 2005 and throughout much of 2006 and 2007 COSAC presented its recommendations to the Bar Association's House of Delegates for review. Ultimately these proposals were endorsed by the House and submitted to the Appellate Divisions with the recommendation that they be adopted as the Courts' rules.

The former Code consisted of Disciplinary Rules (DRs) and Ethical Considerations (ECs). The DRs were mandatory standards of conduct which existed as court rules (found in 22 NYCRR Part 1200 and jointly adopted by the four Appellate Divisions), while the ECs were aspirational

standards established by the Bar Association. The submission to the Appellate Divisions included both new Rules to replace the DRs, and supporting and explanatory Comments to take the place of the ECs. The Bar Association recommended that the Courts adopt both.

On December 17, 2008, the Courts announced adoption of new "Rules of Professional Conduct" based (mostly) upon the Bar Association's recommendations. While the Courts' version reflects the formatting changes proposed by the Bar Association and many of the substantive changes, it does not reflect all of the proposed changes. And unfortunately, the Courts did not explain (and still have not explained) why some changes were adopted and some were not, so lawyers are left to guess as to the Courts' thinking. For example, the Courts completely ignored the Bar Association's recommendation to include provisions dealing with multijurisdictional practice. (This was actually the second time in the past few years that the Courts refused to entertain such a recommendation from the Bar Association. The Courts just recently adopted MJP rules, see Part 523 of the Rules of the Court of Appeals.)

In addition, the Courts neither adopted nor even commented on the supplementary Comments proposed by the Bar Association, leaving them for the Bar Association to separately implement as "non-mandatory" guidance, in the same vein as the prior ECs.

The Rules have undergone some modifications since 2009 and the latest version can be found on the New York State Bar Association's website, www.nysba.org, under "Resources on Professional Standards for Lawyers."

The focus of this paper is on exploring the balance between a lawyer's obligation to maintain client confidentiality and the duty of candor owed to a tribunal and/or third parties under these the Rules of Professional Conduct. One of the hallmarks of New York's former Code was the primacy afforded to client confidentiality, calling for its preservation in almost all circumstances. That, however, is no longer the case in a number of contexts under the Rules.

II. THE SCOPE OF THE CONFIDENTIALITY OBLIGATION

The Rules' basic confidentiality provision is found in Rule 1.6. Subsection (a) states that "[a] lawyer shall not knowingly *reveal* confidential information . . . or *use* such information to the *disadvantage* of a client or for the *advantage* of the lawyer or a third person." (emphasis added). This prohibition against revealing or using confidential information is subject to a number of exceptions, including when the client gives informed consent, as defined in Rule 1.0(j), or when the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community. Rule 1.6(b) also gives the lawyer the *discretion* to reveal or use confidential information to the extent that the lawyer reasonably believes necessary:

1. to prevent reasonably certain death or substantial bodily harm;

2. to prevent the client from committing a crime;

3. to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by

a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;

4. to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm;

5. (i) to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct; or (ii) to establish or collect a fee; or

6. when permitted or required under these Rules or to comply with other law or court order.

A. "Confidential Information"

Previously, the Code's DR 4-101 defined two types of information ("confidences" and "secrets") which a lawyer was required to keep confidential. A "confidence" referred to information protected by the attorney-client privilege, while a "secret" referred to other information "gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." Rule 1.6 abandons the dichotomy between "confidence" and "secret" and instead defines a single concept of "confidential information." Confidential information consists of information *gained during or relating to* the representation of a client, whatever its source, that is:

1. protected by the attorney-client privilege,

2. likely to be embarrassing or detrimental to the client if disclosed, or

3. information that the client has requested be kept confidential.

See also New York State Bar Association Formal Opinion 831 (2009). In substance, the core definition of "confidential information" mirrors that found in DR 4-101. Rule 1.6, however, then narrows this definition of confidential information by expressly excluding two categories of information: (1) "a lawyer's legal knowledge or legal research" and (2) "information that is generally known in the local community or in the trade, field or profession to which the information relates." As to the latter exclusion, the comments note that "information is not 'generally known' simply because it is in the public domain or available in a public file." Rule 1.6, Comment [4A]; *see* NYSBA Formal Opinion 991, at ¶¶ 19 and 20 (The "legislative history" of Comment 4[A] "strongly suggests that information in the public domain may be protected as confidential information even if the information is not "difficult or expensive to discover" and even if it could be obtained without "great effort…. In our view, information is generally known only if it is known to a sizeable percentage of people in "the local community or in the trade, field or profession to which the information relates."); cf. ABA Formal Opinion 479 (2017) (interpreting similar language under the Model Rules to refer to information that is "widely recognized by members of the public…or in the [client's] industry, profession or trade"). No similar explicit exclusions existed under the former Code.

In addition, the scope of confidentiality obligation under New York's Rules differs from that under the Model Rules. Model Rule 1.6 prohibits revealing (with no explicit mention of "using") information "relating to the representation of the client," unless falling within an exception, without regard to whether that information is protected by the attorney-client privilege, its disclosure would be embarrassing or detrimental to that client, or the client has asked that it be kept confidential.

B. "Gained During or Relating to the Representation"

Disciplinary Rule 4-101 made information confidential if it was "gained in the professional relationship." Rule 1.6 replaces the phrase "gained *in* the professional relationship" with the phrase "gained *during or relating to* the representation of a client, whatever its source." This change adds clarity to the definition, including making it explicit that confidential information includes information obtained from the client as well as information obtained from other sources, such as witnesses or documents. Comment [4A] to Rule 1.6 defines "relates to" as "has any possible relevance to the representation or is received because of the representation." (An earlier version of Comment [4A] provided that "gained during or relating to the representation" does *not* include information gained before a representation begins or after it ends," but that portion of Comment [4A] has since been deleted.)

The New York State Bar Association's Committee on Professional Ethics, in Formal Opinions 866 (2011) and 998 (2014), indicated that the "during" requirement is not purely temporal but rather "implies some connection between the lawyer's activities on behalf of the client and the lawyer's acquisition of the information."

The basic confidentiality rule applicable to prospective clients and former clients differs somewhat from the foregoing rule which is applicable to current clients. With respect to prospective clients, Rule 1.18(b) provides, "[e]ven when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client." With respect to former clients, Rule 1.9(c) states that a lawyer who has formerly represented a client in a matter shall not thereafter:

1. *use* confidential information of the former client protected by Rule 1.6 to the *disadvantage* of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or

2. *reveal* confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.

Thus, while the Rules protect the confidential information of current clients from disclosure, use to the disadvantage of the client *or* use to the advantage of the lawyer or a third person, a prospective or former client's confidential information is, at least literally, only protected from disclosure and use that is disadvantageous to the former/prospective client. No explicit restriction is placed on the use of this information for the benefit of the lawyer or another person.

III. PERMISSIVE DISCLOSURE TO PREVENT REASONABLY CERTAIN DEATH/SUBSTANTIAL BODILY HARM

In one of the more significant changes from the former Code, Rule 1.6 now *permits* a lawyer to reveal or use confidential information to prevent reasonably certain death or substantial bodily harm to anyone. According to Comment [6B], this new exception to the duty of confidentiality "recognizes the overriding value of life and physical integrity."

While this provision has been a part of the Model Rules for years, a comparable exception has never been a part of the New York Code. The closest equivalent was DR 4-101(C)(3), which permitted a lawyer to reveal the "intention of a client to commit a crime and the information necessary to prevent the crime."[1] Rule 1.6(b)(1) is much broader in that it permits a lawyer to disclose confidential information to prevent reasonably certain death or substantial bodily harm, even if the client is not involved and even if the conduct in question is not criminal.

But even this new basis for permissive disclosure is very limited. As explained in Comment [6B], harm is "reasonably certain" to occur only if (1) "it will be suffered imminently" or (2) if "there is a present and substantial risk that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat." The Comments provide a number of illustrations to demonstrate the scope of this provision. For example, if a client has accidentally discharged toxic waste into a town's water supply, the lawyer *may* reveal confidential information to protect against harm if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease *and* the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims. Another example given is that the wrongful execution of a person is a life-threatening and imminent harm permitting disclosure *but only* once the person has been convicted and sentenced to death.

In contrast, if the harm the lawyer seeks to protect against is merely a "remote possibility" or carries a "small statistical likelihood that something is expected to cause some injuries to unspecified persons over a period of years," there is no present and substantial risk justifying disclosure. Furthermore, the fact that an event will cause property damage but is unlikely to cause substantial bodily harm does not provide a basis for disclosure. *Id.*

The ABA's Model Rules are broader still in that they permit disclosure to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from a client's commission of a crime or fraud, if the client has used the lawyer's services to further that crime or fraud. ABA Model Rule 1.6(b)(2). New York's Rule 1.6 does not similarly permit disclosure "merely" to protect property or financial interests (unless the "future crime" exception otherwise applies).

In the case of permissive disclosure to prevent reasonably certain death or substantial bodily harm or to prevent the client from committing a crime, Comment [6A] sets out a number of factors for the lawyer to consider in deciding whether to disclose or use confidential information:

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[1] The New York Rules also explicitly continue this Code exception allowing a lawyer to reveal confidential information to the extent that the lawyer reasonably believes necessary "to prevent the client from committing a crime." Rule 1.6(b)(2).

1. the seriousness of the potential injury to others if the prospective harm or crime occurs;

2. the likelihood that it will occur and its imminence;

3. the apparent absence of any other feasible way to prevent the potential injury;

4. the extent to which the client may be using the lawyer's services in bringing about the harm or crime;

5. the circumstances under which the lawyer acquired the information of the client's intent or prospective course of action; and

6. any other aggravating or extenuating circumstances.[2]

Comment [6A] further cautions that disclosure adverse to the client's interest should only be the minimum disclosure the lawyer reasonably believes is necessary to prevent the threatened harm or crime. Where disclosure would be permitted under Rule 1.6, the lawyer's initial duty, where practicable, is to remonstrate with the client. Only when the lawyer reasonably believes that that client nonetheless will carry out the threatened harm or crime may the lawyer disclose confidential information.

A. Related Impact – Representing an Organization

Former DR 5-109 set out an attorney's special obligations when representing an organizational client. One of those obligations was that when the lawyer knew that someone associated with the organization was engaged in action, intended to act, or refused to act in a matter related to that representation which involved a violation of a legal obligation to the organization or a violation of law and it was likely to result in substantial injury to the organization, the lawyer had to proceed as was "reasonably necessary in the best interests of organization." This explicitly included, in appropriate circumstances, reporting that action or inaction up the organizational chain of command, even to the Board of Directors if necessary. Under the Code, reporting outside the organization was not permitted unless the report fell within the "future crimes" exception of DR 4-101's confidentiality requirements.

Rule 1.13 follows DR 5-109. However, because Rule 1.6 (the analog to DR 4-101) permits the disclosure or use of confidential information to prevent reasonably certain death or substantial bodily harm (as well as to prevent the client from committing a future crime), the effect of this scheme is to now allow reporting outside the organization to prevent reasonably certain death or substantial bodily harm.

[2] These same factors apply in the context of a lawyer withdrawing a representation based on materially inaccurate information or being used to further a crime or fraud, which is discussed in Part IV, *infra*.

IV. PERMISSIVE DISCLOSURE TO WITHDRAW THE LAWYER'S PRIOR REPRESENTATIONS BASED ON MATERIALLY INACCURATE INFORMATION OR WHEN BEING USED TO FURTHER A CRIME OR FRAUD

Rule 1.6(b)(3) contains another exception to the lawyer's duty to maintain confidentiality. It permits the lawyer to reveal or use confidential information to the extent that the lawyer reasonably believes necessary "to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person (including opposing counsel), where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud." The scope of Rule 1.6(b)(3) is not limited to representations made to a tribunal. Thus, for example, the Rule applies with equal force in a transactional setting.

Disciplinary Rule 4-101(C)(5), which was the predecessor to Rule 1.6(b)(3), provided that "[a] lawyer may reveal . . . [c]onfidences or secrets *to the extent implicit* in withdrawing a written or oral opinion or representation previously given by the lawyer and believed by the lawyer still to be relied upon by a third person where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud." While on its face, Rule 1.6(b)(3) may appear broader than its predecessor, in that it explicitly permits revealing or using confidential information "to withdraw" a representation (without expressly limiting that disclosure to only that "implicit" in the withdrawal itself), Comment [6E] to Rule 1.6 states that "[p]aragraph (b)(3) permits the lawyer to give *only the limited notice that is implicit in withdrawing an opinion or representation*, which may have the collateral effect of inferentially revealing confidential information." Comment [6E] goes on to explain that the "lawyer's withdrawal of the tainted opinion or representation allows the lawyer to prevent further harm to third persons and to protect the lawyer's own interest when the client has abused the professional relationship, *but paragraph (b)(3) does not permit explicit disclosure of the client's past acts"* unless such disclosure is permitted to prevent the client from committing a crime. Based on these Comments, Rule 1.6(b)(3) apparently is no broader than the former DR 4-101(C)(5). That is, in most circumstances, only a bare-bones withdrawal of an opinion or representation will be permitted. For example, "I hereby withdraw my opinion letter relating to this matter dated November 20, 2009" is permitted even though by doing so, the lawyer is implicitly revealing that the opinion was "based on materially inaccurate information or is being used to further a crime or fraud." The lawyer may not, however, disclose that that is in fact the case, nor may the lawyer disclose the underlying facts or how the lawyer came to know that the opinion was based on materially inaccurate information or is being used to further a crime or fraud.

V. PERMISSIVE DISCLOSURE TO PREVENT A CLIENT FROM COMMITTING A FUTURE CRIME

Rule 1.6(b)(2) contains another exception to the duty of confidentiality, which allows the lawyer to "reveal or use confidential information to the extent that the lawyer reasonably believes necessary . . . to prevent the client from committing a crime." This provision is nearly identical to its counterpart in the former Code, DR 4-101(C)(3), which permitted the lawyer to reveal the "intention of a client to commit a crime and the information necessary to prevent the crime." This exception is limited to instances in which the client's conduct, and not someone else's, will constitute an actual crime. In exercising her discretion under Rule 1.6(b)(2), a lawyer should consider those factors set out in Comment [6A] to Rule 1.6, as discussed in Part III above.

While this Rule generally does not permit disclosure of past crimes, the Rules recognize that past conduct (*e.g.*, prior fraud) which has a continuing effect (*e.g.*, deceiving new victims), can constitute a continuing crime to which this disclosure rule applies. The Comments to Rule 1.6 state that a "lawyer whose services were involved in the criminal acts that constitute a continuing crime may reveal the client's refusal to bring an end to a continuing crime, even though that disclosure may also reveal the client's past wrongful acts." Rule 1.6, Comment [6D].

VI. REQUIRED DISCLOSURE IN THE FACE OF FALSE STATEMENTS/EVIDENCE BY A LAWYER, THE LAWYER'S CLIENT AND/OR THE LAWYER'S WITNESS TO A TRIBUNAL

Rule 3.3, regarding conduct before a tribunal, represents one of the most significant shifts between the former Code and the new Rules. Perhaps the most important part of Rule 3.3 concerns a lawyer's obligation if the lawyer learns that the lawyer's client, a witness called by that lawyer, or the lawyer himself has spoken or written a falsehood to a tribunal. Rule 3.3 states in pertinent part:

> (a) A lawyer shall not knowingly:
>
> > (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; [or]
> >
> > (3) offer or use evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

A. "Tribunal"

Rule 1.0(w) provides that a "tribunal denotes a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity." The definition goes on to provide that "[a] legislative body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party's interests in a particular matter." Furthermore, Comment [1] to Rule 3.3 indicates that the Rule "also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition." This application of Rule 3.3 to discovery proceedings has been confirmed in several ethics opinions. *See* ABA Formal Opinion 93-376 (1993); New York County Bar Association Opinion 741 (2010); Association of the Bar of the City of New York, Formal Opinion 2013-2.

In NYSBA Formal Opinion 838 (2010), the Committee on Professional Ethics offered the following guidelines in analyzing whether a particular administrative proceeding is sufficiently adjudicatory to qualify as a tribunal:

> (a) are specific parties affected by the decision;
>
> (b) do the parties have the opportunity to present evidence, and cross examine other providers of evidence; and
>
> (c) will the ultimate determination be made by a person in a policy-making role or by an independent trier of fact, such as an administrative law judge.

In NYSBA Formal Opinion 1011 (2014), the Committee on Professional Ethics determined that the filing of employment based immigration visa petitions with the Department of Labor and related petitions with the Department of Homeland Security did not qualify as proceedings before a "tribunal." This determination was based on, among other things, the unilateral nature of these proceedings, and the absence of "legal argument," an adverse party, cross examination, and any "trier of fact." Similarly, in NYSBA Formal Opinion 1045 (2015), arising under a different context (the lawyer-witness provisions of Rule 3.7), the Committee concluded that an agency investigatory proceeding that could lead to either a decision not to pursue charges or a decision to pursue charges which would then result in an administrative hearing, was not itself a proceeding before a tribunal.

If a lawyer is not actually counsel appearing before the tribunal on behalf of a client, she has no obligation under Rule 3.3. NYSBA Formal Opinions 963 and 982.

B. "False" Statements/Evidence

Rule 3.3(a)(1) prohibits the lawyer from making a "false" statement to a tribunal or from failing to correct a "false" statement previously made by the lawyer.[3] Rule 3.3(a)(3) prohibits the offer or use of "false" evidence and requires the lawyer to take reasonable remedial measures if the lawyer, the lawyer's client or the lawyer's witness offers false material evidence. Much like its nearly identical counterpart in the ABA Model Rules, the term "false" is a critical but undefined term. Two very different meanings can be given to this term. The first is that evidence is "false" if it is objectively erroneous or untrue. The second is that evidence is "false" only if it is a deliberate falsehood known to be such by the person making the statement or offering the evidence. The Rule would apply quite differently under each variant of the term. If the former were the appropriate meaning, then the remedial measures of Rule 3.3 would be required even if the lawyer making the statement or the witness/client giving the testimony believed it to be true at the time it was made or offered. However, if the latter meaning were appropriate, the Rule's coverage would be far less expansive and essentially limited to cases where a lawyer discovered a client or witness engaged in deliberate perjury or fabricated exhibits for the lawyer to offer in court.

There are substantial indicators that the broader meaning of the term was intended for both the Model Rules and the New York Rules. First, both the Model Rules and the New York Rules, elsewhere, separately reference "fraudulent" conduct (*see, e.g.*, Rule 3.3(b)) and define "fraud" or "fraudulent conduct" as something that has a "purpose to deceive" and has an element of "scienter deceit, intent to mislead." Rule 1.0(i). On the other hand, as defined by Black's Law Dictionary, "false" simply means "untrue." Thus, the plain meaning of these terms suggests a different, and broad, meaning for "false." Second, if only deliberate falsehoods could invoke the duty to disclose or rectify under Rule 3.3(a)(3), that Rule would be superfluous because such conduct is already covered in Rule 3.3(b). Rule 3.3(b) states that "[a] lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures." Thus, a client's or a witness's deliberate falsehood would constitute criminal or fraudulent conduct which is treated in Rule 3.3(b). *See* New York State Bar Association Formal Opinion 837 (2010) (noting that while Rule 3.3(b) applies in the case of fraud, Rule 3.3(a) "requires a lawyer to remedy false evidence even if it was innocently offered."); Association of the Bar of the City of New York, Formal Opinion 2013-2 ("it makes no difference if the falsity was intentional or inadvertent").

In addition, the broader interpretation makes the most sense in light of the lawyer's duty in Rule 3.3(a)(1) to correct his or her own previous false statement. If "false" were to mean only deliberately false statements, it would not make much sense to separately prohibit both the making of such a statement and then the failure to correct that same misstatement. However, if "false" means inaccurate or untrue, then the duty to correct is more understandable (and significant).

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[3] Rule 4.1 also prohibits a lawyer from knowingly making a false statement of fact or law to anyone. Misrepresentations, for this purpose, can occur by "partially true but misleading statements or omissions that are the equivalent of affirmative false statements." *See* NY Rule 4.1, Comment [1]; *In Re Filosa*, 976 F. Supp. 2d 460 (S.D.N.Y. 2013).

Another clue comes from the original Comment to ABA Model Rule 3.3, in which the drafters discussed the duty to take remedial steps in cases of perjured testimony *or* false evidence, suggesting that the drafters recognized perjury and false evidence as two separate categories of evidence and meant the Rule to apply equally to both. Geoffrey C. Hazard, W. William Hodes, *The Law of Lawyering*, 29-20 (Aspen Publishers 2009).

The Restatement of the Law Governing Lawyers also resolves this question in favor of the broader reading. Restatement § 120(1)(c), much like the Model Rules and the New York Rules, provides that "[a] lawyer may not . . . offer testimony or other evidence as to an issue of fact known by the lawyer to be false" and, if the lawyer has offered evidence of a material issue of fact and comes to know of its falsity, the lawyer must take reasonable remedial measures, including disclosure. Comment d to §120 states:

> False testimony includes testimony that a lawyer knows to be false and testimony from a witness who the lawyer knows is only guessing or reciting what the witness had been instructed to say. . . . *[A]lthough a witness who testifies in good faith but contrary to fact lacks the mental state necessary for the crime of perjury, the rule of the Section nevertheless applies to a lawyer who knows that such testimony is false.* (emphasis added).

Thus, under the Restatement, "false" refers not only to deliberate falsehoods, but also to erroneous or untrue statements.

Case law and ethics opinions from other jurisdictions have interpreted similar language as encompassing the broader reading of the term "false" as well. *See, e.g.*, *Morton Bldg., Inc. v. Redeeming Word of Life Church*, 835 So.2d 685, 691 (La. App. 1st Cir. 2002) (citing *Washington v. Lee Tractor Co, Inc.*, 526 So.2d 447, 449 (La. App. 5th Cir.), *writ denied*, 532 So.2d 131 (La. 1998)) ("[F]ailure to correct false evidence, even if originally offered in good faith, violates Rule 3.3 of the Rules of Professional Conduct."); Washington State Bar Opinion 1173 (1988) (if the proceeding was still pending, the lawyer would have had to disclose his client's mistaken, but not fraudulent, failure to provide certain dates and medical treatments in answers to interrogatories). *See also* Mehta, *What Remedial Measures Can A Lawyer Take to Correct False Statements Under New York's Ethical Rules?* 12th Annual AILA New York Chapter Immigration Law Symposium Handbook (2009 ed.); Hazard and Hodes, *The Law of Lawyering*, 29-20.

Finally, the broader reading is probably more consistent with Rule 3.3's underlying objective. As illustrated in the Comments to the Rule, the purpose of imposing the duty of candor toward the tribunal is to keep the tribunal from going astray when the lawyer is in a position to prevent it. *See* Rule 3.3, Comments [2] and [5]. Thus, only the knowledge of the lawyer and the actual incorrectness of the information should be relevant. If a lawyer knows her witness is mistaken, the lawyer should not allow the witness's mistake to lead the tribunal astray.

In sum, although the term "false" is not explicitly defined, it appears that the drafters of the New York Rules likely meant "false" to mean untrue, encompassing more than just deliberate falsehoods.

C. Materiality

While Rule 3.3(a)(1) and (3) prohibit a lawyer from making any false statement or offering/using any false evidence, those sections only require a lawyer to take affirmative corrective action in the event "material" false statements are made or material false evidence is offered. Determining whether this materiality threshold is met is fact specific, "depending on the factors relevant to the ruling in the particular matter, and particularly whether the evidence is of a kind that could have changed the result." Association of the Bar of the City of New York, Formal Opinion 2013-2. *See also* NYSBA Formal Opinions 837 and 732.

D. Lawyer's Duty to Correct His Own False Statements/Evidence

Rule 3.3(a)(1) reads: "[a] lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." The first clause of this rule imposes essentially the same obligation as its predecessor, DR 7-102(A)(5), requiring that a lawyer not knowingly make a false statement of law or fact. Its application is narrower, however, in that Rule 3.3(a) is limited to statements "to a tribunal." Disciplinary Rule 7-102(A)(5) was not limited to a tribunal setting. While Rule 4.1 more generally prohibits false statements of material facts to a third person, Rule 4.1 does not contain the "correction" provision of Rule 3.3(a)(1).

The second clause of Rule 3.3(a)(1) explicitly imposes a new duty. It requires the lawyer to affirmatively *correct* a false statement of material fact[4] or law previously made to the tribunal by the lawyer. This mandatory duty to correct a false statement made by the lawyer to a tribunal is not an entirely new concept, but it has not previously been explicit or quite this broad.

As previously discussed, DR 4-101(C)(5) had *permitted* a lawyer to withdraw a representation made by the lawyer where that representation was based on materially inaccurate information or was being used to further a crime or fraud, and that representation was believed to still be relied upon by third parties. In New York State Bar Formal Opinions 781 (2004) and 797 (2006), the Committee on Professional Ethics concluded that where the lawyer's representation is the product of a client's fraud upon a tribunal, then the combined effect of DR 7-102(B)(1) (which otherwise required the disclosure of the client's fraud upon the tribunal *unless* it constituted a confidence or secret) and DR 4-101(C)(5) (which *permitted* the lawyer to reveal confidences or secrets of the client to the extent implicit in withdrawing a previously given written or oral opinion or representation, provided it was still being relied upon by others) was to *require* withdrawal of the lawyer's representation. However, the obligation was simply to withdraw the lawyer's representation. Disclosure of client confidences and secrets beyond that implicit in the act of withdrawal were not permitted. Under Rule 3.3(a)(1), if the lawyer made a statement of material fact which is false (inaccurate), the obligation is not simply to "withdraw" it but rather to *correct* it, which may require the explicit disclosure of confidential information. *See* Simon, *Roy Simon on the New Rules – Part VII Rule 2.1 through Rule 3.3(a)(1)*, 4-5 (New York Professional Responsibility Report, September 2009).

[4] While 3.3(a)(1) prohibits a lawyer from making any false statement of fact or law to a tribunal, it only imposes upon a lawyer an affirmative obligation to correct a "material" false statement.

In addition, this duty to correct under Rule 3.3(a)(1) applies even when no one is continuing to rely on the false statement.[5] *Compare* Rule 1.6(b)(3) (permitting a lawyer to "reveal or use confidential information to the extent that the lawyer reasonably believes necessary . . . to withdraw a written or oral opinion or representation previously given by the lawyer and *reasonably believed by the lawyer still to be relied upon by a third person,* where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud."). (emphasis added).

Comment [3] to Rule 3.3 also recognizes that there "are circumstances where the failure to make a disclosure is the equivalent of an affirmative misrepresentation."

E. Lawyer's Duty In Light of False Evidence by the Lawyer's Client or Witness

Rule 3.3(a)(3) prohibits a lawyer from knowingly offering or using evidence that the lawyer knows to be false. In another of the more significant changes in the New York Rules, Rule 3.3(a)(3) goes on to require that if a lawyer's client or a witness called by the lawyer has offered *material* evidence and the lawyer comes to know of its falsity, the lawyer must take reasonable remedial measures, *including, if necessary, disclosure to the tribunal*. In other words, disclosure may be required to remedy false evidence by the lawyer's client or witness, as a last resort, even if the information to be disclosed is otherwise "protected" client confidential information.

As close as we came to this requirement under the former Code was DR 7-102(B)(1) which provided that if a lawyer received information clearly establishing that a client (but only a client), in the course of representation, had perpetrated fraud upon a person or tribunal, the lawyer was required to call upon the client to rectify it.[6] If the client refused or was unable to do so, then the lawyer might be required to withdraw from the representation pursuant to DR 2-110(B) if the lawyer could not continue without maintaining or advancing the earlier misrepresentation. Nassau County Bar Association Opinion 05-3 (2005). Disciplinary Rule 2-110(B) mandated withdrawal where the continued employment would result in violation of a disciplinary rule. A lawyer would have violated the disciplinary rules by maintaining or advancing the earlier misrepresentation because DR 1-102(A)(4) prohibited a lawyer from engaging in conduct that involved dishonesty, fraud, deceit, or misrepresentation and DR 7-102(A)(7) prohibited a lawyer from counseling or assisting a client in conduct that the lawyer knew to be illegal or fraudulent.

If the client refused or was unable to rectify the fraud, the lawyer was required under DR 7-102(B)(1) to reveal the fraud to the person or the tribunal, *except* to the extent that the information was protected as a client confidence or secret, in which case confidentiality was the order of the day. However, in most instances, this exception – disclosure unless the information was a client confidence or secret – swallowed the rule because this information was almost always protected as a confidence or secret.

For example, if a lawyer came to learn that a client had committed perjury (an obvious fraud upon the tribunal), that information was almost by definition a client confidence or secret which

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[5] *See* the discussion on the duration of the obligation to disclose under Rule 3.3 at Part VIII, *infra*.

[6] Disciplinary Rule 7-102(B)(1) was only triggered by a client fraud, but it could be a fraud upon either a tribunal or a third party.

could not be disclosed. *See* New York State Bar Association Formal Opinions 674 (1995) and 523 (1980); New York County Bar Association Opinion 706 (1995); Association of the Bar of the City of New York Opinion 1994-8 (1994). In such a case, and assuming the client did not rectify the perjury, the lawyer's choices were to nonetheless continue the representation without disclosure to the tribunal – but only if continued representation could be accomplished without reliance on that perjured testimony – or, in most cases, to withdraw from the representation. *See* New York County Bar Association Opinion 712 (1996); *People v. Andrades*, 4 N.Y.3d 355 (2005). Disclosure under the former Code was not permitted; the duty of confidentiality trumped the duty of candor to the court.

DR 7-102(B)(2) provided that if a lawyer learned that someone *other than a client* (*e.g.*, the lawyer's non-client witness) had perpetrated a fraud on the tribunal (but not on a third party), the lawyer should reveal the fraud. DR 7-102(B)(2) contained no explicit exception for protecting client confidences and secrets in that circumstance. However, in NYSBA Formal Opinion 523 (1980), the Committee on Professional Ethics held that the explicit exception to the disclosure obligation for client confidential information found in DR 7-102(B)(1) applied by implication in circumstances covered by DR 7-102(B)(2).

Marking a dramatic shift in this area, Rule 3.3(a)(3) now provides that if either a lawyer's client or a witness called by the lawyer has offered material evidence to a tribunal and the lawyer comes to know of its falsity, the lawyer must take reasonable remedial measures, including if necessary disclosure to the tribunal. There is no caveat for confidential information. In other words, the Rule may require disclosing client/witness falsity, as a last resort, even if that knowledge is otherwise protected as client confidential information. So Rule 3.3(a)(3) differs from DR 7-102(B) in that (1) Rule 3.3(a)(3) applies equally to the lawyer's client and witnesses (but not to others); (2) is triggered by false material evidence and not necessarily fraud; (3) does not extend to false statements (or frauds) to third parties; and (4) can ultimately require disclosure of even client confidential information.

As detailed in Comment [10] to Rule 3.3, the first remedial measure – calling upon the client to correct the false testimony – is the same as it was under DR 7-102(B)(1) and in the case of intentionally false testimony is not likely to be successful in many cases. *See also* NYSBA Formal Opinion 837 (must bring issue of false evidence to client's attention before taking unilateral action). If that course of action fails, the lawyer is required to take further remedial action. One possibility is to withdraw from the representation.[7] However, as Comment [10] explains, at times withdrawal is not permitted or will not undo the effect of the false evidence. On the latter point, at least one noted commentator has expressed the view that withdrawal in and of itself is not sufficient since the record is not corrected and the problem of the false evidence is simply transferred to another lawyer. Simon, *Roy Simon on the New Rules – Part VII Rule 3.3(a)(3) through Rule 3.3(d)*, 4-5 (New York Professional Responsibility Report, October 2009). *See also* New York County Bar Association Opinion 741; New York State Bar Association Form Opinion 837. Under the New York Rule, then, the lawyer must "make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal confidential information that otherwise would be protected by Rule

[7] Of course, even in a withdrawal from representation, a lawyer has to be careful about what information is communicated to the Court. See NYSBA 1057 (2015).

1.6." Rule 3.3, Comment [10]; *see also* Rule 3.3(c) ("The duties stated in paragraph (a) and (b) apply even if compliance requires disclosure of information otherwise protected by Rule 1.6"); NYSBA Formal Opinion 837 (disclosure only required if "necessary" and if not necessary, disclosure is not permitted). Depending on the circumstances, however, full disclosure might not be required and something less, in the form of a "noisy withdrawal" of the false evidence, might be sufficient. NYSBA Formal Opinion 837; *see also* NYSBA Formal Opinions 980, 982 and 998 (even when disclosure of confidential information is permitted, that disclosure should be no broader than reasonably necessary to achieve that permissible end).[8]

While disclosure may have grave consequences for the client, "the alternative is for the lawyer to cooperate in deceiving the court, thereby subverting the truth-finding process, which the adversary system is designed to implement." Rule 3.3, Comment [11]. Thus, under the new Rule 3.3, the duty of candor toward the tribunal rises above the duty of confidentiality, in stark contrast to the Code.

Rule 3.3(a)(3) is broader than former DR 7-102(B)(1) and (2) not only because the exception for client confidences and secrets has been eliminated, but also because it is triggered by "false" material evidence and not just fraudulent conduct. Thus, for example, helpful but inaccurate testimony offered by the lawyer's witness must be remedied, even if that testimony was provided in good faith and was not fraudulent or perjured. Under DR 7-102(A)(4), a lawyer was precluded from using perjured or false evidence, but had no explicit duty to remedy the introduction of false evidence. Now that obligation exists.

On the other hand, Rule 3.3(a)(3) is limited to false statements by the lawyer's client or a witness called by the lawyer, and does not extend to false statements provided by the other side's witnesses. In other words, a lawyer is not required to disclose to the tribunal merely "false" information provided by opposing counsel, the adverse party, or its witnesses. However, under Rule 3.3(a)(3) (as was the case under DR 7-102(A)(4)), the lawyer may not "use" this false evidence (regardless of its source), which means that the lawyer cannot maintain or advance the falsity, including referencing the false but favorable evidence or otherwise using it to advance her client's cause.

The obligations of Rule 3.3(a)(3) are triggered by the lawyer's "knowledge" that evidence is false. The definition section of the Rules make it clear that the terms "knowingly," "known" and "know" require "actual knowledge," although it is recognized that knowledge can be inferred from the circumstances. Rule 1.0(k). New York County Bar Association Opinion 741 looks to *In re Doe*, 847 F.2d 57 (2d Cir. 1988) for guidance on this issue, indicating that while mere suspicion or belief is not adequate, "proof beyond a moral certainty" is not required either. *See also* NYSBA Formal Opinion 1034 (mere suspicion not enough to trigger disclosure obligation, but may be grounds for withdrawal from representation).

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[8] A lawyer confronted with this remedial obligation must also keep in mind CPLR § 4503(a)(1), the legislatively-enacted attorney-client privilege. The interplay between Rule 3.3 and CPLR § 4503 is not entirely clear. However, there is some commentary that suggests that the impact of CPLR § 4503 is to preclude the lawyer from testifying or otherwise presenting "evidence" to remedy false evidence under Rule 3.3 if not otherwise covered by an exception to the attorney-client privilege (*e.g.*, crime-fraud exception). Under this view, the privilege might not otherwise prevent a lawyer from providing remediation in a non-evidentiary way. *See* NYSBA Formal Opinions 837 and 980.

If a lawyer knows that a client or witness intends to offer false testimony, the lawyer may not offer that testimony or evidence. If a lawyer does not know that his client's or witness' testimony is false, he *may* nonetheless *refuse* to offer it if he "reasonably believes" it will be false.[9] However, "[a] lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact." Rule 3.3, Comment [8].

VII. DUTY TO DISCLOSE ADVERSE AUTHORITY

Pursuant to section 3.3(a)(2) of the Rules of Professional Conduct, attorneys cannot knowingly "fail to disclose to [a] tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." Unfortunately, the Rules of Professional Conduct do not explain when legal authority is controlling or directly adverse. It is important to remember that in New York, lower courts are bound to apply precedent from other departments when there is no contrary precedent established by its own department.[10] Accordingly, if an attorney is before a Supreme Court within the Fourth Department, and the Fourth Department has not ruled on a particular issue that he or she is briefing, the attorney cannot ignore an unfavorable decision from the First, Second or Third Departments because such a decision would be controlling on the Supreme Court in that instance.

Additionally, attorneys should not fail to cite adverse authority merely because they believe that it is distinguishable. The American Bar Association's Committee on Ethics and Professional Responsibility has stated that it is an attorney's duty to disclose a decision of a controlling court "which may be interpreted as adverse to his client's position."[11] While attorneys are required to disclose the adverse authority, they are free to challenge the reasoning of the decision, to distinguish it from the case at bar, or to present any other reason why it should not be followed. In a prior opinion, the Committee stated the test for determining whether disclosure is required as follows:

1. Is the decision one which the court should clearly consider in deciding the case?

2. Would a reasonable judge properly feel that a lawyer who advanced, as the law, a proposition adverse to the undisclosed decision was lacking in candor and fairness? And;

3. Might the judge consider himself or herself misled by an implied representation that the lawyer knew of no adverse authority?[12]

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[9] A lawyer may not refuse to offer his client's testimony in a criminal proceeding unless he knows it to be false. Even a reasonable belief that the client may lie in that setting does not override the client's constitutional right to be heard. *See* Rule 3.3(a)(3).

[10] *See Phelps v. Phelps*, 128 A.D.3d 1545, 1547 (4th Dep't 2015). Decisions and opinions referred to are attached as Exhibit 1.

[11] ABA Informal Opinion No. 84-1505 (1984).

[12] ABA Formal Opinion No. 280 (1949).

In one case, the New York County Supreme Court issued a warning to an attorney who made an assertion contrary to controlling adverse authority, even though the attorney did disclose that authority to the court. The judge warned the attorney that if he was seeking to protect his right to challenge that law on appeal, "it would be advisable for counsel to avoid such unqualified assertions . . . and expressly state that intention in setting forth their arguments against that authority, rather than risk any claims of unethical conduct."[13]

In most reported decisions in New York's state and federal courts, violations or possible violations of Rule 3.3(a)(2) have merely resulted in warnings to the attorneys; however it is possible that a violation can result in sanctions. A magistrate judge in the Western District of New York caught attorneys who advised a different court of a recent decision by the Second Circuit in one matter, but failed to advise the magistrate in a different matter where the recent decision was adverse to their position. In his decision, the magistrate judge ordered the attorneys to show cause as to why they should not be sanctioned pursuant to Rule 11 for their conduct.[14] Similarly, in Queens County Supreme Court, a judge ordered a hearing to determine whether sanctions were appropriate where an attorney failed to disclose adverse controlling authority, which the attorney was expressly aware of, to the Court. Clearly it is better to be safe than sorry as even a warning from a court would be extremely embarrassing; however sanctions remain a possibility for attorneys who fail to disclose adverse controlling authority.

VIII. DISCLOSURE IN THE FACE OF CRIMINAL OR FRAUDULENT CONDUCT BY ANY PERSON

Rule 3.3(b) provides that if a lawyer represents a client before a tribunal and that lawyer knows that *anyone* intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding, he must take reasonable remedial measures, including if necessary disclosure to the tribunal, even if this requires disclosure of information otherwise protected by Rule 1.6 as confidential information.

Rule 3.3(b) requires a lawyer to take reasonable remedial measures regarding the criminal or fraudulent conduct (including perjury) of *any* person. Unlike Rule 3.3(a)(3), it is not limited to conduct by the lawyer's client or witness, and extends to conduct of the other side. On the other hand, it is not triggered by "false evidence," but rather requires criminal or fraudulent conduct. Furthermore, as evidenced by the phrase "intends to engage, is engaging, or has engaged," Rule 3.3(b) covers past, present and future events. But like Rule 3.3(a)(3), once triggered, remedial action is required, including disclosure of confidential information if need be.

In this regard, the closest provision to Rule 3.3(b) in the former Code was DR 7-102(B)(2), which required the lawyer to reveal to the tribunal the fraud of a person, other than the client, committed upon the tribunal, subject to an implicit exception for client confidences and secrets. Rule 3.3(b) differs from DR 7-102(B)(2) in that it (1) applies to criminal or fraudulent conduct (not just fraud); (2) which relates to the proceeding (and not just fraud upon the tribunal); (3) which is occurring, has occurred or will occur in the future; (4) extends to client as well as non-

[13] *Denehy v. Copperman*, Index No. 800349/11, 2013 N.Y. Misc. LEXIS 6099 at fn. 1 (Sup. Ct. N.Y. Cty. Dec. 12, 2013).

[14] *Felix v. Northstar Location Servs.*, 290 F.R.D. 397 (W.D.N.Y. 2013).

client conduct; and (5) can ultimately require the disclosure of even client confidential information.

Rule 3.3(b) actually goes beyond issues of client/witness perjury and false evidence and extends to any criminal or fraudulent conduct by any person related to a proceeding. Thus, for example, it extends to intimidating witnesses, bribing a witness or juror, illegal communications with a court officer, destroying or concealing documents, and failing to disclose information to the tribunal when required to do so. *See* Rule 3.3, Comment [12]. The duty to take remedial action, including disclosure, applies in these circumstances as well.

IX. DURATION OF THE OBLIGATION TO REMEDIATE

Both Model Rule 3.3 and the Bar Association's proposal to the Courts explicitly provided that the remediation (including disclosure) obligation "continue to the conclusion of the proceeding," defined by Comment [13] to mean "when a final judgment has been affirmed on appeal or the time for review has passed."[15] However, the final version of Rule 3.3 as adopted by the New York Courts contains no such temporal limitation. The Courts gave no indication as to whether this omission was intended to signal that the obligation to remediate continues forever. However, one possible limitation to the duration of a lawyer's remediation obligation may be found in the term "reasonable" as Rule 3.3 only requires the lawyer to take "reasonable remedial measures." Yet without further explanation, this ambiguous term offers little guidance.

The obligation to remedy false statements or criminal/fraudulent conduct related to a proceeding before a tribunal extends as long as the fraudulent conduct can be remedied, which may extend beyond the proceeding – but not forever. NYSBA Formal Opinions 831, 837 and 980; *see also* Association of the Bar of the City of New York Formal Opinion 2013-2 (obligation ends "only when it is no longer possible for the tribunal to which the evidence was presented to reopen the proceedings based on new evidence, and it is no longer possible for another tribunal to amend, modify or vacate the final judgment based on the new evidence").

X. REQUIRED DISCLOSURE IN THE CONTEXT OF EX PARTE PROCEEDINGS

Rule 3.3(d), governing a lawyer's conduct during ex parte proceedings, adds an entirely new obligation; it had no equivalent at all in the old Code. Rule 3.3(d) fills a void by explaining how a lawyer is to behave when appearing before a tribunal in a legitimate ex parte proceeding. It provides:

> In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

The policy behind the new provision is explained in Comment [14]. Typically in our adversary system an advocate has the limited responsibility of presenting one side of the matter to the tribunal since the opposing position will be presented by the adverse party. In an ex parte

[15] New York State Bar Association Proposed Rules of Professional Conduct 160 (Feb. 1, 2008) (available at www.nysba.org/proposedrulesofconduct020108).

proceeding, however, there may be no presentation by the opposing side. Nevertheless, the object of an ex parte proceeding is to yield a substantially just result. Because the judge must accord the opposing party, if absent, "just consideration," the lawyer for the represented party "has the correlative duty to make disclosures of material facts known to the lawyer that the lawyer reasonably believes are necessary to an informed decision." Rule 3.3, Comment [14].

Accordingly, a lawyer in an ex parte proceeding before a tribunal – whether before a court, an arbitrator, or a legislative or administrative agency acting in an adjudicative capacity – has the duty to present adverse facts favorable to the opposition. However, Rule 3.3(d) does not require the lawyer to "present" her adversary's case. For example, a lawyer does not have to draw inferences favorable to the adversary or present adverse facts in the most persuasive manner to persuade the court. Furthermore, Rule 3.3(d) only requires the lawyer to disclose adverse facts, not adverse law. A lawyer must only advise the tribunal about unfavorable cases if they are "controlling" pursuant to Rule 3.3(a)(2).

More importantly, the language of this portion of the Rule itself may be subject to the interpretation that it requires the lawyer to disclose all material facts, regardless of whether they constitute client confidential information. The mandatory words used in Rule 3.3(d) – "a lawyer *shall* inform the tribunal of *all* material facts" –suggests that the disclosure obligation is unconditional. *See* Jill M. Dennis, *The Model Rules and the Search for the Truth: The Origins and Applications of Model Rule 3.3(d)*, 8 Geo. J. Legal Ethics 157 (1994) (discussing ABA Model Rule 3.3(d)); *see also Restatement (Third) of the Law Governing Lawyers* §112, cmt. B(2000) ("To the extent the rule of this Section requires a lawyer to disclose confidential client information, disclosure is required by law…"). However, this Rule may not require the disclosure of privileged information. *See* n.7, *supra; Restatement (Third) of the Law Governing Lawyers* §112, cmt b; *compare* Texas Disciplinary Rules of Professional Conduct Rule 3.03(a)(3) ("A lawyer shall not knowingly . . . in an ex parte proceeding, fail to disclose to the tribunal an *unprivileged* fact which the lawyer reasonably believes should be known by that entity for it to make an informed decision.") (emphasis added). On the other hand, Rule 3.3 (c) expressly provides that the duty of candor found in 3.3(a) and 3.3(b) applies even if it requires disclosure of confidential information, but makes no mention of 3.3(d). Compare Florida Rule 4-3.3(d) (expressly extending the exception to client confidentiality to all provisions of Rule 4-3.3, including the ex parte communications provision). Final resolution of this issue will likely have to await the issuance of individual ethics opinions; however – given the straightforward requirement on the face of the Rule – lawyers should be cautious that the tradeoff for participation in an ex parte proceeding may be the sacrifice of client confidences.

XI. CANDOR IN INVESTIGATIONS

Issues of candor, in the sense of deceit and misrepresentation, often arise in the context of workplace investigations. Rule 8.4 provides:

> A lawyer or law firm shall not:
>
> ***

> (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation; [or]

From time to time, in assisting clients with investigations, it may be necessary to seek information through means other than overt interviews, and may even entail the use of outside private investigators. One common investigatory technique is pretexting – pretending to be someone you are not in order to secure that information. Pretexting may entail impersonating another, real individual, or it may involve pretending to be a fictional person. An example of the latter is the use of testers in employment or housing discrimination cases – someone creating and using an entirely false identity to assist in ferreting out discrimination. Both involve deceit and both implicate Rule 8.4 (c). Of course, pretexting can take a variety of forms in between.

Whether the pretexting is done directly by a lawyer or indirectly by a private investigator or staff member working under the lawyer's direction, the ethical issues generally are the same. While the Rules of Professional Conduct apply only to lawyers, Rule 8.4 (a) provides that a lawyer or law firm shall not "violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." In addition, Rule 5.3 (b) provides:

> A lawyer shall be responsible for conduct of a nonlawyer employed or retained by or associated with the lawyer that would be a violation of these Rules if engaged in by a lawyer, if :
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> (1) the lawyer orders or directs the specific conduct, or with knowledge of the specific conduct, ratifies it; or
>
> (2) the lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the nonlawyer is employed or is a lawyer who has supervisory authority over the nonlawyer; and
>
> (i) knows of such conduct at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action; or
>
> (ii) in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could have been taken at a time the consequences of the conduct could have been avoided or mitigated.

Despite the unequivocal language of these ethics rules, the response of courts and disciplinary authorities to various forms of pretexting has been mixed, although pretexting in the extreme – impersonating another to obtain information about that other person – is likely to always be viewed as a violation.

There has been some recognition that pretexting in furtherance of some greater societal benefit, such as in the discrimination tester context, is permissible. Courts generally have recognized the value of testers in the fight against discrimination, providing some condonation for them. *See, e.g., Village of Bellwood v. Dewired*; 895 F.2d 1521 (7th Cir. 1990); *Lea v. Cone Mills Corp.*, 438 F.2d 86 (4th Cir. 1971). So have some bar authorities. For example, in Arizona Opinion No. 99-11 (1999), the Committee on the Rules of Professional Conduct of the State Bar of Arizona condoned use of the limited deceit associated with testers to "protect society from discrimination based upon disability, race, age, national origin, and gender." *See also*, Isbell and Salvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation Under the Model Rules of Professional Conduct*, 8 Georgetown Journal of Legal Ethics 791 (1995). A recent amendment to the rules of professional conduct in Oregon also explicitly permits such activity. *See* Oregon DR 1-102(D) ("[I]t shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these disciplinary rules. "Covert activity"...means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. "Covert activity" maybe commenced by a lawyer or involve a lawyer as an advisor or supervisory only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future.")

An "exception" to the general ethical prohibition against deceit also has been recognized by some authorities when the pretexting occurs in the context of law enforcement or other lawful governmental operations. *See, e.g.*, Utah Ethics Opinion 02-05 (2002) ("A governmental lawyer who participates in a lawful covert governmental operation that entails conduct employing dishonesty, fraud, misrepresentation or deceit for the purpose of gathering relevant information does not, without more, violate the Rules of Professional Conduct."); D.C. Bar Legal Ethics Comm., Op. 323 (2004) ("Lawyers employed by government agencies who act in a non - representational official capacity in a manner they reasonably believe to be authorized by law do not violation [the ethics rules] if, in the course of their employment, they make misrepresentations that are reasonably intended to further the conduct of their official duties."); *United States v. Parker*, 165 F. Supp. 2d 431 (W.D.N.Y. 2001) (same).

Some courts have gone further, permitting "incidental deceit" to promote more private interests. In *Gidatex v. Campaniello Imports, Ltd.*, 82 F. Supp. 2d 119 (S.D.N.Y. 1999), a trademark owner sent private investigators posing as customers to a retail store operated by the defendant to determine whether infringement was occurring. The investigators posed as "typical customers" and engaged the defendant's sales people in conversation regarding items sold by the defendant. The conversations were "typical" of the interaction between a customer and salesperson and, apparently, were not intended to trick any salespeople into making any specific admissions. In response to a claim that the plaintiff's lawyer's involvement in this activity violated the proscription against lawyer deceit, the court observed:

> As for DR 1-102 (A)(4)'s prohibition against attorney "misrepresentations,"[16] hiring investigators to pose as consumers is an accepted investigative technique, not a misrepresentation. The policy interests behind forbidding misrepresentations by attorneys are to protect parties from being tricked into making statements in the absence of their counsel and to protect clients from misrepresentations by their own attorneys. The presence of investigators posing as interior decorators did not cause the sales clerks to make any statements they otherwise would not have made. There is no evidence to indicate that the sales clerks were tricked or duped by the investigators' simple questions such as "is the quality the same?" or "so there is no place to get their furniture?"
>
> * * * *
>
> These ethical rules should not govern situations where a party is legitimately investigating potential unfair business practices by use of an undercover posing as a member of the general public engaging in ordinary business transactions with the target. To prevent this use of investigators might permit targets to freely engage in unfair business practices which are harmful to both trademark owners and consumers in general. Furthermore, excluding evidence obtained by such investigators would not promote the purpose of the rule, namely preservation of the attorney/client privilege.

82 F.Supp.2d at 122.

In *Apple Corps. Ltd. v. International Collectors Soc.*, 15 F. Supp. 2d 456 (D.N.J. 1998), a lawyer for Apple had instructed her secretary, private investigators, and others to contact the defendant posing as interested customers in an effort to buy certain items that the defendant was not authorized to sell. In concluding that this conduct did not violate New Jersey's prohibition on deceit, the court held that "misrepresentations solely as to identify or purpose and solely for evidence gathering purposes," are not prohibited.[17] 15 F.Supp.2d at 475.

Relying explicitly on the decisions in *Gidatex* and *Apple*, the District Court for the Southern District of New York has concluded that

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[16] Like former Disciplinary Rule 1-102(A)(4), current Rule 8.4(c) states that a lawyer or law firm shall not "[e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

[17] While understanding the court's conclusion in the context of these particular facts, it seems unlikely that the court truly intended this sweeping language to apply in all contexts. For example, it seems clear that it would be inappropriate for a lawyer, or his agent, to misrepresent an association with an adverse party for the purpose of inducing a recalcitrant witness to share information, even when doing so involved "merely" a misrepresentation as to identity and purpose. *See, e.g.*, Kansas Bar Association Opinion 94-15 (1995) (inappropriate for lawyer to have staff member contact third party posing as a "friend" of an adverse party for purpose of securing information from that person.)

> the prevailing understanding in the legal profession is that a public or private lawyer's use of an undercover investigator to detect ongoing violations of the law is not ethically proscribed, especially where it would be difficult to discover the violations by other means.

Cartier v. Symbolix, Inc., 386 F. Supp. 2d 354, 362 (S.D.N.Y. 2005).

Notwithstanding these views, there are still other authorities which have been far more literal in their application of the deceit rules, even when the lawyer's conduct was arguably serving some greater societal good. For example, *In re Malone*, 105 A.D. 2d 455 (3d. Dept. 1984), involved an attorney serving as the Inspector General of the New York State Department of Correctional Services. In the course of an investigation into prisoner abuse, Malone took a "private statement" from a corrections officer who had witnessed such abuse. The statement was taken under oath and recorded. This private statement was taken the day before a number of officers, including this individual, were scheduled for formal investigatory interviews. In conjunction with the private statement, Malone instructed the corrections officer to give a false statement that next day (denying any knowledge of abuse), to protect the individual and avert suspicion from him as the informer. The individual did as instructed. In sustaining discipline subsequently imposed on Malone for his role in this ruse of the false second statement, the Appellate Division explicitly rejected the notion that the "ends" (protection of the informer) can justify the "means" (deceit).

A similar result was reached in *Matter of Mark Pautler*, 47 P.3d 1175 (Colo. 2002). Pautler was a Deputy District Attorney. He arrived at a particularly gruesome crime scene in which three women had been murdered with a wood splitting maul. While there, he learned that three other individuals had called the Sheriff's office with information about the murderer. One of those three was someone the murderer had kidnapped and attempted to kill. Eventually, the Sheriff and Pautler made phone contact with the murderer (who by that time had already confessed to the murders and threatened to kill again), although they did not know his location. The murderer made it clear that he would not surrender without legal representation. After a failed attempt to locate the murderer's requested lawyer, the Sheriff agreed with the murderer to locate a public defender. Instead, however, Pautler pretended to be a public defender and eventually secured the murderer's surrender to the Sheriff. The murderer was ultimately convicted and sentenced to death. Subsequently, misconduct charges were brought against Pautler for his deceitful conduct and his misrepresentations. Refusing to create an exception to Colorado's rules against attorney deception even in this context, the Supreme Court upheld Pautler's three month suspension (due to the mitigating circumstances involved, however, it stayed the suspension during a twelve month probation period). However, on September 28, 2017, the Colorado Supreme Court amended Rule 8.4 to include an exception allowing a lawyer to "advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities." *See* Colorado Rules of Prof. Cond., Rule 8.4(c).

Other courts also have been reluctant to create exceptions to the deceit rules. *See Sequa Corp. v. Lititech, Inc.*, 807 F.Supp. 653 (D. Colo. 1992) (recognizing, in context of surreptitious tape recordings, that attorney's interest in ferreting out misconduct does not justify deceptive practices); *In re the Complaint as to the Conduct of Daniel J. Gatti*, 8 P.3d 966 (Or. 2000)

(lawyer posing as someone else as part of an investigation into suspected fraudulent conduct violated ethical rules); *In re Ositis*, 333 Ore. 366 (2002) (lawyer reprimanded for giving direction to private investigator falsely posing as journalist to interview opposing party in litigation); *In the Matter of the disciplinary proceedings against James C. Wood*, 190 Wisc.2d 502 (1995) (pretending to be someone else violates ethics rules).

Consistent with this more stringent view, the Eighth Circuit, on facts similar to those in *Gidatex* and *Apple*, has suggested that the use of investigators posing as customers and engaging salespersons in discussion violates these rules. *Midwest Motor Sports v. Arctic Cat Sales, Inc.*, 347 F. 3d 693 (8th Cir. 2003).

On May 23, 2007, the New York County Bar Association issued Opinion 737 addressing this issue. While recognizing that it is generally unethical for non-governmental lawyers to knowingly utilize and/or supervise an investigator who will employ "dissemblance" in an investigation, it nonetheless recognized a limited exception to this proscription. Specifically, it concluded that non-governmental lawyers may ethically supervise non-attorney investigators employing a limited amount of dissemblance in some strictly limited circumstances where " (1) either (a) the investigation is of a violation of civil rights or intellectual property rights and the lawyer believes in good faith that such violation is taken place or will take place imminently or (b) the dissemblance is expressly authorized by law; and (ii) the evidence sought is not reasonably available through other lawful means; (iii) the lawyer's conduct and the investigator's conduct that the lawyer is supervising do not otherwise violate the Code (including the "no contact" rules of DR 7-104)[18] or applicable law; and (iv) the dissemblance does not unlawfully or unethically violate the rights of their parties. The investigator must be instructed, however, not to elicit information protected by the attorney-client privilege. In this context, the Committee distinguished dissemblance from dishonest, fraud, misrepresentation and deceit by the degree and purpose of dissemblance, defining dissemblance as "misstatements as to identify and purpose made solely for gathering evidence."

An added layer of concern in the pretexting context arises when the party contacted by the pretextor is a "represented" person. As discussed earlier, a lawyer is prohibited from communicating, or causing another to communicate, with a represented person whose interests may be adverse to those of her client. Thus not only is a lawyer prohibited from directly communicating with a represented adversary, but a lawyer breaches the Rules if a private investigator working for or under the supervision of that lawyer does so.

Application of this prohibition becomes even more complicated when the individual contacted by the pretextor is an employee of a represented corporation, raising the issue of whether that employee is deemed "represented" by virtue of the company's representation. Generally in New York, employees of a represented employer (1) whose acts or omissions in the matter under inquiry are binding on the corporation or are imputed to the corporation for liability purposes or (2) who are involved in implementing the advice of counsel, are deemed represented if the corporation is represented. *See Niesig v. Team I*, 76 N.Y. 2d 363 (1990). Other employees and, generally all former employees, fall outside this scope, are not considered represented by virtue of the corporate employer's representation, and are fair game for direct communications. *See*

[18] Now codified at Rule 4.2 of the Rules of Professional Conduct.

Muriel Siebert & Co., Inc. v. Intuit, Inc., 8 N.Y.3d 506 (2007); *Polycast Technology Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621 (S.D.N.Y. 1990); ABA Formal Opinion 95-393.

Applying these rules in the pretexting context, a lawyer must be careful to not allow private investigators, posing as someone they are not, to have contact with anyone who might be considered a represented person. *See Allen v. International Truck and Engine*, 2006 U.S. Dist. LEXIS 63720 (S.D. In. 2006) (ethical rules violated when investigators, with knowledge and under at least some degree of supervision of lawyers, sent into plant posing as employees and engaged in discussions with other employees regarding possible workplace harassment where some of the employees contacted were represented claimants); *Midwest Motor Sports v. Arctic Cat Sales, Inc.*, 144 F. Supp. 2d 1147 (ethical breach when investigators, under lawyer's supervision, posing as customers engaged in discussions with employees of adverse party in effort to solicit damaging information); *Scranton Prods., Inc. v. Bobrick Washroom Equip., Inc.*, 190 F.Supp.3d 419, 430-32 (M.D. Pa. 2016) (ethical violation when attorney listened and took notes on a phone call with an adversary, known to be represented by counsel, without disclosing his presence).[19]

However, as is the case in the use of deceit generally, not all courts are in agreement that all contact with a represented person is off limits. In *Gidatex*, the court not only found that the use of investigators to pose as customers was not a violation of the rules against deceit, it also found that the investigators' conversations with employees of a represented adverse party (who were deemed to be represented themselves) was not a violation of the no contact rules. In that case, although the court concluded that the investigator's communications with the other party's salespeople literally ran counter to former DR 7-104 (a)(1)[20], it nonetheless observed that it

> did not violate the rules because [these] actions simply do not represent the type of conduct prohibited by the rules. The use of private investigators, posing as consumers and speaking to nominal parties who are not involved in any aspect of the litigation, does not constitute an end-run around the attorney/client privilege. Gidatex's investigators did not interview the sales clerks or trick them into making statements they otherwise would not have made. Rather, the investigators merely recorded the normal business routine in the [other side's] showroom and warehouse.

82 F.Supp.2d at 126. And in *Apple*, the court similarly noted:

> RPC 4.2 [prohibiting contact with represented persons] cannot apply where lawyers and/or their investigators, seeking to learn about current corporate misconduct, act as members of the general

[19] Simply because evidence is obtained in violation of ethical rules does not mean it is inadmissible. Both the Second Circuit and New York courts have recognized that the means by which evidence is obtained is not necessarily a barrier to admissibility. *See United States v. Hammad*, 858 F. 2d 834 (2d Cir. 1988); *Gidatex v. Campaniello Imports, Ltd.*, 82 F. Supp. 2d 119 (S.D.N.Y. 1999); *Stagg v. New York City Health & Hosp. Corp.*, 162 A.D. 2d 595 (2d Dept. 1990).

[20] Now Rule 4.2(a).

> public to engage in ordinary business transactions with low-level employees of a represented corporation. To apply the rule to the investigation which took place here would serve merely to immunize corporations from liability for unlawful activity, while not effectuating any of the purposes behind the rule. *See, e.g., Weider*, 912 F. Supp. 502. Accordingly, Ms. Weber's and Plaintiffs' investigators' communications with Defendants' sales representatives did not violate RPC 4.2.

15 F.Supp.2d at 474-75.

It is difficult to generalize too much from these few authorities. Nonetheless, it would appear that conduct which employs some minor deceit or covert activity designed to obtain information that the opposing party seems otherwise willing to make generally available – such as that obtained by posing as a customer and asking nothing more than what a normal customer would ask – might pass muster. However, once an investigator begins to probe below the surface – pushing and pulling as investigators are quick to do -- to acquire more information than would normally be provided to "just anyone," or if the investigator pretends to be a specific person in an effort to acquire private information about that person, the line likely has been crossed.

Social networking sites present almost limitless opportunities as investigatory tools, and almost as many ethical traps for the unwary. If a lawyer is able to access an individual's information on social networking sites (e.g, Facebook, Twitter, etc.) because that information is publicly available, then there is no ethical prohibition to doing so. The New York State Bar Association Committee on Professional Ethics, in Formal Opinion 843, has issued an opinion reaching this conclusion. The Committee found that acquiring information in this manner is no different than acquiring information through some publicly accessible online or print media, or through a subscription research service such as Nexis or Factiva. See West Virginia Legal Ethics Opinion No. 2015-02 (2015) ("WV LEO 2015-02"); Pennsylvania Bar Association Formal Opinion 2014-300 (2014) ("Pa Formal Opinion 2014-300"); Massachusetts Bar Ass'n, Comm. On Prof. Ethics Op. 2014-5 (2014) ("MBA 2014-5"); Kentucky Bar Ass'n Ethics Opinion KBA E-434 (2014) ("KBA E-434"); New Hampshire Ethics Committee Advisory Opinion 2012-13/05 (2013); ("NH Opinion 2012-13/05") San Diego County Bar Legal Ethics Opinion (hereafter "SDCB Legal Ethics Opinion") 2011-2 (2011); New York State Bar Association, Comm. On Prof'l Ethics, Formal Opinion 843 (2010) ("NYSBA Formal Opinion 843") (2010); Oregon State Bar Formal Ethics Op. No. 2005-164 ("OSB 2005-164). Generally, this public viewing is simply not considered a "communication" with the individual (thus avoiding any application of Rule 4.2, prohibiting "communications" with represented individuals) and it does not matter if the individual is represented or not. Commentators have expressed the same view. NYSBA Commercial and Federal Litigation Section, Social Media Ethics Guidelines at p. 18 (2017); Witnov, *Investigating Facebook, supra*, at 61-63; Seidenberg, *Seduced: For Lawyers, the Appeal of Social Media is Obvious. It is Also Dangerous*, www.abajournal.com/magazine/article (February 1, 2011); Bennett, *Ethics of "Pretexting" in a Cyber World*, 41 McGeorge L. Rev. 271 (2010).

However, a lawyer may run afoul of New York's Rules of Professional Conduct if she tries to access sites that are not open to the public. On many social networking sites access is limited to

those granted access rights by the page creator. In some cases, access is limited to those who "friend" the creator. While NYSBA Formal Opinion 843 declined to address that situation, because it was not the case presented to it for an opinion, it did note a recent opinion issued by the Philadelphia Bar Association. In Opinion 2009-02, the Philadelphia Bar was confronted with a situation in which a lawyer inquired about using a third party to access the social networking site of an unrepresented adverse witness in a pending lawsuit for the purpose of obtaining information that might be useful for impeachment purposes at trial. Access could only be gained by the third party "friending" the adverse witness. The inquiring lawyer was proposing that the third party would friend the witness, using only truthful information but concealing the connection between the third party and the lawyer. The Philadelphia Bar Association concluded that such conduct would violate the Pennsylvania Rules of Professional Conduct. Specifically, the Philadelphia Opinion concluded that the third party's failure to reveal the connection with the lawyer would constitute deception in violation of the Rules and since the third party was acting under the supervision of the lawyer, the lawyer would be responsible for that deception.

While NYSBA Formal Opinion 843 declined to formally opine on the "friending" situation presented in the Philadelphia Opinion, it seems likely that the NYSBA Committee on Professional Ethics would reach a similar conclusion, given its comments. Other bar associations have reached this same conclusion. . See DC Bar Opinion 371 (2016); WV LEO 2015-02 (based on Rule 4.3); Pa Formal Opinion 2014-300 (based on Rule 4.3); MBA Opinion 2014-5 (based on Rules 4.1 and 8.4); NH Bar Opinion 2012-13/05 (based on Rules 4.1 and 8.4); SDCBA Opinion 2011-2 (California does not have Rules comparable to Rule 4.1 or Rule 8.4 and the San Diego Bar reached this conclusion based upon, among other things, a common law duty not to deceive.); see also Social Media Ethics Guidelines 18 (NYSBA/Commercial and Federal Litigation Section, May 2017)(in "communicating" with an unrepresented person via social media, a lawyer must use his/her full name and accurate profile; if the unrepresented person askes for additional information from the lawyer, the lawyer must accurately provide the information requested or otherwise cease all further communications and withdraw the request).

However, at least two opinions provide that so long as the information that is provided is truthful, even though it may not indicate the lawyer's connection to the matter, friending is permissible. Association of the Bar of the City of New York, Opinion 2010-2; Oregon Formal Ethics Opinion 2013-189.

Also, if the party to be friended is represented, Rule 4.2 is also likely implicated. That Rule prohibits communication by a lawyer (or another at the direction of a lawyer) with any represented party without the consent of that party's counsel.

XII. CONCLUSION

The adoption of the Rules of Professional Conduct marked a new chapter in professional responsibility in New York. On the one hand, these Rules bring New York practice into greater conformity with the rest of the country. In other respects, however, these Rules retain a special "New York flavor," which continues to mean lawyers practicing in New York cannot not simply assume that our rules are like those which govern everyone else (or govern even them when their practice takes them to other jurisdictions).

Unfortunately, the Courts' adoption of these Rules – most identical to those proposed by the Bar Association, but some not, and without any explanation as to why – leaves New York lawyers in the dark about the meaning of a number of these provisions, even years later.

EXCERPTS REGARDING PROPOSED REVISIONS TO RULE 3.3(c)

FROM THE

COMMITTEE ON STANDARDS OF ATTORNEY CONDUCT'S SEPTEMBER 30, 2018 REPORT TO THE NYSBA HOUSE OF DELEGATES

Rule 3.3
Conduct Before a Tribunal

Rule 3.3(a)(3) and Rule 3.3(b) both obligate lawyers, in specified narrow circumstances, to reveal information to remedy misconduct by a client or other person, even if the revelation would otherwise be prohibited by Rule 1.6. If a lawyer comes to know that the client or another witness called by the lawyer "has offered material evidence" and "the lawyer comes to know of its falsity," *see* Rule 3.3(a)(3), or if a lawyer who represents a client before a tribunal "knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding," *see* Rule 3.3(b), then the lawyer "shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal," *see* Rule 3.3(a) and (b). Disclosure to the tribunal is a momentous step, fraught with serious consequences for both lawyer and client, and even less drastic remedial measures can telegraph problems with a case. Therefore, it is important for lawyers to know when the duty to make disclosure or take other remedial measures ends.

ABA Model Rule 3.3(c) addresses the end point by providing that the duties in paragraphs (a) and (b) "continue to the conclusion of the proceeding." COSAC recommended that language to the Courts in 2008, but the Courts declined to adopt that recommendation, and did not substitute any alternative end point. Thus, New York Rule 3.3 does not specify when a lawyer's duty to take reasonable remedial measures under Rules 3.3(a) and 3.3(b) terminates. Rather, New York Rule 3.3(c) says only that the duties stated in paragraphs (a) and (b) of Rule 3.3 "apply even if compliance requires disclosure of information otherwise protected by Rule 1.6" (New York's basic confidentiality rule).

Various New York ethics opinions have attempted to interpret Rule 3.3 to articulate a workable and practical time limit under Rule 3.3(c). These opinions have done so by limiting the phrase "remedial measures" to situations where disclosure or other measures will actually remedy the problem of false evidence. In N.Y. State 831 n.4 (2009), for example, the Committee said:

> We believe the obligation extends for as long as the effect of the fraudulent conduct on the proceeding can be remedied, which may extend beyond the end of the proceeding — but not forever. If disclosure could not remedy the effect of the conduct on the proceeding, we do not believe the Rule 3.3 disclosure duty applies.

N.Y. State 837 (2010) revisited this issue and said:

> 16. ... [T]he duration of counsel's obligation under New York Rule 3.3(c) as adopted may continue even after the conclusion of the proceeding in which the false material was used. ... *[T]he endpoint of the obligation nevertheless cannot sensibly or logically be viewed as extending beyond the point at which remedial measures are available*, since a disclosure which exposes the client to jeopardy without serving any remedial purpose is not authorized under Rule 3.3. [Emphasis added; citations omitted.]

N.Y. City 2013-2 (2013) reached a similar conclusion, saying:

> [T]he obligations under Rule 3.3(a)(3) survive the "conclusion of a proceeding" where the false evidence was presented. ABA Rule 3.3, cmt. [13] clarifies that the phrase "conclusion of a proceeding" means "when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed." We believe that the courts' rejection of an explicit statement that the obligation ends when the proceeding ends, makes this evident.

N.Y. City 2013-2 thus concluded that Rule 3.3(c) requires a lawyer to disclose false evidence (i) to the tribunal to which the evidence was presented "as long as it is still possible to reopen the proceeding based on this disclosure," or (ii) "to opposing counsel where another tribunal could amend, modify or vacate the prior judgment."

COSAC believes that these tests inject too much uncertainty into determining whether disclosing false testimony to a tribunal or to opposing counsel, or taking other remedial measures, is still required after the conclusion of a proceeding. For the same reason, COSAC rejected the Texas version of Rule 3.3(c), which provides that a lawyer's duties continue until remedial legal measures are "no longer reasonably possible." *See* Texas Rule 3.03(c) ("The duties stated in paragraphs (a) and (b) continue until remedial legal measures are no longer reasonably possible"). Comment [14] to Texas Rule 3.04 elaborates on this test by saying: "The time limit on the obligation to rectify the presentation of false testimony or other evidence varies from case to case but continues as long as there is a reasonable possibility of taking corrective legal actions before a tribunal."

In COSAC's view, Rule 3.3(c) should articulate a bright line to mark the end point of the duty to take remedial measures under Rule 3.3(a) and (b). The certainty of a bright line is necessary both (i) to protect clients against belated accusations of perjury that may have no appreciable effect beyond damaging a client's reputation, and (ii) to protect lawyers against discipline for failing to attempt remedial measures when a lawyer believes in good faith that remedial measures are no longer possible. COSAC therefore recommends that New York amend Rule 3.3(c) to match ABA Model Rule 3.3(c), which ends the lawyer's obligation upon the "conclusion of the proceeding." On balance, COSAC believes this bright line termination of the duty – at the conclusion of the proceeding – is preferable to New York's current open-ended formulation, and is preferable to alternative formulations based on when remedial measures are no longer possible.

COSAC recognizes that, under the proposed formulation, some fraud on tribunals may go unremedied because the false evidence or other impropriety will not be discovered until after the conclusion of a proceeding. New York has a long tradition of a strong duty of confidentiality. Indeed, DR 7-102(B) in the old New York Code of Professional Responsibility did not ordinarily allow disclosure even to remedy a client's fraud on a court if the information to be disclosed was protected as a confidence or secret.[1] New York did not appear to suffer from frequent unremedied fraud on tribunals under the Code. Nevertheless, COSAC is separately considering whether Rule 1.6 should include a discretionary exception to the duty of confidentiality that would permit (but not require) a lawyer to disclose confidential information to the extent the lawyer reasonably believes necessary to remedy a fraud on a tribunal or a wrongful conviction based upon such a fraud.

In any event, COSAC believes that a lawyer who has offered false evidence will most often come to know of its falsity per Rule 3.3(a)(3) before the conclusion of the proceeding (perhaps when an opposing party's cross-examination exposes the false evidence). Likewise, COSAC believes that a lawyer usually will learn before the conclusion of a proceeding that a person has engaged in criminal or fraudulent conduct related to the proceeding. Although no empirical evidence is available on these points, COSAC believes that the potential damage to confidentiality by *requiring* disclosure (or other remedial measures) after the conclusion of a proceeding outweighs the potential gain to the system of justice by retaining New York's current version of Rule 3.3(c). Trust is the fundamental bedrock of a strong attorney-client relationship, and the broader the exceptions to the duty of confidentiality, the more difficult it will be for attorneys to gain and maintain the trust of their clients.

[1] DR 7-102(B) provided as follows:

> B. A lawyer who receives information clearly establishing that:
>
> 1. The *client* has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer *shall reveal the fraud* to the affected person or tribunal, *except when the information is protected as a confidence or secret.*
>
> 2. A person *other than the client* has perpetrated a fraud upon a tribunal *shall reveal the fraud* to the tribunal. [Emphasis added.]

Thus, although there are arguments that requiring a lawyer to take remedial measures beyond the conclusion of the proceeding furthers the interests of justice, COSAC believes that adopting the ABA version of Rule 3.3(c) and the related Comments strikes a better balance and will provide needed clarity and certainty in this important area. In reviewing the Rules of Professional Conduct adopted by other states, COSAC noted that only three other states (Florida, Texas, and Wisconsin) require remedial measures after the close of proceedings. In contrast, more than thirty jurisdictions terminate Rule 3.3 remedial duties under Rule 3.3(a) and (b) at the conclusion of the proceeding, in line with ABA Model Rule 3.3(c) – *see* *https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_3.authcheckdam.pdf* or *https://bit.ly/2kfYBpx* .

Accordingly, COSAC recommends amending Rule 3.3(c) as follows:

> (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

COSAC also recommends adopting ABA Comment [13] as new Comment [13] to New York Rule 3.3, with revisions to refer not only to "when a final judgment in the proceeding has been affirmed on appeal," as in the ABA Comment, but also more broadly to "when a final judgment or order in the proceeding has been entered after appeal." Thus, new Comment [13] would explain the time limit in Rule 3.3(c) as follows:

> [13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment or order in the proceeding has been entered after appeal or the time for review has passed.

(Existing New York Comment [13] to Rule 3.3, which is on a different topic and has no equivalent in the ABA Model Rules, would be renumbered as New York Comment [13B]. That renumbering would maintain consistency with ABA numbering and would continue New York's convention of using capital letters to mark Comments adopted by New York but not by the ABA.)

Candor Before The Tribunal

Hypotheticals

Hypothetical 1: Direct Representation By Lawyer

You are representing a client in a harassment case brought by a former employee. In your early interviews with your client's HR representative, she has mentioned to you that she doubts there is any merit to the plaintiff's claims because, among other things, in response to the former employee's internal complaint, a "thorough" investigation had been conducted and "at least a dozen individuals must have been interviewed," with no one supporting the former employee's version of events. Because it is early in the case and discovery hasn't even started, you have not had a chance to review the full details of the investigation. Despite this early stage, you recently started settlement discussions with plaintiff's counsel. You made some progress, but you were still apart on a settlement amount, in part because plaintiff's counsel apparently didn't think that an adequate internal investigation occurred when his client first complained internally. Up to this point there had been no reason to reveal the scope of the investigation but sensing that now it might push the settlement discussions into a more acceptable range, you blurt out that of course there was a thorough investigation with "at least a dozen" individuals interviewed. With that information, there is a noted change in the plaintiff's position and he reduces the settlement demand enough that you are now confident that you will be able to complete a settlement.

When you explain to your client where things stand, and how disclosing the scope of the investigation has made a significant difference in the tenor of the settlement discussions, your client reluctantly tells you that while she did in fact do an investigation at the time of the internal complaint, due to time constraints caused by the Company preparing for massive layoffs, it was a pretty perfunctory review. While she said she remembers early on that she may have casually indicated to you that she talked to a number of people as part of that internal investigation, she in fact only spoke to the former employee and the alleged harasser. When you tell her that you need to correct your statement to opposing counsel, she insists that you not do so, because she sees how close you are to settlement and how important that piece was in getting there.

Just as you finish up with the client, plaintiff's counsel calls to see where things stand regarding settlement discussions and to see if "we have a deal."

What do you do now?

Would it matter if you had made the representation to the court itself, perhaps in the context of a settlement conference?

Hypothetical 2: False Testimony By The Lawyer's Client

During the course of an arbitration over a subcontracting dispute with the union, your client's HR Director testifies, based on his review of Company records, to the Company's history of subcontracting, providing numerous examples of instances in which subcontracting had happened in the past with the union's knowledge and acquiescence, albeit a number of years ago (predating the personal involvement of your HR director/witness or any of the union's witnesses).

About two weeks after you have submitted your brief, but before the arbitrator has reached any decision, your client calls you. He tells you that in the course of a Company effort to clean out old files, he just came upon a file which makes it clear that his testimony, to the effect that the union acquiesced in this prior subcontracting, was simply wrong. Apparently, the union had disputed it when it occurred years ago, and a resolution had been agreed to as to how subcontracting would be handled, which apparently everyone simply forgot about. The fact that the Company had in fact been operating in accord with that resolution (for many years) until this most recent dispute arose probably explains how this agreed upon resolution had been forgotten about. Your client contact is clear that he was previously unaware of this resolution agreement until just now. Of course, his first reaction (because the case otherwise seemed to go so well) was that he was glad he only uncovered this information now and not before he had testified.

What do you do with this information?

Hypothetical 3: Learning Client's Position Is False

You are representing a union in an arbitration on behalf of a member who was fired for allegedly submitting a forged note to his employer. The note in question states that the member could not stay at work to provide overnight coverage during a snowstorm because the member had to pick up his child from school, which was closing early on account of the snow. The note is on the school's letterhead but contains several typos that make the employer suspect it is forged.

The union, employer and member met several times pre-arbitration to attempt to resolve the grievance. You were not present at these meetings, but understand that the member maintained at these meetings that the note was not forged. When you met with the union and the member pre-arbitration, the member insisted to you that the note was not forged, but was unable to provide you with the name or description of the employee of the school who wrote it.

The morning of the arbitration, you learn from the employer's counsel that the employer intends to call as a witness an employee of the school who will testify that the member did not pick up his son from school on the day in question. You also learn that the member's spouse works for the school in a position where she has access to the school's letterhead, but is not authorized to provide such a note on behalf of the school.

When you relay this to the union and member, the member tells you that he forged the note. The union advises the member that it is in his best interests to try to negotiate a settlement agreement so he does not have to testify. You tell the employer's counsel and arbitrator that the union wants to pursue settlement. The arbitrator insists that first he wants to hear opening statements on the record.

During its opening statement, the employer says that the member forged the note and then lied about it. You make an opening statement without saying anything about the origin of the note. As soon as you're finished, the arbitrator turns to you and asks who wrote the note.

What do you do?

Hypothetical 4: False Testimony By The Other Side

In the course of a trial, one of the witnesses called by your opponent incorrectly testifies that she personally observed your client's Supervisor at a very specific time and place engage in some harassing conduct. The fact is that she is wrong about the time and place. However, that testimony is very helpful to your position, because it actually undermines other evidence of a far more serious nature offered by your opponent. From your own investigation (including interviews with other disinterested witnesses, now known to the other side) you know that the incident which this witness described she observed did in fact happen, but three days earlier than she indicated in her testimony. But by placing the Supervisor where she did, when she did, this witness' testimony is extremely helpful to you.

Do you have to advise the court of the witness's mistake?

Workshop A: ERISA
Employee Leave of Absence Requirements That Affect New York State Employers

Stanley D. Baum, Esq.
Cary Kane LLP, New York, NY

Paul T. Esposito, Esq.
Slevin & Hart, P.C.Washington, DC

Howard T. Schragin, Esq.
Sapir Schragin LLP, New York, NY

Elizabeth E. Hunter Esq.
Frumkin & Hunter LLP, New York, NY

Employee Leave of Absence Requirements That Affect New York State Employers-Introduction

Employers in New York State may be required to allow employees to take a leave of absence under one or more of the following acts;

- The Federal Family and Medical Leave Act
- New York State Paid Family Leave
- New York City Earned Safe and Sick Time Act

Today's presentation covers each of these acts, what they require and how they interact with each other. These materials consist of an outline and memorandum for each of the acts and the presentors.

Note: Effective March 30, 2019, Westchester County will have its own paid sick time requirements, patterned after the New York City Act. The materials contain a discussion of the new Westchester rules.

THE BASICS OF THE FAMILY AND MEDICAL LEAVE ACT

I. INTRODUCTION

II. APPLICABILITY AND ELIGIBILITY

1. To whom does FMLA apply?

2. When does an employee become eligible for FMLA?

    a. 12 month requirement

    b. 1,250 hours of service requirement during prior 12 months

3. Leave Unpaid

    a. Employer can require use of paid leave

III. TAKING FMLA LEAVE

1. Reasons for Leave

    a. Definition of “Serious Health Condition”

    b. Intermittent or Reduced Leave Schedule

2. Procedure for Applying for FMLA Leave

    a. Employee Obligations

    b. Employer Obligations – Required Notices

3. Documentation of “Serious Health Condition”

    a. Timing and Content of Certification of “Serious Health Condition”

        i. Authentication and HIPAA Concerns

    b. Recertification

    c. Fitness for Duty Certification

4. Calculating Use of FMLA Leave

    a. 12 month period for taking FMLA leave

    b. Calculating Leave in terms of Hours

    c. Miscellaneous Calculation Rules

IV. PROTECTED BENEFITS DURING FMLA

1. Job Restoration at the End of Leave

a. "Key Employee" exception

2. Maintenance of Health Benefits

a. Employee Premium Payments Required; Notice Obligations for Delinquent Premium Payments

a. Obligation to Pay Back Employer's Health Benefit Premiums

3. Other Non-Health Benefits; Limitations on Protected Benefits

V. FMLA FOR MILITARY SERVICE MEMBERS

1. "Qualifying Exigency" Leave

2. Military Caregiver Leave

a. Definition of "Serious Injury or Illness"

VI. USERRA AND FMLA INTERACTION

VII. MISCELLANEOUS FMLA RULES

Workshop A: ERISA Employee Leave of Absence Requirements That Affect New York State Employers

New York Paid Family Leave

By Howard Schragin

Overview

- New York's paid family leave law was signed on April 4, 2016.
- Benefits begin under the law on January 1, 2018.
- Provides eligible employees with partially-paid, job protected leave in certain qualifying circumstances.

Who Is Covered?

- Almost all private sector employees in New York with at least 1 employee are covered.
- Full-time and part-time employees are covered.
- There is no minimum number of employees.
- Employees are covered regardless of citizenship or immigration status.
- Public sector employers can opt in to coverage and public sector unions can negotiate to opt in to coverage through the bargaining process.

Who Is Eligible?

- Employees with a regular work schedule of 20 or more hours per week are eligible for paid leave after 26 weeks of employment.
- Employees with a regular work schedule of less than 20 hours per week are eligible for paid leave after 175 days worked.
- Employees are not eligible to take paid leave if they:
    - are collecting New York State disability benefits (total weekly NYS disability benefits and weekly paid family leave benefits is capped at 26 weeks for any 52-consecutive week period);
    - are not working or is on administrative leave;
    - are collecting sick pay or paid time off from the employer;
    - are working the same hours for which the paid leave would be taken; or
    - are employed in a position outside New York State.

What Can Paid Family Leave Be Used For?

- Eligible employees may take paid family leave for three purposes:
    - Providing care for the employee's child (included if adopted, step or in loco parentis), domestic partner, parent, parent-in-law, grandparent, grandchild, or spouse with a serious health condition (including serious mental health condition). A serious health condition is an illness, injury, impairment or physical or mental condition that involves (a) in-patient care in a hospital, hospice or residential health care facility, or (b) continuing treatment or continuing supervision by a health care provider;
    - Bonding with the employee's child within 12 months of the child's birth or placement for adoption or foster care; or
    - Attending to certain needs ("qualifying exigencies") arising from the active military duty of a family member (the employee's child, parent, parent-in-law, spouse or domestic partner).
- Employees cannot take leave for their own health condition.
- "Providing care" may include necessary physical care, emotional support, assistance in treatment, transportation, and other activities.
- Family leave may be taken before the actual placement or adoption if an absence from work is required for the placement or adoption to proceed (*e.g.*, for counseling sessions, court appearances, and required physical examinations).
- Leave due to a military exigency may be taken by an eligible employee whose spouse, domestic partner, child or parent is on active duty, or has been notified of an impending call to duty. Such leave may be taken for several reasons, including to make alternative childcare arrangements, or provide childcare where needed, to enroll in or transfer to a new school, to attend school or childcare meetings, to make financial and legal arrangements, or to spend time with a covered military member who is home on short-term leave.

How Much Leave Is Provided To Eligible Employees?

- In 2018, eligible employees may receive up to 8 weeks of paid family leave during any rolling 52-week period.
- In 2019 and 2020, employees may receive up to 10 weeks of paid family leave.
- Starting in 2021, employees may receive up to 12 weeks of leave.
- Part time employees are entitled to paid family leave, on a reduced basis based upon the average number of days the employee works in a week. For example, an employee who

works 3 days each week is entitled to 60% (three-fifths) of the leave available to full time employees at the time.

- Leave can be taken intermittently in units of at least one day.

What Benefits Are Provided?

- In 2019, employees will receive 55% of their average weekly wage (capped at 55% of the New York State Average Weekly Wage);

- In 2020, employees will receive 60% of their average weekly wage (capped at 60% of the New York State Average Weekly Wage);

- In 2021, employees will receive 67% of their average weekly wage (capped at 67% of the New York State Average Weekly Wage).

- The New York State Department of Labor has determined that the NY State average weekly wage for 2019 is $1,357.11.

Who Pays For The Leave?

- Paid family leave is funded by employees through payroll deductions.

- A maximum rate of payroll deduction per employee is established each year. For 2019, the New York State Superintendent of Financial Services established a maximum rate of payroll deduction, for each employee, of 0.153% of the employee's weekly wage, up to 0.153% of the NY State average weekly wage recognized by the New York State Department of Labor.

- The state average weekly wage rate applicable to 2019 paid family leave benefits is $1,357.11.

- This means that, in 2019, the maximum annual payroll deduction for an employee is $107.97.

- Employees earning less than the Statewide Average Weekly Wage of $1,357.11 will contribute less than the annual cap of $107.97, consistent with their actual wages. For example:

    - Employees earning $519 a week ($27,000 a year) will pay approximately 79 cents per week ($519 x 0.153%).
    - Employees earning $1,000 a week ($52,000 a year) will pay $1.53 per week ($1,000 x 0.153%).
    - Employees earning $1,357.11 ($70,569.72 a year) or more will pay 0.153% x their gross wages each pay period until they reach the maximum of $107.97.

What Notice Is Required?

- Employee Notice. If the need for leave is foreseeable, such as due to an expected birth or other qualifying event, employees must provide at least 30 days' notice before the leave is to begin. If the leave is not foreseeable, such as an emergency medical procedure, employees should give notice as soon as practicable. Employees taking intermittent leave must provide notice as soon as practicable before each day of intermittent leave.

- Employer Notice. Employers must conspicuously post a Notice of Compliance provided by the insurance carrier which notifies employees that the employer has Paid Family Leave coverage. Employers are required to update its employee handbook to discuss the Paid Family Leave. relevant employer policies and employee obligations, particularly the requirement for an employee to provide notice that he or she wishes to take the leave, and to file the leave request, certification and other documents with the policy carrier. If the employer does not have a handbook, it must provide its employees separate written guidance on Paid Family Leave with the foregoing information. An employer should also provide an employee with a "Statement of Rights for Paid Family Leave" when it learns that the employee is taking a leave that would qualify under paid family leave.

What Happens To The Employee's Health Insurance During Paid Family Leave?

- Employees will continue to receive their existing health insurance benefits on the same terms during the duration of a paid family leave.

- During the leave, the employee must continue to make all required premium contributions, and the employer must continue to pay its portion of the premium as if the employee is not on leave.

Is the Employee's Job Protected?

- The Paid Family Leave Law prohibits discrimination and retaliation against employees for requesting or taking paid family leave.

- Employees have reinstatement rights and must be reinstated to the position they had when the leave began, or to a comparable position with comparable pay and benefits.

How Is Paid Leave Coordinated With Other Allowed Leave, Vacation And Other Benefits?

- Paid Time Off

- Family Medical Leave

- NYC Earned Sick and Safe Time

- Disability Benefits

NEW YORK STATE REQUIRES PRIVATE EMPLOYERS TO ALLOW PAID FAMILY LEAVE STARTING IN 2018

INTRODUCTION

In 2016, Governor Cuomo signed into law New York State's Paid Family Leave program. Under this program, which became effective January 1, 2018 (except for payroll deductions which began on July 1, 2017), employees of private employers in New York State are entitled to take job-protected, paid leave to care for a child, to care for a family member with a serious health condition or to help manage affairs if a family member is called to active military service.

The New York State Paid Family Leave program (called the "PFL" below, for convenience) applies to all private employers with at least one employee working in New York State for 30 consecutive days. It applies to in-state employers, and to out-of-state employers with respect to any employees who work in New York State, who are eligible for the leave.

The PFL is administered by the New York State Workers' Compensation Board (the "Board"). The Board has provided interpretive regulations under the PFL.

WHO PAYS FOR THE LEAVE?

Payroll Deductions. The PFL is funded solely by employees through payroll deductions. An employee's participation in the PFL, and thus the deductions from his or her pay, is not optional, except that an employee may be offered the opportunity to waive the deductions if he or she never works 26 consecutive weeks (and his or her regular employment schedule is at least 20 hours per week) or 175 days in a 52 consecutive-week period (and his or her regular employment schedule is not more than 20 hours per week). The waiver is revoked within eight weeks

(retroactive back to date of hire, if applicable) of an increase in an employee's work hours so that he or she no longer meets the foregoing requirements for a waiver.

Rate Of Payroll Deduction. A maximum rate of payroll deduction per employee is established each year. For 2019, the New York State Superintendent of Financial Services established a maximum rate of payroll deduction, for each employee, of 0.153% of the employee's weekly wage, up to 0.153% of the NY State average weekly wage recognized by the New York State Department of Labor. The state average weekly wage rate applicable to 2019 PFL benefits is $1,357.11. This means that, in 2019, the maximum annual payroll deduction for an employee is $107.97. Employees earning less than the current statewide average weekly wage of $1,357.11 will contribute less than the annual cap of $107.97, consistent with their actual wages. For example:

1. Employees earning $519 a week ($27,000 a year) will pay approximately 79 cents per week ($519 x 0.153%).
2. Employees earning $1,000 a week ($52,000 a year) will pay $1.53 per week ($1,000 x 0.153%).
3. Employees earning $1,357.11 a week ($70,569.72 a year) or more will pay 0.153% x their gross wages each pay period until they reach the maximum of $107.97.

The State provides a handy deduction calculator for employees on its PFL website: https://paidfamilyleave.ny.gov/paid-family-leave-calculator2019.

For purposes of the PFL, "wages" include all types of remuneration, including salaries, commissions, tips, bonuses and the reasonable money value of room and board. Salary and

hourly remuneration are deemed paid in accordance with the employer's regular payroll practices. Bonuses, if not paid regularly, should be prorated in accordance with an example on form PFL-1 (discussed below).

Funding Vehicle. The PFL is automatically included in the disability benefits policy that the employer has with the New York State Insurance Fund. Alternatively, the employer can acquire a paid family leave insurance policy from another carrier, except that coverage for disability benefits and PFL must be under the same policy (with the NYS Insurance Fund or other carrier). The amounts deducted from the employees' pay are either applied to directly pay the premiums, or to reimburse the employer for its own payment of the premiums. It is not yet clear whether the policy carrier can charge the employer more than the amount taken from employee's pay. When an employee takes the paid leave, he or she is paid by the policy carrier.

Option Of Self-Insurance. In lieu of obtaining coverage under its disability policy or another insurance policy, the employer can self-fund the PFL. In this case, the employer would retain the amounts it deducts from employees' pay, and pay the employee out of the retained funds when the employee takes a paid leave. However, a number of conditions must be met to self-insure, e.g., the employer must file an application with the Board, which will review whether the employer has the financial and administrative ability to self-insure, and the employer must post security and enter into an agreement with the Board under which the employer assumes the liability to make required payments (using its own funds when benefits exceed amounts collected by payroll deduction). It is assumed below that an employer will not choose to self-insure.

WHEN CAN PAID LEAVE BE TAKEN UNDER THE PFL?

Work Requirement For Eligibility. An employee is eligible to take the paid leave after he or she has been employed for at least 26 consecutive weeks (if he or she normally works at least 20 hours per week) or has been employed for at least 175 days (if he or she normally works less than 20 hours per week). Work outside of New York State counts for this purpose.

Situations In Which Paid Leave May Be Taken. The PFL allows an eligible employee to take paid leave in any one of the following situations:

(a) to care for or bond with a child during the first 12 months following the child's birth, adoption, or placement for foster care (but not before the birth, adoption or placement);

(b) to provide physical or mental care for a spouse, domestic partner, child, parent, parent in-law, grandparent or grandchild with a "serious health condition", defined as an illness, injury, impairment, or physical or mental condition that involves: (i) inpatient care in a hospital, hospice, or residential health care facility, or (ii) continuing treatment or continuing supervision by a health care provider; or

(c) to address certain emergencies, specified in the federal Family and Medical Leave Act, when a spouse, child, domestic partner or parent is on, or has been notified of an impending call or order to active military duty.

PFL may not be taken for an employee's own health condition.

Amount Of Leave Available. The amount of allowed paid leave per year is phased-in over four years, starting January 1, 2018. The PFL provides for 8 weeks of paid leave in 2018, 10 weeks of paid leave in 2019 and 2020, and 12 weeks of paid leave in 2021. An intermittent leave schedule is permitted.

When Paid Leave May NOT Be Taken. Note that an individual may NOT take paid leave under the PFL, if he or she:

-- is collecting New York State disability benefits (total weekly NYS disability benefits and weekly PFL paid leave benefits is capped at 26 weeks for any 52-consecutive week period);

-- is not working or is on administrative leave;

-- is collecting sick pay or paid time off from the employer (except for concurrent use as discussed below);

-- is working the same hours for which the paid leave would be taken; or

-- is employed in a position NOT localized in New York State (to be localized, most of the work for the job must be performed in New York State).

Individuals Not Covered By The PFL. The same categories of employees who are exempt for the purposes of statutory disability benefits are also exempt under the PFL, such as independent contractors, elementary/secondary school students, clergy, livery drivers, jockeys, learned professionals, teachers and executive officers in 501(c)(3) religious, charitable or education institutions, among several others.

HOW MUCH IS THE EMPLOYEE PAID DURING THE PFL LEAVE?

The amount paid to an employee during the PFL leave by the policy carrier will be:

-- 55% of his or her average weekly wage in 2019 (capped at 55% of the NY State average weekly wage);

-- 60% of his or her average weekly wage in 2020 (capped at 60% of the NY State average weekly wage); and

-- 67% of his or her average weekly wage in 2021 (capped at 67% of the NY State average weekly wage).

An employee's average weekly wage is his or her average weekly total wage for the 8 week period immediately preceding the start of the leave. Again, the New York State Department of Labor has determined that the 2019 NY State average weekly wage is $1,357.11. Like unemployment insurance, PFL benefits are reportable for Federal but not State tax (IRS tax reg. section 1.85-1).

WHAT NOTICE AND DISCLOSURE REQUIREMENTS APPLY?

Notice By Employees. If the need for leave is foreseeable, an employee must provide his or her employer with 30 days advance notice that he or she wishes to take paid leave. If the need is not foreseeable, a notice requesting the leave must be given by the employee as soon as practicable. The notice must make the employer aware of the event for which the leave is required and the expected timing and duration of the leave. It is not necessary to assert rights under or specifically refer to the PFL. An employee asking to take leave must complete and file a request

form and medical certification, and also must also file certain documentation (such as a birth certificate), with the policy carrier.

Form PFL-1 And Other Required Certification Forms. Currently, the Board-provided request form is PFL-1, and the various l certification forms are PFL-2 (Bonding Certification), PFL-3 (Release of Personal Health Information Under the Paid Family Leave Law), PFL-4 (Health Care Provider Certificate for Leave of Family Member with Serious Health Condition) and PFL-5 (Military Qualifying Event). The employer provides the request form and the medical certification forms to the employee (the employer itself obtains these forms from the policy carrier or the New York State PFL website). The employee should complete the PFL-1 and return it to the employer. The employer then completes the employer portion of the PFL-1 form and returns it to the employee within three (3) business days. The employee then completes the PFL-1 and the applicable medical certification forms, gathers any necessary supporting documentation and sends all forms and documentation to the policy carrier. The carrier will contact the employee directly if there are any issues with incomplete or missing documentation.

Policy Carrier Review. The carrier pays or denies the leave request within eighteen (18) days of first having a completed application.

Notice And Disclosure By Employers. The employer must conspicuously post a Notice of Compliance provided by the insurance carrier which notifies employees that the employer has PFL coverage. . The employer is also required to update its employee handbook to discuss the PFL, relevant employer policies and employee obligations, particularly the requirement for an employee to provide notice that he or she wishes to take the leave, and to file the leave request, certification and other documents with the policy carrier. If the employer does not have a

handbook, it must provide its employees separate written guidance on the PFL with the foregoing information.

An employer should also provide an employee with a "Statement of Rights for Paid Family Leave" when it learns that the employee is taking a leave that would qualify under the PFL. Employers should use the Statement which is made available by the Board, and which may be found online at: https://paidfamilyleave.ny.gov/pfl-271s-form-2019. This is similar to the requirement under which the employer must provide such a notice when the employee may be eligible for disability benefits.

IS THE PAID LEAVE JOB PROTECTED?

Job Protection. The paid leave under the PFL is job protected. This means that an employee who takes leave is entitled to return to the same position that he or she had prior to the leave, or to a position with pay, benefits and other terms and conditions of employment which are comparable to the pre-leave position. The employer may not discriminate or retaliate against the employee for taking the leave.

Maintaining Health Benefits. The employer is required to maintain the employee's health benefits during the paid leave, and may require the employee to continue to pay for his or her share of the cost of coverage. The health benefits may be terminated, upon 15 days' advance written notice to the employee, if any required payment for coverage is more than 30 days late. The termination generally becomes effective at the end of the 30-day period. Health coverage must continue when the employee returns to active employment after the leave, even if all employee contributions have not been made.

Other Benefits. Aside from health benefits, any benefits accrued by an employee up to the time of the paid leave must be maintained. Employees do not otherwise accrue seniority or any other benefits while on paid leave.

HOW IS PAID LEAVE COORDINATED WITH OTHER ALLOWED LEAVE, VACATION AND OTHER BENEFITS?

Coordination With Paid Time Off.

If the employer already offers a paid family leave program that fulfills or exceeds the requirements under the PFL, employees will receive only those benefits provided under that program. The provisions of the PFL law provide a minimum which an employer may choose to exceed.

An employee does NOT have to take all of his or her employer-paid sick leave, personal days and/or vacation days ("paid time off" or "PTO"), before using PFL. An employer may permit the employee to use PTO to obtain full wages, prior to, or concurrent with, taking the paid leave under the PFL, but may not require the employee to use the PTO.

Employers may, however, prohibit employees from using PTO during a period of PFL leave. However, an employer that provides full pay for a period during which PFL is available may request reimbursement from the policy carrier charged against family paid leave benefits. Employers should update their employee handbooks and leave policies to inform employees precisely how PTO benefits interact with the PFL.

Coordination With FMLA. Employers are subject to the federal Family and Medical Leave Act, and must provide unpaid leave pursuant to that Act ("FMLA Leave"), if they employ at least 50 employees within a 75-mile radius. Employees are required to use paid leave under the PFL concurrently with any FMLA Leave available to them, when leave is taken for a reason available under both laws (for instance, to care for a spouse with a serious health condition), unless the employer permits otherwise. This is permitted so long as the employer notifies the employee of this concurrent use. If an employer fails to provide this notice, the employee is allowed to receive PFL benefits without concurrently using the benefits available under FMLA. When the employer requires PFL to be taken concurrently with FMLA leave, if the employer informs the employee of his or her eligibility for PFL and the employee declines to apply for payment, the employer and its policy carrier may count the leave taken against the employee's maximum duration of paid leave. Employers should make clear in their policies the circumstances in which FMLA leave and PFL leave will run concurrently.

Further, when the leaves are taken concurrently, the employer may charge the employee's accrued PTO in the manner allowed by the FMLA regulations. The paid leave under the PFL may not be used to extend any leave available under the FMLA. However, leave for an employee's own serious health condition may be taken under FMLA, but not under the PFL, so that such a leave under FMLA does not decrease any leave that the employee could subsequently take under the PFL. Further, an employee may use PFL and FMLA consecutively. For example, if an employee develops a serious health condition during pregnancy and birth of a child, and then-as the condition clears up- wants to take leave to bond with a child, she may be entitled to

request twenty (20) weeks of leave in 2018—twelve (12) weeks of unpaid FMLA leave for the serious health problem, then eight (8) weeks of PFL to bond with the child.

The PFL and FMLA also provide for different treatment of leave by members of the same family. Under the FMLA, an employer may not require spouses to use their FMLA benefits at different times, but are only required to allow the two spouses a combined total of twelve (12) weeks of leave if the leave is taken in connection with the birth or adoption of the employee's child or foster care placement, or to care for the employee's parent with a serious health condition. Conversely, while an employer may require family members (not just spouses) to use PFL to care for the same family member at different times, each family member is entitled to the full amount of PFL.

Again, employers should update their employee handbooks and leave policies to inform employees how PFL interacts with FMLA.

Note that benefits may be available to an employee with his or her own serious health condition under New York State short-term disability benefits program (discussed below).

Coordination With NYC Earned Safe and Sick Time. The New York City Earned Safe and Sick Time Act generally provides an employee working in New York City with up to 40 hours of paid sick or safe time leave for specific eligibility purposes. According to guidance from the Board, leave under the Act interacts with the PFL in a similar manner as PTO. Based on this Board guidance, employers may allow their eligible employees to use benefits under the New York City Earned Safe and Sick Time Act during PFL to supplement their pay. One option is for the employer to provide the employee with the ability to use sick time under the New York City

Earned Safe and Sick Time Act when he or she qualifies under both laws (like it may for vacation, PTO, and parental leave), in order to receive full payment for the missed time. In that case, the New York City Earned Safe and Sick Time Act and PFL time would run concurrently and the employee would receive 100% pay, and the employer would seek reimbursement from the policy carrier.

Coordination With New York State Short-Term Disability Benefits. An employee may not receive New York State Short-Term Disability Benefits or "STDBs" at the same time as he or she takes PFL. However, an employee may receive STDBs and PFL benefits in succession. For example, after giving birth to a child, the employee could receive STDBs, and then take PFL to bond with the child. An employee may take a maximum of twenty-six (26) weeks of receiving STDBs and PFL leave in a twelve-month period.

WHAT ARE THE TAX CONSEQUENCES OF THE EMPLOYEE CONTRIBUTIONS AND PFL BENEFITS?

Employee Contributions. Although the law and regulations are silent on this issue, the Department of Taxation and Finance recently issued guidance clarifying that employers should take payroll deductions for PFL benefits from after-tax wages. Employers should report employee contributions on employees' W-2 forms using Box 14 (state disability insurance taxes withheld). Employers that pay premiums should impute income to their employees. Employees may deduct premium amounts as part of state income taxes if they itemize their federal tax returns.

PFL Benefits. These benefits are considered taxable, non-wage income. In addition, taxes will not be automatically withheld from PFL benefits, but employees can request voluntary tax withholding. If the New York State Insurance Fund or a carrier pays the PFL benefit to employees, they will issue a Form 1099-G or 1099-MISC, to the employee. Employees who do not itemize federal income taxes (and therefore do not deduct premiums paid) may reduce the taxable amount of PFL benefits by the value of premiums paid.

WHAT FORMS HAS THE BOARD PUBLISHED FOR THE PFL?

The Board published the employee application and certification forms, the waiver form and the application forms for employers who voluntarily provide coverage to PFL-exempt employees. These forms are available at: https://paidfamilyleave.ny.gov/forms.

RULES FOR COLLECTIVELY BARGAINED EMPLOYEES

A governing collective bargaining agreement (the "CBA") may provide different (but comparable) benefits to those offered under the PFL. The CBA may also provide rules pertaining to the paid leave which differ from those in the Board's regulations, subject to Board approval, including that:

--the CBA may set out eligibility requirements for paid leave, so long as the CBA does not require more work time than the PFL regulations for eligibility (see eligibility requirements above); and

--the CBA may provide that the union is responsible for collecting payroll deductions and maintaining time records pertaining to the PFL.

OUTLINE FOR PRESENTATION ON
NYC SAFE AND SICK LEAVE LAW

New York City Earned Safe and Sick Time Law was effective April 1, 2014 for sick leave, and May 5, 2018 for safe leave

1. Basic Information:. Under the Act, any private employer (including a nonprofit employer), which employs at least five employees, must provide paid safe and sick time to its employees. Any private employer, which employs one to four employees, must provide unpaid safe and sick time to its employees. The paid leave requirement also applies to any private employer with one or more domestic workers.

2. Determining Employer Size: count the number of employees working for the employer per week at the time that that the employee uses safe or sick time leave, or if number fluctuates look at average during previous calendar year.

3. Employers and Employees. Defined by whether employee works in NYC, not where employer is based or where employee lives. The term "employee" does not include: employees who work 80 hours or less in a calendar year in New York City; government employees; federal work study; qualified scholarship programs; certain physical therapists, occupational therapists, speech language pathologists, and audiologists who are licensed by New York State; independent contractors; participants in Work Experience Programs ("WEPs"); certain employees subject to a collective bargaining agreement (discussed below); and owners who do not meet the definition of an employee under NYSLL.

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4. Amount of Safe or Sick Time. 1 hour of safe or sick time for every 30 hours worked by an employee, up to 40 hours per calendar year. Employers must provide domestic workers with at least two days of paid safe or sick leave after one year of employment, in addition to the three days of paid rest they must be paid under the New York Labor Law, for a combined total of five paid days per year.

5. The Amount the Employer Pays for Leave Taken employer must pay what the employee would have earned for the amount of time and the type of work the employee was scheduled to perform at the time the paid safe or sick leave is taken, but not overtime or tips or discretionary bonus or commissions. Employee can work extra hours to make up the time instead of taking leave, if employer and employee both agree. A model form that employers can use to confirm agreement is available at nyc.gov/dca

6. When the Employee Must Be Paid for Leave Taken no later than the payday for the next regular payroll period beginning after the safe and sick leave was used, unless the employer has asked for written documentation or verification of use of safe and sick leave from the employee.

7. When Safe and Sick Leave May First Be Taken. Employees can start using accrued sick of safe leave 120 days

8. Employee Determines Use of Safe or Sick Time. employees will determine how much earned safe or sick time they need to use BUT employers may set a reasonable minimum increment of not be less than four hours, and may limit leave taken to 40 hours in a calendar year.

9. Carryovers. Unused safe and sick time is carried over to the following calendar, up to 40 hours. However, employers are only required to allow employees to use up to 40 hours of safe and sick leave per calendar year.
Employer is not required to allow employees to carry over safe and sick leave if:
- the employer pays them for the unused accrued time AND the employer front-loads 40 hours OR
- the employer front-loaded 40 hours at the beginning of the current calendar year and will front-load 40 hours on the first day of the next calendar year.

10. Front-loading Leave. employer can provide all employees with 40 hours of safe and sick leave at the beginning of each calendar year.

11. Termination of Employment. No requirement of payment of unused, accrued time. Must reinstate if rehired within 6 months and time not paid out at termination.

12. Reasons Why Sick Time May Be Taken. An employee is entitled to use sick time for absence from work due to:

- the employee's mental or physical illness, injury, or health condition;
- the employee's need for preventive medical care;
- care of a family member who needs medical diagnosis, care, or treatment of a mental or physical illness, injury, or health condition, or who needs preventive medical care;
- closure of employee's workplace (or child's school/child care) due to a public health emergency;

13. Reasons Why Safe Time May Be Taken. workers may use safe time if they or a family member may be the victim of any act or threat of domestic violence, sexual offense, theft within the family, stalking or human trafficking, and the covered worker needs to take actions necessary to restore the physical, psychological or economic health or safety of the covered worker or family member, or to protect those who associate or work with the covered worker, including to: obtain services for relief from a Family Offense; participate in safety planning, temporarily or permanently relocate, or take other actions to increase the safety from a Family Offense; meet with a civil attorney or other social service provider; file a report with law enforcement or meet with a district attorney's office; attend court; or enroll a child in a new school.

* Employers are not required to allow employees to take paid leave time for weather reasons.

14, Definition of Family Members. For these purposes, a "family member" is a child (includes in loco parentis or adult); grandchild; spouse or domestic partner (current or former regardless of whether they reside together); parent; grandparent; child or parent of an employee's spouse or domestic partner; sibling (including a half, adopted, or step sibling); any other individual related by blood to the employee; and any other individual whose close association with the employee is the equivalent of a family relationship.

15. Use of Leave After Birth or Adoption of a Child. A mother can use earned leave during any period of his or her sickness or disability following the birth of her child. The other parent can use earned leave to care for the mother during this period. Parents also can use leave to care for a child's need for medical diagnosis, care, or treatment of an illness, injury, or health condition, or preventive medical care. Parents cannot use safe and sick leave for "bonding" purposes. This differs from the federal Family and Medical Leave Act (the "FMLA"), which does permit leave for the purpose of bonding with a newborn or newly adopted child. For more information on FMLA, go to dol.gov and search "Family & Medical Leave."

16. Advance Notice from Employees. Reasonable, written notice may be required – 7 days when foreseeable, as soon as practicable when not foreseeable. Must have written policy about how to give notice. A model form that employees can use to give notice is available at nyc.gov/dca

17, Employer Questions and Documentation employer cannot ask the reason why an employee is taking any sick time, or otherwise require the employee, or a health care provider, to disclose details of the employee's or employee's family member's injury, illness, or condition, except as required by law or with the employee's written consent. The employer can require documentation after 3 days of absence. A model form that employers can use to verify use of safe and sick leave is available at nyc.gov/dca. If an employer requires an employee to submit written documentation, the employee has seven days from the date he or she returns to work to submit the documentation. The employee is responsible for the cost of such documentation not covered by insurance or any other benefit plan. The employer must keep certain information obtained in connection with the employee's safe or sick time confidential.

18. Discipline. An employer may take disciplinary action, up to and including termination, against an employee who uses sick or leave time for other than a permitted purpose.

19. Notice of Employee Rights Employers must deliver the latest version of the Notice of Employee Rights to covered new employees when they begin employment and must have given the Notice to covered existing employees, in English and in the language that the employer customarily uses to communicate with that employee. The law requires employers to keep or maintain records establishing the date the Notice was provided to an employee and proof that the Notice was received by the employee. Saving signed copies of the Notice or email receipts are good ways to document that employers gave employees the required Notice.

20. Employer Safe and Sick Leave Policy. In addition to providing the Notice of Employee Rights, employers must distribute safe and sick time policies (including policy to comply with the Act). The policies must be in a single writing, and must explain, at a minimum:

- the amount of safe and sick time allowable and when an employee can begin using time time, if a front-loading system is used
- when accrual of safe and sick time starts, the rate at which an employee accrues safe and sick time, and the maximum number of hours an employee may accrue in a calendar year if an accrual system is used;

- the employee's notice requirement, and the procedures that an employee must follow to provide notice to the employer of a need to use safe or sick time;
- all requirements for written documentation or verification of the use of safe or sick time;
- any reasonable minimum increment for the use of accrued safe or sick time;
- the confidentiality requirements applicable to the information the employer obtains y law;
- any policy regarding consequences for employee's failure or delay to provide required documentation;
- any policy regarding employee discipline for misuse of safe or sick time; and
- the employer's policy regarding carry-over of unused safe or sick time.

21. Employer Records. Employers should keep their current and past written policies on safe and sick leave, and records documenting compliance with the requirements of the law, specifically those records that detail employee wages, hours, leave taken, amounts paid for leave time, and notices/policies distributed.

22. Using Other Leave. An employer who provides an employee with an amount of paid leave sufficient to meet the requirements of the Act, and who allows this paid leave to be used for the same purposes and under the same conditions as safe or sick time required by the Act, is *not* required to provide additional paid safe or sick time under the Act. Similarly, an employer who provides an employee with an amount of unpaid or paid safe or sick time sufficient to meet the requirements of the Act, and who allows this leave to be used for the same purposes and under the same conditions as safe or sick time required under the Act, is not required to provide additional unpaid safe or sick time for the employee. An employer may require safe or sick time to be taken concurrently with other leave, which is taken for the same purpose as the safe or sick time. The law expressly encourages employers to provide more generous leave policies for such concurrent use or otherwise.

23. Collective Bargaining Agreements. The Act does not apply to any employee covered by a valid collective bargaining agreement if: (1) the provisions of the Act are expressly waived in the agreement, and (2) the agreement provides for a comparable benefit for the employees covered by the agreement, such as paid time off.
For an employee subject to a valid CBA on the Act's effective date (April 1, 2014), or in the case of amendments to the law that expanded the definition of family member and added safe leave uses (May 5, 2018), the Act does not begin to apply, in any event, until that agreement expires.

24. Retaliation
Retaliating against an employee for requesting or using safe or sick time under the Act, filing a complaint about a violation of the Act, communicating with anyone about a violation of the Act, participating in an investigation or action regarding a violation, or informing another person of their rights is prohibited.
The Act has extensive enforcement provisions. Employees have no independent private right of action in court for a violation of the Act. Employees may file a complaint with the DCA within two years after the date the person knew or should have known of the alleged violation.

25. Overlap with Other Laws: FMLA, ADA, NYSHRL, NY Paid Family Leave Law
(for discussion with other panelists)

THE BASICS OF THE FAMILY AND MEDICAL LEAVE ACT

INTRODUCTION

The federal Family and Medical Leave Act (the "FMLA") provides eligible employees up to 12 workweeks of unpaid leave a year. It requires group health benefits to be maintained during the leave as if employees continued to work instead of taking leave. Employees are also entitled to return to their same or an equivalent job at the end of their FMLA leave, subject to certain limited exceptions.

The FMLA also provides certain military family leave entitlements. Eligible employees may take FMLA leave for specified reasons related to certain military deployments of their family members. Additionally, they may take up to 26 weeks of FMLA leave in a single 12-month period to care for a covered service member with a serious injury or illness.

TO WHAT BUSINESSES AND EMPLOYERS DOES THE FMLA APPLY?

The FMLA applies to all:

- public agencies, including federal, State, and local government employers;
- public or private elementary or secondary schools; and
- private sector employers who employ 50 or more employees for at least 20 workweeks in the current or preceding calendar year.

WHEN IS AN EMPLOYEE ELIGIBLE FOR FMLA LEAVE?

To be eligible to take leave under the FMLA, an employee must:

- have worked for a covered employer for 12 months;
- have worked 1,250 hours during the 12 months prior to the start of leave; and
- work at a location where the employer has 50 or more employees within 75 miles.

WHAT WORK AND SERVICE IS COUNTED TOWARDS ELIGIBILITY FOR FMLA LEAVE?

The 12 months of employment, during which the employee must have worked for the employer, do not have to be consecutive. That means any time previously worked for the same employer (including seasonal work) could, in most cases, be used to meet the 12-month requirement. If the employee has a break in service that lasted seven years or more, the time worked prior to the break will not count unless the break is due to service covered by the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), or there is a written agreement, including a collective bargaining agreement, outlining the employer's intention to rehire the employee after the break in service.

The 1,250 hours required include only those hours actually worked for the employer. Paid leave and unpaid leave, including FMLA leave, are not included.

IS THE LEAVE UNPAID?

The FMLA requires only unpaid leave. However, under the regulations, an employee may choose to substitute accrued paid leave for unpaid FMLA leave if the employee complies with the terms and conditions of the employer's applicable paid leave policy. Paid leave under the

New York State Paid Family Leave Act and New York City Earned Safe and Sick Time Act (to the extent available under those Acts) could be used here. The regulations also clarify that substituting paid leave for unpaid FMLA leave means that the two types of leave run concurrently, with the employee receiving pay pursuant to the paid leave policy and receiving protection for the leave under the FMLA. If the employee does not choose to substitute applicable accrued paid leave, the employer may require the employee to do so.

FOR WHAT REASONS CAN FMLA LEAVE BE TAKEN?

A covered employer must grant an eligible employee up to a total of 12 workweeks of unpaid, job-protected leave in a 12-month period for one or more of the following reasons:

- for the birth of a son or daughter, and to bond with the newborn child;
- for the placement with the employee of a child for adoption or foster care, and to bond with that child;
- to care for an immediate family member (spouse, child, or parent – but not a parent "in-law") with a serious health condition;
- to take medical leave when the employee is unable to work because of a serious health condition; or
- for qualifying exigencies arising out of the fact that the employee's spouse, son, daughter, or parent is on covered active duty, or has received a call to covered active duty, as a member of the National Guard, Reserves, or Regular Armed Forces.

An eligible employee may also take up to 26 workweeks of leave during a "single 12-month period" to care for a covered service member with a serious injury or illness, when the employee is the spouse, son, daughter, parent, or next of kin of the service member. The "single 12-month period" during which FMLA can be taken for military caregiver leave is different from, and is not included in, the 12-month period used for non-military caregiver FMLA leave.

HOW ARE THE 12 WORKWEEKS TO BE TAKEN FOR THE FMLA LEAVE CALCULATED?

FMLA Leave Entitlements and Increments of Leave. An employee is entitled to up to 12 workweeks of FMLA leave for most qualifying reasons or up to 26 workweeks of FMLA leave for military caregiver leave. The employee's actual workweek is the basis for determining the employee's FMLA leave entitlement. An employee does not accrue FMLA leave at any particular hourly rate. FMLA leave may be taken in periods of whole weeks, single days, hours, and in some cases even less than an hour. The employer generally must allow employees to use FMLA leave in the smallest increment of time the employer allows for the use of other forms of leave, as long as it is no more than one hour. An employer may always allow FMLA leave in shorter increments than used for other forms of leave, but no work may be performed during any period of time counted as FMLA leave.

Calculation of Leave Usage. Only the amount of leave actually taken may be counted against an employee's FMLA leave entitlement. Where an employee takes FMLA leave for less than a full workweek, the amount of FMLA leave used is determined as a proportion of the employee's actual workweek. The amount of FMLA leave taken is divided by the number of hours the employee would have worked if the employee had not taken leave of any kind

(including FMLA leave) to determine the proportion of the FMLA workweek used. For example, an employee who normally works 30 hours a week but works only 20 hours in a week because of FMLA leave would use one-third of a week of FMLA leave. An employer may convert the FMLA leave usage into hours so long as it fairly reflects the employee's actual workweek.

Time that an employee is not scheduled to report for work may not be counted as FMLA leave. If an employer temporarily stops business activity and employees are not expected to report for work for one or more weeks (e.g., a school that closes two weeks for the winter holiday, or a plant that closes for a week for repairs), the days the employer's business activities have stopped do not count against the worker's FMLA leave. When a holiday falls during a week in which an employee is taking the full week of FMLA leave, the entire week is counted as FMLA leave. However, when a holiday falls during a week when an employee is taking less than the full week of FMLA leave, the holiday is not counted as FMLA leave, unless the employee was scheduled and expected to work on the holiday and used FMLA leave for that day. Required overtime hours that are not worked by the employee because of an FMLA-qualifying reason may be counted as FMLA leave. However, voluntary overtime hours not worked due to an FMLA-qualifying reason may not be counted as FMLA leave.

HOW IS THE 12-MONTH PERIOD FOR TAKING FMLA CALCULATED?

Generally, employers may select one of four options to establish the 12-month period over which FMLA leave may be taken: the calendar year, any fixed 12 months, a 12-month period measured forward, or a "rolling" 12-month period measured backward. The period selected must be

uniformly applied to all employees taking FMLA leave. See DOL FMLA Fact Sheets #28H for details on these options.

HOW ARE THE PERMITTED REASONS FOR TAKING FMLA LEAVE APPLIED?

*Birthing And Bonding***.** Leave to bond with a newborn child, or with a newly placed adopted or foster child, must conclude within 12 months after the birth or placement.

Taking Leave For A Newborn. Mothers and fathers have the same right to take FMLA leave to bond with a newborn child. A mother can also take FMLA leave for prenatal care, incapacity related to pregnancy, and for her own serious health condition following the birth of a child. A father can also use FMLA leave to care for his spouse who is incapacitated due to pregnancy or child birth. (The regulations are not clear as to whether a father can take leave for prenatal care visits.)

Intermittent Or Reduced Leave Schedule. When it is medically necessary, employees may take FMLA leave intermittently – taking leave in separate blocks of time for a single qualifying reason or on a reduced leave schedule – reducing the employee's usual weekly or daily work schedule. When leave is needed for planned medical treatment, the employee must make a reasonable effort to schedule treatment so as not to unduly disrupt the employer's operation.

Leave to care for or bond with a newborn child, or for a newly placed adopted or foster child, may be taken intermittently, but only with the employer's approval, and must conclude within 12 months after the birth or placement. However, if the newly born or newly placed child has a

serious health condition, the employee has the right to take FMLA leave to care for the child intermittently, if medically necessary, and such leave is not subject to the 12-month limitation.

Employees needing intermittent/reduced schedule leave for foreseeable medical treatments must work with their employers to schedule the leave so as not disrupt the employer's operations, subject to the approval of the employee's health care provider. In such cases, the employer may transfer the employee temporarily to an alternative job with equivalent pay and benefits that accommodate recurring periods of leave better than the employee's regular job.

WHAT RULES APPLY TO SERIOUS HEALTH CONDITIONS?

A Serious Health Condition. The most common serious health conditions that qualify for FMLA leave are:

- conditions requiring an overnight stay in a hospital or other medical care facility;
- conditions that incapacitate the employee or a family member (for example, being unable to work or attend school) for more than three consecutive days and have ongoing medical treatment (either multiple appointments with a health care provider, or a single appointment and follow-up care such as prescription medication);
- chronic conditions that cause occasional periods when the employee or a family member are incapacitated and require treatment by a health care provider at least twice a year; and
- pregnancy (including prenatal medical appointments, incapacity due to morning sickness, and medically required bed rest).

Further, under the regulations, employees continue to be able to use FMLA leave for any period of incapacity or treatment due to a chronic serious health condition. The regulations continue to define a chronic serious health condition as one that: (1) requires "periodic visits" for treatment by a health care provider or nurse under the supervision of the health care provider, (2) continues over an extended period of time, and (3) may cause episodic rather than continuing periods of incapacity. The regulations clarify this definition by defining "periodic visits" as at least twice a year.

Domestic Violence Issues. FMLA leave may be available to address certain health-related issues resulting from domestic violence. An eligible employee may take FMLA leave because of his or her own serious health condition or to care for a qualifying family member with a serious health condition that resulted from domestic violence. For example, an eligible employee may be able to take FMLA leave if he or she is hospitalized overnight or is receiving certain treatment for post-traumatic stress disorder that resulted from domestic violence.

WHAT ARE THE RULES FOR REQUIRING CERTIFICATIONS OF SERIOUS HEALTH CONDITIONS?

Certifications For Proving That There Is A Serious Health Condition. An employer may require that the need for leave for a serious health condition of the employee or the employee's immediate family member be supported by a certification issued by a health care provider. The employer must notify the employee each time a certification is required. The notice must be included in the FMLA Rights and Responsibilities Notice given to the employee when leave is

first requested (further described below). The employer may request certification at a later date if it questions the appropriateness of the leave or its duration.

Complete and Sufficient Certification. If the employer requests medical certification, the employee is responsible for providing a complete and sufficient certification and the employee must be given at least 15 calendar days from receipt of the employer's request to provide it. The employee is responsible for paying for the cost of the medical certification and for making sure the certification is provided to the employer. If the certification is incomplete or insufficient, the employer must give the employee a written notice stating what additional information is necessary to make the certification complete and sufficient. The employee must provide the additional information to the employer within seven calendar days to cure any deficiency, unless not practicable under the particular circumstances despite the employee's good faith efforts.

• A certification is considered "incomplete" if one or more of the applicable entries on the form have not been completed.

• A certification is considered "insufficient" if the information provided is vague, unclear, or nonresponsive.

Content of the Certification. Information on the certification may include:

- contact information for the health care provider;
- the date the serious health condition began and how long it will last; appropriate medical facts about the condition;

- when requesting leave for the employee's own serious health condition, information showing that the employee cannot perform the essential functions of the job;
- when requesting leave to care for a family member, a statement of the care needed;
- when requesting intermittent leave, information showing the medical necessity for intermittent or reduced schedule leave and either the dates of any planned leave or the estimated frequency and duration of expected incapacity due to the condition.

Annual Certification. If the employee's need for FMLA leave lasts beyond a single FMLA leave year, the employer may require the employee to provide a new medical certification in each new FMLA leave year.

Certification Forms. The FMLA does not require the use of any specific certification form. The DOL has developed optional forms that can be used for leave for an employee's own serious health condition (WH380-E) or to care for a family member's serious health condition (WH-380-F), or the employer may use its own forms. If the employer chooses to use its own forms, it may not require any additional information beyond what is specified in the FMLA and its regulations. Employers must accept a complete and sufficient medical certification, regardless of the format. In all instances, the information requested on the certification form must relate only to the serious health condition for which the employee is seeking leave. The DOL's forms are available for free at www.dol.gov/whd/fmla/forms.

Authentication and Clarification. Once the employer has received a complete and sufficient certification, the employer may not request additional information from the health care provider. However, the employer may use a human resources professional, a leave administrator, another health care provider, or a management official to contact the health care

provider to authenticate or to clarify the certification. For example, the employer's appropriate representative could ask the health care provider if the information contained on the form was completed or authorized by him or her, or ask questions to clarify the handwriting on the form or the meaning of a response. Under no circumstances may the employee's direct supervisor contact the employee's health care provider.

HIPAA Concerns. The regulations clarify that contact between the employer and the employee's health care provider must comply with the Health Insurance Portability and Accountability Act ("HIPAA") privacy regulations. In order for an employee's HIPAA-covered health care provider to provide an employer with individually-identifiable health information, the employee will need to provide the health care provider with a written authorization allowing the health care provider to disclose such information to the employer.

Second and Third Opinions. If the employer has received a complete and sufficient certification but has a reason to doubt that it is valid, the employer may require the employee to obtain a second medical certification. The employer can choose the health care provider to provide the second opinion, but generally may not select a health care provider who it employs on a regular or routine basis. If the second opinion differs from the original certification, the employer may require the employee to obtain a third certification from a healthcare provider selected by both the employee and employer. The opinion of the third health care provider is final and must be used by the employer. The employer is responsible for paying for the second and third opinions, including any reasonable travel expenses for the employee or family member. While waiting for the second (or third) opinion, the employee is provisionally entitled to FMLA leave.

Recertification. In general, the employer may request the employee to provide a recertification no more often than every 30 days and only in connection with an absence by the employee. If a certification indicates that the minimum duration of the serious health condition is more than 30 days, the employer must generally wait until that minimum duration expires before requesting recertification. However, in all cases, including cases where the condition is of an indefinite duration, the employer may request a recertification for absences every six months. The employer may request a recertification in less than 30 days only if:

• the employee requests an extension of leave;

• the circumstances described by the previous certification have changed significantly; or

• the employer receives information that causes it to doubt the employee's stated reason for the absence or the continuing validity of the existing medical certification.

In general, the employer may ask for the same information in a recertification as that permitted in the original medical certification. However, an employer may provide the health care provider with a record of the employee's absences and ask if the serious health condition and need for leave is consistent with the leave pattern. The employee is responsible for paying for the cost of a recertification. The employer cannot require a second or third opinion for a recertification. In most circumstances, the employer must allow the employee at least 15 calendar days to provide the recertification after the employer's request.

*Signing An Authorization As Part Of A Medical Certification***.** An employer may not require an employee to sign an authorization to share HIPAA-protected health information as part of the medical certification process. The regulations specifically state that completing any such

authorization is at the employee's discretion. Whenever an employer requests a medical certification, however, it is the employee's responsibility to provide the employer with a complete and sufficient certification, which likely cannot be accomplished without the employer signing this type of authorization.

*Fitness -For -Duty Certification***.** The employer may have a policy or practice that requires employees in similar job positions who take leave for similar health conditions to provide a return to work, or "fitness-for-duty," certification from the employee's health care provider showing that the employee is able to resume work. The employer may request a fitness-for-duty certification only with regard to the particular health condition that caused the employee's need for FMLA leave. The model certification forms do not have a section devoted to a fitness-for-duty certification.

If the employer will require a fitness-for-duty certification, it must provide notice of that requirement and whether the certification must address the employee's ability to perform the essential functions of his or her job with the FMLA designation notice. In general, a fitness-for-duty certification may not be required for each absence taken on an intermittent or reduced leave schedule. However, if the employer has a reasonable belief that the employee's return to work presents a significant risk of harm to the employee or to others, the employer may require a fitness-for-duty certification up to once every 30 days. As long as the employer has provided the required notice regarding any fitness-for-duty certification requirement, the employee's return to work may be delayed until the fitness-for-duty certification is provided. An employer may contact an employee's health care provider to clarify or authenticate a fitness-for-duty certification, but cannot delay the employee's return to work while making that contact.

An employer may not require second or third opinions for a fitness-for-duty certification. The employee is responsible for paying any cost of obtaining the fitness-for-duty certification. If State or local law or collective bargaining agreement governs an employee's return to work, those provisions must be applied.

Failure to Provide Certifications. If the employee does not provide a properly requested certification within the time required or fails to provide a complete and sufficient certification despite the opportunity to cure any deficiencies, the employer may deny the employee's request for FMLA leave. Alternatively, FMLA protection for any leave taken may be delayed or denied. In any case, if the employee never provides a medical certification, then the leave is not FMLA leave.

If an employee fails to submit a properly requested fitness-for-duty certification, the employer may delay job restoration until the employee provides the certification. If the employee never provides the certification, he or she may be denied reinstatement.

WHAT NOTICE OF INTENTION TO TAKE FMLA LEAVE MUST AN EMPLOYEE PROVIDE?

Advance Notice. Employees seeking to use FMLA leave are required to provide 30-day advance notice of the need to take the leave when the need is foreseeable and such notice is practicable. If leave is foreseeable less than 30 days in advance, the employee must provide notice as soon as practicable – generally, either the same or next business day. When the need for leave is not foreseeable, the employee must provide notice to the employer as soon as practicable under the facts and circumstances of the particular case. Absent unusual

circumstances, employees must comply with the employer's usual and customary notice and procedural requirements for requesting leave.

Employees must provide sufficient information for an employer to reasonably determine whether the FMLA may apply to the leave request. Depending on the situation, such information may include that the employee is incapacitated due to pregnancy, has been hospitalized overnight, is unable to perform the functions of the job, and/or that the employee or employee's qualifying family member is under the continuing care of a health care provider.

When an employee seeks leave for a FMLA-qualifying reason for the first time, the employee need not expressly assert FMLA rights or even mention the FMLA. When an employee seeks leave, however, due to a FMLA-qualifying reason for which the employer has previously provided the employee FMLA-protected leave, the employee must specifically reference either the qualifying reason for the leave or the need for FMLA leave. Failure to respond to an employer's reasonable request for clarification can result in denial of FMLA leave if the employer is unable to determine whether the leave is FMLA-qualifying.

Employer's Call-In Procedures. Under the regulations, an employee must comply with an employer's call-in procedures to notify the employer of any leave he or she will take, unless unusual circumstances prevent the employee from doing so (in which case the employee must provide notice as soon as he or she can practicably do so). The regulations make clear that, if the employee fails to provide timely notice, he or she may have the FMLA leave request delayed or denied and may be subject to whatever discipline the employer's rules provide.

WHAT NOTICE OF FMLA LEAVE AVAILABILITY MUST THE EMPLOYER PROVIDE?

Employer Notice. Every employer covered by the FMLA is required to post and keep posted on its premises, in conspicuous places where employees are employed, a notice explaining the FMLA's provisions and providing information concerning the procedures for filing complaints of violations of the FMLA with the DOL's Wage and Hour Division. An employer that willfully violates this posting requirement may be subject to a civil money penalty for each separate offense. Employers may post the Wage and Hour Division's FMLA Poster, which is available at no cost from the WHD website at www.dol.gov/whd/fmla, to satisfy this notice requirement, or may use another format so long as the information provided includes, at a minimum, all the information contained in the FMLA Poster.

Additionally, employers must include this notice in employee handbooks or other written guidance to employees concerning benefits, or, if no such materials exist, must distribute a copy of the notice to each new employee upon hiring. The notice may be posted electronically, and (when distribution is required) may be distributed electronically provided all other requirements are met.

When an employee requests FMLA leave, or the employer acquires knowledge that a leave requested may be for a FMLA purpose, the employer must notify the employee of his or her eligibility to take leave (the "Eligibility Notice"), and inform the employee in writing of his or her rights and responsibilities under the FMLA (the "Rights and Responsibilities Notice". When the employer has enough information to determine that leave is being taken for a FMLA-

qualifying reason, the employer must notify the employee that the leave is designated and will be counted as FMLA leave (the "designation notice"). These notices are discussed below.

Where an employer's workforce includes a significant portion of workers who are not literate in English, the employer shall be responsible for providing the notice in a language in which the employees are literate. A Spanish-language version of the notice is available on DOL's website.

Eligibility Notice. Employee eligibility is determined, and notice of eligibility status must be provided, the first time the employee takes leave for an FMLA-qualifying reason in the employer's designated 12-month leave year. The eligibility notice may be either oral or in writing and must:

- be provided **within five business days** of the initial request for leave or when the employer acquires knowledge that an employee leave may be for an FMLA-qualifying reason;

- inform the employee of his or her eligibility status; and

- if the employee is determined to not be eligible for FMLA leave, state at least one reason why.

Once the eligibility notice has been provided, the notice need not be provided for FMLA absences for the same qualifying reason during the same leave year, or for FMLA absences for a different qualifying reason, if the employee's eligibility status (that is, eligibility for FMLA leave) has not changed. If the employee requests leave for a different qualifying reason in the same leave year and the employee's eligibility status has changed, the employer must notify the employee of the change in eligibility status within five business days.

Rights and Responsibilities Notice. Each time employers are required to provide the eligibility notice, they must also provide employees with a rights and responsibilities notice, notifying employees of their obligations concerning the use of FMLA leave and the consequences of failing to meet those obligations. The rights and responsibilities notice must be in writing and must include, as applicable:

--notice that the leave may be counted as FMLA leave;

--the employer's designated 12-month period for counting FMLA leave entitlement;

--any requirement for the employee to furnish a certification and the consequences for failing to do so;

--information regarding the employee's right or the employer's requirement for substitution of paid leave and conditions relating to any substitution, and the employee's right to take unpaid FMLA leave if the conditions for paid leave are not met;

--instructions for making arrangements for any premium payments for maintenance of health benefits that the employee must make during leave (and potential employee liability for those premiums if the employee fails to return to work after FMLA leave);

--notice of designation as "key" employee and what that could mean; and

--the employee's right to job restoration and maintenance of benefits.

The rights and responsibilities notice may be distributed electronically provided all other requirements are met. Employers may use Form WH-381, which is available at no cost from

the WHD website at www.dol.gov/whd/fmla, to provide notice of eligibility and rights and responsibilities. The model form requests additional information that may be required under the employer's policies and procedures but are not required under the regulations (i.e., whether the employer will require periodic reports to return to work). Employers must be responsive to answer questions from employees concerning their FMLA leave.

Designation Notice. The employer is responsible in all circumstances for designating leave as FMLA-qualifying and giving notice of the designation to the employee. This notice must:

• be provided in writing **within five business days** of having enough information to determine whether the leave is FMLA-qualifying, absent extenuating circumstances;

• be provided for each FMLA-qualifying reason per applicable 12-month period (additional notice is required for any changes in the designation information);

• include the employer's designation determination, and any substitution of paid leave and/or fitness for duty requirements; and

• provide the amount of leave that is designated and counted against the employee's FMLA entitlement, if known. If the amount of leave is not known at the time of the designation, the employer must provide this information to the employee upon request, but no more often than once in a 30-day period and only if leave was taken in that period.

If the requested leave is not FMLA-qualifying, the notice may be a simple written statement that the leave does not qualify and will not be designated as FMLA leave. If an employer is unable to determine whether a leave request should be designated as FMLA-protected because

a submitted certification is incomplete or insufficient, the employer is required to state in writing what additional information is needed. The employer may use the designation notice to inform the employee that the certification is incomplete or insufficient and identify what information is needed to make the certification complete and sufficient.

Employers may use Form WH-382, which is available at no cost from the WHD website at www.dol.gov/whd/fmla, to provide this designation notice.

WHAT PROTECTIONS APPLY TO BENEFITS DURING FMLA LEAVE?

Group Health Insurance Benefits. If an employee is provided group health insurance, the employee is entitled to the continuation of the group health insurance coverage during FMLA leave on the same terms as if he or she had continued to work. If family member coverage is provided to an employee, family member coverage must be maintained during the FMLA leave. The employee must continue to make whatever contributions to the cost of the health insurance premiums it was making before the leave.

If paid leave is substituted for FMLA leave, the employee's share of group health plan premiums must be paid by the method normally used during paid leave (usually payroll deduction). An employee on unpaid FMLA leave must make arrangements to pay the normal employee portion of the insurance premiums in order to maintain insurance coverage. If the employee's premium payment is more than 30 days late, the employee's coverage may be dropped unless the employer has a policy of allowing a longer grace period. The employer must provide written notice to the employee that the payment has not been received and allow at least 15 days after the date of the letter to make the payment before coverage stops. The notice can be sent at least 15

days before coverage is to cease. If the employer has a policy to retroactively terminate the coverage back to the date the unpaid premiums were due, then the coverage may be dropped retroactively as long as the notice referenced above is timely provided.

In some instances, an employer may choose to pay the employee's portion of the premium, for example, in order to ensure that it can provide the employee with equivalent benefits upon return from FMLA leave. In that case, the employer may require the employee to repay these amounts. In addition, the employer may require the employee to repay the employer's share of the premium payment if the employee fails to return to work following the FMLA leave, unless the employee does not return because of circumstances that are beyond the employee's control, including a FMLA-qualifying medical condition. For employers that self-insure their benefits, recovery is limited to the employer's share of allowable premiums as would be calculated under COBRA, excluding the 2% fee for administrative costs.

Benefits Other than Health Insurance. An employee's rights to benefits other than group health insurance while on FMLA leave depend upon the employer's established policies. Any benefits that would be maintained while the employee is on other forms of leave, including paid leave if the employee substitutes accrued paid leave during FMLA leave, must be maintained while the employee is on FMLA leave.

All benefits an employee had accrued prior to a period of FMLA leave must be restored to the employee when he or she returns from leave. An employee returning from FMLA leave cannot be required to requalify for any benefits the employee enjoyed before the leave began.

Limitation On Protections. An employee on FMLA leave is not protected from actions that would have affected him or her if the employee was not on FMLA leave. For example, if a shift has been eliminated, or overtime has been decreased, an employee would not be entitled to return to work that shift or the original overtime hours. If an employee is laid off during the period of FMLA leave, the employer must be able to show that the employee would not have been employed at the time of reinstatement.

WHAT ARE THE REQUIREMENTS FOR JOB RESTORATION?

When an employee returns from FMLA leave, he or she must be restored to the same job or to an "equivalent job". The employee is not guaranteed the actual job held prior to the leave. An equivalent job means a job that is virtually identical to the original job in terms of pay, benefits, and other employment terms and conditions (including shift and location).

Equivalent pay includes the same or equivalent pay premiums, such as a shift differential, and the same opportunity for overtime as the job held prior to FMLA leave. An employee is entitled to any unconditional pay increases that occurred while he or she was on FMLA leave, such as cost of living increases. Pay increases conditioned upon seniority, length of service, or work performed must be granted only if employees taking the same type of leave for non-FMLA reasons receive the increases. Equivalent pay includes any unconditional bonuses or payments. If an employee does not meet a specific goal for achieving a bonus because of taking FMLA leave, however, the employer must only pay the bonus if employees taking the same type of leave for non-FMLA reasons receive it. For example, if an employee is substituting accrued paid sick leave for unpaid FMLA leave (see below) and other employees on paid sick leave are

entitled to the bonus, then the employee taking FMLA-protected leave concurrently with sick leave must also receive the bonus.

Key Employees. An employer may also deny restoration to a "key" employee under certain circumstances. A key employee is a salaried, FMLA-eligible employee who is among the highest-paid 10 percent of all of the employer's employees within 75 miles. To deny restoration to a key employee, an employer must have determined that substantial and grievous economic injury to its operations would result from the restoration (including the basis for that determination), must have provided notice to the employee that he or she is a key employee and that restoration will be denied, and must have provided the employee a reasonable period to return to work after stating its intention to deny restoration. An employer has obligation to notify "key" employees that they may be denied reinstatement when the employer provides notice to the employee of the need for FMLA leave, or when the leave itself commences. (Such a notice is part of the DOL's model Rights and Responsibilities Notice.) If the employee does not return to work with that reasonable period, the employee can remain on leave, continue to receive health benefits and cannot be held liable for any of the employer's health premium costs upon conclusion of his or her FMLA leave.

WHAT ARE THE MILITARY SERVICE PROVISIONS OF THE FMLA?

The military family leave provisions of the FMLA entitle eligible employees of covered employers to take FMLA leave for any "qualifying exigency" arising from the foreign deployment of the employee's spouse, son, daughter, or parent with the Armed Forces, or to care

for a service member with a serious injury or illness if the employee is the service member's spouse, son, daughter, parent or next of kin.

Qualifying Exigency Leave. A covered employer must grant an eligible employee up to 12 workweeks of unpaid, job-protected leave during any 12-month period for qualifying exigencies that arise when the employee's spouse, son, daughter, or parent is on covered active duty or has been notified of an impending call or order to covered active duty. Covered active duty means:

• for members of the Regular Armed Forces, duty during deployment of the member with the Armed Forces to a foreign country; or

• for members of the Reserve components of the Armed Forces (members of the National Guard and Reserves), duty during deployment of the member with the Armed Forces to a foreign country under a call or order to active duty in support of a contingency operation.

Deployment to a foreign country includes deployment to international waters.

Qualifying exigencies for which an employee may take FMLA leave include making alternative child care arrangements for a child of the deployed military member, attending certain military ceremonies and briefings, or making financial or legal arrangements to address the military member's absence.

Military Caregiver Leave. A covered employer must grant an eligible employee up to a total of 26 workweeks of unpaid, job-protected leave during a "single 12-month period" to care for a covered service member with a serious injury or illness. The employee must be the spouse, son,

daughter, parent, or next of kin of the covered service member. A covered service member is either:

• a current member of the Armed Forces (including a member of the National Guard or Reserves) who is undergoing medical treatment, recuperation, or therapy, is in outpatient status, or is on the temporary disability retired list, for a serious injury or illness, or

• a veteran of the Armed Forces (including the National Guard or Reserves) discharged within the five year period before the family member first takes military caregiver leave to care for the veteran and who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness. A veteran who was dishonorably discharged does not meet the FMLA definition of a covered service member.

"Serious Injury of Illness" Definition. For a current service member, a serious injury or illness is one that may render the service member medically unfit to perform his or her military duties. For a veteran, a serious injury or illness is one that rendered the veteran medically unfit to perform his or her military duties, or an injury or illness that qualifies the veteran for certain benefits from the Department of Veterans Affairs or substantially impairs the veteran's ability to work. For veterans, it includes injuries or illnesses that were incurred or aggravated during military service but that did not manifest until after the veteran left active duty.

See DOL FMLA Fact Sheets #28M(a) to (c) for additional information on the FMLA's military service provisions.

WHAT REQUIREMENTS OF USERRA APPLY UNDER THE FMLA?

The Uniformed Services Employment and Reemployment Rights Act ("USERRA"). USERRA is a federal law that provides reemployment rights for veterans and members of the National Guard and Reserve following qualifying military service. It also prohibits employer discrimination against any person on the basis of that person's past USERRA-covered service, current military obligations, or intent to join one of the uniformed services.

Effect of USERRA On FMLA Eligibilty Requirements. USERRA requires that service members who conclude their tours of duty and who are reemployed by their civilian employers receive all benefits of employment that they would have obtained if they had been continuously employed, except those benefits that are considered a form of short-term compensation, such as accrued paid vacation. If a service member had been continuously employed, one such benefit to which he or she might have been entitled is leave under the FMLA. The service member's FMLA eligibility will depend upon whether the service member would have met the employee FMLA eligibility requirements outlined above had he or she not performed USERRA-covered service.

Calculating The 12-Month FMLA Requirement. USERRA requires that a person reemployed under its provisions be given credit for any months of service he or she would have been employed but for the period of absence from work due to or necessitated by USERRA-covered service in determining eligibility for FMLA leave. A person reemployed following USERRA-covered service should be given credit for the period of absence from work due to or necessitated by USERRA-covered service towards the months-of-employment FMLA eligibility requirement. Each month served performing USERRA-covered service counts as a month actively employed by the employer. For example, someone who has been employed by an employer for nine months is ordered to active military service for nine months after which he or she is reemployed.

Upon reemployment, the person must be considered to have been employed by the employer for more than the required 12 months (nine months actually employed plus nine months of USERRA-covered service) for purposes of FMLA eligibility. The 12 months of employment need not be consecutive to meet this FMLA requirement for employees covered by USERRA.

Calculating The 1,250 Hours-of-Service Requirement. In determining FMLA eligibility an employee returning from USERRA-covered service must be credited with the hours of service that would have been performed but for the period of absence from work due to or necessitated by USERRA-covered service. Accordingly, a person reemployed following USERRA-covered service has the hours that would have been worked for the employer added to any hours actually worked during the previous 12-month period to meet the 1,250 hour requirement. In order to determine the hours that would have been worked during the period of absence from work due to or necessitated by USERRA-covered service, the employee's pre-service work schedule can generally be used for calculations. For example, an employee who works 40 hours per week for the employer returns to employment following 20 weeks of USERRA-covered service and requests leave under the FMLA. To determine the person's eligibility, the hours he or she would have worked during the period of USERRA-covered service (20 x 40 = 800 hours) must be added to the hours actually worked during the 12-month period prior to the start of the leave to determine if the 1,250 hour requirement is met.

ANY OTHER MATTERS ABOUT THE BASIC FMLA RULES?

Care For A Sibling. FMLA leave to care for a relative is generally limited to caring for a spouse, son, daughter, or parent. An eligible employee standing in loco parentis to a sibling may take leave to care for such a sibling with an FMLA-qualifying serious health condition if

he or she is (i) under 18, or (ii) is 18 years of age or older and incapable of self-care because of a mental or physical disability.

Affecting A Bonus. Under the regulations, an employer may deny a bonus that is based upon achieving a goal, such as hours worked, products sold or perfect attendance, to an employee who takes FMLA leave (and thus does not achieve the goal) as long as it treats employees taking FMLA leave the same as employees taking non-FMLA leave. *Taking FMLA Leave For Overtime*. Employees with proper medical certifications may use FMLA leave in lieu of working required overtime hours. The regulations clarify that the hours that an employee would have been required to work but for the taking of FMLA leave can be counted against the employee's FMLA entitlement. Employers must select employees for required overtime in a manner that does not discriminate against workers who need to use FMLA leave.

Prohibited Acts. An employer is prohibited from interfering with, restraining, or denying the exercise of FMLA rights, retaliating against an employee for filing a complaint and cooperating with the Wage and Hour Division (WHD), or bringing private action to court.

NEW YORK STATE REQUIRES PRIVATE EMPLOYERS TO ALLOW PAID FAMILY LEAVE STARTING IN 2018

INTRODUCTION

In 2016, Governor Cuomo signed into law New York State's Paid Family Leave program. Under this program, which became effective January 1, 2018 (except for payroll deductions which began on July 1, 2017), employees of private employers in New York State are entitled to take job-protected, paid leave to care for a child, to care for a family member with a serious health condition or to help manage affairs if a family member is called to active military service.

The New York State Paid Family Leave program (called the "PFL" below, for convenience) applies to all private employers with at least one employee working in New York State for 30 consecutive days. It applies to in-state employers, and to out-of-state employers with respect to any employees who work in New York State, who are eligible for the leave.

The PFL is administered by the New York State Workers' Compensation Board (the "Board"). The Board has provided interpretive regulations under the PFL.

WHO PAYS FOR THE LEAVE?

Payroll Deductions. The PFL is funded solely by employees through payroll deductions. An employee's participation in the PFL, and thus the deductions from his or her pay, is not optional, except that an employee may be offered the opportunity to waive the deductions if he or she never works 26 consecutive weeks (and his or her regular employment schedule is at least 20 hours per week) or 175 days in a 52 consecutive-week period (and his or her regular employment schedule is not more than 20 hours per week). The waiver is revoked within eight weeks

(retroactive back to date of hire, if applicable) of an increase in an employee's work hours so that he or she no longer meets the foregoing requirements for a waiver.

Rate Of Payroll Deduction. A maximum rate of payroll deduction per employee is established each year. For 2019, the New York State Superintendent of Financial Services established a maximum rate of payroll deduction, for each employee, of 0.153% of the employee's weekly wage, up to 0.153% of the NY State average weekly wage recognized by the New York State Department of Labor. The state average weekly wage rate applicable to 2019 PFL benefits is $1,357.11. This means that, in 2019, the maximum annual payroll deduction for an employee is $107.97. Employees earning less than the current statewide average weekly wage of $1,357.11 will contribute less than the annual cap of $107.97, consistent with their actual wages. For example:

1. Employees earning $519 a week ($27,000 a year) will pay approximately 79 cents per week ($519 x 0.153%).
2. Employees earning $1,000 a week ($52,000 a year) will pay $1.53 per week ($1,000 x 0.153%).
3. Employees earning $1,357.11 a week ($70,569.72 a year) or more will pay 0.153% x their gross wages each pay period until they reach the maximum of $107.97.

The State provides a handy deduction calculator for employees on its PFL website: https://paidfamilyleave.ny.gov/paid-family-leave-calculator2019.

For purposes of the PFL, "wages" include all types of remuneration, including salaries, commissions, tips, bonuses and the reasonable money value of room and board. Salary and

hourly remuneration are deemed paid in accordance with the employer's regular payroll practices. Bonuses, if not paid regularly, should be prorated in accordance with an example on form PFL-1 (discussed below).

Funding Vehicle. The PFL is automatically included in the disability benefits policy that the employer has with the New York State Insurance Fund. Alternatively, the employer can acquire a paid family leave insurance policy from another carrier, except that coverage for disability benefits and PFL must be under the same policy (with the NYS Insurance Fund or other carrier). The amounts deducted from the employees' pay are either applied to directly pay the premiums, or to reimburse the employer for its own payment of the premiums. It is not yet clear whether the policy carrier can charge the employer more than the amount taken from employee's pay. When an employee takes the paid leave, he or she is paid by the policy carrier.

Option Of Self-Insurance. In lieu of obtaining coverage under its disability policy or another insurance policy, the employer can self-fund the PFL. In this case, the employer would retain the amounts it deducts from employees' pay, and pay the employee out of the retained funds when the employee takes a paid leave. However, a number of conditions must be met to self-insure, e.g., the employer must file an application with the Board, which will review whether the employer has the financial and administrative ability to self-insure, and the employer must post security and enter into an agreement with the Board under which the employer assumes the liability to make required payments (using its own funds when benefits exceed amounts collected by payroll deduction). It is assumed below that an employer will not choose to self-insure.

WHEN CAN PAID LEAVE BE TAKEN UNDER THE PFL?

Work Requirement For Eligibility. An employee is eligible to take the paid leave after he or she has been employed for at least 26 consecutive weeks (if he or she normally works at least 20 hours per week) or has been employed for at least 175 days (if he or she normally works less than 20 hours per week). Work outside of New York State counts for this purpose.

Situations In Which Paid Leave May Be Taken. The PFL allows an eligible employee to take paid leave in any one of the following situations:

(a) to care for or bond with a child during the first 12 months following the child's birth, adoption, or placement for foster care (but not before the birth, adoption or placement);

(b) to provide physical or mental care for a spouse, domestic partner, child, parent, parent in-law, grandparent or grandchild with a "serious health condition", defined as an illness, injury, impairment, or physical or mental condition that involves: (i) inpatient care in a hospital, hospice, or residential health care facility, or (ii) continuing treatment or continuing supervision by a health care provider; or

(c) to address certain emergencies, specified in the federal Family and Medical Leave Act, when a spouse, child, domestic partner or parent is on, or has been notified of an impending call or order to active military duty.

PFL may not be taken for an employee's own health condition.

Amount Of Leave Available. The amount of allowed paid leave per year is phased-in over four years, starting January 1, 2018. The PFL provides for 8 weeks of paid leave in 2018, 10 weeks of paid leave in 2019 and 2020, and 12 weeks of paid leave in 2021. An intermittent leave schedule is permitted.

When Paid Leave May NOT Be Taken. Note that an individual may NOT take paid leave under the PFL, if he or she:

-- is collecting New York State disability benefits (total weekly NYS disability benefits and weekly PFL paid leave benefits is capped at 26 weeks for any 52-consecutive week period);

-- is not working or is on administrative leave;

-- is collecting sick pay or paid time off from the employer (except for concurrent use as discussed below);

-- is working the same hours for which the paid leave would be taken; or

-- is employed in a position NOT localized in New York State (to be localized, most of the work for the job must be performed in New York State).

Individuals Not Covered By The PFL. The same categories of employees who are exempt for the purposes of statutory disability benefits are also exempt under the PFL, such as independent contractors, elementary/secondary school students, clergy, livery drivers, jockeys, learned professionals, teachers and executive officers in 501(c)(3) religious, charitable or education institutions, among several others.

HOW MUCH IS THE EMPLOYEE PAID DURING THE PFL LEAVE?

The amount paid to an employee during the PFL leave by the policy carrier will be:

-- 55% of his or her average weekly wage in 2019 (capped at 55% of the NY State average weekly wage);

-- 60% of his or her average weekly wage in 2020 (capped at 60% of the NY State average weekly wage); and

-- 67% of his or her average weekly wage in 2021 (capped at 67% of the NY State average weekly wage).

An employee's average weekly wage is his or her average weekly total wage for the 8 week period immediately preceding the start of the leave. Again, the New York State Department of Labor has determined that the 2019 NY State average weekly wage is $1,357.11. Like unemployment insurance, PFL benefits are reportable for Federal but not State tax (IRS tax reg. section 1.85-1).

WHAT NOTICE AND DISCLOSURE REQUIREMENTS APPLY?

Notice By Employees. If the need for leave is foreseeable, an employee must provide his or her employer with 30 days advance notice that he or she wishes to take paid leave. If the need is not foreseeable, a notice requesting the leave must be given by the employee as soon as practicable. The notice must make the employer aware of the event for which the leave is required and the expected timing and duration of the leave. It is not necessary to assert rights under or specifically refer to the PFL. An employee asking to take leave must complete and file a request

form and medical certification, and also must also file certain documentation (such as a birth certificate), with the policy carrier.

Form PFL-1 And Other Required Certification Forms. Currently, the Board-provided request form is PFL-1, and the various l certification forms are PFL-2 (Bonding Certification), PFL-3 (Release of Personal Health Information Under the Paid Family Leave Law), PFL-4 (Health Care Provider Certificate for Leave of Family Member with Serious Health Condition) and PFL-5 (Military Qualifying Event). The employer provides the request form and the medical certification forms to the employee (the employer itself obtains these forms from the policy carrier or the New York State PFL website). The employee should complete the PFL-1 and return it to the employer. The employer then completes the employer portion of the PFL-1 form and returns it to the employee within three (3) business days. The employee then completes the PFL-1 and the applicable medical certification forms, gathers any necessary supporting documentation and sends all forms and documentation to the policy carrier. The carrier will contact the employee directly if there are any issues with incomplete or missing documentation.

Policy Carrier Review. The carrier pays or denies the leave request within eighteen (18) days of first having a completed application.

Notice And Disclosure By Employers. The employer must conspicuously post a Notice of Compliance provided by the insurance carrier which notifies employees that the employer has PFL coverage. . The employer is also required to update its employee handbook to discuss the PFL, relevant employer policies and employee obligations, particularly the requirement for an employee to provide notice that he or she wishes to take the leave, and to file the leave request, certification and other documents with the policy carrier. If the employer does not have a

handbook, it must provide its employees separate written guidance on the PFL with the foregoing information.

An employer should also provide an employee with a "Statement of Rights for Paid Family Leave" when it learns that the employee is taking a leave that would qualify under the PFL. Employers should use the Statement which is made available by the Board, and which may be found online at: https://paidfamilyleave.ny.gov/pfl-271s-form-2019. This is similar to the requirement under which the employer must provide such a notice when the employee may be eligible for disability benefits.

IS THE PAID LEAVE JOB PROTECTED?

Job Protection. The paid leave under the PFL is job protected. This means that an employee who takes leave is entitled to return to the same position that he or she had prior to the leave, or to a position with pay, benefits and other terms and conditions of employment which are comparable to the pre-leave position. The employer may not discriminate or retaliate against the employee for taking the leave.

Maintaining Health Benefits. The employer is required to maintain the employee's health benefits during the paid leave, and may require the employee to continue to pay for his or her share of the cost of coverage. The health benefits may be terminated, upon 15 days' advance written notice to the employee, if any required payment for coverage is more than 30 days late. The termination generally becomes effective at the end of the 30-day period. Health coverage must continue when the employee returns to active employment after the leave, even if all employee contributions have not been made.

Other Benefits. Aside from health benefits, any benefits accrued by an employee up to the time of the paid leave must be maintained. Employees do not otherwise accrue seniority or any other benefits while on paid leave.

HOW IS PAID LEAVE COORDINATED WITH OTHER ALLOWED LEAVE, VACATION AND OTHER BENEFITS?

Coordination With Paid Time Off.

If the employer already offers a paid family leave program that fulfills or exceeds the requirements under the PFL, employees will receive only those benefits provided under that program. The provisions of the PFL law provide a minimum which an employer may choose to exceed.

An employee does NOT have to take all of his or her employer-paid sick leave, personal days and/or vacation days ("paid time off" or "PTO"), before using PFL. An employer may permit the employee to use PTO to obtain full wages, prior to, or concurrent with, taking the paid leave under the PFL, but may not require the employee to use the PTO.

Employers may, however, prohibit employees from using PTO during a period of PFL leave. However, an employer that provides full pay for a period during which PFL is available may request reimbursement from the policy carrier charged against family paid leave benefits. Employers should update their employee handbooks and leave policies to inform employees precisely how PTO benefits interact with the PFL.

Coordination With FMLA. Employers are subject to the federal Family and Medical Leave Act, and must provide unpaid leave pursuant to that Act ("FMLA Leave"), if they employ at least 50 employees within a 75-mile radius. Employees are required to use paid leave under the PFL concurrently with any FMLA Leave available to them, when leave is taken for a reason available under both laws (for instance, to care for a spouse with a serious health condition), unless the employer permits otherwise. This is permitted so long as the employer notifies the employee of this concurrent use. If an employer fails to provide this notice, the employee is allowed to receive PFL benefits without concurrently using the benefits available under FMLA. When the employer requires PFL to be taken concurrently with FMLA leave, if the employer informs the employee of his or her eligibility for PFL and the employee declines to apply for payment, the employer and its policy carrier may count the leave taken against the employee's maximum duration of paid leave. Employers should make clear in their policies the circumstances in which FMLA leave and PFL leave will run concurrently.

Further, when the leaves are taken concurrently, the employer may charge the employee's accrued PTO in the manner allowed by the FMLA regulations. The paid leave under the PFL may not be used to extend any leave available under the FMLA. However, leave for an employee's own serious health condition may be taken under FMLA, but not under the PFL, so that such a leave under FMLA does not decrease any leave that the employee could subsequently take under the PFL. Further, an employee may use PFL and FMLA consecutively. For example, if an employee develops a serious health condition during pregnancy and birth of a child, and then-as the condition clears up- wants to take leave to bond with a child, she may be entitled to

request twenty (20) weeks of leave in 2018—twelve (12) weeks of unpaid FMLA leave for the serious health problem, then eight (8) weeks of PFL to bond with the child.

The PFL and FMLA also provide for different treatment of leave by members of the same family. Under the FMLA, an employer may not require spouses to use their FMLA benefits at different times, but are only required to allow the two spouses a combined total of twelve (12) weeks of leave if the leave is taken in connection with the birth or adoption of the employee's child or foster care placement, or to care for the employee's parent with a serious health condition. Conversely, while an employer may require family members (not just spouses) to use PFL to care for the same family member at different times, each family member is entitled to the full amount of PFL.

Again, employers should update their employee handbooks and leave policies to inform employees how PFL interacts with FMLA.

Note that benefits may be available to an employee with his or her own serious health condition under New York State short-term disability benefits program (discussed below).

Coordination With NYC Earned Safe and Sick Time. The New York City Earned Safe and Sick Time Act generally provides an employee working in New York City with up to 40 hours of paid sick or safe time leave for specific eligibility purposes. According to guidance from the Board, leave under the Act interacts with the PFL in a similar manner as PTO. Based on this Board guidance, employers may allow their eligible employees to use benefits under the New York City Earned Safe and Sick Time Act during PFL to supplement their pay. One option is for the employer to provide the employee with the ability to use sick time under the New York City

Earned Safe and Sick Time Act when he or she qualifies under both laws (like it may for vacation, PTO, and parental leave), in order to receive full payment for the missed time. In that case, the New York City Earned Safe and Sick Time Act and PFL time would run concurrently and the employee would receive 100% pay, and the employer would seek reimbursement from the policy carrier.

Coordination With New York State Short-Term Disability Benefits. An employee may not receive New York State Short-Term Disability Benefits or "STDBs" at the same time as he or she takes PFL. However, an employee may receive STDBs and PFL benefits in succession. For example, after giving birth to a child, the employee could receive STDBs, and then take PFL to bond with the child. An employee may take a maximum of twenty-six (26) weeks of receiving STDBs and PFL leave in a twelve-month period.

WHAT ARE THE TAX CONSEQUENCES OF THE EMPLOYEE CONTRIBUTIONS AND PFL BENEFITS?

Employee Contributions. Although the law and regulations are silent on this issue, the Department of Taxation and Finance recently issued guidance clarifying that employers should take payroll deductions for PFL benefits from after-tax wages. Employers should report employee contributions on employees' W-2 forms using Box 14 (state disability insurance taxes withheld). Employers that pay premiums should impute income to their employees. Employees may deduct premium amounts as part of state income taxes if they itemize their federal tax returns.

PFL Benefits. These benefits are considered taxable, non-wage income. In addition, taxes will not be automatically withheld from PFL benefits, but employees can request voluntary tax withholding. If the New York State Insurance Fund or a carrier pays the PFL benefit to employees, they will issue a Form 1099-G or 1099-MISC, to the employee. Employees who do not itemize federal income taxes (and therefore do not deduct premiums paid) may reduce the taxable amount of PFL benefits by the value of premiums paid.

WHAT FORMS HAS THE BOARD PUBLISHED FOR THE PFL?

The Board published the employee application and certification forms, the waiver form and the application forms for employers who voluntarily provide coverage to PFL-exempt employees. These forms are available at: https://paidfamilyleave.ny.gov/forms.

RULES FOR COLLECTIVELY BARGAINED EMPLOYEES

A governing collective bargaining agreement (the "CBA") may provide different (but comparable) benefits to those offered under the PFL. The CBA may also provide rules pertaining to the paid leave which differ from those in the Board's regulations, subject to Board approval, including that:

--the CBA may set out eligibility requirements for paid leave, so long as the CBA does not require more work time than the PFL regulations for eligibility (see eligibility requirements above); and

--the CBA may provide that the union is responsible for collecting payroll deductions and maintaining time records pertaining to the PFL.

NYC SAFE AND SICK LEAVE LAW

The New York City Earned Safe and Sick Time Act (the "Act") requires private employers in New York City, including unions and their pension and welfare funds, to provide safe and sick time leave to their employees. The Act went into effect on April 1, 2014 with regard to requirements to provide sick leave. It was most recently amended effective as of May 5, 2018 to add requirements to provide safe leave, and its underlying rules and applicable FAQs have been revised through September 20, 2018. The Act, as of that date, provides as follows.

AVAILABILITY OF SAFE AND SICK TIME

Providing Safe and Sick Time. Under the Act, any private employer (including a nonprofit employer), which employs at least five employees, must provide paid safe and sick time to its employees. Any private employer, which employs one to four employees, must provide unpaid safe and sick time to its employees. The paid leave requirement also applies to any private employer with one or more domestic workers.

To determine employer size:

- count the number of employees working for the employer per week at the time that that the employee uses safe or sick time leave.
- if the number of employees fluctuates between less than five employees and five or more employees per week during the most recent calendar quarter, employer size may be determined for the current calendar year based on the average number of employees per week who worked during the previous calendar year.
- A slightly different rule for counting employees applies during an employer's first year in operation.

All employees on the employer's payroll are counted for purposes of determining the number of employees. Certain employers with common ownership are aggregated, and treated as a single employer, for purposes of counting employees.

The Calendar Year Defined. For purposes of the Act, a "calendar year" is any 12 consecutive month period selected by the employer.

Employers and Employees. For purposes of the Act, an "employer" is any entity which hires an employee (whether or not the entity is located in New York City). An "employee" is any individual who is employed for hire within the city of New York for more than 80 hours in a calendar year, and who performs work on a full-time, part-time, seasonal or temporary basis. Family members and individuals who work on a per diem, on call or transitional basis are treated as employees if they meet the definition of "employee" and are not otherwise excluded (see below). It does not matter where the employee lives. The term "employee" includes owners who are considered to be employees under New York Labor Law, and who meet the definition above. Employees who telecommute are covered by the law for the hours when they are physically working in New York City, even if the employer is physically located outside of the city.

The term "employee" does not include:

- employees who work 80 hours or less in a calendar year in New York City;
- government employees (federal, State of New York, City of New York);
- participants in federal work study programs;
- employees whose work is compensated by qualified scholarship programs as that term is defined in the federal Internal Revenue Code, 26 U.S.C. § 117;
- certain physical therapists, occupational therapists, speech language pathologists, and audiologists who are licensed by New York State;

- independent contractors who do not meet the definition of an employee under New York State Labor Law ("NYSLL");
- participants in Work Experience Programs ("WEPs");
- certain employees subject to a collective bargaining agreement (discussed below); and
- owners who do not meet the definition of an employee under NYSLL.

Amount of Safe or Sick Time. Under the Act, an employer must provide a minimum of one hour of safe or sick time for every 30 hours worked by an employee, up to 40 hours per calendar year. For those employees paid on a commission or flat-rate basis, accrual of the leave is measured by the actual length of time spent performing work. Employees who are exempt from overtime under NYSLL are assumed to work 40 hours in each work week for purposes of safe or sick time accrual, unless their regular workweek is less than 40 hours, in which case safe or sick time accrues based upon that regular workweek. An employer is not required to provide more than 40 hours of safe or sick time for an employee in a calendar year. An employer may always provide more than the minimum amount of safe or sick time.

Employers must provide domestic workers with at least two days of paid safe or sick leave after one year of employment, in addition to the three days of paid rest they must be paid under the New York Labor Law, for a combined total of five paid days per year.

The Amount the Employer Pays for Leave Taken. When an employee uses paid safe or sick leave, the employer must pay the employee what the employee would have earned for the amount of time and the type of work the employee was scheduled to perform at the time the paid safe or sick leave is taken.

If an employee uses safe and sick leave during hours that would have been overtime if worked, the employer does not have to pay the overtime rate of pay.

If the employee's wage is based on tips or gratuity, then the employer must pay the employee at least the full minimum wage. Employees are not otherwise entitled to lost tips or gratuities during use of safe and sick leave.

If the amount of any bonus is wholly within the discretion of the employer, then the employer does not need to count the bonus in determining the employee's rate of pay for paid safe and sick leave purposes.

If an employee is paid in cash and supplements (as defined in section 220(5)(b) of New York State Labor Law), the employer is not required to pay cash instead of supplements when the employee uses safe and sick leave.

If an employee is paid by commission (whether base wage plus commission or commission only), the employer must pay the employee an hourly rate that is the base wage or the New York State minimum wage, whichever is greater.

If an employee is paid at a flat rate, regardless of the number of hours the employee worked, to calculate the employee's rate of pay for paid safe and sick leave for any week, the employer must add together the employee's total earnings, including tips, commissions, and supplements, for the most recent workweek in which the employee did not take paid safe and sick leave, and divide the total by the number of hours the employee worked in that week, or 40 hours, whichever amount is less. In doing this calculation, the employer should consider workdays to mean the days or parts of days the employee worked. In no event can the rate of pay for piecework be less than the minimum wage.

Note that an employer that is required to provide paid safe and sick leave **cannot** require an employee to pay for all or part of that leave, by pay deductions or otherwise.

When the Employee Must Be Paid for Leave Taken. Leave for safe and sick leave purposes must be paid no later than the payday for the next regular payroll period beginning after the safe and sick leave was used by the employee, unless the employer has asked for written documentation or verification of use of safe and sick leave from the employee. In that case, the employer is not required to pay safe and sick leave until the employee has provided such documentation or verification. An employer cannot delay payment of safe and sick leave beyond the next regular payroll period beginning after the safe and sick leave was used if the employer's written safe and sick leave policies do not include the requirement of providing documentation for more than three consecutive workdays of safe and sick leave, the time and manner in which the documentation must be provided, and the consequences for not providing it.

When Safe and Sick Leave May First Be Taken. Employees could start using accrued sick leave on July 30, 2014 or 120 days after the start of employment, whichever is later. Employees could start using accrued safe leave on May 5, 2018 or 120 days after the start of employment, whichever is later.

Employee Determines Use of Safe or Sick Time. While safe or sick time may be used only for the purposes allowed by the Act (discussed below), employees will determine how much earned safe or sick time they need to use for such purposes. However, employers may set a reasonable minimum increment for the use of the time off. The increments of time may not be less than four hours. Further, employers may limit the amount of safe and sick time allowed to 40 hours in a calendar year.

An employer must allow an employee to use safe and sick time leave for any mandatory overtime hours that the employee is scheduled to work. However, the employer is not required to pay the overtime rate of pay for leave so used.

An employer cannot require an employee to work from home or telecommute instead of taking safe and sick leave. But an employer can offer the employee the option of working from home or telecommuting. If the employee voluntarily agrees to work from home or telecommute, the employee would retain the paid or unpaid safe and sick leave that he or she has accrued.

Carryovers. Unused safe and sick time is carried over to the following calendar year, up to 40 hours. However, employers are only required to allow employees to use up to 40 hours of safe and sick leave per calendar year.

Further, an employer can choose—but is not required—to pay an employee for unused safe and sick leave at the end of the calendar year. An employer is not required to allow employees to carry over safe and sick leave if:

- the employer pays them for the unused accrued safe and sick leave AND the employer front-loads 40 hours (i.e., provides the employee with 40 hours of paid safe and sick leave that meets or exceeds the requirements of the law for the next calendar year on the first day of the next calendar year) OR
- the employer front-loaded 40 hours of safe and sick leave at the beginning of the current calendar year and will front-load 40 hours of safe and sick leave on the first day of the next calendar year.

Front-loading Leave. Note that an employer can have a policy that provides all employees with 40 hours of safe and sick leave at the beginning of each calendar year. This

option may be attractive to employers who prefer not to track the accrual of safe and sick leave for each covered employee.

When the employer is not counting use and accruals in the current calendar year (i.e., the employer is using a front-loading system), the employer cannot change the policy to an accrual system during that year, since employees are entitled to carry over unused safe and sick leave and use those hours at the beginning of the next calendar year. An employer that switches from an accrual system to a front-load system must pay out any unused accrued leave at the end of the year in which it was accrued.

Termination of Employment. The Act does not require financial or other reimbursement to an employee from an employer upon the employee's termination, resignation, retirement, or other separation from employment for accrued safe and sick time that has not been used.

When there is a termination of employment and the employee is rehired within six months of the termination by the same employer, previously accrued sick time that was not used will be reinstated, and that employee will be entitled to the accrued safe or sick time at any time after rehire (as long as the employee already completed the120-day waiting period). However, the employer is not required to reinstate any safe or sick time, to the extent the employee was paid for unused accrued safe or sick time at or prior to separation, and the employee agreed to accept this pay for the unused safe or sick time.

ALLOWED USE OF SAFE AND SICK TIME

Reasons Why Sick Time May Be Taken. An employee is entitled to use sick time for absence from work due to:

- the employee's mental or physical illness, injury, or health condition;

- the employee's need for medical diagnosis, care, or treatment of a mental or physical illness, injury, or health condition;
- the employee's need for preventive medical care;
- care of a family member who needs medical diagnosis, care, or treatment of a mental or physical illness, injury, or health condition, or who needs preventive medical care;
- closure of employee's workplace due to a public health emergency; and
- the employee's need to care for a child whose school or child care provider is closed due to a public health emergency.

Reasons Why Safe Time May Be Taken. Effective May 5, 2018, the Act has been expanded, so that safe time is available, in addition to sick time. Covered workers may use safe time if they or a family member may be the victim of any act or threat of domestic violence, sexual offense, theft within the family, stalking or human trafficking ("Family Offenses"), and the covered worker needs to take actions necessary to restore the physical, psychological or economic health or safety of the covered worker or family member, or to protect those who associate or work with the covered worker, including to:

- obtain services from a domestic violence shelter, rape crisis center, or other shelter or services program for relief from a Family Offense;
- participate in safety planning, temporarily or permanently relocate, or take other actions to increase the safety of the covered worker or family member from future harm from a Family Offense;

- meet with a civil attorney or other social service provider to obtain information and advice related to custody, visitation, matrimonial issues, orders of protection, immigration, housing, or discrimination in employment, housing or consumer credit;
- file a domestic incident report with law enforcement or meet with a district attorney's office;
- attend civil or criminal court dates related to any act or threat of a Family Offense; or
- enroll a child in a new school.

Definition of Family Members. For these purposes, a "family member" is a:

□ child (biological, adopted, or foster child; legal ward; child of an employee standing in *loco parentis*) -- Note that under the sick time provisions of the Act, employees can use sick time to care for adult children.

□ grandchild

□ spouse or domestic partner (current or former regardless of whether they reside together)

□ parent

□ grandparent

□ child or parent of an employee's spouse or domestic partner

□ sibling (including a half, adopted, or step sibling)

Effective May 5, 2018, the list of covered family members, for whom an employee may use sick and/or safe time to provide care, is expanded to include the following broad categories:

- any other individual related by blood to the employee; and
- any other individual whose close association with the employee is the equivalent of a family relationship.

Use of Leave After Birth or Adoption of a Child. A mother can use earned leave during any period of his or her sickness or disability following the birth of her child. The other parent can use earned leave to care for the mother during this period. Parents also can use leave to care for a child's need for medical diagnosis, care, or treatment of an illness, injury, or health condition, or preventive medical care. Parents cannot use safe and sick leave for "bonding" purposes. This differs from the federal Family and Medical Leave Act (the "FMLA"), which does permit leave for the purpose of bonding with a newborn or newly adopted child. For more information on FMLA, go to dol.gov and search "Family & Medical Leave."

NOTICE AND DOCUMENTS FROM EMPLOYEES

Advance Notice from Employees. An employer may require reasonable notice from an employee of the need to use safe or sick time. Where this need is foreseeable, an employer may require reasonable written advance notice of the intention to use safe or sick time, up to seven days prior to the date the safe or sick time is to begin. Where the need is not foreseeable, an employer may require an employee to provide written notice of the need to use safe or sick time as soon as practicable.

If the employer requires advance notice of safe or sick time use, the employer must provide its employees with a written policy explaining procedures for giving notice. For example, an employer can require an employee to call a designated phone number to leave a message. An employer's notice policy must be reasonable, taking into account whether the need for safe or sick time is foreseeable or unforeseeable.

An employer may only deny leave based upon a failure to provide adequate notice if the employer had a written policy requiring notice and if the notice the employer required was reasonable under the circumstances.

Employer Questions and Documentation. While advance notice from the employee can be required, the employer cannot ask the reason why an employee is taking any sick time, or otherwise require the employee, or a health care provider, to disclose details of the employee's or employee's family member's injury, illness, or condition that required the use of sick time, except as required by law or with the employee's written consent.

The employer can, in the case of sick time:

- If the requirement is included in a written policy provided by the employer prior to the start of the leave, require a note from a licensed health care provider after more than three consecutive workdays of leave for sick time attesting to: (1) the existence of a need for sick time and the amount of workhours or days used as sick time and (2) that the sick time is being used for a purpose authorized by the Act.
- Ask for a date on which the employee is "cleared" to return to work.
- Ask for the employee to submit written verification that the employee used sick time for permitted purposes.

A model form that employers can use to verify use of safe and sick leave is available at nyc.gov/dca.

Further, on and after May 5, 2018, if the requirement is included in a written policy provided by the employer prior to the start of the leave, the employer will be permitted to obtain "reasonable documentation" of the need for safe time following an absence of more than three consecutive workdays (similar to the rule on obtaining documentation from a health care provider in the case of a medical-related absence). Reasonable documentation may include a signed note from a social service provider, legal service provider, or member of the clergy, or a

copy of a police report, court record, or a notarized letter written by the employee, indicating the need for safe leave. The employer may not request this documentation until after the employee has taken more than three consecutive days of safe leave. The employer could also ask the employee to submit written verification that the employee used the safe time for permitted purposes.

If an employer requires an employee to submit written documentation, the employee has seven days from the date he or she returns to work to submit the documentation. The employee is responsible for the cost of such documentation not covered by insurance or any other benefit plan.

As described below, the employer must keep certain information about an employee or an employee's family member obtained in connection with the employee's safe or sick time confidential unless the employee consents to disclosure in writing or disclosure is required by law.

An employer may take disciplinary action, up to and including termination, against an employee who uses sick or leave time for other than a permitted purpose.

EMPLOYER NOTICES, RECORDS AND POLICIES

Notice from Employers. This notice is called the "Notice of Employee Rights" and a form of the Notice has been created by New York City's Department of Consumer Affairs (the "DCA"). The Notice is available at nyc.gov/dca.

Employers must give the latest version of the Notice of Employee Rights to covered new employees when they begin employment and must have given the Notice to covered existing employees by June 4, 2018. The latest Notice includes safe leave amendments, which took

effect May 5, 2018. The amendments do not require an employer to provide additional time off for safe leave; instead, they require employers to allow employees to use earned leave for safe leave purposes.

The Notice must be provided to the employee in English and in the language that the employer customarily uses to communicate with that employee. If available on the DCA website, the employer must also provide the Notice in the employee's primary language and the language spoken by at least 5 percent of the workers. The Notice must state:

(1) the amount and terms of the safe and sick time, including any right to unpaid time off,

(2) the calendar year being used by the employer,

(3) that the Act prohibits retaliation for requesting or using safe or sick time, and

(4) that employees have the right to file a complaint with the DCA, or any other agency the Mayor designates to enforce the Act.

The employer must use a delivery method for the Notice that reasonably ensures receipt by the employee. For example, an employer may provide the Notice to each employee personally or by regular mail or by email, or deliver the Notice to the employee by including it in new hire materials if the employer gives those materials directly to the employee. An employer cannot post the Notice instead of individually delivering the Notice to employees. There is no requirement that the Notice must be posted or provided annually to existing employees.

The law requires employers to keep or maintain records establishing the date the Notice was provided to an employee and proof that the Notice was received by the employee. The DCA encourages employers to have the employee sign the Notice. Saving signed copies of the Notice or email receipts are good ways to document that employers gave employees the required Notice.

Employer Safe and Sick Leave Policy. In addition to providing the Notice of Employee Rights, employers must provide safe and sick time policies (including policy to comply with the Act). The policies must be in a single writing, and must explain, at a minimum:

- the amount of safe and sick time allowable and when an employee can begin using safe and sick time, if a front-loading system is used (i.e., the employer provides 40 hours of paid sick and paid leave for use on or before the 120th day of employment and on the first day of each new calendar year thereafter);
- when accrual of safe and sick time starts, the rate at which an employee accrues safe and sick time, and the maximum number of hours an employee may accrue in a calendar year if an accrual system is used;
- the employee's notice requirement, and the procedures that an employee must follow to provide notice to the employer of a need to use safe or sick time;
- all requirements for written documentation or verification of the use of safe or sick time;
- any reasonable minimum increment and/or fixed interval for the use of accrued safe or sick time;
- the confidentiality requirements applicable to the information the employer obtains in connection with an employee's sick or same time. Generally, the confidentiality requirements to be detailed in the policy are that an employer: (1) cannot require an employee or his or her health care or other service providers to disclose personal health information or the particulars of the situation for which an employee requests leave under the Act and (2) must maintain confidentiality of information obtained solely because of the Act, unless the employee consents to disclosure in writing, or the disclosure is required by law;

- any policy regarding consequences for employee's failure or delay to provide required documentation;
- any policy regarding employee discipline for misuse of safe or sick time; and
- the employer's policy regarding carry-over of unused safe or sick time at the end of the calendar year.

The written policies must be distributed personally to the employee upon commencement of employment, within 14 days of any change made to the policies, and at the request of an employee. Distribution may be made either in hard copy or electronically (e.g., by email). The policies may be posted when personal distribution is not required.

An employer may not distribute the Notice of Employee Rights as required by the law in lieu of maintaining, distributing, or posting a written safe and sick time policy. Employers should keep their current and past written policies on safe and sick time.

Employer Records. Employers should keep their current and past written policies on safe and sick leave.

Employers must keep and maintain records, including employment, payroll, and timekeeping records, documenting their compliance with the requirements of the law, specifically those records that detail for each employee:

- the employee's name, address, phone number, start date of employment, end date of employment (if applicable), rate of pay, and whether the employee is exempt from the overtime requirements of NYSLL;
- hours worked each week by the employee, unless the employee is exempt from the overtime requirements of NYSLL and has a regular workweek of 40 hours or more;

- the date and time of each instance of safe or sick time used by the employee and the amount paid for each instance;
- any change in the material terms of employment specific to the employee; and
- the date that the Notice of Employee Rights was provided to the employee and proof that it was received by the employee.

Employers must keep and maintain these records for at least three years, unless applicable law requires a longer period.

An employer can keep electronic records as long as the employer is able to produce the records in a manner in which they can be readily inspected or examined by DCA and as long as the confidentiality requirements discussed above can be met.

Using Other Leave. An employer who provides an employee with an amount of paid leave, including paid time off, paid vacation, or paid personal days, sufficient to meet the requirements of the Act, and who allows this paid leave to be used for the same purposes and under the same conditions as safe or sick time required by the Act, is *not* required to provide additional paid safe or sick time for the employee under the Act. Similarly, an employer who provides an employee with an amount of unpaid or paid safe or sick time, including unpaid or paid time off, unpaid or paid vacation, or unpaid or paid personal days, sufficient to meet the requirements of the Act, and who allows this leave to be used for the same purposes and under the same conditions as safe or sick time required under the Act, is not required to provide additional unpaid safe or sick time for the employee under the Act.

An employer may require safe or sick time to be taken concurrently with other leave, which is taken for the same purpose as the safe or sick time. The law expressly encourages employers to provide more generous leave policies for such concurrent use or otherwise.

COLLECTIVE BARGAINING AGREEMENTS

The Act does not apply to any employee covered by a valid collective bargaining agreement if:

(1) the provisions of the Act are expressly waived in the agreement, and

(2) the agreement provides for a comparable benefit for the employees covered by the agreement, such as paid time off.

Condition (2) does not apply to unionized employees in the grocery and construction industries. For an employee subject to a valid collective bargaining agreement on the Act's effective date (April 1, 2014), or in the case of amendments to the law that expanded the definition of family member and added safe leave uses (May 5, 2018), the Act does not begin to apply, in any event, until that agreement expires.

NO RETALIATION/ENFORCEMENT

Retaliating against an employee for requesting or using safe or sick time under the Act, filing a complaint about a violation of the Act, communicating with anyone about a violation of the Act, participating in an investigation or action regarding a violation, or informing another person of their rights is prohibited.

The Act has extensive enforcement provisions. Employees have no independent private right of action in court for a violation of the Act. An employee who feels his or her rights under the Act have been violated may file a complaint with the DCA, or another agency designated by the Mayor to enforce the Act. The complaint must be filed within two years after the date the person knew or should have known of the alleged violation. Aside from the Act, employees retain any other rights they may have under other local, state, or federal laws.

OVERLAP WITH OTHER LAWS

Federal and State Laws. Federal and state laws, such as the Family Medical Leave Act ("FMLA"), Americans with Disabilities Act ("ADA"), or the New York State Human Rights Law, take precedence when they require employers to do more than the Act. For example, depending on the facts in a particular situation, under the FMLA, an employer may be required to provide intermittent time off in increments of time less than four hours.

As another example, depending on the facts in a particular situation, under the ADA or the New York State Human Rights Law, an employer may be required to provide a leave of absence to an employee with a disability that is longer than the amount of safe and sick leave an employer must allow under the Act.

In addition, when an employer is asked to provide leave under federal or state law that goes beyond what the employee is entitled to under the Act, the employer may be able to ask the employee to provide more information about a medical condition or disability than the employee would be required to provide under the Act.

Note: It will often be the case that an employer can meet the requirements of both federal law and the Act at the same time by allowing time off with pay. Moreover, leave an employer provides under the Act would generally count toward meeting obligations under federal and state law, even though additional leave may be required under those laws.

Note: FMLA, ADA and New York State Human Rights Law do not require employers to give time off with pay. An employee's use of safe and sick leave may be counted toward concurrent leave under federal or state law, such as the FMLA.

Some Differences Between the Act and the FMLA**.** The FMLA provides qualified employees with 12 weeks of job-protected unpaid leave for specific purposes. The FMLA

applies only to employers that meet certain criteria and only eligible employees are entitled to take FMLA leave. The FMLA provides time off for bonding with and taking care of a newly born, placed or adopted child, and for handling exigencies of a family member's military service, which the Act does not.

Some Differences Between the Act and New York State Plaid Family Leave Law. Beginning January 1, 2018, the New York State Paid Family Leave Law (the "PFL") provides qualified employees with eight weeks of partially paid leave (at 50% of average weekly pay) to:

- Bond with a newly born, adopted, or fostered child.
- Care for a close relative with a serious health condition.
- Assist loved ones when a family member is deployed abroad on active military service.

The length and monetary amount for this leave is set to increase in 2019, 2020, and 2021.

Again, the Act does not provide leave for bonding with a new child, or assisting loved ones when a family member is involved in military service . But, unlike the Act, the PFL does not permit leave for the employee to take care of himself or herself or for safe time.

A Note On Westchester County

New York's Westchester County has now enacted a law, called "Earned Sick Leave Law" (or the "Law"). The Law is summarized as follows.

Employers Subject to the Law. Under the Law, paid sick time must be provided by any private employer that has at least five employees. Other private employers must provide unpaid sick time to its employees. For purposes of counting the number of employees, an employer must count all of its employees performing work for pay, including full-time, part-time, seasonal and temporary workers. When, in the current calendar year, the number of employees per week fluctuates between above and below five, the employer makes the count by taking the average number of employees who worked per week during the preceding calendar year.

Definition of Employee. For purposes of the law, an "employee" is any individual who works as an employee in Westchester County for more than 80 hours in a calendar year.

Amount of Leave. A private employer must provide an employee with sick time (whether paid or unpaid) up to 40 hours per calendar year. Personal time may count towards the 40 hour requirement. The employer can allow more sick time in its discretion. In general, an employee will accrue one hour of leave for every 30 hours worked. Accruals begin at the start of employment or, if later, the effective date of the Law. Instead of counting accruals, the employer can credit an employee with 40 hours at the start of each year. Unused leave can be carried over to the next year.

Amount of Payment. Sick time leave must be paid at the higher of the hourly rate at which the employee is being paid for time worked, or the state minimum wage. At the termination of employment, the employer need not pay the employee for any unused sick time.

Reasons for Taking Leave. After 90 days of employment (or, if later, 90 days after the effective date of the Law), sick time leave can be taken under the Law for the employee's or a family member's:

--mental or physical illness, injury, or health condition;

--medical diagnosis, care, or treatment of such condition; or

--preventive medical care.

Also, after 90 days of employment (or, if later, 90 days after the effective date of the Law), a sick time leave can be taken: (1) if an employee's place of business, or a child's day care, elementary or secondary school, is closed due to a public health emergency; or (2) to care for the employee or a family member with a communicable disease, when a public health official has determined that a danger to others exists due to the individual's presence.

Family Members. For purposes of the Law, there are three categories of "family members": (1) a child, grandchild, grandparent, parent, sibling, or current or former spouse or domestic partner of the employee, (2) the child of a spouse, domestic partner or other individual listed in (3), and (3) an individual who is related to the employee by blood or affinity, has a child in common with the employee, or who is or has been in an intimate relationship with the employee.

Employee Notice. The Law does not require any advance notice by an employee for taking sick time, unless the employer requires it (see below). If the need for leave is forseeable, an employee must make a reasonable effort to schedule leave in a manner that will not unduly disrupt the employer's operations. Also, a request for a leave must include the expected length of the absence from work.

Employer Requirements. Each employee must be given a copy of the Law, and written notice of how it applies to him or her, within 90 days of the Law's effective date. All new employees must be given the same items at the time of hire. Further, an employer must post a copy of the Law and a poster for employees in a conspicuous and accessible location. These items must be so posted in English, Spanish, and any other language required by Westchester County.

If an employer requires advance notice of the need for leave, it must provide employees with a written policy that states this requirement. If the policy is not so provided, the employer cannot deny earned sick time to an employee who does not provide notice of a leave.

The employer may determine how an employee may ask for leave. For example, the employer can require an oral, written or electronic request, or a request by any other means acceptable by the employer. If the employee is absent from work for more than three consecutive days, the employer may require the employee to provide reasonable documentation (for example, a doctor's note) that the sick leave was used for a permitted purpose. The employer must follow the Law's confidentiality requirements as to any information it obtains from the employee in connection with the Law.

Employers must keep records that clearly show the hours their employees have worked, and all sick time leave accrued or used by their employees, during the prior three years.

No Interference/Employee Complaint. An employer cannot interfere with an employee's right to take the sick time leave, or retaliate against the employee for using such right. The Law allows an employee, who believes that his or her employer has not complied with the Law, to file an administrative complaint or a lawsuit against the employer within one year of the failure to comply.

Effective Date. The Law goes into effect on March 30, 2019. However, for any employee covered by a collective bargaining agreement (a "CBA"), the Law will not apply until the current CBA expires. Further, the Law will not apply at all if the CBA expressly waives the Law and provides a "comparable benefit" in the form of paid days off, for example, sick time, paid vacation time, personal time or premium pay for weekend work or holidays.

Workshop B:
NLRB Update

Karen P. Fernbach, Esq.
Hofstra Law School, Hempstead, NY

Peter C. Conrad, Esq.
Proskauer Rose LLP, New York, NY

Jae W. Chun, Esq.
Friedman & Anspach, New York, NY

NEW YORK STATE BAR ASSOCIATION
LABOR & EMPLOYMENT LAW SECTION
2019 ANNUAL MEETING
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ANALYZING EMPLOYER RULES UNDER THE NLRA AFTER *BOEING*

Peter D. Conrad, Esq.
Proskauer Rose LLP
Eleven Times Square
New York, NY 10036
pconrad@proskauer.com
212.969.3020

Analyzing Employer Rules Under the NLRA After *Boeing*

Peter D. Conrad, Esq.
Proskauer Rose LLP

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The *Boeing* Decision

In late December 2017, just days before then-NLRB Chairman Miscimarra's term ended and he returned to private practice, a sharply-divided Board issued its long-awaited decision in *The Boeing Co.*, 365 N.L.R.B. No. 154 (Dec. 14, 2017). The case involved the legality of a facially neutral Boeing policy prohibiting the use of camera-enabled devices, *e.g*., smartphones, on employer property, which an administrative law judge found was unlawful applying the often-criticized standard established by the Board in *Lutheran Heritage Village-Livonia*, 343 N.L.R.B. 646 (2004).[1] In so finding, the ALJ gave no weight to the Boeing security interests served by the rule.

On review, the Board reversed the ALJ, dismissed that portion of the complaint challenging Boeing's "no-camera rule;" and overruled the *Lutheran Heritage* "reasonably construe" standard; and, announced that the NLRB "will no longer find unlawful the mere maintenance of facially neutral employment policies, work rules and handbook provisions based on a single inquiry, which made legality turn on whether an employee 'would reasonably construe' a rule to prohibit some type of potential Section 7 activity that might (or might not) occur in the future." 365 N.L.R.B. No. 154, slip op. at 2.

[1] There was no claim that Boeing's rule explicitly restricted activity protected by Section 7 of the Act; that it was adopted in response to NLRA-protected activity; or, that the rule had been applied by Boeing to restrict such activity.

The Board cited "multiple defects" inherent in the first prong of the *Lutheran-Heritage* standard, including:

- The single-minded consideration of NLRB-protected rights, without properly taking into account legitimate employer justifications for the rule;
- The tendency of the test to lead employers to conclude that they might be better-served by not having handbooks at all, to the detriment of their employees;
- The fact that the test has resulted in the invalidation of facially neutral rules solely because they were ambiguous in some respect;
- The test's failure to distinguish between core Section 7 activity and rights that lie at the periphery of the statute; and
- Concerns that the test has led to unpredictable results.

In place of the discredited *Lutheran-Heritage* "reasonably construe" standard, the Board adopted a new test under which it now will evaluate "(i) the nature and extent of the potential impact [of the rule] on NLRA rights, *and* (ii) legitimate justifications associated with the rule," adding that the Board "will conduct this evaluation, consistent with [its] 'duty to strike the proper balance between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy,' focusing on the perspective of employees, which is consistent with Section 8(a)(1)." *Id.* at 3.

The NLRB then delineated three categories of employment policies, rules and handbook provisions for analysis in future unfair labor practice cases:

> *Category 1* will include rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated

> with the rule. Examples of Category 1 rules are the no-camera requirement in this case, the "harmonious interactions and relationships" rule that was at issue in *William Beaumont Hospital*, and other rules requiring employees to abide by basic standards of civility.
>
> *Category 2* will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.
>
> *Category 3* will include rules that the Board will designate as *unlawful* to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRSA rights is not outweighed by justifications associated with the rule. An example of a Category 3 rule would be a rule that prohibits employees from discussing wages or benefits with one another.

Id., at 3-4.

Applying these standards to the no-camera rule, the Board found that the "justifications for Boeing's restrictions on the use of camera-enabled devices on Boeing property" -- *i.e.*, maintaining the security of its facilities and information housed therein, critical not only for Boeing's business interests but also for national security -- "outweigh the rule's more limited adverse effect on the exercise of Section 7 rights." *Id.* at 5. Therefore, the Board reversed the ALJ's finding that Boeing's maintenance of the rule violated Section 8(a)(1).

The General Counsel's Guidance on Application of *Boeing*

On June 6, 2018, NLRB General Counsel Peter B. Robb issued a very useful 20-page "Guidance on Handbook Rules Post-*Boeing*" (Memorandum GC 18-04). The memo provides "general guidance for Regions regarding the placement of various types of rules into the three categories set out in *Boeing*, and regarding the Section 7

interests, business justifications, and other considerations that Regions should take into account in arguing to the Board that specific Category 2 rules are unlawful."

In his introductory comments on the *Boeing* decision, the General Counsel emphasized that the Board "significantly altered its jurisprudence on the reasonable interpretation of handbook rules . . ., [and] severely criticized *Lutheran Heritage* and its progeny for prohibiting any rule that could be interpreted as covering Section 7 activity, as opposed to only prohibiting rules that would be so interpreted." He added that after *Boeing*, "ambiguities in rules are no longer interpreted against the drafter, and generalized provisions should not be interpreted as banning all activity that could conceivably be included."

The bulk of GC Memo 18-04 was directed at the types of rules that fall into each of the three categories established by *Boeing*, which are summarized below.

Category 1 – Rules that are Generally Lawful to Maintain

Category 1 includes rules that when reasonably interpreted do not prohibit or interfere with the exercise of Section 7 rights, or where the potential adverse impact on protected activity is outweighed by business justifications for the rule. Unfair labor practice charges based on a claim that such a rule is unlawful on its face should be dismissed. Some examples identified by General Counsel Robb are:

- Civility rules;
- No-photography/no-recording rules;
- Rules against insubordination, non-cooperation, or on-the-job conduct that adversely affects operations;

- Disruptive behavior rules;
- Rules protecting confidential proprietary and customer information or documents;
- Rules against defamation or misrepresentation;
- Rules against using employer logos or intellectual property;
- Rules requiring authorization to speak for the company; and
- Rules prohibiting disloyalty, nepotism, or self-enrichment.

Category 2 – Rules Warranting Individualized Scrutiny

In this category are rules that are neither obviously lawful nor unlawful, which must be evaluated on a case-by-case basis to determine (a) if there would be interference with NLRA-protected rights; and (b) whether any such adverse impact is outweighed by business justifications.

The legality of Category 2 rules depends on context, including positioning of the rule among other rules contained in the employee handbook, the examples provided of conduct covered by the rule, and the type or character of the workplace. The General Counsel takes the view that "the key question . . . is whether the employer's particular business interest in having the rule outweighs the impact on Section 7 rights." In that regard, "the ease with which an employer could tailor the rule to accommodate both its business interests and employees' Section 7 rights should be a relevant factor."

Charges alleging an unfair labor practice based on maintenance of a Category 2 rule are to be submitted to the Division of Advice for further analysis. Examples of such rules are:

- Broad conflict-of-interest rules (not specifically aimed at fraud or self-enrichment);
- Broad confidentiality rules encompassing "employer business" or "employee information";
- Rules regarding disparagement or criticism of the employer (as opposed to civility rules regarding disparagement of employees);
- Rules regulating use of an employer's name (as opposed to its logo or trademark);
- Rules restricting speaking to the media (as opposed to rules prohibiting employees from speaking on behalf of the employer);
- Rules banning off-duty/off-premises conduct that might harm the employer (as opposed to disruptive conduct at work); and
- Rules against fake or inaccurate statements (as opposed to rules prohibiting defamation).

Category 3 – Rules that are Unlawful to Maintain

These are rules that would prohibit or limit NLRA-protected activity, where the adverse impact on Section 7 rights outweighs any justification for the rule. Absent settlement, Regional Directors are instructed to issue complaint in Category 3 cases. Examples:

- Confidentiality rules specifically regarding wages, benefits, or working conditions; and
- Rules against joining outside organizations or voting on matters concerning the employer.

Post-*Boeing* Developments

In the year since *Boeing* was decided, administrative law judges have applied the new standard in several cases and the Division of Advice has provided further guidance

on submissions from the Regional Offices. These developments are summarized below, beginning with the ALJ decisions.

ALJ Decisions

- *UPMC Presbyterian Hosp*., 2018 N.L.R.B. LEXIS 29 (January 18, 2018) – ALJ applied Boeing to portions of the employer's no-solicitation/no-distribution rule and found it to be a Category 3 rule, that was "unlawful to maintain because it prohibits or limits employees' Section 7 protected conduct, and the adverse impact on such rights is not outweighed by the alleged justifications associated with that rule."

- *Seven Seas Union Square*, 2018 N.L.R.B. LEXIS 79 (February 9, 2018) – ALJ found that the employer's overbroad no-solicitation policy was an unlawful Category 3 rule under *Boeing* (analogizing it to a rule prohibiting employees from discussing wages and benefits). ALJ also found the employer's sweeping rule against participation in political process on company property to be unlawful under the new *Boeing* standard, analyzing it as a Category 2 rule. However, no violation was found based on the employer's catch-all prohibition of "improper conduct," noting that it "appears similar to a reasonable desire that employees maintain 'harmonious interactions and relationships.'" As such, it was a Category 1 rule under *Boeing*.

- *Baylor Univ. Med. Ctr.*, 2018 N.L.R.B. LEXIS 77 (February 12, 2018) – applying *Boeing* to several challenged provisions of a separation agreement, the ALJ found that the prohibition on the employee's participation in any claim brought by a third party against the employer was an unlawful Category 3 rule, concluding that the rule

had the "predictable impact of barring NLRA-protected conduct," including providing "voluntary information to Board agents in furtherance of" an unfair labor practice investigation. A strict confidentiality provision was similarly unlawful under Category 3, but the agreement's non-disparagement provision, barring "false, disparaging, negative, . . . or derogatory remarks," was found to be lawful under *Boeing* Category 1, as it merely established a "civility" standard.

- *San Rafael Healthcare and Wellness, L.L.C.*, 2018 N.L.R.B. LEXIS 95 (February 14, 2018) – *Boeing* did not provide a defense to an unfair labor practice charge attacking an employer's mandatory arbitration procedure, as it would reasonably be interpreted to prohibit or restrict the right of employees to file charges with the NLRB. Justifications for arbitration as an "expedient, cost effective resolution of disputes" were "[in]sufficient to outweigh such potentially pervasive interference with employees' fundamental rights and protections under the Act."

- *Saxon Hall Mgmt., L.L.C.*, 2018 N.L.R.B. LEXIS 51 (Jan. 29, 2018) – *Boeing* did not apply, where the alleged unfair labor practice was based not on an employer rule, but rather a directive to an employee, upon discharge, not to speak with former coworkers about his termination.

Advice Memoranda[2]

- *Lyft Inc.*, Case 20-CA-171751 (June 14, 2018) – This case was submitted to the Division of Advice for consideration whether the "Intellectual Property" and

[2] Advice Memoranda dealing with employer rules under *Boeing* may be accessed through the following link to the NLRB's website: https://www.nlrb.gov/news-outreach/nlrb-memoranda/advice-memos/advice-memoranda-dealing-handbook-rules-post-boeing.

"Confidentiality" provisions of the employer's "Terms of Service" agreement violated Section 8(a)(1) in light of the new *Boeing* standard. Advice determined that both policies were lawful. The Intellectual Property policy simply prohibited employee use of employer trademarks/logos and fell within Category 1. Similarly, the confidentiality policy was lawful under *Boeing* because the employees would not reasonably interpret a prohibition on disclosure of proprietary and confidential information relating to Lyft's business, operations and properties, including user information, to extend to Section 7 activity.

- *Kumho Tires*, Cases 10-CA-208153 and 10-CA-208414 (June 11, 2018) – the charges here challenged the employer's social media policy, which prohibited disclosure of the company's trade secrets and private, confidential information. Advice determined that the rule would not reasonably be interpreted as a restriction on the exercise of NLRA rights under Boeing.

- *The Washington Post*, Case 05-CA-206213 (July 6, 2018) – Here, the Regional Office sought guidance from the Division of Advice on an unfair labor practice charge challenging the newspaper's ethics policy, which prohibited employee-reporters from freelancing for competing media outlets. Advice determined that the ethics policy was a lawful Category 1 rule under *Boeing*, treating it as rule "banning disloyal conduct in competition with the employer," that does "not meaningfully implicate Section 7 rights and employers have a substantial interest in ensuring that their employees do not undermine their business by working for a competitor."

- *Blue Cross Blue Shield of Tennessee, Inc.*, Case 10-CA-207362 (August 10, 2018) – This case was submitted to the Division of Advice for Guidance on whether the employer's "Inappropriate Work Behavior Policy," which prohibited audio recordings, was lawful under *Boeing*. Relying on GC Memorandum 18-04, Advice concluded that the no-recording rule was a lawful Category 1 rule as it would not reasonably be interpreted as a restriction of NLRA rights and it advances substantial legitimate management interests. Advice added that "although no-recording rules may occasionally chill employees from engaging in Section 7 activity, they do not significantly impact the ability to engage in such activity and may even promote such activity 'by encouraging open discussion and exchange of ideas.'"

PDC

The Boeing Company *and* Society of Professional Engineering Employees in Aerospace, IFPTE Local 2001. Cases 19–CA–090932, 19–CA–090948, and 19–CA–095926

December 14, 2017

DECISION AND ORDER[1]

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE, MCFERRAN, KAPLAN, AND EMANUEL

This case involves the legality of an employer policy, which is one of a multitude of work rules, policies and employee handbook provisions that have been reviewed by the Board using a test set forth in *Lutheran Heritage Village-Livonia*.[2] In this case, the issue is whether Respondent's mere maintenance of a facially neutral rule is unlawful under the *Lutheran Heritage* "reasonably construe" standard, which is also sometimes called *Lutheran Heritage* "prong one" (because it is the first prong of a three-prong standard in *Lutheran Heritage*). Thus, in *Lutheran Heritage*, the Board stated:

> [O]ur inquiry into whether the maintenance of a challenged rule is unlawful begins with the issue of whether the rule explicitly restricts activities protected by Section 7. If it does, we will find the rule unlawful. If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (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.[3]

Most of the cases decided under *Lutheran Heritage* have involved the *Lutheran Heritage* "reasonably construe" standard,[4] which the judge relied upon in the instant case. Specifically, the judge ruled that Respondent, The Boeing Company (Boeing), maintained a no-camera rule that constituted unlawful interference with the exercise of protected rights in violation of Section 8(a)(1) of the National Labor Relations Act (NLRA or Act).[5]

Boeing designs and manufactures military and commercial aircraft at various facilities throughout the United States. The work undertaken at Boeing's facilities is highly sensitive; some of it is classified. Boeing's facilities are targets for espionage by competitors, foreign governments, and supporters of international terrorism, and Boeing faces a realistic threat of terrorist attack. Maintaining the security of its facilities and of the information housed therein is critical not only for Boeing's success as a business—particularly its eligibility to continue serving as a contractor to the federal government—but also for national security.

Boeing maintains a policy restricting the use of camera-enabled devices such as cell phones on its property. For convenience, we refer to this policy (which is contained in a more comprehensive policy Boeing calls "PRO-2783") as the "no-camera rule." Boeing's no-camera rule does not explicitly restrict activity protected by Section 7 of the Act, it was not adopted in response to NLRA-protected activity, and it has not been applied to restrict such activity. Nevertheless, applying prong one of the test set forth in *Lutheran Heritage*, the judge found that Boeing's maintenance of this rule violated Section 8(a)(1) of the Act. Based on *Lutheran Heritage*, the judge reasoned that maintenance of Boeing's no-camera rule was unlawful because employees "would reasonably

[1] On May 15, 2014, Administrative Law Judge Gerald M. Etchingham issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party each filed an answering brief, and the Respondent filed a reply to each answering brief. The General Counsel filed cross-exceptions, the Charging Party filed cross-exceptions and a supporting brief, the Respondent filed an answering brief to the General Counsel's and Charging Party's cross-exceptions, and the Charging Party filed a reply brief. The National Association of Manufacturers filed an amicus brief, and the Charging Party filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] 343 NLRB 646 (2004) (*Lutheran Heritage*).

[3] Id. at 646–647 (emphasis added; footnote omitted).

[4] For ease of reference, we refer hereafter to prong one of the *Lutheran Heritage* standard as "*Lutheran Heritage*." Also, we use the term "facially neutral" to describe policies, rules and handbook provisions that do not expressly restrict Sec. 7 activity, were not adopted in response to NLRA-protected activity, and have not been applied to restrict NLRA-protected activity.

[5] Sec. 8(a)(1) of the Act makes it unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." In pertinent part, Sec. 7 states that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities. . . ."

construe" the rule to prohibit Section 7 activity.[6] In finding the no-camera rule unlawful, the judge gave no weight to Boeing's security needs for the rule.

The judge's decision in this case exposes fundamental problems with the Board's application of Lutheran Heritage when evaluating the maintenance of work rules, policies and employee handbook provisions. For the reasons set forth below, we have decided to overrule the Lutheran Heritage "reasonably construe" standard. The Board will no longer find unlawful the mere maintenance of facially neutral employment policies, work rules and handbook provisions based on a single inquiry, which made legality turn on whether an employee "would reasonably construe" a rule to prohibit some type of potential Section 7 activity that might (or might not) occur in the future.[7] In our view, multiple defects are inherent in the Lutheran Heritage test:

- The "reasonably construe" standard entails a single-minded consideration of NLRA-protected rights, without taking into account any legitimate justifications associated with policies, rules and handbook provisions. This is contrary to Supreme Court precedent and to the Board's own cases.
- The *Lutheran Heritage* standard, especially as applied in recent years, reflects several false premises that are contrary to our statute, the most important of which is a misguided belief that unless employers correctly anticipate and carve out every possible overlap with NLRA coverage, employees are best served by not having employment policies, rules and handbooks. Employees are disadvantaged when they are denied general guidance regarding what standards of conduct are required and what type of treatment they can reasonably expect from coworkers. In this respect, *Lutheran Heritage* has required perfection that literally is the enemy of the good.
- In many cases, *Lutheran Heritage* has been applied to invalidate facially neutral work rules *solely* because they were ambiguous in some respect. This requirement of linguistic precision stands in sharp contrast to the treatment of "just cause" provisions, benefit plans, and other types of employment documents, and *Lutheran Heritage* fails to recognize that many ambiguities are inherent in the NLRA itself. See fns. 41, 42 & 43, infra.
- The *Lutheran Heritage* "reasonably construe" test has improperly limited the Board's own discretion. It has rendered unlawful every policy, rule and handbook provision an employee might "reasonably construe" to prohibit *any* type of Section 7 activity. It has not permitted the Board to recognize that some types of Section 7 activity may lie at the periphery of our statute or rarely if ever occur. Nor has *Lutheran Heritage* permitted the Board to afford *greater* protection to Section 7 activities that are central to the Act.
- *Lutheran Heritage* has not permitted the Board to differentiate, to a sufficient degree, between and among different industries and work settings, nor has it permitted the Board to take into consideration specific events that may warrant a conclusion that particular justifications outweigh a potential future impact on some type of NLRA-protected activity.
- Finally, the Board's *Lutheran Heritage* "reasonably construe" test has defied all reasonable efforts to make it yield predictable results. It has been exceptionally difficult to apply, which has created enormous challenges for the Board and courts and immense uncertainty and litigation for employees, unions and employers.

Paradoxically, *Lutheran Heritage* is too simplistic at the same time it is too difficult to apply. The Board's responsibility is to discharge the "special function of applying the general provisions of the Act to the complexities of industrial life."[8] Though well-intentioned, the *Lutheran Heritage* standard prevents the Board from giving meaningful consideration to the real-world "complexities" associated with many employment policies, work rules and handbook provisions. Moreover, *Lutheran Heritage* produced rampant confusion for employers, employees and unions. Indeed, the Board itself has struggled when attempting to apply *Lutheran Heritage*:

[6] The judge additionally found that the Respondent engaged in unlawful surveillance when its security guards photographed employees engaged in union activity, and that it created an impression of surveillance when a security guard told employees that he had been directed to document all union activity and that he was taking photographs of "non-Boeing" activity. We agree with the judge, for the reasons stated in his decision, that the Respondent engaged in surveillance and created the impression of surveillance in violation of Sec. 8(a)(1) of the Act.

Member Emanuel does not pass on whether the concerted activity by employees on the Respondent's property in this case was protected by the Act, because the Respondent does not contend that the activity was unprotected.

[7] 343 NLRB at 647.

[8] *NLRB v. Erie Resistor Corp*., 373 U.S. 221, 236 (1963); see also *NLRB v. J. Weingarten, Inc*., 420 U.S. 251, 266–267 (1975) ("The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board.").

since 2004, Board members have regularly disagreed with one another regarding the legality of particular rules or requirements, and in many cases, decisions by the Board (or a Board majority) have been overturned by the courts of appeals.[9]

These problems have been exacerbated by the zeal that has characterized the Board's application of the *Lutheran Heritage* "reasonably construe" test. Over the past decade and one-half, the Board has invalidated a large number of common-sense rules and requirements that most people would reasonably expect every employer to maintain. We do not believe that when Congress adopted the NLRA in 1935, it envisioned that an employer would violate federal law whenever employees were advised to "work harmoniously"[10] or conduct themselves in a "positive and professional manner."[11] Nevertheless, in *William Beaumont Hospital*, the Board majority found that it violated federal law for a hospital to state that nurses and doctors should foster "harmonious interactions and relationships," and Chairman (then-Member) Miscimarra stated in dissent:

> Nearly all employees in every workplace aspire to have "harmonious" dealings with their coworkers. Nobody can be surprised that a hospital, of all workplaces, would place a high value on "harmonious interactions and relationships." There is no evidence that the requirement of "harmonious" relationships actually discouraged or interfered with NLRA-protected activity in this case. Yet, in the world created by *Lutheran Heritage,* it is unlawful to state what virtually every employee desires and what virtually everyone understands the employer reasonably expects.[12]

Under the standard we adopt today, when evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, *and* (ii) legitimate justifications associated with the rule. We emphasize that *the Board* will conduct this evaluation, consistent with the Board's "duty to strike the *proper balance* between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy,"[13] focusing on the perspective of employees, which is consistent with Section 8(a)(1).[14] As the result of this balancing, in this and future cases, the Board will delineate three categories of employment policies, rules and handbook provisions (hereinafter referred to as "rules"):

- *Category 1* will include rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is

[9] See, e.g., *William Beaumont Hospital*, 363 NLRB No. 162 (2016) (Board majority, contrary to dissenting Member Miscimarra, invalidates rule prohibiting conduct that "impedes harmonious interactions and relationships"); *Whole Foods Market, Inc.*, 363 NLRB No. 87 (2015) (Board majority, contrary to dissenting Member Miscimarra, invalidates no-recording rule aimed at fostering employee free expression), enfd. mem. 691 Fed. Appx. 49 (2d Cir. 2017); *Triple Play Sports Bar & Grille*, 361 NLRB 308 (2014) (Board majority, contrary to dissenting Member Miscimarra, invalidates rule stating that social media use "may be violating the law and is subject to disciplinary action" if the employee engages in "inappropriate discussions about the company"), affd. sub nom. *Three D, LLC v. NLRB*, 629 Fed. Appx. 33 (2d Cir. 2015); *Fresh & Easy Neighborhood Market*, 361 NLRB 72 (2014) (Board majority, contrary to dissenting Member Johnson, invalidates rule requiring employees to "[k]eep customer and employee information secure"); *Flagstaff Medical Center*, 357 NLRB 659 (2011) (Board majority, contrary to dissenting Member Pearce, finds lawful an employer's no-camera rule in an acute-care hospital), petition for review granted in part and denied in part 715 F.3d 928 (D.C. Cir. 2013); *Hyundai America Shipping Agency, Inc.*, 357 NLRB 860 (2011), enf. denied in part 805 F.3d 309 (D.C. Cir. 2015) (court rejects Board's invalidation of rule stating "[v]oice your complaints directly to your immediate superior or to Human Resources through our 'open door' policy"); *Guardsmark, LLC*, 344 NLRB 809 (2005), enf. denied in relevant part 475 F.3d 369 (D.C. Cir. 2007) (court rejects Board's finding that a rule lawfully stated employees must not "fraternize on duty or off duty, date or become overly friendly with the client's employees or with co-employees").

[10] *2 Sisters Food Group, Inc.*, 357 NLRB 1816, 1817 (2011).

[11] *Hills & Dales General Hospital*, 360 NLRB 611, 612 (2014).

[12] *William Beaumont Hospital*, supra, slip op. at 8 (Member Miscimarra, concurring in part and dissenting in part).

[13] *NLRB v. Great Dane Trailers, Inc*., 388 U.S. 26, 33–34 (1967) (emphasis added). See also *Republic Aviation v. NLRB,* 324 U.S. 793, 797–798 (1945) (referring to "working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments"); *NLRB v. Erie Resistor Corp*., 373 U.S. at 229 (referring to the "delicate task" of "weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing . . . the intended consequences upon employee rights against the business ends to be served by the employer's conduct").

[14] See fn. 80, infra and accompanying text. As discussed later in this decision, Member Kaplan agrees that the Board has the duty to strike the balance between employees' Sec. 7 rights and employers' business justifications in determining the legality of employment policies, rules, and handbooks. In his view, however, the threshold inquiry of whether the rule, when reasonably interpreted, prohibits or interferes with Sec.7 should be determined by reference to the perspective of an objectively reasonable employee who is "aware of his legal rights but who also interprets work rules as they apply to the everydayness of his job. The reasonable employee does not view every employer policy through the prism of the NLRA." *T-Mobile USA, Inc. v. NLRB*, 865 F.3d 265, at 271 (5th Cir. 2017). If that objective employee would not reasonably view a challenged rule as interfering with Sec. 7 rights, then the need for the Board to engage in a balancing test is mooted. In the absence of any potential interference, the rule is a fortiori lawful. See text accompanying fn. 17, infra.

outweighed by justifications associated with the rule. Examples of Category 1 rules are the no-camera requirement in this case, the "harmonious interactions and relationships" rule that was at issue in *William Beaumont Hospital*, and other rules requiring employees to abide by basic standards of civility.[15]

- *Category 2* will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.

- *Category 3* will include rules that the Board will designate as *unlawful* to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule. An example of a Category 3 rule would be a rule that prohibits employees from discussing wages or benefits with one another.

The above three categories will represent a classification of *results* from the Board's application of the new test. The categories are not part of the test itself. The Board will determine, in future cases, what types of additional rules fall into which category. Although the legality of some rules will turn on the particular facts in a given case, we believe the standard adopted today will provide far greater clarity and certainty to employees, employers and unions. The Board's cumulative experience with certain types of rules may prompt the Board to redesignate particular types of rules from one category to another, although one can expect such circumstances to be relatively rare.

We emphasize that Category 1 consists of two subparts: (a) rules that are lawful because, when reasonably interpreted,[16] they would have no tendency to interfere with Section 7 rights and therefore no balancing of rights and justifications is warranted, and (b) rules that are lawful because, although they do have a reasonable tendency to interfere with Section 7 rights, the Board has determined that the risk of such interference is outweighed by the justifications associated with the rules.[17] Of course, as reflected in Categories 2 and 3, if a particular type of rule is determined to have a potential adverse impact on NLRA activity, the Board may conclude that maintenance of the rule is *unlawful*, either because individualized scrutiny reveals that the rule's potential adverse impact outweighs any justifications (Category 2), or because the type of rule at issue predictably has an adverse impact on Section 7 rights that outweighs any justifications (Category 3). Again, even when a rule's *mainte-*

[15] Although the *maintenance* of Category 1 rules (and certain Category 2 rules) will be lawful, the *application* of such rules to employees who have engaged in NLRA-protected conduct may violate the Act, depending on the particular circumstances presented in a given case. See fn. 76, infra and text accompanying fn. 84, infra.

To the extent the Board in past cases has held that it violates the Act to maintain rules requiring employees to foster "harmonious interactions and relationships" or to maintain basic standards of civility in the workplace, those cases are hereby overruled. As then-Member Miscimarra observed in his dissent in *William Beaumont Hospital*, such rules reflect common-sense standards of conduct that advance substantial employee and employer interests, including the employer's legal responsibility to maintain a work environment free of unlawful harassment based on sex, race or other protected characteristics, its substantial interest in preventing workplace violence, and its interest in avoiding unnecessary conflict that interferes with patient care (in a hospital), productivity and other legitimate business goals; and nearly every employee would desire and expect his or her employer to foster harmony and civility in the workplace. We do not believe these types of employer requirements, when reasonably interpreted, would prohibit or interfere with the exercise of NLRA rights. However, even if basic civility requirements are viewed as potentially interfering with NLRA rights, we believe any adverse effect would be comparatively slight, because a broad range of activities protected by the NLRA are consistent with basic standards of harmony and civility; therefore, rules requiring workplace harmony and civility would have little if any adverse impact on these types of protected activities. Moreover, under the standard we announce today, when an employer lawfully maintains rules requiring employees to foster harmony and civility in the workplace, the *application* of such rules to employees who engage in NLRA-protected conduct may violate the Act, which the Board will determine based on the particular facts in each case.

[16] As indicated in fn. 14, supra, Member Kaplan emphasizes this is an objective standard, and the reasonable interpretation of the rule is conducted from the perspective of a reasonable employee.

[17] Member Kaplan agrees with Chairman Miscimarra and Member Emanuel on the three categories described in the text. However, Member Kaplan would have preferred a structure in which Category 1's subparts would be separate, rather than being grouped into a single category.

Nonetheless, Chairman Miscimarra and Members Kaplan and Emanuel agree that in every future work-rules case, the Board will make the following distinctions when determining the legality of different types of rules: (i) rules that are generally lawful because, when reasonably interpreted, they do not prohibit or interfere with the exercise of NLRA rights; (ii) rules that are generally lawful even though they potentially interfere with the exercise of NLRA rights, but where this risk is outweighed by legitimate justifications; (iii) rules that warrant individualized scrutiny in each case; and (iv) rules that are generally unlawful because their potential interference with the exercise of protected rights outweighs any possible justifications. Under the three categories outlined in the text, groups "i" and "ii" will both be included in Category 1 (rules that the Board will find to be generally lawful).

Again, Member Kaplan would have preferred a four-part framework that separately enumerated each of the four groups outlined in the preceding paragraph, because such a framework would better conform to distinctions made by the Board when determining the legality of different rules. However, Member Kaplan agrees with the three-category structure adopted by the Board today, with the understanding that, in every case, the Board will make precisely the same distinctions when evaluating particular rules, except the rules included in groups "i" and "ii" will both be considered part of Category 1.

nance is deemed lawful, the Board will examine circumstances where the rule is *applied* to discipline employees who have engaged in NLRA-protected activity, and in such situations, the discipline may be found to violate the Act.[18]

The balancing of employee rights and employer interests is not a new concept with respect to the Board's analysis of work rules. For example, in *Lafayette Park Hotel*, the Board expressly stated that "[r]esolution of the issue presented by the contested rules of conduct involves 'working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments. . . . Opportunity to organize and proper discipline are both essential elements in a balanced society.'"[19] Since *Lutheran Heritage*, the Board has far too often failed to give adequate consideration and weight to employer interests in its analysis of work rules. Accordingly, we find that the Board must replace the *Lutheran Heritage* test with an analysis that will ensure a meaningful balancing of employee rights and employer interests.

Applying these standards to the instant case, we find below that the Respondent's justifications for Boeing's restrictions on the use of camera-enabled devices on Boeing property outweigh the rule's more limited adverse effect on the exercise of Section 7 rights. We therefore reverse the judge's finding that Boeing's maintenance of its no-camera rule violates Section 8(a)(1) of the Act.

I. BACKGROUND

For decades, Boeing has had rules in place restricting the use of cameras to capture images or videos on Boeing property.[20] As technology has evolved and changed, so have Boeing's camera-related policies, and they now extend to camera-enabled devices such as cell phones and personal digital assistants (PDAs) with built-in cameras. The current version of Boeing's "camera rule," updated November 7, 2011, is PRO-2783,[21] which provides in relevant part as follows:

> Possession of the following camera-enabled devices is permitted on all company property and locations, except as restricted by government regulation, contract requirements or by increased local security requirements.
>
> However, **use** of these devices to capture images or video is prohibited without a valid business need and an approved Camera Permit that has been reviewed and approved by Security:
>
> 1. Personal Digital Assistants (PDAs)
>
> 2. Cellular telephones and Blackberrys and iPod/MP3 devices
>
> 3. Laptop or personal computers with web cameras for desktop video conferencing, including external webcams.
>
> 4. Bar code scanners and bar code readers, or such devices for manufacturing, inventory, or other work, if those devices are capable of capturing images

GC Exh. 8 (punctuation and emphasis in original).[22] Boeing's no-camera rule defines "business need" as "a determination made by the authorizing manager that images or video are needed for a contractual requirement, training, technical manuals, advertising, technical analysis, or other purpose that provides a positive benefit to the company." Id. Boeing's no-camera rule applies to "all Boeing."

Boeing Senior Security Manager James Harris testified concerning the several purposes of Boeing's no-camera rule. His testimony, which is undisputed, establishes the following.

First, Boeing's no-camera rule is an integral component of Boeing's security protocols, which are necessary to maintain Boeing's accreditation as a federal contractor

[18] See text accompanying fns.83–84, infra.

[19] 326 NLRB 824, 825 (1998) (quoting *Republic Aviation v. NLRB,* 324 U.S. 793, 797–798 (1945)), enfd. 203 F.3d 52 (D.C. Cir. 1999); see also *Caesar's Palace*, 336 NLB 271, 272 (2001) ("We also agree that the Respondent's rule prohibiting discussion of the ongoing drug investigation adversely affected employees' exercise of that right. It does not follow however that the Respondent's rule is unlawful and cannot be enforced. The issue is whether the interests of the Respondent's employees in discussing this aspect of their terms and conditions of employment outweigh[] the Respondent's asserted legitimate and substantial business justifications."); *Hyundai Am. Shipping Agency, Inc. v. NLRB*, 805 F.3d 309, 314 (D.C. Cir. 2015) ("Maintaining a rule reasonably likely to chill employees' Section 7 activity amounts to an unfair labor practice unless the employer 'present[s] a legitimate and substantial business justification for the rule' that 'outweigh[s] the adverse effect on the interests of employees.'").

[20] Boeing's Administrative Procedure No. 137, dated August 1979, states that "[t]his procedure establishes a system and delineates responsibilities for the issuance of camera permits, and control and use of cameras and photographic equipment at Company locations." It goes on to state that "[e]mployees or visitors shall not carry or use cameras (including those associated with video tape recording) or other photographic equipment in any Company facility (Seattle area or remote location) unless authorized to do so in the performance of work assignments." R. Exh. 3.

[21] "PRO" is short for "procedure."

[22] Boeing's no-camera rule also states that *possession* of other camera-enabled devices, as well as any other photographic device not described above, is prohibited on Boeing property without a valid business need and an approved Camera Permit that has been reviewed and approved by Security. The complaint does not allege that this portion of PRO-2783 is unlawful.

to perform classified work for the United States Government.[23]

Second, Boeing's no-camera rule plays a key role in ensuring that Boeing complies with its federally mandated duty to prevent the disclosure of export-controlled information or the exposure of export-controlled materials to unauthorized persons.[24]

Third, Boeing's no-camera rule helps prevent the disclosure of Boeing's proprietary information, which Harris defined as "any nonpublic information that has potential economic value to Boeing" (Tr. 395), such as "manufacturing methods and processes" and "material usage" (Tr. 395, 399).[25]

Fourth, Boeing's no-camera rule limits the risk that employees' personally identifiable information will be released. Besides the invasion of employee privacy, photographs and videos that permit Boeing employees to be identified could also compromise proprietary information.[26] In addition, if a photograph shows an employee's badge, that image could be used to create a counterfeit badge that an unauthorized person may use to gain entry to Boeing property (Tr. 401–402).

Fifth and finally, Boeing's no-camera rule limits the risk of Boeing becoming a target of terrorist attack. Harris testified that Boeing has "documented evidence" of surveillance by potentially hostile actors "to determine vulnerabilities" on Boeing property, and "[u]ncontrolled photography" could inadvertently disclose such vulnerabilities—such as "gaps in the fence line," "key utility entry points," "gas lines, hazardous chemical pipelines, [and] electrical substations" (Tr. 402).

Camera use has occasionally occurred in Boeing facilities in circumstances where Boeing has addressed the above concerns in various ways. For example, Boeing has conducted public or VIP tours at some facilities. Although Boeing does not search tour participants for camera-enabled devices, and tour guides do not confiscate personal camera-enabled devices from individuals who may have used them during a tour, Boeing's 777 Director of Manufacturing and Operations Jason Clark testified that tour participants are briefed beforehand regarding what is and is not permitted during the tour, and Boeing security personnel review tour participants' photos and video footage afterwards.[27] Boeing also cre-

[23] These protocols involve layers of security, including the physical construction of the facilities themselves, a fenced perimeter, security officers, and background checks for personnel granted access to classified information. Harris testified that PRO-2783 regulating the use of camera-enabled devices is another of these layers of security. It furnishes a fail-safe to ensure that classified information will not be released outside of Boeing in the event that such information finds its way into a non-classified area.

[24] "Export-controlled" materials include "sensitive equipment, software and technology," the export of which is controlled by the federal government "as a means to promote our national security and foreign policy objectives." Department of State, "A Resource on Strategic Trade Management and Export Controls," https://www.state.gov/strategictrade/overview/ (last visited July 31, 2017).

For example, the export-control system "[p]revent[s] proliferation of weapons and technologies, including weapons of mass destruction, to problem end-users and supporters of international terrorism." Id. Senior Security Manager Harris testified that the term *export* means "delivering information, technology or hardware to a non-U.S. person," and he added that "[a]n export can occur visually, orally or otherwise either within the United States or outside the United States" (Tr. 388). In other words, export-controlled materials can be "delivered" visually, and therefore an "export" can occur when a "non-U.S. person" merely *sees* export-controlled materials. Boeing regulates the export of export-controlled materials in a variety of ways, including through the enforcement of standoff distances. Harris testified that a "standoff distance" is the distance from an object at which the eye "cannot see enough detail to constitute an export" (Tr. 393). However, camera-enabled devices can defeat the purpose of a standoff distance. Thus, Harris testified that even cell phones "are high enough resolution that if someone took a photograph even at the 25-foot standoff distance of an export-controlled item, that resolution could be refined and expanded to be able to get enough detail to determine what about it might be export controlled" (Tr. 393–394). Export-controlled information can be found at nearly every Boeing site in the Puget Sound region (Tr. 390). Export violations may subject Boeing to fines of up to $1 million per incident, and they may result in Boeing being debarred from government contracts (id.)—not to mention the injury an export violation potentially may inflict on national security.

[25] Proprietary information routinely may be found on the factory floor. Such information includes layout documents that "assist mechanics and technicians . . . in properly assembling an aircraft," and it may exist in a variety of forms, including (i) paper documents and digital renderings displayed on large screens (Tr. 396); (ii) tooling, such as "large framework[s]" that are "subjected to a specific manufacturing technique to shape an aircraft frame or part" (Tr. 396); and (iii) quality control information (Tr. 397). Even the layout of a production area may be proprietary (Tr. 395). As to the role played by measures such as Boeing's no-camera rule to protect Boeing's proprietary information, Senior Security Manager Harris testified that Boeing "regularly receives reports" of "efforts" by "non-U.S. Government agencies" to "task visitors to . . . Boeing . . . with gaining specific kinds of manufacturing technologies, parts, processes, [and] material usage" (Tr. 398). Harris further testified concerning "documented circumstances" of "foreign powers . . . combing . . . through social media to gain knowledge about manufacturing techniques, manufacturing processes, and material usage that they do not currently have within their own countries in order to develop their own aircraft industries" (Tr. 399). Photographs or videos posted on social media websites "can be used as a tool to exploit [the] . . . mission" of such "foreign powers" (Tr. 398).

[26] For example, Harris testified that if a member of "the economic intelligence community"—i.e., an industrial spy—obtains a photograph that identifies someone as a Boeing employee, that photograph could potentially serve as a starting point to establish a seeming friendship for the ulterior purpose of eliciting proprietary information (Tr. 400).

[27] Employee Shannon Moriarty testified that she participated in one VIP tour of Boeing's Everett, Washington facility. According to Moriarty, she was permitted to take photos during that tour, she was the last tour participant to leave, and at no time did Boeing personnel review her photos or anyone else's. No evidence was introduced, however, that disputed Clark's testimony that such reviews are standard practice. Moreover, the tour in which Moriarty participated was a VIP tour, and Senior Security Manager Harris testified that an effort is made to en-

ated a time-lapse video of the 777 production line for public release. However, the video was produced by Boeing itself, which permitted Boeing to ensure that the video did not reveal confidential or proprietary information and was safe to release to the public.[28]

The judge rejected Boeing's justifications for its restrictions on the use of camera-enabled devices on Boeing property. He found those justifications contradicted by Boeing's "contrary practice of allowing free access to its manufacturing processes" by releasing to the public a time-lapse video of the 777 production line and by permitting "unfettered photography" during VIP tours. Applying prong one of *Lutheran Heritage*, the judge found that Boeing violated Section 8(a)(1) of the Act by maintaining its no-camera rule because the judge concluded that employees would reasonably construe the no-camera rule to prohibit Section 7 activity. Boeing filed exceptions challenging the judge's invalidation of its no-camera rule.

II. DISCUSSION

A. Lutheran Heritage Is Overruled

Under *Lutheran Heritage*, even when an employer's facially neutral employment policies, work rules and handbook provisions do not expressly restrict Section 7 activity, were not adopted in response to NLRA-protected activity, and have not been applied to restrict NLRA-protected activity, the Board will still determine that the maintenance of these requirements violates Section 8(a)(1) if employees "would reasonably construe the language to prohibit Section 7 activity."[29] For the following reasons, we overrule the *Lutheran Heritage* "reasonably construe" standard.

First, the *Lutheran Heritage* "reasonably construe" standard is contrary to Supreme Court precedent because it does not permit *any* consideration of the legitimate justifications that underlie many policies, rules and handbook provisions. These justifications are often substantial, as illustrated by the instant case. More importantly, the Supreme Court has repeatedly required the Board to take these justifications into account. A five-member Board recognized this in *Lafayette Park Hotel*, where it quoted the Supreme Court's decision in *Republic Aviation v. NLRB*, supra, and held:

> Resolution of the issue presented by . . . contested rules of conduct involves "working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments. . . . Opportunity to organize and proper discipline are both essential elements in a balanced society."[30]

Nor does *Republic Aviation* stand alone. The Supreme Court elsewhere has similarly required the Board to weigh the interests advanced by a particular work requirement or restriction before the Board concludes that its potential adverse impact on employee rights warrants a finding of unlawful interference with NLRA rights. See *NLRB v. Great Dane Trailers, Inc*., 388 U.S. at 33–34 (referring to the Board's "duty to strike the proper balance between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy"); *NLRB v. Erie Resistor Corp*., 373 U.S. at 229 (referring to the "delicate task" of "weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing . . . the intended consequences upon employee rights against the business ends to be served by the employer's conduct"); cf. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 680–681 (1981) ("[T]he Act is not intended to serve either party's individual interest, but to foster in a neutral manner a system in which the conflict between these interests may be resolved.").

sure that VIP tour participants in particular are not exposed to proprietary information (Tr. 407–408).

[28] Boeing also occasionally holds "rollouts" of new products, at which time the large factory bay doors are open, and persons standing in proximity to the facility may be able to look inside the facility. However, Boeing ensures that sensitive information is not visible to such persons. President Obama visited Boeing's Everett facility in February 2012, and employees were permitted to use personal camera-enabled devices to take photographs in the factory during the President's visit. However, Senior Security Manager Harris testified that prior to the visit, Boeing's intellectual property team along with various other departments, such as security and legal, worked closely with the United States Secret Service to "sanitize" the area to ensure that no sensitive materials or processes were visible.

[29] 343 NLRB at 647.

[30] 326 NLRB at 825 (quoting *Republic Aviation v. NLRB*, 324 U.S. at 797–798). The Board in *Lafayette Park Hotel* stated that "[i]n determining whether the mere maintenance of [disputed] rules violates Section 8(a)(1), the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights." However, Member Hurtgen observed that a rule may reasonably chill the exercise of Sec. 7 rights but still be justified by significant employer interests. 326 NLRB at 825 fn. 5. Member Hurtgen noted that no-solicitation rules restrict the exercise of Sec. 7 rights (by subjecting employees to discipline or discharge if they engage in solicitation—including union solicitation—during working time), but these restrictions have been deemed lawful under Board precedent dating back more than 70 years establishing that "[w]orking time is for work" and that the employer's interest in production outweighs the Sec. 7 right of employees to engage in solicitation during working time. *Peyton Packing Co.,* 49 NLRB 828, 843 (1943), enfd. 142 F.2d 1009 (5th Cir. 1944), cert. denied 323 U.S. 730 (1944). See also text accompanying fn. 31, infra.

Second, the *Lutheran Heritage* "reasonably construe" standard is contradicted by NLRB case law. For example, the Board has recognized that it is lawful for an employer to adopt no-solicitation rules prohibiting *all* employee solicitation—including union-related solicitation—during working time, and no-distribution rules prohibiting *all* distribution of literature—including union-related literature—in work areas.[31] Employers may also lawfully maintain a no-access rule that prohibits off-duty employees from accessing the interior of the employer's facility and outside work areas, even if they desire access to engage in protected picketing, handbilling, or solicitation.[32] Similarly, employers may lawfully adopt "just cause" provisions and attendance requirements that subject employees to discipline or discharge for failing to come to work, even though employees have a Section 7 right to engage in protected strikes.[33] Each of these rules fails the *Lutheran Heritage* "reasonably construe" test because each one clearly prohibits Section 7 activity. Yet each requirement has been upheld by the Board, based on a determination that legitimate employer interests and justifications outweighed any interference with Section 7 rights.

Third, in many cases involving facially neutral policies, rules and handbook provisions, the Board *has explicitly* balanced employees' Section 7 rights against legitimate employer interests rather than narrowly examining the language of a disputed rule solely for its potential to interfere with the exercise of Section 7 rights, as the *Lutheran Heritage* "reasonably construe" test requires. As noted above, in *Lafayette Park Hotel* the Board expressly acknowledged that "[r]esolution of the issue presented by . . . contested rules of conduct involves 'working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments.'"[34] Moreover, the Board in *Lafayette Park* gave weight to the justifications underlying particular work rules as well as to the potential adverse impact of those rules on the exercise of Section 7 rights.[35] In *Caesar's Palace*,[36] the Board upheld a confidentiality rule pertaining to a workplace investigation, even though the rule limited the right of employees to engage in NLRA-protected discussions. The Board's analysis in *Caesar's Palace* has equal application here:

> We agree with the judge that employees have a Section 7 right to discuss discipline or disciplinary investigations involving fellow employees. We also agree that the Respondent's rule prohibiting discussion of the ongoing drug investigation adversely affected employees' exercise of that right. It does not follow however that the Respondent's rule is unlawful and cannot be enforced. The issue is whether the interests of the Respondent's employees in discussing this aspect of their terms and conditions of employment *outweigh[] the Respondent's asserted legitimate and substantial business justifications*.[37]

The Board also upheld a no-photography rule in a subsequent case, *Flagstaff Medical Center*,[38] in part because the rule implicated "weighty" patient confidentiality interests.[39]

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[31] See *Our Way, Inc*., 268 NLRB 394 (1983); *Essex International*, 211 NLRB 749 (1974); *Stoddard-Quirk Mfg. Co*., 138 NLRB 615, 621 (1962); *Peyton Packing*, 49 NLRB at 843. See also discussion in fn. 30, supra.

[32] See *GTE Lenkurt, Inc.,* 204 NLRB 921, 921–922 (1973); *Tri-County Medical Center,* 222 NLRB 1089 (1976). In *GTE Lenkurt*, the Board upheld an employee handbook no-access provision limiting the right of off-duty employees to be on the premises. Stating that determining the legality of the no-access rule "requires a balancing of the employees' Section 7 rights against the employer's private property rights," the Board held that the rule was lawful. 204 NLRB at 921–922. In *Tri-County*, the Board reiterated that a no-access rule applicable to off-duty employees will be lawful, provided that the rule "(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 plant for any purpose and not just to those employees engaging in union activity." 222 NLRB at 1089.

[33] See, e.g., *Health Management, Inc.*, 326 NLRB 801 (1998) (employee lawfully discharged for just cause for continuing attendance and tardiness problems); *Cambridge Chemical Corp.,* 259 NLRB 1374 (1981) (same); *South Carolina Industries*, 181 NLRB 1031 (1970) (same).

[34] 326 NLRB at 825 (quoting *Republic Aviation v. NLRB*, 324 U.S. at 797–798).

[35] See, e.g., 326 NLRB at 825 (observing that the disputed rule "addresses legitimate business concerns"), 826 (in finding confidentiality rule lawful, observing that "businesses have a substantial and legitimate interest in maintaining the confidentiality of private information"), 827 (noting "legitimate business reasons" for rule requiring employees to secure permission before using the hotel's restaurant or cocktail lounge to entertain friends or guests).

[36] 336 NLRB 271 (2001).

[37] 336 NLRB at 272 (emphasis added) (citing *Jeannette Corp. v. NLRB*, 532 F.2d 916 (3d Cir. 1976)).

[38] 357 NLRB at 659.

[39] Id. at 663. In *Flagstaff*, the Board majority upheld a rule prohibiting employees from taking photographs of patients or hospital property. The majority emphasized the "weighty" privacy interests of hospital patients and the hospital's "significant interest in preventing the wrongful disclosure of individually identifiable health information, including by unauthorized photography." Id. The majority reasoned that "[e]mployees would reasonably interpret [the hospital's] rule as a legitimate means of protecting the privacy of patients and their hospital surroundings, not as a prohibition of protected activity." Id. However, Member Pearce relevantly dissented because under *Lutheran Heritage* the analysis turns exclusively on how an employee would "reasonably construe" the language of the no-photography rule, and he found that "employees would reasonably construe the rule's language to prohibit Section 7 activity." Id. at 670 (Member Pearce, dissenting in part).

In all these decisions, the Board has deemed it necessary, when evaluating the legality of one or more work rules, to consider both Section 7 rights *and* the legitimate business interests associated with particular rules.

Fourth, *Lutheran Heritage* is predicated on false premises that are inconsistent with the Act and contrary to the Board's responsibility to promote certainty, predictability and stability.[40] Several considerations are relevant here:

- Because the Act protects so many potential concerted activities (including the right to refrain from such activities), a wide variety of facially neutral rules can be interpreted, under some hypothetical scenario, as potentially limiting some type of Section 7 activity.
- *Lutheran Heritage* requires employers to eliminate all ambiguities from all policies, rules and handbook provisions that might conceivably touch on some type of Section 7 activity, but this disregards the fact that generalized provisions related to employment—including those relating to discipline and discharge—have been deemed acceptable throughout the Act's history.[41]
- Another false premise of *Lutheran Heritage* is the notion that employers drafting facially neutral policies, rules and handbook provisions *can* anticipate and avoid all potential interpretations that may conflict with NLRA-protected activities. This disregards the fact that ambiguities pervade the NLRA itself.[42] Even if employment policies and rules reproduced the full text of the NLRA, they will never attain a level of clarity greater than what Congress incorporated into the statute itself. Therefore, it is likely that one can "reasonably construe" even the most carefully crafted rules in a manner that prohibits some hypothetical type of Section 7 activity.[43]

[40] One of the Board's primary responsibilities under the Act is to promote labor relations stability. See, e.g., *Northwestern University*, 362 NLRB No. 167 (2015) (Board declines to exercise jurisdiction over scholarship football student-athletes because doing so would not promote stability in labor relations). See also *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996) (describing "the Act's goal of achieving industrial peace by promoting stable collective-bargaining relationships"); *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362–363 (1949) ("To achieve stability of labor relations was the primary objective of Congress in enacting the National Labor Relations Act."); *NLRB v. Appleton Electric Co.*, 296 F.2d 202, 206 (7th Cir. 1961) ("A basic policy of the Act [is] to achieve stability of labor relations."). The Supreme Court has also stressed the need to provide "certainty beforehand" for employers and unions so employers can "reach decisions without fear of later evaluations labeling . . . conduct an unfair labor practice," and so a union may discern "the limits of its prerogatives, whether and when it could use its economic powers . . . , or whether, in doing so, it would trigger sanctions from the Board." *First National Maintenance Corp. v. NLRB*, 452 U.S. at 678-679, 684–686.

[41] Linguistic perfection has not been required in other types of employment provisions enforced by the Board and the courts. As then-Member Miscimarra has stated:

> It does not per se violate Federal labor law to use a general phrase to describe the type of conduct that may [result in discipline or discharge]. If it did, "just cause" provisions contained in most collective-bargaining agreements that have been entered into since the Act's adoption nearly 80 years ago would be invalid. However, "just cause" provisions have been called "an obvious illustration" of the fact that many provisions "must be expressed in general and flexible terms." More generally, the Supreme Court has stated, in reference to collective-bargaining agreements, that there are "a myriad of cases which the draftsmen cannot wholly anticipate," and "[t]here are too many people, too many problems, too many unforeseeable contingencies to make the words . . . the exclusive source of rights and duties."

Triple Play Sports Bar & Grille, 361 NLRB 308, 318 (Member Miscimarra, dissenting in part) (quoting *Steelworkers v. Warrior & Gulf Navigation Co*., 363 U.S. 574, 578–579 (1960); Archibald Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1491 (1959)) (other citations and internal quotation marks omitted).

Ironically, the Board itself in *Lutheran Heritage* stated: "Work rules are necessarily general in nature . . . . We will not require employers to anticipate and catalogue in their work rules every instance in which [prohibited types of speech] might conceivably be protected by (or exempted from the protection of) Section 7." 343 NLRB at 648. The Board has disregarded this language in applying *Lutheran Heritage*.

[42] Nobody can reasonably suggest that employers can incorporate into policies, rules and handbooks the precise contours of Sec. 7 protection when these contours have produced so much disagreement between and among the General Counsel, administrative law judges, different Board members, and the courts. See, e.g., *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151 (2014) (divided opinions regarding whether a single employee's complaint asserting statutory rights constituted protected concerted activity); *Purple Communications, Inc.*, 361 NLRB 1050 (2014) (divided opinions regarding whether employees have a statutory right to use employer email systems for Sec. 7 purposes); *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013) (rejecting Board majority's finding that arbitration agreements containing class-action waivers unlawfully interfere with Sec. 7 activity); *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015) (same), cert. granted 137 S. Ct. 809 (2017); *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016) (agreeing with Board majority's finding that arbitration agreements containing class-action waivers unlawfully interfere with Sec. 7 activity), cert. granted 137 S. Ct. 809 (2017); *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016) (same), cert. granted 137 S. Ct. 809 (2017). As the Supreme Court stated in one case, some provisions of the Act "could not be literally construed," there was no "glaringly bright line" between permitted and prohibited activity, and "[h]owever difficult the drawing of lines more nice than obvious, the statute compels the task." *Local 761, International Union of Electrical Workers v. NLRB*, 366 U.S. 667, 672–674 (1961).

[43] In cases involving important employee benefits documents such as summary plan descriptions that are required under the Employee Retirement Income Security Act (ERISA), substantial *deference* is usually afforded the plan administrator—often, the employer—whose determinations may be deemed final and binding whenever relevant benefit documents so provide. See, e.g., *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989) (indicating that a court will not engage in de novo review of a plan administrator's decisions if the "benefit plan gives the administrator or fiduciary discretionary authori-

The broader premise of *Lutheran Heritage*, which is even more seriously flawed, is the notion that employees are better served by *not* having employment policies, rules and handbooks. After all, when parties are held to a standard that cannot be attained, the natural and predictable response is that they will give up trying to create written rules, policies and employee handbooks. Nothing in the NLRA *requires* employers to adopt policies, rules and handbook provisions.[44] Employees in the United States remain generally subject to the doctrine of employment at will, which means employees can be discharged for any reason or no reason at any time.[45] Therefore, it would be lawful for employers to make all decisions regarding the potential discipline or discharge of employees on a case-by-case basis, with no expectations or requirements communicated in advance. This would impose substantial hardship on employers that strive for consistency and fairness when making such decisions, and employees would not know what standards of conduct they must satisfy to keep their jobs. This would also be irreconcilable with the Act's emphasis on stability, certainty and predictability.[46] However, this is the logical and predictable outgrowth of the *Lutheran Heritage* "reasonably construe" standard.

Fifth, the *Lutheran Heritage* "reasonably construe" test imposes too many restrictions on the Board itself. By making the legality of a rule turn on whether employees would "reasonably construe" its language to prohibit *any* type of Section 7 activity, *Lutheran Heritage* requires a "one-size-fits-all" analysis that gives equal weight to every potential intrusion on Section 7 rights, however slight it might be and however remote the possibility that employees would actually engage in that type of protected activity. The "reasonably construe" test also permits no consideration of the justifications for a particular rule, which in turn prevents the Board from treating some justifications as warranting greater weight than others. In sum, *Lutheran Heritage* leaves no room for the Board to draw important distinctions between different types of rules, different business justifications, and different Section 7 rights, and it disregards differences between and among rules with respect to their potential impact on protected rights. Abandoning *Lutheran Heritage* would permit the Board to engage in a more refined evaluation of these significant variables.[47]

Sixth, when applying the *Lutheran Heritage* "reasonably construe" standard, the Board has not given sufficient consideration to unique characteristics of particular work settings and different industries. For example, the Board

ty to determine eligibility for benefits or to construe the terms of the plan").

In Board decisions applying *Lutheran Heritage*, the Board has consistently misapplied an evidentiary principle that ambiguity in general work rule language must be construed against the drafter. See, e.g., *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190, slip op. at 1 (2015); *Sheraton Anchorage*, 362 NLRB No. 123, slip op. at 1–2 fn. 4 (2015); *Flex Frac Logistics, LLC*, 358 NLRB 1131, 1132 (2012) ("Board law is settled that ambiguous employer rules—rules that reasonably *could* be read to have a coercive meaning—are construed against the employer" (emphasis added).), enfd. 746 F.3d 205 (5th Cir. 2014); *Hyundai America Shipping Agency, Inc.*, 357 NLRB 860, 870 (2011), enfd. in part 805 F.3d 309 (D.C. Cir. 2015). The word *ambiguous* means "capable of being understood in two or more possible senses or ways." http://www.merriam-webster.com/dictionary/ambiguous (last viewed Jul. 18, 2017). Thus, a rule is ambiguous if it *could* be read to prohibit Sec. 7 activity, among other possible interpretations, regardless whether employees reasonably *would* read it that way. The cited cases demonstrate the Board's abandonment, *sub silentio*, of the *Lutheran Heritage* limitation that a rule will not be found unlawful "simply because the rule *could* be interpreted" to reach Sec. 7 activity. 343 NLRB at 647 (emphasis in original). Again, the (unattainable) requirement of linguistic perfection, which uniquely applies to facially neutral policies, rules and handbook provisions, stands in stark contrast to the wide latitude with which the Board and courts have always treated generalized language in collective-bargaining agreements.

[44] Employers are required to maintain certain documentation under state and federal statutes other than the NLRA. For example, to avoid liability under Title VII of the Civil Rights Act of 1964, employers are required to have procedures to investigate and remedy complaints of various types of workplace harassment. See, e.g., *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). ERISA requires employers to have certain plan documents and summary plan descriptions regarding employee benefits. See, e.g., 29 U.S.C. § 1022. The Workers Adjustment and Retraining Notification Act (WARN Act) requires employers to provide 60 days' written notice to various parties in advance of business changes that constitute a "plant closing" or "mass layoff." 29 U.S.C. §§ 2101 et seq. Ironically, under *Lutheran Heritage*, these types of documentation, where made available to employees—even though *required* by other legal obligations—would be deemed unlawful by the Board whenever they could be "reasonably construed" to prohibit NLRA-protected activity.

Putting aside whether an employer's facially neutral rules violate Sec. 8(a)(1), employers must comply with the Act's other provisions. Thus, if there is a certified or recognized union, for example, the employer's obligation to bargain under Sec. 8(d) and 8(a)(5) may require negotiations over existing or potential policies, rules or handbook provisions.

[45] There are exceptions to the employment-at-will doctrine where a discharge would violate a statutory requirement or prohibition (for example, Title VII or the Age Discrimination in Employment Act), constitute wrongful discharge in violation of public policy in certain states (see, e.g., *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978)), or violate a "just cause" provision in a collective-bargaining agreement or a similar provision in some other type of employment contract.

[46] See fn. 40, supra.

[47] It is the Board's responsibility—not the responsibility of employers, unions or employees—to balance the legitimate interests served by a facially neutral policy, rule or handbook provision with the potential chilling effect of the rule on the exercise of Sec. 7 rights. Carrying out this responsibility will permit the Board to develop more detailed standards for specific types of rules, particular types of Sec. 7 activity, and whether or when certain justifications do or do not outweigh a risk of interference with employee rights.

and the courts have long recognized the importance of avoiding conflict and disruptions in an acute-care hospital setting.[48] And in *Flagstaff*, the Board majority upheld a hospital's no-photography rule—notwithstanding its potential impact on Section 7 activity—after considering the "weighty" privacy interests of patients and the hospital's "significant interest in preventing the wrongful disclosure of individually identifiable health information, including by unauthorized photography."[49] Yet *Flagstaff* dealt merely with "privacy" and the "wrongful disclosure of . . . information," which pale in comparison to the interests implicated in the instant case, which bear on national security. The "reasonably construe" standard also prevents the Board from taking into consideration specific events that reveal the importance of a particular policy, rule, or handbook provision. For example, in *William Beaumont Hospital*, supra, 363 NLRB No. 162, a full-term newborn infant had unexpectedly died, and the ensuing investigation of that tragic event showed that the infant's death resulted in part from inadequate communication among the hospital's personnel. In addition, when a highly regarded obstetrics nurse resigned, the hospital learned that two other obstetrics nurses had been mean, nasty, intimidating, negative, and bullying. Id., slip op. at 8 (Member Miscimarra, concurring in part and dissenting in part). These events revealed the importance of the interests served by the hospital's rule against conduct that impedes "harmonious interactions and relationships." Nevertheless, a Board majority in *William Beaumont Hospital*, applying prong one of the *Lutheran Heritage* standard, found this rule unlawful, reasoning that since some inharmonious interactions are protected by the NLRA, employees would reasonably construe the rule to prohibit Section 7 activity. Id., slip op. at 2.

Finally, *Lutheran Heritage* has caused extensive confusion and litigation for employers, unions, employees and the Board itself. The "reasonably construe" standard has defied all reasonable efforts to apply and explain it.[50] Indeed, even with the benefit of hindsight, it is still difficult to understand Board rulings that uphold some facially neutral rules while invalidating others.[51] Taking, for

[48] See *NLRB v. Baptist Hospital,* 442 U.S. 773, 783 fn. 12 (1979) ("Hospitals, after all, are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activity, and where the patient and his family—irrespective of whether that patient and that family are labor or management oriented—need a restful, uncluttered, relaxing, and helpful atmosphere, rather than one remindful of the tensions of the marketplace in addition to the tensions of the sick bed."); *St. John's Hospital*, 222 NLRB 1150, 1150 (1976) ("We recognize that the primary function of a hospital is patient care and that a tranquil atmosphere is essential to the carrying out of that function.").

[49] 357 NLRB at 663.

[50] See GC Memorandum 15-04 (March 18, 2015); GC Operations Memorandum 12-59 (May 30, 2012); GC Operations Memorandum 12-31 (Jan. 24, 2012); GC Operations Memorandum 11-74 (Aug. 18, 2011). See also U.S. Chamber of Commerce, *Theater of the Absurd: The NLRB Takes on the Employee Handbook* (available at https://www.uschamber.com/sites/default/files/documents/files/nlrb_theater_of_the_absurd.pdf, last accessed Sept. 29, 2017) (criticizing the Board's decisions regarding employee handbook policies as "seem[ing] to run counter to any balanced reading of the NLRA"); Dagen-Sunsdahl, *Navigating Through Hills and Dales: Can Employers Abide by the NLRA While Maintaining Civil Work Environments?*, 31 ABA J. Lab. & Emp. L. 363 (2016) (advocating for a standard that "strike[s] a better balance between protecting employee labor rights and legitimate employer interests"); Flomenhoft, *Balancing Employer and Employee Interests in Social Media Disputes*, 6 Am. U. Lab. & Emp. L.F. 1 (2016) (criticizing NLRB's standards for "fail[ing] to strike a proper balance between the interests of employers and employees"); Brice, Fifer, and Naron, *Social Media in the Workplace: The NLRB Speaks,* 24 No. 10 Intell. Prop. & Tech. L.J. 13 (2012) (calling the Board's disapproval of some social media rules under the *Lutheran Heritage* test "far from intuitively obvious"); Liss, *Beware That Your Social Media Policies Do Not Draw the Ire of the National Labor Relations Board,* 70 J. Mo. B. 324 (2014) (discussing the difficulty of understanding and applying the Board's recent interpretations of the *Lutheran Heritage* "reasonable employee" standard to rules governing employees' use of social media); Green, *Using Social Networking to Discuss Work: NLRB Protection for Derogatory Employee Speech and Concerted Activity,* 27 Berkley Tech. L.J. 837 (2012) (same); O'Brien, *The National Labor Relations Board: Perspectives on Social Media*, 8 Charleston L. Rev. 411 (2014) (same); Hemenway, *The NLRB and Social Media: Does the NLRB "Like" Employee Interests?,* 38 J. Corp. L. 607 (2013) (citing inconsistencies in the Board's interpretation of social media policies); Link, *Employers Beware,* 284-OCT N.J. Law. 24 (2013) (calling the Board's guidance on social media policies "internally inconsistent at times, and frequently ambiguous"); Logan, *Social Media Policy Confusion: The NLRB's Dated Embrace of Concerted Activity Misconstrues the Realities of Twenty-First Century Collective Action,* 15 Nev. L.J. 754 (2014) ("The Board's inconsistent adaptation of the NLRA to social media policies is 'causing concern and confusion.'"); McNamara, *The Times are Changing: Protecting Employers in Today's Evolving Workplace,* 2011 WL 601173 (2011) (citing the Board's "confusing" application of *Lutheran Heritage* to employer work rules); Rojas, *The NLRB's Difficult Journey Down the Information Super Highway: A New Framework for Protecting Social Networking Activities Under the NLRA,* 51 Washburn L.J. 663 (2012) (asserting that application of the Board's current standards under *Lutheran Heritage* to social networking is "impractical, inefficient, and inconsistent with the purposes of the Act").

[51] Since *Lutheran Heritage* was decided in 2004, the Board has evaluated a variety of facially neutral policies, work rules, and handbook provisions. See, e.g., *Cellco Partnership d/b/a Verizon Wireless*, 365 NLRB No. 38 (2017); *Minteq International, Inc.*, 364 NLRB No. 63 (2016), review denied 855 F.3d 329 (D.C. Cir. 2017); *Schwan's Home Service, Inc.*, 364 NLRB No. 20 (2016); *T-Mobile USA, Inc.*, 363 NLRB No. 171 (2016), enf. denied in part 865 F.3d 265 (5th Cir. 2017); *William Beaumont Hospital*, supra, 363 NLRB No. 162; *Rocky Mountain Eye Center, P.C.*, 363 NLRB No. 34 (2015); *Sheraton Anchorage*, 362 NLRB No. 123 (2015); *Lily Transportation Corp.*, 362 NLRB No. 54 (2015); *Battle's Transportation, Inc.*, 362 NLRB No. 17 (2015); *Casino San Pablo*, 361 NLRB 1350 (2014); *Purple Communications, Inc.*, 361 NLRB 575 (2014); *Triple Play Sports Bar & Grille*, 361 NLRB 308 (2014), affd. sub nom. *Three D, LLC v. NLRB*, 629 Fed.

example, a sampling of cases dealing with rules regarding civility in the workplace, it is difficult to view the different outcomes reached by the Board as anything other than arbitrary.

- In *Lafayette Park Hotel*,[52] it was *lawful* to have a rule prohibiting "conduct that does not support the . . . Hotel's goals and objectives," even though this arguably encompassed conduct that did not support the Hotel's goal of remaining nonunion, i.e., union organizing. However, it was deemed unreasonable to assume, without more, that remaining nonunion was one of the goals encompassed by the rule.
- In *Lafayette Park Hotel* as in a similar case,[53] it was *unlawful* to maintain a rule prohibiting "false, vicious, profane or malicious statements toward or concerning the . . . [employer] or any of its employees" because such statements could occur in the context of activities protected under Section 7.
- In *Adtranz ABB Daimler-Benz Transportation v. NLRB*, the court found it was *lawful* to have a rule prohibiting "abusive or threatening language to anyone on company premises," which the court found merely required employees to "comply with generally accepted notions of civility."[54] The court deemed this "quite different" from *Lafayette Park Hotel* and a similar Board case,[55] in which the Board found that it was *unlawful* to maintain rules "threatening to punish 'false' statements without evidence of malicious intent."[56]
- In *Lutheran Heritage*,[57] it was *lawful* to maintain rules prohibiting "verbal abuse," "abusive or profane language," and "harassment." Although *Lutheran Heritage* renders unlawful every rule that an employee would "reasonably construe" to prohibit Section 7 activity, the Board stated that a rule would not be unlawful merely because it "*could* be interpreted that way."[58]
- In *Palms Hotel & Casino*,[59] it was *lawful* to have a rule prohibiting "conduct which is . . . injurious, offensive, threatening, intimidating, coercing, or interfering with" other employees because the rule was not "so amorphous that reasonable employees would be incapable of grasping the expectation that they comport themselves with general notions of civility and decorum in the workplace."[60]
- In *Flamingo Hilton-Laughlin*,[61] it was *unlawful* to have a rule prohibiting "loud, abusive or foul language" because this was so broad that it "could reasonably be interpreted as barring lawful union organizing propaganda."[62]
- In *2 Sisters Food Group,*[63] it was *unlawful* to maintain a rule subjecting employees to discipline for "inability or unwillingness to work harmoniously with other employees" because the employer did not "define what it means to 'work harmoniously' (or to fail to do so)," and the rule was "sufficiently imprecise that it could encompass any disagreement or conflict among employees, including those related to discussions and interactions protected by Section 7."[64]
- In *The Roomstore*, it was *unlawful* to maintain a rule prohibiting "[a]ny type of negative energy or

Appx. 33 (2d Cir. 2015); *Fresh & Easy Neighborhood Market*, 361 NLRB 72 (2014); *Laurus Technical Institute*, 360 NLRB 1155 (2014); *Hills & Dales General Hospital*, supra, 360 NLRB at 611; *MCPc*, 360 NLRB 216 (2014), enfd. in relevant part 813 F.3d 475 (3d Cir. 2016); *Quicken Loans, Inc.*, 359 NLRB 1201 (2013), affd. 361 NLRB 904 (2014), enfd. 830 F.3d 542 (D.C. Cir. 2016); *Knauz BMW*, 358 NLRB 1754 (2012), invalidated by *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014); *J.W. Marriott Los Angeles at L.A. Live*, 359 NLRB 144 (2012), invalidated by *NLRB v. Noel Canning*, supra; *Flex Frac Logistics, LLC*, 358 NLRB 1131 (2012), enfd. 746 F.3d 205 (5th Cir. 2014); *Heartland Catfish Co.*, 358 NLRB 1117 (2012), invalidated by *NLRB v. Noel Canning*, supra; *Costco Wholesale Corp.*, 358 NLRB 1100 (2012), invalidated by *NLRB v. Noel Canning*, supra; *2 Sisters Food Group, Inc.*, 357 NLRB 1816 (2011); *The Roomstore*, 357 NLRB 1690 (2011); *Arkema, Inc.,* 357 NLRB 1248 (2011), enf. denied 710 F.3d 308 (5th Cir. 2013); *Tenneco Automotive, Inc.,* 357 NLRB 953 (2011), enfd. in relevant part 716 F.3d 640 (D.C. Cir. 2013); *Hyundai America Shipping Agency, Inc.*, 357 NLRB 860 (2011), enf. denied in part 805 F.3d 309 (D.C. Cir. 2015); *Boulder City Hospital*, 355 NLRB 1247 (2010); *NLS Group*, 352 NLRB 744 (2008), affd. 355 NLRB 1154 (2010), enfd. 645 F.3d 475 (1st Cir. 2011); *River's Bend Health & Rehabilitation Services*, 350 NLRB 184 (2007); *Inter-Disciplinary Advantage*, 349 NLRB 480 (2007); *Palms Hotel & Casino*, 344 NLRB 1363 (2005); *Cintas Corp*., 344 NLRB 943 (2005), enfd. 482 F.3d 463 (D.C. Cir. 2007); *Claremont Resort & Spa*, 344 NLRB 832 (2005); *Guardsmark, LLC*, 344 NLRB 809 (2005), enfd. in part 475 F.3d 369 (D.C. Cir. 2007). As explained in the text, the conflicting outcomes of these cases are sometimes virtually impossible to rationalize. Other than the cases addressed specifically in this opinion, we do not pass on the legality of the rules at issue in past Board decisions that have applied the *Lutheran Heritage* "reasonably construe" standard. In all future cases, the legality of such rules will turn on the principles set forth in today's decision.

[52] 326 NLRB at 824.

[53] *Cincinnati Suburban Press, Inc.,* 289 NLRB 966, 975 (1988).

[54] 253 F.3d 19, 27 (D.C. Cir. 2001).

[55] *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999).

[56] 253 F.3d at 26-27.

[57] 343 NLRB at 646.

[58] 343 NLRB at 647 (emphasis in original).

[59] 344 NLRB 1363 (2005).

[60] Id. at 1368.

[61] 330 NLRB at 287.

[62] Id. at 295.

[63] 357 NLRB at 1816.

[64] Id. at 1817.

attitudes."[65] Similarly, in *Claremont Resort & Spa*, it was *unlawful* to maintain a rule prohibiting "[n]egative conversations about associates and/or managers" because the employer did not "clarif[y] any potential ambiguities in its rule by providing examples."[66]

The above cases comprise an extremely small sampling of Board and court cases addressing a single, narrow category of policies, rules and handbook provisions dealing with civility, decorum and respect. Do these cases permit one to understand what the "lawful" rules do correctly and what the "unlawful" rules do incorrectly? We believe the rather obvious answer is no. The above cases yield the following results:

Lawful Rule

- no "abusive or threatening language to anyone on Company premises"
- no "verbal abuse," "abusive or profane language," or "harassment"
- no "conduct which is . . . injurious, offensive, threatening, intimidating, coercing, or interfering with" other employees
- prohibiting "conduct that does not support the . . . Hotel's goals and objectives"

Unlawful Rule

- no "loud, abusive, or foul language"
- no "false, vicious, profane or malicious statements toward or concerning the . . . Hotel or any of its employees"
- no "inability or unwillingness to work harmoniously with other employees"
- no "negative energy or attitudes"
- no "[n]egative conversations about associates and/or managers"

These examples reveal that to a substantial degree, the *Lutheran Heritage* "reasonably construe" standard has led to arbitrary results. Would an employee "reasonably construe" a difference between prohibiting "abusive or threatening language to anyone on Company premises" (held lawful in *Adtranz*) and prohibiting "loud, abusive, or foul language" (deemed unlawful in *Flamingo Hilton*)? Would employees be unlawfully discouraged from engaging in NLRA-protected activity by a rule prohibiting "false, vicious, profane or malicious statements" (deemed unlawful in *Lafayette Park Hotel*) while perceiving they may freely engage in protected activity when a handbook prohibits conduct that is "injurious, offensive, threatening, intimidating, coercing, or interfering with" other employees (deemed lawful in *Palms Hotel & Casino*)? We think not.

It bears emphasis that the above questions relate to cases regarding a *single, narrow category* of rules aimed at fostering workplace civility. The challenges become orders of magnitude greater if one attempts to address the entire spectrum of issues that warrant treatment in policies, work rules or handbook provisions. The Board can and should do better in this area, and employees, unions and employers deserve better.

We do not fault our predecessors on the Board who, with good intentions, articulated the "reasonably construe" standard in *Lutheran Heritage*. After all, the *Lutheran Heritage* majority *included* the employer's legitimate business purposes in their evaluation of how reasonable employees would construe the rules at issue in that case. Thus, the majority observed that those rules—prohibiting "abusive or profane language," "harassment," and "verbal, mental and physical abuse"—served the "legitimate business purposes" of "maintain[ing] order in the workplace" and "protect[ing] the [r]espondent from liability by prohibiting conduct that, if permitted, could result in such liability"; and the Board concluded that in light of these purposes, "reasonable employees would infer that the [r]espondent's purpose in promulgating the challenged rules was to ensure a civil and decent workplace, not to restrict Section 7 activity."[67] Additionally, *Lutheran Heritage* contained qualifications that more recent decisions have improperly disregarded.[68] With rare exceptions, however, in decisions issued since *Lutheran Heritage* the Board has applied the "reasonably construe" standard in a manner that dispenses with any consideration of the employer's legitimate business pur-

[65] 357 NLRB at 1690 fn. 3.

[66] 344 NLRB at 836.

[67] 343 NLRB at 647, 648 (internal quotations omitted).

[68] For example, the Board majority in *Lutheran Heritage* stated: "Where, as here, the rule does not refer to Section 7 activity, we will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way. To take a different analytical approach would require the Board to find a violation whenever the rule could conceivably be read to cover Section 7 activity, even though that reading is unreasonable. We decline to take that approach." 343 NLRB at 647 (emphasis in original). Thus, the Board majority rejected the view expressed by dissenting Members Liebman and Walsh, who contended that a facially neutral work rule should be deemed unlawful whenever it could be interpreted to encompass Sec. 7 activity. Nonetheless, the latter view has been effectively adopted in many subsequent decisions through application of the principle that ambiguity is construed against the employer as the drafter of the rule. See fn. 43, supra.

poses.[69] Indeed, when Chairman Miscimarra argued that the Board is required to give some consideration to a rule's reasonable justifications, the Board majority rejected this proposition, invoking *Lutheran Heritage* and asserting it was improper to go "far beyond [the] text" when evaluating disputed work rules.[70]

The D.C. Circuit has criticized the Board's failure to give adequate weight to justifications associated with reasonable work rules. In *Medco Health Solutions of Las Vegas, Inc. v. NLRB*,[71] the court of appeals stated:

> In the past we have found the Board "remarkably indifferent to the concerns and sensitivity" that lead employers to adopt rules intended "to maintain a civil and decent workplace." *Adtranz ABB Daimler–Benz Transp., N.A. v. NLRB,* 253 F.3d 19, 25, 27 (D.C.Cir.2001). In *Lutheran Heritage Village–Livonia,* 343 NLRB 646, 647 (2003), the Board appeared to accept *Adtranz*'s holding on employers' rights to maintain such a workplace. Moreover, when a rule neither expressly nor inherently restricts protected activity, the Board appeared in *Lutheran Heritage* to condition any decision that the rule's mere existence violated the Act on a finding either that the rule was promulgated in response to union activity or that a reasonable employee reading the rule would construe it to prohibit protected conduct. Id. For no apparent reason the Board seems to have abandoned that analysis in proscribing Medco's ban on provocative and confrontational words.[72]

Our experience with the "reasonably construe" standard has revealed its substantial limitations, as well as its departure from the type of balancing required by Supreme Court precedent and the Board's own decisions. For all these reasons, we overrule *Lutheran Heritage* and adopt a new standard, as explained in Part B below.

B. The New Standard Governing Maintenance of Facially Neutral Rules, Employment Policies, and Employee Handbook Provisions

In cases in which one or more facially neutral policies, rules, or handbook provisions are at issue that, when reasonably interpreted, would potentially interfere with Section 7 rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, *and* (ii) legitimate justifications associated with the requirement(s). Again, we emphasize that *the Board* will conduct this evaluation, consistent with the Board's "duty to strike the *proper balance* between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy."[73]

When engaging in the above analysis, the Board will place particular emphasis on the following considerations.

First, this is an area where the Board has a special responsibility to give parties certainty and clarity.[74] Most work rules, employment policies, and employee handbook provisions exist for the purpose of permitting employees to understand what their employer expects and requires. Therefore, the chaos that has reigned in this area has been visited most heavily on employees themselves. In the best case, under *Lutheran Heritage* nobody (not even Board members themselves)[75] can reliably predict what rules are permissible and what rules are

[69] See, e.g., *Cellco Partnership d/b/a Verizon Wireless*, 365 NLRB No. 38 (2017); *Southern Bakeries, LLC*, 364 NLRB No. 64 (2016); *Minteq International, Inc.*, 364 NLRB No. 63 (2016); *Schwan's Home Service*, 364 NLRB No. 20 (2016); *T-Mobile USA, Inc.*, 363 NLRB No. 171 (2016); *William Beaumont Hospital*, 363 NLRB No. 162 (2016); *Rocky Mountain Eye Center, P.C.*, 363 NLRB No. 34 (2015); *Sheraton Anchorage*, 362 NLRB No. 123 (2015); *Lily Transportation Corp.*, 362 NLRB No. 54 (2015); *Battle's Transportation, Inc.*, 362 NLRB No. 17 (2015); *Casino San Pablo*, 361 NLRB 1350 (2014); *Purple Communications, Inc.*, 361 NLRB 575 (2014); *Triple Play Sports Bar & Grille*, 361 NLRB 308 (2014); *Fresh & Easy Neighborhood Market*, 361 NLRB 72 (2014); *Laurus Technical Institute*, 360 NLRB 1155 (2014); *Hills & Dales General Hospital*, 360 NLRB 611 (2014); *MCPc*, 360 NLRB 216 (2014); *Quicken Loans, Inc.*, 359 NLRB 1201 (2013), affd. 361 NLRB 904 (2014); *Knauz BMW*, 358 NLRB 1754 (2012); *J.W. Marriott Los Angeles at L.A. Live*, 359 NLRB 144 (2012); *Flex Frac Logistics, LLC*, 358 NLRB 1131 (2012); *Heartland Catfish Co.*, 358 NLRB 1117 (2012); *Costco Wholesale Corp.*, 358 NLRB 1100 (2012); *2 Sisters Food Group, Inc.*, 357 NLRB 1816 (2011); *The Roomstore*, 357 NLRB 1690 (2011); *Arkema, Inc.*, 357 NLRB 1248 (2011); *Tenneco Automotive, Inc.*, 357 NLRB 953 (2011); *Hyundai America Shipping Agency, Inc.*, 357 NLRB 860 (2011); *Boulder City Hospital*, 355 NLRB 1247 (2010); *NLS Group*, 352 NLRB 744 (2008), affd. 355 NLRB 1154 (2010); *Cintas Corp.*, 344 NLRB 943 (2005); *Claremont Resort & Spa*, 344 NLRB 832 (2005).

[70] *Schwan's Home Service*, supra, 364 NLRB No. 20, slip op. at 1 fn. 3.

[71] 701 F.3d 710 (D.C. Cir. 2012) (denying enforcement of a Board order invalidating a rule prohibiting employees from wearing clothing bearing provocative and confrontational expressions).

[72] Id. at 718.

[73] *NLRB v. Great Dane Trailers, Inc*., 388 U.S. at 33–34 (1967) (emphasis added). See also fn. 13, supra.

[74] The Supreme Court has stressed the need to provide "certainty beforehand" for employers and unions so employers can "reach decisions without fear of later evaluations labeling . . . conduct an unfair labor practice," and so a union may discern "the limits of its prerogatives, whether and when it could use its economic powers . . . , or whether, in doing so, it would trigger sanctions from the Board." *First National Maintenance Corp. v. NLRB*, 452 U.S. at 678-679, 684–686.

The D.C. Circuit has also criticized the Board—albeit in a different context—for applying an "open-ended rough-and-tumble of factors" without a sufficient explanation of "which factors are significant and which less so, and why," a manner of proceeding that can become "a cloak for agency whim—or worse." *LeMoyne-Owen College v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004) (internal citations and quotations omitted), denying enf. 338 NLRB No. 92 (2003); see also *Pacific Lutheran University*, 361 NLRB 1404, 1419 (2014).

[75] See fn. 9, supra.

unlawful under the NLRA. In the worst case, employees may be subjected to intimidation, profanity, harassment, or even workplace violence because their employers rightfully believe the NLRB is likely to overturn reasonable standards regarding respect and civility in the workplace, or such standards will be upheld only after many years of NLRB litigation. Henceforth, consistent with the Board's responsibility to interpret the Act, we will engage in the above analysis and we will delineate three categories of employment policies, rules and handbook provisions:

- *Category 1* will include rules that the Board designates as *lawful* to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. Examples of Category 1 rules are the no-camera requirement in this case, the "harmonious interactions and relationships" rule that was at issue in *William Beaumont Hospital*, and other rules requiring employees to abide by basic standards of civility.[76]
- *Category 2* will include rules that warrant individualized scrutiny in each case as to whether the rule, when reasonably interpreted, would prohibit or interfere with the exercise of NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.
- *Category 3* will include rules that the Board will designate as *unlawful* to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule. An example would be a rule that prohibits employees from discussing wages or benefits with one another.

As noted previously, the above three categories will represent a classification of results from the Board's application of the new test. The categories are not part of the test itself. The Board will determine, in future cases, what types of additional rules fall into which category. Although the legality of some rules will turn on the particular facts in a given case, we believe adherence to the analysis we announce here will ultimately provide far greater clarity and certainty to employees, employers and unions regarding whether and to what extent different types of rules may lawfully be maintained. Although the Board's cumulative experience with certain types of rules may prompt the Board to re-designate particular types of rules from one category to another, one can expect such circumstances to be relatively rare.[77]

Second, when deciding cases in this area, the Board may differentiate among different types of NLRA-protected activities (some of which might be deemed central to the Act and others more peripheral), and the Board must recognize those instances where the risk of intruding on NLRA rights is "comparatively slight."[78] Similarly, the Board may distinguish between substantial justifications—those that have direct, immediate relevance to employees or the business—and others that might be regarded as having more peripheral importance. In some instances, the impact of a particular rule on NLRA rights may be self-evident, or the justifications associated with particular rules may be apparent from the rule itself or the Board's experience with particular types of workplace issues. Parties may also introduce evidence regarding a particular rule's impact on protected rights or the work-related justifications for the rule. The Board may also draw reasonable distinctions between or among different industries and work settings. We may also take

[76] Although the *maintenance* of Category 1 rules (and certain Category 2 rules) will be lawful, the *application* of such rules to employees who have engaged in NLRA-protected conduct may violate the Act, depending on the particular circumstances presented in a given case. The Board will determine in future cases what other types of rules fall into Category 1.

Again, to the extent the Board in past cases has held that it violates the Act to maintain rules requiring employees to foster "harmonious interactions and relationships" or to maintain basic standards of civility in the workplace, those cases are hereby overruled. See the explanation set forth in fn. 15, supra.

[77] As stated in fn. 17 above, Chairman Miscimarra and Members Kaplan and Emanuel agree that, in every future work-rules case, the Board will make the following distinctions: (i) rules that are generally lawful because, when reasonably interpreted, they do not prohibit or interfere with the exercise of NLRA rights, without any need for a balancing of rights and interests or justifications; (ii) rules that are generally lawful even though they potentially interfere with the exercise of NLRA rights, but where this risk is outweighed by legitimate justifications; (iii) rules that warrant individualized scrutiny in each case; and (iv) rules that are generally unlawful because their potential interference with the exercise of protected rights outweighs any possible justifications. Under the three-category structure adopted by the Board today, groups "i" and "ii" are both included in Category 1 (rules that the Board will find to be generally lawful).

Again, Member Kaplan would have preferred a four-part framework that separately enumerated each of the four groups outlined in the preceding paragraph, because he believes such a framework would better conform to distinctions made by the Board when determining the legality of different rules. However, Member Kaplan agrees with the three-category structure because, under either approach, the Board will make the same distinctions (as summarized in the preceding paragraph), except in the three-category structure that the Board adopts today, the rules included in groups "i" and "ii" will both be considered part of Category 1. See text accompanying fn. 17, supra.

[78] *NLRB v. Great Dane Trailers, Inc*., 388 U.S. at 34.

into consideration particular events that may shed light on the purpose or purposes served by a challenged rule or on the impact of its maintenance on protected rights.[79]

Third, when a facially neutral rule, reasonably interpreted, would *not* prohibit or interfere with the exercise of NLRA rights, maintenance of the rule is lawful without any need to evaluate or balance business justifications, and the Board's inquiry into maintenance of the rule comes to an end.[80] Even under *Lutheran Heritage*—in which legality turned *solely* on a rule's potential impact on protected rights—a rule could lawfully be maintained whenever it would not "reasonably" be construed to prohibit NLRA-protected activity, even though it "could conceivably be read to cover Section 7 activity."[81] Conversely, when a rule, reasonably interpreted, *would* prohibit or interfere with the exercise of NLRA rights, the mere existence of some plausible business justification will not automatically render the rule lawful. Again, the Board must carefully evaluate the nature and extent of a rule's adverse impact on NLRA rights, in addition to potential justifications, and the rule's maintenance will violate Section 8(a)(1) if the Board determines that the justifications are outweighed by the adverse impact on rights protected by Section 7.

Fourth, when the Board interprets any rule's impact on employees, the focus should rightfully be on the employees' perspective. This is consistent with established Board and court case law,[82] and it is especially important when evaluating questions regarding alleged interference with protected rights in violation of Section 8(a)(1). As the Board stated in *Cooper Thermometer Co*., 154 NLRB 502, 503 fn. 2 (1965), Section 8(a)(1) legality turns on "whether the employer engaged in conduct, which, it may reasonably be said, *tends to interfere with the free exercise of employee rights under the Act*" (emphasis added).

Fifth, as indicated above,[83] the Board may find that an employer may lawfully *maintain* a particular rule, notwithstanding some possible impact on a type of protected Section 7 activity, even though the rule cannot lawfully be *applied* against employees who engage in NLRA-protected conduct.[84] For example, if the Board finds that an employer lawfully maintained a "courtesy and respect" rule, but the employer invokes the rule when imposing discipline on employees who engage in a work-related dispute that is protected by Section 7 of the Act, we may find that the discipline constituted unlawful interference with the exercise of protected rights in violation of Section 8(a)(1).

C. Retroactive Application of the New Standard

When the Board announces a new standard, a threshold question is whether the new standard may appropriately be applied retroactively, or whether it should only be applied in future cases. In this regard, "[t]he Board's usual practice is to apply new policies and standards retroactively 'to all pending cases in whatever stage.'" *SNE Enterprises*, 344 NLRB 673, 673 (2005) (quoting *Deluxe*

[79] For example, if an employer operates a coal mine where fatal mine collapses have occurred as the result of loud talking, and the employer has adopted a rule prohibiting "loud talking" in the coal mine, such a rule would be unlawful under *Lutheran Heritage* because many types of NLRA-protected activity involve loud talking—e.g., situations where loud verbal exchanges occur among employees or between employees and supervisors over wages, overtime or working conditions. Obviously, when these types of conversations occur, they are not rendered unprotected merely because the employee-participants may express their views loudly.

Under the standard we announce today, in this hypothetical example the Board would appropriately consider the fact that the rule against "loud talking" has a significant justification pertaining to workplace safety, and the rule's maintenance is also supported by the nature of the business (operating a coal mine) and recent events (past fatal mine collapses resulting from loud talking). Workplaces are not all the same, and the standard we announce today will permit the Board to discharge its "special function" of addressing "complexities" that arise from different work settings. *NLRB v. Erie Resistor Corp*., 373 U.S. at 236; *NLRB v. J. Weingarten, Inc*., 420 U.S. at 266-267.

Contrary to our dissenting colleagues, the considerations set forth above do not constitute a multi-factor standard. Rather, they are common-sense guidelines for analyzing challenged rules under the structure we adopt today.

[80] Member Kaplan agrees with this statement, but he would explain further. In his view, the Board's initial inquiry in any rule maintenance case must focus on whether there is any reasonable tendency for the rule to interfere with employee's Sec. 7 rights. As with any number of other cases involving whether an employer statement (e.g., alleged threats or interrogation) or action (e.g., surveillance) violates Sec. 8(a)(1), the reasonable tendency inquiry focuses on an objective employee in the particular workplace. *Lutheran Heritage* failed to provide an adequate definition of this objective employee, thus permitting Board members in subsequent decisions to decide the legality of rules as if *they* were the objective employee, focused only on potential interference with Sec. 7 rights. In Member Kaplan's opinion, the 5th Circuit's criticism in *T-Mobile*, supra, of this aspect of the *Lutheran Heritage* test is just as relevant and important to the application of the new test we announce today. Accordingly, he would expressly adopt that court's definition of an objective employee as a person "aware of his legal rights but who also interprets work rules as they apply to the everydayness of his job," *T-Mobile,* supra, 865 F.3d at 271. Member Kaplan believes that charging employees, when they interpret work rules, with an awareness of an employer's legitimate needs for discipline and production in their particular workplace is essential to our new test's stated goal of assuring adequate consideration of those needs in every instance.

[81] *Lutheran Heritage*, 343 NLRB at 647.

[82] Cf. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987) ("This emphasis on the employees' perspective furthers the Act's policy of industrial peace.").

[83] See fn. 76, supra.

[84] See, e.g., *Aroostook County Regional Ophthalmology Center v. NLRB*, 81 F.3d 209, 213 (D.C. Cir. 1996); *Adtranz ABB Daimler-Benz Transportation, N.A. v. NLRB,* 253 F.3d 19, 28 (D.C. Cir. 2001).

Metal Furniture Co., 121 NLRB 995, 1006–1007 (1958)). Yet, the Supreme Court has indicated that "the propriety of retroactive application is determined by balancing any ill effects of retroactivity against 'the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.'" Id. (quoting *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 203 (1947)).

Based on the above standards, we find that it is appropriate to apply the standard we announce today retroactively to the instant case and to all other pending cases. We do not believe retroactivity will produce any "ill effects." To the contrary, we believe all parties will benefit from Board decisions that take into account not only whether a work rule, when reasonably interpreted, would prohibit or interfere with the exercise of Section 7 rights, but also any justifications associated with the rule and whether or not such justifications are outweighed by the rule's adverse impact on protected rights. Moreover, failing to apply the new standard retroactively would "produc[e] a result which is contrary to a statutory design or to legal and equitable principles." *SEC v. Chenery Corp.*, supra. As explained above, the Board has long recognized that, under Supreme Court precedent dating back more than 70 years, "[r]esolution of the issue presented by . . . contested rules of conduct involves 'working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments. . . . Opportunity to organize and proper discipline are both essential elements in a balanced society.'" *Lafayette Park Hotel*, 326 NLRB at 825 (quoting *Republic Aviation v. NLRB*, 324 U.S. at 797-798).[85] Accordingly, we find that application of our new standard to this case and all pending cases will not work a "manifest injustice." *SNE Enterprises*, supra.

D. Application of the New Standard to Boeing's No-Camera Rule

To determine the lawfulness of Boeing's no-camera rule under the standard we adopt today, the Board must determine whether the no-camera rule, when reasonably interpreted, would potentially interfere with the exercise of Section 7 rights, and if so, the Board must evaluate two things: (i) the nature and extent of the no-camera rule's adverse impact on Section 7 rights, *and* (ii) the legitimate business justifications associated with the no-camera rule. Based on our review of the record and our evaluation of the considerations described above, we find that the no-camera rule in some circumstances may potentially affect the exercise of Section 7 rights, but this adverse impact is comparatively slight. We also find that the adverse impact is outweighed by substantial and important justifications associated with Boeing's maintenance of the no-camera rule. Accordingly, we find that Boeing's maintenance of its no-camera rule does not constitute unlawful interference with protected rights in violation of Section 8(a)(1) of the Act. Although the justifications associated with Boeing's no-camera rule are especially compelling, we believe that no-camera rules, in general, fall into Category 1, types of rules that the Board will find lawful based on the considerations described above.

As stated above, the policy at issue here is Boeing's no-camera rule, which provides in relevant part as follows:

> Possession of the following camera-enabled devices is permitted on all company property and locations, except as restricted by government regulation, contract requirements or by increased local security requirements.
>
> However, **use** of these devices to capture images or video is prohibited without a valid business need and an approved Camera Permit that has been reviewed and approved by Security:
>
> 5. Personal Digital Assistants (PDAs)
>
> 6. Cellular telephones and Blackberrys and iPod/MP3 devices
>
> 7. Laptop or personal computers with web cameras for desktop video conferencing, including external webcams.
>
> 8. Bar code scanners and bar code readers, or such devices for manufacturing, inventory, or other work, if those devices are capable of capturing images

Boeing's no-camera rule defines "business need" as "a determination made by the authorizing manager that images or video are needed for a contractual requirement, training, technical manuals, advertising, technical analysis, or other purpose that provides a positive benefit to the company."

Boeing Senior Security Manager James Harris furnished undisputed testimony concerning Boeing's justifi-

[85] See also *NLRB v. Great Dane Trailers*, 388 U.S. at 33-34 (stating that it is the "duty" of the Board "to strike the proper balance between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy"); *NLRB v. Erie Resistor Corp.*, 373 U.S. at 229 (referring to the "delicate task" of "weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct").

cations for maintaining its no-camera rule. His testimony establishes the following.

First, Boeing's no-camera rule is an integral component of Boeing's security protocols, which are necessary to maintain Boeing's accreditation as a federal contractor to perform classified work for the United States Government. These protocols involve layers of security, including the physical construction of the facilities themselves, a fenced perimeter, security officers, and background checks for personnel granted access to classified information. Boeing's rule regulating the use of camera-enabled devices is another of these layers of security. It furnishes a fail-safe to ensure that classified information will not be released outside of Boeing in the event that such information finds its way into a non-classified area.

Second, Boeing's no-camera rule plays a key role in ensuring that Boeing complies with its federally mandated duty to prevent the disclosure of export-controlled information or the exposure of export-controlled materials to unauthorized persons. "Export-controlled" materials include "sensitive equipment, software and technology," the export of which is controlled by the federal government "as a means to promote our national security and foreign policy objectives."[86] For example, the export-control system "[p]revent[s] proliferation of weapons and technologies, including weapons of mass destruction, to problem end-users and supporters of international terrorism."[87] Senior Security Manager Harris testified that the term *export* means "delivering information, technology or hardware to a non-U.S. person," and he added that "[a]n export can occur visually, orally or otherwise either within the United States or outside the United States." In other words, export-controlled materials can be "delivered" visually, and therefore an "export" can occur when a "non-U.S. person" merely *sees* export-controlled materials. Boeing regulates the export of export-controlled materials in a variety of ways, including through the enforcement of standoff distances. Harris testified that a "standoff distance" is the distance from an object at which the eye "cannot see enough detail to constitute an export." However, *camera-enabled devices can defeat the purpose of a standoff distance*. Thus, Harris testified that even cell phones "are high enough resolution that if someone took a photograph even at the 25-foot standoff distance of an export-controlled item, that resolution could be refined and expanded to be able to get enough detail to determine what about it might be export controlled." Export-controlled information can be found at nearly every Boeing site in the Puget Sound region. Export violations may subject Boeing to fines of up to $1 million per incident, and they may result in Boeing being debarred from government contracts—not to mention the injury an export violation potentially may inflict on national security.

Third, Boeing's no-camera rule helps prevent the disclosure of Boeing's proprietary information, which Harris defined as "any nonpublic information that has potential economic value to Boeing," such as "manufacturing methods and processes" and "material usage." Proprietary information routinely may be found on the factory floor. Measures such as Boeing's no-camera rule to protect Boeing's proprietary information are critically important. Senior Security Manager Harris testified that Boeing "regularly receives reports" of "efforts" by "non-U.S. Government agencies" to "task visitors to . . . Boeing . . . with gaining specific kinds of manufacturing technologies, parts, processes, [and] material usage." Harris further testified concerning "documented circumstances" of "foreign powers . . . combing . . . through social media to gain knowledge about manufacturing techniques, manufacturing processes, and material usage that they do not currently have within their own countries in order to develop their own aircraft industries." Photographs or videos posted on social media websites "can be used as a tool to exploit their . . . mission."

Fourth, Boeing's no-camera rule limits the risk that employees' personally identifiable information will be released. Besides the invasion of employee privacy, photographs and videos that permit Boeing employees to be identified could also compromise proprietary information. For example, Harris testified that if a member of "the economic intelligence community"—i.e., an industrial spy—obtains a photograph that identifies someone as a Boeing employee, that photograph could potentially serve as a starting point to establish a seeming friendship for the ulterior purpose of eliciting proprietary information. In addition, if a photograph shows an employee's badge, that image could be used to create a counterfeit badge that an unauthorized person may use to gain entry to Boeing property.

Fifth, Boeing's no-camera rule limits the risk of Boeing becoming a target of terrorist attack. Harris testified that Boeing has "documented evidence" of surveillance by potentially hostile actors "to determine vulnerabilities" on Boeing property, and "[u]ncontrolled photography" could inadvertently disclose such vulnerabilities—such as "gaps in the fence line," "key utility entry points," "gas lines, hazardous chemical pipelines, [and] electrical substations."

[86] Department of State, "A Resource on Strategic Trade Management and Export Controls," https://www.state.gov/strategictrade/overview/ (last visited July 31, 2017).

[87] Id.

The General Counsel sought to counter Boeing's claims regarding the justifications for maintaining the no-camera rule. For example, it is undisputed that Boeing conducts both public and VIP tours of some of its facilities, Boeing does not search tour participants for camera-enabled devices, and tour guides are not authorized to confiscate personal camera-enabled devices from individuals who have used them during a tour. However, Boeing's 777 Director of Manufacturing and Operations Jason Clark testified that tour participants are briefed before the tour begins regarding what is and is not allowed during the tour, and Boeing security personnel review tour participants' photos and video footage after the tour. The General Counsel sought to contest Clark's testimony by introducing the testimony of employee Shannon Moriarty. Moriarty testified that she participated in one VIP tour of Boeing's Everett, Washington facility. According to Moriarty, she was permitted to take photos during that tour, she was the last tour participant to leave, and at no time did Boeing personnel review her photos or anyone else's. Notwithstanding this evidence of a single instance when the practice of reviewing tour participants' photos may not have been followed, no evidence was introduced that disputed Clark's testimony that such reviews are standard practice. Moreover, the tour in which Moriarty participated was a VIP tour, and Senior Security Manager Harris testified that an effort is made to ensure that VIP tour participants in particular are not exposed to proprietary information.

Boeing occasionally holds "rollouts" of new products, at which time the large bay doors of the factory are open, and persons standing in proximity to the facility but off Boeing property are able to look inside the facility. During a rollout, however, Boeing ensures that sensitive information is not visible to such persons. In addition, President Obama visited Boeing's Everett facility in February 2012, and employees were permitted to use personal camera-enabled devices to take photographs in the factory during the President's visit. However, Senior Security Manager Harris furnished undisputed testimony that prior to the visit, Boeing's intellectual property team along with various other departments, such as security and legal, worked closely with the Secret Service to "sanitize" the area to ensure that no sensitive materials or processes were visible. Finally, Boeing created a time-lapse video of the 777 production line for public release; but since the video was produced by Boeing itself, Boeing was able to ensure that it was free of confidential or proprietary information and safe to release to the public.

Accordingly, we find that the General Counsel failed to undermine the record evidence establishing the several purposes served by Boeing's no-camera rule's restrictions on the use of camera-enabled devices on its property, and we also find that those purposes constitute legitimate and compelling justifications for those restrictions. Indeed, many of the reasons why Boeing restricts the use of camera-enabled devices on its property provide a sobering reminder that we live in a dangerous world, one in which many individuals—foreign and domestic—may inflict great harm on the United States and its citizens.

Conversely, the adverse impact of Boeing's no-camera rule on NLRA-protected activity is comparatively slight. The vast majority of images or videos blocked by the policy do not implicate any NLRA rights. Moreover, the Act only protects concerted activities that two or more employees engage in for the purpose of mutual aid or protection.[88] Taking photographs to post on social media for the purpose of entertaining or impressing others, for example, certainly falls outside of the Act's protection. It is possible, of course, that two or more Boeing employees might, in the future, engage in protected concerted activity—for example, by conducting a group protest based on an employment-related dispute—and Boeing's no-camera rule might prevent the employees from taking photographs of their activity. However, the no-camera rule would not prevent employees from engaging in the group protest, thereby exercising their Section 7 right to do so, notwithstanding their inability to photograph the event. Additionally, in the instant case, there is no allegation that Boeing's no-camera rule has actually interfered with any type of Section 7 activity, nor is there any evidence that the rule prevented employees from engaging in protected activity.

We find that any adverse impact of Boeing's no-camera rule on the exercise of Section 7 rights is comparatively slight and is outweighed by substantial and important justifications associated with the no-camera rule's maintenance. Accordingly, we find that Boeing's maintenance of the no-camera rule did not constitute unlawful interference with protected rights in violation of Section 8(a)(1) of the Act.[89]

[88] See NLRA Sec. 7, quoted in fn. 5, supra.

[89] Consistent with our analysis of Boeing's no-camera rule, we reaffirm the Board's holding in *Flagstaff Medical Center*, supra, that the no-camera rule at issue there was lawful because the rule's maintenance was supported by substantial patient confidentiality interests, and any potential impact on Sec. 7 rights was comparatively slight. Also, we overrule the Board's finding in *Caesar's Entertainment d/b/a Rio All-Suites Hotel & Casino*, 362 NLRB No. 190, slip op. at 3–5 (2015), that a similar rule was unlawful. In this regard, we agree with dissenting Board Member Johnson in that case that the Board majority in *Rio All-Suites Hotel* improperly limited *Flagstaff* to the facts of that case and failed to give appropriate weight to the casino operator's interests in "safeguarding guest privacy and the integrity of the Respondent's gaming operations." Id., slip op. at 5 fn. 12. As with the Boeing no-camera

E. Response to the Dissents

We respectfully disagree with the views expressed by our dissenting colleagues. In several respects, as the preceding discussion makes clear, we believe Members Pearce and McFerran misunderstand or misrepresent the standard that we adopt today, and they advance arguments that are palpably incorrect.

First, our dissenting colleagues argue against our abandonment of *Lutheran Heritage* based on the mistaken premise that the Board, prospectively, will never declare unlawful the maintenance of work rules that interfere with the exercise of Section 7 rights. Under the standard adopted today, the Board will continue to carefully evaluate the Section 8(a)(1) legality of work rules alleged to be unlawful. In appropriate cases, the Board will continue to find that the maintenance of challenged rules violates Section 8(a)(1). Under the *Lutheran Heritage* standard that we have overruled, the Board upheld certain rules and invalidated others. Under the standard we adopt today, the Board will likewise uphold certain rules and invalidate others. In all cases, the Board will consider whether a facially neutral rule, when reasonably interpreted, has a potential adverse impact on the exercise of NLRA-protected rights. If so, the Board will then consider the justifications associated with the challenged rule to determine whether maintenance of the rule violates the Act. As explained previously, this balancing process has ample support in Board and court cases, including numerous Supreme Court decisions.[90] Moreover, even when the Board concludes that a challenged rule was lawfully maintained, the Board will independently evaluate situations where, in reliance on the rule, an employer disciplines an employee who has engaged in NLRA-protected activity; and the Board may conclude that the discipline violated Section 8(a)(1) even though the rule's maintenance was lawful. This approach is consistent with decisions of the D.C. Circuit that have criticized Board rulings in this area.[91]

Second, our colleagues' adherence to *Lutheran Heritage*'s "reasonably construe" standard prompts them to focus on a challenged rule's potential effect on the exercise of Section 7 rights to the exclusion of everything else.[92] In this regard, the dissenting opinions reflect stereotypes regarding workplace conduct and protected activity that fail to adequately address problems have become more prominent in recent years—indeed, in recent weeks. As to these issues, the Board is obligated to "adapt" our statute to "changing patterns of industrial life."[93] Without question, the NLRA confers vitally important protection on employees by giving them the right

rule, based on the balancing of considerations similar to those described in the text above, we find that the rules in *Flagstaff* and *Rio All-Suites Hotel* fall within Category 1.

Member Kaplan agrees that the no-camera rules in this case, *Flagstaff*, and *Rio All-Suites Hotel* are lawful under a balancing of interests test, and Member Kaplan agrees that no-camera rules appropriately fall within Category 1 as described in the text. However, Member Kaplan notes that Category 1 includes two subparts: (a) rules that are generally lawful because, when reasonably interpreted, they do not prohibit or interfere with the exercise of NLRA rights, without any need for a balancing of rights and interests or justifications; and (b) rules that are generally lawful even though they potentially interfere with the exercise of NLRA rights, but where this risk is outweighed by legitimate justifications. The no-camera rules at issue in this case, *Flagstaff*, and *Rio All-Suites Hotel* fall within subpart "b" above. Such rules are separate from those considered to fall within subpart "a" above, which have no reasonable tendency to interfere with Sec. 7 rights and therefore do not require any balancing of interests or justifications. More generally, as previously stated in fn. 17, supra, Member Kaplan agrees with the three-category structure adopted today, but he would have preferred a framework that treated subparts "a" and "b" separately, because he believes such a framework would better conform to distinctions made by the Board when considering different rules.

[90] See text accompanying fns. 30–39, supra. Member McFerran rejects any balancing of Sec. 7 rights with justifications associated with particular rules, and at the same time, she protests that the *Lutheran Heritage* standard already provided for the consideration of a rule's justifications. As our colleague makes clear, however, she believes that a challenged rule's justifications should be taken into account for the sole purpose of determining whether they can be accommodated by a more narrowly tailored rule. If so, the rule is struck down. As we have explained, however, it is impossible to craft reasonable workplace rules to the exacting standard our dissenting colleague demands. See supra fns. 42–43; infra fn. 92.

[91] See fn. 76, supra and the text accompanying fns. 83–84, supra.

[92] Our dissenting colleagues exhibit new-found enthusiasm for certain passages in *Lutheran Heritage* that emphasize the employer interests served by workplace rules, and our colleagues now ostensibly reject the notion that a rule is to be invalidated merely because it is ambiguous. However, our colleagues' professed leniency in these respects is contradicted by the Board cases that have been decided by our dissenting colleagues and other Board members. Even without conducting an exhaustive survey, we have found at least 31 cases in which the Board has applied the "reasonably construe" standard without treating the challenged rule's justifications as a factor favoring its lawful maintenance. See cases cited in fn. 69, supra. Instead, in the few cases in which the Board has given *any* consideration to a rule's legitimate justifications, it has nearly always done so in the context of conclusory Board findings (endorsed by our dissenting colleagues in this case) that the challenged rule must be "more narrowly tailored" to advance the employer's interests. See, e.g., *William Beaumont Hospital*, 363 NLRB No. 162, slip op. at 4 (whenever a rule "threatens to have a chilling effect" on the exercise of Sec. 7 rights, the employer may "protect his legitimate business interests" only by adopting "a more narrowly tailored rule"). This disregards what the Board's cases applying *Lutheran Heritage* have demonstrated: it is impossible to craft reasonable rules and policies addressing a range of issues without having some ambiguity and potential overlap with one or more types of possible NLRA-protected conduct. See fns. 42–43, supra. And contrary to our colleagues' current portrayal, the Board has consistently supported findings of illegality by declaring that ambiguity must be construed against the employer as the rule's drafter. See cases cited in fn. 43, supra.

[93] *NLRB v. J. Weingarten, Inc*., supra fn. 8, 420 U.S. at 266–267.

to engage in, and refrain from, concerted activities undertaken for the purpose of mutual aid or protection. However, nobody can doubt that employees have equivalent rights—guaranteed by federal, state, and local laws and regulations—to have protection from unlawful workplace harassment and discrimination based on sex, race, national origin, age, disability and numerous other impermissible considerations; protection from workplace assaults and life-threatening violence; and protection from workplace fatalities, accidents and injuries caused by inappropriate employee conduct. Employers have an obligation to maintain work rules and policies to assure these rights. The Board's past decisions have disregarded entirely the overwhelming number of employees and others whose interests are *protected* by rules that the Board has invalidated based on *Lutheran Heritage*. The public has a substantial interest in receiving medical care, for example, in hospitals where physicians and employees have been advised to maintain "harmonious interactions and relationships" affecting patient care.[94] In the instant case, the American people have a substantial interest in permitting one of the country's most prominent defense contractors to prohibit the use of cameras in facilities where work is performed that directly affects national security. Under the standard adopted today, we do not find that the Act's protection is necessarily subordinate to these countervailing considerations. We merely find that, in every present-day workplace, these other considerations must at least be taken into account. The *Lutheran Heritage* "reasonably construe" standard was deficient in this respect, which is a problem resolved by the Board, at long last, in today's decision.

Third, there is no merit in our dissenting colleagues' protest that we cannot or should not overrule *Lutheran Heritage* in this case without inviting *amicus* briefing, nor is there merit in their contention that the Board is required to engage in rulemaking regarding the issues addressed in today's decision.[95] As Member McFerran acknowledges, the Supreme Court has clearly stated the "Board is not precluded from announcing new principles in an adjudicative proceeding and … the choice between rulemaking and adjudication lies in the first instance within the Board's discretion."[96] Obviously, the Board decided *Lutheran Heritage* without engaging in rulemaking, and with extremely rare exceptions, the Board has strongly favored case adjudication over rulemaking. The Board has similar discretion with respect to whether to invite briefing prior to adjudicating a major issue. As we recently stated, "[n]either the Act, the Board's Rules, nor the Administrative Procedures Act requires the Board to invite amicus briefing before reconsidering precedent." *UPMC*, 365 NLRB No. 153, slip op. at 10 (2017). Further, we respectfully disagree with Member McFerran's contention that soliciting *amicus* briefing in major cases has become routine in the past decade, "particularly those where the Board is contemplating reversal of longstanding precedent." In the past decade, the Board has freely overruled or disregarded established precedent without supplemental briefing. See, e.g., *E.I. Du Pont de Nemours*, 364 NLRB No. 113 (2016) (overruling 12-year-old precedent in *Courier-Journal*, 342 NLRB 1093 (2004), and 52-year-old precedent in *Shell Oil Co.*, 149 NLRB 283 (1964), without inviting briefing); *Graymont PA, Inc.*, 364 NLRB No. 37 (2016) (overruling 9-year-old precedent in *Raley's Supermarkets & Drug Centers*, 349 NLRB 26 (2007), without inviting briefing); *Loomis Armored U.S., Inc.*, 364 NLRB No. 23 (2016) (overruling 32-year-old precedent in *Wells Fargo Corp.*, 270 NLRB 787 (1984), without inviting briefing); *Lincoln Lutheran of Racine*, 362 NLRB No. 188 (2015) (overruling 53-year-old precedent in *Bethlehem Steel*, 136 NLRB 1500 (1962), without inviting briefing); *Pressroom Cleaners*, 361 NLRB 643 (2014) (overruling 8-year-old precedent in *Planned Building Services*, 347 NLRB 670 (2006), without inviting briefing); and *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151 (2014) (overruling 10-year-old precedent in *Holling Press*, 343 NLRB 301 (2004), without inviting briefing). Finally, our dissenting colleagues obviously have no blanket commitment to "public participation in agency policymaking" or "public input." Just this past week, Members Pearce and McFerran dissented from a request for information that merely asked interested members of the public whether the Board's extensive rewriting of its representation-election procedures should be retained, modified or rescinded.[97]

We likewise reject any suggestion that the Board lacks authority to resolve issues based on a legal standard that has not been expressly raised the parties. When the Board decides cases, it performs an appellate function.[98]

[94] Member McFerran was part of the Board majority in *William Beaumont Hospital*, 363 NLRB No. 162 (2016), where the Board invalidated a rule requiring hospital physicians and employees to foster "harmonious interactions and relationships."

[95] Indeed, Member McFerran goes so far as to accuse us of engaging in "secret rulemaking in the guise of adjudication, an abuse of the administrative process."

[96] *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974).

[97] See 82 Fed. Reg. 58784-58790 (2017) (NLRB Notice and Request for Information, Representation-Case Procedures) (dissenting views of Members Pearce and McFerran).

[98] In typical unfair labor practice cases, the Board engages in appellate review of decisions and orders of the Agency's administrative law judges, and in typical representation cases, the Board engages appellate review of decisions by Regional Directors.

And the Supreme Court has instructed that "when an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Financial Services,* 500 U.S. 90, 99 (1991).[99]

In sum, the Board has the responsibility to decide all matters that are properly before it, based on our "special function of applying the general provisions of the Act to the complexities of industrial life."[100] In the present case, the issue of a work rule's legality is directly presented to us. In addressing that issue, we have the authority and the obligation to apply the law as we believe it should be, regardless of whether any party has directly challenged *Lutheran Heritage*, and the test we adopt is one of general application, not limited to the particular work rule at issue in this case.

As a final matter, both of our dissenting colleagues have had many opportunities to consider possible alternatives to the *Lutheran Heritage* standard and to solicit briefing regarding the Board's treatment of work rules. Nor did our dissenting colleagues lack notice regarding the problems in this area. Commencing with *MCPc, Inc.*,[101] decided in February 2014, Chairman (then-Member) Miscimarra expressed disagreement with the *Lutheran Heritage* "reasonably construe" standard in every workplace-rules case in which he participated; and in every rules case commencing with *William Beaumont Hospital*,[102] decided in April 2016, he described the deficiencies of the *Lutheran Heritage* standard. More than one General Counsel has also attempted to make sense of the Board's often-contradictory rulings in this area.[103] Our dissenting colleagues and other Board members unfailingly applied *Lutheran Heritage* without expressing or even signaling potential interest in exploring any alternative approach. Nor has the Board ever requested supplemental briefing regarding these issues, notwithstanding repeated opportunities to do so.[104]

Regarding the Act's requirement of good faith in collective bargaining, parties are not required to engage in "fruitless marathon discussions at the expense of frank statement and support of [their] position."[105] Neither does the Act require the Board to postpone or refrain from the appropriate resolution of cases that are properly before us. In today's decision, we have carefully evaluated the *Lutheran Heritage* "reasonably construe" standard, and we have evaluated many Board and court decisions that support the consideration of justifications associated with particular requirements and rules in addition to the potential impact of those rules on the exercise of NLRA-protected rights. We have examined numerous Board decisions applying *Lutheran Heritage* that appear to contradict each other and that make it difficult or impossible for everyone—employees, employers, unions, Board members, and courts—to distinguish between rules that may lawfully be maintained and those that are impermissible. For the reasons explained above, the Board has concluded that numerous policy considerations favor abandoning the *Lutheran Heritage* "reasonably construe" standard. In its place, based on the same policy considerations, we substitute the standard described in today's decision.

ORDER

The National Labor Relations Board orders that the Respondent, The Boeing Company, Renton and Everett, Washington, and Portland, Oregon, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[99] In *Dish Network Corp.*, 359 NLRB 311, 312 (2012), Member Pearce expressly endorsed the applicability of the *Kemper Financial Services* rationale to the Board's adjudicatory authority. Although *Dish Network* was invalidated by the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), based on the absence of a quorum of validly appointed Board members who decided the case, we agree with Member Pearce that the description in *Kemper Financial Services* appropriately explains the scope of the Board's authority.

[100] *NLRB v. Erie Resistor Corp*., 373 U.S. at 236.

[101] 360 NLRB 216, 216 fn. 4 (2014) (Member Miscimarra, concurring).

[102] 363 NLRB No. 162, slip op. at 7–24 (Member Miscimarra, concurring in part and dissenting in part).

[103] See, e.g., GC Mem. 15-4 (March 18, 2004); *Walmart*, Case 11-CA-067171 (Advice Memo, May 30, 2012). See also fn. 50, supra (citing numerous authorities attempting to address and explain the Board's treatment of facially neutral rules).

[104] Although Member McFerran ends her dissent by contemplating possible alternatives to the *Lutheran Heritage* standard (e.g., the "notion of rule categories," more clearly communicating the "legitimate employer interests behind the rules," making rules more "narrowly tailored," and approving "standard disclaimer" language or other "safe harbor" that could make rules immune from challenge), these options have either been rejected in many cases applying *Lutheran Heritage*, or experience has shown they are impractical. For example, the Board majority invalidated the no-recording rule in *Whole Foods Market, Inc.*, supra fn. 9, even though the rule clearly explained its purpose: "to eliminate a chilling effect on the expression of views." Cases applying *Lutheran Heritage* have demonstrated the impossibility of making rules sufficiently "narrowly tailored" to exclude any potential overlap with NLRA-protected conduct. See fns. 41–43, supra. Nor does Member McFerran endorse any alternatives to the extent of indicating that she and Member Pearce would adopt them; rather, these alternatives are mentioned merely to justify arguments favoring "public" input. In any event, as indicated above, the Board has carefully considered the *Lutheran Heritage* standard, and we have concluded that substantial policy reasons favor overruling *Lutheran Heritage* and adopting the standard described in this opinion.

[105] *NLRB v. American National Insurance*, 343 U.S. 395, 404 (1952).

(a) Photographing and videotaping employees engaged in workplace marches and rallies on or near its property.

(b) Creating the impression that its employees' union and/or protected concerted activities are under surveillance.

(c) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) To the extent it has not already done so, rescind all policies and procedures requiring security and/or management personnel to photograph or videotape employees engaged in workplace marches and rallies on or near its property.

(b) Within 14 days after service by the Region, post at its facilities in Everett and Renton, Washington, and Portland, Oregon, copies of the attached notice marked "Appendix."[106] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 19, 2012.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 19 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 14, 2017

Philip A. Miscimarra, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[106] If this Order is enforced by a judgment of a United States court of appeals, the words in the notices reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

MEMBER PEARCE, dissenting in part.[1]

Overruling 13-year-old precedent, the majority today institutes a new standard for determining whether the maintenance of a challenged work rule, policy, or employee handbook provision is unlawful. Although characterized by the majority as a balancing test, its new standard is essentially a how-to manual for employers intent on stifling protected concerted activity before it begins. Overly protective of employer interests and under protective of employee rights, the majority's standard gives employers the green light to maintain rules that chill employees in the exercise of rights guaranteed by the National Labor Relations Act. Because the new standard is fundamentally at odds with the underlying purpose of the Act, I dissent.

The core purpose of the National Labor Relations Act is to protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or mutual aid or protection."[2] Consonant with this objective, Section 7 of the Act guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection[.]" 29 U.S.C. §157. Section 8(a)(1) implements this guarantee by making it

[1] I agree with the majority that Boeing violated Sec. 8(a)(1) of the Act by engaging in surveillance and creating the impression of surveillance.

[2] Sec. 1 of the Act sets forth Congress' findings that employer denials of the right of employees to organize and bargain collectively and the inequality of bargaining power between employers and employees, who do not possess full freedom of association, lead to industrial strife that adversely affects commerce. Congress therefore declared it the United States' policy to mitigate or eliminate those adverse effects by "encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. § 151.

an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. 29 U.S.C. § 158(a)(1). "The central purpose of these provisions was to protect employee self-organization and the process of collective bargaining from disruptive interferences by employers." *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 317 (1965).

The Board and courts have long recognized that overbroad and ambiguous workplace rules and policies may have a coercive impact as potent as outright threats of discharge, by chilling employees in the exercise of their Section 7 rights. Accordingly, the Board, with court approval, has held that the mere maintenance of a rule likely to chill Section 7 activity can amount to an unfair labor practice even absent evidence of enforcement.[3] In *Lutheran Heritage Village-Livonia,*[4] the Board set forth an analytical framework for determining whether an employer rule or policy would reasonably tend to chill Section 7 activity. Under the *Lutheran Heritage* framework, the Board first considers whether an employer's rule "*explicitly* restricts activities protected by Section 7." Id. at 646 (emphasis in original). "If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (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." Id. at 647.

In the 13 years since it was adopted, the *Lutheran Heritage* standard has been upheld by every court to consider the matter.[5] Furthermore, no party in this case has asked the Board to overrule *Lutheran Heritage* or to apply a different standard.

The majority's rationale for overruling *Lutheran Heritage* crumbles under the weight of even casual scrutiny. Its assertion that *Lutheran Heritage* "does not permit *any* consideration of the legitimate justifications that underlie many policies, rules and handbook provisions" (majority's emphasis) is demonstrably false,[6] as is its assertion that *Lutheran Heritage* has not been well-received by the courts.[7] The majority also disingenuously claims that the Board "has struggled when attempting to apply *Lutheran Heritage*" and that "Board members have regularly disagreed" regarding the legality of challenged rules. It fails to acknowledge, however, that most of the dissents are attributable to Chairman Miscimarra's personal disagreement with the test or the manner in which it has been applied.[8] Once the majority's melodramatic flourishes and mischaracterizations are stripped away, what remains is a stratagem to greatly increase protection for employer interests to the detriment of employee Section 7 rights.[9]

[3] *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998), enfd. mem. 203 F.3d 52 (D.C. Cir. 1999); see also *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 374–380 (D.C. Cir. 2007) (explaining and applying *Lafayette Park's* "mere maintenance" policy).

[4] 343 NLRB 646 (2004).

[5] *G4S Secure Solutions Inc. v. NLRB,* --- Fed. Appx. ----, 2017 WL 3822921, fn. 2 (11th Cir. 2017) (mem); *Midwest Division-MMC, LLC v. NLRB,* 867 F.3d 1288, 1302 (D.C. Cir. 2017); *T-Mobile USA, Inc. v. NLRB*, 865 F.3d 265, 270 (5th Cir. 2017); *Mercedes-Benz U.S. International, Inc. v. International Union, UAW,* 838 F.3d 1128, 1139 (11th Cir. 2016); *Care One at Madison Avenue, LLC v. NLRB,* 832 F.3d 351, 362 (D.C. Cir. 2016); *Quicken Loans, Inc. v. NLRB*, 830 F.3d 542, 545 (D.C. Cir. 2016)*; Boch Imports, Inc. v. NLRB***,** 826 F.3d 558, 568 (1st Cir. 2016); *Three D, LLC v. NLRB*, 629 Fed. Appx. 33, 38 (2nd Cir. 2015) (mem); *World Color (U.S.A.) Corp. v. NLRB,* 776 F.3d 17, 20 (D.C. Cir. 2015) (approving standard but finding that it was misapplied); *Flex Frac Logistics, LLC v. NLRB*, 746 F.3d 205, 208–209 (5th Cir. 2014); *NLRB v. Arkema, Inc.*, 710 F.3d 308, 318 (5th Cir. 2013) (approving standard but finding that it was misapplied); *NLRB v. Northeastern Land Services, Ltd.,* 645 F.3d 475, 482 (1st Cir. 2011); *Auto Workers v. NLRB*, 520 F.3d 192, 197 (2nd Cir. 2008); *Cintas Corp. v. NLRB,* 482 F.3d 463, 467 (D.C. Cir. 2007); *Guardsmark, LLC v. NLRB*, supra, 475 F.3d at 374-376.

[6] In *Lutheran Heritage* itself, the majority upheld work rules prohibiting "abusive or profane language," "harassment," and "verbal, mental and physical abuse," because they clearly served "legitimate business purposes." 343 NLRB at 646–647. The majority therefore concluded that "reasonable employees would infer that the [r]espondent's purpose in promulgating the challenged rules was to ensure a civil and decent workplace, not to restrict Section 7 activity." Id. at 648 (internal quotation marks omitted). Contrary to the majority's portrayal, the crux of my disagreement with the new standard is not that it requires the Board to consider the justifications associated with a challenged rule (the Board has routinely done so in rules cases), but that it requires the Board to apply a poorly constructed test with numerous amorphous factors, and the review is not undertaken from the appropriate perspective, i.e., from the perspective of the employees who are expected to abide by the rules.

[7] See fn. 5, supra.

[8] I find it presumptuous that the majority faults the dissent for not previously inviting briefing on the "problems" with *Lutheran-Heritage*—notwithstanding that courts have adopted it and parties have not sought to reverse it –simply because then-Member Miscimarra concocted a different analysis in his dissent in *William Beaumont Hospital*, 363 NLRB No. 162, slip op. at 7–24 (2016). The *William Beaumont* majority comprehensively addressed his dissent, and pointed out the obvious flaws in the alternative standard he proposed (id., slip op. at 2-6). It is no surprise, then, that the majority's analysis in this case -- which is erected on the flawed foundation of that dissent -- has produced an equally flawed standard.

[9] Taking a page out of a familiar playbook, the majority seeks to leverage a hyped-up fear of terrorism and a host of other conjured-up horribles to chip away at fundamental employee rights. I find particularly repellent the majority's unfounded suggestion that the Board's protection of Sec. 7 rights has left employees more vulnerable to sexual harassment and assault. This crude attempt to link *Lutheran Heritage* to sexual harassment and assault—for no discernible reason other than to appeal to emotion and fear—represents a new low in advocating for a position. There has never been - and I cannot even imagine—a case in which the Board would strike down a rule prohibiting sexual harassment, assault, or other workplace violence on the grounds that it interferes with the exercise of Sec. 7 rights. The majority's professed

Further, in upending the clear analytical framework in *Lutheran Heritage,* the majority announces a sweeping new standard for evaluating facially neutral work rules that goes far beyond the issues presented in this case. Moreover, it does so without seeking public input, and without even allowing the parties in this and other pending rules cases to be heard on whether the new standard is appropriate. Parties to this and the numerous pending cases are also denied the opportunity to introduce evidence on the application of the majority's new standard.[10]

I agree with my dissenting colleague, Member McFerran, that the majority's new standard lacks a rational basis and is inconsistent with the Act. I also agree with her that, before the Board abandons or modifies a decade old standard, without prompting by adverse court precedent or any party to this case, it should notify the public and the parties that a reversal of important precedent is under consideration, solicit the informed views of affected stakeholders in industry and labor, and allow the parties to introduce evidence under the new standard.[11]

That the new Board members eschewed a full and fair consideration of the issue is particularly troubling, given their representations in the confirmation process that they would approach issues with an open mind. The majority's rush to impose its ill-conceived test and its disregard for public input are revealed by its statement that it should not be bound by "fruitless marathon discussions" of the relevant legal principles and considerations.[12] Is

concern for the safety and well-being of employees-- to justify weakening fundamental employee protections -- is offensive and disrespectful to the victims of sexual harassment, assault, and other workplace violence.

Chairman Miscimarra's concern over workplace harassment rings rather hollow in light of his repeated efforts to undermine NLRA and other statutory protections for its victims. See, e.g., *G4S Secure Solutions(USA)*, 364 NLRB No. 92, slip op. at 17–20 (2016) (then Member Miscimarra, dissenting from the majority's finding that employer violated Sec. 8(a)(1) by discharging employee for her protected concerted complaint of sexual harassment); *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 161–172 (2014) (then Member Miscimarra, dissenting from majority's decision to overrule *Holling Press, Inc.,* 343 NLRB 301 (2004), and extend Sec. 7 protection to an employee who solicited the assistance of her coworkers in raising a complaint of sexual harassment to management, by asking them to sign a statement as witnesses). See also then-Member Miscimarra's dissenting opinion in *Murphy Oil*, which he has subsequently reiterated in numerous Board decisions. *Murphy Oil USA, Inc.*, 361 NLRB 774, 795–807 (2014) (finding employer violated Sec. 8(a)(1) by maintaining mandatory arbitration agreement that employees would reasonably read to restrict their Sec. 7 right to pursue class or collective claims, including claims of sexual harassment and discrimination, in all forums), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015). Chairman Miscimarra would deny employees the right to stand together for "mutual aid and protection" when seeking to confront sexual harassment and other violations of workers' rights. Even when there is a clear pattern of harassment or discrimination, Chairman Miscimarra would allow the employer to require each employee to pursue their claim individually in a private arbitration proceeding, making it almost impossible for employees to obtain effective representation and allowing employers to avoid the risk of significant financial penalties that might serve as a deterrent to future violations.

[10] The majority erroneously relies on *Dish Network Corp.*, 359 NLRB 311, 311–312 (2012), a case that was invalidated by the Supreme Court in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), for the proposition that the Board has the power to overrule precedent *sua sponte*. In any event, that invalidated decision provides no cover. In *Dish Network*, the charging party expressly requested that the Board overrule existing precedent, but it failed to raise the issue until its reply brief. Id. at 311. Moreover, although the Board in *Dish Network* mused in dicta that it had the power to overrule precedent even though the issue was first raised in a reply brief, it wisely chose not to, and it emphasized that the cases in which the Board does so "should continue to be the exception." Id. at 311 fn. 3. It also acknowledged that overruling precedent in such circumstances could raise due process concerns which "could be easily addressed by requesting supplemental briefing: i.e., providing the party or parties an opportunity to be heard on the specific point in question," citing *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard*, 39 San Diego L. Rev. 1253 (2002). 359 NLRB at 313 fn. 12. It bears repeating that no party has ever requested that the Board overrule *Lutheran Heritage* in this case. Moreover, the majority has refused to provide the parties an opportunity to be heard on the application of its new standard, thus depriving them of due process.

[11] Indeed, I expressly voted to issue a notice and invitation to the parties and the public to file briefs that would assist the Board in reaching an informed decision in this case.

[12] In place of informed decision making and mature and fair consideration of the issues, the majority claims it is primed to reverse 13-year precedent, uniformly adopted by courts that have reviewed it, because it has "evaluated many Board and court decisions," including "numerous Board decisions applying *Lutheran Heritage.*" Given the sheer volume of the Board and court cases, the very short tenure of the newly constituted majority, and the plethora of decisions it is overruling in short order, I can only marvel that the majority was able to undertake such a comprehensive review.

Indeed, the majority's persistent mischaracterization of the Board's decisions applying *Lutheran Heritage* casts doubt upon the efficacy of its review. The majority claims, for example, to have identified "at least 31 cases in which the Board has applied the 'reasonably construe' standard without treating the challenged rule's justifications as a factor favoring its lawful maintenance." See cases cited in the majority opinion at fn. 69. The majority's review of the cited cases was either embarrassingly careless or intentionally myopic. Contrary to the majority, in several of the cited cases, the Board found that challenged rules were lawfully maintained because they were narrowly tailored to serve legitimate business justifications. For a sample of such cases, see *Cellco Partnership d/b/a Verizon Wireless*, 365 NLRB No. 38, slip op. at 1 fn. 3 and 2 fn. 5 (2017) (Board found employer lawfully maintained rule prohibiting use of email system to transmit "offensive" or "harassing" content and "chain letters" "because employees would not reasonably read those terms. . . to encompass protected communications"; Board also found employer lawfully maintained privacy rule that "specifically lists the type of confidential information covered to include social security numbers, identification numbers, passwords, bank account information, and medical information," because the rule was narrowly tailored and would not reasonably be read to encompass protected activity); *William Beaumont*, supra, 363 NLRB No. 162, slip op. at 1, 2, 4, 32–33 (Board found employer lawfully maintained rules prohibiting employees from, among other things: making willful and intentional

the majority convinced that the parties and the public have nothing to offer or is it afraid that it might learn that its emperor of a test has no clothes?

I

With no public input, and so little time for reasoned decision making, it is presumptuous of the newly-constituted majority to believe – when stating that "the Board can and should do better in this area, and employees, unions, and employers deserve better" – that they have achieved this result. Indeed, the majority's new standard is an obviously flawed conceptual framework that fails to provide critical guidance to the Board, employers, unions and employees.

The new standard is an incomprehensible hodgepodge of factors that will be impossible to apply. In addition to the actual text of challenged rules, the Board, employers who implement rules, and workers who interpret them, must also consider seven vague factors and then three dubious categories in order to determine the lawfulness of rules.[13] Contrary to the majority, the fact that its test

threats and engaging in intimidation, harassment, humiliation, or coercion of employees, physicians, patients, or visitors; using profane and abusive language directed at employees, physicians, patients or visitors; engaging in behavior that is rude, condescending or otherwise socially unacceptable; and engaging in behavior that is disruptive to maintaining a safe and healing environment: the Board aptly explained that when the Board upholds a challenged rule "it is typically because the rule is tailored such that the employer's legitimate business interest in maintaining the rule will be sufficiently apparent to a reasonable employee").

In many of the other cases cited by the majority, the Board and/or the administrative law judge considered the proffered business justifications, but found that they were not substantial and legitimate or would not be sufficiently apparent to a reasonable employee, or that the rule was not appropriately tailored to protect the employer's legitimate interests without unnecessarily chilling Sec. 7 rights. See, e.g., *Verizon Wireless*, supra, 365 NLRB No. 38, slip op. at 1 (Board recognized that "employers have a substantial and legitimate interest in maintaining the privacy of certain business information," but found that rule was not tailored to employer's legitimate interests and was so broadly worded that employees would reasonably interpret it to prohibit any discussion of terms and conditions of employment); *T-Mobile USA,* 363 NLRB No. 171, slip op. at 4 (2016) (Board considered employer's assertion that recording ban was justified by, among other things, its interest in maintaining employee privacy and promoting open communication, but found that the rule was not "narrowly tailored to protect legitimate employer interests or to reasonably exclude Section 7 activity"), enfd. in relevant part 865 F.3d at 274–275; *Rocky Mountain Eye Center, P.C.*, 363 NLRB No. 34, slip op. at 8 (2015) (judge, affirmed by the Board, considered employer's argument that confidentiality agreement was promulgated to comply with HIPAA, but found that "[t]he laundry list of items deemed to be 'confidential information'. . . broadens the rule beyond the scope of HIPAA under any reasonable reading"); *Purple Communications, Inc.,* 361 NLRB 575, 583 (2014) (judge, affirmed by the Board, found rule prohibiting "disruption of any kind" unlawful, notwithstanding employer's argument that it was entitled to prevent disruptions during working time, because rule was not limited to working time and would reasonably be interpreted to restrict Sec. 7 activity); *Flex Frac Logistics,* 358 NLRB 1131, 1131 (2012) (finding broadly worded confidentiality rule unlawful because employer never asserted that it had a legitimate business interest in prohibiting discussion of wages or other terms and conditions of employment)*; Heartland Catfish Co.*, 358 NLRB 1117, 1124 (2012) (considering employer's argument that safety considerations justified prohibition on leaving workstation without permission).

In some of the cited cases, the challenged rules were so clearly overbroad that even then-Member Miscimarra had no difficulty finding them unlawful without considering the employer's business justification. See, e.g*., Sheraton Anchorage*, 362 NLRB No. 123 (2015) (rule against behavior that violates common decency or morality or publicly embarrasses employer); *Lily Transportation Corp., 362 NLRB No. 54 (2015) (rule restricting employees from posting any information about employer on the internet)*; *MCPc, Inc.,* 360 NLRB 216, 216 fn. 4 (2014) (rule prohibiting dissemination of "personal or financial information"). The majority also cites *Laurus Technical Institute*, 360 NLRB 1155 (2014), but the Board in that case had no occasion to consider the justifications associated with the challenged rule, because no exceptions were filed to the judge's finding that the rule was unlawful. Id. at 1155 fn. 1.

[13] Among the factors that must be considered in order to determine the legality of work rules, the majority would require the Board, employers, workers, and unions to "differentiate among different types of NLRA-protected activities (some of which might be deemed central to the Act and others more peripheral)"; to "recognize those instances where the risk of intruding on NLRA rights is 'comparatively slight'"; to "distinguish between substantial justifications . . . and others that might be regarded as having more peripheral importance"; and to strike the proper balance between the asserted business justifications and the potential invasion of employee rights. In support of these criteria, the majority cites *NLRB v. Great Dane Trailers, Inc*., 388 U.S. 26 (1967) and *NLRB v. Erie Resistor Corp*., 373 U.S. 221 (1963). The Board has never applied the *Great Dane* and *Erie Resistor* framework in the context of rules cases, and for good reason. In *Great Dane* and *Erie Resistor,* the Supreme Court provided an analytical model for resolving cases that turn on employer motivation, in which the conduct appears to be discriminatory on its face. In *Great Dane*, the Court explained that there are two categories of facially discriminatory conduct which, depending on the nature of their impact on employee rights, require a different analysis in assessing employer motivation. Under this framework, if an action is deemed inherently destructive of employee rights, improper motivation is inferred and the conduct may be found unlawful, whether or not the conduct was based on legitimate business considerations. However, if the action is deemed to have only a "comparatively slight" impact on employee rights, an affirmative showing of improper motive must be made to sustain a violation, if the employer has come forward with evidence of a legitimate and substantial business justification. 388 U.S. at 34. In *Erie Resistor*, the Court explained that an employer's proffer of legitimate business reasons for inherently destructive conduct "present[s] a complex of motives and preferring one motive to another is in reality the far more delicate task . . . of weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner . . . ." 373 U.S. at 228–229. The majority's application of this analytical model conflicts with the settled principle that, in rules cases, as in 8(a)(1) cases generally, interference, restraint, and coercion does not turn on the employer's motive. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act, regardless of whether that was the intent of the employer.

has more moving parts than *Lutheran Heritage* does not make it clearer; it is just the opposite.[14]

Ironically, although the majority criticizes the *Lutheran Heritage* standard for producing conflicting outcomes (based on the majority's purely textual analysis of rules it has taken out of context), the new standard, with its multitude of variables, will yield far less predictable and more inconsistent results. Indeed, it will inevitably result in similar or even identical rules being found lawful in some circumstances and unlawful in others.[15]

As Member McFerran points out in her dissent, the uncertainty and unpredictability inherent in the new standard is not cured by the majority's dubious system of categorizing rules as always lawful, sometimes lawful, and always unlawful. Although stating that this is an area where the Board has a special responsibility to give parties certainty and clarity, the majority's abstruse standard will make it substantially more difficult for employers to anticipate conflict with NLRA policies when drafting new rules, and will produce burdensome and wasteful litigation.

II

I find particularly troubling the majority's designation of rules "requiring employees to abide by basic standards of civility" as always lawful to maintain (Category 1). First, no civility rules are involved in this case. By declaring civility rules always lawful, the majority goes far beyond the issue presented in this case and essentially provides an advisory opinion. The absence of any factual context or evidentiary record – not to mention argument from parties on both sides of the issue - renders its conclusion wholly abstract. It is well established that the Board does not give advisory opinions except on narrow jurisdictional questions.[16] This is no more than "seat-of-the-pants" rulemaking without context.

Second, since early in the history of the Act, the Board and courts have interpreted Section 7 as protecting the right of employees to engage in robust debate, to complain to their employer and fellow employees, and to criticize their employer to government agencies and the public.[17] Section 7 protection is not dependent on whether these activities are carried out in a courteous or civil manner. In other contexts, the Board and courts have repeatedly held that negative, disparaging, disrespectful, intemperate, and vulgar remarks uttered during the course of protected activities will not remove the activities from the Act's protection unless they are flagrant, violent, or extreme.[18]

Our experience demonstrates, moreover, that the fear of reprisal that is instilled in employees by overbroad "civility rules" is well-founded.[19] The cases in which

[14] With due respect to the majority, the component parts of its new standard are not "common-sense guidelines," but a grab bag of arcane factors. Indeed, the majority protests that Member McFerran and I have misunderstood their new standard. But if knowledgeable Board members cannot divine the majority's standard, what hope is there for employers, much less the employees at whom the rules are aimed?

[15] To use the majority's hypothetical, under its standard, if an employer operates a coal mine where fatal mine collapses have occurred as the result of loud talking, and the employer has adopted a rule prohibiting loud talking in the mine, such a rule would be lawful to maintain because it has a significant justification pertaining to workplace safety, and the rule's maintenance is also supported by the nature of the business (operating a coal mine) and recent events (past fatal mine collapses resulting from loud talking). The same rule, however, would presumably be unlawful to maintain in the parking lot or administrative offices of the same mine where the business justification is absent, in a mine where there was no history of mine collapses, or in a different industry.

[16] See Sec. 102.98 and 102.99 of the Board's Rules and Regulations. See also *ITT Job Training Services, Inc.*, 297 NLRB 259, 259-260 (1989); *James M. Casida*, 152 NLRB 526 (1965); *Broward County Port Authority*, 144 NLRB 1539 (1963).

[17] See *Linn v. Plant Guard Workers Local 114*, 383 U.S. 53, 58–61 (1966), observing:

> Labor disputes are ordinarily heated affairs; the language that is commonplace there might well be deemed actionable per se in some state jurisdictions. Indeed, representation campaigns are frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions. Both labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language . . . .
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> * * *
>
> We note that the Board has given frequent consideration to the type of statements circulating during labor controversies, and that it has allowed wide latitude to the competing parties. . . . .
>
> * * *
>
> [T]he Board tolerates intemperate, abusive and inaccurate statements . . . . .

[18] See *USPS*, 364 NLRB No. 62, slip op. at 1-4 (2016) (finding that employer unlawfully discharged union steward who engaged in heated discussion, peppered with profanity, during presentation of grievance); *Hawaii Tribune-Herald*, 356 NLRB 661, 680 (2011) ("The Board has repeatedly held that strong, profane, and foul language, or what is normally considered discourteous conduct, while engaged in protected activity, does not justify disciplining an employee acting in a representative capacity.") (collecting cases), enfd. 677 F.3d 1241 (D.C. Cir. 2012); accord *Noble Metal Processing, Inc.,* 346 NLRB 795, 799 (2006); *Greenfield Die & Mfg. Corp*., 327 NLRB 237, 238 (1998) (union solicitations "do not lose their protection simply because a solicited employee rejects them and feels 'bothered' or 'harassed' or 'abused' when fellow workers seek to persuade him or her about the benefits of unionization"); *Severance Tool Industries*, 301 NLRB 1166, 1170 (1991) ("a certain amount of salty language and defiance" is to be expected and "must be tolerated" in disputes over employees' terms and conditions of employment), enfd. mem. 953 F.2d 1384 (6th Cir. 1992).

[19] The majority's assurance that, although the maintenance of overly broad and ambiguous civility rules will be lawful, the application of such rules to punish NLRA-protected conduct may violate the Act, badly misses the point. The proper role of the Board is to "prevent[] employees from being chilled in the exercise of their Section 7 rights

employers have applied such rules to discipline or discharge employees for engaging in protected concerted activity are numerous.[20] These cases confirm the tendency of employers to interpret overbroad and ambiguous civility rules to prohibit conduct that is clearly protected under the Act. In holding unlawful the promulgation and maintenance of such rules, therefore, the Board not only eliminates a clear restraint on Section 7 activity, it also discourages a second, independent violation – enforcement of such rules to punish employees for engaging in protected concerted activity.[21]

III

There are other serious problems with the majority's standard. To begin, in rules cases, as in 8(a)(1) cases generally, "interference, restraint, and coercion . . . does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act."[22] As explained by the Court of Appeals for the District of Columbia Circuit, "That objective inquiry serves an important prophylactic function: it allows the Board to block rules that might chill the exercise of employees' rights by cowing the employees into inaction, rather than forcing the Board to 'wait[ ] until that chill is manifest,' and then try to 'undertake the difficult task of dispelling it.'"[23]

It follows that, in order to determine the legality of a challenged rule, the rule must be interpreted from the employees' perspective. Although the majority pays lip service to this principle, it ignores it in practice. Under the majority's standard, the legality of a rule turns on a balance of myriad factors that employees could not reasonably be expected to comprehend, including distinctions between different types of protected activities; the risk that the rule will intrude on Section 7 rights; distinctions between justifications that have direct, immediate relevance and those that are peripheral; and specific events and other evidence associated with a rule, regardless of whether they are known to employees. Additionally, the majority emphasizes "that *the Board* will conduct this evaluation" (majority's emphasis). But the question is not whether the Board thinks a challenged rule restricts Section 7 rights; the question is whether a reasonable employee would think that it does. The rule is there to be read by the employees, and thus "what counts is the knowledge and understanding of a reasonable employee."[24]

As the Board explained in *Whole Foods Market*, 363 NLRB No. 87, slip op. at 4, fn. 11 (2015):

> Where reasonable employees are uncertain as to whether a rule restricts activity protected under the Act, that rule can have a chilling effect on employees' willingness to engage in protected activity. Employees, who are dependent on the employer for their livelihood, would reasonably take a cautious approach and refrain from engaging in Sec. 7 activity for fear of running afoul of a rule whose coverage is unclear.[25]

. . . instead of waiting until that chill is manifest, when the Board must undertake the difficult task of dispelling it." *Flex Frac Logistics*, supra, 358 NLRB at 1132.

[20] See e.g. *Component Bar Products, Inc.*, 364 NLRB No. 140, slip op. at 1 fn. 1 (2016) (citing overly broad rule prohibiting "insubordination or other disrespectful conduct," employer unlawfully discharged employee for calling coworker and warning him that his job was in danger); *Hitachi Capital America Corp*., 361 NLRB 123, 123–125 (2014) (employer unlawfully enforced overly broad rule prohibiting "inappropriate conduct" against employee for sending concerted, protected email protesting employer's inclement weather policy); *Laurus Technical Institute*, supra, 360 NLRB at 1162–1164 (citing overly broad no-gossip policy, employer unlawfully discharged employee for protected concerted conversations regarding terms and conditions of employment); *The Roomstore*, 357 NLRB 1690, 1690 fn. 3 and 1706 (2011) (citing overly broad rule prohibiting "[a]ny type of negative energy or attitudes," employer unlawfully threatened to suspend employees for protected concerted conversations regarding terms and conditions of employment).

[21] It is no wonder that the majority significantly underestimates the coercive impact of overly broad and ambiguous rules, given its restrictive understanding of concerted activity. The majority asserts that "the Act only protects concerted activities that two or more employees engage in for the purpose of mutual aid or protection." That is clearly wrong and would significantly narrow the scope of concerted activity. See *NLRB v. City Disposal Sys. Inc*., 465 U.S. 822, 830 (1984) (single employee asserting a right may constitute concerted activity even without prior discussion with other employees); *Meyers Industries*, 281 NLRB 882, 887 (1986) (concerted activity includes not only activity that is engaged in with or on the authority of other employees, but also activity where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management), enfd. sub nom. 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988); *Fresh & Easy Neighborhood Market*, supra, 361 NLRB at 153 ("the activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much concerted activity as is ordinary group activity") (citation and internal quotation marks omitted).

[22] *American Freightways Co.,* 124 NLRB 146, 147 (1959).

[23] *Quicken Loans*, supra, 830 F.3d at 549 (citing *Flex Frac Logistics,* supra, 358 NLRB at 1132).

[24] *Auto Workers*, supra, 520 F.3d at 197.

[25] It is this natural tendency of employees to steer clear of any conduct that might violate a work rule in order to avoid jeopardizing their employment that supplies the rationale for the long-standing and judicially approved principle that any ambiguity in a rule must be construed against the employer as the drafter of the rule. See *Schwan's Home Service*, 364 NLRB No. 20, slip op. at 3 (2016) "([E]mployees should not have to decide at their peril what activities a rule prohibits. . . . Faced with . . . ambiguity, and fearing potential discipline, employees would reasonably err on the side of caution and refrain from exercising their Section 7 right." (citations omitted)); *Lafayette Park*, supra, 326

This is the very essence of the problem that the *Lutheran Heritage* standard was intended to prevent. The majority's wrongheaded approach shifts the focus away from the employees' perspective and, in doing so, diminishes the Act's proactive role in safeguarding Section 7 rights, a result that Congress could not have intended.

Finally, although the majority writes at great length about the importance of considering an employer's legitimate business interests in determining the legality of a challenged rule, it ignores an important corollary: an employer's interests, even if legitimate, will not excuse interference with Section 7 rights if "[a] more narrowly tailored rule that does not interfere with protected employee activity would be sufficient" to accomplish the employer's goals. *Cintas Corp.,* supra, 482 F.3d at 470. Contrary to the majority's claim, in applying the *Lutheran Heritage* standard to determine whether employees would reasonably construe a rule to restrict Section 7 activity, the Board has routinely considered legitimate employer interests associated with the rule. However, in order to protect the rights of employees guaranteed by Section 7, the Board and courts have required employers to show that a challenged rule is narrowly tailored to serve its legitimate interests. See *Guardsmark,* supra, 475 F.3d at 380 (an employer "ha[s] an obligation to demonstrate its inability to achieve [its] goal with a more narrowly tailored rule that would not interfere with protected activity"). See also *Quicken Loans*, supra, 830 F.3d at 549 (employer's legitimate interest in protecting *some* of the information covered by its confidentiality rule "does nothing to legitimate the blunderbuss sweep" of the rule). By casting aside this requirement, the majority allows employers to maintain overly broad rules that chill the exercise of NLRA-protected activities, even when it does not serve a substantial and legitimate employer interest.[26] Such a standard cannot be reconciled with the Board's statutory mandate.[27]

Because the majority's new standard is based on an unreasonable and indefensible interpretation of Section 8(a)(1)'s prohibition, I dissent.

Dated, Washington, D.C. December 14, 2017

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Mark Gaston Pearce, Member

NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting in part.[1]

The Board's approach to employer work rules is worth getting right. Those rules are virtually everywhere, and they surely affect nearly every employee and employer covered by the National Labor Relations Act. For more than 13 years, the Board has applied the analytical framework adopted in *Lutheran Heritage*[2] for assessing whether challenged work rules would reasonably tend to chill employees in the exercise of their Section 7 rights. Even though no court has ever rejected this test, despite many opportunities, it is not surprising that a newly-constituted majority is nonetheless revisiting precedent. What *is* surprising is the arbitrary and capricious process the majority has followed in its rush to replace the current test and the alarmingly flawed result of that process.

NLRB at 828 ("any ambiguity in [a] rule must be construed against the [employer] as the promulgator of the rule"), enfd. 203 F.3d 52; *Advance Transportation Co.*, 310 NLRB 920, 925 (1993) (finding rule barring "intimidation, distraction, or disruption of another employee" unlawful because it is ambiguous and over broad "thereby fortifying [r]espondent with power to define its terms and inhibit employees in exercising rights under Section 7 of the Act"); *Marlene Industries Corp.*, 166 NLRB 703, 704 (1967) (same), enfd. in relevant part 406 F.2d 886 (6th Cir. 1969). See also *Quicken Loans*, supra, 830 F.3d at 550 (employer cannot "compel employees to hazard potentially career-imperiling guesses about whether the Employment Agreement—that [the employer] unilaterally drafted and required them to sign—means what it says and says what it means"); *NLRB* v. *Miller-Charles and Company,* 341 F.2d 870, 874 (2d Cir. 1965) ("The true meaning of the rule might be the subject of grammatical controversy. However, the employees of respondent are not grammarians. The rule is at best ambiguous and the risk of ambiguity must be held against the promulgator of the rule rather than against the employees who are supposed to abide by it."). To the extent the majority implies that I have rejected this principle, they have mischaracterized my position.

[26] Indeed, so much does the majority's test skew in favor of employer interests, the most the majority can offer is that its standard will not necessarily subordinate the fundamental right of employees to employer interests. Clearly that is at odds with the Agency's obligation to safeguard Sec. 7 rights.

[27] Applying the *Lutheran Heritage* standard, I would find that Boeing failed to meet its burden of establishing that its "no camera" rule – which encompasses any and all photography on Boeing premises at any time without permission -- is tailored to its legitimate interest in protecting classified, export-controlled, and proprietary information. I would therefore find that Boeing violated Sec. 8(a)(1) by promulgating and maintaining the rule. See *T-Mobile USA,* supra, 865 F.3d at 275 (finding that rule prohibiting all photography or recording on corporate premises at any time without permission from a supervisor was unlawfully over broad because it "plainly forbid[s] a means of engaging in protected activity"). See also *Flagstaff Memorial Hospital*, 357 NLRB 659, 670 (2011), where I dissented in relevant part from the majority's holding lawful a rule prohibiting "the use of cameras for recording images of patients *and/or hospital equipment, property, or facilities*" (emphasis added), because, in my view, employees would reasonably believe that the rule prohibited protected activity, and its stated prohibition extended beyond Flagstaff's legitimate interest in protecting patient privacy.

[1] I agree with the majority in adopting the judge's decision that Boeing violated Sec. 8(a)(1) of the Act by engaging in surveillance and creating the impression of surveillance.

[2] *Lutheran Heritage Village –Livonia*, 343 NLRB 646 (2004).

No party and no participant in this case—which involves a single, no-photography rule—has asked the Board to overrule *Lutheran Heritage*.[3] Nor has the Board asked anyone whether it should. Over the minority's objection, the Board majority has refused to notify the public that it was contemplating a break with established precedent. It has refused to invite amicus briefing from interested persons, even though this has become the Board's wise norm in the years following *Lutheran Heritage*. Without the benefit of briefs from the parties or the public, the majority invents a comprehensive new approach to work rules that goes far beyond any issue presented in this case and, indeed, beyond the scope of *Lutheran Heritage* itself. This is secret rulemaking in the guise of adjudication, an abuse of the administrative process that leaves Board law not better, but demonstrably worse: The majority has devised a new test that is more complicated, more unpredictable, and much less protective of the statutory rights of employees than the standard it replaces. Indeed, it simply fails to address the labor-law problem before the Board: that employees may be chilled from exercising their statutory rights by overbroad employer rules.

I.

This case involves a facial challenge to a single employer policy restricting the use of camera-enabled devices on Boeing's property. Applying the test established in *Lutheran Heritage*, the administrative law judge found the policy unlawful, concluding that although the policy did not explicitly restrict activity protected by Section 7 of the Act, "employees would reasonably construe the language [of the policy] to prohibit Section 7 activity." 343 NLRB at 647.[4] As I will explain (see Part III, below), the judge correctly held that Boeing's rule was unlawfully overbroad under the controlling test. In short, Boeing's rule is closer to the no-photography and/or no-recording rules that the Board has struck down than it is to the rule that the Board has upheld. Of course, Boeing and amicus National Association of Manufacturers disagree on the correct result here under *Lutheran Heritage* and the Board's relevant precedent applying that standard. But what no party to this case has argued is that the Board should or must reverse *Lutheran Heritage* and apply some new test. The majority overrules precedent entirely on its own initiative. That step is suspect – as is the process followed by the majority.

The Board is certainly not responding to the invitation or the order of a federal appellate court. No court has rejected the *Lutheran Heritage* test in the 13 years since it was decided. Then-Member Miscimarra's dissenting observation in an earlier case was misplaced there, but apt here: "It is simply impossible that all the courts of appeals would have missed [the] train wreck" that *Lutheran Heritage* supposedly amounts to.[5]

Indeed, the courts have applied *Lutheran Heritage* themselves, even striking down certain employer rules that had been *upheld* by the Board.[6] The District of Columbia Circuit has endorsed the Board's "focus[] on the text of the challenged rule,"[7] explaining that the Board is entitled to judicial deference in its interpretation of Section 8(a)(1) when it "faithfully applies [its] standard, and adequately explains the basis for its conclusion."[8] The First Circuit, meanwhile, has explicitly rejected the basic claim of the majority here, that the Board is compelled by the Act to adopt a balancing test giving greater weight to employer business interests.[9] And the Eleventh Circuit, too, has rejected the argument that *Lutheran Herit-*

[3] Like the majority, I use the term "*Lutheran Heritage*" to refer to rules alleged to be unlawful because "employees would reasonably construe the language to prohibit Section 7 activity." Id. at 647.

[4] Sec. 7 of the Act provides in relevant part that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. §157.

"Employee photographing and videotaping is protected by Section 7 when employees are acting in concert for their mutual aid and protection and no overriding employer interest is present." *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190, slip op. at 4 (2015). Accordingly, the Board has found some no-photography and/or no-recording rules unlawful under *Lutheran Heritage*—with judicial approval in two Circuits. *T-Mobile USA, Inc.*, 363 NLRB No. 171, slip op. at 3–5 (2016), enfd. in relevant part 865 F.3d 265 (5th Cir. 2017); *Whole Foods Market, Inc.*, 363 NLRB No. 87, slip op. at 3 & fns. 7–9 (2015), enfd. mem. 691 F. Appx. 49 (2d Cir. 2017). It has also upheld such a rule maintained by a hospital, again with judicial approval. *Flagstaff Medical Center*, 357 NLRB 659, 662–663 (2011), enfd. in relevant part 715 F.3d 928 (D.C. Cir. 2013).

[5] *BFI Newby Island Recyclery*, 362 NLRB No. 186, slip op. at 35 (2015) (Members Miscimarra and Johnson, dissenting).

[6] See, e.g., *Flex Frac Logistics, LLC v. NLRB,* 746 F.3d 205, 209–210 (5th Cir. 2014) (enforcing Board's finding that rule was unlawful); *International Union, UAW v. NLRB*, 520 F.3d 192, 197 (2d Cir. 2008) (reversing Board's finding that rule was lawful); *Cintas Corp. v. NLRB*, 482 F.3d 463, 467–470 (D.C. Cir. 2007) (enforcing Board's finding that rule was unlawful); *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 378-380 (D.C. Cir. 2007) (reversing Board's finding that rule was lawful).

[7] *Guardsmark*, supra, 475 F.3d at 374.

[8] Id. (quoting *Adtranz ABB Daimler-Benz Transp. V. NLRB*, 253 F.3d 19, 25 (D.C. Cir. 2001)).

[9] *NLRB v. Northeastern Land Services, Ltd*., 645 F.3d 475, 483 (1st Cir. 2011). The First Circuit explained that "[n]othing in *Republic Aviation* [*Corp. v.* NLRB, 324 U.S. 793 (1945)] compel[s] the Board to apply a balancing test" in cases like this one and that "[w]hile the Board could have chosen to structure its rule differently and engage in a balancing analysis, [the courts] owe[] deference to its decision not to do so."

age is not a reasonable construction of the National Labor Relations Act.[10]

It is not the case, in turn, that the Board has somehow failed to consider and address criticisms of *Lutheran Heritage*. Only last year, the Board carefully explained why the dissenting view of then-Member Miscimarra was unpersuasive. *William Beaumont Hospital*, 363 NLRB No. 162, slip op. at 3–6 (2016). Today's majority opinion is based on that dissent, with all of its demonstrated flaws. I continue to agree with the majority's opinion in *William Beaumont*. I am no more persuaded by this majority now than by Member Miscimarra's dissent then.[11]

Of course, the Board has a new majority.[12] But the change in the composition of the Board is not a reason for us to revisit our earlier decisions—as the Board itself has held, repeatedly, since the mid-1950's.[13]

Just as troubling as the majority's decision to reverse precedent sua sponte is the manner in which it has proceeded to that result. In an unexplained and unwarranted break with the Board's practice of the last several years, the majority has refused to notify the public and the parties that a reversal of *Lutheran Heritage* was under consideration and has refused to solicit briefs from the parties and the public.[14] This is particularly ironic for two reasons: (1) because the Board, only weeks ago, for the first time adopted a rule codifying its practice of accepting, and on appropriate occasions inviting, amicus briefs;[15] and (2) because *Lutheran Heritage*, which the majority excoriates, was itself decided without inviting briefs – a cautionary example that should have given the majority pause.

Since at least the 1950's, the Board has solicited briefing in some major cases.[16] In the last decade, this has become the Board's routine practice in significant cases, particularly those where the Board is contemplating reversal of longstanding precedent.[17] Cases that involve

[10] *G4S Secure Solutions, Inc. v. NLRB*, ___ Fed. Appx. ___, 2017 WESTLAW 3822921 at *2 fn. 2 (11th Cir. Sept. 1, 2017), citing *Mercedes-Benz U.S. Int'l, Inc. v. Int'l Union, UAW*, 838 F.3d 1128, 1135, 1138–1139 (11th Cir. 2016).

[11] It is particularly disappointing to see today's majority reiterate then-Member Miscimarra's canard in *William Beaumont* that either the Board's approach to work rules generally, or its holding with respect to the rule at issue there, had any connection whatsoever to the death of a baby at the hospital involved. The *William Beaumont* Board dismantled the insinuation there, see, supra, 363 NLRB No. 162, slip op. at 3, and its repetition here is regrettable.

[12] Indeed, for two members of the majority who have just joined the Board (Member Kaplan was sworn in August 10, 2017, and Member Emanuel, September 26, 2017), this case is the first matter involving employer rules they have ever considered.

[13] See *Brown & Root Power & Mfg. Inc.*, 2014 WL 4302554 (Aug. 29, 2014); *UFCW, Local No. 1996 (Visiting Nurse Health System, Inc.)*, 338 NLRB 1074, 1074 (2003) (full Board), citing *Iron Workers Local 471 (Wagner Iron Works)*, 108 NLRB 1237, 1239 (1954).

[14] I requested that the Board issue a notice and invitation to file briefs. Member Pearce and I voted to approve that request. The notice and invitation was not issued because a majority of the Board did not approve the request.

[15] Board's Rules & Regulations Sec. 102.46(i); see also 82 Fed. Reg. 43695 (Sept. 19, 2017).

[16] See, e.g., *Keystone Coat, Apron & Towel Supply Company*, 121 NLRB 880, 881 fn. 1 (1958); *Hershey Chocolate Corporation*, 121 NLRB 901, 901 (1958).

[17] See, e.g., *Temple University Hospital, Inc.*, Case No. 04-RC-162716, Order Granting Review in Part and Invitation to File Briefs (filed Dec. 29, 2016), available at https://apps.nlrb.gov/link/document.aspx/09031d45822fb922 (whether the Board should exercise its discretion to decline jurisdiction over the employer); *Postal Service*, 364 NLRB No. 116 (2016) (whether the Board may continue to permit administrative law judges to issue a "consent order," incorporating the terms proposed by a respondent to settle an unfair labor practice case, to which no other party has agreed, over the objection of the General Counsel); *King Soopers, Inc.*, 364 NLRB No. 93 (2016) (whether the Board should revise its treatment of search-for-work and interim employment expenses as part of the make-whole remedy for unlawfully discharged employees), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017); *Columbia University*, 364 NLRB No. 90 (2016) (whether the Board should modify or overrule its decision in *Brown University*, 342 NLRB 483 (2004), in which it held that graduate assistants who perform services at a university in connection with their studies are not statutory employees under the National Labor Relations Act); *Miller & Anderson, Inc.*, 364 NLRB No. 39 (2016) (whether the Board should adhere to its decision in *Oakwood Care Center,* 343 NLRB 659 (2004), which disallowed inclusion of solely employed employees and jointly employed employees in the same unit absent consent of the employers, and if not, whether the Board should return to the holding of *M.B. Sturgis, Inc.*, 331 NLRB 1298 (2000), which permits the inclusion of both solely and jointly employed employees in the same unit without the consent of the employers); *Service Workers Local 1192 (Buckeye Florida Corp.)*, 362 NLRB No. 187 (2015) (whether the Board should reconsider its rule that, in the absence of a valid union-security clause, a union may not charge nonmembers a fee for processing grievances); *BFI Newby Island Recyclery*, 362 NLRB No. 186 (2015) (whether the Board should adhere to its existing joint employer standard or adopt a new standard); *Northwestern University*, 362 NLRB No. 167 (2015) (whether the Board should find grant-in-aid scholarship football players are employees under the NLRA); *Purple Communications, Inc.*, 361 NLRB 1050 (2014) (whether the Board should adopt a rule that employees who are permitted to use their employer's email for work purposes have the right to use it for Sec. 7 activity, subject only to the need to maintain production and discipline); *Pacific Lutheran University*, 361 NLRB 1404 (2014) (whether a religiously-affiliated university is subject to the Board's jurisdiction, and whether certain university faculty members seeking to be represented by a union are employees covered by the National Labor Relations Act or excluded managerial employees); *Latino Express, Inc.*, 361 NLRB 1171 (2014) (whether, in awarding backpay, the Board should routinely require the respondent to: 1) submit documentation to the Social Security Administration so that backpay is allocated to the appropriate calendar quarters, and 2) pay for any excess federal and state income taxes owed as a result of receiving a lump-sum payment); *Babcock & Wilcox Construction Co.*, 361 NLRB 1127 (2014) (whether the Board should change the standard for determining when the Board should defer to an arbitration award), rev. denied sub nom. *Beneli v. NLRB*, 873 F.3d 1094 (9th Cir. 2017); *New York University*, Case No. 02-RC-023481, Notice

and Invitation to File Briefs (filed June 22, 2012), available at https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3252/ntc_02-rc-23481_nyu_and_polytechnic_notice___invitation.pdf (whether graduate student assistants who perform services at a university in connection with their studies are or are not statutory employees within the meaning of Sec. 2(3) of the National Labor Relations Act); *Point Park University*, Case No. 06-RC-012276, Notice and Invitation to File Briefs (filed May 22, 2012), available at https://apps.nlrb.gov/link/document.aspx/09031d4580a0ee7d (whether university faculty members seeking to be represented by a union are employees covered by the National Labor Relations Act or excluded managers); *D.R. Horton, Inc.*, 357 NLRB 2277 (2012) (whether mandatory arbitration agreements that preclude employees from filing joint, class, or collective claims addressing their wages, hours or other working conditions against the employer in any forum, arbitral or judicial, violate the NLRA), enf. granted in part and denied in part, 737 F.3d 344 (5th Cir. 2013); *Hawaii Tribune-Herald*, Case No. 37-CA-007043, Notice and Invitation to File Briefs (filed Mar. 2, 2011), available at https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3253/stephensmediainvite.pdf (whether the Respondent had a duty to provide the Union with a statement provided to it by an employee or any other statements that it obtained in the course of its investigation of another employee's alleged misconduct); *Chicago Mathematics and Science Academy Charter School, Inc.*, Case No. 13-RM-001768, Notice and Invitation to File Briefs (filed Jan. 10, 2011), available at https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3253/chicago_mathematics_brief.pdf (whether an Illinois charter school should fall under the jurisdiction of the NLRB or the Illinois Educational Labor Relations Board); *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011) (what constitutes an appropriate bargaining unit), enfd. sub nom. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013); *Roundy's Inc.*, Case No. 30-CA-017185, Notice and Invitation to File Briefs (filed November 12, 2010), available at https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3253/roundys_notice_and_invitation.pdf (what standard the Board should apply to define discrimination in cases alleging unlawful employer discrimination in nonemployee access); *UGL-UNICCO Service Co.*, 357 NLRB 801 (2011) (what duties a successor employer has toward an incumbent union); *Lamons Gasket Co.*, 357 NLRB 739 (2011) (whether, and how long, employees and other unions should have to file for an election following an employer's voluntary recognition of a union); *J. Picini Flooring*, 356 NLRB 11 (2010) (whether Board-ordered remedial notices should be posted electronically and, if so, what legal standard should apply and at what stage of the proceedings any necessary factual showing should be required); *Kentucky River Medical Center*, 356 NLRB 6 (2010) (whether the Board should routinely order compound interest on backpay and other monetary awards in backpay cases and if so, what the standard period for compounding should be); *Long Island Head Start Child Development Services*, 354 NLRB No. 82 (2009) (two-member Board decision) (whether the Board should find contract termination based on bargaining even in the absence of any contractually-required notice); *Register Guard*, 351 NLRB 1110 (2007) (whether employees have a Sec. 7 right to use their employer's e-mail system to communicate with one another, what standard should govern that determination, and whether an employer violates the Act if it permits other nonwork-related e-mails but prohibits e-mails on Sec. 7 matters), enfd. in part and remanded sub nom. *Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009); *Can-Am Plumbing, Inc.*, 350 NLRB 947 (2007) (whether the job targeting program at issue violated the Davis-Bacon Act), enfd. 340 Fed.Appx. 354 (9th Cir. 2009); *Dana Corp.*, 351 NLRB 434 (2007) (whether the Board should modify its recognition bar doctrine as articulated in *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966), *Smith's Food & Drug Centers.*, 320 NLRB 844 (1996), and *Seattle Mariners*, 335 NLRB 563 (2001)); *Alyeska Pipeline Service Co.*, 348 NLRB 808 (2006) (whether a systemwide presumption is warranted in the circumstances of the instant case); *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006) (seeking comment relating to (1) the meaning of "assign," "responsibly to direct," and "independent judgment," as those terms are used in Sec. 2(11) of the Act; and (2) an appropriate test for determining unit placement of employees who take turns or "rotate" as supervisors), see also *Croft Metals, Inc.*, 348 NLRB 717 (2006) and *Golden Crest Heath Center*, 348 NLRB 727 (2006); *Firstline Transportation Security*, 347 NLRB 447 (2006) (whether the Board should assert jurisdiction over the employer, a private company contracting with the Transportation Security Administration).

the reconsideration of precedent mean not only determining the right result in a specific case, but also devising a general standard that is consistent with the Act and sound going forward.[18] While the Board may be expert in the National Labor Relations Act, employers, employees, and unions are expert in the effects of the Board's decisions in workplaces around the country.[19] It should be clear that the Board benefits from public input and that the public is interested in being heard. In response to invitations to file briefs, we have received briefs from (among others) employer groups, trade associations, international and local unions, law firms, academics, Congressmen and Senators, federal and state agencies, public interest groups, and individuals, as well as our own General Counsel.[20]

[18] See, e.g., *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552, 560 (6th Cir. 2013) ("'An administrative agency may reexamine its prior decisions and may depart from its precedents provided the departure is explicitly and rationally justified.'"), quoting *State of Mich. v. Thomas*, 805 F.2d 176, 184 (6th Cir. 1986); see also Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 Admin. L. Rev. 163, 181 fn. 66 (1985) (advocating for rulemaking pursuant to public notice-and-comment procedures of the Administrative Procedures Act when overruling Board precedent over the Board's case-by-case adjudication, or, as an alternative measure, "reversal [of Board precedent] on a prospective-only basis and only after a proceeding involving oral argument and amici participation.").

[19] See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295 (1974) (finding that Board was not required to employ rulemaking before determining the issue of whether particular employees were managerial employees excluded under the Act's coverage, but noting that opportunity for public input during the rulemaking process "would provide the Board with a forum for soliciting the informed views of those affected in industry and labor before embarking on a new course."). Cf. Luther T. Munford, Essay, *When Does the Curiae Need An Amicus?,* 1 J.App. Prac. & Process 279, 281 (1999) ("Some amicus briefs collect background or factual references that merit judicial notice. Some friends of the court are entities with particular expertise not possessed by any party to the case. Others argue points deemed too far-reaching for emphasis by a party intent on winning a particular case. Still others explain the impact a potential holding might have on an industry or other group." (internal citations omitted)).

[20] For example, in recent years the Board has received amicus briefs from the AFL–CIO, the American Staffing Association, Associated Builders and Contractors, the Chamber of Commerce of the United States of America, the American Hospital Association, the American Staffing Association, the Equal Employment Opportunity Commission, the Higher Education Council of the Employment Law Alliance, Mem-

In refusing to seek briefs, the Board has deprived itself of the benefits of public participation in agency policymaking. And it has done so arbitrarily. None of the cases cited by the majority diminishes the fact that inviting briefs has become an established Board norm – and the majority tellingly cites no recent case in which the Board refused to seek briefing over objections from a member.[21] There was no compelling reason not to issue a notice and invitation to file briefs here. True, seeking briefs would have delayed disposition of the case (as, of course, did the decision not to straightforwardly apply existing law, i.e., *Lutheran Heritage*). But there is no pressing deadline for issuing a decision here.

Today's decision—although it was reached entirely without public participation—looks very much like rulemaking, not adjudication. The Board majority does not decide the rules issue actually presented by the parties in this case—the legality of Boeing's no-photography policy under *Lutheran Heritage*—but instead adopts a comprehensive new approach to rules issues generally and even designates two particular *categories* of rules ("no-camera" rules perhaps and "rules requiring employees to abide by basic standards of civility" for sure) as always "lawful to maintain," regardless of the context or the circumstances presented. To be clear, no "civility" rule whatsoever is at issue in this case. In the process, the majority overrules not just *Lutheran Heritage*, but also *Rio All-Suites Hotel,* supra, involving a no-photography rule, and the Board's 2016 decision in *William Beaumont Hospital*, supra, as well as all prior decisions (unidentified) in which the Board "has held that it violates the Act to maintain rules requiring employees to foster 'harmonious interactions and relationships' or to maintain basic standards of civility in the workplace."

The scope of today's decision demonstrates that the Board is going far beyond the adjudication of a single case. It is making policy and reaching more broadly even than *Lutheran Heritage* did. At the same time, the Board has deliberately and arbitrarily excluded the public from participating in the policymaking process. As the Supreme Court has made clear, the Board's adjudication is subject to the requirement of the Administrative Procedure Act that an agency engage in "reasoned decisionmaking." *Allentown Mack Sales and Service, Inc. v.*

bers of the United States Senate Committee on Health, Education, Labor, and Pensions and the United States House of Representatives Committee on Education and the Workforce, the National Association of Manufacturers, the National Employment Law Project, the National Restaurant Association, the National Retail Federation, the National Right to Work Legal Defense and Education Foundation, the Retail Litigation Center, SEIU, the United States Postal Service, and the United States Secretary of Labor.

[21] The majority asserts that, "[i]n the past decade, the Board has freely overruled or disregarded established precedent without supplemental briefing." But the six decisions the majority cites are easily distinguishable from this one. See *E.I. Du Pont de Nemours*, 364 NLRB No. 113 (2016) (considering whether unilateral changes made after expiration of a collective-bargaining agreement violate the Act); *Graymont PA, Inc.*, 364 NLRB No. 37 (2016) (considering, inter alia, whether the Board is precluded from considering an unalleged failure to timely disclose that requested information does not exist when the unalleged issue is closely connected to the subject matter of the complaint and has been fully litigated); *Loomis Armored U.S., Inc.*, 364 NLRB No. 23 (2016) (considering whether an employer, having voluntarily recognized a "mixed-guard union" as the representative of its security guards, lawfully may withdraw recognition if no collective-bargaining agreement is in place, even without an actual loss of majority support for the union); *Lincoln Lutheran of Racine*, 362 NLRB No. 188 (2015) (considering whether an employer's obligation to check off union dues from employees' wages terminates upon expiration of a collective-bargaining agreement); *Pressroom Cleaners*, 361 NLRB 643 (2014) (considering, inter alia, whether an employer can limit its backpay liability in compliance through an evidentiary showing or whether the predecessor employer's terms and conditions of employment should continue until the parties bargain to agreement or impasse), reconsideration denied 361 NLRB 1166 (2014); *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151 (2014) (considering, inter alia, whether an employee was engaged in "concerted activity" for the purpose of "mutual aid or protection" when she sought assistance from her coworkers in raising a sexual harassment complaint to her employer).

First, in all six cited cases a party explicitly and publicly asked the Board to overrule precedent, a fact surely not lost on persons interested in the development of federal labor law. (The General Counsel asked the Board to revisit or overrule precedent in *Fresh & Easy*, *Lincoln Lutheran*, *Loomis*, *Graymont*, and *Du Pont*. In *Pressroom Cleaners*, the Charging Party asked the Board to overrule precedent.)

In two cited cases, *Loomis* and *Lincoln Lutheran*, amicus briefs were actually filed. See *Loomis Armored U.S., Inc.*, 364 NLRB No. 23 (2016) (amicus brief filed by SEIU urging the Board to overrule *Wells Fargo Corp.*, 270 NLRB 787 (1984)); *Lincoln Lutheran of Racine*, 362 NLRB No. 188 (2015) (amicus brief filed by National Right to Work Legal Defense Foundation urging the Board not to overrule *Bethlehem Steel*, 136 NLRB 1500 (1962)).

Both *Du Pont* and *Lincoln Lutheran*, meanwhile, were the culmination of long-running discussions of the precedent they ultimately overruled. In *Du Pont*, the Board accepted a remand from the United States Court of Appeals for the District of Columbia Circuit for the express purpose of deciding between two conflicting branches of precedent. See *E.I. Du Pont de Nemours and Co. v. NLRB*, 682 F.3d 65, 70 (D.C. Cir. 2012). *Lincoln Lutheran*, in turn, was the culmination of a 15-year dialogue with the United States Court of Appeals for the Ninth Circuit about *Bethlehem Steel.* See *WKYC-TV, Inc.*, 359 NLRB 286, 286 (2012) (discussing history).

And, as already pointed out, in none of the cases cited by the majority did the Board refuse to request briefing over the objection of one or more Board members.

The cases cited by the majority throw into even sharper relief the aberrance of the majority's process in this case. Unlike the six cases cited by the majority, here, no party—not the General Counsel, the Respondent, the Charging Party, or amicus National Association of Manufacturers--has asked us to revisit or overrule precedent. This decision is not the culmination of a long-running dialogue with a federal court of appeals. Neither the parties nor the public knew that the Board was planning to overrule 13 years of precedent in this case. And the majority has rebuffed a request from Member Pearce and me to seek input from the parties and the public through briefing.

NLRB, 522 U.S. 359, 374 (1998). "Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." Id. To be sure, the "Board is not precluded from announcing new principles in an adjudicative proceeding and … the choice between rulemaking and adjudication lies in the first instance within the Board's discretion." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974). But the Supreme Court has left open the possibility that in some "situations … the Board's reliance on adjudication would amount to an abuse of discretion or a violation of the Act." Id.[22] This is such a case. Without good reason, the Board has failed to "solicit[] the informed views of those affected in industry and labor before embarking on a new course" and has made no effort to acquire the "relevant information necessary to mature and fair consideration of the issues" resolved by the majority. Id. at 295. As I will explain, however, the majority's decision is fundamentally flawed in other respects as well.[23]

II.

The arbitrary process followed by the majority has led, not surprisingly, to an arbitrary result. The majority reverses and replaces *Lutheran Heritage* based on a fundamental, even willful, misunderstanding of the labor-law problem that the *Lutheran Heritage* doctrine is intended to address. That misunderstanding is reflected in the majority's persistent mischaracterization of *Lutheran Heritage* and its progeny—in the face of judicial authority—and it results in a "solution" that creates significant challenges in interpretation and implementation while leaving the key statutory consideration facing the Board largely unaddressed. The Supreme Court has explained that, when an administrative agency changes course, "a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."[24] And an agency decision is arbitrary if it has "entirely failed to consider an important aspect of the problem" before it.[25]

A.

The problem before the Board is how to address the fact that some work rules maintained by employers will discourage employees subject to the rules from engaging in activity that is protected by the National Labor Relations Act. An employee who may be disciplined or discharged for violating a work rule may well choose not to do so—whether or not a federal statute guarantees her right to act contrary to her employer's dictates. Not surprisingly, then, it is well established (as the *Lutheran Heritage* Board observed) "that an employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights." 343 NLRB at 646, citing *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). The aspect of the *Lutheran Heritage* test that the majority attacks is its approach to a subset of employer work rules that do "not explicitly restrict activity protected by Section 7" of the Act, were not "promulgated in response to union activity," and have not been "applied to restrict the exercise of Section 7 rights." 343 NLRB at 647. For such rules, the *Lutheran Heritage* Board explained, the "violation is dependent upon a showing … [that] employees would reasonably construe the language to prohibit Section 7 activity." Id.

Thirteen years after this standard was adopted, the majority belatedly concludes that the Board was not permit-

[22] Under the Administrative Procedure Act, the Board's decision may be set aside if a reviewing court finds it to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706.

[23] Contrary to the majority's apparent assertion, I do not argue that in order to address the *Lutheran Heritage* standard, the Board must engage in rulemaking, rather than adjudication. My argument here, rather, is that given its scope, today's decision amounts to rulemaking in fact – but rulemaking without the statutorily required public participation. In particular, as explained, the majority's determination that "civility" rules are always and everywhere lawful—although no such rule is at issue in this case—exceeds the proper bounds of an adjudication.

Had the majority wished to comprehensively review the Board's *Lutheran Heritage* jurisprudence, there are several different procedural mechanisms—aside from rulemaking or today's adjudicative overreaching—that would have been available to the Board.

The Board has previously extended an invitation for briefing in several cases presenting similar or related issues. Although the Board did not consolidate the cases for decision, the Board extended an invitation for briefing in *Oakwood Healthcare*, *Croft Metals*, and *Golden Crest Health Center*, because each raised similar supervisory status issues. See *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006); *Croft Metals, Inc.*, 348 NLRB 717 (2006); *Golden Crest Heath Center*, 348 NLRB 727 (2006). Likewise, the Board considered issues related to an employer's withdrawal of recognition when it issued a notice and invitation to file briefs in *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), and *Chelsea Industries*, 331 NLRB 1648 (2000), enfd. 285 F.3d 1073 (D.C. Cir. 2002).

Alternatively, the Board has previously consolidated multiple cases for decision where the cases presented similar or related issues. In *California Saw & Knife Works*, cases originating in unfair labor practice charges against the application of the union's rules and procedures under its voluntary *Beck* program to employees of a number of different employers were consolidated for trial. The consolidated cases presented "a range of questions respecting rights and duties under union-security clauses authorized by Section 8(a)(3) that [had] been triggered by the holding in *Beck* but were unanswered by the Supreme Court." 320 NLRB 224, 224–225 (1995), enfd. sub nom. *Machinists v. NLRB*, 133 F.3d 1012 (7th Cir. 1998), cert. denied sub nom. *Strang v. NLRB*, 525 U.S. 813 (1998); see also *Communications Workers v. Beck*, 487 U.S. 735 (1988).

[24] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009).

[25] *Motor Vehicle Manufacturers Assn. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983).

ted to do so, insisting that the "*Lutheran Heritage* 'reasonably construe' standard is contrary to Supreme Court precedent because it does not permit *any* consideration of the legitimate justifications that underlie many policies, rules and handbook provisions." This premise is simply false.

The Board has never held that legitimate business justifications for employer work rules may not be considered—to the contrary. As the Board recently explained in *William Beaumont*, supra, responding to then-Member Miscimarra's dissent, the claim made by the majority here:

> reflects a fundamental misunderstanding of the Board's task in evaluating rules that are alleged to be unlawfully *overbroad*.
>
> * * *
>
> [T]he appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights.
>
> * * *
>
> That a particular rule threatens to have a chilling effect does not mean, however, that an employer may not address the subject matter of the rule and protect his legitimate business interests. Where the Board finds a rule unlawfully overbroad, the employer is free to adopt a more narrowly tailored rule that does not infringe on Section 7 rights.
>
> * * *
>
> When, in contrast, the Board finds that a rule is *not* overbroad – that employees would not "reasonably construe the language to prohibit Section 7 activity" (in the *Lutheran Heritage Village* formulation) – it is typically because the rule is tailored such that the employer's legitimate business interest in maintaining the rule will be sufficiently apparent to a reasonable employee . . . . [citing *First Transit, Inc.*, 360 NLRB 619, 620-621 (2014).] Here, too, the *Lutheran Heritage Village* standard demonstrably does take into account employer interests.

363 NLRB No. 162, slip op. at 4 (emphasis in original; quotation marks and footnotes omitted).[26]

No court, meanwhile, has ever understood *Lutheran Heritage*, as the majority does, to prohibit the Board from considering an employer's legitimate business interests—again, to the contrary. Consider, for example, the District of Columbia Circuit's recent unanimous decision upholding the Board's conclusion that an employer confidentiality rule was unlawful under *Lutheran Heritage*. The court observed:

> An employer presumptively violates that Act "when it maintains a work rule that … tends to chill employees in the exercise of their Section 7 rights." [Citation to *Lutheran Heritage.*] That situation occurs when "employees would reasonably construe the language [of a work rule] to prohibit Section 7 activity." [Id.] We construe any ambiguity in such a rule against the employer. [Citation omitted.]
>
> Maintaining a rule reasonably likely to chill employees' Section 7 activity amounts to an unfair labor practice unless the employer "present[s] a legitimate and substantial business justification for the rule" that "outweigh[s] the adverse effect on the interests of employees." *Hyundai Am. Shipping Agency, Inc. v. NLRB*, 805 F.3d 309, 314 (D.C. Cir. 2015).

Midwest Division-MMC, LLC v. NLRB, 867 F.3d 1288, 1302 (D.C. Cir. 2017).

Oddly, the majority follows up its claim that *Lutheran Heritage* prohibits the Board from considering an employer's legitimate interests by asserting that "in many cases involving facially neutral policies, rules and handbook provisions, the Board *has explicitly* balanced employees' Section 7 rights against legitimate employer interests rather than narrowly examining the language of a disputed rule solely for its potential to interfere with the exercise of Section 7 rights, as the *Lutheran Heritage* 'reasonably construe' test requires." Of course, the cited cases—including a decision applying *Lutheran Heritage* to uphold a no-photography rule (*Flagstaff Medical Center*, supra)—simply demonstrate that *Lutheran Heritage* does not impose the prohibition that the majority attributes to it. *Lutheran Heritage*, by its terms, does not preclude the Board from considering employer interests. It did not overrule any earlier work-rules decision in which the Board did consider employer interests. And in cases applying its standard, the Board has considered employer

[26] The courts have recognized that invalidating an overbroad rule under *Lutheran Heritage* does not prevent the employer from adopting a more narrowly tailored, lawful rule. See, e.g., *Flex Frac*, supra, 746 F.3d at 210 fn. 4; *Northeastern Land Services*, supra, 645 F.3d at 483; *Cintas Corp.*, supra, 482 F.3d at 470. Accord *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 503 (1978) (observing that in invalidating a hospital's work rule, the "Board ha[d] not foreclosed the hospital from imposing less restrictive means of regulating organizational activity more nearly directed toward the harm to be avoided").

interests.[27] Indeed, when *Lutheran Heritage* was decided, the dissenting Board members faulted the majority for placing too *much* weight on employer interests[28] and scholars understood the decision as reflecting a new and greater emphasis by the Board on employer interests.[29]

The majority's mischaracterization of *Lutheran Heritage* is enough to demonstrate that its reconsideration of the decision is arbitrary and capricious. Before an agency changes a policy, it surely must have a reasonable understanding of what its prior policy actually is.[30]

Apart from the matter of employer interests, however, the majority attributes to *Lutheran Heritage* other features that are simply conjured up. According to the majority, *Lutheran Heritage* "requires employers to eliminate all ambiguities from all policies, rules and handbook provisions that might conceivably touch on some type of Section 7 activity." But the *Lutheran Heritage* Board rejected precisely the notion that the Board was "require[d] . . . to find a violation whenever the rule could conceivably be read to cover Section 7 activity, even though that reading is unreasonable" and observed that "[w]here … the rule does not refer to Section 7 activity, [the Board] will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way." 343 NLRB at 647 (emphasis in original).[31] According to the majority, "[a]nother false premise of *Lutheran Heritage* is the notion that employers drafting facially neutral policies, rules and handbook provisions *can* anticipate and avoid all potential interpretations that may conflict with NLRA-protected activities." But *Lutheran Heritage* actually says just the opposite, observing that "[w]ork rules are necessarily general in nature and are typically drafted by and for laymen, not experts in the field of labor law." Id. at 648. Finally, the majority insists that the "broader premise of *Lutheran Heritage* … is the notion that employees are better served by *not* having employment policies, rules and handbooks." There is no support at all for this claim – and certainly no support for the claim that *Lutheran Heritage* has in any way caused employers to abandon, or fail to adopt, any lawful policy, rule, or handbook. If that was the goal of *Lutheran Heritage* (and, of course, it was not), then the obvious ubiquity of workplace rules—reflected, for example, in the many cases applying *Lutheran Heritage*—would demonstrate that the decision had failed completely.

B.

In addition to fundamentally mischaracterizing the *Lutheran Heritage* test itself, the majority attacks the way the test has been applied, taking the language of particular work rules out of context and then insisting that the Board's case law is inconsistent and unpredictable. The *William Beaumont* Board addressed this same charge when it was previously leveled by then-Member Miscimarra:

> Certainly, cases involving allegedly overbroad employer rules and implicating the *Lutheran Heritage Village* standard may raise difficult issues, complicated, too, by

[27] This is certainly true in cases where the Board has considered the lawfulness of employer rules prohibiting photography and/or recording. See, e.g., *G4S Secure Solutions (USA) Inc.*, 364 NLRB No. 92, slip op. at 5–6 (2016) (considering employer interest in protecting customer privacy), enfd. on other grounds ___ Fed. Appx. ___, 2017 WESTLAW 3822921 (11th Cir. Sept. 1, 2017); *Whole Foods Market, Inc.*, supra, 363 NLRB No. 87, slip op. at 3–5 (considering employer interest in preserving the privacy of personal and medical information about employees, comments about employee performance, details about employee discipline, criticism of store leadership, and confidential business strategy and trade secrets); *T-Mobile USA, Inc.*, supra 363 NLRB No. 71, slip op. at 3–5 (considering employer interest in maintaining employee privacy, protecting confidential information, and promoting open communication); *Rio All-Suites Hotel and Casino*, supra, 362 NLRB No. 190, slip op. at 3–5 (considering the fact that the employer failed to link any articulated interest to the allegedly unlawful rule); *Flagstaff Medical Center*, supra, 357 NLRB at 662–663 (considering employer interest in preventing the wrongful disclosure of individually identifiable health information).

[28] 343 NLRB at 650 (Members Liebman and Walsh, dissenting). The dissenters argued that that the majority had "[i]gnor[ed] the employees' side of the balance" and had retreated from a broad application of the principle announced in *Lafayette Park Hotel*. Id.

[29] See, e.g., Michael C. Harper, *Judicial Control of the National Labor Relations Board's Lawmaking in the Age of* Chevron *and* Brand X, 89 Boston U. L. Rev. 189, 229–233 (2009); William R. Corbett, *The Narrowing of the National Labor Relations Act: Maintaining Workplace Decorum and Avoiding Liability*, 27 Berkeley J. Emp. & Lab. L. 23, 41–45 (2006).

[30] The majority's view is similarly unfounded in asserting that I "reject[] any balancing of Sec. 7 rights with justifications associated with particular rules." Here, too, the majority mischaracterizes both *Lutheran Heritage* and the new standard. As explained, *Lutheran Heritage* balances those competing interests by, in effect, requiring that a work rule be narrowly tailored to address an employer's legitimate interests. The majority's new standard reflects no such requirement at all.

[31] The majority at one point acknowledges what *Lutheran Heritage* actually says, but insists that the Board has since abandoned that approach "in many subsequent decisions through application of the principle that ambiguity is construed against the employer as the drafter of the rule." But that commonsense principle has been endorsed by the courts, as already observed. See, e.g., *Midwest Division-MMC*, supra, 867 F.3d at 1302; *ConAgra Foods, Inc. v. NLRB*, 813 F.3d 1079, 1090 (8th Cir. 2016).

If, on occasion, the Board arguably has applied the *Lutheran Heritage* standard too loosely, the problem is not the standard, but rather the Board's decision in a particular case. The solution, in turn, is not to abandon the standard altogether, but to apply it with greater care and, as needed, to refine it in a way that promotes clarity and consistency. One need not agree with every decision under *Lutheran Heritage* in order to defend the standard, especially as compared to the majority's proffered—and inferior—alternative. Indeed, in light of the number of cases that the Board must decide, no Board member would ever say that the Board has *always* applied any given legal standard correctly.

> the need to harmonize the Board's decisions over time. But this challenge is not a function of the Board's legal standard. Rather, it is inherent in the remarkable number, variety, and detail of employer work rules (and the larger documents in which they appear), drafted with differing degrees of skill and levels of legal sophistication. Already 30 years ago, one legal scholar described the "bureaucratization of work" as having "enmeshe[d] the worker in a 'web of rules.'" This phenomenon, whatever drives it, is largely out of the Board's hands.

363 NLRB No. 162, slip op. at 5 (footnotes omitted).

The Board's decisions under *Lutheran Heritage*, for all their number and variety, do, in fact, yield clear, guiding principles that allow employers and employees to grasp what sorts of rules are prohibited and what sorts are permitted. The Board has uniformly found that confidentiality rules prohibiting the disclosure of "employee" or "personnel" information, without further clarification, would be reasonably construed by employees to restrict Section 7 activity.[32] The Board has also provided guidelines for employers seeking to address attendance matters and, in so doing, has found that employees would reasonably construe rules prohibiting them from "walking off" the job as unlawfully prohibiting Section 7 strike activity, while they would construe rules that, on their face, only prevent an employee from taking unauthorized leave or breaks and do not expressly restrict concerted activity as being lawful.[33] In addition, while acknowledging that an employer may regulate who makes official statements on its behalf, the Board has consistently held that employees would reasonably construe rules prohibiting them from communicating with third parties, such as unions or the media, as unlawfully restricting their Section 7 right to discuss an ongoing labor dispute.[34] Even in the often challenging context of so-called civility rules, our precedent establishes that an employer may maintain rules seeking to prevent disparagement, so long as any such rules are focused on its products or services and do not cover disparaging statements more generally such that employees would reasonably construe the prohibition to include matters protected by Section 7.[35] The Board has also made clear its view that employees would not reasonably construe rules prohibiting insubordination or insubordinate conduct alone to restrict them in the exercise of their Section 7 rights.[36] And, finally, the Board has long been tolerant of language that seeks to regulate severe or extreme behavior, or conduct which is reasonably associated with actions that fall outside of the Act's protections. For example, the Board has found that employees would not reasonably construe rules prohibiting intimidating, coercive, harassing, or threatening behavior to be unlawful.[37] It is thus hardly accurate for the majority to contend that the Board's jurisprudence involving the "reasonably construe" prong of *Lutheran Heritage* defies all reasonable efforts at explanation and application.[38] But even if the majority were correct that the Board's experience in applying *Lutheran Heritage* demonstrates the need to revisit and refine the standard, it would not follow that that the majority has used the proper process to replace the prior standard or, as I explain next, that the majority's new standard is even tenable in the abstract, much less superior to *Lutheran Heritage*.

C.

It is hard to know precisely what the majority's new standard for evaluating work rules *is*. The majority opinion is a jurisprudential jumble of factors, considerations, categories, and interpretive principles. To say, as the

[32] *Quicken Loans, Inc.*, 361 NLRB 904, 904 fn. 1 (2014), affirming 359 NLRB 1201 (2013), enfd. 830 F.3d 542 (D.C. Cir. 2016) (personnel information); *Fresh & Easy Neighborhood Market*, 361 NLRB 72, 72-73 (2014), reconsideration denied 2014 WL 5286315 (Oct. 15, 2014) (employee information); *MCPC, Inc.*, 360 NLRB 216, 216 (2014), enfd. in relevant part 813 F.3d 475 (3d Cir. 2016) (personal or financial information); *Cintas Corp.*, 344 NLRB 943, 943 (2005), enfd. 482 F.3d 463 (D.C. Cir. 2007) (policy referred to employees as "partners" and prohibited disclosure of information about its "partners").

[33] *2 Sisters Food Group*, 357 NLRB 1816, 1817-1818 (2011).

[34] *Schwan's Home Service*, 364 NLRB No. 20, slip op. at 3–4 (2016); *Sheraton Anchorage*, 362 NLRB No. 123 (2015) (incorporating by reference 359 NLRB 803, 806 (2013)); *DirecTV U.S. DirecTV Holdings*, 362 NLRB No. 48 (2015) (incorporating by reference 359 NLRB 545, 545–546 (2013)), enf. denied on other grounds 650 Fed.Appx. 846 (6th Cir. 2016); *HTH Corp.*, 356 NLRB 1397, 1398, 1422 (2011), enfd. 693 F.3d 1051 (9th Cir. 2012); *Trump Marina Casino Resort*, 355 NLRB 585 (2010) (incorporating by reference 354 NLRB 1027, 1027 fn.2 (2009)), enfd. 435 Fed.Appx. 1 (D.C. Cir. 2011).

[35] *Medco Health Solutions of Las Vegas, Inc.*, 364 NLRB No. 115, slip op. at 5 (2016); *Chipotle Services, LLC d/b/a Chipotle Mexican Grill*, 364 NLRB No. 72, slip op. at 1 fn.3, 9 (2016), rev. denied 690 Fed. Appx. 277 (mem.) (5th Cir. 2017); *UPMC*, 362 NLRB No. 191, slip op. at 2 fn. 5, 24–25 (2015), reconsideration denied 2016 WL 7100574 (Dec. 5, 2016); *Quicken Loans, Inc.*, supra, 361 NLRB at 904 fn. 1; *Triple Play Sports Bar & Grille*, 361 NLRB 308, 313–315 (2014), affd. sub nom. *Three D, LLC v. NLRB*, 629 Fed. Appx. 33 (2d Cir. 2015).

[36] *Component Bar Products*, 364 NLRB No. 140, slip op. at 1 fn. 1 and 10 (2016); *Casino San Pablo*, 361 NLRB 1350, 1351–1352 (2014).

[37] *Palms Hotel & Casino*, 344 NLRB 1363, 1367–1368 (2005); *Lutheran Heritage*, supra, 343 NLRB at 648.

[38] It is worth noting that, in asserting that the Board's application of the reasonably construe prong of *Lutheran Heritage* has led to inconsistent, inexplicable results, the majority relies on several cases decided *prior to* the *Lutheran Heritage* and not applying the "reasonably construe" standard. If the majority's goal is to identify (and ultimately rectify) a problem with the *Lutheran Heritage* precedent, then it seems odd to point to this pre-*Lutheran Heritage* precedent as evidence of the problem.

majority does, that its approach will yield "certainty and clarity" is unbelievable, unless the certainty and clarity intended is that work rules will almost never be found to violate the National Labor Relations Act. Indeed, without even the benefit of prior discussion, the majority reaches out to declare an entire, vaguely-defined category of workplace rules—those "requiring employees to abide by basic standards of civility"—to be always lawful. That today's decision narrows the scope of Section 7 protections for employees is obvious.[39] Put somewhat differently, the majority solves the problem addressed by *Lutheran Heritage* – how to guard against the chilling effect of work rules on the exercise of statutory rights – by deciding it is no real problem at all where a rule does not explicitly restrict those rights and was not adopted in response to Section 7 activity.

1.

To begin, the majority effectively abandons the key premise of *Lutheran Heritage*: that for purposes of administering the National Labor Relations Act, an employer's work rules should be evaluated from the perspective of the employees subject to the rules—and protected by the statute. The majority emphasizes that "*the Board* [its emphasis] will conduct this evaluation." One might ask, "Who else would?" But what the majority means is quite clear: going forward, the Board's primary focus will not be on the potential chilling effect of work rules on employees, but rather on the interests of employers in imposing rules on their employees. This new focus—a sharp break from the Board's long-established approach – is unreasonable.[40]

We are dealing here with Section 8(a)(1) of the Act, which makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]" of the Act. 29 U.S.C. §158(a)(1). When the Board evaluates an employer's statements under Section 8(a)(1), it does so "'from the standpoint of employees over whom the employer has a measure of economic power.'"[41] The Supreme Court itself has made clear that the Board *must* adopt this perspective:

> Any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting. Thus, an employer's rights cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in [Section] 7 and protected by [Section] 8(a)(1)…. *And any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear*.

NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969) (emphasis added). An employer's work rules are a particular form of employer expression—and one that obviously implicates the potential of coercion, because rules are intended to be the basis for discipline and discharge. The Board's approach under *Lutheran Heritage* is firmly grounded in this simple fact. "Employees, who are dependent on the employer for their livelihood, would reasonably take a cautious approach and refrain from engaging in Sec. 7 activity for fear of running afoul of a rule whose coverage is unclear."[42]

2.

Coupled with its unwarranted, and impermissible, break from the premise of *Lutheran Heritage* is the majority's false promise of "certainty and clarity." The majority begins by announcing that there are "three categories of employment policies, rules and handbook provisions," essentially the always-lawful, the sometimes-lawful, and the never-lawful. So long as the sometimes-lawful category includes many or most rules, of course, the majority's new framework does very little to create "certainty and clarity"—and that is before taking into account the majority's statement that even these categories are fluid: "[t]he Board's cumulative experience with certain types of rules," the majority observes, "may prompt the Board to re-designate particular types of rules from one category to another." So much for certainty.

What about the sometimes-lawful rules ("Category 2"), which "warrant individualized scrutiny in each case"? Under the majority's new framework, the Board

[39] That result is excused (in the majority's view) because the "chaos that has reigned in this area has been visited most heavily on employees themselves." This claim only adds insult to injury. It goes without saying that no employees, and no organizations representing employees, have ever begged the Board to save employees from the awful effects of *Lutheran Heritage*.

[40] The majority places *fourth* among its analytical "considerations" the notion that "when the Board interprets any rule's impact on employees, the focus should rightfully be on the employees' perspective." What the majority actually understands this "consideration" to mean is entirely unclear from its opinion. The majority refers to "interpret[ing]" the "impact" of a rule on employees, not to how economically-dependent employees themselves would reasonably interpret an employer rule—precisely the prong of *Lutheran Heritage* that the majority vehemently rejects. What is clear, however, is that the employee-perspective "consideration" is far subordinate to the other "considerations" endorsed by the majority.

[41] *Mesker Door, Inc.*, 357 NLRB 591, 595 (2011), quoting *Henry I. Siegel Co. v. NLRB*, 417 F.2d 1206, 1214 (6th Cir. 1969).

[42] *Whole Foods Market*, supra, 363 NLRB No. 87, slip op. at 4 fn. 11, citing *Gissel Packing*, supra.

will apply a balancing test that differentiates on the one hand among "different types of NLRA-protected activities (some of which might be deemed central to the Act and others more peripheral)" and, on the other hand, among different "substantial justifications" for work rules, "those that have direct, immediate relevance to employees or the business" versus "others that might be regarded as having more peripheral importance." In this exercise, the Board may consider several factors, including "reasonable distinctions between or among different industries and work settings."[43] To pretend that this ill-defined, multi-factor balancing test will yield "certainty and clarity" is laughable.

The majority offers no hint at all as to precisely which "NLRA-protected activities" are entitled to more weight and which to less weight. Nor, similarly, does it actually identify which particular employer justifications are weightiest. Which industries and which work settings might warrant particular work rules (and which not) is also almost entirely unclear. How, then, are employees to know how the Board's balancing test will come out beforehand, when they are deciding to engage in Section 7 activity that may cost them their jobs, for violating their employer's rule? And, for that matter, how are employers to know whether their work rules will survive the Board's scrutiny and why?

Thirteen years of experience under *Lutheran Heritage*—resulting in some guidance (however imperfect) for employees and employers, as already explained—is now largely discarded. It seems obvious that years of litigation under the Board's *new* approach will be required before employees and employers have even a clue as to what Board law permits and what it prohibits—unless, as suggested, the Board means to give employers far more scope to adopt rules that trench on employees' statutory rights. In that case, there will be certainty, but at the expense of the policies of the National Labor Relations Act.

3.

On that score, consider the majority's holding today that "rules requiring employees to abide by basic standards of civility" are *always* lawful. These are "Category 1" rules, under the majority's new scheme. For these rules, in contrast to "Category 2" rules, it makes absolutely no difference what Section 7 rights are at stake, what justification the employer might offer (or fail to offer), what industry the employer is in, what the "work setting" is, or what "particular events … may shed light on the purpose or purposes served by a challenged rule or on the impact of its maintenance on protected rights." Instead, the majority holds that all employers everywhere may always demand that employees "abide by basic standards of civility." That approach—foregoing "individualized scrutiny" altogether—is arbitrary and capricious, particularly as adopted in an adjudication where no such work rule is even before the Board.

First, the majority makes no genuine attempt to *define* the "basic standards of civility." What are those standards—and what are they, in particular, in a workplace setting? Are they really the same, moreover, in every workplace setting? The same on a construction site as in a hospital? The same on a loading dock as in a retail store? Second, the majority seems oblivious to the possibility that common forms of protected concerted activity under the National Labor Relations Act may reasonably be understood as uncivil. Does walking off the job to protest unsafe working conditions conform to "basic standards of civility"? Or distributing literature that, in impolite language, criticizes an employer's failure to pay employees what they are owed and urges employees to resist? The majority's apparent decision to permit all employers to maintain whatever "civility" rules they wish simply ignores the reality of the labor disputes that can arise in various workplaces and move employees to act to defend themselves—just as federal labor law aims to encourage. With respect to uncivil language, for example, the Supreme Court has observed that "[l]abor disputes are ordinarily heated affairs; the language that is commonplace there might well be deemed actionable per se in some state jurisdictions."[44]

It adds insult to injury for the majority to assert that recognizing the potential for statutorily-protected conflict in the workplace amounts to endorsing "stereotypes regarding workplace conduct and protected activity that fail to adequately address problems [that] have become more prominent in recent years." Nothing in the Board's *Lutheran Heritage* jurisprudence prevents an employer from adopting tailored rules that genuinely serve to pro-

[43] The majority here invokes a silly hypothetical in which a coal mine owner adopts a rule prohibiting "loud talking" after fatal mine collapses have occurred "as the result of loud talking." In contrast to, say, adequate roof support, loud talking has no connection to mine collapses: modern mining equipment obviously makes more noise than talking miners do. See generally Mine Safety and Health Administration (MSHA), *Roof fall accidents decline, but remain leading cause of coal miner injuries* (news release posted July 6, 2017), *available at* https://www.msha.gov/news-media/press-releases/2017/07/06/roof-fall-accidents-decline-remain-leading-cause-coal-miner. Hopefully the majority is better informed about the realities of American workplaces than this hypothetical suggests.

[44] *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 272 (1974), quoting *Linn v. Plant Guard Workers Local 114*, 383 U.S. 53, 58 (1966). Accordingly, the Supreme Court has established a heightened standard for allegedly defamatory statements made in the course of labor disputes.

tect employees from illegal discrimination or harassment in the workplace – and the majority points to no decision in which the Board has invalidated such a rule.[45] Indeed, in *Lutheran Heritage* itself, the Board upheld a rule prohibiting "[h]arassment of other employees, supervisors and any other individuals in any way."[46] Nothing in the majority's new test, meanwhile, makes it better suited to "address problems [that] have become more prominent in recent years—indeed, in recent weeks"—to the contrary, many aspects of the majority's approach today could have precisely the opposite effect. Categorically approving any and all rules that permit discipline or termination for violating norms of "civility" is the most obvious example. Workers facing harassment or assault often have to act "uncivilly" to protect their safety and their rights. Knowing that their employer has promulgated a workplace rule to make it crystal clear that raising a fuss can be a fireable offense hardly makes it easier on victims reluctant to speak up about assault or harassment.

Consider a workplace where employees are required, under penalty of discipline and discharge, to "work harmoniously" at all times. No one is likely to consider it a "harmonious" workplace interaction when several employees join together to speak up and demand better treatment, or to file reports of sexual harassment against a powerful, high-level manager. Or, when a given workplace is rife with racist or sexist slurs, surely two employees working under such circumstances are not promoting positive "harmony" with their coworkers when they blow the whistle on perceived wrongdoing by reporting the conduct internally at the workplace or threatening to file charges with a government agency.

The majority suggests that maintaining the sort of "civility" rules that it champions (as opposed to clearly lawful rules directly prohibiting harassment or assault) will foster a workplace where employees are less likely to experience discrimination, harassment, or violence. I would suggest instead that when such "civility" rules are unlawfully overbroad, they tend to perpetuate hostile environments and cultures of discrimination, to the detriment of workers, by making employees scared to speak up, and forcing them to choose between being "good" and following the rules, or joining together with colleagues to speak up and report inappropriate behavior.[47]

There can be no doubt, then, that employees who contemplate engaging in basic types of protected concerted activity will be discouraged from doing so by the sort of "civility" rules that the majority give blanket authorization to today. It is no answer to say that employers can only maintain such rules, but cannot enforce them against Section 7 activity. The employee who is chilled from exercising her rights will never have the rule enforced against her, but the harm to the policies of the Act will be the same. The majority seems not to grasp this basic point.

* * *

The issues that the Board must decide in this context are not easy, and perfection cannot be fairly demanded from the Board or any other administrative agency. But the majority's decision fails so badly to address the problem before it, and the process by which it was reached

[45] Indeed, the General Counsel has declined to challenge such rules. See, e.g., *Sears Holdings (Roebucks)*, Case No. 18–CA–019081, 2009 WESTLAW 5593880 (NLRB Div. of Advice, Dec. 4, 2009) (concluding that social media policy preventing employees from discussing on social media "[e]xplicit sexual references" and "[d]isparagement of any race, religion, gender, sexual orientation, disability or national origin" was lawful).

[46] 343 NLRB at 646 fn. 3, 648. In cases where context and circumstances make clear that a rule is actually targeted toward preventing harassment and discrimination, the Board has been quick to recognize that employees would reasonably understand the rule as a restriction on harassment and/or discrimination, not protected activity. See, e.g., *Cellco Partnership d/b/a Verizon Wireless*, 365 NLRB No. 38, slip op. at 1 fn. 3 (2017) (distinguishing as lawful portions of rule prohibiting employees from transmitting "offensive" or "harassing" content and "chain letters," from unlawfully overbroad portions of the same rule prohibiting "unauthorized mass distributions," and "communications primarily directed to a group of employees inside the company on behalf of an outside organization."), reconsideration denied 2017 WL 1462126 (Apr. 21, 2017). The Board knows how to distinguish between a rule that is properly tailored to avert harassment and a rule that has an evident potential to interfere with employees in the exercise of statutory rights. Compare *River's Bend Health & Rehabilitation Services*, 350 NLRB 184, 187 (2007) (in the context of a workplace where employee reported that she was threatened to join a strike "or else," employer lawfully issued a policy asking that employees report harassment or threats to management, where policy contained assurances that employees have the right to strike and described its concern as limited to ensuring that all employees "can continue to work in a non-threatening environment."); with *Care One at Madison Ave., LLC v. NLRB*, 832 F.3d 351, 363–364 (D.C. Cir. 2016) (affirming the Board's conclusion that employer's posting of a memorandum reiterating its pre-existing Workplace Violence Prevention policy, posted 3 days after a union victory, is unlawful) ("[A] reasonable employee could understand the memorandum as not merely an entreaty to respectful behavior, but as a warning that [the employer] would discipline protected activity such as occurred during the 'NLRB election.' . . . The memorandum emphasized with explicit reference to the just-concluded election that the employees should 'let go' of their differences and start treating one another with 'dignity and respect,' or risk being in violation of the [policy]."), enfg. 361 NLRB 1462 (2014).

[47] Over then-Member Miscimarra's unfortunate dissent, the Board has held that such conduct is protected concerted activity under Sec. 7 of the Act. See *Fresh & Easy Neighborhood Market*, supra, 351 NLRB at 154–158. The majority's view seems to be that employees must rely on their employers to protect them from discrimination and harassment, and that employees' efforts to protect themselves are of secondary, if any, importance—precisely contrary to the policies of the National Labor Relations Act.

was so flawed, that the Board's new approach seems unlikely to survive judicial review.

III.

The majority's unwarranted rush extends to applying its new test retroactively. None of the parties to this case, or any pending case, had any clear idea that the Board was contemplating a change in the law or any fair opportunity either to influence that change or to argue whether and, if so, how the new standard should be applied in this case. Only by filing a motion for reconsideration of today's decision would the General Counsel and the Charging Party be able to put their views before the Board.[48] Because I do not believe it was properly adopted, much less properly given retroactive effect, I decline to apply the majority's new standard here.

Instead, I would decide this case under established law, as reflected in the *Lutheran Heritage* standard, and I would find that Boeing's no-photography rule was unlawfully overbroad. Such a finding, of course, does *not* mean that Boeing is prohibited from adopting a no-photography rule. Rather, Boeing would be free to adopt a more narrowly-tailored rule that did not impermissibly infringe on the Section 7 rights of its employees.

Under *Lutheran Heritage*, employees "would reasonably construe the language [of Boeing's no-photography rule] to prohibit Section 7 activity." 343 NLRB at 647. It is well established that:

> Employee photographing and videotaping is protected by Section 7 when employees are acting in concert for their mutual aid and protection and no overriding employer interest is present. Such protected conduct may include, for example, employees recording images of employee picketing, documenting unsafe workplace equipment or hazardous working conditions, documenting and publicizing discussions about terms and conditions of employment, or documenting inconsistent application of employer rules.

Rio All-Suites Hotel & Casino, supra, 362 NLRB No. 190, slip op. at 4 (internal reference omitted).[49]

Under Boeing's no-photography rule, known as PRO-2783, use of a camera-enabled device to capture images or video is categorically prohibited on all Boeing property absent "a valid business need" and approval from the Respondent. Although some conduct—for example, documenting unsafe equipment or hazardous working conditions—might arguably have "a valid business need," the vast majority of protected concerted photographing and video recording would not serve any "business need" as defined in PRO-2783. Moreover, to the extent that PRO-2783 leaves uncertain whether particular acts of protected concerted photographing or video recording may serve a defined "business need," that very uncertainty would chill Section 7 activity. See *Whole Foods Market*, supra, 363 NLRB No. 87, slip op. at 4 fn. 11. And even in those rare instances where protected concerted photographing and video recording might arguably serve a defined "business need," PRO-2783's requirement that employees first secure the approval of an authorizing manager would certainly tend to chill the exercise of Section 7 rights. See *Rio All-Suites Hotel & Casino*, supra, 362 NLRB No. 190, slip op. at 4 fn. 10.[50] In addition, because PRO-2783 restricts employees' use of camera-enabled devices to capture images or video "on all company property and locations," it limits employees' use of their camera-enabled devices even on employees' own time in nonwork areas. See id.

Flagstaff Medical Center, 357 NLRB 659 (2011), enfd. in relevant part 715 F.3d 928 (D.C. Cir. 2013),which the Respondent cites and on which it principally relies, is distinguishable. In *Flagstaff*, a Board majority found that an employer policy prohibiting the use of cameras for recording images in a hospital setting did not violate the Act. The *Flagstaff* majority found that in light of weighty patient privacy interests and the employer's well-understood obligation under the Health Insurance Portability and Accountability Act (HIPAA) to prevent the wrongful disclosure of individually identifiable health information, employees would reasonably interpret the rule as a legitimate means of protecting those interests, not as a prohibition of protected activity. The Respondent asserts that, similar to *Flagstaff*, PRO-2783 is supported by compelling interests: namely, that PRO-2783 was adopted to protect classified, trade secret, pro-

[48] See Sec. 102.48(c) of the Board's Rules and Regulations. It seems to me that the Board would be obligated to grant such a motion given the "extraordinary circumstances" presented here: the retroactive application of a new legal standard, adopted by sua sponte overruling existing precedent, without prior notice or an opportunity to submit briefs.

[49] See *G4S Secure Solutions (USA)Inc.*, supra, 364 NLRB No. 92, slip op. at 5-6; *T-Mobile USA, Inc.*, supra, 363 NLRB No. 171, slip op. at 3-5; *Whole Foods Market, Inc.*, supra, 363 NLRB No. 87, slip op. at 3 & fns. 7–9 (collecting cases); see also *White Oak Manor*, 353 NLRB 795, 795 fn. 2, 798–799 (2009), reaffirmed by and incorporated by reference in 355 NLRB 1280 (2010), enfd. 452 Fed. Appx. 374 (4th Cir. 2011); *Sullivan, Long & Hagerty*, 303 NLRB 1007, 1013 (1991), enfd. mem. 976 F.2d 743 (11th Cir. 1992)).

[50] A different Boeing procedure, PRO-3439, includes safe-harbor language providing that "[n]othing in this procedure should be construed as preventing employees" from engaging in Sec. 7–protected activity. However, in its exceptions brief, Boeing expressly rejects adding such a provision to PRO-2783, stating that it "would eviscerate the rule and license unfettered photography on Boeing property." Respondent's Exceptions Brief at 37.

prietary, and export-controlled information, employee privacy, and physical security. The rule at issue in *Flagstaff*, however, is distinguishable because it expressly referenced "recording images of patients." PRO-2783, by contrast, does not tie the restrictions it places on the use of camera-enabled devices to the interests it now articulates in defense of the policy. See *Rio All-Suites Hotel & Casino*, supra, 362 NLRB No. 190, slip op. at 4 (similarly distinguishing *Flagstaff*).[51]

Moreover, the interests Boeing now articulates, however weighty in the abstract—preventing disclosure of classified, proprietary, and export-controlled information; protecting Boeing against threats of violence—are undermined by evidence of what Boeing actually does (and does not do) in practice. Thus, the record establishes that when Boeing conducts tours of its facilities, tour participants are not searched for camera-enabled devices, and tour guides are not authorized to confiscate such devices from individuals who have used them to take pictures or shoot video during a tour. Although 777 Director of Manufacturing and Operations Jason Clark testified that security personnel review photos and video footage after each tour, his testimony was contradicted by that of employee Shannon Moriarty. Moriarty testified that she took part in a VIP tour, during which she took photographs. She further testified that she was the last person to leave after the tour ended and that Boeing personnel did not at any point review her photos or anyone else's. Besides Clark's general testimony regarding Boeing's purported practice, no security personnel employed by Boeing testified that he or she has actually screened tour participants' photos or videos.

The Respondent's defense is further undermined by conduct in circumstances other than during tours. For instance, during "rollouts," the large bay doors of the Everett facility are open, and those in the vicinity of the facility may take photographs. In addition, Boeing itself created a time-lapse video of the 777 production line that was made available for public viewing. Thus, Boeing's actual *practice* regarding camera-enabled devices, such as permitting their use by tour groups, makes it even more unlikely that employees would view PRO-2783 as designed to protect legitimate security and confidentiality interests. Furthermore, Boeing *does* permit employees to take photographs or video in its facilities when it determines that a "business need" justifies doing so. In contrast, the rule in *Flagstaff* admitted no exceptions. This suggests that Boeing's purported "overriding interest" is actually one of a number of considerations that Boeing balances in deciding when or if it will permit employees to use their personal camera-enabled devices to take photographs or video on its property.

Boeing's justifications thus fail to justify PRO-2783's unqualified restriction on Section 7 activity. Accordingly, applying *Lutheran Heritage Village* and Board precedent, I would find that by maintaining PRO-2783 as written, Boeing violated Section 8(a)(1) of the Act.

IV.

If the Board had genuinely attempted to revise and refine the *Lutheran Heritage* standard in a way that was consistent with the National Labor Relations Act and the Administrative Procedure Act, there are other possibilities it could have considered (but did not). I turn to those possibilities next.

As the *William Beaumont* Board acknowledged, employer work rules come in great number and variety, inevitably posing difficult questions for the Board in some cases where an unfair labor practice charge is filed, the General Counsel issues a complaint, and the matter reaches the Board. The way to minimize these difficult cases is not to adopt a standard that simplifies the Board's work by drastically restricting the scope of the Act's protections. Administrative ease is not the overriding statutory goal established by Congress.

Instead, the Board should explore possible solutions by inviting the participation of the persons whose rights and interests are directly involved and whose experience with work rules is lived firsthand: employees, employers, and their organizations. Students of the workplace, too, could surely contribute. These parties can provide the Board with factual information, from the broad range of American workplaces, on how employees actually understand and abide by work rules, as well as how and to what extent they understand their statutory rights, and why and how employers devise and adopt particular types of rules.

If, in fact, the notion of rule categories is a valuable one, then this sort of information is obviously important for the Board to have. The same information, in turn, would put any refined balancing test ultimately adopted by the Board on a firmer, real-world foundation. Indeed, there is virtually no aspect of the analytical framework adopted by the majority today that might not be improved by being first exposed to public notice and comment *before* becoming the law. Were today's decision a notice of proposed rulemaking instead, the final "rule" would almost certainly look quite different from what the majority now decrees. Rulemaking is one way of ensuring public participation, to be sure, but as I explained earlier at Part I, seeking amicus briefing would have been

[51] Another section of PRO-2783, dealing with webcams, does refer to some (but not all) of the interests Boeing articulates. But nothing in PRO-2783 connects those interests to the separate section of the policy dealing with camera-enabled devices.

the bare minimum the Board could have done to ensure thoughtful and reasoned decision-making. To repeat: there is no legitimate reason *not* to seek such public participation. Even if it failed to illuminate the issues confronting the Board, the Board would have at least demonstrated a commitment to informed decision-making.[52]

In conjunction with seeking public participation, the Board could direct attention to particular factors that might minimize the potential for work rules to chill the exercise of Section 7 rights. One such factor, reflected in Board cases where work rules have been found *lawful*, is the practice of drafting rules that clearly communicate to employees the legitimate employer interests behind the rules and that are narrowly tailored to serve those interests.[53] To the extent that employers explain *to employees* their lawful purposes in adopting a particular rule, employees are surely less likely to reasonably construe the rule to restrict or prohibit protected concerted activity. (For an employer to invoke a rule's uncommunicated purposes before the Board is too little, too late.) There is no reason why, with public participation, the Board could not devise some number of basic model rules that would achieve important employer purposes without the potential for unlawful coercion, building on the rules that the Board has already found *lawful* in its 13 years of applying the *Lutheran Heritage* standard. Each such rule would provide a safe harbor for employers. They could adopt the rule with certainty that it is immune from legal challenge under the Act, because the Board has said so specifically. That genuine certainty stands in sharp contrast to the majority's approach (except where the majority has unwisely declared entire categories of rules to be lawful, no matter how they are written or in what context they appear).

In the same safe-harbor vein, the Board could consider developing, with public participation, a standard disclaimer that employers—at their option—could include in employee handbooks that would mitigate the potential coercive impact of workplace rules on the exercise of Section 7 rights, by making explicit that the employer's rules will not be applied to protected concerted activity under the Act and by making clear to employees, at an appropriate level of detail, what their basic statutory rights are. Employees who read the disclaimer—in which the employer itself clearly and specifically informs them of their rights under Act—would be much less likely to construe even an ambiguous work rule as bearing on their statutory right to engage in conduct that might, in theory, violate the rule. Use of such a disclaimer might establish a rebuttable presumption that any particular rule that did not explicitly restrict Section 7 activity was lawful. The Board has already held that an "employer's express notice to employees of their Section 7 rights may, in certain circumstances, clarify the scope of an otherwise ambiguous and unlawful rule," although a "vague reference to 'rights under federal law' is insufficient to inform employees that the [rule] does not prohibit conduct protected by Section 7." *G4S Secure Solutions (USA) Inc.*, supra, 364 NLRB No. 92, slip op. at 6, citing *First Transit*, supra, 360 NLRB at 621–622. The virtue of the disclaimer approach is clear, inasmuch as it would cover every employer work rule at once, making compliance with the Act simpler and easier. It is hard to see any legitimate objection, meanwhile, to voluntarily informing employees of the rights guaranteed them by federal law, using language provided by the Board, in order to minimize the potential for engaging in unfair labor practices.

Finally, the Board might take heed of the Fifth Circuit's recent observation that the Board has not "specifically defined" the "reasonable employee" reflected in the *Lutheran Heritage* standard. *T-Mobile USA*, supra, 865 F.3d at 271. A more specific definition—necessarily grounded in the already-discussed observation of the *Gissel* Court that employees are economically dependent on their employers and thus particularly sensitive to coercive implications in employer statements—might aid the Board, the courts, and the public. Such a refined definition would want to take into account the level of knowledge concerning their Section 7 rights that may reasonably be attributed to employees, as well as an informed understanding of what forms of Section 7 activity are most commonly undertaken—or considered—in the typical workplace, where most workers are not represented by a union.

I have no doubt that there are many other options that the Board might consider, options that public participation in the process of reexamining the Board's approach to work rules might reveal. I sketch out these examples only as illustrations of what the Board might consider, rather than proceeding as the majority does today—in a hurry and on its own. The majority faults me for not endorsing any particular alternative to its test, but, of

[52] The majority tries to justify its failure to seek briefing in this case by asserting that the Board should have revisited *Lutheran Heritage* before today—based on Member Miscimarra's dissenting view in *William Beaumont* and other cases (which no court has endorsed)—and sought briefing then. That claim is absurd on its face, not least because two members of the majority here have never before decided a work-rules case. If nothing else, one might have expected that the new Board majority might have wished to hear the views of the Board's new General Counsel.

[53] See, e.g., *Rio All-Suites Hotel*, supra, 362 NLRB No. 190, slip op at 1 fns. 3–4.

course, that is precisely my point—the Board should hear from the public *before* making a wholesale change in existing law and that the choice here is not between two limited options, *Lutheran Heritage* and the test articulated in Chairman Miscimarra's *William Beaumont* dissent.

V.

Today's decision, I predict, will be a Pyrrhic victory at best for the majority. The majority establishes a new standard that is worse, not better, than the old standard, burdening the Board and the public with more uncertainty and even less clarity. Mess *ipsa loquitur*. And the Board's rush to an ill-considered judgment will do real damage to the Board's institutional reputation – and, if not corrected by a reviewing court, to the fair administration of the National Labor Relations Act, and to the statutory rights of American workers. Accordingly, I dissent.

Dated, Washington, D.C. December 14, 2017

Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT photograph or videotape employees engaged in workplace marches and rallies on or near our property.

WE WILL NOT create the impression that we are watching your union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, to the extent we have not already done so, rescind all policies and procedures requiring security and/or management personnel to photograph or videotape employees engaged in workplace marches and rallies on or near our property.

THE BOEING COMPANY

The Board's decision can be found at www.nlrb.gov/case/19-CA-090932 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Irene Hartzell Botero, for the General Counsel.
Charles N. Eberhardt, Esq. (Perkins, Coie LLP), for the Respondent Company.
Thomas B. Buescher, Esq. (Buescher, Goldhammer, Kelman & Perera, P.C.), for the Union.

DECISION

GERALD M. ETCHINGHAM, Administrative Law Judge. This case was tried in Seattle, Washington, from September 24–26, 2013. Charging Party, The Society of Professional Engineering Employees in Aerospace, IFPTE Local 2001 (Engineers' Union, SPEEA, or Union) filed the charges and amended charges in these three consolidated cases beginning on October 9, 2012,[1] and at various times through April 12, 2013.[2]

The General Counsel issued the consolidated complaint and notice of hearing on April 29, 2013.[3]

[1] All dates are in 2012 unless otherwise indicated.

[2] A portion of this consolidated action was severed in a late August 2013 conference call with the parties' counsel and administrative law judge prior to hearing and confirmed at the beginning of hearing such that for this decision pars. 7(b), 8, 11, and 13 of the consolidated complaint are severed and litigated subsequently at a later hearing. Tr. at pp. 5–8; General Counsel Exhibit (GC Exh.) 1(v). For ease of reference, testimonial evidence cited here will be referred to as "Tr." (Transcript) followed by the page number(s).

[3] Fn. 2, at p. 3 of Respondent's closing brief (R. Br.) refers to Respondent's earlier motion to dismiss based on allegations that the complaint in this case "was unauthorized and void" because the prior Acting General Counsel lacked authority to delegate the issuance of the complaint in this case to the Regional Director. I find no merit in the Respondent's contention that the Acting General Counsel lacked the authority to prosecute this case. The Acting General Counsel (AGC) was properly appointed under the Federal Vacancies Reform Act, 5

The complaint alleges that Respondent, The Boeing Company (Respondent/Employer), violated Section 8(a)(1) of the National Labor Relations Act (NLRA/the Act) when on four separate dates it engaged in surveillance or created an impression of surveillance and photographed Engineers' Union employees during a union march[4] or while participating in protected concerted activities at Respondent's facilities in Everett and Renton, Washington, and Portland, Oregon. The complaint also alleges that Respondent violated Section 8(a)(1) of the Act when it promulgated and maintained Procedure PRO 2783 (the Rule) which states that use of employees' personal camera-enabled devices "to capture images or video is prohibited without a valid business need and an approved Camera Permit that has been reviewed and approved by Security." Respondent denies that it has violated the Act in any way.

On the entire record,[5] including my observation of the demeanor of the witnesses, and after considering the posthearing briefs[6] filed by the General Counsel, Respondent, and the Engineers' Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

The parties admit and I find that Respondent is a Delaware corporation with its headquarters in Chicago, Illinois, who manufactures and produces military and commercial aircraft at various facilities throughout the United States, including Everett and Renton, Washington, and Portland, Oregon. The parties further admit and I further find that during the preceding 12 months of the relevant dates of the various charges in this case, Respondent derived gross revenues in excess of $500,000 in conducting its business operations and during the same time periods while also conducting its business operations, it both sold and shipped from, and purchased and received at, the facility goods valued in excess of $50,000 directly to and from points outside the State of Washington.

I further find and it is also admitted that Respondent is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

It is also admitted, and I so find, that the Engineers' Union is a labor organization within the meaning of Section 2(5) of the Act at all relevant times leading to this proceeding.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Overview of Respondent's Operations And Facilities In The Pacific Northwest

1. Respondent

Respondent operates a division of its company in the States of Washington and Oregon known as the Commercial Airplanes Division (CAD) which designs and builds airplanes for the commercial passenger and freight market and produces military derivatives of commercial aircraft for the U.S. Government. This case involves Respondent's CAD operations at its facilities in Everett and Renton, Washington and Portland, Oregon where Respondent primarily performs commercial airplane work, but it also performs military systems and aircraft work, including some classified work which is conducted in marked areas or behind closed doors that require further security clearance not involved in this case.

2. Two separate Unions—Engineers' Union and Machinists' Union

The Engineers' Union represents salaried professional (engineering) and technical employees in Washington and Oregon. These units comprise approximately 24,000 Respondent employees, most of who work in the Puget Sound region in Washington, with the highest concentration at the Everett facility. Approximately 200 of Engineers' Union's members work at Respondent's Portland facility.

Respondent and Engineers' Union have a long and stable collective-bargaining history dating back to 1946 for the professional unit and 1972 for the technical unit. In the fall of 2012, the parties were negotiating successor labor contracts which were signed in the first half of 2013, retroactive to October 2012. Many of the Engineers' union employees at Respondent are white collar workers with extensive secondary education who work primarily in office environments away from the factory and production floor though many of them walk the factory floor to and from their jobs. Prior to August 2012, the Engineer's Union had not engaged in any marches inside Respondent's facilities during contract negotiations.

Respondent's other larger union, the International Association of Machinists (the Machinists' Union) comprise the vast majority of Respondent's hourly-wage employees in the factory

U.S.C. § 3345 and not pursuant to Sec. 3(d) of the Act. See *Muffley v. Massey Energy Co.*, 547 F.Supp. 2d 536, 542–543 (S.D.W.Va. 2008), affd. 570 F.3d 534 (4th Cir. 2009) (upholding authorization of a 10(j) injunction proceeding by Acting General Counsel designated pursuant to the Vacancies Act). See *The Ardit Co.*, 360 NLRB 74 (2013). In addition, the motion to dismiss was denied because at the time of hearing the AGC was still actively considering an appeal of the [8/13 D.Ct. Order]" As such, I find that the 8/13 D.Ct. Order is not final and currently has no relevance to this administrative adjudication of the complaint or the instant motion. Moreover, I further find that Respondent's argument that the Board lacks a constitutionally valid quorum is inapplicable to this case because this question about the Board's validity remains in litigation, and pending a definitive resolution, the Board is charged to fulfill its responsibilities under the Act. See *Bloomingdale's Inc*., 359 NLRB 1015 (2013) (Board rejects same argument for the same reasons.). More importantly, as pointed out by the AGC, I further find that the AGC's authority to issue and prosecute a complaint is unaffected by any issue concerning the composition of the Board. See e.g. *NLRB v. Food Workers Union*, 484 U.S. 112, 126–128 (1987); *NLRB v. FLRA*, 613 F.3d 275, 278 (D.C. Cir. 2010)).

[4] The terms solidarity walk(s) and mass march(es) are used interchangeably in this decision and mean the same thing. In this case, they are basically a group of Respondent employees belonging to the Engineers' Union who got together to walk and march through various areas on or near Respondent's facilities during contract negotiations for a new collective-bargaining agreement.

[5] I hereby correct the transcript as follows: Tr. 608, line 16: "I will offer it as substantive evidence" should be "I will not offer it as substantive evidence."; Tr. 659, line 9: "March" should be "march"; Tr. 661, line 17: "formed" should be "informed."

[6] Documentary evidence is referred to either as "GC Exh." for a General Counsel Exhibit, or "R. Exh." for a Respondent exhibit. References to posttrial briefs shall be either "GC Br.", "R. Br.", or "CP Br." followed by the page numbers. Citing to specific evidence in the record is for emphasis and there may be additional evidence in the record that supports a finding of fact or conclusion of law.

and production floor areas in Washington and Oregon and they perform blue collar production and maintenance work, including machining, assembly, tooling, material support, and parts movement, including forklift and crane operation. Unlike the Engineer's Union, for many years prior to 2012, the Mechanic's Union held lunchtime marches with staggered lunches. (Tr. 40–41, 53, 57.) Respondent admits to never trying to stop the Machinist marches. (Tr. 708.)

As a result of these Machinists' Union marches, Respondent created a document in 2008 which it used to train its managers and security guards regarding procedures to follow during workplace marches (the March Rule). (Tr. 34–35, 60; GC Exh. 27.) This included security guards providing bicycle or patrol car escorts to Machinists' marchers over the years before 2012 at the front and back of each march.[7] The lead guard would stop vehicles and forklifts and clear transportation aisles along the march route, and the guard in the back of the march would prevent vehicles from approaching or passing the marchers from behind. The Machinists' Union never questioned or objected to Respondent's developed its own practices or rules for Machinists' Union marches.

Respondent's security personnel also prepare and file written Uniformed Security Incident Reports (USIR's) when they respond to various incidents on Respondent property that affect people, buildings, equipment, safety, or accidents. These reports evolved over time as they also summarize pertinent details of the incident and began to include photographs taken of individuals, equipment, or property related to the incident.[8]

No violence, rioting or safety issues were recorded nor did security record any incidents of Machinists' union employees disrupting production during a march. (Tr. 61–62.) What further evolved from the Machinists' marches and the March Rule was that the security guards routinely completed and filed USIR's documenting the time, location, march participants, route, and any notable interactions of each Machinist march. In addition, Respondent's security guards' practice during the Machinists' marches was to provide an escort in the front and rear of the march and to stop vehicular traffic along the route. (Tr. 442, 501.) No evidence was presented that the Machinists' Union ever objected to the taking of photos by Respondent's security personnel documenting the Machinists' marches.

3. Respondent's secured facilities

Access to Respondent's facilities is controlled through fences and security guards and authorized personnel use security badges to gain access to various parts of the facilities through pedestrian gates. Once access is gained to the general factory areas, additional stricter levels of security are required to gain further access within the facilities to classified areas designated by additional locked doors or cordoned-off areas marked as top secret or containing classified information.[9]

In addition to personnel, vehicles must also pass through gates staffed at Respondent's facilities by uniformed security guards. More than protecting personnel and property by staffing perimeter gates, Respondent's security guards also support special events, perform traffic control, enforce vehicle and pedestrian safety rules, respond to incidents and medical emergencies, perform first aid, supply security escorts, and help employees with car unlocks, jumpstarting dead batteries, and computer cable unlocks.

At Respondent's factories, a constant stream of truck, forklift, and other vehicle and equipment traffic inside and around these large factory buildings throughout the workday sometimes puts employees at risk. Respondent has developed and published various specialized safety rules to address dangers unique to the factory environment, including rules for pedestrian walkways, transportation aisles, interactions between pedestrians and vehicles inside the factory, overhead-door safety, over-head crane safety, and eye safety. Respondent's employees do not always follow these safety rules yet in this case no evidence was presented that any Engineers' Union employee was cited or disciplined by Respondent for any alleged safety violation during the last half of 2012.

B. Respondent's Challenged Rules

1. The Revised March Rule

In late summer, early fall 2012, Engineers' Union employees began to wear red union shirts on Wednesdays and engage in peaceful solidarity walks or marches in and around Respondent's facilities in Everett and Renton, Washington, and Portland, Oregon, to show their support for the Union during contract negotiations. Prior to late summer 2012, there had been no marches at Respondent's facilities by the Engineers' Union. (Tr. 36, 56, 664.) The decision to photograph was made by Respondent before any of the Engineers' Union marches in the fall of 2012. (Tr. 35–36; GC Exh. 27.)[10]

Respondent updated the March Rule in August 2012 and presented it to its managers and security guards in September for training in connection with the Engineers' Union contract negotiations taking place at that time. (Tr. 35–36, 469, 479, 536; GC Exhs. 27, 31 and 32.) Respondent's express instructions to its security guards before the Engineers' Union marches took place was to "[o]penly communicate with picketing employees when a safety hazard exists." GC Exh. 32 at 4.) The 2008 security officer etiquette training, however, instructed security guards *not* to record peaceful picket line conduct. (GC Exh. 31.) Respondent's directive to its guards *not* to record peaceful picket line conduct was removed from the security officer etiquette training document by September 2012 and the Engineers' Union marches. (GC Exh. 32.)

[7] The Machinists' Union did not conduct mass marches in 2012. R. Br. at 9.

[8] This is in contrast to Respondent's earlier instructions to its security personnel not to photograph or record "peaceful" picketing. See GC Exh. 31 at 4. The Machinists' marches also resulted in further instruction that Respondent's security personnel photograph and document "behavior which is disruptive or unsafe." Id.

[9] None of the facts in this case involve allegations that any Engineers' Union members tried to march or gain access to top secret or classified areas at Respondent's facilities anytime in late 2012.

[10] Respondent's security guards' training provides that if a march occurs management is supposed to notify security "immediately for video-tape support . . . ." GC Exh. 27 at 4. This training was created in 2008 in anticipation of Machinists' union marches. Tr. 40.

Also as of August 2012, Respondent's managers were required by the March Rule to notify security immediately for videotape support if a workplace march occurred. (GC Exh. 27 at 4.) The March Rule also requires managers to notify employees of the potential for corrective action and pay impact for unacceptable conduct during mass marches. (GC Exh. 27 at 5.) Respondent completed USIR's and photographed and videotaped the Engineers' Union members during these walks in the Everett factory facility on September 19 and December 12, at the Portland 85–001 Building on October 3, and outside the Renton plant near the D-9 gate on September 26, 2012 as referred to below in more detail. (Tr. 45–48, 51, 453, 529–530, and 663; GC Exhs. 24, 25, 29(b), 30, 33–35.)

The lunchtime walks were peaceful and no Engineers' Union member was disciplined for their conduct during any of these four walks. (Tr. 470, 718, and 721; GC Exh. 29(b); GC Exh. 33.) Respondent's admitted custom and practice is not to discipline any groups of employees or march participants who may violate safety rules during marches such as failing to wear safety glasses in the factory or walking briefly outside the pedestrian walkway. (Tr. 527–528, 722.)

(a.) The Everett, WA facility

Respondent's Everett facility is where the Engineers' Union conducted its September 19 and December 12 lunchtime redshirt walks. The walks took place on the factory floor where there are no classified areas. (Tr. 73–74, 93, 151–153, 430–431, 437–438: GC Exhs. 2–3.)

The Everett factory building is one of the largest enclosed buildings in the world estimated to measure six football fields in total volume. (Tr. 216, 218.) It is approximately six or seven stories high with offices above the factory floor at certain locations. (Tr. 74, 216.) The factory building houses the main manufacturing areas for Respondent's airplane models 747, 767, 777, and 787. (Tr. 567; GC Exh. 3.)[11] Production of the airplanes moves from north to south, with all but the 767 model moving out of the south bay doors on completion. (Tr. 568.)

Approximately 42,000 employees worked at the Everett facility in 2012 and of these, about 19,500 were Machinists' employees and about 12,000 were Engineers' union employees. (Tr. 703, 715.) Engineers' union members worked on the factory floor in cubicles with Machinists, in closed offices and elsewhere and approximately 1800 Engineers' union members working in the entire factory building on three shifts with 1200 of them on first shift. (Tr. 200, 716.) Of the 1800 Engineers union members working in the factory building, at least 300 worked directly on the factory floor in cubicles and 200 of those worked the first shift. (Tr. 92, 127, 633–634, 704.) Approximately 150–300 Engineers' Union members walked at lunch on September 19 and December 12, 2012.

A main transportation aisle, which is referred to by employees as "main street" runs east to west through the factory building. (GC Exh. 3.) Forklifts and other vehicles use the transportation aisles to move equipment and parts around the factory. Forklift traffic is intermittent and employees are trained to be aware of this traffic as they move around the factory. (Tr. 203.) A pedestrian aisle parallels the main aisle on the north side. (Tr. 105, 207–208; GC Exh. 3.) Another major transportation aisle paralleled by a pedestrian aisle on the west side runs north to south in the 40–25 factory building through the model 777 final assembly line. (Tr. 217–218; GC Exh. 3.) There are a number of pedestrian aisles running throughout the factory that are stand-alone aisles which do not parallel transportation aisles and there are pedestrian tunnels running under the factory floor for employees to use though they do not always connect with each other. (Tr. 188, 201, 216, 218.) There are crosswalks at most intersections throughout the factory with accompanying stop signs for both pedestrians and vehicles. (Tr. 296; GC Exh. 3.)

All Respondent employees whose jobs take them to the factory floor are required to take an annual safety course on factory operations. (Tr. 236.) The course instructs employees regarding the guidelines to follow in the event of an overhead crane move—to stop, look up, to watch and to stay out of the area of the crane envelope, and, if possible, to stand under a structure. (Tr. 236, 297.) During crane moves, large signs measuring 8–10 feet long and about 4 feet high are moved by the crane crew near the crane move area to alert employees that there is an impending move. (Tr. 156, 297–298; GC Exh. 22.) The crane crew wears orange and white helmets and gathers and arranges the crane in position, the crane operator sounds the crane horn, cords are lowered down from the crane, the crane horn usually goes off again and indicator lights start flashing. (Tr. 237.) Employees are not notified in advance that there is going to be a crane move, and they simply follow the training they have received when encountering workers about to begin to move and operate the crane. (Tr. 238–239.)

Employees and managers, however, frequently walk in the transportation aisles of the factory building and not the adjacent pedestrian lane during shift changes which occur approximately three times per day, during break times, during emergency evacuations, when parts or equipment block the pedestrian lanes, and when employees are cutting across the factory taking the shortest route between two points. (Tr. 130, 137–139, 188, 241–242, 246–247, 641; GC Exhs. 17–19.) There are often hundreds of employees in the transportation lane during shift breaks and changes. (Tr. 243.) Employees have not observed security guards taking photos of workers in the transportation aisles under these circumstances. (Tr. 189, 302–3-03.)

Non-material handling pedestrians are often in the apron area outside the factory building. (Tr. 174.) It is the normal custom and practice for employees at Respondent to regularly walk through large overhead bay doors in the factory as well as overhead doors inserted within the bay doors, despite guidelines advising employees not to do so. (Tr. 172–173, 175, 244, 254–255.) Respondent does not discipline employees for disregarding this safety guideline. (Tr. 256, 473–474.) Nonetheless, the overhead doors have a switch that pedestrians can flip to keep the doors locked open. (Tr. 623, 644–645.) Security

[11] GC Exh. 3 is a to-scale schematic of the Everett facility, which shows the different airplane production lines and major transportation corridors. It also shows the alpha-numeric column grid used to identify locations and features within the factory. Columns on the east-west axis are identified by letters from A (at the west extreme) to R (at the east extreme) of the 40–26 building. Columns on the north-south axis are identified by numerals from 1 (at the south wall) to 17 (to the north).

guards do not normally take photos of employees walking through overhead doors, or of employees who are walking through the factory without their safety glasses on, or generally at any other time other than during Engineers' Union member marches or walks. (Tr. 176, 240, 246, 291.)

(i) The September 19 Engineers' Union March at the Everett Plant

On September 19, approximately 150–300 Engineers' Union employees gathered for approximately 10 minutes near the in-house Tully's Coffee Shop (Tully's) location within the factory building during their lunch hour around 11 a.m. for their first Everett march wearing their red Union shirts and carrying various signs which read, "No nerds No birds," "We delivered," "We're Boeing," "Not my pension," and "I'm voting No." (Tr. 73, 78–79, 105, 119–120, 124, 183, 187, 214; GC Exh. 4, GC Exh. 5.)

The described purpose of this red-shirt walk was to march around the factory to show solidarity among Engineers' Union members during their contract negotiations with the Respondent. (Tr. 72–73, 118, 183, 213–214.) Engineers' Union employee Suzanne Kamiya recognized the walk participants as mostly comprised of those working in the factory building. (Tr. 95, 200.) The employees were chatting with each other and chanting slogans, such as "I'm voting No." (Tr. 79, 151.)

Respondent was advised of the march prior to its occurrence and had dispatched guards Jeffery J. Catalini (Catalini) and Dave Lopez (Lopez) for bike patrol duty along the walk. (Tr. 503.) Security guard Kelly Hess (Hess), Catalini's and Lopez' supervisor, was also present during the walk. (Tr. 282, 445, 483.) These guards photographed Engineers' Union members who were gathering mainly along the pedestrian aisles and crosswalks located at the intersection closest to the Tully's. (Tr. 79–80, 107, 234–235, 482; GC Exh. 3.) As per the guards, the purpose of their photographing the walk was to show the scope of the crowd size for the first Engineers' Union walk at the facility. (Tr. 451, 473.) Catalini testified that before the September 19 march he and Lopez were instructed by Hess to "[d]ocument the scope and size of the crowd, any intimidating factors." (Tr. 480, 538.) These guards did not speak with or say anything to the employees at the time other than to ask them what their planned route was. (Tr. 235, 470.)

While gathered at Tully's, workers not participating in the walk were able to navigate down the transportation aisles riding tricycles with cargo boxes. (Tr. 494; GC Exh. 29(b), photo 1.) If vehicles could not get through the Tully's intersection, it was because security guards prevented them from passing. (Tr. 492.) After gathering for approximately 10–15 minutes by the Tully's, employees walked south down the H transportation aisle, using the pedestrian walkway that paralleled it as much as possible. (Tr. 81–82, 106, 108, 110, 262; GC Exh. 3.)

The employees in the red-shirt walk then continued out of the factory building onto the apron, moved east on the apron, re-entered the factory at the 40–25 building, proceeded north on the pedestrian aisle located in the middle of the 777 final assembly line, up to the main transportation aisle, and turned west on the pedestrian aisle paralleling the main transportation aisle back to Tully's. (Tr. 85–86, 91, 110, 185; GC Exh. 3; GC Exh. 29(b).)

Engineers' Union members Suzanne Kamiya and Scott Steffen convincingly testified that as walkers left Tully's and began the walk, a security guard photographed the marchers while on a bicycle from about 20-50 feet away, blocked their path and continued to take photos of the walkers as they approached him, forcing them to walk around him on their way down the H aisle. (Tr. 83–84, 109; GC Exh. 3.) Guard Catalini, who was on a bicycle during the march, admitted he took photographs of walk participants when they entered the 40–24 production area. Photo 7 of GC Exh. 29(b), taken by Catalini, documents the scene as testified by Kamiya, Steffen, and Catalini. (Tr. 451, 472; GC Exh. 29(b).)

Engineers' Union employee Scott Peters observed a guard on a bicycle photographing employees while they were out on the apron for a few minutes. (Tr. 187, 469.) Peters credibly noted that he had never previously seen a Respondent guard take photos of employees during the course of his 23-year employment with Respondent. (Tr. 178, 191.) Catalini admitted taking photographs of employees who had gathered on the apron for a couple of minutes until the full group came out of the building and headed east and testified that he took photos on September 19 "just to show the scope of the crowd size for the first SPEEA march that we encountered." (Tr. 451, 468, 473.) Catalini's September 19 USIR corroborates employee testimony regarding photographs taken by security guards of the walkers at various points along the route. (Tr. 452–453; GC Exh. 29(b).) Security guards did not instruct the walkers to stay in the pedestrian lanes nor did they direct any of the walkers to or out of a particular area. (Tr. 247, 474.) In addition, guards testified it was not their role to direct or interact with the walkers; rather, their role was to provide an escort in the front and the rear of the walk, and to document the walk with photography. (Tr. 447, 474.)

The Engineers' Union members testifying at hearing believably expressed that as a group it was not their intent as marchers to block pedestrian or vehicular traffic or to shut down work being performed by the Machinists' Union members or others during the walk. (Tr. 82, 145–146, 189–190.) The Respondent's guards, and not the Engineers' Union members, temporarily stopped vehicular traffic to allow the marchers to proceed along their route. (82, 85, 145–147, 176, 190–191, 262, 462, 465, 545, 553.) While Guard Lopez estimated that the September 19 walk took approximately 15–25 minutes to complete, generally the estimate by employees was that the walk took from 40–45 minutes to complete and was conducted primarily during the Engineers' Union members' lunch period. (Tr. 83, 86, 114, 187, 540.)

The march did not materially impact or slowdown work being performed at the factory, production which occurs generally nonstop 24 hours a day, 5 days a week at Respondent. (87, 111–112, 123, 151, 577–578, 642, 648.) Any chanting or other noisemaking engaged in by the marchers blended in or was drowned out by the usual loud factory noise made by non-march workers in the normal course of their workday from operating forklifts, rivet guns, scissor lifts, welding guns, and cranes. (88–89, 151, 477.) The single witness testimony to the

contrary is rejected as outweighed by more credible testimony denying the use of air horns and by the fact that Guard Catalini's USIR did not indicate that air horns were used by the marchers, the path taken by the marchers did not pass by any marked restricted areas, and the USIR itself provides that "the rally was conducted without incident" and that "[n]o derogatory signs or chants were seen or heard." (Tr. 153, 164, 711; GC Exh. 29(b).) While the photos taken by Catalini were not of individual marchers, the faces of various marchers in most of the photos are clear enough to identify individual SPEAA employee marchers. (GC Exh. 29(b).)

(ii) The December 12 Engineers' Union March at the Everett Plant

Like its earlier September march, the Engineers' Union conducted a December 12 red-shirt walk that started and ended at the Tully's in the Everett factory building during the union members' lunchbreak and took approximately 40 minutes to complete.[12] (Tr. 218–219.) Also as before, approximately 150–250 Engineers' Union members participated in the march to show solidarity during contract negotiations with Respondent. (Tr. 214–215, 219, 282, 284; GC Exh. 34.) The Engineers' Union did not instruct its members to disrupt factory work during the march. (Tr. 241.)

The march began at approximately 11 a.m. at the Tully's location and security guards Hess and Lopez were dispatched to control traffic for the march after a guard reported employees wearing red Engineers' Union shirts gathering in the factory at Tully's. (Tr. 222, 283, 504.) Guard Lopez prepared a USIR for the march and attached to the report photographs taken by guards of the marchers at various points along the way. (Tr. 514; GC Exh. 34.)

Similar to the September march, employees held posters during the march that said. "No Nerds No Birds," "We Don't Need Corporate Greed," "We Delivered, Will Boeing," and "Respect be it to the Max," and chanted slogans throughout various points along the route. (Tr. 219, 229.) Slogans were chanted repeating the various posters messages and the spelling of the members' union "S-P-E-E-A." (Tr. 220.) As before, any chanting or other noisemaking engaged in by the marchers blended in or was drowned out by the usual loud factory noise made by non-march workers in the normal course of their workday from operating forklifts, robotic machines, rivet guns, general banging or hammering, scissor lifts, welding guns, and cranes. (Tr. 221, 291–292.)

At the start of the march, a vehicle stopped for the marchers as they were heading west along the pedestrian aisle adjacent to the transportation lane. (Tr. 293, 308.) The vehicle waited no more than a minute or two for the remaining 75 marchers to pass before passing though. (Tr. 293.) On two other occasions, vehicles moved adjacent to the marchers who were in pedestrian aisles and throughout the march, employees made an effort to stay in the pedestrian walkways and out of the transportation aisles during the march. (Tr. 250, 254, 294, 511, 521: GC Exh. 3; GC Exh. 34.) On one other occasion, marchers encountered a truck at the end of the 40-21 building and waited for the truck to pass on before they crossed over the transportation aisle. (Tr. 295; GC Exh. 3.)

The marchers moved west down the main transportation aisle, headed south halfway down the transportation aisle located in the middle of the 40–21 building, and followed the pedestrian paths heading eastbound through the 40–22, 40–23, 40–24, and 40–25 buildings. They next intersected the transportation aisle in the 40-25 building, headed south along that lane until intersecting another pedestrian aisle, and turned east until arriving at the building 40-26 bay. At that point, they headed northward in the pedestrian aisle of the same 40-26 building until it intersected with the main transportation aisle, crossed over that aisle and then headed west along the pedestrian pathway back to the Tully's. (Tr. 222–223, 230, 250–252, 285; GC Exh. 3; GC Exh. 34.)

Marchers followed the pedestrian aisle which was located between two aircraft in positions one and two when employees entered the 777 area of the factory in the 40–25 building. (Tr. 618; GC Exh. 3; R. Exh. 5.) Machinists performing prep work for functional tests up around the vertical stabilizer paused for approximately 10–25 minutes to continue their work while the marchers completely passed by. (Tr. 619, 642, 647–648.) Jason Clark (Clark), Respondent's director of manufacturing and operations of the 777 airplane, opined that this brief pause in work and even a 20 minute pause in work did not delay the delivery date of any of the aircraft. (Tr. 563, 605, 642.) In addition, no crane moves were noted by the marchers along the route used on December 12. (Tr. 237, 300.)

Engineers' Union member Sandra Hastings (Hastings) witnessed a Respondent security guard taking photos of the marchers with what appeared to her to be a cell phone when the marchers were walking east between building 40–24 and building 40–25 through rows J, K, and L. (Tr. 290; GC Exh. 3.) At that same time, marchers were walking and chanting but they were not blocking vehicular or pedestrian traffic nor were they interfering with any work going on at the factory. (Tr. 290, 292.)

Because there was no crosswalk across the transportation aisle, marchers looked both ways and crossed over the main transportation aisle to get to the pedestrian path located along the north side of the main transportation aisle when marchers first arrived at the end of the pedestrian aisle as they headed north along the 40-26 building. (Tr. 223–224; GC Exh. 3; GC Exh. 10; GC Exh. 34.) It took the entire group of marchers less than 5 minutes to all cross between the two pedestrian walkways across the main transportation aisle – a common practice by all Respondent employees, union and nonunion, who frequently cross the main transportation aisle at this location to get to the pedestrian aisle without taking an alternative route. (Tr. 227, 640–641: GC Exh. 3.)

At this point near the end of the march, Guard Lopez stopped his vehicle in the main transportation aisle to photograph marchers and to prevent vehicular traffic from proceeding down the transportation aisle. There was, however, no vehicular traffic stopped there as the marchers crossed over the aisle to get to the pedestrian aisle. (Tr. 227–228, 513.) Guard Lopez was also observed photographing marchers a second time while inside his vehicle at location I-12, building 40–24, approxi-

[12] Guard Lopez estimated that the December 12 march took approximately 15 minutes to complete. Tr. 540.

mately 10–12 minutes after Lopez was initially observed taking photos. (Tr. 228–229; GC Exh. 3.) Lopez testified that he took photos on December 12 "to ensure safety and to document the event." (Tr. 509.) Engineers' Member Shannon Moriarty (Moriarty) was gathering employees and leading some chants at that time before marchers were dismissed to go back to work. (Tr. 229.) As before in September, there was no material interference with any work performed at the factory. (Tr. 229, 241, 642; GC Exh. 34.) While the photos taken by Lopez were not of individual marchers, the faces of various marchers in most of the photos are clear enough to identify individual SPEAA employee marchers. (GC Exh. 34.)

(iii) December 12 Interaction between Ms. Moriarty and Mr. Lopez at Everett

Engineers' Union members observed Guard Lopez a third time sitting in his security vehicle in the main transportation aisle at the intersection closest to the Tully's in the factory building on December 12. (Tr. 230. GC Exh. 3; GC Exh. 11.) At this time, Lopez engaged in two short conversations with two employees—Moriarty and Hastings.

When Moriarty approached Lopez parked in his vehicle, she stated: "I noticed you were taking photographs of our group." (Tr. 231.) Lopez responded: "I've been directed to document all union activities." Id. Lopez admitted the same with his testimony but added that the photos were "to ensure safety." (Tr. 509.) Moriarty replied: "It makes our folks feel a bit uncomfortable." Id. Moriarty further reported that in conflict with Lopez' testimony, he did not tell her he was taking photos to ensure compliance with safety or to document traffic or safety concerns and he clearly indicated to her that he would continue to document and take photos to document in his report that 250 individuals participated in the walk. (Tr. 231, 523.) Lopez' USIR provides that 200–250 SPEEA members participated in the march. (GC Exh. 34.)

As their discussion was ending, Engineers' Union member Hastings approached Lopez and Moriarty and began to speak with Lopez as Moriarty left the group. (Tr. 232–233.) Hastings asked Lopez twice what he was doing with his camera and each time he replied that he was taking photos of non-Boeing activity. (Tr. 288.) Hastings then asked Lopez why he was taking these photos and he responded by saying: "We always do this [photo taking]." Id. No testimony was presented that during their conversation Lopez told Hastings that he was taking photos to ensure compliance with safety standards or to document safety concerns or violations. (Tr. 289.) At the end of these conversations, the march was winding down and there were approximately 15 marchers remaining leaving the pedestrian aisle and not blocking any vehicular or pedestrian traffic or interfering with plant operations. (Tr. 288–289.)

Both Moriarty and Hastings opined that neither Lopez nor any other guards directed vehicular or pedestrian traffic during the march and Lopez' report is silent with respect to engaging verbally with employees or otherwise directing traffic as it indicates that he merely observed Engineers' Union employees and photographed them. (Tr. 240, 303; GC Exh. 32.)

Lopez testified: "I was in my vehicle and I was approached, and I was questioned why we were taking photographs. And my reply to her was that I am taking photograph[s] at the request of my management. And we take those pictures to document safety and the review of safety." (Tr. 523.) Also, Lopez' version of his interaction with Hastings was that it was just a "short little hi, how you doing" with nothing related to photographs. Id.

(b.) The September 26 Engineers' Union walk at Respondent's Renton, Washington Facility

Respondent's Renton plant is located along the southern end of Lake Union near a commercial development called The Landing. (Tr. 419–420, 691; GC Exh. 12.) Respondent manufactures its 737 airplane at the Renton facility. (Tr. 420.) About 12,000 to 13,000 employees work the day shift at the Renton plant. (Tr. 697.)

On Wednesday, September 26, at 11 a.m. at the southwest corner of the 482 building, an ice cream social was held by the Engineers' Union at the Renton plant after a red-shirt walk to show union solidarity. (Tr. 318–320.) The last group of marchers arrived at approximately 11:20 a.m. to join their coworkers at the social. (Tr. 320.) Approximately 500 employees gathered at the social to listen to Engineers' union president, Tom McCarty (McCarty) provide a contract negotiation update. Id.

Respondent's security personnel had been advised prior to the social that an Engineers' Union rally was going to take place in front of the 481 and 482 factory buildings. (Tr. 685.) After approximately 5–10 minutes, McCarty led a group of about half of the attendees outside the Renton plant, through the pedestrian gate, D9, to the northwest intersection of Park and Logan Avenue. (Tr. 320–321; GC Exh. 14.) Employees stood and chanted on the intersection for about 15–20 minutes. (Tr. 324, 695.)

Soon after arriving at the intersection, employee Benjamin Braatz (Braatz) observed Respondent guard Dean Torgude (Torgude) taking photos of the workers who were gathered at the intersection. (Tr. 323–324.) Torgude was positioned inside a security vehicle, with his arm extended outside the vehicle, holding a photographic device, and parked near the Respondent's property fence about 65 feet away from the gathered workers. (Tr. 324, 694–695.)

After Braatz had been at the intersection for approximately 15–20 minutes, about 100 of his coworkers left the rally using the crosswalk button to cross Logan Avenue. (Tr. 324–325.) Braatz has used this intersection in the past and has made it across the street before the crosswalk light turns red. (Tr. 327.) After observing his co-workers cross Logan Avenue, Braatz returned back to his building. (Tr. 324.)

Security guard Torgude testified that he took photos of workers at this intersection for "[s]afety issues, safety concerns" because a lot of people were crossing the intersection and not making it across before the walk/don't walk signal changed to "don't walk." (Tr. 686, 688, 690, 692; GC Exhs. 25 and 28.) Torgude also reported this to the City of Renton after the incident. (Tr. 693.) While the photos taken by Torgude were not of individual marchers, the faces of various marchers in most of the photos are clear enough to identify individual SPEAA employee marchers. (GC Exhs. 25 and 28.)

Approximately 12,000–13,000 employees work the day shift

at the Renton plant. (Tr. 697.) When day shift employees get off work at the plant, many cross over Logan Avenue to head down to the section 11 parking area across from Renton stadium. (Tr. 696–697; GC Exh. 13.) Often, workers do not make it across Logan Avenue before the stoplight or the walk/don't walk sign changes. (Tr. 697.) Guard Torgude has notified the City of Renton several times with respect to traffic safety issues in connection with employees getting off shift. (Tr. 697–698.) Respondent's security guards have not taken photographs of employees under such common circumstances prior to the rally on September 26. (Tr. 698.)

(c) The October 3 surveillance in building 85–001 at Respondent's Portland, Oregon Facility

The first red-shirt march conducted by the Engineers' Union at Respondent's Portland, Oregon facility took place on October 3 and was organized by employee Kenneth Parcher (Parcher). (Tr. 662.) Before the October 3 march, the Portland security guards were instructed by Respondent about what to do if there were any "demonstrations" in Portland. (GC Exh. 24.) The instructions do not mention a single incident of disruption or safety violations in describing what had occurred at other Respondent facilities. Id. In addition, the instructions provide: "If there is a demonstration please let me know and have the patrol respond to the event, take photos of those involved in the event, ensure participants are acting in a safe manner and clearly document the event in USIR before the end of your shift." Id.

On October 3, approximately 45–50 employees gathered at about 11:15 a.m. at the flag pole area on the north side of the Portland facility to participate in the march. (Tr. 339.) The majority of employees were wearing red Engineers' Union shirts. (Tr. 340.) A few held poster-sized union signs which said, "Respect SPEEA to the Max." Id.

On September 5, Security Site Manager Don Collins (Collins) sent an email to Portland facility guards indicating that Engineers' Union activity was likely to increase in the coming weeks and to ensure that guards documented any Union demonstrations with USIR and photographs at the facility. (Tr. 665, 677; GC Exh. 24.) When the march began, Collins instructed guard Ed Crowe (Crowe) to be in front of the walk and to have a uniformed guard follow the walk. (Tr. 665, 677.)

After gathering at the flag pole, employees walked through the office hallways and through the production areas of the three main buildings of the Portland facility—buildings 85–120, 85–001, and 85–105.[13] Engineers' Union members did not chant nor use noisemakers and there were no derogatory signs used by the marchers during the October 3 Portland walk. (Tr. 679; GC Exh. 33.)

After Engineers' Union members marched through the Portland factory area in the 85–001 building, they went to a training area in front of the building, and Parcher observed guard Crowe filming the employees walking past him either single file or in pairs using a digital camera. (Tr. 346, 679.) Parcher was approximately 20 feet away from Crowe when he first noticed him filming the walkers. Crowe continued to film employees as they passed right by him. (Tr. 346, 668.) Employees were not chanting, blocking workers, or preventing work from being performed. (Tr. 356–347.)

The marchers continued down the front of building 85–001, went inside the cafeteria, continued along to the front of the building and re-entered the building through the main entrance and proceeded down the main hallway. (Tr. 347.) Immediately after the marchers re-entered the building through the main entrance, Crowe was right there taking photos of the marchers. (Tr. 347, 668; GC Exh. 26.) This time, Crowe was taking photos within 5 feet of the marchers despite the fact that they were not chanting, making noise, or preventing work from being completed. (Tr. 348, 675.) After exiting the 85–001 building, the marchers walked through the 85–105 building. (Tr. 349–350.)

On October 4, Crowe filed an incident report of the October 3 march that describes the march as lasting approximately 40 minutes and not being disruptive to the nonmarch work force as the march was quiet with no chants, whistles, or horns. (GC Exh. 33.) The report also indicates that photos and video were taken of the October 3 march. Id. While the photos taken by Crowe were not of individual marchers, the faces of various marchers in most of the photos are clear enough to identify individual SPEAA employee marchers. (GC Exh. 33.)

2. Rule PRO 2783

Respondent attempts to regulate camera use on its properties to protect information from disclosure to third parties. (Tr. 383–384.) The use of camera-enabled devices in classified areas at Respondent's facilities is prohibited outright and these classified areas are designated by signage, locks, and warning signs.[14] (Tr. 386, 428.) Respondent also physically designates its proprietary and less sensitive than classified areas at its Everett facility by placing it behind locked doors or with signage and either curtains, fences or theatre tape. (Tr. 428–429.)

Respondent has a working procedure/rule, PRO 2783, known by its employees, that precludes the use of personal camera-enabled devices without a valid business need and a preapproved Camera Permit from Respondent. (Tr. 183; GC Exh. 8.) This rule was last revised to its current restricted language in November 2011. Specifically, the rule provides:

> A. Possession of the following camera-enabled devices is permitted on all company property and locations except as restricted by government regulation, contract requirements or by increased local security requirements.

[13] Respondent's counsel argues in fn. 16 of its closing brief that it was error for me to disallow Respondent the opportunity to introduce additional evidence of Respondent's surveillance in the Portland Building 85–001 *factory floor* area, an area that General Counsel had no prior evidence of surveillance before hearing. This case involves, among other things, allegations of Respondent's illegal surveillance of SPEEA employees in the Portland building 85–001 *office* area. A review of the hearing transcript at pp. 659–661 shows that Respondent was given ample opportunity to present new evidence of Respondent's filming in the building 85–001 *factory floor* area in exchange for General Counsel amending the complaint to add more surveillance allegations but Respondent's counsel, instead, elected to forego adding further surveillance to this case and, therefore, waived its opportunity to add evidence of additional filming in the *factory floor* area.

[14] This case does not involve any allegation that photos were taken in Respondent's classified areas.

> However, **use** of these devices to capture images or video is prohibited without a valid business need and an approved Camera Permit that has been reviewed and approved by Security: [list of devices omitted]. Id. [Emphasis in original.]

The definition of business need is:

> Business need: In relation to the use of a photographic or imaging device, a business need is a determination made by the authorizing manager that images or video are needed for a contractual requirement, training, technical manuals, advertising, technical analysis, or other purpose that provides a positive benefit to the company. Id.

PRO 2783 applies to the two main divisions of Respondent: Boeing Commercial Airplanes (BCA) and Boeing Defense Based Group (BDS). (Tr. 378.) Moriarty explained that she was given express permission by Respondent and allowed to take photos while on a VIP tour at the Everett facility with her own photo-enabled device that were not reviewed at the conclusion of the tour. (Tr. 279–282.) Respondent's director of 777 operations opined that typically no outside visitor on a VIP tour who takes photos at Respondent would have their cameras or cellphones seized for taking improper photos and he did not recall any incident where a VIP visitor had their camera or cellphone seized for taking an improper photo. (Tr. 646.) Instead, Respondent just hopes for cooperation from the VIP tour individuals in sharing photographs of the inside Everett facility they take with Respondent. Id.

Respondent's Exhibit 5 is a dvd or video it produced for public consumption showing the 18–19 days of the manufacturing process or moving final assembly line of its 777 airplanes over a lengthy period of time at the Everett facility. (Tr. 593, 598, 646.) Respondent also has a continuing policy known as PRO-3439 relating to disclosure of information outside the company. (GC Exh. 36.) This policy specifically provides, among other things:

Nothing in this procedure should be construed as preventing employees from:

> 1. Discussing or releasing information about wages, hours, working conditions, or other terms and conditions of employment to the extent privileged by Section 7 of the National Labor Relations Act or other law …. Id.

ANALYSIS

I. CREDIBILITY

I have outlined my credibility findings in the findings of fact above and in the analysis below. As a general matter, however, in significant instances, reliable documentary evidence fails to support accounts provided by Respondent's key witnesses which weighs against such accounts being credible. Evidence contradicting the findings, particularly testimony from Madison, Smith, Harris, and Lopez, has been considered but has not been credited except to the extent it is consistent with more reliable witness testimony. For example, the general theme of Respondent's defense of the alleged Act violations here is that its questioned rules were put in place: (1) due to Respondent's "reasonable" concerns with trespassing and safety issues related to each of the four Engineers' Union marches discussed in this decision; and (2) to protect its valuable manufacturing process from competitive or terrorist outsiders with its anticamera-device rule PRO 2783.

I find that the convincing testimony from Respondent's security guards Catalini and Lopez as well as their USIR reports and the largely undisputed testimony at hearing from the eight Engineers' Union members provides strong evidence that Respondent's employees regularly veer outside Respondent's internal safety rules without discipline on a daily basis. These include frequent examples of not wearing safety glasses in the Everett factory facility or walking outside the pedestrian walkways into the transportation aisles or walking outside on the Everett factory apron through large overhead doors or walking across Logan Avenue outside the Renton facility to get to their parked cars after work before the stoplight warning light changes. No evidence was submitted that showed that any of these alleged employee infractions led to any form of discipline by Respondent before or after any of the Engineers' Union marches in 2012. Therefore I reject Respondent's alleged safety concerns to justify its questioned conduct here as it is contradicted by its actions, the documentary evidence and Engineers' Union members' testimony. Had these alleged safety infractions been real and enough to provide Respondent with solid justification for its photographing or videotaping, one would expect employee citations or some form of discipline taken to correct such unsafe conduct. In fact, there is no evidence that the security guards who escorted the marchers instructed them at any time to comply with Respondent's safety rules had they actually been in violation. I also reject Respondent's argument that individual participants cannot be identified in the photos taken of the solidarity marches.

In addition, I reject Respondent's allegation that its questioned conduct was justified due to the disruptive nature of the marches because the evidence shows that each of the four marches were not disruptive and Respondent maintained its production schedule with only its own security guards receiving Respondent's instructions to stop traffic during marches. For example, Clark, Respondent's director of manufacturing and operations of the 777 airplane, was very candid and believable when he opined that the brief pause in work from the December 12 march and even a 20-minute pause in work did not delay the delivery date of any of the aircraft. (Tr. 563, 605, 642.)

I also find the eight Engineers' Union employees' testimony particularly credible over Respondent's manager witnesses' testimony given the fact that each of the eight nonsupervisor engineer employees testified against their own interests as they were employed at Respondent at the time of trial and must continue to face Respondent's management after trial. See *S.E. Nichols, Inc.*, 284 NLRB 556 fn. 2 (1987) (Current respondent employee's testimony more reliable because it is given against his interest to remain employed by Respondent.).

As to the credibility of Moriarty, Hastings, and Lopez with respect to their conversations on December 12 when Lopez was approached while in his vehicle as the Engineers' march was ending, I credit Moriarty and Hastings versions of what Lopez said over his own blunted testimony. Moriarty and Hastings were more convincing witnesses as their demeanors were con-

fident and their versions of events having Lopez omit any reference that he was taking photos to ensure compliance with safety standards or to document safety concerns or violations were more believable and consistent with the documentary evidence in this case. This includes the USIR of Lopez which is silent with respect to engaging verbally with employees or otherwise directing traffic as it indicates that he merely observed Engineers' Union employees and photographed them. (Tr. 240, 303; GC Exh. 32.) As per the guards, the purpose of their photographing the walk was to show the scope of the crowd size for the first Engineers' Union walk at the facility. (Tr. 451, 473, 480, 538.) Even Catalini testified that before the September 19 march he and Lopez were instructed by Hess to document the scope and size of the crowd, any intimidating factors with no reference to any safety concerns. (Tr. 480, 538.)

Moreover, Respondent produced a video (R. Exh. 5), for public distribution that shows the very manufacturing process that Respondent at hearing argued needs protection from outsiders with its rule PRO 2783. While Respondent does get involved in top secret military and other highly confidential matters, those designated areas are not at issue here as Respondent argues that its manufacturing process at the Everett factory floor facility is highly confidential though as stated above, its video showing the very same process over many days' time is a public video and Respondent conducts VIP tours to foreign and local employers without the same concern for privacy it has toward its Engineers' Union member employees. I further find that any concern for plant or worker safety is noticeably absent from the security guard reports with respect to the Everett and Portland marches and only passing reference is made to a safety concern outside its facility in the Renton march report though, once again, no employees were cited for trespassing or any other safety or work rule violation. Respondent's defense here appears to have been created after the marches at issue. Therefore, I do not find that Respondent's general theme of the case credible as it is greatly outweighed by the several Engineers' Union members' testimony and its own internal reports.

II. RESPONDENT'S SURVEILLANCE RULE TO PHOTOGRAPH OR VIDEO ENGINEERS' UNION MARCHERS

The General Counsel alleges in paragraphs 7(a), 7(c), 7(d), 9, 12, and 14 of the complaint that, on September 19 and December 12 in and around Respondent's Everett factory facility, September 26 near gate D-9 at the Renton facility, and October 3 in building 85–001 at its Portland facility, Respondent, by its security guards engaged in surveillance of the Engineers' Union and/or protected, concerted activities in violation of Section 8(a)(1) of the Act.

The fundamental principles governing employer surveillance by photographing or videotaping of protected employee activity remain unchanged as set forth in *F. W. Woolworth Co*., 310 NLRB 1197 (1993), as follows:

> . . .[A]n employer's mere observation of open, public union activity on or near its property does not constitute unlawful surveillance. Photographing and videotaping such activity clearly constitute more than mere observation, however, because such pictorial record keeping tends to create fear among employees of future reprisals. The Board in *Woolworth* reaffirmed the principle that photographing in the mere belief that something might happen does not justify the employer's conduct to interfere with employees' right to engage in concerted activity . . . . Rather, the Board requires an employer engaging in such photographing or videotaping to demonstrate that it had a reasonable basis to have anticipated misconduct by the employees. "[T]he Board may properly require a company to provide a solid justification for its resort to anticipatory photographing . . . . The inquiry is whether the photographing or videotaping has a reasonable tendency to interfere with protected activity under the circumstances in each case. [Citations omitted.]"

National Steel & Shipbuilding Co., 324 NLRB 499 (1997), enfd. 156 F.3d 1268 (D.C. Cir. 1998). Therefore, Respondent must show that it had a reasonable, objective basis for anticipatory misconduct before its photography or videotape of any Engineers' Union march is allowed. Furthermore, *F. W. Woolworth Co*., supra at 1197, held that the mere taking of photos of protected activity is inherently intimidating and that taking photos just to stick them in a file as seems to be Respondent's policy here is not solid legal justification.

Respondent argues that an employer's photography of employees engaged in a peaceful demonstration does not constitute *per se* unlawful surveillance in violation of Section 8(a)(1) of the Act and cites as authority the case *U.S. Steel Corp. v. NLRB*, 682 F.2d 98, 101 (3d Cir. 1982.) However, I am not bound by the Third Circuit Court of Appeal's decision in *U.S. Steel Corp.* I am bound to follow Board precedent that has not been reversed by the Supreme Court or the Board itself. See *Pathmark Stores*, 342 NLRB 378 fn. 1 (2004). As such, I find that General Counsel does not have the burden to show that Respondent's photographing or videotaping of Engineers' Union marches caused actual interference, restraint, or coercion of employees' exercise of their Section 7 rights under the Act.

Respondent further argues that its photographing and videotaping of Engineers' Union marches in late 2012 were lawful "because [Respondent's] attempts to document disruptive and unsafe SPEEA marches were based on legitimate and substantial safety and business disruption concerns." (R. Br. at 28–32.) Respondent adds that its prior history with Machinists' Union marches justified its questionable conduct here along with the Engineers' Union members' actual disruption and workplace safety violations. Id.

I reject Respondent's argument that the larger Machinists' Union marches are relevant to this case as I find that they are too remote in time and represent actions by an entirely different group of employees represented by a different union under different circumstances. While no evidence of violence or trespassing was tied to Machinists' Union marches either, Respondent's smaller professional Engineers' Union members' conduct does not provide a solid justification for Respondent's resort to anticipatory photographing and the Engineers' Union should not be held accountable for an entirely different union members' conduct that occurred more than 4 years earlier under different circumstances.

In addition, as stated above, there were no actual incidents of trespass or violence cited against any Engineers' Union em-

ployee to provide solid justification for the questioned photography or videotaping. There were no reports of unsafe behavior that Respondent had not seen before any of the four marches at issue in this case during regular workdays when no Engineers' Union marches occurred. Significantly, not any of the marchers were disciplined for any safety violations during any of the four marches. No evidence was presented showing photographs of Respondent's employees behaving in the same manner as when they marched. If photography of the same alleged unsafe conduct does not exist *before* the march (though credible evidence shows this behavior to be the same) then what is different about Respondent's employees' behavior on the questioned dates of the marches – only the fact that the Engineers' Union employees are marching. This alone is not solid justification to photograph or videotape these employees. Moreover, Respondent provided the marchers with security guard escorts in the front and back of the marchers and the guards also stopped vehicular traffic around the marchers thereby improving safety conditions during marches.

Respondent's photographing and videotaping of Engineers' Union members marching prevented employees who desired to march anonymously from doing so. Consistent with Board precedent, I find that Respondent's deviation from Respondent's regular custom and practice of *not* photographing, videotaping, or citing or disciplining its employees' very same noncitable behavior was not legitimate. This conduct that occurred before and after the late 2012 marches includes not wearing safety goggles, walking outside of pedestrian walkways and congregating at Respondent's third party-run Tully's Coffee Shop during breaks, walking onto Respondent's outside apron and under large overhead doors, and walking across crosswalks outside the facility and Respondent's property after warning lights have changed. I find that photographing and videotaping this same noncitable conduct *only* during Engineers' Union marches protected under Section 7 of the Act where no incidents of trespass or violence were recorded violates Section 8(a)(1) of the Act.

Also, Respondent's argument that the photography was justified due to the disruption of Respondent's manufacturing process caused by the marches is again false. None of the USIRs note any interference with production. Specifically, the USIR tied to the October 3 Portland Engineers' Union march expressly states that there was no interference. (GC Exh. 34.) As stated above, Respondent's director of manufacturing and operations convincingly opined that the brief pause in work caused by the Engineers' Union marches and even all of the marches combined did not delay the delivery date of any of the aircraft in Everett. (Tr. 563, 605, 642.) Furthermore, the September 26 solidarity walk was an ice cream social held *outside* the Renton facility which obviously did not cause any production disruption inside the facility where work is performed.

Respondent cites *Washington Fruit & Produce Co*., 343 NLRB 1215, 1217–1218 (2004), for its argument that it had a reasonable basis to suspect anticipatory misconduct on the part of the Engineers' Union members during each of the four marches to warrant its photography and videotaping of the protected concerted activities. I find that *Washington Fruit & Produce Co.* is distinguishable from the facts in this case because there the respondent's safety concerns were legitimate and the majority of 100 marchers in *Washington Fruit & Produce* included complete strangers who were not respondent's employees and at the time the decision to videotape was made the deciding official knew that the union was planning a high profile event with its own out-of-state union officials and that there had been previous trespassing on respondent's property that led respondent to contact the police for help a second time that day. The Board found respondent's videotaping lawful given these unique facts and the prior incidents of trespassing on respondent's property and further finding that taking photographs or videotaping to document trespassory activities for the purpose of making a claim of trespass is lawful. Id.

Consequently, for the reasons stated herein, I find that photographing and videotaping the four Engineers' Union marches in late 2012 was not reasonably based on solid justification and each instance violates Section 8(a)(1) of the Act.

III. SECURITY GUARD LOPEZ' DECEMBER 12 CONVERSATIONS WITH ENGINEERS' MEMBERS MORIARTY AND HASTINGS

The General Counsel alleges in paragraphs 10, 1, and 14 of the complaint that, on December 12, 2012, Respondent, by Lopez, at the Everett factory facility, created an impression among its employees that their union and/or protected, concerted activities were under surveillance in violation of Section 8(a)(1) of the Act.

The test for determining whether an employer has created an impression that its employees' protected activities have been placed under surveillance is "whether the employees would reasonably assume from the employer's statements or conduct that their protected activities had been placed under surveillance." *Greater Omaha Packing Co.,* 360 NLRB 493, 495 (2014); *Rood Industries*, 278 NLRB 160, 164 (1986). When an employer tells employees that it is aware of their protected activities, but fails to tell them the source of that information, it violates Section 8(a)(1) "because employees are left to speculate as to how the employer obtained the information, causing them reasonably to conclude the information was obtained through employer monitoring." Id.

Here, the Engineers' Union did not advise Respondent ahead of its December 12 march that a march would occur at the Everett facility that day. The march began at approximately 11a.m. at the Tully's location and security guards Hess and Lopez were dispatched to control traffic for the march after a guard reported employees wearing red Engineers' Union shirts gathering in the factory at Tully's. (Tr. 222, 283, 504.)

Engineers' Union members observed Guard Lopez sitting in his security vehicle in the main transportation aisle at the intersection closest to the Tully's in the factory building on December 12. (Tr. 230. GC Exh. 3; GC Exh. 11.) At this time, Lopez engaged in two short conversations with two employees – Moriarty and Hastings. When Moriarty approached Lopez parked in his vehicle, she stated: "I noticed you were taking photographs of our group." (Tr. 231.) Lopez responded: "I've been directed to document all union activities." Id. Lopez admitted the same with his testimony. (Tr. 509.) Moriarty replied: "It makes our folks feel a bit uncomfortable." Id. Moriarty further reported that Lopez did not tell her he was taking photos to

ensure compliance with safety or to document traffic or safety concerns and he clearly indicated to her that he would continue to document and take photos to document in his report that 250 individuals participated in the walk. (Tr. 231, 523.) Lopez' USIR provides that 200–250 SPEEA members participated in the march. (GC Exh. 34.)

As their discussion was ending, Engineers' Union member Hastings approached Lopez and Moriarty and began to speak with Lopez as Moriarty left the group. (Tr. 232–233.) Hastings asked Lopez twice what he was doing with his camera and each time he replied that he was taking photos of non-Boeing activity. (Tr. 288.) Hastings then asked Lopez why he was taking these photos and he responded by saying: "We always do this [photo taking]." Id. No testimony was presented that during their conversation Lopez told Hastings that he was taking photos to ensure compliance with safety standards or to document safety concerns or violations. (Tr. 289.) At the end of these conversations, the march was winding down and there were approximately 15 marchers remaining leaving the pedestrian aisle and not blocking any vehicular or pedestrian traffic or interfering with plant operations. (Tr. 288–289.)

Both Moriarty and Hastings opined that neither Lopez nor any other guards directed vehicular or pedestrian traffic during the march and Lopez' report is silent with respect to engaging verbally with employees as it indicates that he merely observed Engineers' Union employees and photographed them. (Tr. 240, 303; GC Exh. 32.)

In determining whether an employer has unlawfully created the impression of surveillance of employees' union activities, the test is whether under all the relevant circumstances, reasonable employees would assume from the statement in question that their union or other protected activities had been placed under surveillance. *Frontier Telephone of Rochester, Inc*., 344 NLRB 1270, 1276 (2005). The essential focus has always been on the *reasonableness* of the employees' assumption that the employer was monitoring their union or protected activities. Id. As with all conduct alleged to violate Section 8(a)(1), the critical element of reasonableness is analyzed under an objective standard. Id.

I find that the Lopez' activities taking photographs of the December 12 march at various times and parked in his vehicle solely to document Engineers' Union activities without any further explanation and the Respondent did not explain to the workers or put forth any credible evidence at trial that explained that why it was taking photos of the December 12 march. Therefore, Lopez' statements to Moriarty and Hastings on December 12 that he'd been directed to document all union activities and that he was taking photos of non-Boeing activity reasonably suggested to the two SPEEA employees that the Respondent was closely monitoring the degree and extent of their protected concerted march and other activities. See *Emerson Electric Co*., 287 NLRB 1065 (1988). Stated differently, I find that Lopez' statements and conduct on December 12 before Moriarty and Hastings would reasonably cause them to assume that their protected activities had been placed under surveillance. Consequently, I find that Lopez' statements to Moriarty and Hastings on December 12 created the impression that the Engineers' Union activities were under surveillance and violated Section 8(a)(1) of the Act.

IV. RESPONDENT'S RULE PRO 2783 REGULATING EMPLOYEES' PERSONAL CAMERA PICTURE-TAKING OR VIDEO-TAKING WITHOUT A BUSINESS NEED AND PERMIT

The General Counsel alleges in paragraphs 6, 12, and 14 of the complaint that, on November 11, 2011, Respondent promulgated and since then has maintained its rule PRO 2783 to discourage its employees from forming, joining, and/or assisting the Union and/or engaging in other protected concerted activities in violation of Section 8(a)(1) of the Act.

When evaluating whether a rule violates Section 8(a)(1), the Board applies the test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). See *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enfd. 255 Fed.Appx. 527 (D.C. Cir. 2007). Under *Lutheran Heritage*, the first inquiry is whether the rule explicitly restricts activities protected by Section 7. If it does, the rule is unlawful. If it does not, "the violation is dependent upon a showing of one of the following: (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." *Lutheran Heritage* at 647.

Board law is settled that ambiguous employer rules–rules that reasonably could be read to have a coercive meaning – are construed against the employer. "This principle follows from the Act's goal of preventing employees from being chilled in the exercise of their Section 7 rights—whether or not that is the intent of the employer – instead of waiting until the chill is manifest, when the Board must undertake the difficult task of dispelling it." *Flex Frac Logistics, LLC*, 358 NLRB 1131, 1132 (2012).

Respondent argues that its rule PRO 2783 is necessary to protect the valid business need of protecting its valuable manufacturing process. I find Respondent's argument non-credible based on its contrary practice of allowing free access to its manufacturing process both in the form of its dvd referenced herein which has been placed by Respondent in the public domain and its VIP tours that allow unfettered photography to the general public. I find that Respondent's manufacturing process is no more in need of protection than an automobile assembly line. See (Tr. 646; R. Exh. 5) (Respondent's airplane assembly line process in the public domain.) Respondent has adequate protection for keeping its top secret and truly confidential military and commercial information and processes protected behind closed doors with heightened security clearance. Its argument at hearing that the rule is needed to protect Respondent's competitive advantage and as a security matter is a mere smokescreen as its professed business purpose for the rule is eviscerated by its actual practice which allows public access to its Everett factory manufacturing process. As referenced above, Respondent disseminates its manufacturing process to the general public in the form of its dvd. (Tr. 646; R. Exh. 5.) In addition, Respondent admits that it allows non-Boeing outside foreign and domestic visitors to take photos of the Everett facility without showing a similar business need or permit. (Tr. 245, 269–272.)

As stated above under *Lutheran Heritage Village-Livonia*, 343 NLRB at 646, "an employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights." Respondent maintains its rule PRO 2783 that precludes the use of personal camera-enabled devices without a valid business need, defined to include a "purpose that provides a positive benefit to the company [Respondent] . . ." and a preapproved Camera Permit from Respondent without an exemption for activity protected by the Act. (Tr. 183; GC Exh. 8; GC Exh. 36.)

Here, Respondent is not using its rule PRO 2783 to protect the "weighty" privacy interests of hospital patients thereby distinguishing the facts in this case from those involved in *Flagstaff Medical Center*, 357 NLRB 659, 662–663 (2011). (R. Br. 39–40.) Instead, Respondent's rule is better analyzed in the context of other recent cases.

In *Hills & Dales General Hospital*, 360 NLRB 611, 611–612 (2014), the Board found as overly broad and ambiguous, a requirement that employees represent the Respondent "in the community in a positive and professional manner in every opportunity." The Board found that this requirement violated Section 8(a)(1) of the Act and could "discourage employees from engaging in protected public protests of unfair labor practices, or from making statements to third parties protesting their terms and conditions of employment –activity that may not be 'positive' towards the Respondent but is clearly protected by Section 7. [citations omitted]" Id. The same thing can be said of Respondent's rule in this case requiring a "purpose that provides a positive benefit to the company [Respondent] . . . ." as an employee could reasonably believe that photographing protected concerted activity would not be viewed by management as providing a positive benefit to Respondent. (See GC Exh. 8.) I find that Respondent's rule PRO 2783 reasonably discourages its employees from taking photos of protected concerted activities such as their solidarity marching during a lunch break during successor CBA negotiations or photographing an unsafe condition at work.

Moreover, the requirement that employees request and receive permission and a permit in order to find out if their Section 7 photo activity will be permitted is adverse to the Act. See *J. W. Marriot*, 359 NLRB 144 (21012) (Manager's absolute discretion over application of rule is unlawful because it requires management permission to engage in Section 7 activity and leads employees to reasonably conclude that they are required to disclose to management the nature of the activity for which they seek permission, a compelled disclosure that would certainly tend to chill the exercise of Sec. 7 rights.) Here, I find that Respondent's employees would reasonably construe the rule as prohibiting all photography in Respondent's factory facilities including photography performed in concert of Engineers' union solidarity marches during successor CBA negotiations or of other protected concerted activities. As such, I further find that Respondent's facially overly broad and ambiguous rule PRO 2783 would reasonably tend to chill employees in the exercise of their Section 7 rights and that an employee would reasonably construe the language to prohibit Section 7 activity. Consequently, I find that rule PRO 2783 violates Section 8(a)(1) of the Act.[15]

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Security Guards Hess, Lopez, and Catalini are agents within the meaning of Section 2(13) of the Act.
4. Respondent engaged in conduct in violation of Section 8(a)(1) of the Act:

(a) By surveilling employees on September 19, 2012, at the Everett factory facility.

(b) By surveilling employees on December 12, 2012, at the Everett factory facility.

(c) By surveilling employees on September 26, 2012, near gate D-9 at Respondent's Renton facility.

(d) By surveilling employees on October 3, 2012, in building 85–001 at Respondent's Portland, Oregon facility.

(e) By creating an impression of surveillance of employees' union activities on December 12, 2012.

5. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.
6. The above violations are unfair labor practices within the meaning of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist from engaging in such conduct in the future and to take certain affirmative action designed to effectuate the policies of the Act. To remedy the Respondent's violations of Section 8(a)(1) of the Act, I shall recommend that the Respondent post and abide by the attached notice to employees.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[16]

ORDER

The Respondent, The Boeing Company, Renton and Everett, Washington, Portland, Oregon, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Photographing and videotaping employees engaged in workplace marches and rallies and/or near its property.

[15] Respondent could have avoided a violation by including a caveat like it has in its Rule PRO-3439, referenced above, that its rule PRO-2783 does not apply to conduct protected by the Act. See generally *Costco Wholesale Corp*., 358 NLRB 1100 (2012) (finding unlawful the maintenance of a rule prohibiting statements posted electronically that "damage the Company . . . or damage any person's reputation"). As indicated above, Respondent uses this caveat in other rules such as its continuing policy known as PRO-3439 relating to disclosure of information outside the company. See GC Exh. 36.

[16] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Creating the impression that its employees' union and/or protected concerted activities are under surveillance.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of the Board's Order, to the extent it has not already done so, revise or rescind rule PRO 2738 so that it does not restrict Section 7 rights and allows employees to use their personal camera enabled device in non-restricted areas.

(b) Within 14 days of the Board's Order, to the extent it has not already done so, rescind all policies and procedures requiring security and/or management personnel to photograph or videotape employees engaged in workplace marches and rallies and/or near its property.

(c) Within 14 days after service by the Region, post copies of the attached notice marked "Appendix A" at its Everett and Renton, Washington facilities and its Portland, Oregon facility.[17] Copies of the notices, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities where posting is required, the Respondent shall duplicate and mail, at its own expense, a copy of the notices to all current employees and former employees employed at those facilities at any time since September 19, 2012.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., May 15, 2014

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE

[17] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT photograph or videotape employees engaged in workplace marches and rallies and/or near its property.

WE WILL NOT watch, photograph, or videotape you in order to find out about your union activities.

WE WILL NOT create an impression that we are watching your union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days of the Board's Order, to the extent we have not already done so, revise or rescind PRO 2738 so that it does not restrict Section 7 rights and allows employees to use their personal camera enabled device in non-restricted areas.

WE WILL, within 14 days of the Board's Order, to the extent we have not already done so, rescind all policies and procedures requiring security and/or management personnel to photograph or videotape employees engaged in workplace marches and rallies and/or near its property.

THE BOEING COMPANY

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/19-CA-090932 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 18-04 June 6, 2018

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Peter B. Robb, General Counsel /s/

SUBJECT: Guidance on Handbook Rules Post-*Boeing*

In its decision in *The Boeing Company*, 365 NLRB No. 154 (Dec. 14, 2017), the Board reassessed its standard for when the mere maintenance of a work rule violates Section 8(a)(1) of the Act. Overturning the first prong of *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), the Board established a new standard that focused on the balance between the rule's negative impact on employees' ability to exercise their Section 7 rights and the rule's connection to employers' right to maintain discipline and productivity in their workplace. This memorandum contains general guidance for Regions regarding the placement of various types of rules into the three categories set out in *Boeing*, and regarding the Section 7 interests, business justifications, and other considerations that Regions should take into account in arguing to the Board that specific Category 2 rules are unlawful.

Regions should note that not only did the Board in *Boeing* add a balancing test, but it also significantly altered its jurisprudence on the reasonable interpretation of handbook rules. Specifically, the Board severely criticized *Lutheran Heritage* and its progeny for prohibiting any rule that *could* be interpreted as covering Section 7 activity, as opposed to only prohibiting rules that *would* be so interpreted.[1] Regions should now note that ambiguities in rules are no longer interpreted against the drafter, and generalized provisions should not be interpreted as banning all activity that could conceivably be included.[2]

Regions should also note that the Board in *Boeing* did not alter well-established standards regarding certain kinds of rules where the Board has already struck a balance between employee rights and employer business interests. For instance, *Boeing* did not change the balancing test involved in assessing the legality of no-distribution,

[1] *Boeing Co.*, 365 NLRB No. 154, slip op. at 9 n.43 (Dec. 14, 2017).

[2] *See id.*, slip op. at 9 & n.43.

no-solicitation, or no-access rules.[3] The decision similarly did not deal with the "special circumstances" test of apparel rules, although it may apply to aspects of apparel rules that are alleged to be unlawfully overbroad.[4]

The Board in *Boeing* specifically noted that the decision only applied to the mere maintenance of facially neutral rules. Rules that specifically ban protected concerted activity, or that are promulgated directly in response to organizing or other protected concerted activity, remain unlawful. Moreover, the Board held that the *application* of a facially neutral rule against employees engaged in protected concerted activity is still unlawful.[5] A neutral handbook rule does not render protected activity unprotected.

Finally, Advice has not yet determined *Boeing*'s effect on rules regarding confidentiality of discipline or arbitration, or rules that potentially limit employees' access to Board processes. Thus, when presented with such rules, Regions should submit the case to Advice.

Category 1: Rules that are Generally Lawful to Maintain

The types of rules in this category are generally lawful, either because the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of rights guaranteed by the Act, or because the potential adverse impact on protected rights is outweighed by the business justifications associated with the rule.

Charge allegations alleging that rules in this category are facially unlawful should be dismissed, absent withdrawal. However, Regions should be cautious about dismissing allegations regarding rules that are not specifically listed here as Category 1 rules. If a Region believes a rule not listed below should fall in this category, the Region should submit the case to Advice.

[3] *See Boeing Co.*, 365 NLRB No. 154, slip op. at 8 (Dec. 14, 2017) (relying on doctrine regarding those types of rules as support in overturning *Lutheran Heritage*).

[4] *See Long Beach Memorial Center, Inc. d/b/a Long Beach Memorial Medical Center & Miller Children's and Women's Hospital Long Beach*, 366 NLRB No. 66, slip op. at 1–2 (Apr. 20, 2018) (finding hospital's restrictions on wearing union pins overbroad and unlawful without reference to *Boeing* test).

[5] *See Boeing Co.*, 365 NLRB No. 154, slip op. at 16 (Dec. 14, 2017). However, it is possible that the Board will, in a future case, also change the prong of *Lutheran Heritage* that suggested that, once a facially lawful rule has been applied to protected activity, the rule *itself* becomes unlawful. *See id.* (noting that application of a facially lawful rule to protected concerted activity would still be unlawful, but not suggesting such application would affect the lawfulness of the rule itself).

In addition, if a Region believes that special circumstances render a normally-lawful rule under Category 1 to be unlawful, e.g., due to a unique industrial setting, the history of the rule's application, or direct evidence of employee chill, the Region should submit the case to Advice.

Again, the Board made clear in *Boeing* that merely maintaining a facially lawful rule does not determine whether the rule was applied lawfully.[6] Thus, simply because a rule falls in Category 1 does not mean an employer may lawfully use the rule to prohibit protected concerted activity or to discipline employees engaged in protected concerted activity.

A. Civility Rules

The Board has placed this type of rule in Category 1. The following examples were the civility rules at issue in *William Beaumont Hospital* that were incorporated by reference in *Boeing*:

- "Conduct . . . that is inappropriate or detrimental to patient care of [sic] Hospital operation or that impedes harmonious interactions and relationships will not be tolerated."[7]

- "Behavior that is rude, condescending or otherwise socially unacceptable" is prohibited.[8]

- Employees may not make "negative or disparaging comments about the . . . professional capabilities of an employee or physician to employees, physicians, patients, or visitors."[9]

In addition, the following examples should be considered lawful civility-type rules:

- "Disparaging . . . the company's . . . employees" is prohibited.[10]

[6] *Id.*

[7] *William Beaumont Hospital*, 363 NLRB No. 162, slip op. at 1 (Apr. 13, 2016) (incorporated by reference in *Boeing Co.*, 365 NLRB No. 154, slip op. at 5 n.15).

[8] *Id.*

[9] *Id.*, slip op. at 21–22.

- Rude, discourteous or unbusinesslike behavior is forbidden.

- Disparaging, or offensive language is prohibited.

- Employees may not post any statements, photographs, video or audio that reasonably could be viewed as disparaging to employees.

Impact on NLRA Rights: In *Boeing* the Board found that these types of rules, when reasonably interpreted, would not prohibit or interfere with the exercise of rights guaranteed by the Act. Indeed, the vast majority of conduct covered by such a rule, including name-calling, gossip, and rudeness, does not implicate Section 7 at all. In addition, the Board held that even if some rules of this type could potentially interfere with Section 7 rights, any adverse effect would be comparatively slight since a broad range of activities protected by the NLRA are consistent with basic standards of harmony and civility.[11] For instance, while protected concerted activity may involve criticism of fellow employees or supervisors, the requirement that such criticism remain civil does not unduly burden the core right to criticize. Instead, it burdens the peripheral Section 7 right of criticizing other employees in a demeaning or inappropriate manner.

As Chairman Miscimarra noted in his dissent in *Cellco Partnership*, the reason a rule against disparaging coworkers should be lawful is that "disparagement" describes statements that attack the person. To "disparage" means "to describe someone as unimportant, weak, bad, etc." or "to lower in rank or reputation," and its synonyms include "badmouth," "belittle," and "put down."[12] Employees are capable of exercising their Section 7 rights without resorting to disparagement of their fellow employees; thus the impact of such a rule on NLRA-rights is comparatively slight.[13]

[10] *Cellco Partnership d/b/a Verizon Wireless*, 365 NLRB No. 38, slip op. at 11–12 (Feb. 23, 2017) (although the Board found this rule unlawful under *Lutheran Heritage*, Chairman Miscimarra in dissent argued that under his *William Beaumont* test the rule was lawful).

[11] *Boeing Co.*, 365 NLRB No. 154, slip op. at 4 n.15 (Dec. 14, 2017).

[12] *Cellco Partnership d/b/a Verizon Wireless*, 365 NLRB No. 38, slip op. at 12 (Feb. 23, 2017).

[13] *Id.*

Legitimate Justifications: The Board has held that this rule type advances substantial employee and employer interests, including the employer's legal responsibility to maintain a workplace free of unlawful harassment, its substantial interest in preventing violence, and its interest in avoiding unnecessary conflict or a toxic work environment that could interfere with productivity, patient care (in hospitals), and other legitimate business goals.[14] In addition to healthcare facilities, industries that rely on close teamwork or that are particularly vulnerable to toxic work environments may have further legitimate interests in promoting civility. In addition, nearly every employee would desire and expect his or her employer to foster harmony and civility in the workplace.

Balance: Given the substantial legitimate interests behind such rules, and the little, if any, effect on NLRA rights, the Board has placed civility rules in Category 1.

B. No-Photography Rules and No-Recording Rules

The Board in *Boeing* placed no-photography rules in Category 1. The specific rule at issue there was:

- "[U]se of [camera-enabled devices] to capture images or video is prohibited . . . ."[15]

No-recording rules should similarly fall in Category 1. Such rules include:

- Employees may not "record conversations, phone calls, images or company meetings with any recording device" without prior approval.[16]

- Employees may not record telephone or other conversation they have with their coworker, managers or third parties unless such recordings are approved in advance.

Impact on NLRA Rights: The Board in *Boeing* determined that no-photography rules have little impact on NLRA-protected rights, since photography is not central to

[14] *Boeing Co.*, 365 NLRB No. 154, slip op. at 17–19, 19 n.89.

[15] *Id.*, slip op. at 5.

[16] *Whole Foods Market Inc.*, 363 NLRB No. 87, slip op. at 6–7 (Dec. 24, 2015) (although the Board found this rule unlawful under *Lutheran Heritage*, Chairman Miscimarra in dissent argued that the rule was lawful).

protected concerted activity.[17] However, such rules may occasionally chill employees from taking pictures of their protected concerted activity, or from taking pictures of their working conditions as part of a larger protected concerted campaign. No-recording rules implicate the same logic, but it is also possible that no-recording rules may *promote* Section 7 activity by encouraging open discussion and exchange of ideas.[18]

Legitimate Justifications: Employers have a legitimate and substantial interest in limiting recording and photography on their property. This interest may involve security concerns, protection of property, protection of proprietary, confidential, and customer information, avoiding legal liability, and maintaining the integrity of operations.[19] Restricting audio recordings can also encourage open communication among employees.[20]

Balance: Given the substantial legitimate interests behind such rules, and the small risk that the rules would interfere with peripheral NLRA-protected activity, the Board has deemed no-photography rules always lawful. The same analysis applies to no-recording rules, and thus such rules should be in Category 1.

Note that, although the Board in *Boeing* addressed rules prohibiting the use of camera-enabled cell phones to take photographs, it did not address the use or possession of cellphones for communication purposes. The Division of Advice has concluded that a ban on mere possession of cell phones at work may be unlawful where the employees' main method of communication during the work day is by cell phone.

C. Rules Against Insubordination, Non-cooperation, or On-the-job Conduct that Adversely Affects Operations

Almost every employer with a rulebook has a rule forbidding insubordination, unlawful or improper conduct, uncooperative behavior, refusal to comply with orders or perform work, or other on-the-job conduct that adversely affects the employer's operation. Some examples are:

[17] *Boeing Co.*, 365 NLRB No. 154, slip op. at 19.

[18] *Whole Foods Market Inc.*, 363 NLRB No. 87, slip op. at 6–7 (Miscimarra dissenting).

[19] *Boeing Co.*, 365 NLRB No. 154, slip op. at 17–19.

[20] *Whole Foods Market Inc.*, 363 NLRB No. 87, slip op. at 7 (Miscimarra dissenting).

- "Being uncooperative with supervisors . . . or otherwise engaging in conduct that does not support the [Employer's] goals and objectives" is prohibited.[21]

- "Insubordination to a manager or lack of . . . cooperation with fellow employees or guests" is prohibited.[22]

Impact on NLRA Rights: The vast majority of activity covered by these rules is unprotected, and employees would not usually understand such rules as covering protected concerted activity. Indeed, even prior to *Boeing* the Board has always been careful to note that employees would not, without more, read rules against improper or unlawful conduct as applying to Section 7 activity.[23] Even rules that prohibit employees from engaging in any conduct that merely "does not support" the employer would not reasonably be understood by employees to cover Section 7 activity, absent language that explicitly lists examples of protected concerted activity that is covered.[24]

Legitimate Justifications: An employer has a legitimate and substantial interest in preventing insubordination or non-cooperation at work. Furthermore, during working time an employer has every right to expect employees to perform their work and follow directives.

Balance: Where insubordination rules lack any reference that would indicate Section 7 activity is forbidden, the Board should not presume any impact on NLRA rights. And, even where there is some ambiguity, it is likely that the employer's interest in maintaining discipline and production will outweigh any chilling effect.[25]

Note, however, that rules that indicate that the employer could consider protected concerted activity to be a type of unsupportive conduct are in Category 2 below.

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

[22] *Copper River of Boiling Springs, LLC*, 360 NLRB 459, 459 n.3 (2014) (finding this rule lawful under *Lutheran Heritage*).

[23] *See Flamingo Hilton-Laughlin*, 330 NLRB 287, 288–89 (1999).

[24] *See Lafayette Park Hotel*, 326 NLRB at 825.

[25] *See Boeing Co.*, slip op. at 7 n.30 (Dec. 14, 2017) (citing *Lafayette Park Hotel*, 326 NLRB at 825) (noting approvingly Member Hurtgen's concurrence that even where a rule chills the exercise of Section 7 rights, it can nonetheless be lawful if it is justified by significant employer interests, like a ban on solicitation during working time).

D. Disruptive Behavior Rules

Disruptive behavior rules are also common in employer handbooks. Some examples of such rules are:

- "Boisterous and other disruptive conduct."[26]

- Creating a disturbance on Company premises or creating discord with clients or fellow employees.

- Disorderly conduct on Hospital premises and/or during working hours for any reason is strictly prohibited.

Impact on NLRA Rights: The majority of conduct covered by this type of rule is unprotected roughhousing, dangerous conduct, or bad behavior. Thus, employees often will not interpret such rules as applying to Section 7 activity.[27] On the other hand, some such rules might, depending on the context, appear to apply to classic core protected concerted activity such as walk-outs, protests, picketing, strikes, and the presentation to management of petitions or grievances, since these activities are often considered disorderly or disruptive. Indeed, such activity is often engaged in *because* it is disruptive—in order to draw attention, underline seriousness, or be used as an economic weapon. Nevertheless, even if employees would read such rules as applying to strikes and walkouts (as opposed to only unprotected conduct), employees would not generally refrain from such activity merely because a rule bans disruptive conduct. Rule or no, in these circumstances employees know that they are discomfiting their employer and are acting anyway.[28]

[26] *Component Bar Products*, 364 NLRB No. 140, slip op. at 6 (Nov. 8, 2016) (although the Board found this rule unlawful under *Lutheran Heritage*, Chairman Miscimarra in dissent argued that under his *William Beaumont* test the rule was lawful) (citing *Tradesmen International*, 338 NLRB 460, 460–61 (2002) (finding lawful rule that prohibited "disloyal, disruptive, competitive, or damaging" conduct)).

[27] *See, e.g.*, *First Transit, Inc.*, 360 NLRB 619, 629 (2014) (finding under *Lutheran Heritage* that in context, rule banning "fighting . . . and other disruptive behavior" would not be read as applying to Section 7 activity).

[28] In the classic example of *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962), for instance, it is exceedingly unlikely the employees would have stopped to consider a rule against disruptions before walking out, since they knew already that their employer did not wish them to do so.

Legitimate Justifications: Rules of this type discourage conduct that would result in injury to employees and others. Such rules enhance workplace productivity and safety by preventing fighting, roughhousing, horseplay, tomfoolery, and other shenanigans. Depending on the workplace, such rules may also address issues created by yelling, profanity, hostile or angry tones, throwing things, slamming doors, waving arms or fists, verbal abuse, destruction of property, threats, or outright violence.

Balance: This type of rule clearly applies most directly to the employer's substantial interests in safety and productivity, and employees would reasonably understand the rule not to be about protected concerted activity. Moreover, even if employees did understand rules of this type to apply to protected concerted activity, the rule likely would not chill employees from engaging in such activity due to the nature of the activity covered. Accordingly, the legitimate interests advanced by such rules outweigh the potential adverse impact on Section 7 activity caused by the mere maintenance of the rule.[29]

Note that a no-disruption rule may not be applied to discipline employees for a strike or walkout in some circumstances. Furthermore, no-disruption rules that explicitly ban walk-outs or strikes are not Category 1 rules.

E. Rules Protecting Confidential, Proprietary, and Customer Information or Documents

Certain types of confidentiality rules also belong in Category 1, e.g., rules banning the discussion of confidential, proprietary, or customer information that make no mention of employee or wage information:

- "[I]nformation concerning customers . . . shall not be disclosed, directly or indirectly" or "used in any way."[30]

- Do not disclose confidential financial data, or other non-public proprietary company information. Do not share confidential information regarding business partners, vendor, or customers.

[29] *See Component Bar Products*, 364 NLRB No. 140, slip op. at 6 (Miscimarra, dissenting, applying his *William Beaumont* dissent to a disruption rule).

[30] *Schwan's Home Service*, 364 NLRB No. 20, slip op. at 16 (June 10, 2016) (although the Board found this rule unlawful under *Lutheran Heritage*, Chairman Miscimarra in dissent argued that under his *William Beaumont* test the rule was lawful).

- "Divulging Hotel-private information to employees or other individuals" is prohibited.[31]

- No unauthorized disclosure of business secrets or other confidential information.

Impact on NLRA Rights: The vast majority of conduct affected by these types of rules is unrelated to Section 7. Even under *Lutheran Heritage*, a broad ban on discussing confidential or proprietary information, or trade or business secrets, was not thought to affect Section 7 rights unless terms and conditions of employment were specifically included.[32]

As for a ban on discussing customer information, the terms of an employer's customer relationships are not subject to collective bargaining, and employees would not generally understand this type of rule as applying to legitimate public relations campaigns or boycotts.[33] Even if employees considered a particular rule of this type to apply to protected conduct, any impact would only affect peripheral rights. To the extent employees may sometimes concertedly engage in NLRA-protected activity that implicates customer information, such as contacting customers about a labor dispute, such conduct usually only occurs in limited circumstances as part of a broader campaign, and must accord with *Jefferson Standard* in order to be protected. Moreover, even if employees so interpreted a rule, it would be unlikely to cause employees to refrain from engaging in a boycott or PR campaign entirely. Any effect would be on a peripheral right to use customer information to better implement or focus such a campaign.

In addition, employees do not have a right under the Act to disclose employee information obtained from unauthorized access/use of confidential records, or to remove records from the employer's premises.[34] Accordingly, where the rule is specifically about accessing or disclosing confidential employee records or documents (as opposed to disclosing employee information), the rule will also not affect Section 7 rights.

[31] *Lafayette Park Hotel*, 326 NLRB 824, 824 (1998), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999)

[32] *See id*. at 826; *Super K-Mart*, 330 NLRB 263, 263 (1999).

[33] *Schwan's Home Service*, 364 NLRB No. 20, slip op. at 16 (Miscimarra dissenting).

[34] *See Macy's, Inc.*, 365 NLRB No. 116, slip op. at 3 (Aug. 14, 2017); *Cellco Partnership d/b/a Verizon Wireless*, 365 NLRB No. 38, slip op. at 8 n.28, 8–9 (Feb. 23, 2017) (Miscimarra, dissenting in part and concurring in part).

Legitimate Justifications: Employers have an obvious need to protect confidential and proprietary information, as well as customer information. Customer information may include records of past purchases, which may affect an employer's decisions concerning inventory and marketing, among other things. Customers also routinely provide businesses with their personal information, such as credit card numbers, with the reasonable expectation that the business will protect that information. Employers have a compelling interest in prohibiting the disclosure of such information to protect their business reputation and avoid significant legal liability.[35]

Balance: Given the substantial legitimate interests behind such rules, and the little, if any, adverse impact on NLRA-protected activity, these rule types should be in Category 1.[36]

F. Rules against Defamation or Misrepresentation

Rules prohibiting defamation or misrepresentation should be placed in Category 1, notwithstanding that defamation that occurs in the course of Section 7 activity is legally protected if not engaged in with *New York Times*[37] malice. Examples of such rules are:

- "[M]isrepresenting the company's products or services or its employees" is prohibited.[38]

- Do not email messages that are defamatory.

Impact on NLRA Rights: Much like civility rules, rules banning defamation will not likely cause employees to refrain from protected concerted activity. The vast majority of conduct covered by these rules is unprotected. Even concerted defamatory speech to improve working conditions can be unprotected if the defamation is

[35] *See Schwan's Home Service*, 364 NLRB No. 20, slip op. at 16 n.34 (Miscimarra, dissenting in part) (noting that Target had incurred $162 million in expenses as a result of a data breach involving customer information).

[36] *Id.*

[37] *New York Times Co. v. Sullivan*, 376 U.S. 254 (1963).

[38] *Cellco Partnership d/b/a Verizon Wireless*, 365 NLRB No. 38, slip op. at 10 (although the Board found this rule unlawful under *Lutheran Heritage*, Chairman Miscimarra in dissent argued that under his *William Beaumont* test the rule was lawful).

intentional.[39] And, notwithstanding the technical legal definition of "defamation," in general parlance that term is synonymous with making intentionally false and disparaging statements. Similarly, "misrepresentation," while perhaps not necessarily being malicious, is defined as a false statement "usually with an intent to deceive or be unfair."[40] Employees will generally understand that these types of rules do not apply to subjectively honest protected concerted speech. As the Board noted in *Boeing*, employee rules should not be expected to be perfect, especially where requiring such perfection negatively affects employees themselves because it prevents employees from knowing their employer's conduct rules.[41]

Even if such a rule affects employee speech, it only affects employees' peripheral Section 7 right to engage in unintentional defamation of coworkers or supervisors. Employees might use a bit more caution when speaking, but these rules would not generally engender the self-censorship the Supreme Court was concerned about in *Linn*.[42]

Legitimate Justifications: Employers have a significant interest in protecting themselves, their reputations, and their employees from defamation and slander. Businesses often live or die off their reputation, and there is a reason that under normal circumstances a party can recover civil damages for defamation. Promoting honesty among employees creates a healthy working environment and reduces the chance of a defamation lawsuit against the company. The justifications for this rule also overlap with the justifications for civility rules, in that harming coworker reputations can create a toxic workplace atmosphere.

Balance: While a rule against defamation, slander, or misrepresentation may technically cover some activity that is protected by the law, the majority of behavior it covers is unrelated to the NLRA.[43] Like civility rules, these types of rules would

[39] *See Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53, 61 (1966).

[40] *Cellco Partnership d/b/a Verizon Wireless*, 365 NLRB No. 38, slip op. at 10 (Miscimarra dissenting) (quoting http://merriam-webster.com/dictionary/misrepresent (last viewed Feb. 24, 2017)).

[41] *Boeing Co.*, 365 NLRB No. 154, slip op. at 2 (noting the negative effects of requiring employers to anticipate and carve out every possible overlap with NLRA coverage).

[42] *See Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. at 58–63.

[43] *See id.*

generally not affect core Section 7 rights, and to the extent they do, the chilling effect is outweighed by legitimate and substantial interests.[44] It is thus unreasonable to require employers to understand and articulate the difference in their rules between malicious defamation and simple defamation.

G. Rules against Using Employer Logos or Intellectual Property

Traditional rules prohibiting employee use of employer logos and trademarks also belong in Category 1. Examples of such rules are:

- Employees are forbidden from using the Company's logos for any reason.[45]
- "Do not use any Company logo, trademark, or graphic [without] prior written approval."[46]

Impact on NLRA Rights: Most activity covered by this rule is unprotected, including use of employer intellectual property for unprotected personal gain or using it to give the impression one's activities are condoned by the employer. Although some protected concerted activity might fall under such a rule, including fair use of an employer's intellectual property on picket signs and leaflets, usually employees will understand this type of rule as protecting the employer's intellectual property from commercial and other non-Section 7 related uses.

Furthermore, even where employees would reasonably interpret such a rule to apply to fair use of an employer's logos as part of protected concerted activity, it is unlikely that the rule would actually cause them to refrain from so using them. The types of protected concerted activity implicated by these rules are usually fairly advanced in terms of employee organization, and employees are unlikely to be deterred from fair use of a logo on a picket sign by a rule in an employee manual.

Finally, even in the event employees did refrain from fair use of an employer's logo or intellectual property, such chill would have only a peripheral effect on Section 7

[44] *See Cellco Partnership d/b/a Verizon Wireless*, 365 NLRB No. 38, slip op. at 11–12 (Miscimarra, dissenting).

[45] *Boch Honda*, 362 NLRB No. 83, slip op. at 1–2 (Apr. 30, 2015) (finding rule unlawful under *Lutheran Heritage*), *enforced*, 826 F.3d 558 (1st Cir. 2016).

[46] *Giant Food LLC*, Case 05-CA-064793, et al., Advice Memorandum dated Mar. 21, 2012, at 4 (finding that under *Lutheran Heritage* this rule was unlawfully overbroad).

rights. While employees might refrain from using the logo as part of their protected concerted activity, it would not stop the protected concerted activity itself.

Legitimate Justifications: Employers have a significant interest in protecting their intellectual property, including logos, trademarks, and service marks. Such property can be worth millions of dollars and be central to a company's business model. Failure to police the use of such property can result in its loss, which can be a crippling blow to a company. Employers also have an interest in ensuring that employee social media posts and other publications do not appear to be official via the presence of the employer's logo.

Balance: Because rules against the use of logos and intellectual property generally will not cause employees to refrain from NLRA-protected activity, and even if they did the employer's legitimate interests would outweigh the peripheral Section 7 rights at issue, this type of rule should be in Category 1.

H. Rules Requiring Authorization to Speak for Company

Rules requiring authorization to speak for the company or requiring that only certain persons speak for the company fall into Category 1. Examples of such rules are:

- The company will respond to media requests for the company's position *only* through the designated spokespersons.

- Employees are not authorized to comment for the Employer.

Impact on NLRA Rights: Where the rule merely regulates who may speak on behalf of the company, there will normally be no impact on Section 7 rights.

Legitimate Justifications: Employers have a significant interest in ensuring that only authorized employees speak for the company. Controlling a company's message in response to a crisis or other developing events can be vital to weathering the crisis, and doing so often demands that only a prepared spokesperson or public relations firm comments for the employer. This is especially true for media companies or other employers that regularly find themselves in the public eye.

Balance: Absent any impact on Section 7 rights, and in light of the substantial employer interests at stake, rules of this type should fall in Category 1.

I. Rules Banning Disloyalty, Nepotism, or Self-Enrichment

Rules banning these types of conflicts of interest have generally been deemed lawful, even prior to *Boeing*:

- Employees may not engage in conduct that is "disloyal . . . competitive, or damaging to the company" such as "illegal acts in restraint of trade" or "employment with another employer."[47]

- Employees are banned from activities or investments . . . that compete with the Company, interferes with one's judgment concerning the Company's best interests, or exploits one's position with the Company for personal gain.

Impact on NLRA Rights: The Board has historically interpreted rules banning disloyalty and blatant conflicts of interest to not have any meaningful impact on Section 7 rights.

Legitimate Justifications: Employers have a legitimate and substantial interest in preventing conflicts of interest such as nepotism, self-dealing, or maintaining a financial interest in a competitor. Such usurpation of corporate opportunities, pitting the pecuniary interest of employees against their employer's, can have a serious detrimental effect on an employer's revenue. Conflicts of interest can also undermine a company's reputation and integrity, and cause employees to doubt the fairness of personnel actions. Financial institutions, law offices, and other professional industries will likely have particularly significant reasons for avoiding these types of conflicts of interest.

Balance: Since rules banning these types of activity do not meaningfully implicate Section 7 rights, and are substantially justified by legitimate employer interests, these types of rules fall in Category 1.

Note that where a conflict of interest rule goes beyond restricting these types of activities, it will fall in Category 2 or 3, below.

Category 2: Rules Warranting Individualized Scrutiny

Rules in this category are not obviously lawful or unlawful, and must be evaluated on a case-by-case basis to determine whether the rule would interfere with rights guaranteed by the NLRA, and if so, whether any adverse impact on those rights is outweighed by legitimate justifications.

[47] *Tradesmen International*, 338 NLRB 460, 460 (2002).

Often, the legality of such rules will depend on context. In interpreting the context of rules, the Board has noted that general or conclusory prohibitions do not have to be perfect, and do not have to anticipate and catalogue every instance in which activity covered by the rule might be protected by Section 7.[48] Rather, such rules should be viewed as they would by employees who interpret work rules as they apply to the everydayness of their job.[49] Other contextual factors include the placement of the rule among other rules, the kinds of examples provided, and the type and character of the workplace. Finally, the Board in *Boeing* noted that evidence that a rule has actually caused employees to refrain from Section 7 activity is a useful interpretive tool.[50]

Some of the rules in this category clearly would be read to preclude some Section 7 activity, and the key question then is whether the employer's particular business interest in having the rule outweighs the impact on Section 7 rights. In considering that question, the ease with which an employer could tailor the rule to accommodate both its business interests and employees' Section 7 rights should be a relevant factor.

In the absence of any Board jurisprudence applying *Boeing* to a Category 2 rule, Regions should submit all Category 2 rules to Advice. The submissions may be in the form of an email, outline, or brief memorandum. Regardless of format, the submission should include the rule at issue and any related rules, the employer's asserted justification for the rule, any evidence of the rule actually chilling employee protected conduct, and pertinent past enforcement of the rule. The submission should also include any factors raised by the parties or identified by the Region that weigh in favor of either the rule's negative impact on protected concerted activity or the employer's legitimate business interests furthered by the rule. Finally, the submission should include the Region's proposed balancing of the factors and recommended conclusion.

Some possible examples of Category 2 rules are:

- Broad conflict-of-interest rules that do not specifically target fraud and self-enrichment (*see* Section 1-I, above) and do not restrict membership in, or voting for, a union (*see* Section 3-B, below)

[48] *See Boeing Co.*, 365 NLRB No. 154, slip op. at 9, n.41.

[49] *See Boeing Co.*, 365 NLRB No. 154, slip op. at 3, n.14 (Kaplan, concurring) (quoting *T-Mobile USA, Inc. v. NLRB*, 865 F.3d 265, 271 (5th Cir. 2017)).

[50] *See id.*, slip op. at 15.

- Confidentiality rules broadly encompassing "employer business" or "employee information" (as opposed to confidentiality rules regarding customer or proprietary information, *see* Section 1-E, above, or confidentiality rules more specifically directed at employee wages, terms of employment, or working conditions, *see* Section 3-A, below)

- Rules regarding disparagement or criticism of the *employer* (as opposed to civility rules regarding disparagement of employees, *see* Section 1-A, above)

- Rules regulating use of the employer's name (as opposed to rules regulating use of the employer's logo/trademark, *see* Section 1-G, above)

- Rules generally restricting speaking to the media or third parties (as opposed to rules restricting speaking to the media *on the employer's behalf*, *see* Section 1-H, above)

- Rules banning off-duty conduct that might harm the employer (as opposed to rules banning insubordinate or disruptive conduct at work, *see* Sections 1-C and 1-D, above, or rules specifically banning participation in outside organizations, *see* Section 3-B, below)

- Rules against making false or inaccurate statements (as opposed to rules against making defamatory statements, *see* Section 1-F, above)

Category 3: Rules that are Unlawful to Maintain

Rules in this category are generally unlawful because they would prohibit or limit NLRA-protected conduct, and the adverse impact on the rights guaranteed by the NLRA outweighs any justifications associated with the rule. Regions should issue complaint on these rules, absent settlement. However, if a Region believes that special circumstances render lawful a rule that normally would fall in Category 3, it should submit the case to Advice.

A. Confidentiality Rules Specifically Regarding Wages, Benefits, or Working Conditions

The Board has placed this type of rule in Category 3.[51] The following are examples of some confidentiality rules that Chairman Miscimarra stated would be unlawful under his *William Beaumont* test, and that should be included in Category 3:

[51] *Boeing Co.*, 365 NLRB No. 154, slip op. at 15.

- Employees are prohibited from disclosing "salaries, contents of employment contracts . . . ."[52]

- Employees shall not disclose "any information pertaining to the wages, commissions, performance, or identity of employees of the Employer."[53]

In addition, rules that expressly prohibit discussion of working conditions or other terms of employment should be considered Category 3 rules, for substantially the same reasons.

- Employees are prohibited from disclosing to "any media source" information "regarding employment at [Employer], the workings and conditions of [Employer], or any . . . staff member."[54]

Impact on NLRA Rights: Most discussion of wages and benefits will likely be protected and concerted. Moreover, discussions and coordination between employees, unions, and others regarding working conditions and wages is a core NLRA right.

Legitimate Justifications: There are no legitimate interests in banning employees from discussing wages or working conditions that are sufficient to overcome Section 7 rights.

Balance: This type of rule has a serious adverse impact on the central NLRA right of employees to contact one another and discuss working conditions and employment disputes, which is not outweighed by any employer interest, and is thus always unlawful.[55]

[52] *Long Island Association for AIDS Care, Inc.*, 364 NLRB No. 28, slip op. at 1 n.5 (June 14, 2016) (although the majority found this rule unlawful pursuant to *Lutheran Heritage*, Chairman Miscimarra, concurring, would have found it unlawful under his *William Beaumont* dissent).

[53] *Schwan's Home Service*, 364 NLRB No. 20, slip op. at 17 (June 10, 2016) (Miscimarra concurring).

[54] *Long Island Association for AIDS Care, Inc.,* 364 NLRB No. 28, slip op. at 1 n.5.

[55] *Boeing Co.*, 365 NLRB No. 154, slip op. at 15.

B. Rules Against Joining Outside Organizations or Voting on Matters Concerning Employer

Impact on NLRA Rights: Rules regulating membership in outside organizations cover some unprotected activity, but also clearly encompass protected activity. A core aspect of protected concerted activity under the NLRA is that employees may desire to have "outside organizations," specifically unions, represent them.[56] Where an employer's conflict-of-interest policy includes a rule that would be interpreted as restricting membership or work for a union, it would naturally cause more timid employees to refrain from such activity.[57] Employees may be more reluctant to go to meetings, sign authorization cards, or join employee committees. For instance, in *Cellco Partnership*, Chairman Miscimarra, concurring with the Board majority, argued that under his *William Beaumont* test a rule banning membership in an outside organization that might interfere with work was unlawful, since employees would readily understand such a rule to apply to unions.[58] Similarly in *Cellco*, Chairman Miscimarra concurred with the Board majority that a rule requiring employees to remove themselves from discussing or voting on any matters concerning the employer was also unlawful.[59] Thus, bans or other limitations on membership in, or work for, outside organizations that would be interpreted as covering unions will have a significant impact on core rights under the Act.

Legitimate Justifications: Employers have a legitimate and substantial interest in preventing nepotism, self-dealing, fraud, or maintaining a financial interest in a competitor, and rules against these "conflict of interest" activities fall in Category 1, above. However, rules specifically prohibiting membership in outside organizations or participation in any "voting" concerning the employer do not address those concerns, or at least do not address them narrowly so as to accommodate legitimate concerns without infringing on significant Section 7 rights.

Balance: If a rule is so broad as to be reasonably read as banning joining a union, the impact on core Section 7 rights will be significant. Where the employer's legitimate

[56] *Cellco Partnership d/b/a Verizon Wireless*, 365 NLRB No. 38, slip op. at 10 (Feb. 23, 2017) (Miscimarra, concurring).

[57] *See id.* (while the Board in this case found the conflict of interest rule unlawful under *Lutheran Heritage*, Chairman Miscimarra, in concurrence, would have found it unlawful under his *William Beaumont* test).

[58] *Id.*

[59] *Id.*

goals can be served by a narrower rule, an overbroad rule should be unlawful. Because employers can achieve their goal of preventing self-dealing and other business conflicts of interest without banning membership in outside organizations, and because the right to join a union is a fundamental right under the Act, such a rule will always be unlawful.

Please contact the Division of Advice, or your AGC in Operations, if you have questions about this Memorandum.

NLRB RULEMAKING ON JOINT EMPLOYER STATUS

NLRB Further Extends Time for Submitting Comments on Proposed Joint-Employer Rulemaking

Office of Public Affairs
202-273-1991
publicinfo@nlrb.gov
www.nlrb.gov

December 10, 2018

The National Labor Relations Board is extending the time for submitting comments regarding its proposed rulemaking to address its joint-employer standard for an additional 30 days. **The submission window is currently open and interested parties may now file comments on or before Monday, January 14, 2019**. Comments replying to the comments submitted during the initial comment period must be received by the Board on or before **January 22, 2019**.

Public comments are invited on all aspects of the proposed rule and should be submitted either electronically to www.regulations.gov, or by mail or hand-delivery to Roxanne Rothschild, Acting Executive Secretary, National Labor Relations Board, 1015 Half Street S.E., Washington, D.C. 20570-0001.

Click here to read the request for comments in the Federal Register.

Click here to read the original announcement regarding the Notice of Proposed Rule-Making.

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News

Board Rescinds Invitation to File Briefs in Loshaw Thermal Technology
December 14, 2018

NLRB Further Extends Time for Submitting Comments on Proposed Joint-Employer Rulemaking
December 10, 2018

Fred B. Jacob Named NLRB Solicitor
December 10, 2018

Board Proposes Rule to Change its Joint-Employer Standard

Office of Public Affairs
202-273-1991
publicinfo@nlrb.gov
www.nlrb.gov

September 13, 2018

WASHINGTON, DC — The National Labor Relations Board will publish a Notice of Proposed Rulemaking tomorrow in the Federal Register regarding its joint-employer standard. Under the proposed rule, an employer may be found to be a joint-employer of another employer's employees only if it possesses and exercises substantial, direct and immediate control over the essential terms and conditions of employment and has done so in a manner that is not limited and routine. Indirect influence and contractual reservations of authority would no longer be sufficient to establish a joint-employer relationship.

As explained in the Notice, rulemaking in this important area of the law would foster predictability, consistency and stability in the determination of joint-employer status. The proposed rule reflects the Board majority's initial view, subject to potential revision in response to public comments, that the National Labor Relations Act's intent is best supported by a joint-employer doctrine that does not draw third parties, who have not played an active role in deciding wages, benefits, or other essential terms and conditions of employment, into a collective-bargaining relationship for another employer's employees.

In announcing the proposed rule, Board Chairman John F. Ring stated, "I look forward to receiving the public's comments and to working with my colleagues to promulgate a final rule that clarifies the joint-employer standard in a way that promotes meaningful collective bargaining and advances the purposes of the Act."

Chairman Ring was joined by Board Members Marvin E. Kaplan, and William J. Emanuel in proposing the new joint-employer standard. Board Member Lauren McFerran dissented.

Public comments are invited on all aspects of the proposed rule and should be submitted within 60 days of the Notice's publication in the Federal Register, either electronically to www.regulations.gov, or by mail or hand-delivery to Roxanne Rothschild, Deputy Executive Secretary, National Labor Relations Board, 1015 Half Street S.E., Washington, D.C. 20570-0001.

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

Any person wishing to comment on any ongoing rulemaking by the National Labor Relations Board must do so in accordance with the applicable Notice of Proposed Rulemaking. Communications submitted in any other manner, including comments on this website, will not be considered by the Board.

Click here to view the Fact Sheet.

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NLRB Further Extends Time for Submitting Comments on Proposed Joint-Employer Rulemaking
December 10, 2018

Fred B. Jacob Named NLRB Solicitor
December 10, 2018

NLRB Issues Strategic Plan for FY 2019 to FY 2022
December 7, 2018

NLRB Region 21 Office in Los Angeles Moving to New Location, Office to be Closed to the Public Friday and Monday for Move
November 1, 2018

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NLRB FACT SHEET

Proposed Rule Regarding the Standard for Determining Joint-Employer Status

OVERVIEW

The National Labor Relations Board's (NLRB) proposed rule would change the standard for determining whether one employer can be found to be a joint employer of another employer's employees.

AT-A-GLANCE

- The proposed rule reflects a return to the previously longstanding standard that an employer may be considered a joint employer of another employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction.

- The intent of the proposed rule is to foster predictability and consistency regarding determinations of joint-employer status in a variety of business relationships, thereby promoting labor-management stability.

- Since 2015, there has been instability in the law regarding whether a company shares or codetermines the essential terms and conditions of another employer's employees when it indirectly influences those terms and conditions, has never invoked a contractual reservation of authority to set them, or has exercised authority that is merely "limited and routine," such as by instructing employees where and when to perform work, but not how to perform it.

- The change to current law that would be effectuated by the proposed rule, should it become final after notice and comment, would be that a company could no longer be deemed to be a joint employer of another employer's workers based solely on its indirect influence, a contractual reservation of authority that the company has never exercised, or its exercise of only "limited and routine" authority.

- Under the National Labor Relations Act, the legal consequences of a joint-employer finding are significant. The Board may compel a joint employer to bargain over the terms and conditions of employees employed by another employer. Also, each company comprising the joint employer may be found jointly and severally liable for the other's unfair labor practices. And a finding of joint-employer status may determine whether picketing directed at a particular business is primary and lawful, or secondary and unlawful.

- The proposed rule reflects the Board's initial view, subject to potential revision in response to comments, that the Act's purposes would not be furthered by drawing into a collective-bargaining relationship, or exposing to joint-and-several liability, the business partner of an employer where the business partner does not actively participate in decisions setting the employees' wages, benefits, and other essential terms and conditions of employment.

ADDITIONAL INFORMATION

The Board seeks public comment on all aspects of its proposed rule. As specified in the Notice of Proposed Rulemaking, published in the Federal Register on September 14, 2018, public comments may be submitted electronically or in hard copy.

The proposed rule may be found at:
https://www.federalregister.gov/documents/2018/09/14/2018-19930/definition-of-joint-employer

The Board will review the public comments and work to promulgate a final rule that clarifies the joint-employer standard in a way that promotes meaningful collective bargaining and advances the purposes of the Act.

(c) Applicability

This AD applies to all Zodiac Seats France, 536-Series Cabin Attendant Seats, part number (P/N) 53600, all dash numbers, all serial numbers. These appliances are installed on, but not limited to, Avions de transport regional (ATR) 42 and ATR 72 airplanes of U.S. registry.

(d) Subject

Joint Aircraft System Component (JASC) Code 2500, Cabin Equipment/Furnishings.

(e) Unsafe Condition

This AD was prompted by corrosion found on the seat structure or on clamps of the Zodiac Seats France 536-Series Cabin Attendant Seats. We are issuing this AD to prevent failure of these seats. The unsafe condition, if not addressed, could result in failure of the seat occupied by the cabin attendant, and possible injury to the seat occupant.

(f) Compliance

Comply with this AD within the compliance times specified, unless already done.

(g) Required Actions

(1) Within 14 months after the first installation of the seat on an aircraft, or within three months after the effective date of this AD, whichever occurs later, remove the seat from the aircraft and perform a detailed visual inspection in accordance with the Accomplishment Instructions, Paragraph 2.B., of Zodiac Seats France Service Bulletin (SB) No. 536–25–002, Revision 3, dated September 30, 2016. If the date of the first installation of a seat on an airplane is unknown, use the date of manufacture of the seat (which can be found on the ID placard of the seat) to determine when the inspection must be accomplished.

(2) Within three months after the inspection required by paragraph (g)(1) of this AD, and, thereafter, at intervals not to exceed three months, perform a detailed visual inspection in accordance with the Accomplishment Instructions, Paragraphs 2.A. and 2.B., of Zodiac Seats France SB No. 536–25–002, Revision 3, dated September 30, 2016.

(3) If corrosion or other damage is found, before further flight or before reinstallation of the seat on an aircraft, as applicable, repair the seat in accordance with the Accomplishment Instructions, Paragraphs 2.B. and 2.C., of Zodiac Seats France SB No. 536–25–002, Revision 3, dated September 30, 2016.

(4) Temporarily stowing and securing a damaged attendant seat in a retracted position to prevent occupancy, in accordance with the provisions and limitations applicable Master Minimum Equipment List item, is an acceptable alternative method to defer compliance with the requirements of paragraph (g)(3) of this AD.

(h) Installation Prohibition

After the effective date of this AD, do not install an affected Zodiac Seats France 536-Series Cabin Attendant Seat on any aircraft, unless having accumulated more than 14 months since first installation on any aircraft, provided that before installation, it has passed an inspection in accordance with the Accomplishment Instructions, Paragraph 2.B., of Zodiac Seats France SB No. 536–25–002, Revision 3, dated September 30, 2016.

(i) Credit for Previous Actions

You may take credit for actions required by paragraph (g) of this AD if you performed these actions before the effective date of this AD using Zodiac Seats France SB No. 536–25–002, Revision 2, dated August 29, 2016.

(j) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Boston ACO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO Branch, send it to the attention of the person identified in paragraph (k)(1) of this AD.

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(k) Related Information

(1) For more information about this AD, contact Dorie Resnik, Aerospace Engineer, Boston ACO Branch, FAA, 1200 District Avenue, Burlington, MA, 01803; phone: 781–238–7693; fax: 781–238–7199; email: *dorie.resnik@faa.gov.*

(2) Refer to European Aviation Safety Agency AD 2016–0167, dated August 17, 2016, for more information. You may examine the EASA AD in the AD docket on the internet at *http://www.regulations.gov* by searching for and locating it in Docket No. FAA–2017–0839.

(3) For service information identified in this AD, contact Zodiac Service Europe, 61, rue Pierre Curie, 78 373 Plaisir, France; phone: +33 (0)1 61 34 19 58; email: *zs.aog@zodiacaerospace.com;* website: *https://www.zodiacaerospace.com/en/zodiac-aerospace-services/contacts.* You may view this referenced service information at the FAA, Engine and Propeller Standards Branch, 1200 District Avenue, Burlington, MA, 01803. For information on the availability of this material at the FAA, call 781–238–7759.

Issued in Burlington, Massachusetts, on September 5, 2018.

Robert J. Ganley,

Manager, Engine and Propeller Standards Branch, Aircraft Certification Service.

[FR Doc. 2018–19797 Filed 9–13–18; 8:45 am]

BILLING CODE 4910–13–P

NATIONAL LABOR RELATIONS BOARD

29 CFR Chapter I

RIN 3142–AA13

The Standard for Determining Joint-Employer Status

AGENCY: National Labor Relations Board.

ACTION: Notice of proposed rulemaking; request for comments.

SUMMARY: In order to more effectively enforce the National Labor Relations Act (the Act or the NLRA) and to further the purposes of the Act, the National Labor Relations Board (the Board) proposes a regulation establishing the standard for determining whether two employers, as defined in Section 2(2) of the Act, are a joint employer of a group of employees under the NLRA. The Board believes that this rulemaking will foster predictability and consistency regarding determinations of joint-employer status in a variety of business relationships, thereby promoting labor-management stability, one of the principal purposes of the Act. Under the proposed regulation, an employer may be considered a joint employer of a separate employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction. More specifically, to be deemed a joint employer under the proposed regulation, an employer must possess and actually exercise substantial direct and immediate control over the essential terms and conditions of employment of another employer's employees in a manner that is not limited and routine.

DATES: Comments regarding this proposed rule must be received by the Board on or before November 13, 2018. Comments replying to comments submitted during the initial comment period must be received by the Board on or before November 20, 2018. Reply comments should be limited to replying to comments previously filed by other parties. No late comments will be accepted.

ADDRESSES:

Internet—Federal eRulemaking Portal. Electronic comments may be submitted through *http://www.regulations.gov.*

Delivery—Comments should be sent by mail or hand delivery to: Roxanne Rothschild, Associate Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570–0001. Because of security

precautions, the Board continues to experience delays in U.S. mail delivery. You should take this into consideration when preparing to meet the deadline for submitting comments. The Board encourages electronic filing. It is not necessary to send comments if they have been filed electronically with *regulations.gov.* If you send comments, the Board recommends that you confirm receipt of your delivered comments by contacting (202) 273–2917 (this is not a toll-free number). Individuals with hearing impairments may call 1–866–315–6572 (TTY/TDD).

Only comments submitted through *http://www.regulations.gov,* hand delivered, or mailed will be accepted; ex parte communications received by the Board will be made part of the rulemaking record and will be treated as comments only insofar as appropriate. Comments will be available for public inspection at *http://www.regulations.gov* and during normal business hours (8:30 a.m. to 5 p.m. EST) at the above address.

The Board will post, as soon as practicable, all comments received on *http://www.regulations.gov* without making any changes to the comments, including any personal information provided. The website *http://www.regulations.gov* is the Federal eRulemaking portal, and all comments posted there are available and accessible to the public. The Board requests that comments include full citations or internet links to any authority relied upon. The Board cautions commenters not to include personal information such as Social Security numbers, personal addresses, telephone numbers, and email addresses in their comments, as such submitted information will become viewable by the public via the *http://www.regulations.gov* website. It is the commenter's responsibility to safeguard his or her information. Comments submitted through *http://www.regulations.gov* will not include the commenter's email address unless the commenter chooses to include that information as part of his or her comment.

FOR FURTHER INFORMATION CONTACT: Roxanne Rothschild, Associate Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570–0001, (202) 273–2917 (this is not a toll-free number), 1–866–315–6572 (TTY/TDD).

SUPPLEMENTARY INFORMATION: Whether one business is the joint employer of another business's employees is one of the most important issues in labor law today. There are myriad relationships between employers and their business partners, and the degree to which particular business relationships impact employees' essential terms and conditions of employment varies widely.

A determination by the Board regarding whether two separate businesses constitute a ''joint employer'' as to a group of employees has significant consequences for the businesses, unions, and employees alike. When the Board finds a joint-employer relationship, it may compel the joint employer to bargain in good faith with a Board-certified or voluntarily recognized bargaining representative of the jointly-employed workers. Additionally, each joint employer may be found jointly and severally liable for unfair labor practices committed by the other. And a finding of joint-employer status may determine whether picketing directed at a particular business is primary and lawful, or secondary and unlawful.

The last three years have seen much volatility in the Board's law governing joint-employer relationships. As detailed below, in August 2015, a divided Board overruled longstanding precedent and substantially relaxed the evidentiary requirements for finding a joint-employer relationship. *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery,* 362 NLRB No. 186 (2015) (*Browning-Ferris*), petition for review docketed *Browning-Ferris Indus. of Cal.* v. *NLRB,* No. 16–1028 (D.C. Cir. filed Jan. 20, 2016). Then, in December 2017, a different Board majority restored the prior, more stringent standard. In February 2018, the Board vacated its December 2017 decision, effectively changing the law back again to the relaxed standard of *Browning-Ferris.* A petition for review challenging *Browning-Ferris*'s adoption of the relaxed standard as beyond the Board's statutory authority is currently pending in the United States Court of Appeals for the District of Columbia Circuit. In light of the continuing uncertainty in the labor-management community created by these adjudicatory variations in defining the appropriate joint-employer standard under the Act, and for the reasons explained below, the Board proposes to address the issue through the rulemaking procedure.

I. Background

Under Section 2(2) of the Act, ''the term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [45 U.S.C. 151 *et seq.*], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.'' Under Section 2(3) of the Act, ''the term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter [of the Act] explicitly states otherwise . . . .''

Section 7 of the Act grants employees ''the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .'' Section 8(a)(1) of the Act makes it an unfair labor practice for an employer ''to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7],'' and Section 8(a)(5) of the Act makes it an unfair labor practice for an employer ''to refuse to bargain collectively with the representatives of *his* employees . . . .'' (emphasis added).

The Act does not contain the term ''joint employer,'' much less define it, but the Board and reviewing courts have over the years addressed situations where the working conditions of a group of employees are affected by two separate companies engaged in a business relationship. *Boire* v. *Greyhound Corp.,* 376 U.S. 473 (1964) (holding that Board's determination that bus company possessed ''sufficient control over the work'' of its cleaning contractor's employees to be considered a joint employer was not reviewable in federal district court); *Indianapolis Newspapers, Inc.,* 83 NLRB 407, 408–409 (1949) (finding that two newspaper businesses, Star and INI, were not joint employers, despite their integration, because ''there [wa]s no indication that Star, by virtue of such integration, t[ook] an active part in the formulation or application of the labor policy, or exercise[d] any immediate control over the operation, of INI'').

When distinguishing between an ''employee'' under Section 2(3) of the Act and an ''independent contractor'' excluded from the Act's protection, the Supreme Court has explained that the Board is bound by common-law principles, focusing on the control exercised by one employer over a person performing work for it. *NLRB* v. *United Insurance Co. of America,* 390 U.S. 254, 256 (1968); see also *Nationwide Mutual Insurance Co.* v. *Darden,* 503 U.S. 318, 322–323 (1992)

(''[W]hen Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common law agency doctrine.'') (citations omitted). Similarly, it is clear that the Board's joint-employer standard, which necessarily implicates the same focus on employer control, must be consistent with the common law agency doctrine.

The Development of the Joint-Employment Doctrine Under the NLRA

Under the Act, there has been a longstanding consensus regarding the general formulation of the Board's joint-employer standard: Two employers are a joint employer if they share or codetermine those matters governing the employees' essential terms and conditions of employment. See *CNN America, Inc.,* 361 NLRB 439, 441, 469 (2014), enf. denied in part 865 F.3d 740 (D.C. Cir. 2017); *Southern California Gas Co.,* 302 NLRB 456, 461 (1991). The general formulation derives from language in *Greyhound Corp.,* 153 NLRB 1488, 1495 (1965), enfd. 368 F.2d 778 (1966), and was endorsed in *NLRB* v. *Browning-Ferris Industries,* 691 F.2d 1117, 1122–1123 (3d Cir. 1982), where the United States Court of Appeals for the Third Circuit carefully explained the differences between the Board's joint-employer and single-employer doctrines, which had sometimes been confused.[1]

At certain points in its history, the Board has discussed the relevance of an employer's direct control over the essential employment conditions of another company's employees, as compared with its indirect control or influence, in determining whether joint-employer status has been established. For example, in *Floyd Epperson,* 202 NLRB 23, 23 (1973), enfd. 491 F.2d 1390 (6th Cir. 1974), the Board found that a dairy company (United) was the joint employer of truck drivers supplied to it by an independent trucking firm (Floyd Epperson) based on evidence of both United's direct control and indirect control over the working conditions of Epperson's drivers. The Board relied on ''all the circumstances'' of the case, including the fact that United dictated the specific routes that Epperson's drivers were required to take when transporting its goods, ''generally supervise[d]'' Epperson's drivers, and had authority to modify their work schedules. Id. at 23. The Board also relied in part on United's ''indirect control'' over the drivers' wages and discipline.[2] Id. Importantly, in *Floyd Epperson* and like cases, the Board was not called upon to decide, and did not assert, that a business's indirect influence over another company's workers' essential working conditions, standing alone, could establish a joint-employer relationship.[3]

In fact, more recently, the Board, with court approval, has made clear that ''the essential element'' in a joint-employer analysis ''is whether a putative joint employer's control over employment matters is direct and immediate.'' *Airborne Express,* 338 NLRB 597, 597 fn. 1 (2002) (citing *TLI, Inc.,* 271 NLRB 798, 798–799 (1984), enfd. mem. sub nom. *General Teamsters Local Union No. 326* v. *NLRB,* 772 F.2d 894 (3d Cir. 1985)); see also *NLRB* v. *CNN America, Inc.,* 865 F.3d 740, 748–751 (D.C. Cir. 2017) (finding that Board erred by failing to adhere to the Board's ''direct and immediate control'' standard); *SEIU Local 32BJ* v. *NLRB,* 647 F.3d 435, 442–443 (2d Cir. 2011) ('''An essential element' of any joint employer determination is 'sufficient evidence of immediate control over the employees.' '') (quoting *Clinton's Ditch Co-op Co.* v. *NLRB,* 778 F.2d 132, 138 (2d Cir. 1985)); *Summit Express, Inc.,* 350 NLRB 592, 592 fn. 3 (2007) (finding that the General Counsel failed to prove direct and immediate control and therefore dismissing joint-employer allegation); *Laerco Transportation,* 269 NLRB 324 (1984) (dismissing joint-employer allegation where user employer's supervision of supplied employees was limited and routine).

Accordingly, for at least 30 years (from no later than 1984 to 2015), evidence of indirect control was typically insufficient to prove that one company was the joint employer of another business's workers. Even direct and immediate supervision of another's employees was insufficient to establish joint-employer status where such supervision was ''limited and routine.'' *Flagstaff Medical Center, Inc.,* 357 NLRB 659, 667 (2011); *AM Property Holding Corp.,* 350 NLRB 998, 1001 (2007), enfd. in relevant part sub nom. *SEIU, Local 32 BJ* v. *NLRB,* 647 F.3d 435 (2d Cir. 2011); *G. Wes Ltd. Co.,* 309 NLRB 225, 226 (1992). The Board generally found supervision to be limited and routine where a supervisor's instructions consisted mostly of directing another business's employees what work to perform, or where and when to perform the work, but not how to perform it. *Flagstaff Medical Center,* 357 NLRB at 667.

The Board's treatment of a company's contractually reserved authority over an independent company's employees also evolved over the years. In the 1960s, the Board found that a contractual reservation of authority, standing alone, could establish a joint-employer relationship even where that reserved authority had never been exercised. For example, in *Jewel Tea Co.,* 162 NLRB 508, 510 (1966), the Board found that a department store (the licensor) was a joint employer of the employees of two independent companies licensed to operate specific departments of its store. The text of the license agreements between the store and the departments provided, inter alia, that ''employees shall be subject to the general

[1] As the Third Circuit explained, a ''single employer'' relationship exists where two nominally separate employers are actually part of a single integrated enterprise so that, for all purposes, there is in fact only a ''single employer.'' The question in the ''single employer'' situation, then, is whether two nominally independent enterprises constitute, in reality, only *one integrated enterprise.* In answering that question, the Board examines four factors: (1) Functional integration of the operations; (2) centralized control of labor relations; (3) common management; and (4) common ownership. In contrast, the ''joint employer'' concept assumes that the two companies are indeed independent employers, and the four-factor standard is inapposite. Rather, as stated above, the Board has analyzed whether the two separate employers share or codetermine essential terms and conditions of employment.

[2] In *Floyd Epperson,* the Board found that United had indirect control over the drivers' wages because wage increases to Epperson's drivers came from raises given by United to Epperson, a sole proprietor. The Board found that United had indirect influence over discipline because Epperson replaced a certain driver on a route after United complained that the driver had been constantly late. 202 NLRB at 23.

[3] See also *Sun-Maid Growers of California,* 239 NLRB 346 (1978) (finding that food-processing company was joint employer of maintenance electricians supplied by a subcontractor where company actually directed electricians by making specific assignments to individual electricians and determined which of those assignments took precedence when all could not be timely completed; the Board also relied on indirect impact on other terms), enfd. 618 F.2d 56 (9th Cir. 1980); *Hamburg Industries, Inc.,* 193 NLRB 67, 67 (1971) (finding remanufacturer of railroad cars was a joint employer of labor force supplied by subcontractor where remanufacturer used subcontractor's supervisors as conduit to convey work instructions while ''constantly check[ing] the *performance* of the workers and the quality of the work'' and where remanufacturer also indirectly affected employees' other terms) (emphasis added). The Board's decision in *Clayton B. Metcalf,* 223 NLRB 642 (1976), appears to be the closest the Board has come to finding a joint-employment relationship in the absence of some exercise of direct and immediate control over essential terms. There, the Board found that a mine operator did not exercise direct supervisory authority over the employees of a subcontractor engaged to remove ''overburden'' atop coal seams. However, the Board found that the subcontractor's entire operation in removing the overburden, as well as other collateral duties performed by it, depended entirely on the mine operator's site plan, and, ''[a]s a result, [the mine operator] exercised considerable control over *the manner and means* by which [the subcontractor] performed its operations.'' Id. at 644 (emphasis added).

supervision of the licensor,'' that the licensee ''shall at all times conform to a uniform store policy with reference to wages, hours and terms, and conditions of employment for all sales and stock personnel,'' that the licensor shall approve employees hired by the licensee, and that the licensor ''may request discharge and the licensee will immediately comply with such request.'' The Board found it ''clear beyond doubt'' that the license agreements gave the store the ''power to control effectively the hire, discharge, wages, hours, terms, and other conditions of employment'' of the other two companies' employees. According to the Board, ''[t]hat the licensor has not exercised such power is not material, for an operative legal predicate for establishing a joint-employer relationship is a reserved right in the licensor to exercise such control, and we find such right of control adequately established by the facts set out above.'' Id.; see also *Thriftown, Inc.,* 161 NLRB 603, 607 (1966) (''Since the power to control is present by virtue of the operating agreement, whether or not exercised, we find it unnecessary to consider the actual practice of the parties regarding these matters as evidenced by the record.'').

However, even during the same period, not all contractual reservations of authority were found sufficient to establish a joint-employer relationship. For example, in *Hy-Chem Constructors, Inc.,* 169 NLRB 274 (1968), the Board found that a petrochemical manufacturer was not a joint employer of its construction subcontractor's employees even though their cost-plus agreement reserved to the manufacturer a right to approve wage increases and overtime hours and the right to require the subcontractor to remove any employee whom the manufacturer deemed undesirable. The Board found that the first two reservations of authority ''are consistent with the [manufacturer's] right to police reimbursable expenses under its cost-plus contract and do not warrant the conclusion that [the manufacturer] has thereby forged an employment relationship, joint or otherwise, with the [subcontractor's] employees.'' Id. at 276. Additionally, the Board found the manufacturer's ''yet unexercised prerogative to remove an undesirable . . . employee'' did not establish a joint-employment relationship. Id.

Over time, the Board shifted position, without expressly overruling precedent, and held that joint-employer status could not be established by the mere existence of a clause in a business contract reserving to one company authority over its business partner's employees absent evidence that such authority had ever been exercised. For example, in *AM Property Holding Corp.,* the Board found that a ''contractual provision giving [a property owner] the right to approve [its cleaning contractor's] hires, standing alone, is insufficient to show the existence of a joint employer relationship.'' 350 NLRB at 1000. The Board explained that ''[i]n assessing whether a joint employer relationship exists, the Board does not rely merely on the existence of such contractual provisions, but rather looks to the actual practice of the parties.'' Id. (citing *TLI,* 271 NLRB at 798–799). Because the record in *AM Property* failed to show that the property owner had ever actually participated in the cleaning contractor's hiring decisions, the Board rejected the General Counsel's contention that the two employers constituted a joint employer. See also *Flagstaff Medical Center,* 357 NLRB at 667 (finding that business contract's reservation of hospital's right to require its subcontractor to ''hire, discharge, or discipline'' any of the subcontractor's employees did not establish a joint-employer relationship absent evidence that the hospital had ever actually exercised such authority); *TLI,* 271 NLRB at 798–799 (finding that paper company's actual practice of only limited and routine supervision of leased drivers did not establish a joint-employer relationship despite broad contractual reservation of authority that paper company ''will solely and exclusively be responsible for maintaining operational control, direction and supervision'' over the leased drivers).

The law governing joint-employer relationships changed significantly in August 2015. At that time, a divided Board overruled the then-extant precedent described above and substantially relaxed the requirements for proving a joint-employer relationship. Specifically, a Board majority explained that it would no longer require proof that a putative joint employer has exercised any ''direct and immediate'' control over the essential working conditions of another company's workers. *Browning-Ferris,* 362 NLRB No. 186, slip op. at 2, 13–16. The majority in *Browning-Ferris* explained that, under its new standard, a company could be deemed a joint employer even if its ''control'' over the essential working conditions of another business's employees was indirect, limited and routine, or contractually reserved but never exercised. Id., slip op. at 15–16.

The *Browning-Ferris* majority agreed with the core of the Board's long-recognized joint-employer standard: whether two separate employers ''share'' or ''codetermine'' those matters governing the essential terms and conditions of employment. Elaborating on the core ''share'' or ''codetermine'' standard, the *Browning-Ferris* majority noted that, in some cases, two companies may engage in genuinely shared decision-making by conferring or collaborating directly to set an essential term or condition of employment. Alternatively, each of the two companies ''may exercise comprehensive authority over different terms and conditions of employment.'' Id., slip op. at 15 fn. 80.

While agreeing with the core standard, the *Browning-Ferris* majority believed that the Board's joint-employer precedents had become ''increasingly out of step with changing economic circumstances, particularly the recent dramatic growth in contingent employment relationships.'' Id., slip op. at 1. The *Browning-Ferris* majority's expressed aim was ''to put the Board's joint-employer standard on a clearer and stronger analytical foundation, and, within the limits set out by the Act, to best serve the Federal policy of 'encouraging the practice and procedure of collective-bargaining.' '' Id., slip op. at 2 (quoting 29 U.S.C. 151).

According to the *Browning-Ferris* majority, during the period before *Laerco* and *TLI* were decided in 1984, the Board had ''typically treated the *right* to control the work of employees and their terms of employment as probative of joint-employer status.'' Id., slip op. at 9 (emphasis in original). Also during that time, ''the Board gave weight to a putative joint employer's 'indirect' exercise of control over workers' terms and conditions of employment.'' Id. (citing *Floyd Epperson,* 202 NLRB at 23).

The *Browning-Ferris* majority viewed Board precedent, starting with *Laerco* and *TLI,* that expressly required proof of some exercise of direct and immediate control as having unjustifiably and without explanation departed from the Board's pre-1984 precedent. Specifically, the *Browning-Ferris* majority asserted that, in cases such as *Laerco, TLI, AM Property,* and *Airborne Express,* the Board had ''implicitly repudiated its earlier reliance on reserved control and indirect control as indicia of joint-employer status.'' Id., slip op. at 10. Further, the *Browning-Ferris* majority viewed those decisions as ''refus[ing] to assign *any significance* to contractual language expressly giving a putative employer the power to dictate

workers' terms and conditions of employment.'' Id. (emphasis added).

In short, the *Browning-Ferris* majority viewed Board precedent between 1984 and 2015 as having unreasonably ''narrowed'' the Board's joint-employer standard precisely when temporary and contingent employment relationships were on the rise. Id., slip op. at 11. In its view, under changing patterns of industrial life, a proper joint-employer standard should not be any ''narrower than statutorily required.'' Id. According to the *Browning-Ferris* majority, the requirement of exercise of direct and immediate control that is not limited and routine ''is not, in fact, compelled by the common law—and, indeed, seems inconsistent with common-law principles.'' Id., slip op. at 13. The *Browning-Ferris* majority viewed the common-law concept of the ''right to control'' the manner and means of a worker's job performance—used to distinguish a servant (*i.e.,* employee) from an independent contractor—as precluding, or at least counseling against, any requirement of exercise of direct and immediate control in the joint-employment context. Id.

Browning-Ferris reflects a belief that it is wise, and consistent with the common law, to include in the collective-bargaining process an employer's independent business partner that has an indirect or potential impact on the employees' essential terms and conditions of employment, even where the business partner has not itself actually established those essential employment terms or collaborated with the undisputed employer in setting them. The *Browning-Ferris* majority believed that requiring such a business partner to take a seat at the negotiating table and to bargain over the terms that it indirectly impacts (or could, in the future, impact under a contractual reservation) best implements the right of employees under Section 7 of the Act to bargain collectively through representatives of their own choosing. The *Browning-Ferris* majority conceded that deciding joint-employer allegations under its stated standard would not always be an easy task, id., slip op. at 12, but implicitly concluded that the benefit of bringing all possible employer parties to the bargaining table justified its new standard.

In dissent, two members argued that the majority's new relaxed joint-employer standard was contrary to the common law and unwise as a matter of policy. In particular, the *Browning-Ferris* dissenters argued that by permitting a joint-employer finding based solely on indirect impact, the majority had effectively resurrected intertwined theories of ''economic realities'' and ''statutory purpose'' endorsed by the Supreme Court in *NLRB* v. *Hearst Publications,* 322 U.S. 111 (1944), but rejected by Congress soon thereafter. In *Hearst,* the Supreme Court went beyond common-law principles and broadly interpreted the Act's definition of ''employee'' with reference to workers' economic dependency on a putative employer in light of the Act's goal of minimizing industrial strife. In response, Congress enacted the Taft-Hartley Amendments of 1947, excluding ''independent contractors'' from the Act's definition of ''employee'' and making clear that common-law principles control.

Additionally, the *Browning-Ferris* dissenters disagreed with the majority's understanding of the common law of joint-employment relationships. The dissenters argued that the ''right to control'' in the joint-employment context requires some exercise of direct and immediate control.

Then, accepting for argument's sake that the common law does not preclude the relaxed standard of *Browning-Ferris,* the dissenters found that practical considerations counseled against its adoption. They found the relaxed standard to be impermissibly vague and asserted that the majority had failed to provide adequate guidance regarding how much indirect or reserved authority might be sufficient to establish a joint-employment relationship. Additionally, the dissenters believed that the majority's test would ''actually foster substantial bargaining instability by requiring the nonconsensual presence of too many entities with diverse and conflicting interests on the 'employer' side.'' Id., slip op. at 23.

The *Browning-Ferris* dissenters also complained that the relaxed standard made it difficult not only to correctly identify joint-employer relationships but also to determine the bargaining obligations of each employer within such relationships. Under the relaxed standard, an employer is only required to bargain over subjects that it controls (even if the control is merely indirect). The dissenters expressed concern that disputes would arise between unions and joint employers, and even between the two employers comprising the joint employer, over which subjects each employer-party must bargain. Further, the dissenters found such fragmented bargaining to be impractical because subjects of bargaining are not easily severable, and the give-and-take of bargaining frequently requires reciprocal movement on multiple proposals to ultimately reach a comprehensive bargaining agreement. Finally, the dissenters were suspicious about the implications of *Browning-Ferris* for identifying an appropriate bargaining unit in cases involving a single supplier employer that contracts with multiple user employers and with potential subversion of the Act's protection of neutral employers from secondary economic pressure exerted by labor unions. Accordingly, the dissenters would have adhered to Board precedent as reflected in cases such as *Laerco, TLI,* and *Airborne Express.*

Recent Developments

In December 2017, after a change in the Board's composition and while *Browning-Ferris* was pending on appeal in the D.C. Circuit, a new Board majority overruled *Browning-Ferris* and restored the preexisting standard that required proof that a joint employer actually exercised direct and immediate control in a manner that was neither limited nor routine. *Hy-Brand Industrial Contractors, Ltd.,* 365 NLRB No. 156 (2017). Soon thereafter, the charging parties in *Hy-Brand* filed a motion for reconsideration. The Board granted that motion and vacated its earlier decision for reasons unrelated to the substance of the joint-employer issue, effectively returning the law to the relaxed joint-employer standard adopted in *Browning-Ferris. Hy-Brand,* 366 NLRB No. 26 (2018). Subsequently, the Board in *Hy-Brand* denied the respondents' motion for reconsideration and issued a decision finding it unnecessary to address the joint-employer issue in that case because, in any event, the two respondents constituted a single employer under Board precedent and were therefore jointly and severally liable for each other's unfair labor practices. 366 NLRB No. 93 (2018); 366 NLRB No. 94 (2018). As stated above, a petition for review of the Board's *Browning-Ferris* decision remains pending in the court of appeals.

II. Validity and Desirability of Rulemaking; Impact Upon Pending Cases

Section 6 of the Act, 29 U.S.C. 156, provides, ''The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by subchapter II of chapter 5 of Title 5 [the Administrative Procedure Act, 5 U.S.C. 553], such rules and regulations as may be necessary to carry out the provisions of this Act.'' The Board interprets Section 6 as

authorizing the proposed rule and invites comments on this issue.[4]

Although the Board historically has made most substantive policy determinations through case adjudication, the Board has, with Supreme Court approval, engaged in substantive rulemaking. *American Hospital Assn.* v. *NLRB,* 499 U.S. 606 (1991) (upholding Board's rulemaking on appropriate bargaining units in the healthcare industry); see also *NLRB* v. *Bell Aerospace Co.,* 416 U.S. 267, 294 (1974) (''[T]he choice between rulemaking and adjudication lies in the first instance within the Board's discretion.'').

The Board finds that establishing the joint-employer standard in rulemaking is desirable for several reasons. First, given the recent oscillation on the joint-employer standard, the wide variety of business relationships that it may affect (*e.g.,* user-supplier, contractor-subcontractor, franchisor-franchisee, predecessor-successor, creditor-debtor, lessor-lessee, parent-subsidiary, and contractor-consumer), and the wide-ranging import of a joint-employer determination for the affected parties, the Board finds that it would be well served by public comment on the issue. Interested persons with knowledge of these widely varying relationships can have input on our proposed change through the convenient comment process; participation is not limited, as in the adjudicatory setting, to legal briefs filed by the parties and amici. Second, using the rulemaking procedure enables the Board to clarify what constitutes the actual exercise of substantial direct and immediate control by use of hypothetical scenarios, some examples of which are set forth below, apart from the facts of a particular case that might come before the Board for adjudication. In this way, rulemaking will provide unions and employers greater ''certainty beforehand as to when [they] may proceed to reach decisions without fear of later evaluations labeling [their] conduct an unfair labor practice,'' as the Supreme Court has instructed the Board to do. *First National Maintenance Corp.* v. *NLRB,* 452 U.S. 666, 679 (1981). Third, by establishing the joint-employer standard in the Board's Rules & Regulations, employers, unions, and employees will be able to plan their affairs free of the uncertainty that the legal regime may change on a moment's notice (and possibly retroactively) through the adjudication process. *NLRB* v. *Wyman-Gordon Co.,* 394 U.S. 759, 777 (1969) (''The rule-making procedure performs important functions. It gives notice to an entire segment of society of those controls or regimentation that is forthcoming.'') (Douglas, J., dissenting).

[4] As previously stated, Secs. 2(2) and 2(3) of the Act define, respectively, ''employer'' and ''employee,'' but neither these provisions nor any others in the Act define ''joint employer.''

III. The Proposed Rule

Under the proposed rule, an employer may be considered a joint employer of a separate employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction. A putative joint employer must possess and actually exercise substantial direct and immediate control over the employees' essential terms and conditions of employment in a manner that is not limited and routine.

The proposed rule reflects the Board's preliminary view, subject to potential revision in response to comments, that the Act's purposes of promoting collective bargaining and minimizing industrial strife are best served by a joint-employer doctrine that imposes bargaining obligations on putative joint employers that have actually played an active role in establishing essential terms and conditions of employment. Stated alternatively, the Board's initial view is that the Act's purposes would not be furthered by drawing into an employer's collective-bargaining relationship, or exposing to joint-and-several liability, a business partner of the employer that does not actively participate in decisions setting unit employees' wages, benefits, and other essential terms and conditions of employment. The Board's preliminary belief is that, absent a requirement of proof of some ''direct and immediate'' control to find a joint-employment relationship, it will be extremely difficult for the Board to accurately police the line between independent commercial contractors and genuine joint employers. The Board is inclined toward the conclusion that the proposed rule will provide greater clarity to joint-employer determinations without leaving out parties necessary to meaningful collective bargaining.

The proposed rule is consistent with the common law of joint-employer relationships. The Board's requirement of exercise of direct and immediate control, as reflected in cases such as *Airborne Express,* supra, has been met with judicial approval . See, *e.g., SEIU Local 32BJ* v. *NLRB,* 647 F.3d at 442–443.

The Board believes that the proposed rule is likewise consistent with Supreme Court precedent and that of lower courts, which have recognized that contracting enterprises often have some influence over the work performed by each other's workers without destroying their status as independent employers. For example, in *NLRB* v. *Denver Building & Construction Trades Council,* 341 U.S. 675, 689–690 (1951), the Supreme Court held that a contractor's exercise of supervision over a subcontractor's work ''did not eliminate the status of each as an independent contractor or make the employees of one the employees of the other,'' emphasizing that ''[t]he business relationship between independent contractors is too well established in the law to be overridden without clear language doing so.''

The requirement of ''direct and immediate'' control seems to reflect a commonsense understanding that two contracting enterprises will, of necessity, have some impact on each other's operations and respective employees. As explained in *Southern California Gas Co.,* 302 NLRB at 461:

> An employer receiving contracted labor services will of necessity exercise sufficient control over the operations of the contractor at its facility so that it will be in a position to take action to prevent disruption of its own operations or to see that it is obtaining the services it contracted for. It follows that the existence of such control, is not in and of itself, sufficient justification for finding that the customer-employer is a joint employer of its contractor's employees. Generally a joint employer finding is justified where it has been demonstrated that the employer-customer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction.

Notably, the Board is presently inclined to find, consistent with prior Board cases, that even a putative joint employer's ''direct and immediate'' control over employment terms may not give rise to a joint-employer relationship where that control is too limited in scope. See, *e.g., Flagstaff Medical Center,* 357 NLRB at 667 (dismissing joint-employer allegation even though putative joint employer interviewed applicants and made hiring recommendations, evaluated employees consistent with criteria established by its supplier employer, and disciplined supplied employees for unscheduled absences); *Lee Hospital,* 300 NLRB 947, 948–950 (1990) (putative joint employer's ''limited hiring and disciplinary authority'' found insufficient to establish that it ''shares or codetermines those matters governing the essential terms and conditions of employment *to an extent* that it may be found to be a joint employer'') (emphasis added). Cases like *Flagstaff Medical Center* and *Lee Hospital* are

consistent with the Board's present inclination to find that a putative joint employer must exercise substantial direct and immediate control before it is appropriate to impose joint and several liability on the putative joint employer and to compel it to sit at the bargaining table and bargain in good faith with the bargaining representative of its business partner's employees.[5]

Accordingly, under the proposed rule, there must exist evidence of direct and immediate control before a joint-employer relationship can be found. Moreover, it will be insufficient to establish joint-employer status where the degree of a putative joint employer's control is too limited in scope (perhaps affecting a single essential working condition and/or exercised rarely during the putative joint employer's relationship with the undisputed employer).

The proposed rule contains several examples, set forth below, to help clarify what constitutes direct and immediate control over essential terms and conditions of employment. These examples are intended to be illustrative and not as setting the outer parameters of the joint-employer doctrine established in the proposed rule.

The Board seeks comment on all aspects of its proposed rule. In particular, the Board seeks input from employees, unions, and employers regarding their experience in workplaces where multiple employers have some authority over the workplace. This may include (1) experiences with labor disputes and how the extent of control possessed or exercised by the employers affected those disputes and their resolution; (2) experiences organizing and representing such workplaces for the purpose of collective bargaining and how the extent of control possessed or exercised by the employers affected organizing and representational activities; and (3) experiences managing such workplaces, including how legal requirements affect business practices and contractual arrangements. What benefits to business practices and collective bargaining do interested parties believe might result from finalization of the proposed rule? What, if any, harms? Additionally, the Board seeks comments regarding the current state of the common law on joint-employment relationships. Does the common law dictate the approach of the proposed rule or of *Browning-Ferris*? Does the common law leave room for either approach? Do the examples set forth in the proposed rule provide useful guidance and suggest proper outcomes? What further examples, if any, would furnish additional useful guidance? As stated above, comments regarding this proposed rule must be received by the Board on or before November 13, 2018. Comments replying to comments submitted during the initial comment period must be received by the Board on or before November 20, 2018.

Our dissenting colleague, who was in the majority in *Browning-Ferris* and in the dissent in the first *Hy-Brand* decision, would adhere to the relaxed standard of *Browning-Ferris* and refrain from rulemaking. She expresses many of the same points made in furtherance of her position in those cases. We have stated our preliminary view that the Act's policy of promoting collective bargaining to avoid labor strife and its impact on commerce is not best effectuated by inserting into a collective-bargaining relationship a third party that does not actively participate in decisions establishing unit employees' wages, benefits, and other essential terms and conditions of employment. We look forward to receiving and reviewing the public's comments and, afterward, considering these issues afresh with the good-faith participation of all members of the Board.

VI. Dissenting View of Member Lauren McFerran

Today, the majority resumes the effort to overrule the Board's 2015 joint-employer decision in *Browning-Ferris,* which remains pending on review in the United States Court of Appeals for the District of Columbia Circuit.[6] An initial attempt to overrule *Browning-Ferris* via adjudication—in a case where the issue was neither raised nor briefed by the parties[7]—failed when the participation of a Board member who was disqualified required that the decision be vacated.[8] Now, the Board majority, expressing new support for the value of public participation, proposes to codify the same standard endorsed in *Hy-Brand I*[9] via a different route: rulemaking rather than adjudication. The majority tacitly acknowledges that the predictable result of the proposed rule would be fewer joint employer findings.[10]

The Board has recently made or proposed sweeping changes to labor law in adjudications going well beyond the facts of the cases at hand and addressing issues that might arguably have been better suited to consideration via rulemaking.[11] Here, in contrast, the majority has chosen to proceed by rulemaking, if belatedly.[12] Reasonable minds might question why the majority is pursuing rulemaking here and now.[13]

[5] Even the *Browning-Ferris* majority acknowledged that ''it is certainly possible that in a particular case, a putative joint employer's control might extend only to terms and conditions of employment too limited in scope or significance to permit meaningful collective bargaining.'' 362 NLRB No. 186, slip op. at 16.

[6] *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery,* 362 NLRB No. 186 (2015), petition for review docketed *Browning-Ferris Indus. of Cal.* v. *NLRB,* No. 16–1028 (D.C. Cir filed Jan. 20, 2016).

[7] See *Hy-Brand Industrial Contractors, Ltd (Hy-Brand I),* 365 NLRB No. 156 (2017). In a departure from what had become established practice, the majority there also declined to issue a public notice seeking amicus briefing before attempting to reverse precedent. *See id.* at 38–40 (dissenting opinion).

[8] See *Hy-Brand Industrial Contractors, Ltd.,* 366 NLRB No. 26 (2018) (*Hy-Brand II*), granting reconsideration in part and vacating order reported at 365 NLRB No. 156 (2017) (*Hy-Brand I*). See also *Hy-Brand Industrial Contractors, Ltd.,* 366 NLRB No. 63 (2018) (*Hy-Brand III*) (order denying motion for reconsideration of order vacating).

[9] *Hy-Brand I* was decided by a majority comprising then-Chairman Miscimarra, Member Kaplan, and Member Emanuel (who was later determined to have been disqualified). The majority today, proposing what is essentially an identical standard in rulemaking, comprises Chairman Ring, Member Kaplan, and Member Emanuel. Thus, a majority of today's majority has considered and endorsed the proposed outcome of this rulemaking process before.

[10] The majority observes that under the proposed rule, ''fewer employers may be alleged as joint employers, resulting in lower costs to some small entities.''

[11] See *The Boeing Company,* 365 NLRB No.154, slip op. at 33–34 (2017) (dissenting opinion); *Caesars Entertainment Corp. d/b/a Rio All-Suites Hotel & Casino,* Case 28–CA–060841, Notice & Invitation to File Briefs (Aug. 1, 2018) (dissenting opinion), available at *www.nlrb.gov.*

[12] After *Hy-Brand I* was vacated (in *Hy-Brand II*) and after reconsideration of the order vacating was denied (in *Hy-Brand III*), the Chairman announced that the Board was contemplating rulemaking on the joint-employer standard, as reflected in a submission to the Unified Agenda of Federal Regulatory and Deregulatory Actions. See NLRB Press Release, *NLRB Considering Rulemaking to Address Joint-Employer Standard* (May 9, 2018), available at *www.nlrb.gov.* That step did not reflect my participation or that of then-Member Pearce, as the press release discloses.

[13] *See, e.g.,* May 29, 2018 Letter from Senators Warren, Gillibrand, and Sanders to Chairman Ring, available at *https://www.warren.senate.gov/imo/media/doc/2018.05.29%20Letter%20to%20NLRB%20on%20Joint%20Employer%20Rulemaking.pdf* (expressing concern that the rulemaking effort could be an attempt ''to evade the ethical restrictions that apply to adjudications''). Chairman Ring has provided assurances ''that any notice-and-comment rulemaking undertaken by the NLRB will never be for the purpose of evading ethical restrictions.'' See June 5, 2018 Letter from Chairman Ring to Senators Warren, Gillibrand, and Sanders at 1, available at *https://www.nlrb.gov/news-outreach/news-story/nlrb-chairman-provides-response-senators-regarding-joint-employer-inquiry.*

Notably, under the Standards of Ethical Conduct for Executive Branch Employees, rulemaking implicates different recusal considerations than does case adjudication, because a rulemaking of general scope is not regarded as a ''particular matter'' for purposes of determining disqualifying financial interests. See 5 CFR 2635.402. By

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It is common knowledge that the Board's limited resources are severely taxed by undertaking a rulemaking process.[14] But whatever the rationale, and whatever process the Board may use, the fact remains that there is no good reason to revisit *Browning-Ferris,* much less to propose replacing its joint-employer standard with a test that fails the threshold test of consistency with the common law and that defies the stated goal of the National Labor Relations Act: ''encouraging the practice and procedure of collective bargaining.'' [15]

A. The Majority's Justification for Revisiting Browning-Ferris Is Inadequate.

Since August 2015, the joint-employer standard announced in *Browning-Ferris* has been controlling Board law. It remains so today, and the majority properly acknowledges as much.[16] After laying out the checkered history of the effort to overrule *Browning-Ferris,* the majority points to the ''continuing uncertainty in the labor-management community created by these adjudicatory variations in defining the appropriate joint-employer standard'' as the principal reason for proposing to codify not *Browning-Ferris* (existing Board law) but the pre-*Browning-Ferris* standard resurrected in *Hy-Brand I.* The majority cites no evidence of ''continuing uncertainty in the labor-management community,'' [17] and to the extent such uncertainty exists, it has only itself to blame for the series of missteps undertaken in seeking to hurriedly reverse *BFI.*

More to the point, the best way to end uncertainty over the Board's joint-employer standard would be to adhere to existing law, not to upend it. The majority's decision to pursue rulemaking ensures the Board's standard will remain in flux as the Board develops a final rule and as that rule, in all likelihood, is challenged in the federal courts. And, of course, any final rule could not be given retroactive effect, a point that distinguishes rulemaking from adjudication.[18] Thus, cases arising before a final rule is issued will nonetheless have to be decided under the *Browning-Ferris* standard.

The majority's choice here is especially puzzling given that *Browning-Ferris* remains under review in the District of Columbia Circuit. When the court's decision issues, it will give the Board relevant judicial guidance on the contours of a permissible joint-employer standard under the Act. The Board would no doubt benefit from that guidance, even if it was not required to follow it. Of course, if the majority's final rule could not be reconciled with the District of Columbia Circuit's *Browning-Ferris* decision, it presumably would not survive judicial review in that court.[19] The Board majority thus proceeds at its own risk in essentially treating *Browning-Ferris* as a dead letter.

B. The Proposed Rule Is Inconsistent With Both the Common Law and the Goals of the NLRA

No court has held that *Browning-Ferris* does not reflect a reasonable interpretation of the National Labor Relations Act. Nor does the majority today assert that its own, proposed joint-employer standard is somehow compelled by the Act. As the majority acknowledges, the ''Act does not contain the term 'joint employer,' much less define it.'' The majority also acknowledges, as it must, that ''it is clear that the Board's joint-employer standard . . . must be consistent with common law agency doctrine.'' The joint-employer standard adopted in *Browning-Ferris,* of course, is predicated on common-law agency doctrine, as the decision explains in careful detail.[20] As the *Browning-Ferris* Board observed:

> In determining whether a putative joint employer meets [the] standard, the initial inquiry is *whether there is a common-law employment relationship with the employees in question.* If this common-law employment relationship exists, the inquiry then turns to whether the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining.

362 NLRB No. 186, slip op. at 2 (emphasis added).[21]

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pursuing rulemaking rather than adjudication with respect to the joint-employer standard, the Board is perhaps able to avoid what might otherwise be difficult ethical issues, as the *Hy-Brand* case illustrates. See generally Peter L. Strauss, *Disqualifications of Decisional Officials in Rulemaking,* 80 Columbia L. Rev. 990 (1980); Administrative Conference of the United States, *Decisional Officials' Participation in Rulemaking Proceedings,* Recommendation 80–4 (1980).

[14] See Jeffrey M. Hirsch, *Defending the NLRB: Improving the Agency's Success in the Federal Courts of Appeals,* 5 FIU L. Rev. 437, 457 (2010) (explaining that rulemaking at the Board would consume significant resources, especially ''given that the NLRB is banned from hiring economic analysts'').

What is striking here is that the Board majority has opted to use this resource-intensive process to address an issue that has never been addressed through rulemaking before, and that the majority observes is implicated in *fewer than one percent* of Board filings and (by the majority's own analysis) directly affects only ''.028% of all 5.9 million business firms.'' The majority observes that the number of employers affected is ''very small.'' In contrast for example, consider the standards governing employer rules and handbooks at issue in *Boeing, supra,* which presumably affect the overwhelming number of private-sector employers in the country, but which the Board majority chose to establish by adjudication and without public participation.

[15] National Labor Relations Act, Sec. 1, 29 U.S.C. 151.

[16] As the Board recently observed in *Hy-Brand II,* because the original *Hy-Brand* decision and order was vacated, the ''overruling of the *Browning-Ferris* decision is of no force or effect.'' 366 NLRB No. 26, slip op. at 1. The majority here states that ''[i]n February 2018, the Board vacated its December 2017 decision [in *Hy-Brand*], effectively changing the law back again to the relaxed standard of *Browning-Ferris.*''

[17] To the extent that the majority is relying on anything other than anecdotal evidence of this alleged uncertainty, it is required to let the public know the evidentiary basis of its conclusion. ''It is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that, to a critical degree, is known only to the agency.'' *Portland Cement Ass'n* v. *Ruckelshaus,* 486 F.2d 375, 393 (D.C. Cir. 1973).

[18] See generally *Bowen* v. *Georgetown University Hospital,* 488 U.S. 204 (1988). There is no indication in Sec. 6 of the National Labor Relations Act that Congress intended to give the Board authority to promulgate retroactive rules. Sec. 6 authorizes the Board ''to make . . . in the manner prescribed by [the Administrative Procedure Act] . . . such rules and regulations as may be necessary to carry out the provisions of'' the National Labor Relations Act. 29 U.S.C. 156. The Administrative Procedure Act defines a ''rule'' as an ''agency statement of general or particular applicability and *future effect.* . . .'' 5 U.S.C. 551(4) (emphasis added). *See also* See June 5, 2018 Letter from Chairman Ring to Senators Warren, Gillibrand, and Sanders at 2, available at *https://www.nlrb.gov/news-outreach/news-story/nlrb-chairman-provides-response-senators-regarding-joint-employer-inquiry* (acknowledging that ''final rules issued through notice-and-comment rulemaking are required by law to apply prospectively only'').

[19] If the District of Columbia Circuit were to uphold the Board's *Browning-Ferris* standard (in whole or in part) as compelled by—or at least consistent with—the Act, but the Board, through rulemaking, rejected *Browning-Ferris* (in whole or in part) as *not* permitted by the Act, then the Board's final rule would be premised on a legal error. Moreover, insofar as the court might hold the *Browning-Ferris* standard to be permitted by the Act, then the reasons the Board gave for *not* adopting that standard would have to be consistent with the court's understanding of statutory policy and common-law agency doctrine insofar as they govern the joint-employer standard.

[20] 362 NLRB No. 186, slip op. at 12–17. Notably, the *Browning-Ferris* Board rejected a broader revision of the joint-employer standard advocated by the General Counsel because it might have suggested ''that the applicable inquiry is based on 'industrial realities' rather than the common law.'' 362 NLRB No. 186, slip op. at 13 fn. 68. The General Counsel had urged the Board to find joint-employer status:

> where, under the totality of the circumstances, including the way the separate entities have structured their commercial relationships, the putative joint employer wields sufficient influence over the working conditions of the other entity's employees such that meaningful collective bargaining could not occur in its absence.

Id.

[21] This approach, as the *Browning-Ferris* Board explained, was consistent with the Board's traditional joint-employer doctrine, as it existed

In contrast, the Board's prior standard (which the majority revives today) had never been justified in terms of common-law agency doctrine. For the 31 years between 1984 (when the Board, in two decisions, narrowed the traditional joint-employer standard) [22] and 2015 (when *Browning-Ferris* was decided), the Board's approach to joint-employer cases was not only unexplained, but also inexplicable with reference to the principles that must inform the Board's decision-making. Common-law agency doctrine simply does not require the narrow, pre-*Browning-Ferris* standard to which the majority now seeks to return. Nor is the ''practice and procedure of collective bargaining'' encouraged by adopting a standard that reduces opportunities for collective bargaining and effectively shortens the reach of the Act.

Thus, it is not surprising that two labor-law scholars have endorsed *Browning-Ferris* as ''the better approach,'' ''predicated on common law principles'' and ''consistent with the goals of employment law, especially in the context of a changing economy.'' [23] *Browning-Ferris,* the scholars observe, ''was not a radical departure from past precedent;'' rather, despite ''reject[ing] limitations added to the joint employer concept from a few cases decided in the 1980s,'' it was ''consistent with earlier precedents.'' [24] The crux of the *Browning-Ferris* decision, and the current majority's disagreement with it, is whether the joint-employer standard should require: (1) That a joint employer ''not only *possess* the authority to control employees' terms and conditions of employment, but also *exercise* that authority;'' (2) that the employer's control ''must be exercised directly and immediately;'' and (3) that control not be ''limited and routine.'' [25] The *Browning-Ferris* Board carefully explained that none of these limiting requirements is consistent with common-law agency doctrine, as the *Restatement (Second) of Agency* makes clear.[26] It is the *Restatement* on which the Supreme Court has relied in determining the existence of a common-law employment relationship for purposes of the National Labor Relations Act.[27] The Court, in turn, has observed that the ''Board's departure from the common law of agency with respect to particular questions and in a particular statutory context, [may] render[] its interpretation [of the Act] unreasonable.'' [28]

Hy-Brand I impermissibly departed from the common law of agency as the dissent there demonstrated,[29] and the majority's proposed rule does so again. Remarkably, the majority makes no serious effort here to refute the detailed analysis of common-law agency doctrine advanced in *Browning-Ferris* and in the *Hy-Brand I* dissent. The majority fails to confront the *Restatement (Second) of Agency,* for example, or the many decisions cited in *Browning-Ferris* (and then in the *Hy-Brand I* dissent) that reveal that at common law, the existence of an employment relationship does *not* require that the putative employer's control be (1) exercised (rather than reserved); (2) direct and immediate (rather than indirect, as through an intermediary); *and* not (3) limited and routine (rather than involving routine supervision of at least some details of the work). None of these restrictions, much less all three imposed together, is consistent with common-law agency doctrine.[30]

before 1984. 362 NLRB No. 186, slip op. at 8–11. In tracing the evolution of the Board's joint-employer standard, the *Browning-Ferris* Board observed that:

> Three aspects of that development seem clear. First, the Board's approach has been consistent with the common-law concept of control, within the framework of the National Labor Relations Act. Second, before the current joint-employer standard was adopted, the Board (with judicial approval) generally took a broader approach to the concept of control. Third, the Board has never offered a clear and comprehensive explanation for its joint-employer standard, either when it adopted the current restrictive test or in the decades before.

Id. at 8.

[22] *TLI, Inc.,* 271 NLRB 798 (1984), enfd. mem. 772 F.2d 894 (3d Cir. 1985), and *Laerco Transportation,* 269 NLRB 324 (1984).

[23] Charlotte Garden & Joseph E. Slater, *Comments on Restatement of Employment Law (Third), Chapter 1,* 21 Employee Rights & Employment Policy Journal 265, 276 (2017).

[24] Id. at 276–277.

Id.

[25] *Browning-Ferris,* supra, 362 NLRB No. 186, slip op. at 2 (emphasis in original).

[26] Id. at 13–14. See also *Hy-Brand I,* supra, 365 NLRB No. 156, slip op. at 42–45 (dissenting opinion).

As to whether authority must be exercised, Section 220(1) of the *Restatement (Second) of Agency* defines a ''servant'' as a ''person employed to perform services . . . who with respect to the physical conduct in the performance of the services is subject to the other's control *or right to control*'' (emphasis added). Section 220(2), in turn, identifies as a relevant factor in determining the existence of an employment relationship ''the extent of control which, *by the agreement,* the master *may* exercise over the details of the work'' (emphasis added). See, *e.g., Community for Creative Non-Violence* v. *Reid,* 490 U.S. 730, 751 (1989) (''In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished.''); *Singer Mfg. Co.* v. *Rahn,* 132 U.S. 518, 523 (1889) (observing that the ''relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done'').

As to whether control must be direct and immediate, the *Restatement* observes that the ''control needed to establish the relation of master and servant may be very attenuated.'' *Restatement (Second) of Agency* Section 220(l), comment d. The *Restatement* specifically recognizes the common-law ''subservant'' doctrine, addressing cases in which one employer's control is or may be exercised indirectly, while a second employer directly controls the employee. *Restatement (Second) of Agency* Sections 5, 5(2), comment e. See, *e.g., Kelley* v. *Southern Pacific Co.,* 419 U.S. 3218, 325 (1974) (recognizing subservant doctrine for purposes of Federal Employers' Liability Act); *Allbritton Communications Co.* v. *NLRB,* 766 F.2d 812, 818–819 (3d Cir. 1985) (applying subservant doctrine under National Labor Relations Act), cert. denied, 474 U.S. 1081 (1986).

As to the issue of control that is limited and routine, the *Restatement* makes clear that if an entity routinely exercises control ''over the details of the work,'' it is more likely to be a common-law employer. See *Restatement (Second) of Agency* Section 220(2)(a). That control might be routine, in the sense of not requiring special skill, does not suggest the absence of an employment relationship; to the contrary, an unskilled worker is *more* likely to be an employee, rather than an independent contractor. See *id.,* Section 220(2)(d) and comment i.

[27] See, *e.g., NLRB* v. *United Insurance Co. of America,* 390 U.S. 254, 256–258 (1968) (interpreting Act's exclusion of independent contractors from coverage).

[28] *NLRB* v. *Town & Country Electric, Inc.,* 516 U.S. 85, 94 (1995), citing *United Insurance,* supra, 390 U.S. at 256.

[29] See *Hy-Brand I,* supra, 365 NLRB No. 156, slip op. at 42–47 (dissenting opinion).

[30] The majority observes that in some cases, courts have upheld the Board's application of the ''direct and immediate''-control restriction. But as the *Hy-Brand I* dissent explained, no federal appellate court has addressed the argument that this restriction is inconsistent with common-law agency principles. 365 NLRB No. 156, slip op. at 46.

Nor, as the majority suggests, is the restriction supported by the Supreme Court's decision in *NLRB* v. *Denver Building & Construction Trades Council,* 341 NLRB 675 (1951). As the *Hy-Brand I* dissent explained:

> The issue in . . . *Denver Building & Construction Trades Council* . . . was whether (as the Board had found) a labor union violated Sec. 8(b)(4)(A) of the Act ''by engaging in a strike, an object of which was to force the general contractor on a construction project to terminate its contract with a certain subcontractor on the project.'' Id. at 677. The relevant statutory language prohibits a strike ''where an object thereof is . . . forcing or requiring . . . any employer or other person . . . to cease doing business with any other person.'' Id. at 677 fn. 1 (citing 29 U.S.C. 158(b)(4)(A), current version at 29 U.S.C. 158(b)(4)(i)(B)). The Court agreed with the Board's conclusion that the general contractor and the subcontractor were ''doing business'' with each other. Id. at 690.
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> It was in that context that the Court observed that ''the fact that the contractor and the subcontractor were engaged on the same construction project, and that the contactor had some supervision over the subcontractor's work, did not eliminate the status of each as an independent contractor or make the employees of one the employees of the other,'' such that the ''doing business'' element could not be satisfied. Id. at 689–690. The Court's decision in no way implicated the common-law test for an employment relationship or the Board's joint-employer standard. As a general matter, to say that a general contractor and a subcontractor are

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Instead of demonstrating that its proposed rule is consistent with the common law (an impossible task), the majority simply asserts that it is—and then invites public comment on the ''current state of the common law on joint-employment relationships'' and whether the ''common law dictate[s] the approach of the proposed rule or of *Browning-Ferris*'' or instead ''leave[s] room for either approach.'' The answers to these questions have been clear for quite some time: The restrictive conditions for finding joint-employer status proposed by the majority simply restore the pre-*Browning Ferris* standard, which the Board had never presented as consistent with, much less compelled by, common-law agency doctrine.[31] The majority, in short, seeks help in finding a new justification for an old (and unsupportable) standard. But the proper course is for the Board to *start* with first principles, as the *Browning-Ferris* decision did, and then to derive the joint-employer standard from them.

Just as the majority fails to reconcile the proposed rule with common-law agency doctrine—a prerequisite for any viable joint-employer standard under the National Labor Relations Act—so the majority fails to explain how its proposed standard is consistent with the actual policies of the Act. There should be no dispute about what those policies are. Congress has told us. Section 1 of the Act states plainly that:

> It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate those obstructions when they have occurred *by encouraging the practice and procedure of collective bargaining* and by protecting the exercise of workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. 151 (emphasis added). The Supreme Court has explained that:

> Congress' goal in enacting federal labor legislation was to create a framework within which labor and management can establish the mutual rights and obligations that govern the employment relationship. ''The theory of the act is *that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace* and may bring about the adjustments and agreements which the act in itself does not attempt to compel.''

NLRB v. *J. Weingarten, Inc.,* 420 U.S. 251, 271 (1975) (emphasis added), quoting *NLRB* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1, 45 (1937).

The *Browning-Ferris* standard—current Board law—clearly ''encourage[s] the practice and procedure of collective bargaining'' (in the words of the Act) by eliminating barriers to finding joint-employer relationships that have no basis in the common-law agency doctrine that Congress requires the Board to apply. The predictable result is that more employees will be able to engage in ''free opportunities for negotiation'' (in the Supreme Court's phrase) with the employers who actually control the terms and conditions of their employment—as Congress intended—and that orderly collective bargaining, not strikes, slowdowns, boycotts, or other ''obstructions to the free flow of commerce'' will prevail in joint-employer settings.

The question for the majority is why it would preliminarily choose to abandon *Browning-Ferris* for a standard that, by its own candid admission, is intended to—and will—result in *fewer* joint employer findings and thus in a greater likelihood of economically disruptive labor disputes. Where collective bargaining under the law is not an option, workers have no choice but to use other means to improve their terms and conditions of employment. Economic pressure predictably will be directed at the business entities that control a workplace, whether or not the Board recognizes them as employers. History shows that when employees' right to have effective union representation is obstructed, they engage in alternative and more disruptive means of improving their terms of employment.[32] Resort to such economic weapons is hardly a relic of the past. Recent examples include nationwide strikes by employees unable to gain representation in fast food, transportation, retail, and other low-pay industries, often directed at parent companies, franchisors, investors, or other entities perceived by the workers as having influence over decisions that ultimately impact the workers' well-being.[33] Congress enacted the NLRA in order to minimize the disruption of commerce and to provide employees with a structured, non-disruptive alternative to such action. In blocking effective representation by unreasonably narrowing the definition of joint employer, the majority thwarts that goal and invites disruptive economic activity.

The majority does not explain its choice in any persuasive way. It asserts that codifying the *Hy-Brand I,* pre-*Browning-Ferris* standard ''will foster predictability and consistency regarding determinations of joint-employer status in a variety of business relationships, thereby promoting labor-management stability, one of the principal purposes of the Act.'' But, as already suggested, ''predictability and consistency'' with respect to the Board's joint-employer standard could be achieved just as well by codifying the *Browning-Ferris* standard—which, crucially, is both consistent with common-law agency doctrine and promotes the policy of the Act (in contrast to the *Hy-Brand I* standard).

As for ''labor-management stability,'' that notion does *not* mean the perpetuation of a state in which workers in joint-employer situations remain

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independent entities (*e.g.,* not a ''single employer'') is not to say that they can *never* be joint employers, *if* it is proven that the general contractor retains or exercises a sufficient degree of control over the subcontractor's workers to satisfy the common-law test of an employment relationship.

Hy-Brand I, supra, 365 NLRB No. 156, slip op. at 46 fn. 63 (dissenting opinion).

[31] With respect to the issue of reserved control, the majority acknowledges that ''[o]ver time, the Board shifted position, without expressly overruling precedent, and held that joint-employer status could not be established by the mere existence of a clause in a business contract reserving to one company authority over its business partner's employees absent evidence that such authority had ever been exercised.'' The Board, however, is required to adhere to its precedent or to explain why it chooses to deviate from it. See, *e.g., ABM Onsite Services-West, Inc.* v. *NLRB,* 849 F.3d 1137, 1146 (D.C. Cir. 2017). Here, too, the Board's pre-*Browning-Ferris* approach fell short of the standard for reasoned decision-making.

[32] Between 1936 and 1939, when the NLRA was in its infancy and still meeting massive resistance from employers, American employees engaged in 583 sit-down strikes of at least one day's duration. Jim Pope, *Worker Lawmaking, Sit-Down Strikes, and the Shaping of American Industrial Relations, 1935—1938,* Law and History Review, Vol. 24, No. 1 at 45, 46 (Spring 2006). See also *NLRB* v. *Fansteel Metallurgical Corp.,* 306 U.S. 240 (1939). For many years after plant occupations were found illegal by the Supreme Court, employees resorted to wildcat, ''quickie,'' ''stop-and-go,'' and partial strikes; slowdowns; and mass picketing. *Id* at 108–111.

[33] E.g., Michael M. Oswalt, *The Right to Improvise in Low-Wage Work,* 38 Cardozo L. Rev. 959, 961–986 (2017); Steven Greenhouse and Jana Kasperkevic, *Fight For $15 Swells Into Largest Protest By Low-wage Workers in US History,* The Guardian/U.S. News (April 15, 2015); Dominic Rushe, *Fast Food Workers Plan Biggest US Strike to Date Over Minimum Wage,* The Guardian/U.S. News (September 1, 2014). Strikes, walkouts, and other demonstrations of labor unrest have also been seen in recent years in the college and university setting among graduate teaching assistants and similar workers responding to their academic employers' refusal to recognize unions and engage in collective bargaining. See, *e.g.,* Danielle Douglas-Gabrielle, *Columbia Graduate Students Strike Over Refusal to Negotiate a Contract,* The Washington Post (April 24, 2018); David Epstein, *On Strike: In a showdown over TA unions at private universities, NYU grad students walk off the job,* Inside Higher Ed (November 10, 2005). Here, again, the common thread is workers resort to more disruptive channels when they are denied the ability to negotiate directly about decisions impacting their employment.

unrepresented, despite their desire to unionize, because Board doctrine prevents it. ''The object of the National Labor Relations Act is industrial peace and stability, *fostered by collective-bargaining agreements providing for the orderly resolution of labor disputes between workers and employe[r]s.*'' [34] Congress explained in Section 1 of the Act that it is the ''denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining'' that ''lead to strikes and other forms of industrial strife or unrest.'' [35] A joint-employer standard that predictably and consistently frustrates the desire of workers for union representation is a recipe for workplace instability—for just the sort of conflict that Congress wanted to eliminate. Whether it proceeds by adjudication or by rulemaking, the Board is not free to substitute its own idea of proper labor policy for the Congressional policy embodied in the statute.

The majority expresses the ''preliminary belief . . . that absent a requirement of proof of some 'direct and immediate' control to find a joint-employment relationship, it will be extremely difficult for the Board to accurately police the line between independent commercial contractors and genuine joint employers.'' But any such difficulty is a function of applying common-law agency doctrine, which the Board is not free to discard, whether in the interests of administrative convenience or a so-called predictability that insulates employers from labor-law obligations. In holding that Congress had made common-law agency doctrine controlling under the Act, the Supreme Court itself has noted the ''innumerable situations which arise in the context of the common law where it is difficult to say whether a particular individual is an employee or an independent contractor.'' [36] To quote the *Hy-Brand I* majority, ''[t]he Board is not Congress.'' [37] It is not free to decide that the common law is simply too difficult to apply, despite the Congressional instruction to do so.

Notably, the majority's proposed inclusion of a ''direct and immediate'' control requirement in the joint-employer standard would hardly result in an easy-to-apply test. The majority takes pains to say that while the exercise of ''direct and immediate'' control is *necessary* to establish a joint-employer relationship, it is not *sufficient.*[38] As for the ''examples'' set forth in the proposed rule, they are ''intended to be illustrative and not as setting the outer parameters of the joint-employer doctrine established in the proposed rule.'' [39] Even with respect to those examples that illustrate the exercise of ''direct and immediate'' control, the proposed rule does not actually state that a joint-employer relationship is demonstrated. Here, too, the majority's ostensible goal of predictability is elusive. The proposed rule, if ultimately adopted by the Board, will reveal its true parameters only over time, as it is applied case-by-case through adjudication. What purpose, then, does codifying the *Hy-Brand I* standard via rulemaking actually serve?

The majority's examples, rather than helping ''clarify'' what constitutes ''direct and immediate control,'' confirm that joint employment cannot be determined by any simplistic formulation, let alone the majority's artificially restrictive one. This is because additional circumstances in each of the provided examples could change the result. In example 1(a), the majority declares that under its proposed rule a ''cost-plus'' service contract between two businesses that merely establishes a maximum reimbursable labor expense does not, by itself, justify finding that the user business exercises direct control. But if, under that contract, the user also imposes hiring standards; prohibits individual pay to exceed that of the user's own employees; determines the provider's working hours and overtime; daily adjusts the numbers of employees to be assigned to respective production areas; determines the speed of the worksite's assembly or production lines; conveys productivity instructions to employees through the provider's supervisors; or restricts the period that provided employees are permitted to work for the user—all as in *Browning-Ferris*—does the result change? Would some but not all of these additional features change the result? If not, under common-law principles, why not?

In example 2(a), the majority declares that under its proposed rule, a user business does not exercise direct control over the provider's employees simply by complaining that the product coming off its assembly line worked by those employees is defective. Does the result change if the user also indicates that it believes certain individual employees are partly responsible for the defects? Or if it also demands those employees' reassignment, discipline, or removal? Or if it demands that provided employees be allocated differently to different sections of the line?

And in example 6(a), the majority declares that where a service contract reserves the user's right to discipline provided employees, but the user has never exercised that authority, the user has not exercised direct control. Again, does the result change if the user indicates to the supplier which employees deserve discipline, and/or how employees should be disciplined? And, assuming that the actual exercise of control is necessary, when is it sufficient to establish a joint-employer relationship? How many times must control be exercised, and with respect to how many employees and which terms and conditions of employment?

The majority's simplified examples, meanwhile, neither address issues of current concern implicating joint employment—such as, for example—the recent revelation that national fast-food chains have imposed ''no poaching'' restrictions on their franchisees that limit the earnings and mobility of franchise employees [40]—nor accurately

[34] *Auciello Iron Works, Inc.* v. *NLRB,* 517 U.S. 781, 785 (1996) (emphasis added).

[35] 29 U.S.C. 151.

[36] *United Insurance,* supra, 390 U.S. at 258. See also *Restatement (Second) of Agency* Section 220, comment c (''The relation of master and servant is one not capable of exact definition. . . . [I]t is for the triers of fact to determine whether or not there is a sufficient group of favorable factors to establish the relation.'').

[37] *Hy-Brand I,* supra, 365 NLRB No. 156, slip op. at 33.

[38] ''Direct and immediate'' control ''will be insufficient,'' the majority observes, ''where the degree of a putative employer's control is too limited in scope (perhaps affecting a single essential working condition and/or exercised rarely during the putative joint employer's relationship with the undisputed employer).'' In comparison, *Browning-Ferris* explained that a joint employer ''will be required to bargain only with respect to those terms and conditions over which it possesses sufficient control for bargaining to be meaningful.'' 362 NLRB No. 186, slip op. at 2 fn. 7. The decision acknowledged that a ''putative joint employer's control might extend only to terms and conditions of employment too limited in scope or significance to permit meaningful collective bargaining.'' Id. at 16. The difference between the proposed rule and *Browning-Ferris* is that the former treats joint employment as an all-or-nothing proposition, while the latter permits joint-employer determinations that are tailored to particular working arrangements, allowing collective bargaining to the extent that it can be effective.

[39] Of course, illustrating a legal standard is not the same as explaining it: In this case, demonstrating that the proposed joint-employer standard, as illustrated by a particular example, is consistent with common-law agency doctrine and promotes statutory policies.

[40] ''AG Ferguson Announces Fast-Food Chains Will End Restrictions on Low-Wage Workers Nationwide,'' Press Release, Office of the Attorney General, Washington State (July 12, 2018) (explaining that ''seven large corporate fast-foods chains will immediately end a nationwide practice that restricts worker mobility and decreases competition for labor by preventing workers from moving among the chains' franchise locations''), available at *www.atg.wa.gov/news/news-releases;* ''AG Ferguson: Eight More Restaurant Chains Will

Continued

reflect the complicated circumstances that the Board typically confronts in joint-employer cases, where the issue of control is raised with respect to a range of employment terms and conditions and a variety of forms of control.[41]

The majority's examples and their possible variations therefore illustrate why the issue of joint employment is particularly suited to individual adjudication under common-law principles. As the majority acknowledges, ''[t]here are myriad relationships between employers and their business partners, and the degree to which particular business relationships impact employees' essential terms and conditions of employment varies widely.'' This being true, the majority's simplistic examples are of limited utility in providing guidance, and merely serve to illustrate the impossibility of predetermining with ''clarity'' all of the situations in which a joint employment relationship does or does not exist. This is why the Board's best course of action may well be to continue to define the contours of the correct standard, re-established in *Browning-Ferris,* through the usual process of adjudication. This process will provide a more nuanced understanding of the contours of potential joint employment relationships that is difficult to achieve in the abstract via rulemaking.

C. The Majority's Proposed Rulemaking Process Is Flawed

For all of these reasons, I dissent from the majority's decision to issue the notice of proposed rulemaking (NPRM). To be sure, if the majority is determined to revisit *Browning-Ferris,* then permitting public participation in the process is preferable to the approach taken in the now-vacated *Hy-Brand I,* where the majority overruled *Browning-Ferris* sua sponte and without providing the parties or the public with notice and an opportunity to file briefs on that question. Having chosen to proceed, however, the majority should at the very least encourage greater public participation in the rulemaking process, by holding one or more public hearings.

There is no indication that the Board intends to hold a public hearing on the proposed rule, in addition to soliciting written comments. In the past, the Board has held such hearings to enhance public participation in the rulemaking process,[42] and there is no good reason why it should not do so again. Despite the Chairman's publicly professed desire to hear from ''thousands of commentators . . . including individuals and small businesses that may not be able to afford to hire a law firm to write a brief for them, yet have valuable insight to share from hard-won experience,'' [43] the process outlined by the majority—with limited time for public comment and no public hearings—seems ill-designed to provide the broad range of public input the majority purportedly seeks.

Regardless of my views on the desirability of rulemaking on the joint-employer standard in the wake of *Hy-Brand I,* I will give careful consideration to the public comments that the Board receives and to the views of my colleagues. It is worth recalling that the *Hy-Brand I* majority, in overruling *Browning-Ferris,* asserted that the decision ''destabilized bargaining relationships and created unresolvable legal uncertainty,'' ''dramatically changed labor law sales and successorship principles and discouraged efforts to rescue failing companies and preserve employment,'' ''threatened existing franchising arrangements,'' and ''undermined parent-subsidiary relationships.'' [44] The *Hy-Brand I* majority cited no actual examples from the Board's case law applying *BFI,* or empirical evidence of any sort, to support its hyperbolic claims, instead recycling Member Miscimarra's dissent in *Browning-Ferris* practically verbatim.[45] *Browning-Ferris* was issued more than 3 years ago, on August 27, 2015. Today's notice specifically solicits empirical evidence from the public: information about real-world experiences, not desk-chair hypothesizing. And so the question now is whether the record in this rulemaking ultimately will support the assertions made about *Browning-Ferris* and its supposed consequences—or, instead, will reveal them to be empty rhetoric.

V. Regulatory Procedures

The Regulatory Flexibility Act

A. Initial Regulatory Flexibility Analysis

The Regulatory Flexibility Act of 1980 (''RFA''), 5 U.S.C. 601, *et seq.* ensures that agencies ''review rules to assess and take appropriate account of the potential impact on small businesses, small governmental jurisdictions, and small organizations, as provided by the [RFA].'' [46] It requires agencies promulgating proposed rules to prepare an Initial Regulatory Flexibility Analysis (''IRFA'') and to develop alternatives wherever possible, when drafting regulations that will have a significant impact on a substantial

End No-Poach Practices Nationwide,'' Press Release, Office of the Attorney General, Washington State (Aug. 20, 2018), available at *www.atg.wa.gov/news/news-releases.* See also generally Rachel Abrams, ''Why Aren't Paychecks Growing? A Burger-Joint Clause Offers a Clue,'' *The New York Times* (Sept. 27, 2017); Alan B. Krueger & Orley C. Ashenfelter, ''Theory and Evidence on Employer Collusion in the Franchise Sector,'' Princeton University Working Paper No. 614 (Sept. 28, 2017), available at *http://arks.princeton.edu/ark:/88435/dsp014f16c547g.*

[41] In *Browning-Ferris,* for example, the Board found that BFI Newby Island Recyclery (BFI) was a joint employer with Leadpoint Business Services (Leadpoint) of sorters, screen cleaners, and housekeepers at a recycling facility. That finding was based on a range of evidence reflecting both direct and indirect control, both reserved and exercised, over various terms and conditions of employment.

First, the Board found that under its agreement with Leadpoint, BFI ''possesse[d] significant control over who Leadpoint can hire to work at its facility,'' with respect to both hiring and discipline, and at least occasionally exercised that authority in connection with discipline. 362 NLRB No. 16, slip op. at 18.

Second, BFI ''exercised control over the processes that shape the day-to-day work'' of the employees, particularly with respect to the ''speed of the [recycling] streams and specific productivity standards for sorting,'' but also by assigning specific tasks that need to be completed, specifying where Leadpoint workers were to be positioned, and exercising oversight of employees' work performance.'' Id. at 18–19. (footnote omitted).

Third, BFI ''played a significant role in determining employees' wages'' by (1) ''prevent[ing] Leadpoint from paying employees more than BFI employees performing comparable work; and (2) entering into a cost-plus contract with Leadpoint coupled with an ''apparent requirement of BFI approval over employee pay raises.'' Id. at 19.

Example 1(a) of the proposed rule suggests that the majority would give no weight to BFI's cost-plus contract, but it is not clear how the majority would analyze BFI's veto power over pay raises. Example 1(b) suggests that this power might be material. Example 2(b), meanwhile, suggests that BFI's control over day-to-day work processes supports a joint-employer finding. Finally, Example 6(b), apparently would support finding that BFI exercised direct and immediate disciplinary control over Leadpoint employees. Ironically, then, it is far from clear that adoption of the majority's proposed rule would lead to a different result in *Browning-Ferris.*

[42] See Representation-Case Procedures, 79 FR 74308 (2014) (the Board held four days of oral hearings with live questioning by Board members that resulted in over 1,000 pages of testimony); Union Dues Regulations, 57 FR 43635 (1992) (the Board held one hearing); Collective-Bargaining Units in the Health Care Industry, 53 FR 33900 (1988), (the Board held four hearings—two in Washington, DC, one in Chicago, IL, and one in San Francisco, CA—that over the course of 14 days resulted in the appearance of 144 witnesses and 3,545 pages of testimony).

[43] See June 5, 2018 Letter from Chairman Ring to Senators Warren, Gillibrand, and Sanders, available at *https://www.nlrb.gov/news-outreach/news-story/nlrb-chairman-provides-response-senators-regarding-joint-employer-inquiry.*

[44] *Hy-Brand I,* supra, 365 NLRB No.156, slip op. at 20, 26, 27, and 29.

[45] The relationship between Member Miscimarra's dissent in *Browning-Ferris* and the majority opinion in *Hy-Brand* is examined in a February 9, 2018 report issued by the Board's Inspector General, which is posted on the Board's website (''OIG Report Regarding *Hy-Brand* Deliberations'' available at *www.nlrb.gov*).

[46] E.O. 13272, Sec. 1, 67 FR 53461 (''Proper Consideration of Small Entities in Agency Rulemaking'').

number of small entities. However, an agency is not required to prepare an IRFA for a proposed rule if the agency head certifies that, if promulgated, the rule will not have a significant economic impact on a substantial number of small entities.[47] The RFA does not define either ''significant economic impact'' or ''substantial number of small entities.''[48] Additionally, ''[i]n the absence of statutory specificity, what is 'significant' will vary depending on the economics of the industry or sector to be regulated. The agency is in the best position to gauge the small entity impacts of its regulations.''[49]

The Board has elected to prepare an IRFA to provide the public the fullest opportunity to comment on the proposed rule. An IRFA describes why an action is being proposed; the objectives and legal basis for the proposed rule; the number of small entities to which the proposed rule would apply; any projected reporting, recordkeeping, or other compliance requirements of the proposed rule; any overlapping, duplicative, or conflicting Federal rules; and any significant alternatives to the proposed rule that would accomplish the stated objectives, consistent with applicable statutes, and that would minimize any significant adverse economic impacts of the proposed rule on small entities. Descriptions of this proposed rule, its purpose, objectives, and the legal basis are contained earlier in the **SUMMARY** and **SUPPLEMENTAL INFORMATION** sections and are not repeated here.

The Board believes that this rule will likely not have a significant economic impact on a substantial number of small entities. While we assume for purposes of this analysis that a substantial number of small employers and small entity labor unions will be impacted by this rule, we anticipate low costs of compliance with the rule, related to reviewing and understanding the substantive changes to the joint-employer standard. There may be compliance costs that are unknown to the Board; perhaps, for example, employers may incur potential increases in liability insurance costs. The Board welcomes comments from the public that will shed light on potential compliance costs or any other part of this IRFA.

[47] 5 U.S.C. 605(b).

[48] 5 U.S.C. 601.

[49] Small Business Administration Office of Advocacy, ''A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act'' (''SBA Guide'') at 18, *https://www.sba.gov/sites/default/files/advocacy/How-to-Comply-with-the-RFA-WEB.pdf.*

B. Description and Estimate of Number of Small Entities to Which the Rule Applies

In order to evaluate the impact of the proposed rule, the Board first identified the entire universe of businesses that could be impacted by a change in the joint-employer standard. According to the United States Census Bureau, there were approximately 5.9 million business firms with employees in 2015.[50] Of those, the Census Bureau estimates that about 5,881,267 million were firms with fewer than 500 employees.[51] While this proposed rule does not apply to employers that do not meet the Board's jurisdictional requirements, the Board does not have the data to determine the number of excluded entities.[52] Accordingly, the Board assumes for purposes of this analysis that the great majority of the 5,881,267 million small business firms could be impacted by the proposed rule.

The proposed rule will only be applied as a matter of law when small businesses are alleged to be joint employers in a Board proceeding. Therefore, the frequency that the issue comes before the Board is indicative of the number of small entities most directly impacted by the proposed rule. A review of the Board's representation petitions and unfair labor practice (ULP) charges provides a basis for estimating the frequency that the joint-employer issue comes before the Agency. During the five-year period between January 1, 2013 and December 31, 2017, a total of 114,577 representation and unfair labor practice cases were initiated with the Agency. In 1,598 of those filings, the representation petition or ULP charge filed with the Agency asserted a joint-employer relationship between at least two employers.[53] Accounting for repetitively alleged joint-employer relationships in these filings, we identified 823 separate joint-employer relationships involving an estimated 1,646 employers.[54] Accordingly, the joint-employer standard most directly impacted approximately .028% of all 5.9 million business firms (including both large and small businesses) over the five-year period. Since a large share of our joint-employer cases involves large employers, we expect an even lower percentage of small businesses to be most directly impacted by the Board's application of the rule.

Irrespective of an Agency proceeding, we believe the proposed rule may be more relevant to certain types of small employers because their business relationships involve the exchange of employees or operational control.[55] In addition, labor unions, as organizations representing or seeking to represent employees, will be impacted by the

[50] ''Establishments'' refer to single location entities—an individual ''firm'' can have one or more establishments in its network. The Board has used firm level data for this IRFA because establishment data is not available for certain types of employers discussed below. Census Bureau definitions of ''establishment'' and ''firm'' can be found at *https://www.census.gov/programs-surveys/susb/about/glossary.html.*

[51] The Census Bureau does not specifically define small business, but does break down its data into firms with 500 or more employees and those with fewer than 500 employees. *See* U.S. Department of Commerce, Bureau of Census, 2015 Statistics of U.S. Businesses (''SUSB'') Annual Data Tables by Establishment Industry, *https://www.census.gov/data/tables/2015/econ/susb/2015-susb-annual.html* (from downloaded Excel Table entitled ''U.S., 6-digit NAICS''). Consequently, the 500-employee threshold is commonly used to describe the universe of small employers. For defining small businesses among specific industries, the standards are defined by the North American Industry Classification System (NAICS), which we set forth below.

[52] Pursuant to 29 U.S.C. 152(6) and (7), the Board has statutory jurisdiction over private sector employers whose activity in interstate commerce exceeds a minimal level. *NLRB* v. *Fainblatt,* 306 U.S. 601, 606–07 (1939). To this end, the Board has adopted monetary standards for the assertion of jurisdiction that are based on the volume and character of the business of the employer. In general, the Board asserts jurisdiction over employers in the retail business industry if they have a gross annual volume of business of $500,000 or more. *Carolina Supplies & Cement Co.,* 122 NLRB 88 (1959). But shopping center and office building retailers have a lower threshold of $100,000 per year. *Carol Management Corp.,* 133 NLRB 1126 (1961). The Board asserts jurisdiction over non-retailers generally where the value of goods and services purchased from entities in other states is at least $50,000. *Siemons Mailing Service,* 122 NLRB 81 (1959).

The following employers are excluded from the NLRB's jurisdiction by statute:

- Federal, state and local governments, including public schools, libraries, and parks, Federal Reserve banks, and wholly-owned government corporations. 29 U.S.C. 152(2).
- Employers that employ only agricultural laborers, those engaged in farming operations that cultivate or harvest agricultural commodities, or prepare commodities for delivery. 29 U.S.C. 153(3).
- Employers subject to the Railway Labor Act, such as interstate railroads and airlines. 29 U.S.C. 152(2).

[53] This includes initial representation case petitions (RC petitions) and unfair labor practice charges (CA cases) filed against employers.

[54] Since a joint-employer relationship requires at least two employers, we have estimated the number of employers by multiplying the number of asserted joint-employer relationships by two. Some of these filings assert more than two joint employers; but, on the other hand, some of the same employers are named multiple times in these filings. Additionally, this number is certainly inflated because the data does not reveal those cases where joint-employer status is not in dispute.

[55] The Board acknowledges that there are other types of entities and/or relationships between entities that may be affected by a change in the joint-employer rule. Such relationships include but are not limited to: Lessor/lessee, and parent/subsidiary. However, the Board does not believe that entities involved in these relationships would be impacted more than the entities discussed below.

Board's change in its joint-employer standard. Thus, the Board has identified the following five types of small businesses or entities as those most likely to be impacted by the rule: Contractors/subcontractors, temporary help service suppliers, temporary help service users, franchisees, and labor unions.

(1) Businesses commonly enter into contracts with vendors to receive a wide range of services that may satisfy their primary business objectives or solve discrete problems that they are not qualified to address. And there are seemingly unlimited types of vendors who provide these types of contract services. Businesses may also subcontract work to vendors to satisfy their own contractual obligations—an arrangement common to the construction industry. Businesses that contract to receive or provide services often share workspaces and sometimes share control over workers, rendering their relationships subject to application of the Board's joint-employer standard. The Board does not have the means to identify precisely how many businesses are impacted by contracting and subcontracting within the U.S., or how many contractors and subcontractors would be small businesses as defined by the SBA.[56]

(2) Temporary help service suppliers (North American Industry Clarification System (''NAICS'') #561320), are primarily engaged in supplying workers to supplement a client employer's workforce. To be defined as a small business temporary help service supplier by the SBA, the entity must generate receipts of less than $27.5 million annually.[57] In 2012, there were 13,202 temporary service supplier firms in the U.S.[58] Of these business firms, 6,372 had receipts of less than $1,000,000; 3,947 had receipts between $1,000,000 and $4,999,999; 1,639 had receipts between $5,000,000 and $14,999,999; and 444 had receipts between $15,000,000 and $24,999,999. In aggregate, at least 12,402 temporary help service supplier firms (93.9% of total) are definitely small businesses according to SBA standards. Since the Board cannot determine how many of the 130 business firms with receipts between $25,000,000–$29,999,999 fall below the $27.5 million annual receipt threshold, it will assume that these are small businesses as defined by the SBA. For purposes of this IRFA, the Board assumes that 12,532 temporary help service suppliers firms (94.9% of total) are small businesses.

(3) Entities that use temporary help services in order to staff their businesses are widespread throughout many types of industries, and include both large and small employers. A 2012 survey of business owners by the Census Bureau revealed that at least 266,006 firms obtained staffing from temporary help services in that calendar year.[59] This survey provides the only gauge of employers that obtain staffing from temporary help services and the Board is without the means to estimate what portion of those are small businesses as defined by the NAICS. For purposes of this IRFA, the Board assumes that all users of temporary services are small businesses.

(4) Franchising is a method of distributing products or services, in which a franchisor lends its trademark or trade name and a business system to a franchisee, which pays a royalty and often an initial fee for the right to conduct business under the franchisor's name and system.[60] Franchisors generally exercise some operational control over their franchisees, which renders the relationship subject to application of the Board's joint-employer standard. The Board does not have the means to identify precisely how many franchisees operate within the U.S., or how many are small businesses as defined by the SBA. A 2012 survey of business owners by the Census Bureau revealed that at least 507,834 firms operated a portion of their business as a franchise. But, only 197,204 of these firms had paid employees.[61] In our view, only franchisees with paid employees are potentially impacted by the joint-employer standard. Of the franchisees with employees, 126,858 (64.3%)) had sales receipts totaling less than $1 million. Based on this available data and the SBA's definitions of small businesses, which generally define small businesses as having receipts well over $1 million, we assume that almost two-thirds of franchisees would be defined as small businesses.[62]

(5) Labor unions, as defined by the NLRA, are entities ''in which employees participate and which exist for the purpose . . . of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.'' [63] By defining which employers are joint employers under the NLRA, the proposed rule impacts labor unions generally, and more directly impacts those labor unions that organize the specific business sectors discussed above. The SBA's ''small business'' standard for ''Labor Unions and Similar Labor Organizations'' (NAICS #813930) is $7.5 million in annual receipts.[64] In 2012, there were 13,740 labor union firms in the U.S.[65] Of these firms, 11,245 had receipts of less than $1,000,000; 2,022 labor unions had receipts between $1,000,000 and $4,999,999, and 141 had receipts between $5,000,000 and $7,499,999. In aggregate, 13,408 labor union firms (97.6% of total) are small businesses according to SBA standards.

Based on the foregoing, the Board assumes there are 12,532 temporary help supplier firms, 197,204 franchise firms, and 13,408 union firms that are small businesses; and further that all 266,006 temporary help user firms are small businesses. Therefore, among these four categories of employers that are most interested in the proposed rule, 489,150 business firms are assumed to be small businesses as defined by the

[56] The only data known to the Board relating to contractor business relationships involve businesses that contract with the Federal Government. In 2014, the Department of Labor reported that approximately 500,000 federal contractor firms were registered with the General Services Administration. *Establishing a Minimum Wage for Contractors,* 79 FR 60634, 60697. However, the Board is without the means to identify the precise number of firms that actually receive federal contracts or to determine what portion of those are small businesses as defined by the SBA. Even if these data were available, given that the Board does not have jurisdiction over government entities, business relationships between federal contractors and the federal agencies will not be impacted by the Board's joint-employer rule. The business relationships between federal contractors and their subcontractors could be subject to the Board's joint-employer rule. However, we also lack the means for estimating the number of businesses that subcontract with federal contractors or determine what portion of those would be defined as small businesses. Input from the public in this regard is welcome.

[57] 13 CFR 121.201.

[58] The Census Bureau only provides data about receipts in years ending in 2 or 7. The 2017 data has not been published, so the 2012 data is the most recent available information regarding receipts. *See* U.S. Department of Commerce, Bureau of Census, 2012 SUSB Annual Data Tables by Establishment Industry, NAICS classification #561320, *https://www2.census.gov/programs-surveys/susb/tables/2012/us_6digitnaics_r_2012.xlsx.*

[59] *See* U.S. Department of Commerce, Bureau of Census, 2012 Survey of Business Owners, *https://factfinder.census.gov/bkmk/table/1.0/en/SBO/2012/00CSCB46.*

[60] *See* International Franchising Establishments FAQs, found at *https://www.franchise.org/faqs-about-franchising.*

[61] *See* U.S. Department of Commerce, Bureau of Census, 2012 Survey of Business Owners, *https://factfinder.census.gov/bkmk/table/1.0/en/SBO/2012/00CSCB67.*

[62] *See* 13 CFR 121.201.

[63] 29 U.S.C. 152(5).

[64] 13 CFR 121.201.

[65] *See* U.S. Department of Commerce, Bureau of Census, 2012 SUSB Annual Data Tables by Establishment Industry, NAICS classification #722513, *https://www2.census.gov/programs-surveys/susb/tables/2012/us_6digitnaics_r_2012.xlsx.*

SBA. We believe that all of these small businesses, and also those businesses regularly engaged in contracting/subcontracting, have a general interest in the rule and would be impacted by the compliance costs discussed below, related to reviewing and understanding the rule. But, as previously noted, employers will only be directly impacted when they are alleged to be a joint employer in a Board proceeding. Given our historic filing data, this number is very small relative to the number of small employers in these five categories.

C. Recordkeeping, Reporting, and Other Compliance Costs

The RFA requires an agency to consider the direct burden that compliance with a new regulation will likely impose on small entities.[66] Thus, the RFA requires the Agency to determine the amount of ''reporting, recordkeeping and other compliance requirements'' imposed on small entities.[67]

We conclude that the proposed rule imposes no capital costs for equipment needed to meet the regulatory requirements; no costs of modifying existing processes and procedures to comply with the proposed rule; no lost sales and profits resulting from the proposed rule; no changes in market competition as a result of the proposed rule and its impact on small entities or specific submarkets of small entities; and no costs of hiring employees dedicated to compliance with regulatory requirements.[68] The proposed rule also does not impose any new information collection or reporting requirements on small entities.

Small entities may incur some costs from reviewing the rule in order to understand the substantive changes to the joint-employer standard. We estimate that a labor compliance employee at a small employer who undertook to become generally familiar with the proposed changes may take at most one hour to read the summary of the rule in the introductory section of the preamble. It is also possible that a small employer may wish to consult with an attorney which we estimated to require one hour as well.[69] Using the Bureau of Labor Statistics' estimated wage and benefit costs, we have assessed these labor costs to be $124.37.[70]

As for other potential impacts, it is possible that liability and liability insurance costs may increase for small entities because they may no longer have larger entities with which to share the cost of any NLRA backpay remedies ordered in unfair labor practice proceedings. Such a cost may arguably fall within the SBA Guide's category of ''extra costs associated with the payment of taxes or fees associated with the proposed rule.'' Conversely, fewer employers may be alleged as joint employers, resulting in lower costs to some small entities. The Board is without the means to quantify such costs and welcomes any comment or data on this topic.[71] Nevertheless, we believe such costs are limited to very few employers, considering the limited number of Board proceedings where joint-employer status is alleged, as compared with the number of employers subject to the Board's jurisdiction. Moreover, the proposed rule may make it easier for employers to collectively bargain without the complications of tri-partite bargaining, and further provide greater certainty as to their bargaining responsibilities. We consider such positive impacts as either indirect, or impractical to quantify, or both.

As to the impact on unions, we anticipate they may also incur costs from reviewing the rule. We believe a union would consult with an attorney, which we estimate to require no more than one hour of time ($80.26, *see* n.45) because union counsel should already be familiar with the pre-*Browning-Ferris* standard. Additionally, the Board expects that the additional clarity of the proposed rule will serve to reduce litigation expenses for unions and other small entities. Again, the Board welcomes any data on any of these topics.

The Board does not find the estimated $124.37 cost to small employers and the estimated $80.26 cost to unions in order to review and understand the rule to be significant within the meaning of the RFA. In making this finding, one important indicator is the cost of compliance in relation to the revenue of the entity or the percentage of profits affected.[72] Other criteria to be considered are the following:

—Whether the rule will cause long-term insolvency, *i.e.,* regulatory costs that may reduce the ability of the firm to make future capital investment, thereby severely harming its competitive ability, particularly against larger firms;

—Whether the cost of the proposed regulation will (a) eliminate more than 10 percent of the businesses' profits; (b) exceed one percent of the gross revenues of the entities in a particular sector, or (c) exceed five percent of the labor costs of the entities in the sector.[73]

The minimal cost to read and understand the rule will not generate any such significant economic impacts.

Since the only quantifiable impact that we have identified is the $124.37 or $80.26 that may be incurred in reviewing and understanding the rule, we do not believe there will be a significant economic impact on a substantial number of small entities associated with this proposed rule.

D. Duplicate, Overlapping, or Conflicting Federal Rules

The Board has not identified any federal rules that conflict with the proposed rule. It welcomes comments that suggest any potential conflicts not noted in this section.

E. Alternatives Considered

Pursuant to 5 U.S.C. 603(c), agencies are directed to look at ''any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities.'' The Board considered two primary alternatives to the proposed rules.

First, the Board considered taking no action. Inaction would leave in place the *Browning-Ferris* joint-employer standard to be applied in Board decisions. However, for the reasons

[66] *See Mid-Tex Elec. Co-op* v. *FERC,* 773 F.2d 327, 342 (D.C. Cir. 1985) (''[I]t is clear that Congress envisioned that the relevant 'economic impact' was the impact of compliance with the proposed rule on regulated small entities.'').

[67] *See* 5 U.S.C. 603(b)(4), 604(a)(4).

[68] *See* SBA Guide at 37.

[69] We do not believe that more than one hour of time by each would be necessary to read and understand the rule. This is because the new standard constitutes a return to the pre-*Browning-Ferris* standard with which most employers are already knowledgeable if relevant to their businesses, and with which we believe labor-management attorneys are also familiar.

[70] For wage figures, see May 2017 National Occupancy Employment and Wage Estimates, found at *https://www.bls.gov/oes/current/oes_nat.htm.* The Board has been administratively informed that BLS estimates that fringe benefits are approximately equal to 40 percent of hourly wages. Thus, to calculate total average hourly earnings, BLS multiplies average hourly wages by 1.4. In May 2017, average hourly wages for labor relations specialists (BLS #13–1075) were $31.51. The same figure for a lawyer (BLS #23–1011) is $57.33. Accordingly, the Board multiplied each of those wage figures by 1.4 and added them to arrive at its estimate.

[71] The RFA explains that in providing initial and final regulatory flexibility analyses, ''an agency may provide either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, *or more general descriptive statements if quantification is not practicable or reliable.*'' 5 U.S.C. 607 (emphasis added).

[72] *See* SBA Guide at 18.

[73] *Id.* at 19.

stated in Sections II and III above, the Board finds it desirable to revisit the *Browning-Ferris* standard and to do so through the rulemaking process. Consequently, we reject maintaining the status quo.

Second, the Board considered creating exemptions for certain small entities. This was rejected as impractical, considering that an exemption for small entities would substantially undermine the purpose of the proposed rule because such a large percentage of employers and unions would be exempt under the SBA definitions. Moreover, as this rule often applies to relationships involving a small entity (such as a franchisee) and a large enterprise (such as a franchisor), exemptions for small businesses would decrease the application of the rule to larger businesses as well, potentially undermining the policy behind this rule. Additionally, given the very small quantifiable cost of compliance, it is possible that the burden on a small business of determining whether it fell within a particular exempt category might exceed the burden of compliance. Congress gave the Board very broad jurisdiction, with no suggestion that it wanted to limit coverage of any part of the Act to only larger employers.[74] As the Supreme Court has noted, ''[t]he [NLRA] is federal legislation, administered by a national agency, intended to solve a national problem on a national scale.'' [75] As such, this alternative is contrary to the objectives of this rulemaking and of the NLRA.

Neither of the alternatives considered accomplished the objectives of proposing this rule while minimizing costs on small businesses. Accordingly, the Board believes that proceeding with this rulemaking is the best regulatory course of action. The Board welcomes public comment on any facet of this IRFA, including issues that we have failed to consider.

Paperwork Reduction Act

The NLRB is an agency within the meaning of the Paperwork Reduction Act (PRA). 44 U.S.C. 3502(1) and (5). This Act creates rules for agencies when they solicit a ''collection of information.'' 44 U.S.C. 3507. The PRA defines ''collection of information'' as ''the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format.'' 44 U.S.C. 3502(3)(A). The PRA only applies when such collections are ''conducted or sponsored by those agencies.'' 5 CFR 1320.4(a).

The proposed rule does not involve a collection of information within the meaning of the PRA; it instead clarifies the standard for determining joint-employer status. Outside of administrative proceedings (discussed below), the proposed rule does not require any entity to disclose information to the NLRB, other government agencies, third parties, or the public.

The only circumstance in which the proposed rule could be construed to involve disclosures of information to the Agency, third parties, or the public is when an entity's status as a joint employer has been alleged in the course of Board administrative proceedings. However, the PRA provides that collections of information related to ''an administrative action or investigation involving an agency against specific individuals or entities'' are exempt from coverage. 44 U.S.C. 3518(c)(1)(B)(ii). A representation proceeding under section 9 of the NLRA as well as an investigation into an unfair labor practice under section 10 of the NLRA are administrative actions covered by this exemption. The Board's decisions in these proceedings are binding on and thereby alter the legal rights of the parties to the proceedings and thus are sufficiently ''against'' the specific parties to trigger this exemption.[76]

For the foregoing reasons, the proposed rule does not contain information collection requirements that require approval by the Office of Management and Budget under the PRA.

Congressional Review Act

The provisions of this rule are substantive. Therefore, the Board will submit this rule and required accompanying information to the Senate, the House of Representatives, and the Comptroller General as required by the Small Business Regulatory Enforcement Fairness Act (Congressional Review Act or CRA), 5 U.S.C. 801–808.

This rule is a ''major rule'' as defined by Section 804(2) of the CRA because it will have an effect on the economy of more than $100 million, at least during the year it takes effect. 5 U.S.C. 804(2)(A).[77] Accordingly, the rule will become effective no earlier than 60 days after publication of the final rule in the **Federal Register**.

List of Subjects in 29 CFR Part 103

Colleges and universities, Health facilities, Joint-employer standard, Labor management relations, Military personnel, Music, Sports.

Text of the Proposed Rule

For the reasons discussed in the preamble, the Board proposes to amend 29 CFR part 103 as follows:

PART 103—OTHER RULES

■ 1. The authority citation for part 103 continues to read as follows:

Authority: 29 U.S.C. 156, in accordance with the procedure set forth in 5 U.S.C. 553.

■ 2. Add § 103.40 to read as follows:

§ 103.40: Joint employers.

An employer, as defined by Section 2(2) of the National Labor Relations Act (the Act), may be considered a joint employer of a separate employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction. A putative joint employer must possess and actually exercise substantial direct and immediate control over the

[74] However, there are standards that prevent the Board from asserting authority over entities that fall below certain jurisdictional thresholds. This means that extremely small entities outside of the Board's jurisdiction will not be affected by the proposed rule. *See* CFR 104.204.

[75] *NLRB* v. *Nat. Gas Util. Dist. of Hawkins Cty., Tenn.,* 402 U.S. 600, 603–04 (1971) (quotation omitted).

[76] Legislative history indicates Congress wrote this exception to broadly cover many types of administrative action, not just those involving ''agency proceedings of a prosecutorial nature.'' *See* S. REP. 96–930 at 56, *as reprinted in* 1980 U.S.C.C.A.N. 6241, 6296. For the reasons more fully explained by the Board in prior rulemaking, 79 FR 74307, 74468–69 (2015), representation proceedings, although not qualifying as adjudications governed by the Administrative Procedure Act, 5 U.S.C. 552b(c)(1), are nonetheless exempt from the PRA under 44 U.S.C. 3518(c)(1)(B)(ii).

[77] A rule is a ''major rule'' for CRA purposes if it will (A) have an annual effect on the economy of $100 million or more; (B) cause a major increase in costs or prices for consumers, individual industries, government agencies, or geographic regions; or (C) result in significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States–based enterprises to compete with foreign-based enterprises in domestic and export markets. 5 U.S.C. 804. The proposed rule is a ''major rule'' because, as explained in the discussion of the Regulatory Flexibility Act above, the Board has estimated that the average cost of compliance with the rule would be approximately $124.37 per affected employer and approximately $80.26 per union. Because there are some 5.9 million employers and 13,740 unions that could potentially be affected by the rule, the total cost to the economy of compliance with the rule will exceed $100 million ($733,783,000 + $1,102,772.4 = $734,885,772.4) in the first year after it is adopted. Since the costs of compliance are incurred in becoming familiar with the legal standard adopted in the proposed rule, the rule would impose no additional costs in subsequent years. Additionally, the Board is confident that the rule will have none of the effects enumerated in 5 U.S.C. 804(2)(B) and (C), above.

employees' essential terms and conditions of employment in a manner that is not limited and routine.

Example 1 to § 103.40. Company A supplies labor to Company B. The business contract between Company A and Company B is a ''cost plus'' arrangement that establishes a maximum reimbursable labor expense while leaving Company A free to set the wages and benefits of its employees as it sees fit. Company B does not possess and has not exercised direct and immediate control over the employees' wage rates and benefits.

Example 2 to § 103.40. Company A supplies labor to Company B. The business contract between Company A and Company B establishes the wage rate that Company A must pay to its employees, leaving A without discretion to depart from the contractual rate. Company B has possessed and exercised direct and immediate control over the employees' wage rates.

Example 3 to § 103.40. Company A supplies line workers and first-line supervisors to Company B at B's manufacturing plant. On-site managers employed by Company B regularly complain to A's supervisors about defective products coming off the assembly line. In response to those complaints and to remedy the deficiencies, Company A's supervisors decide to reassign employees and switch the order in which several tasks are performed. Company B has not exercised direct and immediate control over Company A's lineworkers' essential terms and conditions of employment.

Example 4 to § 103.40. Company A supplies line workers and first-line supervisors to Company B at B's manufacturing plant. Company B also employs supervisors on site who regularly require the Company A supervisors to relay detailed supervisory instructions regarding how employees are to perform their work. As required, Company A supervisors relay those instructions to the line workers. Company B possesses and exercises direct and immediate control over Company A's line workers. The fact that Company B conveys its supervisory commands through Company A's supervisors rather than directly to Company A's line workers fails to negate the direct and immediate supervisory control.

Example 5 to § 103.40. Under the terms of a franchise agreement, Franchisor requires Franchisee to operate Franchisee's store between the hours of 6:00 a.m. and 11:00 p.m. Franchisor does not participate in individual scheduling assignments or preclude Franchisee from selecting shift durations. Franchisor has not exercised direct and immediate control over essential terms and conditions of employment of Franchisee's employees.

Example 6 to § 103.40. Under the terms of a franchise agreement, Franchisor and Franchisee agree to the particular health insurance plan and 401(k) plan that the Franchisee must make available to its workers. Franchisor has exercised direct and immediate control over essential employment terms and conditions of Franchisee's employees.

Example 7 to § 103.40. Temporary Staffing Agency supplies 8 nurses to Hospital to cover during temporary shortfall in staffing. Over time, Hospital hires other nurses as its own permanent employees. Each time Hospital hires its own permanent employee, it correspondingly requests fewer Agency-supplied temporary nurses. Hospital has not exercised direct and immediate control over temporary nurses' essential terms and conditions of employment.

Example 8 to § 103.40. Temporary Staffing Agency supplies 8 nurses to Hospital to cover for temporary shortfall in staffing. Hospital manager reviewed resumes submitted by 12 candidates identified by Agency, participated in interviews of those candidates, and together with Agency manager selected for hire the best 8 candidates based on their experience and skills. Hospital has exercised direct and immediate control over temporary nurses' essential terms and conditions of employment.

Example 9 to § 103.40. Manufacturing Company contracts with Independent Trucking Company (''ITC'') to haul products from its assembly plants to distribution facilities. Manufacturing Company is the only customer of ITC. Unionized drivers—who are employees of ITC—seek increased wages during collective bargaining with ITC. In response, ITC asserts that it is unable to increase drivers' wages based on its current contract with Manufacturing Company. Manufacturing Company refuses ITC's request to increase its contract payments. Manufacturing Company has not exercised direct and immediate control over the drivers' terms and conditions of employment.

Example 10 to § 103.40. Business contract between Company and a Contractor reserves a right to Company to discipline the Contractor's employees for misconduct or poor performance. Company has never actually exercised its authority under this provision. Company has not exercised direct and immediate control over the Contractor's employees' terms and conditions of employment.

Example 11 to § 103.40. Business contract between Company and Contractor reserves a right to Company to discipline the Contractor's employees for misconduct or poor performance. The business contract also permits either party to terminate the business contract at any time without cause. Company has never directly disciplined Contractor's employees. However, Company has with some frequency informed Contractor that particular employees have engaged in misconduct or performed poorly while suggesting that a prudent employer would certainly discipline those employees and remarking upon its rights under the business contract. The record indicates that, but for Company's input, Contractor would not have imposed discipline or would have imposed lesser discipline. Company has exercised direct and immediate control over Contractor's employees' essential terms and conditions.

Example 12 to § 103.40. Business contract between Company and Contractor reserves a right to Company to discipline Contractor's employees for misconduct or poor performance. User has not exercised this authority with the following exception. Contractor's employee engages in serious misconduct on Company's property, committing severe sexual harassment of a coworker. Company informs Contractor that offending employee will no longer be permitted on its premises. Company has not exercised direct and immediate control over offending employee's terms and conditions of employment in a manner that is not limited and routine.

Dated: September 10, 2018.

Roxanne Rothschild,

Deputy Executive Secretary.

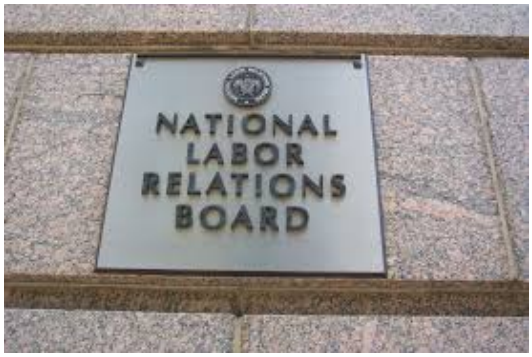
[FR Doc. 2018–19930 Filed 9–13–18; 8:45 am]

BILLING CODE 7545–01–P

NLRB Announces Proposed Rule Changing Joint-Employer Standard

By **Zach Fasman** on September 14, 2018

Posted in **Joint Employer, NLRA**



The National Labor Relations Board announced that it will publish a Notice of Proposed Rulemaking today, September 14, regarding its joint-employer standard.

The proposed rule will state that an employer may be considered a joint-employer of another employer's employees only if it possesses and exercises substantial, direct and immediate control over the essential terms and conditions of employment in a manner that is not limited and routine. Indirect influence and contractual reservations of authority will no longer be sufficient to establish a joint-employer relationship. The new rule, if adopted, will restore Board law to the traditional standard for determining joint employer status under the NLRA.

This proposed rule would reverse the controversial Obama Board decision in *Browning-Ferris*, 362 NLRB No. 186 (2015), *appeal pending*. Under the *Browning-Ferris* standard, two or more employers would be considered joint employers if they share or codetermine matters governing the essential terms and conditions of employment. The inquiry focuses on whether the alleged joint employer had the potential to control aspects of the workplace, either directly or indirectly, regardless of whether the employer ever exercised that authority. This standard was heavily criticized and was the subject of legislative correction that passed the House but was never considered by the Senate.

The NLRB press release states that the proposed rule reflects the Trump Board's "majority initial view" that the intent of the National Labor Relations Act is "best supported by a joint-employer doctrine that does not draw third parties, who have not played an active role in deciding wages, benefits, or other essential terms and conditions of employment, into a collective-bargaining relationship for another employer's employees."

The Board previously attempted to reverse the *Browning-Ferris* joint-employer standard in *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (Dec. 14, 2017) (which we blogged about here). The Board reversed and vacated *Hy-Brand* in February, 2018 based upon Member William Emanuel's participation in the decision. Prior to joining the Board, Member Emanuel was a partner at Littler Mendelson, which had represented one of the unsuccessful parties in *Browning-Ferris*.

The public may submit comments to the Board on the proposed rule for sixty days following its publication on September 14.

TAGS: BARGAINING UNITS, JOINT EMPLOYER, NLRB

Labor Relations Update

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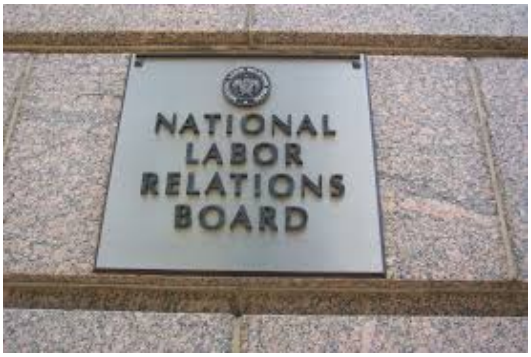
NLRB Considers Rulemaking to Address Hotly-Contested Joint-Employer Standard

By **Mark Theodore**, **Joshua Fox** and **Dana N. Berber** on May 14, 2018

Posted in **Joint Employer, NLRA, NLRB, Rulemaking**



As we previously reported here, here and here, the NLRB's "joint employer" standard has vacillated over the last several years, and currently remains in flux. For historical reference, the NLRB expanded the scope of joint-employment in 2015 in *Browning-Ferris,* 362 NLRB No. 186 (2015), and then reverted to a more rigorous showing that had been required for years in *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (Dec. 14, 2017).

Most recently, under extensive political pressure, the Board vacated *Hy-Brand* due to Member William Emanuel's participation in the decision; Emanuel's former firm, Littler Mendelson, represented one of the unsuccessful parties in *Browning-Ferris* and was under pressure by lawmakers to recuse himself. Since then, with cases pending before the Board and courts involving potential joint-employer liability, parties on both sides of this issue have been on the edge of their seats awaiting guidance.

In a stark and unconventional departure from the Board's normal practices—which is to overturn prior legal precedent through decision-making, rather than rulemaking—the NLRB announced that it is considering rulemaking to address the joint-employer standard. On May 9, 2018, the Office of the Information and Regulatory Affairs published a Board submission, prepared at the request of Board Chairman John Ring, that the Board may be determining the joint-employer standard under the Act via rulemaking. This is unusual because the Board has only engaged in rulemaking a few times in its 83-year history, one of which (the agency's attempt to require all employers to post a notice of rights under the NLRA) ended badly.

An apparent benefit of pursuing change through the rulemaking process, rather than an adversary proceeding, is that there does not appear to be the same potential arguments that Member Emanuel or any other Board Member must recuse him or herself based on the identities of the interested parties.

In the NLRB press release, recently-confirmed Chairman Ring emphasized the importance of restoring clarity in determining joint-employer status, and also touted that proceeding down this path allows the Board to hear "all views" on this critical issue before reaching a decision. Chairman Ring also promised that the Board would issue a proposed rule "as soon as possible" after hearing from all interested parties on the issue.

The Board has formally taken the necessary steps to begin the long public comment process associated with rulemaking here. The regulatory agenda includes a proposal, but notably does not indicate the participation of Members Mark Gaston Pearce and Lauren McFerran, the Board's two Democratic-members.

The next steps are as follows: If and when the proposed rule receives support from a majority of the five-member Board (notably, neither Members Pearce or McFerran would be needed), the Board will then issue a Notice of Proposed Rulemaking, which will open the process for public comment to receive at least one round of written comments on the proposed rule. The Board may also elect to hold public hearings, which may include cross-examination, and provide additional comment periods to obtain more information.

Although the next Board can reverse any decision made through this process, subsequent Boards will similarly have to trudge through the arduous and prolonged formalities of the rulemaking and notice-and-comment period to accomplish that objective.

The Board's potential use of rulemaking here is quite an interesting reaction to the extensive political pressure placed by lawmakers on the Board's members to recuse themselves from cases involving parties currently or formerly represented by their prior firms.

We will keep you posted as to how this unfolds in the closely-watched context of the joint-employer standard, as well as whether rulemaking evolves into the new *modus operandi* of the Trump Board in light of the political heat the Board members have recently faced.

TAGS: JOINT EMPLOYER, NLRA, NLRA RULEMAKING, NLRB, RULEMAKING

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ABOUT FACE! Under Pressure, NLRB Vacates Joint Employer Standard and Returns to Browning-Ferris

By **Michael Lebowich**, **Joshua Fox** and **Jordan Simon** on February 26, 2018

Posted in **Joint Employer, NLRA, NLRB**

In an unexpected and critical turn of events, after extensive political pressure, the NLRB, sitting as a three-member panel comprised of Chairman Kaplan and Members Pearce and McFerran, vacated last year's decision in *Hy-Brand Industrial Contractors, Ltd*., 365 NLRB No. 156 (Dec. 14, 2017) due to Member William Emanuel's participation in the decision. Prior to joining the Board, Member Emanuel was a partner at Littler Mendelson, and his firm represented one of the unsuccessful parties in the Browning-Ferris case—which established the "joint employer" standard that Hy-Brand overturned. The Board concluded that Emanuel should have recused himself from the decision.

The Hy-Brand decision, which we previously reported on here and here, reinstated the traditional joint-employer standard that was significantly relaxed under the Obama-era Board in Browning-Ferris. As a result of the Board's order to vacate, Hy-Brand's overruling of Browning-Ferris is of "no force or effect." So for the time being, Browning-Ferris returns to being the law of the land, and this outcome could have far-reaching implications to future cases by the Board involving potential conflicts of interest involving Board members.

The Board's decision vacating Hy-Brand arose in the context of intense scrutiny concerning Member Emanuel's participation in the decision. On February 9, the Office of the Inspector General for the NLRB released a report to the Board in which he determined that Member Emanuel's involvement in Hy-Brand ran afoul of Exec. Order. No. 13770(1) (Executive branch employees are prohibited from "participat[ing] in any particular matter involving specific parties that is directly and substantially related to [a] former employer . . .") and that Emanuel should have recused himself from taking part in the decision. The Inspector General reached his conclusion on the basis that the deliberative process in Hy-Brand was essentially a continuation of the deliberative process in Browning-Ferris—of which Emanuel's former firm had represented one of the Charging Parties that has since been remanded to the D.C. Circuit.

On the same day the Board vacated the Hy-Brand ruling, Senator Elizabeth Warren (D-Massachusetts) and Senator Patty Murray (D-Washington), the ranking member on the Senate Committee on Health, Education, Labor and Pensions, criticized Member Emanuel's involvement in the Hy-Brand decision and sent multiple requests for information regarding his involvement. Earlier this month, a group of Democratic Congressmen sent a letter to the NLRB clarifying whether Emanuel violated federal regulations and the ethics pledge by participating in the Hy-Brand case.

Pursuant to the Order, Hy-Brand is now before the Board for further proceedings in which Member Emanuel will be ineligible to participate. We will of course keep you up to date with further developments in this case.

TAGS: JOINT EMPLOYER, NLRA, NLRB

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A Return to Clarity: Traditional Joint Employer Test Reinstated

By **Joshua Fox** on December 18, 2017

Posted in **Joint Employer, NLRA, NLRB**

As we noted last week, one of the more controversial Obama-Board rulings expanding joint employer liability was overruled this past week. In a widely-predicted 3-2 decision (Miscimarra, Kaplan, Emanuel), the NLRB, in *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (Dec. 14, 2017), reinstated the traditional standard that had been followed for more than 30 years.

Under the reinstated standard, a joint employer finding will once again require proof that the alleged joint employer actually exercises direct and immediate control over the essential terms and conditions of employment of the employees in question. The ruling not only restores clarity on this important question, but also casts doubt upon the NLRB's ability to argue, as it has in the much publicized McDonald's litigation, that franchisors are joint employers with franchisees.

Let's take a closer look at how the pendulum has swung on this issue through the years.

Traditional Joint Employer Standard

Beginning in 1984 and continuing until the NLRB's 2015 *Browning-Ferris* decision, the NLRB and the courts determined whether two separate entities were joint employers by assessing whether each exerted such direct and significant control over the same employees that they could be said to "share or codetermine those matters governing the essential terms and conditions of employment. . ." The Board applied this analysis by evaluating whether an alleged joint employer "meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction" and whether that entity's control over such matters was direct and immediate. And it deliberately distinguished direct and immediate control from situations where the alleged joint employer's supervision was limited and routine.

The Browning-Ferris Standard: Reserved, Potential or Indirect Control is Enough

In *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (2015), citing "changing economic circumstances, particularly the recent dramatic growth in contingent employment," the NLRB significantly broadened the joint employer standard. The Board jettisoned the actual conduct of the parties and decided to base NLRB decisions not on what actually happened in the workplace but on hypothetical concepts; whether the alleged joint employer had the "potential" to control aspects of the workplace, either "directly or indirectly", even though it never had exercised that authority.

That standard would have allowed the NLRB to impose joint employer liability after the fact based upon legal conclusions about the contractual relationships between the parties, as opposed to what actually happened in the workplace. Indeed, in *Hy-Brand,* the majority observed that the Board had done exactly that in *CNN America, Inc.*, 361 NLRB 439 (2014), (which was overturned on appeal by the D.C. Circuit) where the Board "imposed after-the-fact joint employer obligations contrary to the parties'20-year bargaining history, applicable collective bargaining agreements, relevant services contracts and the Board's own prior union certifications."

At the time, this sweeping departure from precedent created potentially unforeseen liability under the Act, as well as bargaining obligations for entities that had never even attempted to control the workplace. The impact of this decision upended decades of bargaining history and parties' relationships.

Actual Exercise of Direct and Immediate Control Is Now Needed

The Board restored the pre-*Browning-Ferris* paradigm that had existed for nearly 30 years. Now, joint employer liability is based upon the actual conduct of the parties, as opposed to hypothetical after the fact legal conclusions about retained but unexercised control.

The majority opinion in *Hy-Brand*, borrowing heavily from then-Member Miscimarra's dissent in *Browning-Ferris*, is an extensive catalogue of the many reasons the *Browning-Ferris* standard was both practically unworkable and inconsistent with the common law and Congressional intent. The House of Representatives apparently shared that view by passing, earlier this year, H.R. 3441, the Save Local Business Act, which would reinstate the traditional joint employer test under both the NLRA and the FLSA. H.R. 3441 has not yet been voted on by the Senate, and in light of the *Hy-Brand* decision, it may not be a priority. The *Hy-Brand* ruling should also moot the D.C. Circuit's consideration of *Browning-Ferris* itself, which was argued in February 2017, but never decided.

Application of the Hy-Brand Standard

Interestingly, the Board concluded that the two employers in *Hy–Brand* were joint employers due to the exercise of actual control by both entities over employment conditions. The Board further held that they had unlawfully terminated employees who struck one of their businesses. This prompted the dissenters in *Hy-Brand* – Members Pearce and McFerran, both part of the *Browning-Ferris* majority – to argue that there was no need to overturn *Browning-Ferris* to reach the correct result in the case itself. The dissenters also claimed that the Board should have allowed public notice before changing the *Browning-Ferris* standard, citing to the fact that advance notice and extensive public briefing had been provided in *Browning-Ferris* in 2014. Neither those claims nor the argument that *Browning-Ferris* was correctly decided carried the day.

Impact on Pending Litigation and Commercial Relationships

Significantly, and unsurprisingly, given the way the Board has ruled in recent days, the *Hy-Brand* holding is retroactive, meaning it applies to all current and pending cases. The most highly publicized of these cases is the McDonald's litigation, in which the General Counsel is arguing that McDonald's is the joint employer of franchisee employees across the country. The trial in McDonald's before an NLRB Administrative Law Judge has been ongoing since March 10, 2016. This ruling certainly calls into question the continuing vitality of that litigation, as well as the scores of additional unfair labor practice charges against franchisors and/or franchisees now siloed at the NLRB awaiting a McDonald's ruling. Newly-appointed NLRB General Counsel, Peter Robb, will have to decide whether to pursue that litigation (and the many pending charges) under the traditional joint employer standard, or expend the agency's resources in a different fashion. We will keep you posted on how this sea-change ruling impacts these cases.

For employers, return to the direct and immediate control standard is vitally important, as it provides much needed certainty in commercial contracting relationships. Businesses contracting for services can avoid joint employer liability by ensuring that they do not control the essential terms and conditions of employment of the employees in question. Hiring, firing, discipline, supervision and direction of employees should be left to the direct employer, as should decisions about compensation and benefits. The majority in *Hy-Brand* clarified that cost-plus contracts involve indirect control and are not in themselves proof of a joint employer relationship. While gray areas will always remain in these fact-based cases, precise contract drafting and care in observing the separate spheres of authority within the workplace should allow contracting entities to avoid claims of joint employment under the NLRA, as was the case prior to the 2015 *Browning-Ferris* decision.

TAGS: COLLECTIVE BARGAINING, JOINT EMPLOYER, NLRA, NLRB, UNFAIR LABOR PRACTICE

Labor Relations Update

Proskauer Rose LLP

Issues Relating to GC Memo 19-01 (Duty of Fair Representation)

New York State Bar Association
Annual Meeting 2019
Labor and Employment Law Section Meeting
New York, New York

Jae W. Chun
Friedman & Anspach
1500 Broadway, 23rd Floor
New York, New York 10036
jchun@friedmananspach.com

General Counsel Peter Robb of the National Labor Relations Board (the “Board”) may have shot himself in the foot by issuing GC Memo 19-01, dated October 24, 2018 (the "Memo"), which instructs all Regions to issue complaints against unions that negligently administer employee grievances. Since his appointment, Mr. Robb has been vocal about reducing the Board's staff size (https://www.bna.com/labor-board-leader-n57982088415/), but his new standard for assessing a union's duty of fair representation will undoubtedly increase his staff's workload, as well as that of unions and employers alike, with cases that have no support in well-established law.

In the Memo, the General Counsel instructs Regional Directors to issue a complaint against a union when it: (1) "asserts a mere negligence defense based on its having lost track, misplaced or otherwise forgotten about a grievance, whether or not it had committed to pursue it" and does not "show the existence of established, reasonable procedures or systems in place to track grievances," or (2) fails to "communicate decisions related to a grievance or to respond to inquiries for information or documents by the charging party . . . unless there is a reasonable excuse or meaningful explanation." The General Counsel also instructs Regional Directors to proceed with the issuance of a complaint if the union did not communicate with the bargaining unit employee before he or she filed the duty of fair representation charge.

The stated goal of the Memo is "to enable employees to better understand the duty owed by a union representative and to help unions discern their duty owed to employees." However, if employees were to rely on the Memo and file a charge with the Board whenever they do not receive from their bargaining representative the type of overnight, blue-ribbon service expected nowadays from internet companies like Amazon, they are bound to be

disappointed because the General Counsel's directive is incongruous with the long-standing body of law governing a union's duty of fair representation.

A union's duty of fair representation is based on well-established case law, stemming from Steele v. Louisville & Nashville Railroad, 323 U.S. 192 (1944), where the Supreme Court held that unions may not discriminate against bargaining unit employees under the Railway Labor Act, and culminating with the seminal case, Vaca v. Sipes, 386 U.S. 171 (1967), where the Court held that a union violates its duty of fair representation under the National Labor Relations Act (the "Act") when it acts in a manner that is "arbitrary, discriminatory, or in bad faith."

Over the years, the Board has refined the meaning of these terms – in particular, the meaning of "arbitrary" – by following the Supreme Court's guidance in Vaca v. Sipes, 386 U.S. 171, and its progeny, and frequently citing the Court's explanation in Air Line Pilots Ass'n, Int'l v. O'Neill, 499 U.S. 65 (1991), that a union's action is "arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness' as to be irrational," and that "any subsequent examination of a union's performance, therefore, must be highly deferential."

The Board, under both Democratic and Republican majorities, provides clear guidance to unions and the employees they represent that "mere negligence, poor judgment, or ineptitude in grievance handling are insufficient to establish a breach of duty of fair representation." See, e.g., Local 814, Affiliated with Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., 281 NLRB 1130 (1986). In General Truck Drivers, Chauffeurs and Helpers Union, Local No. 692, Teamsters (Greater Western Unifreight System), 209 NLRB 446 (1974), the Board held that "negligent action or nonaction of a union by itself

will not be considered to be arbitrary, irrelevant, invidious, or unfair," and that "[s]omething more is required" to constitute a violation of the Act.

Based on this standard, the Board has repeatedly found that "something more" than negligence exists where a union ignores a meritorious grievance or processes it in a perfunctory fashion. Hence, for example, a union breaches its duty of fair representation when it ignores an employee's grievance letter and fails to return phone calls (Itt Arctic Serv., Inc. & Bistor, 238 NLRB 116 (1978)); does not respond to calls and emails and keeps the grievant in the dark about the reason for his termination (Omni Commer. Lighting, Inc., 364 NLRB No. 54 (2016)); willfully keeps an employee ignorant concerning the processing of his grievance (Yellow Freight System of Indiana, 327 NLRB 996, 996 (1999)); favors the employer's position without regard to the employee's view or any precipitating event (Service Employees Local 579, 229 NLRB 692 (1977)); or refuses to provide to the grievant copies of the arbitration decision disposing of his grievance (Local 1657, United Foo, 340 NLRB 329 (2003)).

The Memo provides further examples of when the Board finds a union in violation of its duty of fair representation:

> *Service Employees Local 579 (Convacare of Decatur)*, 229 NLRB 692 (1977) (little or no investigation in connection with a discharge grievance); Retail Clerks Local 324 (Fed Mart Stores), 261 NLRB 1086 (1982) (willfully misinforming or keeping a grievant uninformed of grievance after committing to pursue arbitration). Similarly, a union's failure to provide information relating to a bargaining unit member's grievance also may violate Section 8(b)(1)(A). See *Branch 529 Letter Carriers (USPS)*, 319 NLRB 879 (1995) (failure to provide grievance forms pertaining to a grievance filed by the employee making the request violated the Act where the employee communicated her interest in the information to the union and the union raised no substantial countervailing interest in refusing to provide the documents). Additionally, non-action may amount to a willful and unlawful failure to pursue a grievance. See *Union of Sec. Personnel of Hospitals and Health Related Facilities*, 267 NLRB 974 (1983).

See GC Memo 19-01, p. 1.

Indeed, the Board has considered nearly every scenario, including the ones addressed in the Memo, *i.e*., negligently processing a grievance or failing to provide information concerning a grievance. There is simply no need to implement a fast rule that flies in the face of decisions that, for the most part, carefully analyze important factors like the consequence(s) resulting from a union agent's negligence, past history of negligence, the importance of an employee's request, and so forth.

The problem with the General Counsel's directive is illustrated in a recent case where the General Counsel issued a complaint against a union that did not immediately provide the information requested by its member. In Int'l Longshore and Warehouse Union, Local 23, 19-CB-175084, 2018 NLRB LEXIS 78 (Feb. 9, 2018), reviewed dismissed by NLRB v. Int'l Longshore & Warehouse Union, Local 23, 2018 U.S. App. LEXIS 26334 (9th Cir. Sept. 17, 2018), the General Counsel charged that a union acted arbitrarily when it did not provide its monthly meeting minutes to a member within two to three weeks of the request. The member requested the union's April minutes on March 23, but was told that they would be ready, as per the union's normal business practice, sometime in May. In May, just a few days after the minutes were finalized, the union informed the member that the minutes were ready for pickup. The General Counsel nonetheless argued that the union violated the Act because it should have produced the minutes within two to three weeks of the request.

The administrative law judge in the case reproached the General Counsel by saying:

> The General Counsel's attempt to bind the Respondent to the 2-3 week timeframe set forth on Respondent's request form ignores any context, and appears to be an attempt to impose a bright line rule unsupported by the law.

Int'l Longshore and Warehouse Union, Local 23, 2018 NLRB LEXIS 78, at * 23-24.

Undaunted, the General Counsel instructs Regional Directors in the Memo to continue making the same argument – ignore context and impose a bright line rule that has no support in the law. In other words, discard common sense and flout existing law. The Memo accomplishes the opposite of its stated objective when the General Counsel calls for complaints to be issued even if the requested documents are unavailable to the union while permitting Regional Directors to consider "a reasonable excuse or meaningful explanation" – both union representatives and bargaining unit employees are left confused.

Such a pell-mell approach to charges filed by employees against their unions increases not only the workload of the Board's staff and labor organizations, but also, and possibly more so, that of employers because it is the employer that typically possesses the information sought by the grievant.

An employer must provide a union, on request, all relevant information necessary for the proper performance of its duties. NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956); Southern California Gas Co., 344 NLRB 231, 235 (2005) (citing Hobelmann Port Services, 317 NLRB 279 (1995)) ("A labor organization's right to information exists not only for the purpose of negotiating a collective-bargaining agreement, but also for the proper administration of an existing contract, including the bargaining required to resolve employee grievances."). "An actual grievance need not be pending nor must the requested information clearly dispose of the grievance." United Technologies Corp., 274 NLRB 504, 506 (1985), supp. 277 NLRB 584 (1985). As per the Memo, a union's duty would now require it to immediately procure and furnish to the requesting employee all documents relating to his or her grievance.

To avoid a charge under the General Counsel's new directive, unions should request all documents relating to any potential grievance in any situation where an employee

might face disciplinary action, including whenever he or she receives a verbal warning. It is imperative that unions do so because the Memo expressly states that a union's communication with the bargaining unit employee after the filing of the charge "should not furnish the basis for dismissal on grounds that the union's conduct was mere negligence, nor should it be found to cure earlier violations resulting from a failure to communicate." In other words, if a union is unable to immediately produce the documents requested by a bargaining unit employee, or at least before he or she opts to file a charge with the Board, then the Regional Director is likely to issue a complaint against it and proceed to a hearing even if everything is already resolved to the employee's satisfaction.

All unions should therefore be advised to request from employers all documents relating to any potential discipline, even at its earliest stage, and file a charge against the employer if the union does not receive the requested documents immediately. The General Counsel will then have to decide whether to issue a complaint against the employer using the same standard against unions as set forth in the Memo, or, in a situation where a duty of fair representation charge is pending, consider the employer's failure to produce the documents requested by the union as a reasonable excuse or meaningful explanation.

Needless to say, employers would bear the brunt of the General Counsel’s new initiative if unions took heed because they are the ones that must assemble and produce the documents that unions are required to produce to the employees.

A far better approach is to leave the matter alone, especially since no one is complaining about the Board's standard. A purported increase in "unions defend[ing] Section 8(b)(1)(A) duty of fair representation charges at the Regional level by asserting a 'mere negligence' defense" is no reason to change the standard. How a union fares with such a defense

depends on the individual facts. Quite bluntly, Regional Directors should continue to follow the Supreme Court's instruction to give unions "high deference" in the administration of grievances, and find a union's action arbitrary only when the behavior "is so far outside a wide range of reasonableness as to be irrational."

The Memo cites Office Employees Local 2, 268 NLRB 1353 (1984), for the sensible proposition that "[t]he Board examines the totality of the circumstances in evaluating whether a union's grievance processing was arbitrary." Regional Directors should continue to be guided by this principle, examining all the relevant facts presented and assessing it against the wealth of existing law.

The Memo is attached below.

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 19-01 October 24, 2018

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Peter B. Robb, General Counsel /s/

SUBJECT: General Counsel's Instructions Regarding Section 8(b)(1)(A) Duty of Fair Representation Charges

The following memorandum explains the General Counsel's position regarding certain cases alleging union violations of the duty of fair representation under Section 8(b)(1)(A) of the Act.

We are seeing an increasing number of cases where unions defend Section 8(b)(1)(A) duty of fair representation charges at the Regional level by asserting a "mere negligence" defense. Under extant Board law, a union breaches its duty of fair representation to the bargaining unit it represents by engaging in conduct which is arbitrary, discriminatory or in bad faith. See *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). It is well established that a union's mere negligence, alone, does not rise to the level of arbitrary conduct. See *Teamsters Local 692 (Great Western Unifreight)*, 209 NLRB 446 (1974). On the other hand, perfunctory or arbitrary grievance handling can constitute more than mere negligence, and thus violate Section 8(b)(1)(A). See *Service Employees Local 579 (Convacare of Decatur),* 229 NLRB 692 (1977) (little or no investigation in connection with a discharge grievance); *Retail Clerks Local 324 (Fed Mart Stores)*, 261 NLRB 1086 (1982) (willfully misinforming or keeping a grievant uninformed of grievance after committing to pursue arbitration). Similarly, a union's failure to provide information relating to a bargaining unit member's grievance also may violate Section 8(b)(1)(A). See *Branch 529 Letter Carriers (USPS)*, 319 NLRB 879 (1995) (failure to provide grievance forms pertaining to a grievance filed by the employee making the request violated the Act where the employee communicated her interest in the information to the union and the union raised no substantial countervailing interest in refusing to provide the documents). Additionally, non-action may amount to a willful and unlawful failure to pursue a grievance. See *Union of Sec. Personnel of Hospitals and Health Related Facilities*, 267 NLRB 974 (1983). The Board examines the totality of the circumstances in evaluating whether a union's grievance processing was arbitrary. See *Office Employees Local 2*, 268 NLRB 1353, 1354-56 (1984).

The General Counsel is committed to fair enforcement of the above-cited doctrines and cases. In an effort to enable employees to better understand the duty owed by a union representative and to help unions discern their duty owed to employees, the

General Counsel offers the following clarification for Regions to apply in duty of fair representation cases. In cases where a union asserts a mere negligence defense based on its having lost track, misplaced or otherwise forgotten about a grievance, whether or not it had committed to pursue it, the union should be required to show the existence of established, reasonable procedures or systems in place to track grievances, without which, the defense should ordinarily fail.[1]

Similarly, a union's failure to communicate decisions related to a grievance or to respond to inquiries for information or documents by the charging party, in the General Counsel's view, constitutes more than mere negligence and, instead, rises to the level of arbitrary conduct unless there is a reasonable excuse or meaningful explanation.[2] This is so irrespective of whether the decisions, alone, would violate the duty of fair representation. In addition, where a union ultimately communicates with the charging party in a Section 8(b)(1)(A) duty of fair representation case only after he/she filed the ULP charge, such post-hoc communications should not furnish the basis for dismissal on grounds that the union's conduct was mere negligence, nor should it be found to cure earlier violations resulting from a failure to communicate.

The General Counsel is aware that the above-described approaches may be inconsistent with the way Regional Directors may have been historically interpreting duty of fair representation law. Going forward, Regions are directed to apply the above principles to Section 8(b)(1)(A) duty of fair representation cases, and issue complaint where appropriate.

If you have a question about any given case, please contact your AGC or Deputy AGC in the Division of Operations-Management.

/s/
P.B.R.

[1] As with any case, there may be extenuating or exceptional circumstances that, in considering the totality of the conduct, nevertheless excuses the lack of an established procedure. Regions should carefully exercise their discretion in making such a determination.

[2] For example, where a union has responded to a grievant's inquiry, but where the grievant is dissatisfied with the response, the union's subsequent failure to provide additional explanation to arguments already considered would not, in and of itself, rise to the level of a violation.

Workshop C: EPIC
A Road Map: Revisiting Arbitration Agreements in Light of Epic

Ann Lesser, Esq. / Moderator
American Arbitrarion Association, New York, NY

Theodore K. Cheng, Esq.
ADR Office of Theo Cheng LLC, Princeton Junction, NJ

Melissa L. Stewart, Esq.
Outten & Golden LLP, New York, NY

Amanda M. Fugazy, Esq.
Ellenoff Grossman & Schole LLP, New York, NY

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

EPIC SYSTEMS CORP. *v.* LEWIS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 16–285. Argued October 2, 2017—Decided May 21, 2018*

In each of these cases, an employer and employee entered into a contract providing for individualized arbitration proceedings to resolve employment disputes between the parties. Each employee nonetheless sought to litigate Fair Labor Standards Act and related state law claims through class or collective actions in federal court. Although the Federal Arbitration Act generally requires courts to enforce arbitration agreements as written, the employees argued that its "saving clause" removes this obligation if an arbitration agreement violates some other federal law and that, by requiring individualized proceedings, the agreements here violated the National Labor Relations Act. The employers countered that the Arbitration Act protects agreements requiring arbitration from judicial interference and that neither the saving clause nor the NLRA demands a different conclusion. Until recently, courts as well as the National Labor Relations Board's general counsel agreed that such arbitration agreements are enforceable. In 2012, however, the Board ruled that the NLRA effectively nullifies the Arbitration Act in cases like these, and since then other courts have either agreed with or deferred to the Board's position.

Held: Congress has instructed in the Arbitration Act that arbitration agreements providing for individualized proceedings must be enforced, and neither the Arbitration Act's saving clause nor the NLRA suggests otherwise. Pp. 5–25.

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*Together with No. 16–300, *Ernst & Young LLP et al.* v. *Morris et al.*, on certiorari to the United States Court of Appeals for the Ninth Circuit, and No. 16–307, *National Labor Relations Board* v. *Murphy Oil USA, Inc., et al.*, on certiorari to the United States Court of Appeals for the Fifth Circuit.

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(a) The Arbitration Act requires courts to enforce agreements to arbitrate, including the terms of arbitration the parties select. See 9 U. S. C. §§2, 3, 4. These emphatic directions would seem to resolve any argument here. The Act's saving clause—which allows courts to refuse to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract," §2—recognizes only "'generally applicable contract defenses, such as fraud, duress, or unconscionability,'" *AT&T Mobility LLC* v. *Concepcion*, 563 U. S. 333, 339, not defenses targeting arbitration either by name or by more subtle methods, such as by "interfer[ing] with fundamental attributes of arbitration," *id.*, at 344. By challenging the agreements precisely because they require individualized arbitration instead of class or collective proceedings, the employees seek to interfere with one of these fundamental attributes. Pp. 5–9.

(b) The employees also mistakenly claim that, even if the Arbitration Act normally requires enforcement of arbitration agreements like theirs, the NLRA overrides that guidance and renders their agreements unlawful yet. When confronted with two Acts allegedly touching on the same topic, this Court must strive "to give effect to both." *Morton* v. *Mancari*, 417 U. S. 535, 551. To prevail, the employees must show a "'clear and manifest'" congressional intention to displace one Act with another. *Ibid.* There is a "stron[g] presum[ption]" that disfavors repeals by implication and that "Congress will specifically address" preexisting law before suspending the law's normal operations in a later statute. *United States* v. *Fausto*, 484 U. S. 439, 452, 453.

The employees ask the Court to infer that class and collective actions are "concerted activities" protected by §7 of the NLRA, which guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively . . . , and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," 29 U. S. C. §157. But §7 focuses on the right to organize unions and bargain collectively. It does not mention class or collective action procedures or even hint at a clear and manifest wish to displace the Arbitration Act. It is unlikely that Congress wished to confer a right to class or collective actions in §7, since those procedures were hardly known when the NLRA was adopted in 1935. Because the catchall term "other concerted activities for the purpose of . . . other mutual aid or protection" appears at the end of a detailed list of activities, it should be understood to protect the same kind of things, *i.e.,* things employees do for themselves in the course of exercising their right to free association in the workplace.

The NLRA's structure points to the same conclusion. After speak-

ing of various "concerted activities" in §7, the statute establishes a detailed regulatory regime applicable to each item on the list, but gives no hint about what rules should govern the adjudication of class or collective actions in court or arbitration. Nor is it at all obvious what rules should govern on such essential issues as opt-out and opt-in procedures, notice to class members, and class certification standards. Telling too is the fact that Congress has shown that it knows exactly how to specify certain dispute resolution procedures, cf., *e.g.,* 29 U. S. C. §§216(b), 626, or to override the Arbitration Act, see, *e.g.,* 15 U. S. C. §1226(a)(2), but Congress has done nothing like that in the NLRA.

The employees suggest that the NLRA does not discuss class and collective action procedures because it means to confer a right to use *existing* procedures provided by statute or rule, but the NLRA does not say even that much. And if employees do take existing rules as they find them, they must take them subject to those rules' inherent limitations, including the principle that parties may depart from them in favor of individualized arbitration.

In another contextual clue, the employees' underlying causes of action arise not under the NLRA but under the Fair Labor Standards Act, which permits the sort of collective action the employees wish to pursue here. Yet they do not suggest that the FLSA displaces the Arbitration Act, presumably because the Court has held that an identical collective action scheme does not prohibit individualized arbitration proceedings, see *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U. S. 20, 32. The employees' theory also runs afoul of the rule that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions," *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 468, as it would allow a catchall term in the NLRA to dictate the particulars of dispute resolution procedures in Article III courts or arbitration proceedings—matters that are usually left to, *e.g.,* the Federal Rules of Civil Procedure, the Arbitration Act, and the FLSA. Nor does the employees' invocation of the Norris-LaGuardia Act, a predecessor of the NLRA, help their argument. That statute declares unenforceable contracts in conflict with its policy of protecting workers' "concerted activities for the purpose of collective bargaining or other mutual aid or protection," 29 U. S. C. §102, and just as under the NLRA, that policy does not conflict with Congress's directions favoring arbitration.

Precedent confirms the Court's reading. The Court has rejected many efforts to manufacture conflicts between the Arbitration Act and other federal statutes, see, *e.g. American Express Co.* v. *Italian Colors Restaurant*, 570 U. S. 228; and its §7 cases have generally involved efforts related to organizing and collective bargaining in the

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workplace, not the treatment of class or collective action procedures in court or arbitration, see, *e.g., NLRB* v. *Washington Aluminum Co.*, 370 U. S. 9.

Finally, the employees cannot expect deference under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, because *Chevron*'s essential premises are missing. The Board sought not to interpret just the NLRA, "which it administers," *id.,* at 842, but to interpret that statute in a way that limits the work of the Arbitration Act, which the agency does not administer. The Board and the Solicitor General also dispute the NLRA's meaning, articulating no single position on which the Executive Branch might be held "accountable to the people." *Id.,* at 865. And after "employing traditional tools of statutory construction," *id.,* at 843, n. 9, including the canon against reading conflicts into statutes, there is no unresolved ambiguity for the Board to address. Pp. 9–21.

No. 16–285, 823 F. 3d 1147, and No. 16–300, 834 F. 3d 975, reversed and remanded; No. 16–307, 808 F. 3d 1013, affirmed.

GORSUCH, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, and ALITO, JJ., joined. THOMAS, J., filed a concurring opinion. GINSBURG, J., filed a dissenting opinion, in which BREYER, SOTOMAYOR, and KAGAN, JJ., joined.

SUPREME COURT OF THE UNITED STATES

Nos. 16–285, 16–300, 16–307

EPIC SYSTEMS CORPORATION, PETITIONER
16–285 *v.*
JACOB LEWIS;

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ERNST & YOUNG LLP, ET AL., PETITIONERS
16–300 *v.*
STEPHEN MORRIS, ET AL.; AND

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, PETITIONER
16–307 *v.*
MURPHY OIL USA, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[May 21, 2018]

JUSTICE GORSUCH delivered the opinion of the Court.

Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers?

As a matter of policy these questions are surely debatable. But as a matter of law the answer is clear. In the Federal Arbitration Act, Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings. Nor can we agree with the employees' suggestion that the National Labor Relations Act (NLRA) offers a conflicting command. It is this Court's duty to interpret Congress's statutes as a harmonious whole rather than at war with one another. And abiding that duty here leads to an unmistakable conclusion. The NLRA secures to employees rights to organize unions and bargain collectively, but it says nothing about how judges and arbitrators must try legal disputes that leave the workplace and enter the courtroom or arbitral forum. This Court has never read a right to class actions into the NLRA—and for three quarters of a century neither did the National Labor Relations Board. Far from conflicting, the Arbitration Act and the NLRA have long enjoyed separate spheres of influence and neither permits this Court to declare the parties' agreements unlawful.

I

The three cases before us differ in detail but not in substance. Take *Ernst & Young LLP* v. *Morris*. There Ernst & Young and one of its junior accountants, Stephen Morris, entered into an agreement providing that they would arbitrate any disputes that might arise between them. The agreement stated that the employee could choose the arbitration provider and that the arbitrator could "grant any relief that could be granted by . . . a court" in the relevant jurisdiction. App. in No. 16–300, p. 43. The agreement also specified individualized arbitration, with claims "pertaining to different [e]mployees [to] be heard in separate proceedings." *Id.,* at 44.

After his employment ended, and despite having agreed

to arbitrate claims against the firm, Mr. Morris sued Ernst & Young in federal court. He alleged that the firm had misclassified its junior accountants as professional employees and violated the federal Fair Labor Standards Act (FLSA) and California law by paying them salaries without overtime pay. Although the arbitration agreement provided for individualized proceedings, Mr. Morris sought to litigate the federal claim on behalf of a nationwide class under the FLSA's collective action provision, 29 U. S. C. §216(b). He sought to pursue the state law claim as a class action under Federal Rule of Civil Procedure 23.

Ernst & Young replied with a motion to compel arbitration. The district court granted the request, but the Ninth Circuit reversed this judgment. 834 F. 3d 975 (2016). The Ninth Circuit recognized that the Arbitration Act generally requires courts to enforce arbitration agreements as written. But the court reasoned that the statute's "saving clause," see 9 U. S. C. §2, removes this obligation if an arbitration agreement violates some other federal law. And the court concluded that an agreement requiring individualized arbitration proceedings violates the NLRA by barring employees from engaging in the "concerted activit[y]," 29 U. S. C. §157, of pursuing claims as a class or collective action.

Judge Ikuta dissented. In her view, the Arbitration Act protected the arbitration agreement from judicial interference and nothing in the Act's saving clause suggested otherwise. Neither, she concluded, did the NLRA demand a different result. Rather, that statute focuses on protecting unionization and collective bargaining in the workplace, not on guaranteeing class or collective action procedures in disputes before judges or arbitrators.

Although the Arbitration Act and the NLRA have long coexisted—they date from 1925 and 1935, respectively—the suggestion they might conflict is something quite new. Until a couple of years ago, courts more or less agreed that

arbitration agreements like those before us must be enforced according to their terms. See, *e.g., Owen* v. *Bristol Care, Inc.*, 702 F. 3d 1050 (CA8 2013); *Sutherland* v. *Ernst & Young LLP*, 726 F. 3d 290 (CA2 2013); *D. R. Horton, Inc.* v. *NLRB*, 737 F. 3d 344 (CA5 2013); *Iskanian* v. *CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 327 P. 3d 129 (2014); *Tallman* v. *Eighth Jud. Dist. Court*, 131 Nev. 71, 359 P. 3d 113 (2015); 808 F. 3d 1013 (CA5 2015) (case below in No. 16–307).

The National Labor Relations Board's general counsel expressed much the same view in 2010. Remarking that employees and employers "can benefit from the relative simplicity and informality of resolving claims before arbitrators," the general counsel opined that the validity of such agreements "does not involve consideration of the policies of the National Labor Relations Act." Memorandum GC 10–06, pp. 2, 5 (June 16, 2010).

But recently things have shifted. In 2012, the Board—for the first time in the 77 years since the NLRA's adoption—asserted that the NLRA effectively nullifies the Arbitration Act in cases like ours. *D. R. Horton, Inc.*, 357 N. L. R. B. 2277. Initially, this agency decision received a cool reception in court. See *D. R. Horton*, 737 F. 3d, at 355–362. In the last two years, though, some circuits have either agreed with the Board's conclusion or thought themselves obliged to defer to it under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). See 823 F. 3d 1147 (CA7 2016) (case below in No. 16–285); 834 F. 3d 975 (case below in No. 16–300); *NLRB* v. *Alternative Entertainment, Inc.*, 858 F. 3d 393 (CA6 2017). More recently still, the disagreement has grown as the Executive has disavowed the Board's (most recent) position, and the Solicitor General and the Board have offered us battling briefs about the law's meaning. We granted certiorari to clear the confusion. 580 U. S. ___ (2017).

II

We begin with the Arbitration Act and the question of its saving clause.

Congress adopted the Arbitration Act in 1925 in response to a perception that courts were unduly hostile to arbitration. No doubt there was much to that perception. Before 1925, English and American common law courts routinely refused to enforce agreements to arbitrate disputes. *Scherk* v. *Alberto-Culver Co.*, 417 U. S. 506, 510, n. 4 (1974). But in Congress's judgment arbitration had more to offer than courts recognized—not least the promise of quicker, more informal, and often cheaper resolutions for everyone involved. *Id.*, at 511. So Congress directed courts to abandon their hostility and instead treat arbitration agreements as "valid, irrevocable, and enforceable." 9 U. S. C. §2. The Act, this Court has said, establishes "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, 460 U. S. 1, 24 (1983) (citing *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U. S. 395 (1967)); see *id.,* at 404 (discussing "the plain meaning of the statute" and "the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts").

Not only did Congress require courts to respect and enforce agreements to arbitrate; it also specifically directed them to respect and enforce the parties' chosen arbitration procedures. See §3 (providing for a stay of litigation pending arbitration "in accordance with the terms of the agreement"); §4 (providing for "an order directing that . . . arbitration proceed in the manner provided for in such agreement"). Indeed, we have often observed that the Arbitration Act requires courts "rigorously" to "enforce arbitration agreements according to their terms, including terms that specify *with whom* the

parties choose to arbitrate their disputes and *the rules* under which that arbitration will be conducted." *American Express Co.* v. *Italian Colors Restaurant*, 570 U. S. 228, 233 (2013) (some emphasis added; citations, internal quotation marks, and brackets omitted).

On first blush, these emphatic directions would seem to resolve any argument under the Arbitration Act. The parties before us contracted for arbitration. They proceeded to specify the rules that would govern their arbitrations, indicating their intention to use individualized rather than class or collective action procedures. And this much the Arbitration Act seems to protect pretty absolutely. See *AT&T Mobility LLC* v. *Concepcion*, 563 U. S. 333 (2011); *Italian Colors*, *supra*; *DIRECTV, Inc.* v. *Imburgia*, 577 U. S. ___ (2015). You might wonder if the balance Congress struck in 1925 between arbitration and litigation should be revisited in light of more contemporary developments. You might even ask if the Act was good policy when enacted. But all the same you might find it difficult to see how to avoid the statute's application.

Still, the employees suggest the Arbitration Act's saving clause creates an exception for cases like theirs. By its terms, the saving clause allows courts to refuse to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract." §2. That provision applies here, the employees tell us, because the NLRA renders their particular class and collective action waivers illegal. In their view, illegality under the NLRA is a "ground" that "exists at law . . . for the revocation" of their arbitration agreements, at least to the extent those agreements prohibit class or collective action proceedings.

The problem with this line of argument is fundamental. Put to the side the question whether the saving clause was designed to save not only state law defenses but also defenses allegedly arising from federal statutes. See 834 F. 3d, at 991–992, 997 (Ikuta, J., dissenting). Put to the

side the question of what it takes to qualify as a ground for "revocation" of a contract. See *Concepcion*, *supra,* at 352–355 (THOMAS, J., concurring); *post,* at 1–2 (THOMAS, J., concurring). Put to the side for the moment, too, even the question whether the NLRA actually renders class and collective action waivers illegal. Assuming (but not granting) the employees could satisfactorily answer all those questions, the saving clause still can't save their cause.

It can't because the saving clause recognizes only defenses that apply to "any" contract. In this way the clause establishes a sort of "equal-treatment" rule for arbitration contracts. *Kindred Nursing Centers L. P.* v. *Clark*, 581 U. S. ___, ___ (2017) (slip op., at 4). The clause "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability.'" *Concepcion*, 563 U. S., at 339. At the same time, the clause offers no refuge for "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Ibid.* Under our precedent, this means the saving clause does not save defenses that target arbitration either by name or by more subtle methods, such as by "interfer[ing] with fundamental attributes of arbitration." *Id.*, at 344; see *Kindred Nursing*, *supra,* at ___ (slip op., at 5).

This is where the employees' argument stumbles. They don't suggest that their arbitration agreements were extracted, say, by an act of fraud or duress or in some other unconscionable way that would render *any* contract unenforceable. Instead, they object to their agreements precisely because they require individualized arbitration proceedings instead of class or collective ones. And by attacking (only) the individualized nature of the arbitration proceedings, the employees' argument seeks to interfere with one of arbitration's fundamental attributes.

We know this much because of *Concepcion*. There this Court faced a state law defense that prohibited as uncon-

scionable class action waivers in consumer contracts. The Court readily acknowledged that the defense formally applied in both the litigation and the arbitration context. 563 U. S., at 338, 341. But, the Court held, the defense failed to qualify for protection under the saving clause because it interfered with a fundamental attribute of arbitration all the same. It did so by effectively permitting any party in arbitration to demand classwide proceedings despite the traditionally individualized and informal nature of arbitration. This "fundamental" change to the traditional arbitration process, the Court said, would "sacrific[e] the principal advantage of arbitration—its informality—and mak[e] the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.,* at 347, 348. Not least, *Concepcion* noted, arbitrators would have to decide whether the named class representatives are sufficiently representative and typical of the class; what kind of notice, opportunity to be heard, and right to opt out absent class members should enjoy; and how discovery should be altered in light of the classwide nature of the proceedings. *Ibid.* All of which would take much time and effort, and introduce new risks and costs for both sides. *Ibid.* In the Court's judgment, the virtues Congress originally saw in arbitration, its speed and simplicity and inexpensiveness, would be shorn away and arbitration would wind up looking like the litigation it was meant to displace.

Of course, *Concepcion* has its limits. The Court recognized that parties remain free to alter arbitration procedures to suit their tastes, and in recent years some parties have sometimes chosen to arbitrate on a classwide basis. *Id.*, at 351. But *Concepcion*'s essential insight remains: courts may not allow a contract defense to reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties' consent. *Id.*, at 344–351; see also *Stolt-Nielsen S. A.* v. *AnimalFeeds Int'l*

Corp., 559 U. S. 662, 684–687 (2010). Just as judicial antagonism toward arbitration before the Arbitration Act's enactment "manifested itself in a great variety of devices and formulas declaring arbitration against public policy," *Concepcion* teaches that we must be alert to new devices and formulas that would achieve much the same result today. 563 U. S., at 342 (internal quotation marks omitted). And a rule seeking to declare individualized arbitration proceedings off limits is, the Court held, just such a device.

The employees' efforts to distinguish *Concepcion* fall short. They note that their putative NLRA defense would render an agreement "illegal" as a matter of federal statutory law rather than "unconscionable" as a matter of state common law. But we don't see how that distinction makes any difference in light of *Concepion*'s rationale and rule. Illegality, like unconscionability, may be a traditional, generally applicable contract defense in many cases, including arbitration cases. But an argument that a contract is unenforceable *just because it requires bilateral arbitration* is a different creature. A defense of that kind, *Concepcion* tells us, is one that impermissibly disfavors arbitration whether it sounds in illegality or unconscionability. The law of precedent teaches that like cases should generally be treated alike, and appropriate respect for that principle means the Arbitration Act's saving clause can no more save the defense at issue in these cases than it did the defense at issue in *Concepcion*. At the end of our encounter with the Arbitration Act, then, it appears just as it did at the beginning: a congressional command requiring us to enforce, not override, the terms of the arbitration agreements before us.

III

But that's not the end of it. Even if the Arbitration Act normally requires us to enforce arbitration agreements

like theirs, the employees reply that the NLRA overrides that guidance in these cases and commands us to hold their agreements unlawful yet.

This argument faces a stout uphill climb. When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at "liberty to pick and choose among congressional enactments" and must instead strive "'to give effect to both.'" *Morton* v. *Mancari*, 417 U. S. 535, 551 (1974). A party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing "'a clearly expressed congressional intention'" that such a result should follow. *Vimar Seguros y Reaseguros, S. A.* v. *M/V Sky Reefer*, 515 U. S. 528, 533 (1995). The intention must be "'clear and manifest.'" *Morton*, *supra*, at 551. And in approaching a claimed conflict, we come armed with the "stron[g] presum[ption]" that repeals by implication are "disfavored" and that "Congress will specifically address" preexisting law when it wishes to suspend its normal operations in a later statute. *United States* v. *Fausto*, 484 U. S. 439, 452, 453 (1988).

These rules exist for good reasons. Respect for Congress as drafter counsels against too easily finding irreconcilable conflicts in its work. More than that, respect for the separation of powers counsels restraint. Allowing judges to pick and choose between statutes risks transforming them from expounders of what the law *is* into policymakers choosing what the law *should be*. Our rules aiming for harmony over conflict in statutory interpretation grow from an appreciation that it's the job of Congress by legislation, not this Court by supposition, both to write the laws and to repeal them.

Seeking to demonstrate an irreconcilable statutory conflict even in light of these demanding standards, the employees point to Section 7 of the NLRA. That provision guarantees workers

> "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U. S. C. §157.

From this language, the employees ask us to infer a clear and manifest congressional command to displace the Arbitration Act and outlaw agreements like theirs.

But that much inference is more than this Court may make. Section 7 focuses on the right to organize unions and bargain collectively. It may permit unions to bargain to prohibit arbitration. Cf. *14 Penn Plaza LLC* v. *Pyett*, 556 U. S. 247, 256–260 (2009). But it does not express approval or disapproval of arbitration. It does not mention class or collective action procedures. It does not even hint at a wish to displace the Arbitration Act—let alone accomplish that much clearly and manifestly, as our precedents demand.

Neither should any of this come as a surprise. The notion that Section 7 confers a right to class or collective actions seems pretty unlikely when you recall that procedures like that were hardly known when the NLRA was adopted in 1935. Federal Rule of Civil Procedure 23 didn't create the modern class action until 1966; class arbitration didn't emerge until later still; and even the Fair Labor Standards Act's collective action provision postdated Section 7 by years. See Rule 23–Class Actions, 28 U. S. C. App., p. 1258 (1964 ed., Supp. II); 52 Stat. 1069; *Concepcion*, 563 U. S., at 349; see also *Califano* v. *Yamasaki*, 442 U. S. 682, 700–701 (1979) (noting that the "usual rule" then was litigation "conducted by and on behalf of individual named parties only"). And while some forms of group litigation existed even in 1935, see 823 F. 3d, at 1154, Section 7's failure to mention them only reinforces that

the statute doesn't speak to such procedures.

A close look at the employees' best evidence of a potential conflict turns out to reveal no conflict at all. The employees direct our attention to the term "other concerted activities for the purpose of . . . other mutual aid or protection." This catchall term, they say, can be read to include class and collective legal actions. But the term appears at the end of a detailed list of activities speaking of "self-organization," "form[ing], join[ing], or assist[ing] labor organizations," and "bargain[ing] collectively." 29 U. S. C. §157. And where, as here, a more general term follows more specific terms in a list, the general term is usually understood to "'embrace only objects similar in nature to those objects enumerated by the preceding specific words.'" *Circuit City Stores, Inc.* v. *Adams*, 532 U. S. 105, 115 (2001) (discussing *ejusdem generis* canon); *National Assn. of Mfrs.* v. *Department of Defense*, 583 U. S. ___, ___ (2018) (slip op., at 10). All of which suggests that the term "other concerted activities" should, like the terms that precede it, serve to protect things employees "just do" for themselves in the course of exercising their right to free association in the workplace, rather than "the highly regulated, courtroom-bound 'activities' of class and joint litigation." *Alternative Entertainment*, 858 F. 3d, at 414–415 (Sutton, J., concurring in part and dissenting in part) (emphasis deleted). None of the preceding and more specific terms speaks to the procedures judges or arbitrators must apply in disputes that leave the workplace and enter the courtroom or arbitral forum, and there is no textually sound reason to suppose the final catchall term should bear such a radically different object than all its predecessors.

The NLRA's broader structure underscores the point. After speaking of various "concerted activities" in Section 7, Congress proceeded to establish a regulatory regime applicable to each of them. The NLRA provides rules for

the recognition of exclusive bargaining representatives, 29 U. S. C. §159, explains employees' and employers' obligation to bargain collectively, §158(d), and conscribes certain labor organization practices, §§158(a)(3), (b). The NLRA also touches on other concerted activities closely related to organization and collective bargaining, such as picketing, §158(b)(7), and strikes, §163. It even sets rules for adjudicatory proceedings under the NLRA itself. §§160, 161. Many of these provisions were part of the original NLRA in 1935, see 49 Stat. 449, while others were added later. But missing entirely from this careful regime is any hint about what rules should govern the adjudication of class or collective actions in court or arbitration. Without some comparably specific guidance, it's not at all obvious what procedures Section 7 might protect. Would opt-out class action procedures suffice? Or would opt-in procedures be necessary? What notice might be owed to absent class members? What standards would govern class certification? Should the same rules always apply or should they vary based on the nature of the suit? Nothing in the NLRA even whispers to us on any of these essential questions. And it is hard to fathom why Congress would take such care to regulate all the other matters mentioned in Section 7 yet remain mute about this matter alone—unless, of course, Section 7 doesn't speak to class and collective action procedures in the first place.

Telling, too, is the fact that when Congress wants to mandate particular dispute resolution procedures it knows exactly how to do so. Congress has spoken often and clearly to the procedures for resolving "actions," "claims," "charges," and "cases" in statute after statute. *E.g.,* 29 U. S. C. §§216(b), 626; 42 U. S. C. §§2000e–5(b), (f)(3)–(5). Congress has likewise shown that it knows how to override the Arbitration Act when it wishes—by explaining, for example, that, "[n]otwithstanding any other provision of law, . . . arbitration may be used . . . only if" certain condi-

tions are met, 15 U. S. C. §1226(a)(2); or that "[n]o predispute arbitration agreement shall be valid or enforceable" in other circumstances, 7 U. S. C. §26(n)(2); 12 U. S. C. §5567(d)(2); or that requiring a party to arbitrate is "unlawful" in other circumstances yet, 10 U. S. C. §987(e)(3). The fact that we have nothing like that here is further evidence that Section 7 does nothing to address the question of class and collective actions.

In response, the employees offer this slight reply. They suggest that the NLRA doesn't discuss any particular class and collective action procedures because it merely confers a right to use *existing* procedures provided by statute or rule, "on the same terms as [they are] made available to everyone else." Brief for Respondent in No. 16–285, p. 53, n. 10. But of course the NLRA doesn't say even that much. And, besides, if the parties really take existing class and collective action rules as they find them, they surely take them subject to the limitations inherent in those rules—including the principle that parties may (as here) contract to depart from them in favor of individualized arbitration procedures of their own design.

Still another contextual clue yields the same message. The employees' underlying causes of action involve their wages and arise not under the NLRA but under an entirely different statute, the Fair Labor Standards Act. The FLSA allows employees to sue on behalf of "themselves and other employees similarly situated," 29 U. S. C. §216(b), and it's precisely this sort of collective action the employees before us wish to pursue. Yet they do not offer the seemingly more natural suggestion that the FLSA overcomes the Arbitration Act to permit their class and collective actions. Why not? Presumably because this Court held decades ago that an identical collective action scheme (in fact, one borrowed from the FLSA) does *not* displace the Arbitration Act or prohibit individualized arbitration proceedings. *Gilmer* v. *Interstate/Johnson*

Lane Corp., 500 U. S. 20, 32 (1991) (discussing Age Discrimination in Employment Act). In fact, it turns out that "[e]very circuit to consider the question" has held that the FLSA allows agreements for individualized arbitration. *Alternative Entertainment*, 858 F. 3d, at 413 (opinion of Sutton, J.) (collecting cases). Faced with that obstacle, the employees are left to cast about elsewhere for help. And so they have cast in this direction, suggesting that one statute (the NLRA) steps in to dictate the procedures for claims under a different statute (the FLSA), and thereby overrides the commands of yet a third statute (the Arbitration Act). It's a sort of interpretive triple bank shot, and just stating the theory is enough to raise a judicial eyebrow.

Perhaps worse still, the employees' theory runs afoul of the usual rule that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001). Union organization and collective bargaining in the workplace are the bread and butter of the NLRA, while the particulars of dispute resolution procedures in Article III courts or arbitration proceedings are usually left to other statutes and rules—not least the Federal Rules of Civil Procedure, the Arbitration Act, and the FLSA. It's more than a little doubtful that Congress would have tucked into the mousehole of Section 7's catchall term an elephant that tramples the work done by these other laws; flattens the parties' contracted-for dispute resolution procedures; and seats the Board as supreme superintendent of claims arising under a statute it doesn't even administer.

Nor does it help to fold yet another statute into the mix. At points, the employees suggest that the Norris-LaGuardia Act, a precursor of the NLRA, also renders their arbitration agreements unenforceable. But the

Norris-LaGuardia Act adds nothing here. It declares "[un]enforceable" contracts that conflict with its policy of protecting workers' "concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U. S. C. §§102, 103. That is the same policy the NLRA advances and, as we've seen, it does not conflict with Congress's statutory directions favoring arbitration. See also *Boys Markets, Inc.* v. *Retail Clerks*, 398 U. S. 235 (1970) (holding that the Norris-LaGuardia Act's anti-injunction provisions do not bar enforcement of arbitration agreements).

What all these textual and contextual clues indicate, our precedents confirm. In many cases over many years, this Court has heard and rejected efforts to conjure conflicts between the Arbitration Act and other federal statutes. In fact, this Court has rejected *every* such effort to date (save one temporary exception since overruled), with statutes ranging from the Sherman and Clayton Acts to the Age Discrimination in Employment Act, the Credit Repair Organizations Act, the Securities Act of 1933, the Securities Exchange Act of 1934, and the Racketeer Influenced and Corrupt Organizations Act. *Italian Colors*, 570 U. S. 228; *Gilmer*, 500 U. S. 20; *CompuCredit Corp.* v. *Greenwood*, 565 U. S. 95 (2012); *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U. S. 477 (1989) (overruling *Wilko* v. *Swan*, 346 U. S. 427 (1953)); *Shearson/American Express Inc.* v. *McMahon*, 482 U. S. 220 (1987). Throughout, we have made clear that even a statute's express provision for collective legal actions does not necessarily mean that it precludes "'individual attempts at conciliation'" through arbitration. *Gilmer*, *supra,* at 32. And we've stressed that the absence of any specific statutory discussion of arbitration or class actions is an important and telling clue that Congress has not displaced the Arbitration Act. *CompuCredit*, *supra,* at 103–104; *McMahon*, *supra,* at 227; *Italian Colors*, *supra,*

at 234. Given so much precedent pointing so strongly in one direction, we do not see how we might faithfully turn the other way here.

Consider a few examples. In *Italian Colors*, this Court refused to find a conflict between the Arbitration Act and the Sherman Act because the Sherman Act (just like the NLRA) made "no mention of class actions" and was adopted before Rule 23 introduced its exception to the "usual rule" of "individual" dispute resolution. 570 U. S., at 234 (internal quotation marks omitted). In *Gilmer*, this Court "had no qualms in enforcing a class waiver in an arbitration agreement even though" the Age Discrimination in Employment Act "expressly permitted collective legal actions." *Italian Colors*, *supra*, at 237 (citing *Gilmer*, *supra*, at 32). And in *CompuCredit*, this Court refused to find a conflict even though the Credit Repair Organizations Act expressly provided a "right to sue," "repeated[ly]" used the words "action" and "court" and "class action," and even declared "[a]ny waiver" of the rights it provided to be "void." 565 U. S., at 99–100 (internal quotation marks omitted). If all the statutes in all those cases did not provide a congressional command sufficient to displace the Arbitration Act, we cannot imagine how we might hold that the NLRA alone and for the first time does so today.

The employees rejoin that our precedential story is complicated by some of this Court's cases interpreting Section 7 itself. But, as it turns out, this Court's Section 7 cases have usually involved just what you would expect from the statute's plain language: efforts by employees related to organizing and collective bargaining in the workplace, not the treatment of class or collective actions in court or arbitration proceedings. See, *e.g., NLRB* v. *Washington Aluminum Co.*, 370 U. S. 9 (1962) (walkout to protest workplace conditions); *NLRB* v. *Textile Workers*, 409 U. S. 213 (1972) (resignation from union and refusal to strike); *NLRB* v. *J. Weingarten, Inc.*, 420 U. S. 251

(1975) (request for union representation at disciplinary interview). Neither do the two cases the employees cite prove otherwise. In *Eastex, Inc.* v. *NLRB*, 437 U. S. 556, 558 (1978), we simply addressed the question whether a union's distribution of a newsletter in the workplace qualified as a protected concerted activity. We held it did, noting that it was "undisputed that the union undertook the distribution in order to boost its support and improve its bargaining position in upcoming contract negotiations," all part of the union's "'continuing organizational efforts.'" *Id.,* at 575, and n. 24. In *NLRB* v. *City Disposal Systems, Inc.*, 465 U. S. 822, 831–832 (1984), we held only that an employee's assertion of a right under a collective bargaining agreement was protected, reasoning that the collective bargaining "process—beginning with the organization of the union, continuing into the negotiation of a collective-bargaining agreement, and extending through the enforcement of the agreement—is a single, collective activity." Nothing in our cases indicates that the NLRA guarantees class and collective action procedures, let alone for claims arising under different statutes and despite the express (and entirely unmentioned) teachings of the Arbitration Act.

That leaves the employees to try to make something of our dicta. The employees point to a line in *Eastex* observing that "it has been held" by other courts and the Board "that the 'mutual aid or protection' clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums." 437 U. S., at 565–566; see also Brief for National Labor Relations Board in No. 16–307, p. 15 (citing similar Board decisions). But even on its own terms, this dicta about the holdings of other bodies does not purport to discuss what *procedures* an employee might be entitled to in litigation or arbitration. Instead this passage at most suggests only that

"resort to administrative and judicial forums" isn't "entirely unprotected." *Id.,* at 566. Indeed, the Court proceeded to explain that it did not intend to "address . . . the question of what may constitute 'concerted' activities in this [litigation] context." *Ibid.,* n. 15. So even the employees' dicta, when viewed fairly and fully, doesn't suggest that individualized dispute resolution procedures might be insufficient and collective procedures might be mandatory. Neither should this come as a surprise given that not a single one of the lower court or Board decisions *Eastex* discussed went so far as to hold that Section 7 guarantees a right to class or collective action procedures. As we've seen, the Board did not purport to discover that right until 2012, and no federal appellate court accepted it until 2016. See *D. R. Horton*, 357 N. L. R. B. 2277; 823 F. 3d 1147 (case below in No. 16–285).

With so much against them in the statute and our precedent, the employees end by seeking shelter in *Chevron*. Even if this Court doesn't see what they see in Section 7, the employees say we must rule for them anyway because of the deference this Court owes to an administrative agency's interpretation of the law. To be sure, the employees do not wish us to defer to the general counsel's judgment in 2010 that the NLRA and the Arbitration Act coexist peaceably; they wish us to defer instead to the Board's 2012 opinion suggesting the NLRA displaces the Arbitration Act. No party to these cases has asked us to reconsider *Chevron* deference. Cf. *SAS Institute Inc.* v. *Iancu*, *ante,* at 11. But even under *Chevron*'s terms, no deference is due. To show why, it suffices to outline just a few of the most obvious reasons.

The *Chevron* Court justified deference on the premise that a statutory ambiguity represents an "implicit" delegation to an agency to interpret a "statute which it administers." 467 U. S., at 841, 844. Here, though, the Board hasn't just sought to interpret its statute, the NLRA, in

isolation; it has sought to interpret this statute in a way that limits the work of a second statute, the Arbitration Act. And on no account might we agree that Congress implicitly delegated to an agency authority to address the meaning of a second statute it does not administer. One of *Chevron*'s essential premises is simply missing here.

It's easy, too, to see why the "reconciliation" of distinct statutory regimes "is a matter for the courts," not agencies. *Gordon* v. *New York Stock Exchange, Inc.*, 422 U. S. 659, 685–686 (1975). An agency eager to advance its statutory mission, but without any particular interest in or expertise with a second statute, might (as here) seek to diminish the second statute's scope in favor of a more expansive interpretation of its own—effectively "'bootstrap[ping] itself into an area in which it has no jurisdiction.'" *Adams Fruit Co.* v. *Barrett*, 494 U. S. 638, 650 (1990). All of which threatens to undo rather than honor legislative intentions. To preserve the balance Congress struck in its statutes, courts must exercise independent interpretive judgment. See *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U. S. 137, 144 (2002) (noting that this Court has "never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA").

Another justification the *Chevron* Court offered for deference is that "policy choices" should be left to Executive Branch officials "directly accountable to the people." 467 U. S., at 865. But here the Executive seems of two minds, for we have received competing briefs from the Board and from the United States (through the Solicitor General) disputing the meaning of the NLRA. And whatever argument might be mustered for deferring to the Executive on grounds of political accountability, surely it becomes a garble when the Executive speaks from both sides of its mouth, articulating no single position on which it might be held accountable. See Hemel & Nielson, *Chev-*

ron Step One-and-a-Half, 84 U. Chi. L. Rev. 757, 808 (2017) ("If the theory undergirding *Chevron* is that voters should be the judges of the executive branch's policy choices, then presumably the executive branch should have to take ownership of those policy choices so that voters know whom to blame (and to credit)"). In these circumstances, we will not defer.

Finally, the *Chevron* Court explained that deference is not due unless a "court, employing traditional tools of statutory construction," is left with an unresolved ambiguity. 467 U. S., at 843, n. 9. And that too is missing: the canon against reading conflicts into statutes is a traditional tool of statutory construction and it, along with the other traditional canons we have discussed, is more than up to the job of solving today's interpretive puzzle. Where, as here, the canons supply an answer, "*Chevron* leaves the stage." *Alternative Entertainment*, 858 F. 3d, at 417 (opinion of Sutton, J.).

IV

The dissent sees things a little bit differently. In its view, today's decision ushers us back to the *Lochner* era when this Court regularly overrode legislative policy judgments. The dissent even suggests we have resurrected the long-dead "yellow dog" contract. *Post,* at 3–17, 30 (opinion of GINSBURG, J.). But like most apocalyptic warnings, this one proves a false alarm. Cf. L. Tribe, American Constitutional Law 435 (1978) ("'*Lochnerizing*' has become so much an epithet that the very use of the label may obscure attempts at understanding").

Our decision does nothing to override Congress's policy judgments. As the dissent recognizes, the legislative policy embodied in the NLRA is aimed at "safeguard[ing], first and foremost, workers' rights to join unions and to engage in collective bargaining." *Post,* at 8. Those rights stand every bit as strong today as they did yesterday. And

rather than revive "yellow dog" contracts against union organizing that the NLRA outlawed back in 1935, today's decision merely declines to read into the NLRA a novel right to class action procedures that the Board's own general counsel disclaimed as recently as 2010.

Instead of overriding Congress's policy judgments, today's decision seeks to honor them. This much the dissent surely knows. Shortly after invoking the specter of *Lochner*, it turns around and criticizes the Court for trying *too hard* to abide the Arbitration Act's "'liberal federal policy favoring arbitration agreements,'" *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U. S. 79, 83 (2002), saying we "'ski'" too far down the "'slippery slope'" of this Court's arbitration precedent, *post,* at 23. But the dissent's real complaint lies with the mountain of precedent itself. The dissent spends page after page relitigating our Arbitration Act precedents, rehashing arguments this Court has heard and rejected many times in many cases that no party has asked us to revisit. Compare *post,* at 18–23, 26 (criticizing *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614 (1985), *Gilmer*, 500 U. S. 20, *Circuit City*, 532 U. S. 105, *Concepcion*, 563 U. S. 333, *Italian Colors*, 570 U. S. 228, and *CompuCredit*, 565 U. S. 95), with *Mitsubishi*, *supra,* at 645–650 (Stevens, J., dissenting), *Gilmer*, *supra,* at 36, 39–43 (Stevens, J., dissenting), *Circuit City*, *supra,* at 124–129 (Stevens, J., dissenting), *Concepcion*, *supra,* at 357–367 (BREYER, J., dissenting), *Italian Colors*, *supra,* at 240–253 (KAGAN, J., dissenting), and *CompuCredit*, *supra,* at 116–117 (GINSBURG, J., dissenting).

When at last it reaches the question of applying our precedent, the dissent offers little, and understandably so. Our precedent clearly teaches that a contract defense "conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures" is inconsistent with the Arbitration Act and

its saving clause. *Concepcion*, *supra*, at 336 (opinion of the Court). And that, of course, is exactly what the employees' proffered defense seeks to do.

Nor is the dissent's reading of the NLRA any more available to us than its reading of the Arbitration Act. The dissent imposes a vast construction on Section 7's language. *Post,* at 9. But a statute's meaning does not always "turn solely" on the broadest imaginable "definitions of its component words." *Yates* v. *United States*, 574 U. S. ___, ___ (2015) (plurality opinion) (slip op., at 7). Linguistic and statutory context also matter. We have offered an extensive explanation why those clues support our reading today. By contrast, the dissent rests its interpretation on legislative history. *Post,* at 3–5; see also *post,* at 19–21. But legislative history is not the law. "It is the business of Congress to sum up its own debates in its legislation," and once it enacts a statute "'[w]e do not inquire what the legislature meant; we ask only what the statute means.'" *Schwegmann Brothers* v. *Calvert Distillers Corp.*, 341 U. S. 384, 396, 397 (1951) (Jackson, J., concurring) (quoting Justice Holmes). Besides, when it comes to the legislative history here, it seems Congress "did not discuss the right to file class or consolidated claims against employers." *D. R. Horton*, 737 F. 3d, at 361. So the dissent seeks instead to divine messages from congressional commentary directed to different questions altogether—a project that threatens to "substitute [the Court] for the Congress." *Schwegmann*, *supra*, at 396.

Nor do the problems end there. The dissent proceeds to argue that its expansive reading of the NLRA conflicts with and should prevail over the Arbitration Act. The NLRA leaves the Arbitration Act without force, the dissent says, because it provides the more "pinpointed" direction. *Post,* at 25. Even taken on its own terms, though, this argument quickly faces trouble. The dissent says the NLRA is the more specific provision because it supposedly

"speaks directly to group action by employees," while the Arbitration Act doesn't speak to such actions. *Ibid.* But the question before us is whether courts must enforce particular arbitration agreements according to their terms. And it's the Arbitration Act that speaks directly to the enforceability of arbitration agreements, while the NLRA doesn't mention arbitration at all. So if forced to choose between the two, we might well say the Arbitration Act offers the more on-point instruction. Of course, there is no need to make that call because, as our precedents demand, we have sought and found a persuasive interpretation that gives effect to all of Congress's work, not just the parts we might prefer.

Ultimately, the dissent retreats to policy arguments. It argues that we should read a class and collective action right into the NLRA to promote the enforcement of wage and hour laws. *Post,* at 26–30. But it's altogether unclear why the dissent expects to find such a right in the NLRA rather than in statutes like the FLSA that actually regulate wages and hours. Or why we should read the NLRA as mandating the availability of class or collective actions when the FLSA expressly authorizes them yet allows parties to contract for bilateral arbitration instead. 29 U. S. C. §216(b); *Gilmer*, *supra,* at 32. While the dissent is no doubt right that class actions can enhance enforcement by "spread[ing] the costs of litigation," *post,* at 9, it's also well known that they can unfairly "plac[e] pressure on the defendant to settle even unmeritorious claims," *Shady Grove Orthopedic Associates, P. A.* v. *Allstate Ins. Co.*, 559 U. S. 393, 445, n. 3 (2010) (GINSBURG, J., dissenting). The respective merits of class actions and private arbitration as means of enforcing the law are questions constitutionally entrusted not to the courts to decide but to the policymakers in the political branches where those questions remain hotly contested. Just recently, for example, one federal agency banned individualized arbitration agree-

ments it blamed for underenforcement of certain laws, only to see Congress respond by immediately repealing that rule. See 82 Fed. Reg. 33210 (2017) (cited *post,* at 28, n. 15); Pub. L. 115–74, 131 Stat. 1243. This Court is not free to substitute its preferred economic policies for those chosen by the people's representatives. *That*, we had always understood, was *Lochner*'s sin.

*

The policy may be debatable but the law is clear: Congress has instructed that arbitration agreements like those before us must be enforced as written. While Congress is of course always free to amend this judgment, we see nothing suggesting it did so in the NLRA—much less that it manifested a clear intention to displace the Arbitration Act. Because we can easily read Congress's statutes to work in harmony, that is where our duty lies. The judgments in *Epic*, No. 16–285, and *Ernst & Young*, No. 16–300, are reversed, and the cases are remanded for further proceedings consistent with this opinion. The judgment in *Murphy Oil*, No. 16–307, is affirmed.

So ordered.

SUPREME COURT OF THE UNITED STATES

Nos. 16–285, 16–300, 16–307

EPIC SYSTEMS CORPORATION, PETITIONER
16–285 *v.*
JACOB LEWIS;

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ERNST & YOUNG LLP, ET AL., PETITIONERS
16–300 *v.*
STEPHEN MORRIS, ET AL.; AND

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, PETITIONER
16–307 *v.*
MURPHY OIL USA, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[May 21, 2018]

JUSTICE THOMAS, concurring.

I join the Court's opinion in full. I write separately to add that the employees also cannot prevail under the plain meaning of the Federal Arbitration Act. The Act declares arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U. S. C. §2. As I have previously explained, grounds for revocation of a contract are those that concern "'the formation of the arbitration agreement.'" *American Express Co.* v. *Italian Colors*

Restaurant, 570 U. S. 228, 239 (2013) (concurring opinion) (quoting *AT&T Mobility LLC* v. *Concepcion*, 563 U. S. 333, 353 (2011) (THOMAS, J., concurring)). The employees argue, among other things, that the class waivers in their arbitration agreements are unenforceable because the National Labor Relations Act makes those waivers illegal. But illegality is a public-policy defense. See Restatement (Second) of Contracts §§178–179 (1979); *McMullen* v. *Hoffman*, 174 U. S. 639, 669–670 (1899). Because "[r]efusal to enforce a contract for public-policy reasons does not concern whether the contract was properly made," the saving clause does not apply here. *Concepcion*, *supra*, at 357. For this reason, and the reasons in the Court's opinion, the employees' arbitration agreements must be enforced according to their terms.

SUPREME COURT OF THE UNITED STATES

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[May 21, 2018]

JUSTICE GINSBURG, with whom JUSTICE BREYER, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, dissenting.

The employees in these cases complain that their employers have underpaid them in violation of the wage and hours prescriptions of the Fair Labor Standards Act of 1938 (FLSA), 29 U. S. C. §201 *et seq.*, and analogous state laws. Individually, their claims are small, scarcely of a size warranting the expense of seeking redress alone. See Ruan, What's Left To Remedy Wage Theft? How Arbitration Mandates That Bar Class Actions Impact Low-Wage

Workers, 2012 Mich. St. L. Rev. 1103, 1118–1119 (Ruan). But by joining together with others similarly circumstanced, employees can gain effective redress for wage underpayment commonly experienced. See *id.,* at 1108–1111. To block such concerted action, their employers required them to sign, as a condition of employment, arbitration agreements banning collective judicial and arbitral proceedings of any kind. The question presented: Does the Federal Arbitration Act (Arbitration Act or FAA), 9 U. S. C. §1 *et seq.,* permit employers to insist that their employees, whenever seeking redress for commonly experienced wage loss, go it alone, never mind the right secured to employees by the National Labor Relations Act (NLRA), 29 U. S. C. §151 *et seq.,* "to engage in . . . concerted activities" for their "mutual aid or protection"? §157. The answer should be a resounding "No."

In the NLRA and its forerunner, the Norris-LaGuardia Act (NLGA), 29 U. S. C. §101 *et seq.*, Congress acted on an acute awareness: For workers striving to gain from their employers decent terms and conditions of employment, there is strength in numbers. A single employee, Congress understood, is disarmed in dealing with an employer. See *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 33–34 (1937). The Court today subordinates employee-protective labor legislation to the Arbitration Act. In so doing, the Court forgets the labor market imbalance that gave rise to the NLGA and the NLRA, and ignores the destructive consequences of diminishing the right of employees "to band together in confronting an employer." *NLRB* v. *City Disposal Systems, Inc.*, 465 U. S. 822, 835 (1984). Congressional correction of the Court's elevation of the FAA over workers' rights to act in concert is urgently in order.

To explain why the Court's decision is egregiously wrong, I first refer to the extreme imbalance once prevalent in our Nation's workplaces, and Congress' aim in the

NLGA and the NLRA to place employers and employees on a more equal footing. I then explain why the Arbitration Act, sensibly read, does not shrink the NLRA's protective sphere.

I

It was once the dominant view of this Court that "[t]he right of a person to sell his labor upon such terms as he deems proper is . . . the same as the right of the purchaser of labor to prescribe [working] conditions." *Adair* v. *United States*, 208 U. S. 161, 174 (1908) (invalidating federal law prohibiting interstate railroad employers from discharging or discriminating against employees based on their membership in labor organizations); accord *Coppage* v. *Kansas*, 236 U. S. 1, 26 (1915) (invalidating state law prohibiting employers from requiring employees, as a condition of employment, to refrain or withdraw from union membership).

The NLGA and the NLRA operate on a different premise, that employees must have the capacity to act collectively in order to match their employers' clout in setting terms and conditions of employment. For decades, the Court's decisions have reflected that understanding. See *Jones & Laughlin Steel*, 301 U. S. 1 (upholding the NLRA against employer assault); cf. *United States* v. *Darby*, 312 U. S. 100 (1941) (upholding the FLSA).

A

The end of the 19th century and beginning of the 20th was a tumultuous era in the history of our Nation's labor relations. Under economic conditions then prevailing, workers often had to accept employment on whatever terms employers dictated. See 75 Cong. Rec. 4502 (1932). Aiming to secure better pay, shorter workdays, and safer workplaces, workers increasingly sought to band together to make their demands effective. See *ibid.*; H. Millis & E.

Brown, From the Wagner Act to Taft-Hartley: A Study of National Labor Policy and Labor Relations 7–8 (1950).

Employers, in turn, engaged in a variety of tactics to hinder workers' efforts to act in concert for their mutual benefit. See J. Seidman, The Yellow Dog Contract 11 (1932). Notable among such devices was the "yellow-dog contract." Such agreements, which employers required employees to sign as a condition of employment, typically commanded employees to abstain from joining labor unions. See *id.,* at 11, 56. Many of the employer-designed agreements cast an even wider net, "proscrib[ing] all manner of concerted activities." Finkin, The Meaning and Contemporary Vitality of the Norris-LaGuardia Act, 93 Neb. L. Rev. 6, 16 (2014); see Seidman, *supra*, at 59–60, 65–66. As a prominent United States Senator observed, contracts of the yellow-dog genre rendered the "laboring man . . . absolutely helpless" by "waiv[ing] his right . . . to free association" and by requiring that he "singly present any grievance he has." 75 Cong. Rec. 4504 (remarks of Sen. Norris).

Early legislative efforts to protect workers' rights to band together were unavailing. See, *e.g., Coppage*, 236 U. S., at 26; Frankfurter & Greene, Legislation Affecting Labor Injunctions, 38 Yale L. J. 879, 889–890 (1929). Courts, including this one, invalidated the legislation based on then-ascendant notions about employers' and employees' constitutional right to "liberty of contract." See *Coppage*, 236 U. S., at 26; Frankfurter & Greene, *supra,* at 890–891. While stating that legislatures could curtail contractual "liberty" in the interest of public health, safety, and the general welfare, courts placed outside those bounds legislative action to redress the bargaining power imbalance workers faced. See *Coppage*, 236 U. S., at 16–19.

In the 1930's, legislative efforts to safeguard vulnerable workers found more receptive audiences. As the Great

Depression shifted political winds further in favor of worker-protective laws, Congress passed two statutes aimed at protecting employees' associational rights. First, in 1932, Congress passed the NLGA, which regulates the employer-employee relationship indirectly. Section 2 of the Act declares:

> "Whereas . . . the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, . . . it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, . . . and that he shall be free from the interference, restraint, or coercion of employers . . . in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U. S. C. §102.

Section 3 provides that federal courts shall not enforce "any . . . undertaking or promise in conflict with the public policy declared in [§2]." §103.[1] In adopting these provisions, Congress sought to render ineffective employer-imposed contracts proscribing employees' concerted activity of any and every kind. See 75 Cong. Rec. 4504–4505 (remarks of Sen. Norris) ("[o]ne of the objects" of the NLGA was to "outlaw" yellow-dog contracts); Finkin, *supra*, at 16 (contracts prohibiting "all manner of concerted activities apart from union membership or support . . . were understood to be 'yellow dog' contracts"). While banning court enforcement of contracts proscribing con-

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[1] Other provisions of the NLGA further rein in federal-court authority to disturb employees' concerted activities. See, *e.g.,* 29 U. S. C. §104(d) (federal courts lack jurisdiction to enjoin a person from "aiding any person participating or interested in any labor dispute who is being proceeded against in, or [who] is prosecuting, any action or suit in any court of the United States or of any State").

certed action by employees, the NLGA did not directly prohibit coercive employer practices.

But Congress did so three years later, in 1935, when it enacted the NLRA. Relevant here, §7 of the NLRA guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, *and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection*." 29 U. S. C. §157 (emphasis added). Section 8(a)(1) safeguards those rights by making it an "unfair labor practice" for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [§7]." §158(a)(1). To oversee the Act's guarantees, the Act established the National Labor Relations Board (Board or NLRB), an independent regulatory agency empowered to administer "labor policy for the Nation." *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 242 (1959); see 29 U. S. C. §160.

Unlike earlier legislative efforts, the NLGA and the NLRA had staying power. When a case challenging the NLRA's constitutionality made its way here, the Court, in retreat from its *Lochner*-era contractual-"liberty" decisions, upheld the Act as a permissible exercise of legislative authority. See *Jones & Laughlin Steel*, 301 U. S., at 33–34. The Court recognized that employees have a "fundamental right" to join together to advance their common interests and that Congress, in lieu of "ignor[ing]" that right, had elected to "safeguard" it. *Ibid.*

B

Despite the NLRA's prohibitions, the employers in the cases now before the Court required their employees to sign contracts stipulating to submission of wage and hours claims to binding arbitration, and to do so only one-by-

one.[2] When employees subsequently filed wage and hours claims in federal court and sought to invoke the collective-litigation procedures provided for in the FLSA and Federal Rules of Civil Procedure,[3] the employers moved to compel individual arbitration. The Arbitration Act, in their view, requires courts to enforce their take-it-or-leave-it arbitration agreements as written, including the collective-litigation abstinence demanded therein.

In resisting enforcement of the group-action foreclosures, the employees involved in this litigation do not urge

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[2] The Court's opinion opens with the question: "Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration?" *Ante,* at 1. Were the "agreements" genuinely bilateral? Petitioner Epic Systems Corporation e-mailed its employees an arbitration agreement requiring resolution of wage and hours claims by individual arbitration. The agreement provided that if the employees "continue[d] to work at Epic," they would "be deemed to have accepted th[e] Agreement." App. to Pet. for Cert. in No. 16–285, p. 30a. Ernst & Young similarly e-mailed its employees an arbitration agreement, which stated that the employees' continued employment would indicate their assent to the agreement's terms. See App. in No. 16–300, p. 37. Epic's and Ernst & Young's employees thus faced a Hobson's choice: accept arbitration on their employer's terms or give up their jobs.

[3] The FLSA establishes an opt-in collective-litigation procedure for employees seeking to recover unpaid wages and overtime pay. See 29 U. S. C. §216(b). In particular, it authorizes "one or more employees" to maintain an action "in behalf of himself or themselves and other employees similarly situated." *Ibid.* "Similarly situated" employees may become parties to an FLSA collective action (and may share in the recovery) only if they file written notices of consent to be joined as parties. *Ibid.* The Federal Rules of Civil Procedure provide two collective-litigation procedures relevant here. First, Rule 20(a) permits individuals to join as plaintiffs in a single action if they assert claims arising out of the same transaction or occurrence and their claims involve common questions of law or fact. Second, Rule 23 establishes an opt-out class-action procedure, pursuant to which "[o]ne or more members of a class" may bring an action on behalf of the entire class if specified prerequisites are met.

that they must have access to a judicial forum.[4] They argue only that the NLRA prohibits their employers from denying them the right to pursue work-related claims in concert in any forum. If they may be stopped by employer-dictated terms from pursuing collective procedures in court, they maintain, they must at least have access to similar procedures in an arbitral forum.

C

Although the NLRA safeguards, first and foremost, workers' rights to join unions and to engage in collective bargaining, the statute speaks more embracively. In addition to protecting employees' rights "to form, join, or assist labor organizations" and "to bargain collectively through representatives of their own choosing," the Act protects employees' rights "to engage in *other* concerted activities for the purpose of . . . mutual aid or protection." 29 U. S. C. §157 (emphasis added); see, *e.g., NLRB* v. *Washington Aluminum Co.*, 370 U. S. 9, 14–15 (1962) (§7 protected unorganized employees when they walked off the job to protest cold working conditions). See also 1 J. Higgins, The Developing Labor Law 209 (6th ed. 2012) ("Section 7 protects not only union-related activity but also 'other concerted activities . . . for mutual aid or protection.'"); 1 N. Lareau, Labor and Employment Law §1.01[1], p. 1–2 (2017) ("Section 7 extended to employees three federally protected rights: (1) the right to form and join unions; (2) the right to bargain collectively (negotiate) with employers about terms and conditions of employment; *and* (3) the right to work in concert with another employee or employees to achieve employment-related goals." (emphasis added)).

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[4] Notably, one employer specified that if the provisions confining employees to individual proceedings are "unenforceable," "any claim brought on a class, collective, or representative action basis must be filed in . . . court." App. to Pet. for Cert. in No. 16–285, at 35a.

Suits to enforce workplace rights collectively fit comfortably under the umbrella "concerted activities for the purpose of . . . mutual aid or protection." 29 U. S. C. §157. "Concerted" means "[p]lanned or accomplished together; combined." American Heritage Dictionary 381 (5th ed. 2011). "Mutual" means "reciprocal." *Id.,* at 1163. When employees meet the requirements for litigation of shared legal claims in joint, collective, and class proceedings, the litigation of their claims is undoubtedly "accomplished together." By joining hands in litigation, workers can spread the costs of litigation and reduce the risk of employer retaliation. See *infra,* at 27–28.

Recognizing employees' right to engage in collective employment litigation and shielding that right from employer blockage are firmly rooted in the NLRA's design. Congress expressed its intent, when it enacted the NLRA, to "protec[t] the exercise by workers of full freedom of association," thereby remedying "[t]he inequality of bargaining power" workers faced. 29 U. S. C. §151; see, *e.g., Eastex, Inc.* v. *NLRB*, 437 U. S. 556, 567 (1978) (the Act's policy is "to protect the right of workers to act together to better their working conditions" (internal quotation marks omitted)); *City Disposal*, 465 U. S., at 835 ("[I]n enacting §7 of the NLRA, Congress sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment."). See also *supra,* at 5–6. There can be no serious doubt that collective litigation is one way workers may associate with one another to improve their lot.

Since the Act's earliest days, the Board and federal courts have understood §7's "concerted activities" clause to protect myriad ways in which employees may join together to advance their shared interests. For example, the Board and federal courts have affirmed that the Act shields employees from employer interference when they partici-

pate in concerted appeals to the media, *e.g., NLRB* v. *Peter Cailler Kohler Swiss Chocolates Co.*, 130 F. 2d 503, 505–506 (CA2 1942), legislative bodies, *e.g., Bethlehem Shipbuilding Corp.* v. *NLRB*, 114 F. 2d 930, 937 (CA1 1940), and government agencies, *e.g., Moss Planing Mill Co.*, 103 N. L. R. B. 414, 418–419, enf'd, 206 F. 2d 557 (CA4 1953). "The 74th Congress," this Court has noted, "knew well enough that labor's cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context." *Eastex*, 437 U. S., at 565.

Crucially important here, for over 75 years, the Board has held that the NLRA safeguards employees from employer interference when they pursue joint, collective, and class suits related to the terms and conditions of their employment. See, *e.g., Spandsco Oil and Royalty Co.*, 42 N. L. R. B. 942, 948–949 (1942) (three employees' joint filing of FLSA suit ranked as concerted activity protected by the NLRA); *Poultrymen's Service Corp.*, 41 N. L. R. B. 444, 460–463, and n. 28 (1942) (same with respect to employee's filing of FLSA suit on behalf of himself and others similarly situated), enf'd, 138 F. 2d 204 (CA3 1943); *Sarkes Tarzian, Inc.*, 149 N. L. R. B. 147, 149, 153 (1964) (same with respect to employees' filing class libel suit); *United Parcel Service, Inc.*, 252 N. L. R. B. 1015, 1018 (1980) (same with respect to employee's filing class action regarding break times), enf'd, 677 F. 2d 421 (CA6 1982); *Harco Trucking, LLC*, 344 N. L. R. B. 478, 478–479 (2005) (same with respect to employee's maintaining class action regarding wages). For decades, federal courts have endorsed the Board's view, comprehending that "the filing of a labor related civil action by a group of employees is ordinarily a concerted activity protected by §7." *Leviton Mfg. Co.* v. *NLRB*, 486 F. 2d 686, 689 (CA1 1973); see, *e.g., Brady* v. *National Football League*, 644 F. 3d 661, 673

(CA8 2011) (similar).[5] The Court pays scant heed to this longstanding line of decisions.[6]

D

In face of the NLRA's text, history, purposes, and longstanding construction, the Court nevertheless concludes that collective proceedings do not fall within the scope of §7. None of the Court's reasons for diminishing §7 should carry the day.

1

The Court relies principally on the *ejusdem generis* canon. See *ante,* at 12. Observing that §7's "other concerted activities" clause "appears at the end of a detailed list of activities," the Court says the clause should be read

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[5] The Court cites, as purported evidence of contrary agency precedent, a 2010 "Guideline Memorandum" that the NLRB's then-General Counsel issued to his staff. See *ante,* at 4, 19, 22. The General Counsel appeared to conclude that employees have a §7 right to file collective suits, but that employers can nonetheless require employees to sign arbitration agreements waiving the right to maintain such suits. See Memorandum GC 10–06, p. 7 (June 16, 2010). The memorandum sought to address what the General Counsel viewed as tension between longstanding precedent recognizing a §7 right to pursue collective employment litigation and more recent court decisions broadly construing the FAA. The memorandum did not bind the Board, and the Board never adopted the memorandum's position as its own. See *D. R. Horton*, 357 N. L. R. B. 2277, 2282 (2012), enf. denied in relevant part, 737 F. 3d 344 (CA5 2013); Tr. of Oral Arg. 41. Indeed, shortly after the General Counsel issued the memorandum, the Board rejected its analysis, finding that it conflicted with Board precedent, rested on erroneous factual premises, "defie[d] logic," and was internally incoherent. *D. R. Horton*, 357 N. L. R. B., at 2282–2283.

[6] In 2012, the Board held that employer-imposed contracts barring group litigation in any forum—arbitral or judicial—are unlawful. *D. R. Horton*, 357 N. L. R. B. 2277. In so ruling, the Board simply applied its precedents recognizing that (1) employees have a §7 right to engage in collective employment litigation and (2) employers cannot lawfully require employees to sign away their §7 rights. See *id.,* at 2278, 2280. It broke no new ground. But cf. *ante,* at 2, 19.

to "embrace" only activities "similar in nature" to those set forth first in the list, *ibid.* (internal quotation marks omitted), *i.e.,* "'self-organization,' 'form[ing], join[ing], or assist[ing] labor organizations,' and 'bargain[ing] collectively,'" *ibid.* The Court concludes that §7 should, therefore, be read to protect "things employees 'just do' for themselves." *Ibid.* (quoting *NLRB* v. *Alternative Entertainment, Inc.*, 858 F. 3d 393, 415 (CA6 2017) (Sutton, J., concurring in part and dissenting in part); emphasis deleted). It is far from apparent why joining hands in litigation would not qualify as "things employees just do for themselves." In any event, there is no sound reason to employ the *ejusdem generis* canon to narrow §7's protections in the manner the Court suggests.

The *ejusdem generis* canon may serve as a useful guide where it is doubtful Congress intended statutory words or phrases to have the broad scope their ordinary meaning conveys. See *Russell Motor Car Co.* v. *United States*, 261 U. S. 514, 519 (1923). Courts must take care, however, not to deploy the canon to undermine Congress' efforts to draft encompassing legislation. See *United States* v. *Powell*, 423 U. S. 87, 90 (1975) ("[W]e would be justified in narrowing the statute only if such a narrow reading was supported by evidence of congressional intent over and above the language of the statute."). Nothing suggests that Congress envisioned a cramped construction of the NLRA. Quite the opposite, Congress expressed an embracive purpose in enacting the legislation, *i.e.,* to "protec[t] the exercise by workers of full freedom of association." 29 U. S. C. §151; see *supra,* at 9.

2

In search of a statutory hook to support its application of the *ejusdem generis* canon, the Court turns to the NLRA's "structure." *Ante,* at 12. Citing a handful of provisions that touch upon unionization, collective bar-

gaining, picketing, and strikes, the Court asserts that the NLRA "establish[es] a regulatory regime" governing each of the activities protected by §7. *Ante,* at 12–13. That regime, the Court says, offers "specific guidance" and "rules" regulating each protected activity. *Ante,* at 13. Observing that none of the NLRA's provisions explicitly regulates employees' resort to collective litigation, the Court insists that "it is hard to fathom why Congress would take such care to regulate all the other matters mentioned in [§7] yet remain mute about this matter alone—unless, of course, [§7] doesn't speak to class and collective action procedures in the first place." *Ibid.*

This argument is conspicuously flawed. When Congress enacted the NLRA in 1935, the only §7 activity Congress addressed with any specificity was employees' selection of collective-bargaining representatives. See 49 Stat. 453. The Act did not offer "specific guidance" about employees' rights to "form, join, or assist labor organizations." Nor did it set forth "specific guidance" for any activity falling within §7's "other concerted activities" clause. The only provision that touched upon an activity falling within that clause stated: "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike." *Id.,* at 457. That provision hardly offered "specific guidance" regarding employees' right to strike.

Without much in the original Act to support its "structure" argument, the Court cites several provisions that Congress added later, in response to particular concerns. Compare 49 Stat. 449–457 with 61 Stat. 142–143 (1947) (adding §8(d) to provide guidance regarding employees' and employers' collective-bargaining obligations); 61 Stat. 141–142 (amending §8(a) and adding §8(b) to proscribe specified labor organization practices); 73 Stat. 544 (1959) (adding §8(b)(7) to place restrictions on labor organizations' right to picket employers). It is difficult to comprehend why Congress' later inclusion of specific guidance

regarding some of the activities protected by §7 sheds any light on Congress' initial conception of §7's scope.

But even if each of the provisions the Court cites had been included in the original Act, they still would provide little support for the Court's conclusion. For going on 80 years now, the Board and federal courts—including this one—have understood §7 to protect numerous activities for which the Act provides no "specific" regulatory guidance. See *supra,* at 9–10.

3

In a related argument, the Court maintains that the NLRA does not "even whispe[r]" about the "rules [that] should govern the adjudication of class or collective actions in court or arbitration." *Ante,* at 13. The employees here involved, of course, do not look to the NLRA for the procedures enabling them to vindicate their employment rights in arbitral or judicial forums. They assert that the Act establishes their right to act in concert using existing, generally available procedures, see *supra,* at 7, n. 3, and to do so free from employer interference. The FLSA and the Federal Rules on joinder and class actions provide the procedures pursuant to which the employees may ally to pursue shared legal claims. Their employers cannot lawfully cut off their access to those procedures, they urge, without according them access to similar procedures in arbitral forums. See, *e.g.,* American Arbitration Assn., Supplementary Rules for Class Arbitrations (2011).

To the employees' argument, the Court replies: If the employees "really take existing class and collective action rules as they find them, they surely take them subject to the limitations inherent in those rules—including the principle that parties may (as here) contract to depart from them in favor of individualized arbitration procedures." *Ante,* at 14. The freedom to depart asserted by the Court, as already underscored, is entirely one sided.

See *supra,* at 2–5. Once again, the Court ignores the reality that sparked the NLRA's passage: Forced to face their employers without company, employees ordinarily are no match for the enterprise that hires them. Employees gain strength, however, if they can deal with their employers in numbers. That is the very reason why the NLRA secures against employer interference employees' right to act in concert for their "mutual aid or protection." 29 U. S. C. §§151, 157, 158.

4

Further attempting to sow doubt about §7's scope, the Court asserts that class and collective procedures were "hardly known when the NLRA was adopted in 1935." *Ante,* at 11. In particular, the Court notes, the FLSA's collective-litigation procedure postdated §7 "by years" and Rule 23 "didn't create the modern class action until 1966." *Ibid.*

First, one may ask, is there any reason to suppose that Congress intended to protect employees' right to act in concert using only those procedures and forums available in 1935? Congress framed §7 in broad terms, "entrust[ing]" the Board with "responsibility to adapt the Act to changing patterns of industrial life." *NLRB* v. *J. Weingarten, Inc.*, 420 U. S. 251, 266 (1975); see *Pennsylvania Dept. of Corrections* v. *Yeskey*, 524 U. S. 206, 212 (1998) ("[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." (internal quotation marks omitted)). With fidelity to Congress' aim, the Board and federal courts have recognized that the NLRA shields employees from employer interference when they, *e.g.,* join together to file complaints with administrative agencies, even if those agencies did not exist in 1935. See, *e.g., Wray Electric Contracting, Inc.,* 210 N. L. R. B. 757, 762 (1974) (the NLRA protects concerted filing of

complaint with the Occupational Safety and Health Administration).

Moreover, the Court paints an ahistorical picture. As Judge Wood, writing for the Seventh Circuit, cogently explained, the FLSA's collective-litigation procedure and the modern class action were "not written on a clean slate." 823 F. 3d 1147, 1154 (2016). By 1935, permissive joinder was scarcely uncommon in courts of equity. See 7 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure §1651 (3d ed. 2001). Nor were representative and class suits novelties. Indeed, their origins trace back to medieval times. See S. Yeazell, From Medieval Group Litigation to the Modern Class Action 38 (1987). And beyond question, "[c]lass suits long have been a part of American jurisprudence." 7A Wright, *supra*, §1751, at 12 (3d ed. 2005); see *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U. S. 356, 363 (1921). See also Brief for Constitutional Accountability Center as *Amicus Curiae* 5–16 (describing group litigation's "rich history"). Early instances of joint proceedings include cases in which employees allied to sue an employer. *E.g., Gorley* v. *Louisville*, 23 Ky. 1782, 65 S. W. 844 (1901) (suit to recover wages brought by ten members of city police force on behalf of themselves and other officers); *Guiliano* v. *Daniel O'Connell's Sons*, 105 Conn. 695, 136 A. 677 (1927) (suit by two employees to recover for injuries sustained while residing in housing provided by their employer). It takes no imagination, then, to comprehend that Congress, when it enacted the NLRA, likely meant to protect employees' joining together to engage in collective litigation.[7]

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[7]The Court additionally suggests that something must be amiss because the employees turn to the NLRA, rather than the FLSA, to resist enforcement of the collective-litigation waivers. See *ante,* at 14–15. But the employees' reliance on the NLRA is hardly a reason to "raise a judicial eyebrow." *Ante,* at 15. The NLRA's guiding purpose is to protect employees' rights to work together when addressing shared

E

Because I would hold that employees' §7 rights include the right to pursue collective litigation regarding their wages and hours, I would further hold that the employer-dictated collective-litigation stoppers, *i.e.,* "waivers," are unlawful. As earlier recounted, see *supra,* at 6, §8(a)(1) makes it an "unfair labor practice" for an employer to "interfere with, restrain, or coerce" employees in the exercise of their §7 rights. 29 U. S. C. §158(a)(1). Beyond genuine dispute, an employer "interfere[s] with" and "restrain[s]" employees in the exercise of their §7 rights by mandating that they prospectively renounce those rights in individual employment agreements.[8] The law could hardly be otherwise: Employees' rights to band together to meet their employers' superior strength would be worth precious little if employers could condition employment on workers signing away those rights. See *National Licorice Co.* v. *NLRB*, 309 U. S. 350, 364 (1940). Properly assessed, then, the "waivers" rank as unfair labor practices outlawed by the NLRA, and therefore unenforceable in court. See *Kaiser Steel Corp.* v. *Mullins*, 455 U. S. 72, 77 (1982) ("[O]ur cases leave no doubt that illegal promises will not be enforced in cases controlled by the federal law.").[9]

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workplace grievances of whatever kind.

[8] See, *e.g., Bethany Medical Center*, 328 N. L. R. B. 1094, 1105–1106 (1999) (holding employer violated §8(a)(1) by conditioning employees' rehiring on the surrender of their right to engage in future walkouts); *Mandel Security Bureau Inc.*, 202 N. L. R. B. 117, 119, 122 (1973) (holding employer violated §8(a)(1) by conditioning employee's reinstatement to former position on agreement that employee would refrain from filing charges with the Board and from circulating work-related petitions, and, instead, would "mind his own business").

[9] I would similarly hold that the NLGA renders the collective-litigation waivers unenforceable. That Act declares it the public policy of the United States that workers "shall be free from the interference, restraint, or coercion of employers" when they engage in "concerted

II

Today's decision rests largely on the Court's finding in the Arbitration Act "emphatic directions" to enforce arbitration agreements according to their terms, including collective-litigation prohibitions. *Ante,* at 6. Nothing in the FAA or this Court's case law, however, requires subordination of the NLRA's protections. Before addressing the

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activities" for their "mutual aid or protection." 29 U. S. C. §102; see *supra,* at 5. Section 3 provides that federal courts shall not enforce any "promise in conflict with the [Act's] policy." §103. Because employer-extracted collective-litigation waivers interfere with employees' ability to engage in "concerted activities" for their "mutual aid or protection," see *supra,* at 8–11, the arm-twisted waivers collide with the NLGA's stated policy; thus, no federal court should enforce them. See Finkin, The Meaning and Contemporary Vitality of the Norris-LaGuardia Act, 93 Neb. L. Rev. 6 (2014).

Boys Markets, Inc. v. *Retail Clerks*, 398 U. S. 235 (1970), provides no support for the Court's contrary conclusion. See *ante*, at 16. In *Boys Markets*, an employer and a union had entered into a collective-bargaining agreement, which provided that labor disputes would be resolved through arbitration and that the union would not engage in strikes, pickets, or boycotts during the life of the agreement. 398 U. S., at 238–239. When a dispute later arose, the union bypassed arbitration and called a strike. *Id.,* at 239. The question presented: Whether a federal district court could enjoin the strike and order the parties to arbitrate their dispute. The case required the Court to reconcile the NLGA's limitations on federal courts' authority to enjoin employees' concerted activities, see 29 U. S. C. §104, with §301(a) of the Labor Management Relations Act, 1947, which grants federal courts the power to enforce collective-bargaining agreements, see 29 U. S. C. §185(a). The Court concluded that permitting district courts to enforce no-strike and arbitration provisions in collective-bargaining agreements would encourage employers to enter into such agreements, thereby furthering federal labor policy. 398 U. S., at 252–253. That case has little relevance here. It did not consider the enforceability of arbitration provisions that require employees to arbitrate disputes only one-by-one. Nor did it consider the enforceability of arbitration provisions that an employer has unilaterally imposed on employees, as opposed to provisions negotiated through collective-bargaining processes in which employees can leverage their collective strength.

interaction between the two laws, I briefly recall the FAA's history and the domain for which that Act was designed.

A

1

Prior to 1925, American courts routinely declined to order specific performance of arbitration agreements. See Cohen & Dayton, The New Federal Arbitration Law, 12 Va. L. Rev. 265, 270 (1926). Growing backlogs in the courts, which delayed the resolution of commercial disputes, prompted the business community to seek legislation enabling merchants to enter into binding arbitration agreements. See *id.,* at 265. The business community's aim was to secure to merchants an expeditious, economical means of resolving their disputes. See *ibid.* The American Bar Association's Committee on Commerce, Trade and Commercial Law took up the reins in 1921, drafting the legislation Congress enacted, with relatively few changes, four years later. See Committee on Commerce, Trade & Commercial Law, The United States Arbitration Law and Its Application, 11 A. B. A. J. 153 (1925).

The legislative hearings and debate leading up to the FAA's passage evidence Congress' aim to enable merchants of roughly equal bargaining power to enter into binding agreements to arbitrate *commercial* disputes. See, *e.g.,* 65 Cong. Rec. 11080 (1924) (remarks of Rep. Mills) ("This bill provides that where there are commercial contracts and there is disagreement under the contract, the court can [en]force an arbitration agreement in the same way as other portions of the contract."); Joint Hearings on S. 1005 and H. R. 646 before the Subcommittees of the Committees on the Judiciary, 68th Cong., 1st Sess. (1924) (Joint Hearings) (consistently focusing on the need for binding arbitration of commercial disputes).[10]

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[10] American Bar Association member Julius H. Cohen, credited with

The FAA's legislative history also shows that Congress did not intend the statute to apply to arbitration provisions in employment contracts. In brief, when the legislation was introduced, organized labor voiced concern. See Hearing on S. 4213 and S. 4214 before the Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 9 (1923) (Hearing). Herbert Hoover, then Secretary of Commerce, suggested that if there were "objection[s]" to including "workers' contracts in the law's scheme," Congress could amend the legislation to say: "but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce." *Id.,* at 14. Congress adopted Secretary Hoover's suggestion virtually verbatim in §1 of the Act, see Joint Hearings 2; 9 U. S. C. §1, and labor expressed no further opposition, see H. R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924).[11]

Congress, it bears repetition, envisioned application of the Arbitration Act to voluntary, negotiated agreements. See, *e.g.,* 65 Cong. Rec. 1931 (remarks of Rep. Graham) (the FAA provides an "opportunity to enforce . . . an agreement to arbitrate, when voluntarily placed in the

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drafting the legislation, wrote shortly after the FAA's passage that the law was designed to provide a means of dispute resolution "particularly adapted to the settlement of commercial disputes." Cohen & Dayton, The New Federal Arbitration Law, 12 Va. L. Rev. 265, 279 (1926). Arbitration, he and a colleague explained, is "peculiarly suited to the disposition of the ordinary disputes between merchants as to questions of fact—quantity, quality, time of delivery, compliance with terms of payment, excuses for non-performance, and the like." *Id.,* at 281. "It has a place also," they noted, "in the determination of the simpler questions of law" that "arise out of th[e] daily relations between merchants, [for example,] the passage of title, [and] the existence of warranties." *Ibid.*

[11] For fuller discussion of Congress' intent to exclude employment contracts from the FAA's scope, see *Circuit City Stores, Inc.* v. *Adams*, 532 U. S. 105, 124–129 (2001) (Stevens, J., dissenting).

document by the parties to it"). Congress never endorsed a policy favoring arbitration where one party sets the terms of an agreement while the other is left to "take it or leave it." Hearing 9 (remarks of Sen. Walsh) (internal quotation marks omitted); see *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U. S. 395, 403, n. 9 (1967) ("We note that categories of contracts otherwise within the Arbitration Act but in which one of the parties characteristically has little bargaining power are expressly excluded from the reach of the Act. See §1.").

2

In recent decades, this Court has veered away from Congress' intent simply to afford merchants a speedy and economical means of resolving commercial disputes. See Sternlight, Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration, 74 Wash. U. L. Q. 637, 644–674 (1996) (tracing the Court's evolving interpretation of the FAA's scope). In 1983, the Court declared, for the first time in the FAA's then 58-year history, that the FAA evinces a "liberal federal policy favoring arbitration." *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, 460 U. S. 1, 24 (1983) (involving an arbitration agreement between a hospital and a construction contractor). Soon thereafter, the Court ruled, in a series of cases, that the FAA requires enforcement of agreements to arbitrate not only contract claims, but statutory claims as well. *E.g., Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614 (1985); *Shearson/American Express Inc.* v. *McMahon*, 482 U. S. 220 (1987). Further, in 1991, the Court concluded in *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U. S. 20, 23 (1991), that the FAA requires enforcement of agreements to arbitrate claims arising under the Age Discrimination in Employment Act of 1967, a workplace antidiscrimination statute. Then, in 2001, the Court ruled in *Circuit City*

Stores, Inc. v. *Adams*, 532 U. S. 105, 109 (2001), that the Arbitration Act's exemption for employment contracts should be construed narrowly, to exclude from the Act's scope only transportation workers' contracts.

Employers have availed themselves of the opportunity opened by court decisions expansively interpreting the Arbitration Act. Few employers imposed arbitration agreements on their employees in the early 1990's. After *Gilmer* and *Circuit City*, however, employers' exaction of arbitration clauses in employment contracts grew steadily. See, *e.g.,* Economic Policy Institute (EPI), A. Colvin, The Growing Use of Mandatory Arbitration 1–2, 4 (Sept. 27, 2017), available at https://www.epi.org/files/pdf/135056.pdf (All Internet materials as visited May 18, 2018) (data indicate only 2.1% of nonunionized companies imposed mandatory arbitration agreements on their employees in 1992, but 53.9% do today). Moreover, in response to subsequent decisions addressing class arbitration,[12] employers have increasingly included in their arbitration agreements express group-action waivers. See Ruan 1129;

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[12] In *Green Tree Financial Corp.* v. *Bazzle*, 539 U. S. 444 (2003), a plurality suggested arbitration might proceed on a class basis where not expressly precluded by an agreement. After *Bazzle*, companies increasingly placed explicit collective-litigation waivers in consumer and employee arbitration agreements. See Gilles, Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action, 104 Mich. L. Rev. 373, 409–410 (2005). In *AT&T Mobility LLC* v. *Concepcion*, 563 U. S. 333 (2011), and *American Express Co.* v. *Italian Colors Restaurant*, 570 U. S. 228 (2013), the Court held enforceable class-action waivers in the arbitration agreements at issue in those cases. No surprise, the number of companies incorporating express class-action waivers in consumer and employee arbitration agreements spiked. See 2017 Carlton Fields Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation 29 (2017), available at https://www.classactionsurvey.com/pdf/2017-class-action-survey.pdf (reporting that 16.1% of surveyed companies' arbitration agreements expressly precluded class actions in 2012, but 30.2% did so in 2016).

Colvin, *supra*, at 6 (estimating that 23.1% of nonunionized employees are now subject to express class-action waivers in mandatory arbitration agreements). It is, therefore, this Court's exorbitant application of the FAA—stretching it far beyond contractual disputes between merchants—that led the NLRB to confront, for the first time in 2012, the precise question whether employers can use arbitration agreements to insulate themselves from collective employment litigation. See *D. R. Horton*, 357 N. L. R. B. 2277 (2012), enf. denied in relevant part, 737 F. 3d 344 (CA5 2013). Compare *ante,* at 3–4 (suggesting the Board broke new ground in 2012 when it concluded that the NLRA prohibits employer-imposed arbitration agreements that mandate individual arbitration) with *supra,* at 10–11 (NLRB decisions recognizing a §7 right to engage in collective employment litigation), and *supra,* at 17, n. 8 (NLRB decisions finding employer-dictated waivers of §7 rights unlawful).

As I see it, in relatively recent years, the Court's Arbitration Act decisions have taken many wrong turns. Yet, even accepting the Court's decisions as they are, nothing compels the destructive result the Court reaches today. Cf. R. Bork, The Tempting of America 169 (1990) ("Judges . . . live on the slippery slope of analogies; they are not supposed to ski it to the bottom.").

B

Through the Arbitration Act, Congress sought "to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint*, 388 U. S., at 404, n. 12. Congress thus provided in §2 of the FAA that the terms of a written arbitration agreement "shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*." 9 U. S. C. §2 (emphasis added). Pursuant to this "saving clause," arbitration agreements and terms may be invali-

dated based on "generally applicable contract defenses, such as fraud, duress, or unconscionability." *Doctor's Associates, Inc.* v. *Casarotto*, 517 U. S. 681, 687 (1996); see *ante,* at 7.

Illegality is a traditional, generally applicable contract defense. See 5 R. Lord, Williston on Contracts §12.1 (4th ed. 2009). "[A]uthorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract." *Kaiser Steel*, 455 U. S., at 77 (quoting *McMullen* v. *Hoffman*, 174 U. S. 639, 654 (1899)). For the reasons stated *supra,* at 8–17, I would hold that the arbitration agreements' employer-dictated collective-litigation waivers are unlawful. By declining to enforce those adhesive waivers, courts would place them on the same footing as any other contract provision incompatible with controlling federal law. The FAA's saving clause can thus achieve harmonization of the FAA and the NLRA without undermining federal labor policy.

The Court urges that our case law—most forcibly, *AT&T Mobility LLC* v. *Concepcion*, 563 U. S. 333 (2011)—rules out reconciliation of the NLRA and the FAA through the latter's saving clause. See *ante,* at 6–9. I disagree. True, the Court's Arbitration Act decisions establish that the saving clause "offers no refuge" for defenses that discriminate against arbitration, "either by name or by more subtle methods." *Ante,* at 7. The Court, therefore, has rejected saving clause salvage where state courts have invoked generally applicable contract defenses to discriminate "covertly" against arbitration. *Kindred Nursing Centers L. P.* v. *Clark*, 581 U. S. ___, ___ (2017) (slip op., at 5). In *Concepcion*, the Court held that the saving clause did not spare the California Supreme Court's invocation of unconscionability doctrine to establish a rule blocking enforcement of class-action waivers in adhesive consumer contracts. 563 U. S., at 341–344, 346–352. Class proceed-

ings, the Court said, would "sacrific[e] the principal advantage of arbitration—its informality—and mak[e] the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.,* at 348. Accordingly, the Court concluded, the California Supreme Court's rule, though derived from unconscionability doctrine, impermissibly disfavored arbitration, and therefore could not stand. *Id.,* at 346–352.

Here, however, the Court is not asked to apply a generally applicable contract defense to generate a rule discriminating against arbitration. At issue is application of the ordinarily superseding rule that "illegal promises will not be enforced," *Kaiser Steel*, 455 U. S., at 77, to invalidate arbitration provisions at odds with the NLRA, a path-marking federal statute. That statute neither discriminates against arbitration on its face, nor by covert operation. It requires invalidation of *all* employer-imposed contractual provisions prospectively waiving employees' §7 rights. See *supra,* at 17, and n. 8; cf. *Kindred Nursing Centers*, 581 U. S., at ___, n. 2 (slip op., at 7, n. 2) (States may enforce generally applicable rules so long as they do not "single out arbitration" for disfavored treatment).

C

Even assuming that the FAA and the NLRA were inharmonious, the NLRA should control. Enacted later in time, the NLRA should qualify as "an implied repeal" of the FAA, to the extent of any genuine conflict. See *Posadas* v. *National City Bank*, 296 U. S. 497, 503 (1936). Moreover, the NLRA should prevail as the more pinpointed, subject-matter specific legislation, given that it speaks directly to group action by employees to improve the terms and conditions of their employment. See *Radzanower* v. *Touche Ross & Co.*, 426 U. S. 148, 153 (1976) ("a specific statute" generally "will not be controlled or nullified by a

general one" (internal quotation marks omitted)).[13]

Citing statutory examples, the Court asserts that when Congress wants to override the FAA, it does so expressly. See *ante,* at 13–14. The statutes the Court cites, however, are of recent vintage.[14] Each was enacted during the time this Court's decisions increasingly alerted Congress that it would be wise to leave not the slightest room for doubt if it wants to secure access to a judicial forum or to provide a green light for group litigation before an arbitrator or court. See *CompuCredit Corp.* v. *Greenwood*, 565 U. S. 95, 116 (2012) (GINSBURG, J., dissenting). The Congress that drafted the NLRA in 1935 was scarcely on similar alert.

III

The inevitable result of today's decision will be the underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers. See generally Sternlight, Disarming Employees: How American Employers Are Using Mandatory Arbitration To Deprive Workers of Legal Protections, 80 Brooklyn L. Rev. 1309 (2015).

The probable impact on wage and hours claims of the kind asserted in the cases now before the Court is all too evident. Violations of minimum-wage and overtime laws are widespread. See Ruan 1109–1111; A. Bernhardt et al., Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities 11–16, 21–22 (2009). One study estimated that in Chicago, Los

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[13] Enacted, as was the NLRA, after passage of the FAA, the NLGA also qualifies as a statute more specific than the FAA. Indeed, the NLGA expressly addresses the enforceability of contract provisions that interfere with employees' ability to engage in concerted activities. See *supra,* at 17, n. 9. Moreover, the NLGA contains an express repeal provision, which provides that "[a]ll acts and parts of acts in conflict with [the Act's] provisions . . . are repealed." 29 U. S. C. §115.

[14] See 116 Stat. 1836 (2002); 120 Stat. 2267 (2006); 124 Stat. 1746 (2010); 124 Stat. 2035 (2010).

Angeles, and New York City alone, low-wage workers lose nearly $3 billion in legally owed wages each year. *Id.*, at 6. The U. S. Department of Labor, state labor departments, and state attorneys general can uncover and obtain recoveries for some violations. See EPI, B. Meixell & R. Eisenbrey, An Epidemic of Wage Theft Is Costing Workers Hundreds of Millions of Dollars a Year 2 (2014), available at https://www.epi.org/files/2014/wage-theft.pdf. Because of their limited resources, however, government agencies must rely on private parties to take a lead role in enforcing wage and hours laws. See Brief for State of Maryland et al. as *Amici Curiae* 29–33; Glover, The Structural Role of Private Enforcement Mechanisms in Public Law, 53 Wm. & Mary L. Rev. 1137, 1150–1151 (2012) (Department of Labor investigates fewer than 1% of FLSA-covered employers each year).

If employers can stave off collective employment litigation aimed at obtaining redress for wage and hours infractions, the enforcement gap is almost certain to widen. Expenses entailed in mounting individual claims will often far outweigh potential recoveries. See *id.*, at 1184–1185 (because "the FLSA systematically tends to generate low-value claims," "mechanisms that facilitate the economics of claiming are required"); *Sutherland* v. *Ernst & Young LLP*, 768 F. Supp. 2d 547, 552 (SDNY 2011) (finding that an employee utilizing Ernst & Young's arbitration program would likely have to spend $200,000 to recover only $1,867.02 in overtime pay and an equivalent amount in liquidated damages); cf. Resnik, Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights, 124 Yale L. J. 2804, 2904 (2015) (analyzing available data from the consumer context to conclude that "private enforcement of small-value claims depends on collective, rather than individual, action"); *Amchem Products, Inc.* v. *Windsor*, 521 U. S. 591, 617 (1997) (class actions help "overcome the problem that

small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights" (internal quotation marks omitted)).[15]

Fear of retaliation may also deter potential claimants from seeking redress alone. See, *e.g.,* Ruan 1119–1121; Bernhardt, *supra*, at 3, 24–25. Further inhibiting single-file claims is the slim relief obtainable, even of the injunctive kind. See *Califano* v. *Yamasaki*, 442 U. S. 682, 702 (1979) ("[T]he scope of injunctive relief is dictated by the extent of the violation established."). The upshot: Employers, aware that employees will be disinclined to pursue small-value claims when confined to proceeding one-by-one, will no doubt perceive that the cost-benefit balance of underpaying workers tips heavily in favor of skirting legal obligations.

In stark contrast to today's decision,[16] the Court has repeatedly recognized the centrality of group action to the effective enforcement of antidiscrimination statutes. With Court approbation, concerted legal actions have played a critical role in enforcing prohibitions against workplace discrimination based on race, sex, and other protected characteristics. See, *e.g., Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971); *Automobile Workers* v. *Johnson Controls, Inc.*, 499 U. S. 187 (1991). In this context, the Court has comprehended that government entities charged with enforcing antidiscrimination statutes are unlikely to be funded at levels that could even begin to compensate for a significant dropoff in private enforcement efforts. See

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[15] Based on a 2015 study, the Bureau of Consumer Financial Protection found that "pre-dispute arbitration agreements are being widely used to prevent consumers from seeking relief from legal violations on a class basis, and that consumers rarely file individual lawsuits or arbitration cases to obtain such relief." 82 Fed. Reg. 33210 (2017).

[16] The Court observes that class actions can be abused, see *ante,* at 24, but under its interpretation, even two employees would be stopped from proceeding together.

Newman v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400, 401 (1968) (*per curiam*) ("When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law."). That reality, as just noted, holds true for enforcement of wage and hours laws. See *supra,* at 27.

I do not read the Court's opinion to place in jeopardy discrimination complaints asserting disparate-impact and pattern-or-practice claims that call for proof on a group-wide basis, see Brief for NAACP Legal Defense & Educational Fund, Inc., et al. as *Amici Curiae* 19–25, which some courts have concluded cannot be maintained by solo complainants, see, *e.g., Chin* v. *Port Auth. of N. Y. & N. J.*, 685 F. 3d 135, 147 (CA2 2012) (pattern-or-practice method of proving race discrimination is unavailable in non-class actions). It would be grossly exorbitant to read the FAA to devastate Title VII of the Civil Rights Act of 1964, 42 U. S. C. §2000e *et seq.*, and other laws enacted to eliminate, root and branch, class-based employment discrimination, see *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 417, 421 (1975). With fidelity to the Legislature's will, the Court could hardly hold otherwise.

I note, finally, that individual arbitration of employee complaints can give rise to anomalous results. Arbitration agreements often include provisions requiring that outcomes be kept confidential or barring arbitrators from giving prior proceedings precedential effect. See, *e.g.,* App. to Pet. for Cert. in No. 16–285, p. 34a (Epic's agreement); App. in No. 16–300, p. 46 (Ernst & Young's agreement). As a result, arbitrators may render conflicting awards in cases involving similarly situated employees—even employees working for the same employer. Arbitrators may resolve differently such questions as whether certain jobs are exempt from overtime laws. Cf. *Encino Motor Cars,*

LLC v. *Navarro*, *ante,* p. ___ (Court divides on whether "service advisors" are exempt from overtime-pay requirements). With confidentiality and no-precedential-value provisions operative, irreconcilable answers would remain unchecked.

* * *

If these untoward consequences stemmed from legislative choices, I would be obliged to accede to them. But the edict that employees with wage and hours claims may seek relief only one-by-one does not come from Congress. It is the result of take-it-or-leave-it labor contracts harking back to the type called "yellow dog," and of the readiness of this Court to enforce those unbargained-for agreements. The FAA demands no such suppression of the right of workers to take concerted action for their "mutual aid or protection." Accordingly, I would reverse the judgment of the Fifth Circuit in No. 16–307 and affirm the judgments of the Seventh and Ninth Circuits in Nos. 16–285 and 16–300.

The Impact of *Epic Systems* on Wage and Hour Litigation

By:

Michele R. Fisher
Nichols Kaster, PLLP[1]

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I. INTRODUCTION

This paper focuses on arbitration in the wake of the United States Supreme Court's decision in *Epic Systems Corp. v.* Lewis[2] finding that class waivers in arbitration agreements are generally valid and enforceable. It details the reasoning of justices in reaching their decision, summarizes cases related to arbitration post-*Epic*, discusses *Lamps Plus, Inc. v. Varela*,[3] and provides a real case study of the cost of arbitration.

II. ARBITRATION

A. *Epic Systems Corp. v. Epic*: Class Waivers in Arbitration Agreements

Epic was the consolidation of three separate cases. Although the facts of each case differed, they all involved the question of whether class waivers in arbitration agreements are enforceable under the National Labor Relations Act (NLRA) and the Federal Arbitration Act (FAA).

Before *Epic*, there was the National Labor Relation Board's (NLRB) decision in *D.R. Horton, Inc.*, 357 NLRB 2277 (2012). There, the NLRB found that individual employment arbitration agreements ran afoul of the concerted activity portion of the NLRA. A split among the Federal Court of Appeals ensued, with some circuits finding that class and collective action waivers in arbitration agreements were valid and others finding they were not, holding that the NLRA preempted the FAA.

As arbitration agreements in employment contracts become increasingly popular, the Supreme Court's decision in *Epic* becomes increasingly relevant. The inability for employees to take collective action may deter employees from taking action against employers. Justice Gorsuch acknowledged that there is public policy disagreement over class action waivers in arbitration agreements. Justice Ginsburg, in her dissent, urges congressional correction of the majority decision.

1. Justice Gorsuch's Majority Opinion

As Justice Gorsuch wrote, the main question in *Epic* was "should employees and employers be allowed to agree that any disputes between them will be resolved through

[1] A special thanks to my partner Matthew Helland and our law clerk Rebecca Jones for their contributions to this paper.
[2] 138 S. Ct. 1612 (2018).
[3] 138 S. Ct. 1697 (2018).

one-on-one arbitration? Or should employees always be permitted to bring their claim in class or collective actions, no matter what they agreed with their employers?"[4]

As previously mentioned, *Epic* was the consolidation of three separate cases, each involving class action waivers in employee arbitration agreements.

In *Epic*, the employee alleged that he and his fellow employees were misclassified as exempt from the FLSA. The Seventh Circuit concluded that the arbitration agreement violated the NLRA because the agreement contained a class action waiver. It found that "[c]oncerted activities" under the NLRA included class, representative, and collective legal processes.[5]

In *Morris v. Ernst & Young, LLP*,[6] employees brought a putative class action against their employer for misclassifying them and similarly situated employees as exempt. Similar to the Seventh Circuit, the Ninth Circuit held that class action waivers violated the NLRA because "a lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment is 'concerted activity' under § 7 of the National Labor Relations Act."[7]

Finally, *Murphy Oil USA, Inc. v. NLRB*[8] involved a petition filed by an employer to review an order of the NLRB. The NLRB had previously found that the employer unlawfully required employees to sign arbitration agreements that contained class and collective action waivers. The Fifth Circuit noted that the "any claims" language found in the arbitration agreement implied that an employee was waiving administrative rights in addition to trial rights.[9] This was a violation of Section 8(a)(1) of the NLRA. However, the "any claims" language removed from the agreement after 2012.[10] With that language gone, the Fifth Circuit held that it would be unreasonable for an employee to believe that the agreement prevented him or her from filing an unfair labor charge against the company before the NLRB.[11]

In analyzing whether class action waivers violated the NLRA, Justice Gorsuch first examined how the NLRA and FAA coexisted.[12] The NLRA was passed in 1935.[13] The FAA was passed in 1925.[14] "Until a couple of years ago, courts more or less agreed that arbitration agreements like those before us must be enforced according to their terms."[15] However, in 2012, the NLRB asserted that the NLRA effectively nullified the FAA because of the FAA's "savings clause."[16] The "savings clause" allows courts to

[4] 138 S. Ct. 1612, 1618 (2018).
[5] *Lewis v. Epic Systems Corp.* 823 F.3d 1147, 1152 (7th Cir. 2016).
[6] *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016).
[7] *Id.* at 981 (quoting *Brady v. NFL*, 644 F.3d 661, 673 (8th Cir. 2011)).
[8] *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015).
[9] *Id.* at 1019.
[10] *Id.* at 1011.
[11] *Id.* at 1019-20.
[12] *Lewis*, 138 S. Ct. at 1620.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.* at 1621.

refuse to enforce an arbitration agreement "upon such grounds as exist at law or in equity for the revocation of any contract."[17] Essentially, the savings clause meant that if a contract would be nullified because of fraud, duress, unconscionability, or some other concept found in common law, the same could apply to a contract for arbitration.[18] Arbitration agreements were to be treated just as any other contract.[19]

Although the plaintiffs cited the savings clause in the FAA as grounds for unenforceability of the arbitration clause, Gorsuch and the rest of the majority believes that the savings clause does not apply to *Epic*. The employees in each lawsuit did not allege that the arbitration agreement was extracted through fraud, duress, etc. Instead, "they object to their agreements precisely because they require individualized arbitration proceedings instead of class or collective ones."[20]

Even if arbitration agreements were illegal because of conflicting language in the NLRA, the plaintiffs would still fail under the majority's rationale because of the Supreme Court's holding in *AT&T Mobility LLC v. Concepcion.*[21] *Concepcion* involved customers bringing a class action against a telephone company, alleging that the company's offer of a free phone to anyone who signed up for its cellphone service was fraudulent. However, the cellphone agreements contained an arbitration clause that did not permit class wide arbitration. The district court relied on the California Supreme Court's decision in *Discover Bank* that found class waivers in arbitration agreements unconscionable. Unconscionability is a reason for an arbitration agreement—or any contract—to be unenforceable. However, the Supreme Court overruled that finding. It stated that the FAA displaces a conflicting state law that outright prohibits arbitration of a particular type of claim. California's ruling would "interfere with the fundamental attributes of arbitration,"[22] by forcing a slower, more costly, and more procedurally complicated resolution.[23]

As it applies to *Epic*, Gorsuch summed up *Concepcion* by stating that "courts may not allow a contract defense to reshape traditional individualized arbitration by mandating class wide arbitration procedures without the parties' consent."[24] Any argument that an arbitration agreement is "unenforceable just because it requires bilateral arbitration" is different than arguing that it is unconscionable or illegal.[25]

The next argument Gorsuch tackles is that the NLRB overrides the FAA.[26] The burden is on the plaintiff to show "a clearly expressed congressional intent" to displace one statute over another.[27] The plaintiffs cited Section 7 of the NLRA, stating that

[17] 9 U.S.C.A. § 2.
[18] *Epic*, 138 S. Ct. at 1622.
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011).
[23] *Id.* at 348.
[24] *Lewis*, 138 S. Ct at 1623.
[25] *Id.* at 1623.
[26] *Id.* at 1623-24.
[27] *Id.* (quoting *Vimar Seguros y Reasegoros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995)).

employees have a "right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[28] However, the Court found that this does not show a clear and manifest congressional command to displace the FAA and outlaw arbitration agreements with class action waivers.

First, Gorsuch points out that class action did not exist in 1935 when the NLRA was adopted.[29] Rule 23 did not exist until 1966 and the FLSA's collective action "postdated Section 7 by several years."[30]

Second, he explains that activities for "mutual aid or protection" cannot be read as class or collective actions.[31] Gorsuch applies the statutory interpretation canon of *ejusdem generis*. *Ejusdem generis* states that where there is a list of specific classes of persons or things followed by a general statement, the general statement only applies to the same kind of persons or things specifically listed. Here, he reasoned, mutual aid or protection follows a list of activities such as self-organization, forming, joining, or assisting labor organizations, and bargaining collectively.[32] Mutual aid or protection belongs with a list of actions that employees "'just do' for themselves in the course of exercising their right to free association in the workplace, rather than 'the highly regulated, court-room bound 'activities' of class and joint litigation.'"[33] Furthermore, the NLRA provides rules for bargaining, representation, and labor organization practices.[34] It does not prescribe rules for adjudication of class or collective actions.[35]

Gorsuch also writes that Congress knows how to override the FAA when it wishes. Gorsuch cites multiple statutes, including the Motor Vehicle Franchise Contract Dispute Resolution Process,[36] whistleblower statutes for the agriculture industry,[37] Wall Street reforms and consumer protections,[38] and military law.[39] Gorsuch implies that the only reason Plaintiffs are trying to apply collective/class action to the NLRA, rather than the FLSA, is because the Court has already ruled that collective FLSA action does not displace the FAA.[40] Gorsuch also categorically claims that the Norris-LaGuardia Act, a precursor to the NLRA, does not add anything to the discussion.[41]

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[28] 29 U.S.C. § 157.
[29] *Lewis*, 138 S. Ct at 1624.
[30] *Id.*
[31] *Id.* at 1625.
[32] *Id.*; *see also* 29 U.S.C. § 157.
[33] *Lewis*, 138 S. Ct. at 1625 (quoting *National Labor Relations Board v. Alternative Entertainment, Inc.*, 858 F.3d 393, 414-15 (6th Cir. 2017)).
[34] *Id.*
[35] *Id.*
[36] 15 U.S.C.A. § 1226(a)(2).
[37] 7 U.S.C. § 26(n)(2).
[38] 12 U.S.C. § 5567(d)(2).
[39] 10 U.S.C. § 987(e)(3).
[40] *Lewis*, 138 S. Ct. at 1626 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991)).
[41] *Id.* at 1627.

Finally, Gorsuch addresses the application of *Chevron*.[42] The plaintiffs state that the Court owes the NLRB—an administrative agency—deference to its interpretation of the law.[43] However, the NLRB is attempting to interpret the NLRA in a way that limits the FAA.[44] It does not make sense for Congress to "delegate[] to an agency authority to address the meaning of a second statute it does not administer."[45]

Gorsuch ends his majority opinion by admitting that disagreeing with the policy of class action waivers in arbitration agreements is valid.[46] Still, even if there are strong public policy reasons to disagree with this judgment, the law itself is clear that the NLRA does not displace the FAA.[47]

2. Justice Thomas's Concurring Opinion

Readers of past Supreme Court decisions regarding the FAA will note that Justice Thomas writes a dissenting opinion when the FAA preempts conflicting state arbitration laws. Here, however, there is no conflicting state arbitration law. Instead, Thomas writes a concurring opinion to emphasize that the plaintiffs cannot prevail "under the plain meaning of the Federal Arbitration Act."[48] Illegality, Thomas argues, is a public policy defense. It is not a defense to contract formation, therefore the savings clause does not apply.[49]

3. Justice Ginsburg's Dissenting Opinion

Ginsburg frames the dispute at issue as "[d]oes the Federal Arbitration Act permit employers to insist that their employees, whenever seeking redress for commonly experienced wage loss, go it alone, never mind the right secured to employees by the National Labor Relations Act to engage in concerted activities for their mutual aid or protection?"[50]

Ginsburg points out that the main idea behind the NLRA is that there is strength in numbers. The NLRA and its forerunner, the Norris-LaGuardia Act, operate on the premise that employees must have the capacity to act collectively in order to match their employers' ability to set terms and conditions of employment.[51] In an important distinction, Ginsburg points out that the plaintiffs in this case are not asking for access to a judicial forum; rather, they are arguing that the NLRA prohibits their employer from denying them the right to pursue their work-related claims collectively.[52] This fits comfortably under the NLRA, she explains, because it is a "concerted activit[y] for the

[42] *Id.* at 1629.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.* at 1632.
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.* at 1633 (internal quotations and citations omitted).
[51] *Id.* at 1634.
[52] *Id.* at 1636.

purposes of . . . mutual aid or protection."[53] Ginsburg criticizes Gorsuch's reliance on *ejusdem generis* because a canon of construction should only be used when there is doubt over Congress's intended statutory words or phrases.[54] Ginsburg believes that Congress expressed "an embracive purpose in enacting legislation to protect the exercise by workers of full freedom of association."[55]

Ginsburg also addresses the assertion that class and collective actions were "unknown" when the NLRA was adopted in 1935.[56] Ginsburg believes that Congress framed Section 7 of the NLRA in broad terms to allow for it to be applied to future civil procedure changes.[57] Furthermore, permissive joinder was allowed when the NLRA was passed, and class action can be "trace[d] back to medieval times."[58]

Therefore, because Section 7 includes the right to collective litigation regarding wages and hours, waiver of that collective action should be unlawful.[59] Illegality, Ginsburg writes, is an applicable contract defense.[60] Therefore, in contrast to what Gorsuch argues, the FAA's saving clause can put arbitration provisions "on the same footing as any other contract provision incompatible with controlling federal law."[61] This is different than *Concepcion* because here the Court is being asked to apply a general contract defense, not enforce a promise made illegal by the NLRA.[62]

Finally, even if the FAA and the NLRA are inharmonious, Ginsburg argues that the NLRA should control because the NLRA was enacted after the FAA, therefore it is an "implied repeal" of the FAA.[63]

B. Court Decisions Post-*Epic* Regarding Arbitration

Davis v. Red Eye Jack's Sports Bar, Inc., 2018 WL 2734037 (S.D. Cal. June 7, 2018)

In this case, the plaintiff signed an arbitration agreement that covered all of the plaintiff's claims against the defendant. The only issue in dispute was whether the arbitration agreement was valid and enforceable as the result of its inclusion of a concerted action waiver. Per *Epic*, the arbitration agreement was found by the district court to be valid.

Internal Service Revenue v. Murphy, --- F.3d ---, 2018 WL 2730764 (1st Cir. 2018)

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[53] *Id.* at 1637 (quoting 29 U.S.C. § 157).
[54] *Id.* at 1639.
[55] *Id.* (internal citations and quotations omitted).
[56] *Id.* at 1640.
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.* at 1645.
[61] *Id.*
[62] *Id.*
[63] *Id.*

Epic was cited for the proposition that Congress does not alter the fundamental details of a regulatory scheme in vague terms of ancillary provisions; "it does not, one might say, hide elephants in mouse holes."

Curatola v. TitleMax of Tenn. and TMX Finance of Tenn, Inc., 2018 WL 2728037 (W.D. Tenn. June 6, 2018)

Defendants filed a motion to stay the proceedings and compel individual arbitration. The magistrate originally denied the motion based on *NLRB v. Alternative Entertainment*. *Alternative Entertainment* required an employee be permitted to opt-out of an arbitration agreement that otherwise waives the right to collective action.

However, after *Epic* was published, the defendants filed a motion of seeking review of that decision. The court noted that the Supreme Court's decision in *Epic* abrogated *Alternative Entertainment* and plainly dictated that TitleMax must prevail in the present matter of compelling arbitration.

Gomez v. MLB Enterprises, Corp., 2018 WL 3019102 (S.D.N.Y. June 5, 2018)

On June 11, 2015, the defendants moved to compel arbitration and dismiss the complaint. Both plaintiffs signed an arbitration agreement that required them to adjudicate employment-related claims through arbitration. However, one of the employee's signatures was forged.

After arbitrating, the defendant did not pay its arbitration fees. Thereafter, the AAA declined to administer any future employment matters involving defendant. Two additional plaintiffs—now unable to arbitrate—brought their claims before the court.

Here, the court concluded that it could not enforce the arbitration agreement because the defendant materially breached the contract. Citing *Epic*, the court stated that it was fine that the arbitration agreement contained a class action waiver. However, 30 plaintiffs were unable to bring their claims to the AAA because of a failure on the part of the defendant. The arbitration agreements and the waivers contained within were not enforceable because the contract was materially breached by the defendants, rendering plaintiffs unable to perform. Nothing in *Epic* is contrary to this—*Epic* held that an employer can enforce a ban on bringing class claims; it does not suggest that an employer who has breached or rendered performance impossible can still compel arbitration.

Camilo v. Uber Technologies, Inc., 2018 WL 2464507 (S.D.N.Y. May 31, 2018)

Uber moved to compel arbitration, strike the plaintiffs' class allegation, and dismiss the complaint on the basis of the arbitration and class waiver clause contained in the plaintiffs' agreement with Uber. Per *Epic*, class action waivers are valid and not precluded by § 7 of the NLRA. Therefore, the agreements were valid and enforceable.

Bayer v. Neiman Marcus Group, Inc., 2018 WL 2427787 (N.D. Cal. May 30, 2018)

The court notes that *Epic* is *not* applicable to the present situation. The plaintiff never agreed to be bound by an arbitration agreement—in fact, he refused to sign one. Therefore, *Epic* is not applicable because *Epic* is limited to employees who have agreed that any dispute between them and their employer will be resolved through one-on-one arbitration.

Williams v. Dearborn Motors 1, LLC, 2018 WL 2364051 (E.D. Mich. May 24, 2018)

In this case, the plaintiffs argued that the arbitration agreement was unenforceable because it required employees to waive any right to participate in any proceeding commenced by a third party, including the EEOC. The defendant responded by pointing out the delegation provision in the arbitration agreement gave the arbitrator exclusive authority to resolve any and all disputes over the validity of "any part of the lease."

However, because the agreement referred to *lease* and not arbitration agreement, the Court concluded that the class waiver provision was for the court and not an arbitrator to decide.

Relying on *Epic*, the Court concluded that the NLRA did not displace the FAA. Therefore, the motion to compel arbitration was granted.

Williams v. FCA US LLC, 2018 WL 2364068 (E.D. Mich. May 24, 2018)

The defendants sought to compel arbitration pursuant to two arbitration policies. There was a dispute over whether the class agreed to arbitrate its claims. Two of the employees did not sign arbitration agreements, but continued to work after an arbitration policy was implemented.

Although the court noted that case law does not suggest that continued employment by itself is sufficient to manifest assent to an arbitration policy, continued employment can manifest assent when the employee *knows* that continued employment manifests assent. The language in the agreement ("IT APPLIES TO YOU. It will govern all future disputes between you and Chrysler that was covered under the Process.") did not sufficiently put employees on notice that continued employment would constitute assent. Those employees are not bound by the arbitration agreement.

The plaintiffs additionally argued that a waiver of class or collective action is unenforceable. The court disagreed, citing *Epic*.

C. *Varela v. Lamps Plus, Inc*: No Express Class Waiver

The Supreme Court recently granted certiorari in *Lamps Plus, Inc. v. Varela*.[64] The question at issue is whether the FAA forecloses a state-law interpretation of an arbitration agreement that would authorize class arbitration based solely on general language commonly used in arbitration agreements. Specifically, the arbitration agreement at issue does not contain an express waiver of class wide arbitration.

[64] *Lamps Plus, Inc. v. Varela*, 138 S. Ct. 1697 (2018).

At the district court level, the defendants moved to compel arbitration.[65] The plaintiff had been an employee of Lamps Plus for approximately nine years.[66] As a condition of employment, Lamps Plus required Varela to provide it with his personal information.[67] Although Valera does not recall signing an arbitration agreement, there is evidence that he did.[68] The pertinent part of the arbitration agreement read "The Company and I mutually consent to the resolution by arbitration of all claims or controversies ("claims"), past, present or future that I may have against the Company or against its officers, directors, employees or agents in their capacity as such, or otherwise, or that the Company may have against me. **Specifically, the Company and I mutually consent to the resolution by arbitration all claims that may hereafter arise in connection with my employment**, or any of the parties' rights and obligations arising under this Agreement."[69] Later, the plaintiff's personal information—along with information of 1300 other employees—was stolen as the result of a data breach.[70]

At the district court, Lamps Plus contended that arbitration should be compelled on an individual basis.[71] The plaintiff responded that the arbitration agreement did not waive class-wide arbitration because the agreement stated *all* claims arising in connection with employment.[72] Citing *Stolt-Nielsen*, [73] the defendant stated that it cannot be compelled to submit to class arbitration unless there was a contractual basis for concluding that it agreed to do so.[74] *Stolt-Nielsen*, it argued, also states that "parties cannot be compelled to submit their disputes to class arbitration" if the arbitration agreement is silent on the issue.[75]

However, the district court distinguished the facts here from *Stolt-Nielsen*. It stated that the lack of explicit mention of class arbitration is not the type of "silence" contemplated by *Stolt-Nielsen*.[76] Constructing the ambiguity in the agreement against the drafter—the defendant—the court concluded that the agreement allowed for class-wide arbitration.[77] The employer appealed.

On appeal, both parties agree that the agreement includes no express mention of class proceedings.[78] Echoing its argument at the district court level, the defendants say that they did not agree to class arbitration.[79] The Court of Appeals stated that the "silence" found in this agreement differed from the silence in *Stolt-Nielsen*.[80] *Stolt-*

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[65] *Varela v. Lamps Plus, Inc.*, 2016 WL 9110161 (C.D. Cal. July 7, 2016).
[66] *Id.* at *1.
[67] *Id.*
[68] *Id.*
[69] *Id.* (emphasis added).
[70] *Id.*
[71] *Id.* at *6.
[72] *Id.*
[73] *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 599 U.S. 662, 684 (2010)
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Varela v. Lamps Plus, Inc.*, 701 Fed. App'x. 670, 672 (9th Cir. 2017).
[79] *Id.*
[80] *Id.*

Nielsen constituted more than a mere absence of language explicitly referring to class arbitration—instead, it was purposeful absence of class arbitration because the parties did not agree to arbitrate on a class-wide basis.[81] This is different than a party simply not contemplating class-wide arbitration.

The Court of Appeals applies state contract principles to interpret the agreement.[82] Under California law, a contract is ambiguous if it is capable of two or more reasonable constructions.[83] Here, arbitration is "in lieu of" judicial actions that include class actions.[84] In addition, arbitration in this agreement includes *all* claims or controversies the parties may have against each other.[85] Finally, the contract defines arbitral claims as those that would have been available to the parties by law.[86] This would include claims as part of a class action proceeding.[87]

Therefore, it found the district court was correct when it constructed any ambiguity in the contract against the drafter of the contract. It properly found the necessary contractual basis for agreements to class arbitration.

Judge Fernandez writes a short dissent. He states that "We should not allow Varela to enlist us in the palpable evasion of *Stolt-Nielsen*."[88]

D. A Cost/Benefit Analysis of Arbitration

In the wake of several pro-arbitration decisions issued by the Supreme Court, many employers view arbitration agreements with class action waivers as the surest defense against wage and hour class litigation. However, employers instituting these arbitration programs must consider the costs of defending a large-scale, coordinated filing of individual arbitrations.

This section recounts recent litigation involving over 150 individual overtime exemption misclassification arbitrations, with a focus on the costs of defending each arbitration case to resolution. The litigation can serve as an instructive case study in the costs of defending mass arbitrations in the wage and hour context.

1. Litigation Timeline

a. <u>Early Litigation Activity</u>

The litigation began as a class and collective action, filed by a single Named Plaintiff in federal court. Plaintiff alleged that Defendant misclassified a group of its employees as exempt from overtime under state and federal law. One additional Plaintiff filed an FLSA consent form with the initial complaint.

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[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.*

Soon after Plaintiff filed the case, Defendant advised Plaintiffs' Counsel that Plaintiffs signed arbitration agreements. The arbitration agreements contained class and collective action waivers, and according to Defendant, were signed by the vast majority of putative class members. The arbitration agreements mandated arbitration with JAMS in the employer's headquarters city.[89] Defendant asked the original Plaintiffs to voluntarily move the case to Arbitration.

However, it was soon clear that the litigation would not be limited to two Plaintiffs. Employee response was enthusiastic from the outset; eleven additional Plaintiffs joined the case in the first three weeks. Because some worked in a second job position, Plaintiffs were prepared to amend their case to expand the classes. Armed with this early, enthusiastic participation and expanded case, Plaintiffs' Counsel asked Defendant reconsider its decision to enforce its arbitration agreements. Plaintiffs' Counsel warned that participation would be high and that individual arbitration would be prohibitively expensive and disruptive for the company.

Defendant elected to stand by its arbitration agreements and their class and collective action waivers. Rather than challenging the arbitration agreement, most Plaintiffs[90] willingly filed their claims in arbitration in exchange for Defendant's waiver of certain (arguably unenforceable) provisions in the arbitration agreements. Importantly, Defendant also agreed to pay Plaintiffs' half the arbitration filing fees, based on Plaintiffs' argument that federal opt-in Plaintiffs (who could file a consent in federal court for free) could not be forced to pay a filing fee in arbitration. *See Armandariz v. Found. Health Psychcare Services, Inc.*, 24 Cal. 4th 83, 110-11 (2000) (In employer-mandated arbitration, employees cannot be forced to bear "any *type* of expenses that the employee would not be required to bear" if they filed in court).

b. Litigation Proceeds in Arbitration

New Plaintiffs[91] continued to join the case after the litigation moved to arbitration. JAMS began sending arbitrator strike lists, and it quickly became apparent that the list of potential arbitrators was very short. And because JAMS rules allow each side to strike two arbitrators (and rank the rest), the vast majority of Plaintiffs' cases were assigned to three arbitrators.

Nine months into the case, the list of participating Plaintiffs grew from thirteen to over seventy-five. Litigation began in earnest. Defendant steadfastly adhered to the individualized nature of the arbitrations – and Plaintiffs complied with the company's desires. Plaintiffs scheduled arbitration hearings on a first-come, first-served basis,

[89] The employees at issue all worked in the headquarters city.

[90] A small handful of Plaintiffs terminated employment before Defendant launched its arbitration agreements. These Plaintiffs remained in federal court.

[91] Plaintiffs in arbitration are commonly called "Claimants." This paper uses the term "Plaintiff" throughout for consistency and clarity.

taking the first available dates for each arbitrator. Plaintiffs filled the arbitrator's schedules as fully and completely as the arbitrators would allow.

Discovery was also individualized. Although Defendant provided Fed. R. Civ. P. 30(b)(6) depositions that could be used in all cases, written discovery and individual depositions focused on a handful of cases at a time. Thus, even though a supervisor may have supervised twenty Plaintiffs in the group, Defendant limited that supervisor's deposition testimony to Plaintiffs who were next up for hearing. As a result, almost every individual case involved at least one supervisor deposition.

As the first hearing dates approached, Defendant provided settlement offers to those Plaintiffs with imminent hearing dates. Some Plaintiffs accepted the settlements and others did not. This strategy had immediate benefits for Defendant, as the company saved a great deal in JAMS filing fees and legal fees. However, the settlements also provided an escape hatch for Plaintiffs with credibility issues, extenuating circumstances, or little desire to pursue their claims through full discovery and a hearing. Those Plaintiffs who wanted to fight for full payment pushed forward.

c. The First Plaintiff Loses, the Next Four Plaintiffs Win

The first arbitration hearing took place in December 2013. The arbitrator for the hearing ("Arbitrator 1") was very low on Plaintiffs' ranking list, and thus was only assigned to one case.[92] After a three day hearing and submission of post-hearing briefs, Arbitrator 1 found in Defendant's favor on its exemption affirmative defense and awarded zero damages. Plaintiffs' Counsel paid approximately $10,000 in costs to Defendant on its client's behalf.

If Defendant had permitted class arbitration and drawn Arbitrator 1 the litigation would have been over. Instead, the right to strike arbitrators ensured Plaintiffs they would never see Arbitrator 1 again. The adverse ruling had no issue preclusive effect. Plaintiffs moved forward trusting that later arbitrators would find the decision poorly reasoned and unpersuasive.

The second and third hearings took place in February 2014 in front of Arbitrator 2. Those hearings were quickly followed in March 2014 by the fourth and fifth hearings, in front of Arbitrator 3. Because of the timing of post-hearing briefings and the loaded schedule, Defendant was forced to pay nonrefundable arbitration fees on the fourth and fifth cases before receiving a ruling on the second and third cases. Plaintiffs declined Defendant's request to continue the fourth and fifth hearings.

The day before the fourth hearing (in front of Arbitrator 3), Arbitrator 2 issued Final Awards in Plaintiffs' favor in the second and third hearings. Arbitrator 2 rejected

[92]Coincidentally (or not), Arbitrator 1 had the most immediate availability for hearing dates, which led to his case coming up for hearing first.

Defendant's exemption defense and awarded wage loss damages of $20,000 and $30,000. He later awarded $186,888 in attorneys' fees and costs.

Arbitrator 3 followed suit in the fourth and fifth hearings, also rejecting Defendant's affirmative defense and awarding damages of $15,067 and $43,631. Arbitrator 3 later awarded $104,793 in fees and costs.

d. Resolution

With four Plaintiff victories in the books, the parties agreed to pull a number of hearings off calendar for a global mediation. Unfortunately, that mediation was unsuccessful. Thus, the hearings continued once again, with three September hearings scheduled in front of Arbitrator 3 (who had already rejected Defendant's exemption defense) and one hearing scheduled in front of a new arbitrator ("Arbitrator 4").

The parties took depositions, exchanged documents, drafted witness and exhibit lists, and filed opening briefs for the four September cases. On the morning of the first September hearing, however, the four cases settled. Settling the four September cases gave the parties time to hold a second global mediation, which resulted in a global settlement for 156 Plaintiffs.

2. Payments Prior to Second Global Mediation

a. Defendant Owed Almost $650,000 in Settlements and Awards

The second global mediation did not include the thirteen Plaintiffs who had already won or settled their cases. At the time of the mediation, Defendant owed or had paid $642,441.92 in settlements and awards to thirteen Plaintiffs. Those settlements and awards were enlightening for several reasons.

First, the cost of each case increased dramatically the closer it got to hearing. Defendant owed **over $400,000** in damages, fees and costs, or **$100,000 a head**, on the four cases it lost. That number does not include the substantial JAMS fees and defense fees Defense incurred in each case. When it settled on the eve of trial, on the other hand, Defendant paid less. Even factoring in the plaintiffs who took a quick payout instead of litigating, Defendant owed (or had paid) an average of **over $49,000 per head** on the thirteen Plaintiffs whose cases resolved.

Second, any savings to Defendant in identifying and cheaply resolving weaker plaintiffs was far outweighed by the cost of going to hearing against strong plaintiffs. The plaintiffs who settled their cases early all faced extenuating circumstances unrelated to the facts of their case. Those plaintiffs still received valuable settlements. While there may have been other Plaintiffs with similar weaknesses, Defendant would have had to proceed through individualized discovery to find them. And for every such plaintiff Defendant found, it would have to pay hundreds of thousands of dollars in settlements, awards, defense costs, and JAMS fees to successful plaintiffs.

Third, as outlined in more detail below, Defendant's costs of defense were far greater than the cost to settle cases, even on the eve of trial. Defendant would certainly spend more than $49,000 in JAMS fees and defense fees on each individual hearing. Thus, even a win on the merits was a financial loss for Defendant. Settling cases on the eve of trial – when the cases cost the most, JAMS fees had become non-refundable, and Defendant had paid tens of thousands of dollars in defense counsel fees – was the worst financial decision for Defendant.

b. JAMS Fees and Costs of Defense for Initial Hearings

Plaintiffs estimate that Defendant paid JAMS between $17,000 and $34,000 for the hearing in front of Arbitrator 1, between $19,000 and $24,000 each for the two hearings in front of Arbitrator 2, and between $22,000 and $28,000 each for the two hearings in front of Arbitrator 3. Thus, the JAMS fees for these five arbitrations alone were between **$99,000 and $138,000**.

Of course, Defendant paid its own lawyers as well. Assuming a very conservative $250,000 in defense fees and costs to litigate through the first five cases (an average of $50,000 per case), and subtracting the $10,000 Plaintiffs' Counsel reimbursed Defendant for the first loss, Defendant spent at least **$240,000** in its own attorneys' fees to defend the first five cases.

By Plaintiffs' very conservative estimate, therefore, the first five arbitration hearings cost Defendant approximately $775,000. Extrapolated across 156 hearings, the potential cost of continued litigation to Defendant was a whopping **$24,180,000**. Knowing Defendant would argue that it could litigate subsequent arbitrations more efficiently and cost-effectively, Plaintiffs created a detailed cost of defense analysis.

3. Costs of Defense Going Forward

Arbitrator	**Cases Assign**	**Cases Resolved**	**Cases Outstanding**
Arbitrator 1 (Ruled for Def.)	1	1	0
Arbitrator 2 (Ruled for Plf.)	13	6	7
Arbitrator 3 (Ruled for Plf.)	37	6	31
Arbitrator 4	22	1	21
Arbitrator 5	1	0	1
Arbitrator 6	1	0	1
Arbitrator 7	1	0	1
Unfiled/Unassigned			94
TOTAL		**14**	**156**

The second global mediation covered 156 Plaintiffs, each of whom returned a consent form to Plaintiffs' Counsel. Many had filed arbitration demands but others had not yet done so. (Various tolling agreements throughout the litigation obviated the need

for Plaintiffs to file their arbitration demands immediately.) The chart below outlines the number of Plaintiffs per arbitrator.

Defendant's exposure included not only damages or settlement payments to Plaintiffs, but also JAMS fees and costs of defense. Defendant's exposure was significant.

a. JAMS Fees

JAMS fees for each individual case were substantial. Defendant was first responsible for an $800 filing fee and a $5,000 retainer for each case. Plaintiffs had filed 106 arbitration demands at the time of mediation, meaning Defendant had paid (or owed) over $626,000 to JAMS just in initial filing costs. If mediation had failed and the remaining Plaintiffs had all filed their claims, Defendant would have owed JAMS another $226,200 in initial filing fees.

The initial JAMS filing fees were substantial. But the JAMS fees increase significantly 30 days before each hearing, when they become nonrefundable. For a two day hearing, Defendant must pay two daily arbitrator fees (ranging from $5,000-$6,500 per day) and two daily case management fees ($800 per day), on top of the initial $800 filing fee and $5,000 deposit. JAMS credits the $5,000 deposit to the arbitrator's research and writing time.

Assuming the arbitrator devotes two days for preparation, research, reviewing the record, and writing an award, the cost for a single two-day arbitration ranges from $22,000 to $28,000. This does not include any time spent on a motion for fees and costs. Thus, total JAMS fees for arbitrating all 156 remaining cases would have been **$3,820,800**.

JAMS fees might have gone down the longer the cases were litigated. For example, the parties might have limited later hearings in front of repeat arbitrators to one day. Likewise, arbitrators might spend less time researching and writing in subsequent hearings. However, JAMS costs would be substantial even with these costs savings. Assuming only five additional two day hearings, with the rest of the hearings taking one day of hearing time and one day of arbitrator prep, **the JAMS fees would be a minimum of $1,999,000.**

b. Defense Counsel Fees and Costs

While Defendant might have been able to defend subsequent arbitration hearings cheaply, it could not do so for free. Each hearing involved a claimant deposition, a defense witness deposition, witness preparation, document production, document review, briefing and/or argument preparation, and general hearing preparation. Defendant must also pay for transcripts and other costs.

Using conservative hours and rate estimates[93], Plaintiffs estimated that Defendant might be able to defend the remaining cases for approximately $43,400 apiece. Over an additional 156 cases, that amounts to **$6,770,400** in defense fees and costs. For the sake of argument, and to put the most conservative spin possible on these numbers, one might assume that Defendant could cut defense costs in half through efficiency measures. Even if it only spent $21,700 to defend each arbitration, however, Defendant would still pay over **$3,385,200** in defense fees and costs to arbitrate the remaining cases.

c. Payments to Claimants and Claimants' Counsel

The first four awards averaged approximately $100,000: $27,000 in damages and almost $73,000 in fees and costs. For various reasons too detailed to include here, Plaintiffs believed that $27,000 in damages per Plaintiff was a *very* conservative projection for future hearings. By improving presentation of documentary evidence and witness testimony, future Plaintiffs were likely to be significantly more successful than the first four.

Importantly, the $27,000 average award was *free and clear* of attorneys' fees and costs. Even assuming Plaintiffs' Counsel continued to streamline its prosecution, thus incurring only the $43,400 of fees and costs estimated for Defense Counsel, each loss would still cost Defendant over $70,000 in payments to Claimants and Claimants' Counsel.

d. Defendant's Exposure

When one tallies the JAMS fees, defense counsel fees and costs, and payments to Plaintiffs and Plaintiffs' Counsel, Defendant's exposure was staggering. The chart below uses the following variables:

- Single day hearing and one day of Arbitrator prep, research, review, and writing (with only five more two day hearings)
- $21,700 in defense fees and costs in each case
- $27,000 per Plaintiff for each Plaintiff victory
- $43,400 in Plaintiffs' fees and costs for each Plaintiff victory
- $5,000 in costs reimbursed to Defendant for each Defendant victory

[93] Plaintiffs estimated a rate $600/hour, although in 2011, Defense Counsel's cheapest partner billed at $540/hour, and the average partner rate was $646/hour. The vast majority of the work in the litigation, including every deposition and every hearing, was performed by partners.

COSTS OF DEFENSE: 1 Day Hearing, 1 Add'l Day	
DEFENDANT'S COST TO LOSE ALL REMAINING CASES	**$16,366,**
DEFENDANT'S COST TO WIN 50% OF REMAINING CASES	**$10,485,**
DEFENDANT'S COST TO WIN 75% OF REMAINING CASES	**$7,544,8**
DEFENDANT'S COST TO WIN 90% OF REMAINING CASES	**$5,780,4**

Of course, these numbers did not reflect reality – they ignore that Arbitrator 2 and Arbitrator 3 already ruled on the exemption defense based on Defendant's corporate testimony, and that there were multiple cases pending before each of these arbitrators. Therefore, Defendant's best case scenario was to win *every single case* not assigned to Arbitrator 2 or Arbitrator 3, *as well as every single case* which has not yet been assigned to an arbitrator. That highly unlikely turn of events would still cost Defendant mightily:

DEFENDANT'S COST TO WIN EVERY CASE ASSIGNED TO ARBITRATOR 1 OR ARBITRATOR 2	**$7,589,400**

Importantly, these calculations do not include a dollar value for the unproductive supervisor time required for each hearing. To bring a case to hearing, Defendant had to produce, at the very least, a supervisor for the hearing and witnesses regarding job duties. If Defendant actually litigated 156 future arbitrations, it would essentially employ a manager for a year to do nothing but attend hearings.

4. Arbitration Scenario Conclusion

The litigation recounted above settled after five arbitration hearings and the expenditure of significant resources by Plaintiffs and Defendant. Although the parties were able to settle the litigation at a second global mediation, there is no guarantee of resolution at any point in the case. Defendant was contractually bound to litigate each individual arbitration hearing to resolution. The costs of defense exposure was real, and it was significant.

At the end of the day, most plaintiffs' counsel will prefer class or collective litigation over individual arbitrations. However, the right to arbitrate – and the right to arbitrate individually – arises from contract. Accordingly employees who are subject to arbitration agreements with class action waivers may choose to arbitrate individually, in order to impose greater litigation costs on the defendant in hopes of higher individual awards. Employers considering an arbitration program must consider the worst case scenario: mass individual arbitrations leading to stifling costs of defense.

Life After Epic Systems: How Employers, Employees, and Arbitrators are Adapting to the World of Class Action Waivers

By: Jesse Ferrantella,[1] Robin Gise,[2] Rebecca Stephens,[3] and Melissa Stewart.[4]

INTRODUCTION AND BACKGROUND

The Supreme Court's ruling in *Epic Systems Corp. v. Lewis*[5] was the product of a six-year long dispute over the enforceability of class and collective action waivers in employee arbitration agreements.

The standoff began in January 2012 when the National Labor Relations Board ("NLRB") issued its ruling in *D.R. Horton*.[6] The NLRB held that employers cannot use class or collective action waivers in arbitration agreements with employees covered by the National Labor Relations Act ("NLRA"). The Board found that these waivers infringed upon employee rights to engage in protected "concerted activities" for their benefit under Section 7 of the NLRA.

The NLRB's opinion was challenged in federal court. Notably, in December 2013, the Fifth Circuit reversed the NLRB's decision and found that class action waiver provisions in arbitration agreements were enforceable under the Federal Arbitration Act ("FAA").[7] Eventually, the Second and Eighth Circuits also adopted this view, finding that such provisions were enforceable according to their terms.[8]

On the other hand, the Sixth, Seventh and Ninth Circuits sided with the NLRB, finding that class or collective action waivers run afoul of the NLRA.[9] The courts relied on a variety of rationales, finding that the arbitration provisions violated Section 7 of the NLRA and were unenforceable based on the FAA's savings clause. The savings clause gives courts the right to refuse to enforce agreements "upon such grounds as exist at law or in equity for the revocation of any contract."[10]

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[1] Associate attorney, Ogletree, Deakins, Nash, Smoak & Stewart P.C., San Diego, CA.

[2] Mediator and arbitrator, JAMS, New York, NY.

[3] Associate attorney, Farella Braun + Martel LLP, San Francisco, CA.

[4] Partner, Outten & Golden LLP, New York, NY.

[5] 138 S.Ct. 1612, 584 U.S. __ (May 21, 2018).

[6] *In re D.R. Horton*, 357 NLRB No. 184 (2012).

[7] *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013); *see also Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015).

[8] *Cellular Sales of Missouri, LLC v. NLRB*, 824 F.3d 772 (8th Cir. 2016); *Patterson v. Raymours Furniture Co.*, 659 F App'x 40 (2d Cir. 2016).

[9] *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016); *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016); *NLRB v. Alternative Entertainment Inc.*, 858 F.3d 393 (6th Cir. 2017).

[10] 9 U.S.C. 2.

On January 13, 2017, the United States Supreme Court agreed to resolve the growing dispute. The consolidated appeal included the Fifth Circuit's ruling in *NLRB v. Murphy Oil*, the Second Circuit's ruling in *Morris v. Ernst & Young*, and the Seventh Circuit's ruling in *Lewis v. Epic Systems.* All three cases involved mandatory, individual-only arbitration provisions that employees were asked to sign.

The Supreme Court heard argument on the issue in October 2017. On May 21, 2018, the United States Supreme Court issued its ruling on the enforceability of class action waivers. In a 5 to 4 opinion authored by Justice Gorsuch, the Supreme Court upheld class action waivers in arbitration agreements. The Court held that while "as a matter of policy" the enforceability of such provisions was "debatable," the FAA required federal courts to "enforce arbitration agreements according to their terms—including terms providing for individualized proceedings.[11]

Significantly, the high Court found that the NLRA did not contain a contrary congressional command meant to displace or trump the FAA. Specifically, the Court considered whether Section 7 of the NLRA—which allows employees to engage in "concerted activities" for their mutual aid or protection—prohibited class or collective action waivers. The Court found it did not, reasoning that Section 7 did not confer any substantive right to class or collective action lawsuits.

The Supreme Court also rejected the argument that the FAA's savings clause created an exception to enforcement on the basis that the NLRA prohibits class action waivers. It reasoned that the savings clause only permitted courts to invalidate arbitration agreements on the basis of generally applicable contract defenses like duress, and not on the basis of defenses that single out or only apply to arbitration.

SUBSEQUENT JUDICIAL AND LEGISLATIVE DEVELOPMENTS RELATED TO *EPIC SYSTEMS*

Unsurprisingly, the majority of courts interpreting the Supreme Court's *Epic Systems* decision have issued orders upholding arbitration agreements with class waivers and compelling plaintiffs to individual arbitration.[12] To date, the only courts which have declined to enforce arbitration agreements with class and collective action waivers have done so based on state-law contract defenses.[13]

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[11] *Epic Systems*, Slip Op. at p. 2.

[12] *See, e.g.*, *Whitworth v. SolarCity Corp.*, No.16-cv-01540-JSC, 2018 WL 3995937 (N.D. Cal. Aug. 21, 2018); *Guerrero v. Halliburton Energy Services, Inc.*, No. 1:16-cv-01300-LJO-JLT, 2018 WL 3615840 (E.D. Cal. Jul. 26, 2018); *Williams v. Dearborn Motors 1 LLC*, No. 17-12724, 2018 WL 2364051 (E.D. Mich. May 24, 2018).

[13] *See, e.g.*, *Huckaba v. Ref-Chem, LP*, 892 F.3d 686, 691 (5th Cir. 2018) (invalidating arbitration agreement because employer had not signed agreement); *Weckesser v. Knight Enterprises SE, LLC*, Case No. 17-1247 (4th Cir. Jun. 12, 2018) (invalidating arbitration agreement involving a class action waiver due to ambiguity as to who was bound by agreement).

Since the *Epic Systems* decision was issued, several states and localities have taken steps to minimize its effects by discouraging or prohibiting employers from requiring employees to sign arbitration agreements with class waivers. For example:

- *Washington:* On June 12, 2018, Washington governor Jay Inslee issued Executive Order 18-03 "Supporting Workers' Rights to Effectively Address Workplace Violations," instructing state agencies to do business with companies that can show that their employees are not required to sign mandatory arbitration clauses or class action waivers.[14]

- *California:* Going a step further, the California legislature passed Assembly Bill 3080 (currently awaiting signature from California Governor Jerry Brown), which prohibits employers from *requiring* employees and applicants to sign agreements to arbitrate discrimination, harassment, retaliation, or wage and hour claims.[15]

Other initiatives could also be aimed at providing alternative mechanisms for relief that are not subject to arbitration. For example, the New York Legislature has proposed the "Empowering People in Rights Enforcement (EMPIRE) Worker Protection Act," which would provide a mechanism for aggrieved employees to initiate a public enforcement action on behalf of the state for violations of labor law.[16] The provision would mirror California's Private Attorneys General Act of 2004 ("PAGA"), which allows representative actions for underlying wage and hour violations. PAGA currently cannot be waived by arbitration agreement under California Supreme Court law.[17] New York's proposed initiative could represent a similar attempt to provide for representative actions that cannot be arbitrated.

Finally, apart from the issue of class action waivers, there has been a general backlash against mandatory arbitration provisions, particularly for sexual harassment or discrimination lawsuits. New York and Maryland have passed laws prohibiting mandatory arbitration of sexual harassment disputes.[18] Washington passed a similar provision regarding confidential arbitration of discrimination claims.[19] The United States Senate has also proposed legislation to end mandatory arbitration of sexual harassment disputes called the Ending Forced Arbitration of Sexual Harassment Act of 2017. The bill has 18 co-sponsors, including three Republican senators.[20]

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[14] State of Washington, Office of the Governor, Executive Order 18-03: Supporting Workers' Rights to Effectively Address Workplace Violations, www.governor.wa.gov/sites/default/files/exe_order/18-03%20-%20Workers%20Rights%20%28tmp%29.pdf.

[15] California Assembly Bill 3080, https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB3080.

[16] New York Assembly Bill A7958, https://www.nysenate.gov/legislation/bills/2017/a7958.

[17] *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014).

[18] N.Y.C.P.L.R. 7515(a)(2), 7515(a)(4)(b)(i)-(iii); 2018 Md. Laws Ch. 739 (S.B. 1010).

[19] Washington S.B. 5996, 65th Leg., 2018 Reg. Sess. (Wash. 2018).

[20] S.B. 2203, https://www.congress.gov/bill/115th-congress/senate-bill/2203/text?format=txt.

Despite these legislative efforts, if California or any other state passes a statute prohibiting arbitration agreements in the employment context, it is highly likely that such a statute would be challenged as being preempted by the FAA.

RESPONSES TO *EPIC SYSTEMS*

I. Responses in the workplace

A. Employer Responses

Given the Supreme Court's ruling, more and more employers are considering arbitration agreements with class action waivers. Prior to *Epic Systems*, given the uncertainty in enforcing individual arbitration provisions, there were certainly more balanced costs and benefits to arbitration. For many employers, the potential benefits of arbitration included that arbitration (a) is often a quicker form of resolving disputes; (b) contains less stringent procedural rules; (c) provides more flexibility regarding deadlines and dates; (d) provides a mechanism to have input in selection of the arbiter of disputes; (e) can be more private than court proceedings; and (f) prevents the risk of a runaway jury. The potential downsides included (a) concerns of the costs of arbitration (particularly since employers generally bear the arbitrator's fees); (b) costs of "satellite motions" such as motions to compel arbitration or disputes over the scope of arbitration; (c) perceptions that arbitrators are more apt to "split the baby" or issue divided rulings; and (d) concerns over the very limited appellate rights that arbitrations provide to challenge erroneous rulings.

Now, in the wake of *Epic Systems*, employers can add one resounding "pro" to the list: the ability in arbitration to enforce a class or collective action waiver. Arbitration is not a solution without risk. But for many employers, this ability to minimize collective claims has tipped the scales dramatically in favor of arbitration.

Questions still remain, however, and the answers to many of them vary by company. They include questions regarding:

- *Mandatory class waivers?* It is important to note that the consolidated cases before the Supreme Court arose from mandatory arbitration provisions. Although they did not include provisions allowing employees to opt out of class arbitration, they were nevertheless upheld by the Court.[21] The question remains whether mandatory provisions are best for all businesses. Many employers are weighing the potential benefit of broadly having all employees subject to a mandatory arbitration provision against the downsides

[21] *See, e.g.*, *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016) (email arbitration agreement "mandating that wage-and-hour claims could be brought only through individual arbitration" and employees were "deemed to have accepted this Agreement" if they "continue[d] to work at Epic") (punctuation in original); *Morris v. Ernst & Young, LLP*, 834 F.3d 975 n. 4 (9th Cir. 2016) (distinguishing other agreements based on inability to opt out of arbitration provision).

of this approach. Downsides can include an employee backlash to the lack of choice, or even potential media backlash (particularly for large companies which are in the spotlight). Opt out provisions can buttress the enforceability of the agreement as a whole, as the element of choice provides a further defense from unconscionability arguments. Employers considering arbitration agreements will have to carefully weigh these interests.

- *Delegation Clauses?* As discussed further below, one key remaining issue is who decides disputes over class arbitrability: the court or the arbitrator? Many employers prefer for a court to decide this issue at the onset of the case. This is particularly true because a court ruling provides a more meaningful avenue for appeal. Since the Supreme Court has not yet ruled on this issue, employers should consider explicitly delegating this question to the courts in their arbitration agreements.

- *Scope of Claims?* Employers considering employee arbitration agreements are also re-assessing the scope of claims they want to cover by the agreements. Traditionally, employers have drafted the agreements to be as broad as possible, so they cover all arbitrable claims. However, there has been some public backlash against arbitration of claims, particularly sexual harassment claims.[22] Employers are also wary of potential costs of arbitration. For these reasons, there is growing consideration over whether the scope of arbitration agreements should be limited to those claims with the greatest risk of high-exposure class or collective action litigation. This typically includes wage and hour claims.

The key guiding principle for these decisions should be the company's business operations and values. Just because mandatory arbitration agreements may provide the broadest protection and make sense for many businesses does not mean they are appropriate for all businesses and workforces. Each company should carefully consider its workforce and their reaction to arbitration agreements before implementing any program.

B. Employee Responses

Because employers require employees to sign arbitration agreements at the outset of employment—before any dispute arises—employees often fail to understand the significance of these agreements. For those who do understand the rights they are waiving, arbitration is often the only realistic option. When faced with the choice between accepting a job offer contingent on forced arbitration and class waivers and remaining unemployed, most people will chose to be employed.[23]

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[22] *See, e.g.* Gretchen Carlson, How to Encourage More Women to Report Sexual Harassment, New York Times (Oct. 10, 2017), https://www.nytimes.com/2017/10/10/opinion/women-reporting-sexual-harassment.html.

[23] *See Porreca v. Rose Grp.*, No. 13 Civ. 1674, 2013 WL 6498392, at *9 (E.D. Pa. Dec. 11, 2013) (plaintiff-employee was "economically compelled to accept Defendant's terms" with respect to arbitration).

The *Epic Systems* decision and other current events have certainly led to more public debate, media coverage, and scrutiny around arbitration agreements. As noted above, it has even led to several legislative initiatives at the state and federal level about arbitration of disputes. But it has yet to be seen whether this will empower more employees to redline, negotiate, or refuse to sign arbitration agreements.

II. Litigation Issues Post-*Epic Systems*

A. Threshold issues

In the wake of *Epic Systems*, one important issue is who decides whether an arbitration agreement allows for class or collective arbitration. In other words, should the court or the arbitrator determine if arbitration can proceed on an individual only or collective basis?

There is a growing circuit split on this issue. Previously, in a plurality opinion, the United States Supreme Court suggested that arbitrators should decide whether class arbitration is appropriate.[24] However, a majority did not reach consensus on this issue. Since this time, the majority of appellate circuits have held class arbitrability is a threshold question for the court to resolve. This includes the Third, Fourth, Sixth, and Eighth circuits.[25] On the other hand, the Fifth Circuit has suggested this is an issue for the arbitrator to decide.[26] Not all circuits have ruled on the issue, but some courts of appeals have held that other issues regarding consolidated (not class) arbitration are presumptively for the arbitrator to decide.[27]

Courts analyzing this issue distinguish between procedural questions that are presumptively for the arbitrator and substantive gateway issues which are presumptively for the court to resolve. The majority of courts of appeals reason that class arbitrability is a gateway substantive question that can substantially impact the nature and scope of the arbitration, and hold that this issue should be decided by the court unless the parties "clearly and unmistakably provide otherwise." These cases often rely on United States Supreme Court authority indicating that class arbitration can fundamentally alter the nature of arbitration.[28]

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[24] *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) (plurality).

[25] *Catamaran Corp. v. Towncrest Pharmacy*, 864 F.3d 966 (8th Cir. 2017); *Dell Webb Communities, Inc. v. Carlson*, 817 F.3d 867 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 567 (2016); *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746, 761 (3d Cir. 2016), *cert. denied*, 137 S. Ct. 40, (2016); *Opalinski v. Robert Half Int'l Inc.*, 761 F.3d 326 (3d Cir. 2014), *cert. denied*, 135 S.Ct 1530 (2015); *Reed Elsevier, Inc. ex rel LexisNexis Div. v. Crockett*, 734 F.3d 594, 598 (6th Cir. 2013), *cert. denied*, 134 S. Ct 2291 (2014).

[26] *See, e.g., Robinson v. J&K Admin. Mgmt, Servs, Inc*., 817 F.3d 193 (5th Cir. 2016), *cert denied*, 137 S.Ct. 373 (2016).

[27] *See, e.g., Blue Cross Blue Shield of Massachusetts, Inc. v. BCS Ins. Co.*, 671 F.3d 635 (7th Cir. 2011).

[28] *ATT Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011); *Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683 (2010).

The California Supreme Court has adopted the minority view with respect to ambiguous agreements. In analyzing an agreement that was silent on the issue of class arbitration, the California Supreme Court held that the arbitrator should rule on the question of class arbitrability unless the parties expressly delegate this question to the court.[29] The California appellate courts have not yet decided whether this rule applies to arbitration provisions with explicit class action waivers (versus agreements that are silent or unclear on this issue).

The Supreme Court has not yet granted review on the "who decides" question. However, given its ruling in *Epic Systems* and the growing circuit split, it is very possible the Supreme Court will agree to resolve this issue in the not-so-distant future. In *Epic Systems*, the Supreme Court held that class action waivers "must be enforced as written."[30] It also noted that classwide arbitration proceedings alter the "traditionally individualized and informal nature of arbitration" and result in a "fundamental change" to the arbitration process.[31] This may suggest that the Supreme Court believes that courts should simply enforce these agreements as written, and that any dispute over their meaning should be resolved by the courts as a gateway issue prior to arbitration.

One additional wrinkle on the "who decides" question is the incorporation of American Arbitration Association (AAA) and/or Judicial Arbitration and Mediation Services (JAMS) rules in arbitration agreements. Many arbitration agreements reference these rules. Both AAA and JAMS rules contain broad arbitration provisions and suggest, in varying degree, that the arbitrator should resolve issues of class arbitrability. AAA rules broadly provide that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement."[32] They also provide that "the arbitrator shall determine as a threshold matter…whether the applicable arbitration clause permits the arbitrator to proceed on behalf of or against a class."[33]

JAMS similarly delegates several threshold issues to the arbitrator. The rules provide that "[j]urisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator. Unless the relevant law requires otherwise, the Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter."[34] Furthermore, the JAMS Class Action Procedures provide that "the Arbitrator … shall determine as a threshold matter whether the arbitration can proceed on behalf of or against a class."[35] However, they also provide that JAMS "will not

[29] *Sandquist v. Lebo Automotive, Inc.*, 1 Cal. 5th 233 (2016).

[30] *Epic Systems*, Slip Op. at p 25.

[31] *Id.*, Slip Op. at p. 8.

[32] AAA Employment Arbitration Rules and Mediation Procedures, Rule 6(a).

[33] AAA Supplementary Rules for Class Arbitrations, Rule 3.

[34] JAMS Employment Arbitration Rules, Rule 11(b).

[35] JAMS Class Action Procedures, Rule 2.

administer a demand for class action arbitration when the underlying agreement contains a class preclusion clause."[36]

Courts have begun to grapple with how the incorporation of these rules otherwise impacts the "who decides" question. Prior appellate authority indicated that the incorporation of these rules could demonstrate an intent to delegate threshold questions of arbitrability to the arbitrator. But these cases did not grapple with class action waiver provisions. More recently, some appellate courts that held the question of class arbitrability to be one for the courts to decide have further held that the mere incorporation of rules like the AAA or JAMS rules does not constitute clear and unmistakable evidence that the parties delegated this question to the arbitrator. Those courts have held that notwithstanding incorporation of such rules, the court should still decide the threshold question of class arbitrability.[37]

This issue is an important one for several reasons. *First*, whether an arbitration is limited to individual claims or instead allowed to proceed as a putative class action can fundamentally change the nature of arbitration. It can lead to far more complex, expensive and time-consuming arbitrations, with far greater potential exposure. *Second*, the rulings of arbitrators and the rulings of courts are subject to vastly different standards of review. Court rulings regarding arbitration are often subject to *de novo* review, and may be subject to immediate appeal if the court denies a motion to compel arbitration.[38] On the other hand, an arbitrator's interpretation of an arbitration provision is subject to far more limited review under the FAA. Under the FAA, an arbitrator's ruling cannot be vacated or reversed due to legal error. It can instead be reviewed only if the ruling was the result of bias, corruption or fraud, a failure to hear evidence, or whether the arbitrator acted in excess of his or her powers.[39] The result is that an arbitrator has more flexibility in interpreting arbitration provisions, and given the standard of review, an employer may have a far more difficult time challenging an arbitrator's ruling on class or collective arbitration. That is why many employers want this issue to be decided by the courts.

However, when facing the "who decides" question, it is critical to look first at the language of the arbitration agreement itself. If the agreement contains a broad delegation clause, which provides "clear and unmistakable evidence" that the parties intended to submit any dispute relating to the formation, existence, validity, interpretation or scope of the agreement to the arbitrator, then the arbitrator will decide whether the class action waiver will be enforced. If the agreement does not contain such a delegation, then it will be up to a court to determine whether the enforceability of the class action waiver is a substantive gateway issue for the court to decide or a procedural issue for the arbitrator to decide. As a result, if employers prefer for a

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[36] *Id.*, Rule 1(a).

[37] *See, e.g. Catamaran Corp.*, 864 F.3d at 973; *Scout Petroleum*, 809 F.3d at 761-66; *Crockett*, 734 F.3d at 599-600.

[38] 9 U.S.C. § 16.

[39] 9 U.S.C. § 10; *Oxford Health Plans v. Sutter*, 133 S. Ct. 2064, 2068-2071 (2013) (court may vacate arbitrator's decision "only in very unusual circumstances;" refusing to review whether arbitrator's order of class arbitration was a correct interpretation of the parties' agreement).

court to decide the issue of class arbitrability, they may consider having a specific provision in the agreement reserving this issue for the court.

B. Ways for plaintiffs to avoid being compelled to individual arbitration

1. Contract Law Defenses

Arbitration agreements are contracts, subject to the same defenses that apply to any contract. 9 U.S.C. § 2. Thus, plaintiffs may assert state law defenses to contract formation, such as "fraud, duress, or unconscionability[.]"[40]

- *Lack of Assent.* Courts decline to enforce arbitration agreements for lack of assent where the arbitration term is not sufficiently conspicuous.[41]

- *Unconscionability.* Courts reject arbitration agreements where they are substantively and procedurally unconscionable. Procedural unconscionability typically refers to issues regarding equality of bargaining power and take-it-or-leave it provisions. Substantive unconscionability typically refers to one-sided, harsh or unfair terms.[42]

- *Lack of Mutual Consideration.* Arbitration agreements that are so one-sided as to lack consideration are not enforced by courts. The rules regarding consideration for an arbitration agreement vary by state, and can include hiring, a promise of continued employment, or a mutual agreement to arbitrate.[43]

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[40] *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

[41] *See, e.g.*, *Hudson v. Bah Shoney's Corp.*, 263 F. Supp. 3d 661, 668-71 (M.D. Tenn. 2017) (applying Tennessee law and rejecting motion to compel arbitration where employee did not knowingly and voluntarily agree to waive her right to a jury trial by signing an employment handbook acknowledgement form); *Leodori v. CIGNA Corp.*, 175 N.J. 293, 302-08 (2003) (applying New Jersey law, and holding that receipt of handbook and continued employment did not evince employee's affirmative agreement to arbitrate).

[42] *See, e.g.*, *O'Connor v. Uber Techs., Inc.,* 150 F. Supp. 3d 1095, 1100 (N.D. Cal. Dec. 10, 2015) (substantively unconscionable terms included: confidentiality clause, carve-out for certain claims, and unilateral modification provision); *Zaborowski v. MHN Gov't Servs., Inc.*, 936 F. Supp. 2d 1145, 1152-54 (N.D. Cal. 2013) (arbitration provision procedurally unconscionable where it was a contract of adhesion and the clause was inconspicuous; and substantively unconscionable because it truncated statute of limitations, gave employer greater control over arbitrator selection, limited discovery, and required employees to pay filing fees), *aff'd*, 601 F. App'x 461 (9th Cir. 2014); *Day v. Fortune Hi-Tech Mktg., Inc.,* 536 F. App'x 600, 604 (6th Cir. 2013) (substantively unconscionable agreement permitted defendant to modify any term of the contract, at any time).

[43] *See, e.g.*, *Noohi v. Toll Bros., Inc.*, 708 F.3d 599, 610-11 (4th Cir. 2013) (applying Maryland law and finding no mutual consideration where arbitration clause's notice provisions did not apply equally to both parties); *Caire v. Conifer Value Based Care, LLC*, 982 F. Supp. 2d 582, 592-94 (D. Md. 2013) (under Maryland law, employment or continued employment is not adequate consideration where the employer retained sole discretion to change agreement's terms).

- *Enforcement by Non-Party.* Courts generally do not allow non-parties to an agreement to compel arbitration; however, the language of the agreement governs who is a party to the agreement.[44]

- *Arbitration Agreement Rolled Out During Litigation.* Courts have invalided agreements that were instituted during the course of ongoing litigation.[45]

- *Employer Cannot Locate Agreement.* Courts will not enforce an arbitration agreement that a party cannot locate, even if it was standard operating procedure to require all employees to sign such agreements.[46]

- *Employer Did Not Sign Agreement*. Some courts have found arbitration clauses unenforceable in the absence of bilateral execution, particularly where the express terms of the agreement require execution by both parties.[47]

2. Default

Courts have found that employers waive the right to arbitration where they default on the arbitration process. *See, e.g., Pre-Paid Legal Servs., Inc. v. Cahill*, 786 F.3d 1287, 1296, 1299

[44] *See, e.g.*, *Weckesser v. Knight Enterprises S.E., LLC*, No. 17 Civ. 1247, 2018 WL 2972665, at *4-7 (4th Cir. Jun. 12, 2018) (defendant was not a third-party beneficiary of the arbitration contract); *Roes v. SFBSC Mgmt., LLC,* 656 F. App'x 828, 830-31 (9th Cir. 2016) (non-signatory employer lacked standing to enforce arbitration agreement between employees and nightclub where they worked); *Murphy v. DirecTV, Inc.,* 724 F.3d 1218, 1234 (9th Cir. 2013) (Best Buy could not "piggy-back" onto DirecTV's arbitration clause); *Laumann v. Nat'l Hockey League,* 989 F. Supp. 2d 329, 338-41 (S.D.N.Y. 2013) (Comcast could compel arbitration against only its own subscribers' disputers, not those of DirecTV customers).

[45] *See, e.g.*, *O'Connor v. Uber Techs., Inc.*, No. 13 Civ. 3826, 2013 WL 6407583, at *1, 7 (N.D. Cal. Dec. 6, 2013) (promulgation of arbitration agreement during pending litigation "runs a substantial risk of interfering with the rights of [class members] under Rule 23[]"); *Piekarski v. Amedisys Ill., LLC*, 4 F. Supp. 3d 952, 955-56 (N.D. Ill. 2013) (nullifying self-executing arbitration agreement that defendant sent to class members during stay of case in attempt to moot class claims); *Williams v. Securitas Sec. Servs. USA, Inc.*, No. 10 Civ. 7181, 2011 WL 2713741, at *2-3 (E.D. Pa. July 13, 2011) (mid-litigation arbitration agreement with class waiver unenforceable because it was "designed to thwart employees of [defendant] from participating in this lawsuit"); *In re Currency Conversion Fee Antitrust Litig.*, 224 F.R.D. 555, 569-70 (S.D.N.Y. 2004) (arbitration clauses imposed by defendant after commencement of class action unenforceable as unconscionable).

[46] *See, e.g., Barkley v. Pizza Hut of Am., Inc.,* No. 14 Civ. 376, 2014 WL 3908197 *1-4 (M.D. Fla. Aug. 11, 2014) (court refused to compel arbitration of claims of delivery drivers whose executed arbitration agreements could not be located, notwithstanding defendant's declaration that these drivers must have signed identical agreements as required by company policy); *Bachenheimer v. Wells Fargo Bank, N.A.,* No. B251980, 2014 WL 3585061, at *1, 4 (Cal. Ct. App. July 21, 2014) (defendant's declaration stating that plaintiff "could not have opened an account" without agreeing to arbitration insufficient when defendant did not have original or copy of the agreement supposedly signed by plaintiff).

[47] *See, e.g.*, *Huckaba v. Ref-Chem, LP*, 892 F.3d 686, 691 (5th Cir. 2018) (applying Texas law, invalidating arbitration agreement that required mutual signatures because employer failed to sign); *Westmoreland v. Sadoux*, 299 F.3d 462, 465 (5th Cir. 2002) ("to be enforceable, an arbitration clause must be in writing and signed by the party invoking it").

(10th Cir. 2015) (declining to enforce arbitration agreement where AAA terminated its proceeding after sending multiple notices of unpaid fees).

3. Contracts Not Subject to the FAA

Certain categories of employment contracts are subject to a statutory carve-out in the FAA, such as independent contractors and those in the transportation or railway industries. *See* 9 U.S.C. § 1 (exempting from FAA coverage "contracts of employment of seamen, railroad employees, [and] any other class of workers engaged in foreign or interstate commerce"); *Oliveira v. New Prime, Inc.*, 857 F.3d 7, 17-22 (1st Cir. 2017), *cert. granted*, 138 S. Ct. 1164 (2018) (FAA's exclusion of certain "contracts of employment" includes contracts that purport to establish an independent contractor relationship).

4. Government Enforcement of Rights

Certain statutes, like California's Private Attorney General Act ("PAGA"), allow aggrieved employees to stand in the shoes of the government and enforce their rights and the rights of other similarly situated employees. This mechanism avoids arbitration because the real party in interest is the government, which is a non-party to the agreement, rather than the employee. *See Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 382-83 (2014) ("[t]he government entity on whose behalf the plaintiff files suit is always the real party in interest . . . an employee's right to bring a PAGA action is unwaivable"). The Supreme Court has never reviewed the arbitrability of PAGA disputes. Therefore, in California, this avenue for employees' collective enforcement of rights is not impacted by the Supreme Court's *Epic* decision. *See Whitworth v. SolarCity Corp.*, No. 16 Civ. 1540, 2018 WL 3995937, at *5 (N.D. Cal. Aug. 21, 2018).

C. Arbitration Drafting Considerations

If an employer decides to use arbitration agreements, the goal is to ensure there is an enforceable agreement that maximizes the benefit of the *Epic Systems* ruling. Below are some considerations in drafting an effective arbitration agreement in the wake of *Epic*:

- *The Class Action Waiver.* The class action waiver should be worded broadly enough to cover the different types of class, collective or consolidated claims you would like to include. It should specify any prohibitions on consolidation and joinder of claims, in addition to class or collective procedures, if desired.

- *Mandatory Provisions vs. Opt-Out Provisions.* As discussed above, a key consideration after *Epic Systems* is whether to have a provision whereby employees may opt out of a class action waiver. Employers who desire arbitration of disputes will have to analyze the costs and benefits of these alternatives.

- *Delegation Clauses*. As also discussed above, many employers prefer that a court, not an arbitrator, rule on any disputes about class action waivers. While the ruling in *Epic Systems* helped clarify the law, if an employer would prefer that a court resolve this gateway issue, the employer may consider adding a provision that explicitly delegates this decision to the court. This is particularly true in California, given the *Sandquist* ruling providing that absent an explicit delegation to the court, an arbitrator will resolve disputes or ambiguity over class arbitrability. Common provisions may say something to the effect of: "Company and I agree that a court of competent jurisdiction will be the sole determiner of any disputes regarding whether this Agreement allows for class, collective or representative arbitration."

- *Know your State*. If you are an employer with operations in many states, it makes sense to have your arbitration agreement reviewed and customized to ensure compliance with all applicable laws. States may have different rules regarding arbitration procedures, permissible employee costs, consideration, offer and acceptance, and choice of law provisions. They may also have different types of unique, non-arbitrable claims. It is a sound practice to address these questions prior to drafting and rolling out your agreements.

- *Staying Non-Arbitrable Claims.* Arbitration agreements generally contain a carve out for non-arbitrable claims. A key claim that cannot currently be arbitrated in California courts are representative claims under PAGA. PAGA claims allow an aggrieved employee to bring claims on behalf of the state for civil penalties for alleged Labor Code violations. They allow the employee to do so on a representative basis, on behalf of other similarly aggrieved employees. PAGA is a very powerful tool and is a right that the California Supreme Court has held cannot be waived in an arbitration agreement. Typically, if an employee brings a class action and PAGA action and an employer has an enforceable arbitration agreement with a class action waiver, the individual claims will be compelled to arbitration, class claims will be dismissed, but the PAGA claims will remain in court. Most employers prefer to then stay the PAGA claims pending individual arbitration. As a result, employers may consider language agreeing to a stay of representative claims pending arbitration. Such language may indicate: "all claims that by law are not subject to arbitration shall be stayed until the claims subject to arbitration are fully arbitrated."

- *Implementation.* In the technological age, many large businesses choose to disseminate employee policies electronically. Electronically-signed arbitration agreements are enforceable, but employers have to demonstrate that the employee's electronic signature is attributable to that person. This generally requires a showing that there were security measures limiting access to the electronic system (such as a username and unique password), and a showing that the employee actually signed the agreement at the date and time in question. Employers using electronic signatures should consider applicable state laws and plan for how they will demonstrate an employee's electronic signature is "authentic."

D. Mass arbitration and its practical implications

1. Employees' Perspective on Mass Arbitration

Even before the Supreme Court's *Epic Systems* decision, courts in several circuits enforced arbitration agreements with class waivers. Although some plaintiffs were no doubt inhibited from bringing their small dollar value claims or dissuaded from enforcing their rights in light of other obstacles erected by well-funded corporate defendants in arbitration,[48] others found ways to band together and achieve economies of scale—even in the absence of the traditional class action device—by pursuing arbitrations on a mass scale.[49]

This trend is likely to continue and will be even more important after *Epic Systems*. Employees and their counsel, when faced with arbitration class action waivers, may consider filing more individual arbitrations, knowing that employers generally bear the costs of these arbitrations. Employees who are pursuing claims in individual arbitration may also pursue individualized discovery and depositions in these individual arbitrations as a means of exerting increased pressure on employers who insist on individualized proceedings.

Employees may also use the prospect of claim preclusion against an employer. For example, if Employee A defeats the employer's affirmative defense, Employee B could ask the arbitrator to preclude the employer (who was a *party* to Employee A's arbitration) from relitigating its defense which was previously rejected. If successful, the employer could lose the right to present its defenses in subsequent arbitrations.

To be clear, mass arbitration is not the most efficient dispute resolution mechanism. Class and collective actions are a far superior way to determine whether large numbers of similarly situated employees' rights were violated by the same allegedly unlawful policies. However, mass arbitration is the now the only option for some employees.

2. Employers' Perspective on Mass Arbitration

Mass arbitration is not necessarily an efficient dispute resolution mechanism from the employer's perspective, either. Compared with the publicly-funded federal and state court systems, where the judge's time spent holding hearings and writing decisions is free to litigants, employers are typically required to pay the costs to proceed in arbitration, including filing fees, forum administration fees, and fees for the arbitrator's time. In the mass arbitration context, these costs can quickly exceed the damages employees stood to recover in the first place.

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[48] Jessica Silver-Greenberg and Michael Corkery, *In Arbitration, a Privatization of the Justice System*, The New York Times, Nov. 1, 2015; Jessica Silver-Greenberg and Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, The New York Times, Oct. 31, 2015.

[49] Ben Penn, *Workers Lawyers End Turf War After High Court Arbitration Loss*, Bloomberg Law, Aug. 13, 2018.

Other inefficiencies inherent in mass arbitration can compound these costs for employers, including the potential for non-mutual collateral estoppel. For individual employees pursuing mass arbitrations, a merits decision against Employee A embracing the employer's affirmative defense may not have any legal preclusive effect on Employee B, who was not a *party* to Employee A's action. It may, however, help dissuade future litigants.

Notwithstanding these points, for employers the prospect of mass arbitration is often more palatable than the risk of class or collective action litigation. The reason is that the class or collective action mechanism provides a higher risk of exposure, especially for large companies. In the wake of *Epic Systems*, one key issue is managing the risk of mass arbitration. For example, a growing response by the plaintiff's bar to class action waivers is to encourage more employees to bring individual arbitrations. The hope is that by doing so, the risk of mass arbitration will place additional pressure and threatened costs on employers. Such repeat filings in arbitration can create escalating cost pressures and multi-venue arbitration. It can also create the risk of coordinated or consolidated proceedings under applicable arbitration rules, which can function as smaller-scale collective actions. Employees who are required to arbitrate individually in separate arbitrations may also seek to depose corporate witnesses repeatedly in these arbitrations as a means of exerting pressure on employers.

Employers will have to creatively manage these risks. Approaches may include stipulations to avoid the inefficiencies of repeatedly addressing the same issues in many arbitrations, proceeding with groupings of cases before a few mutually-agreeable arbitrators, or issuing Rule 68-style offers in arbitration to promote resolution of disputes.

3. Arbitrator's Perspective on Mass Arbitration

From the perspective of the arbitration provider, mass arbitrations can present difficult practical issues. As class action waivers have been written into employment agreements in the years preceding *Epic Systems*, arbitration providers have been presented with hundreds of individual arbitrations filed against the same employer, which must be administered as individual cases.

JAMS has rules which allow it to consolidate arbitrations that have common issues of law and fact.[50] If a request for consolidation is made by a party, JAMS must determine whether consolidation would be permitted under the particular class action waiver at issue.[51] Consolidation requests can made by the employer or the employee and may be opposed by the other side. For instance, an employer may want to consolidate a large number of individual arbitrations for ease of administration or to reduce arbitration fees. However, the employees' counsel may oppose such a request, seeking to take advantage of the burden on the employer.

[50] JAMS Employment Arbitration Rule, 6(e).

[51] AAA's Employment Rules do not contain specific provisions permitting or disallowing consolidation of cases. However, AAA Commercial Arbitration Rules provide for the possibility of consolidation. AAA Commercial Arbitration Preliminary Hearing Procedures, P-2.

In some cases, it may be the employees' counsel seeking a consolidation that is opposed by the employer. That said, some class action waiver clauses are drafted to prohibit any kind of consolidation or group of claims, to avoid any possibility of group litigation.

In many cases, however, the parties have litigated the class action waiver in court prior to going to arbitration. By the time the cases reach the arbitrator, there is often an agreement between the parties on how to proceed with the mass arbitrations, including possible groupings of cases. Given the administrative and logistical burden of mass arbitration, it may be preferable for the parties to come to some agreement, but it is understood that such an agreement may not be possible or desirable in all cases.

CONCLUSION

The Supreme Court's decision in *Epic Systems* was significant and has far-reaching implications for employers, employees, and arbitrators. While we are already seeing some effects of the decision, many are yet to be seen. Over the next several years, stakeholders will be carefully monitoring new workplace, legislative, and judicial developments related to *Epic Systems*, arbitration agreements, and class action waivers.

Resolution Alley

Providing for Neutrals with Industry, Legal, and Business Expertise

By Theodore K. Cheng

Resolution Alley is a column about the use of alternative dispute resolution in the entertainment, arts, sports, and other related industries.

Imagine that you are the Human Resources manager at a record label and you have just received a copy of a federal court complaint filed by a recently terminated employee who is now claiming that her firing was discriminatory. The court has also automatically referred the case to mediation. Although there are any number of potential mediators with expertise in the employment field, you wonder whether someone with knowledge of the music industry might better understand the context of the employment situation.

"A mediator who is an acknowledged expert in the subject matter of the dispute could also add a helpful, perhaps more evaluative, perspective for the parties, oftentimes offering a different kind of reality testing—not a reality testing of the legal contentions, but the practicalities of implementing certain proposals."

Or maybe you negotiate agreements for the purchase of artwork for your museum's own collection. Allegations have surfaced that your most recent acquisition from a private gallery may be a counterfeit. Your agreements with galleries always contain a standard, generic arbitration clause, but you now wonder whether having an arbitrator with knowledge, training, or expertise in art history might better understand both the background of the dispute, as well as appreciate the technical information that might be adduced at the evidentiary hearing.

Or perhaps your company licenses the logo of a professional basketball team and makes and sells various articles of clothing and other merchandising on which that logo appears. Recently, the team's in-house director of intellectual property and licensing contacted you and is upset about the quality of the apparel being made by your overseas manufacturer, which she contends is damaging the brand. She is threatening to terminate the licensing agreement, pointing to some arguable language in the agreement as a basis for doing so. You wonder whether you might suggest that the parties try mediating the dispute using someone with knowledge of sports merchandising and licensing in the apparel industry.

In each of the above scenarios, the characteristics of the person being selected as the arbitrator or mediator could make a difference in how (and sometimes whether) the dispute is resolved, how quickly a resolution is achieved, and how cost-effective the process will likely be. As alternative dispute resolution mechanisms like arbitration and mediation are voluntary and consensual in nature, they are processes detailed in dispute resolution clauses that are (outside of the mandatory, adhesion context) customizable by the parties, in that the parties have broad flexibility to design a dispute resolution mechanism that best fits the dispute in question. One of the aspects of this customization is the ability of the parties to select neutrals who are "experts" familiar with the subject matter of the dispute, the industry or background business norms in which the dispute arises, or the legal framework governing the dispute itself. Exercising this flexibility is something often overlooked by many parties.

Theodore K. Cheng

Arbitration is seen as having a number of significant advantages over litigation. One of these advantages is that the parties have the ability to choose their own decision maker. That decision maker can be someone who is an acknowledged expert in the subject matter of the dispute, such that an arbitration should (at least in theory) be conducted more quickly and efficiently than having it heard and decided by a randomly assigned and, most likely, generalist judge, who has no special expertise, knowledge or insight into the dispute, the relevant industry, or the business context.

A mediator who is an acknowledged expert in the industry or the business norms underlying the dispute could assist in helping the parties to furnish or uncover creative and innovative solutions. A mediator who is an acknowledged expert in the subject matter of the dispute could also add a helpful, perhaps more evaluative, perspective for the parties, oftentimes offering a different kind of reality testing—not a reality testing of the legal contentions, but the practicalities of implementing certain proposals.

Delineating the qualifications and/or credentials of the arbitrator or mediator can also lead to increased savings in both time and cost. The parties do not need to expend additional time and energy educating the neutral as much about the underlying industry, business norms, or legal framework applicable to the dispute, as so often is important in entertainment, arts, and sports disputes.

"Although the parties may disagree on the merits and preferred outcome of the dispute, it is conceivable that they will each recognize the benefits of agreeing, after the dispute has arisen, to select a neutral who has certain industry, business, or legal expertise."

The parties can begin thinking about this option when they first draft and enter into a dispute resolution provision. Here is an example of an arbitration clause that requires a certain level of subject matter experience:

> Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules before a single arbitrator. The arbitrator shall have at least 10 years of experience in intellectual property licensing matters. Judgment on any award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

Or, for employment matters in a particular industry, the clause might read something like this:

> If a dispute arises out of or relates to this employment contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Procedures before resorting to arbitration. The mediator shall be currently employed at either a record company or a music publisher, neither of which is affiliated with the parties to the contract. Any arbitration shall be administered by the American Arbitration Association under its Employment Arbitration Rules and Mediation Procedures before a single arbitrator, who shall also similarly be currently employed at either a record company or a music publisher, neither of which is affiliated with the parties to the contract. Judgment upon any award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

Depending upon the circumstances, some degree of expertise can matter. Why not provide for it upfront in the dispute resolution clause?

For the situation where a court has automatically referred or mandated the dispute to be resolved, in the first instance, through one or more alternative dispute resolution mechanisms, many courts maintain rosters of individuals with varying degrees of industry, business, and legal backgrounds. Parties can choose someone from those rosters with the appropriate background for that dispute. And if the practice is for the court to assign a neutral, the rules usually permit parties to opt out of that selection and choose a replacement—someone who would be a better fit.

One cautionary note is to exercise some restraint in drafting such specificity into the clause. Being too specific can inadvertently limit the pool of arbitrators or mediators from which the parties can make their selection. For example, a clause that mandates that "the mediator shall possess a Ph.D. degree in the field of experimental plasma physics and/or quantum particle acceleration" would obviously result in few available candidates because, even if the pool of such Ph.D. degree recipients is large, the likelihood that they also possess the requisite mediation skills (or can even conduct anything approaching a mediation process) is undoubtedly low. Thus, over-specifying the qualifications and/or credentials of the arbitrator or mediator may inadvertently lead to situations where very few suitable neutrals can be identified (or, in some cases, none), thereby thwarting the original intent of the parties in trying to design a more cost-effective and efficient process.

If the parties had not exercised this flexibility to insert the qualifications and/or credentials of the neutral into the dispute resolution clause before the dispute arises, all is not lost. Although the parties may disagree on the merits and preferred outcome of the dispute, it is conceivable that they will each recognize the benefits of agreeing, after the dispute has arisen, to select a neutral who has certain industry, business, or legal expertise. In matters administered by a provider such as the AAA, the CPR Institute, or Resolute Systems, the parties may be afforded an opportunity, after the case is filed, to articulate any preferences they may have for the neutral, particularly in situations where the dispute resolution clause is generic or silent as to the neutral's qualifications and/or credentials. Such an opportunity is another time when the flexibility and customization of alternative dispute resolution mechanisms can be leveraged to ensure that the neutral might have a better understanding of the industry, business norms, and/or legal framework in which the dispute has arisen

and appreciate any technical information that might be adduced at the evidentiary hearing.

The ability to provide for, and ultimately select, the neutral with the right background and experience for the dispute in question is one of the hallmarks of a voluntary, consensual alternative dispute resolution process. It distinguishes arbitration and mediation, for example, from the traditional litigation model for resolving disputes and is well worth considering, not only at the moment when dispute resolution clauses are being drafted and entered into, but also when disputes actually arise.

Theodore K. Cheng is an independent, full-time arbitrator and mediator, focusing on commercial, intellectual property, technology, entertainment, and labor/employment disputes. He has been appointed to the rosters of the American Arbitration Association, the CPR Institute, FINRA, Resolute Systems, the Silicon Valley Arbitration & Mediation Center's List of the World's Leading Technology Neutrals, and several federal and state courts. Mr. Cheng also has over 20 years of experience as an intellectual property and commercial litigator. More information is available at www.theocheng.com, and he can be reached at tcheng@theocheng.com.

SUMMARY JUDGMENTS
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Reflections on Epic Systems v. Lewis

By Professor Hiro Aragaki

Earlier this week, the U.S. Supreme Court decided three consolidated cases, styled *Epic Systems Corp. v Lewis*, Nos. 16–285, 16–300, 16–307, 584 U.S. __ (2018), that all raised the issue of whether a class arbitration wavier in various employment contracts was enforceable, given the potentially conflicting mandates of the Federal Arbitration Act (FAA) and the National Labor Relations Act (NLRA). In a 5-4 majority opinion authored by Justice Neil Gorsuch, the Court held that there was no conflict between the two federal statutes and that both were consistent with enforcing the class arbitration wavier. Justice Ginsburg, writing for the dissent, also found no conflict but believed that both statutes were consistent with the opposite conclusion—namely, that the class arbitration wavier was illegal and should not be enforced. In the alternative, the dissent reasoned that even if there were a conflict, the waiver was still unenforceable.

The basic facts of these consolidated cases were that certain employees sought to bring a putative class action against their employers even though their employment contract contained a class arbitration waiver—that is, a clause that not only requires the employee to arbitrate rather than sue in court, but that also prohibits the employee from bringing a class arbitration on behalf of similarly situated employees. The employees argued that the waiver was illegal and thus unenforceable, because NLRA section 7 had been construed by the National Labor Relations Board to give employees an absolute, non-waivable right to band together in a class when suing their employers. *See D. R. Horton*, 357 N. L. R. B. 2277 (2012). The employers countered that under the FAA section 2, class arbitration waivers must be enforced strictly according to their terms, in some cases even if those terms are otherwise illegal.

These cases therefore raised the specter of a conflict between two federal statutes: The NLRA, enacted in 1935, and the FAA, enacted in 1925. Under traditional conflict of laws principles, in the event of an unavoidable conflict between coequal statutes the later-enacted statute controls (in this case, the NLRA). In *Epic Systems*, that would translate into a victory for the employee. So the employers had to hang their hat on the argument that there was no inherent conflict between the FAA and the NLRA.

By contrast, the employees had the freedom to argue that there was no conflict between the FAA and the NLRA *and* that even if there were a conflict, the NLRA would control. These

arguments, which were respectively adopted by the majority and the dissent, can be summarized as follows:

	Interpretation of FAA	Interpretation of NLRA	Conflict?	Conclusion
Employers' Argument	The class arbitration waiver must be enforced under FAA section 2 *even assuming* NLRA section 7 makes it illegal. *See* majority op. Part II.	The class arbitration waiver is not unenforceable under NLRA section 7 (overturning *D.R. Horton*). *See* majority op. Part III.	No.	The class arbitration waiver must be enforced
Employees' Argument #1	The class arbitration waiver need not be enforced under FAA section 2 because there is a savings clause defense. *See* dissenting op. Part II.B.	The class arbitration waiver is illegal and unenforceable under NLRA section 7. *See* dissenting op. Part I.	No.	The class arbitration waiver must not be enforced.
Employees' Argument #2	Same as Employers' Argument.	Same as Employees' Argument #1.	Yes. *See* dissenting op. Part II.C.	The class arbitration waiver must not be enforced because the NLRA, as the later-enacted statute, trumps the FAA.

Now let's take a closer look at the majority opinion, which essentially tracked the employers' argument. The majority first held that the FAA required the class arbitration waiver to be enforced *even assuming* the NLRA made such waivers illegal (which the majority later held it did not). The reason was that the FAA requires arbitration clauses—and any class waiver contained within it—to be enforced unless there is some ground for invalidating them that applies to "any contract." (9 U.S.C. section 2.) The majority explained this as "a sort of 'equal-treatment' rule for arbitration contracts . . . . [that] offers no refuge for 'defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.' Under our precedent, this means the saving clause does not save defenses that target arbitration either by name or by more subtle methods . . . ." (Slip. Op. at 7.)

In doing so, the Court affirmed its longstanding view of the FAA as a sort of antidiscrimination statute, one that seeks to protect arbitration from what was viewed back in the 1920s as the common law's longstanding "hostility" toward arbitration. Most readers would probably find this antidiscrimination frame jarring, especially because it invariably inures to the benefit of businesses that impose arbitration clauses—the purported victim of discrimination—on "little guy" consumers and employees. I encountered a lot of this skepticism when I first proposed the idea that, like it or not, the Court's FAA preemption jurisprudence was in reality a jurisprudence of antidiscrimination.

Now even the liberal, dissenting justices are on-board with this idea. Indeed, the antidiscrimination lens through which the Court sees almost everything arbitration arguably originated from none other than Justice Ginsburg. In 1996, Ginsburg, writing for the majority in *Doctor's Associates v. Casarotto*, 517 U.S. 681 (1996), observed that "By enacting § 2 [of

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the Federal Arbitration Act] . . . Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'" Justice Ginsburg reiterated the antidiscrimination theme in her *Epic Systems* dissent, as did Justice Breyer in his dissent in the landmark case of *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011). The transcripts of oral arguments in key cases such as *Concepcion* suggest that Justices Kagan and Sotomayor, too, have taken on board the antidiscrimination model of the FAA.

The real question in *Epic Systems* is why FAA section 2's antidiscrimination principle requires enforcement of the class arbitration waiver. Here *Epic Systems* breaks absolutely no new ground, since the rationale is exactly the same as the (tortured) rationale the Court relied on in *Concepcion*. Assuming, as the majority does in Part II, that NLRA section 7 makes collective action waivers illegal, section 7 is no different in form from the *Discover Bank* rule held preempted in *Concepcion*. Neither singled out arbitration directly; both banned class waivers equally in arbitration and litigation and in this sense were "facially neutral." The trouble is that a rule that requires the availability of classwide relief disproportionately impacts arbitration because it "interfere[s] with a fundamental attribute of arbitration," which the Court claims to be arbitration's "traditionally individualized and informal nature." (Slip. Op. at 8.) In antidiscrimination terms the argument is that arbitration and litigation are differently situated with respect to their ability to handle classwide relief; thus, imposing that mechanism equally on both of them is a form of discrimination, just as it is to require a disabled person to use stairs. As I have argued elsewhere, this is the antidiscrimination logic of *Concepcion*, and that logic was lifted lock, stock, and barrel into *Epic Systems*.

Because of *Concepcion* and to some extent even *Southland Corp. v. Keating*, 465 U.S. 1 (1984), the employees' contrary arguments that the class arbitration waiver was unenforceable, either because illegality is a ground for the revocation of "any contract" or because NLRA section 7 applies equally to class waivers in arbitration and litigation (and is thus non-discriminatory), were doomed from the very start. The arguments are persuasive in the abstract to be sure (and I should know since I made the latter argument in my amicus brief on behalf of the Concepcions back in 2011). But it is somewhat surprising that the lawyers chose to regurgitate arguments that the Court had already soundly rejected.

The takeaway for me is that *Epic Systems* did not do a whole lot of damage, at least on the arbitration law side of things. For example, unlike *Concepcion* it did not affirmatively expand the FAA's scope, such as by identifying a whole new category of state law (i.e., generally applicable contract defenses such as unconscionability, when they are deemed to discriminate against arbitration) that is now preempted. Likewise, unlike *American Express v. Italian Colors*, 133 S. Ct. 2304 (2013), it did not narrow the vindication of rights doctrine to situations in which enforcing the arbitration clause would make it *impossible*—rather than just cost-prohibitive—for one party to vindicate its rights. Simply put, *Epic Systems* did not involve any new interpretation of the FAA at all. The only arguably "new" thing about *Epic Systems* from an FAA standpoint is that it held that there was no conflict between the FAA and the NLRA. But given the Court's tendency since the mid-1980s to find no conflict between the FAA and other federal statutes such as the ADEA and the Securities Acts, this was hardly surprising.

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The damage done by *Epic Systems* was more on the labor law and NLRA side of things. The reason I say this has to do with the issue at the core of the case, which I explained above to be about a conflict or potential conflict between two federal statutes. In order to reach its conclusion, the Court had to find both (i) that there was no conflict between the FAA and the NLRA and (ii) that at least one of them required enforcement of the class arbitration waiver. The Court managed to do the latter in Part II, by essentially reiterating the holding in *Concepcion*; it managed to the former in Part III, by interpreting the NLRA as having nothing to say about the subject at all (and by overturning *D.R. Horton*). It was the Court's self-contained construction of the NLRA, in other words, that was new and that was instrumental in the ultimate decision.

None of this is to deny that the damage done from this new interpretation of the NLRA is likely huge. Part of that damage consists, moreover, in the availability of fewer NLRA-based defenses to class arbitration and thus in a potential threat to the legitimacy of arbitration itself. But I am not an expert in labor matters and so will defer to others on the implications of *Epic Systems* in that field of application.

Hiro Aragaki is Professor of Law at Loyola Law School, Los Angeles and a Professorial Research Associate at SOAS Law School, University of London.

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Court Decisions

While Plaintiffs' Lawyers Strategize, the Supreme Court's Strong Backing Likely Will Grow Mandatory Processes

BY RUSS BLEEMER

The conflict over workplace conflict resolution is officially over. For now.

The May 21 5-4 U.S. Supreme Court decision backing employers' mandatory waivers by workers on using class processes to resolve employment disputes ends six years of uncertainty on the role of alternative dispute resolution in settling employee-company conflict.

But while *Epic Systems Corp. v. Lewis*, No. 16-285 (available at https://bit.ly/2rWzAE8) resolves the question of whether employers can require individualized arbitration, the result isn't sitting quietly.

Consumer advocates, labor leaders, and attorneys who represent employees in all types and categories of jobs against their present and former bosses weren't expected to like the decision, which some Court observers believed was a fait accompli in the employers' favor after the oral argument, which kicked off the Court's 2017-2018 term on Oct. 2.

But in addition, a broad spectrum of arbitration users beyond the plaintiffs' bar is cautious in addressing the future of the process in the wake of the majority opinion by Justice Neil Gorsuch.

The Court's backing of class waivers in employment cases under the Federal Arbitration Act authorizes businesses to require workers, and demand in employment contracts, that disputes be resolved individually, in arbitration.

This means simply that business can require employees to go solo, without joining other workers, in addressing problems in the workplace.

The arguments on behalf of employees, ranging from their own briefs, to their amicus supporters, and even to Justice Ruth Bader Ginsberg's dissent, warned either directly or implicitly that companies will rush to install the waivers and require arbitration to resolve claims.

The author edits *Alternatives*. Some material here has been updated and expanded from four May 21 posts on *Epic Systems v. Lewis* at *CPR Speaks*, a blog by this newsletter's publisher, the CPR Institute, which is available at https://blog.cpradr.org.

Reporting on the decision picked up on the point. "Tens of millions of employees currently work under contracts limiting redress to claims filed before a private arbitrator on an individualized basis," noted the *Wall Street Journal*, adding, "With the issue clarified, employers are expected to impose such limits on millions more." Jess Bravin, Supreme Court Imposes Limits on Workers in Arbitration Cases, *Wall Street Journal* (May 21, 2018)(available at https://on.wsj.com/2sOhJzE).

Academic research in anticipation of the decision also leaned toward class waiver/mandatory arbitration proliferation. Alexander J.S. Colvin, "The growing use of mandatory arbitration," Economic Policy Institute (April 6, 2018)(available at https://bit.ly/2HxgQUL)

The plaintiffs, as well as Justice Ginsberg, also warned that the result of the Court's decision will be under-enforcement—that without the ability to form classes in either litigation or arbitration, many workplace claims could not proceed and would be dropped.

May's Supreme Court decision has cleared up questions by resolving the overarching issue, with the details to be worked out in employment policies, ADR sessions and, eventually, courtrooms nationwide.

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CPR

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DESIGN AND STRUCTURE

Still, how that plays out in practice is far more in question than it was even a few months ago.

Beyond employee-side fears that claims will be cut off altogether, now that the Court's endorsement of workplace class waivers and mandatory arbitration is here, a lawyerly cautious view appears predominant. See, e.g., Lisa Burden, "Employers shouldn't rush to adopt arbitration agreements in light of 'Epic,' experts say," HRDive.com (June 4) (available at https://bit.ly/2JaS3Y6); Braden Campbell, "Class Waiver Ruling Could Backfire on Businesses: Panel," *Law360* (May 23)(available with a subscription at https://bit.ly/2JtdkfW).

That means tackling everything from contract clauses to design and structural questions about employment programs for management-side attorneys and the in-house counsel who hire them, all ultimately geared to boost programs' credibility and maximize dispute resolution effectiveness.

But for plaintiffs' lawyers, the new era means finding ways to bring claims efficiently without the ability to combine workers with small-value or tough-to-prove cases into class matters.

There's little doubt that employers will embrace the ability to continue to restrict class processes. For many, the arbitration process was a sideshow to the ability to limit class actions.

At the same time, new employment arbitration programs will be faced with the same legitimacy questions that adopters over the past 20 years have had to address, and now, with the higher-profile role of ADR in employment matters, perhaps more worker skepticism.

That's because the problems plaintiffs lawyers saw in mandatory arbitration in the *Epic Systems* consolidated cases—which overturned nationally the National Labor Relations Board case that started the controversy, *In re D.R. Horton*, 357 NLRB No. 184, 2012 WL 36274 (Jan. 3, 2012)(PDF download link at http://1.usa.gov/1IMkHn8)–have been overshadowed by the accusations against arbitration by the #MeToo campaign.

Arbitration has been under attack for the past year for its frequent use of confidentiality and nondisclosure provisions in sexual harassment and discrimination matters by the #MeToo social media movement. The ADR process has been a target in real world, high-profile matters such as former anchor Gretchen Carlson's settlement with her former employer, Fox News.

Microsoft CEO Brad Smith announced that the company would stop using mandatory employment arbitration with respect to sexual harassment claims (which was shortly followed by Uber and Lyft), and legislation barring the process has been proposed. Elena Gurevich, "Predispute Arbitration Would be Barred for Sex Harassment Claims under Legislative Proposal," CPR Speaks blog (Jan. 25)(available at http://bit.ly/2FUyv4V).

The grassroots hashtag push has made accusations about arbitration stick in a way that the plaintiffs' lawyers in the Supreme Court cases and, for advocates in the regulatory and legislative arena in their fight to preserve a rule issued by the Consumer Financial Protection Bureau banning consumer financial services arbitration, simply could not. (The CFPB rule was rescinded last fall with Vice President Mike Pence casting the deciding Senate vote to overturn.)

Accusations that companies use private arbitration to protect themselves from the embarrassment of any sex discrimination charges and incidents of harassment and even sexual violence have met with little public counterargument, although so far only a handful of companies and law firms have changed their practices in response.

The phrase "forced arbitration" has become synonymous with alternative dispute resolution—even dragging mediation into question when it was revealed that the U.S. Congress has a mandatory employment mediation policy designed to cool off parties, but which critics charged kept the problems under the Capitol's roof and offending members from exposure. The Senate responded with mandatory sexual harassment training. Id.

Epic Systems provides ADR program points that need attention and adjusting. But #MeToo has produced even more than its most important product: awareness, solidarity, and compassion for crime and tort victims. Mostly originating directly from those often-angry threads on social media—and probably even more so than the result of the Court's *Epic Systems* opinion—the movement lays out reform, including a focus on key structural issues facing arbitration users that need attention.

First, it has produced accusations that arbitration comes from programs favoring companies, staffed by industry-leaning neutrals who work the cases often, and against the individuals.

Second, confidentiality has become the #MeToo campaign's biggest issue. Many believe that arbitration itself exists only to protect the powerful abusers.

REPEAT PLAYERS

The repeat player issue is supposed to be covered by the employment arbitration processes themselves in two ways: workers are allowed to have input into the arbitrators, and quality control comes from independent processes conducted by established ADR administrators with broad neutral-selection choices.

Open-door human resources programs are designed to resolve the cases before arbitration. But it's questionable whether employees taking processes past the informal negotiation and mediation steps can handle vetting professional arbitrators.

Of course, those same programs allow for attorney assistance, and rules will explain processes for reviewing neutrals choices to both complainants and advocates.

Michelle Leetham, chief legal officer and secretary, Rodan & Fields LLC, a San Francisco-based skincare manufacturer and marketer, says, "I simply don't buy the notion that you are taking away employees' rights and they are not getting a fair hearing."

"Unless the parties are informed and voluntarily choose otherwise, neutrality in ADR is sacrosanct," notes Noah Hanft, president and chief executive officer of the International Institute for Conflict Prevention and Resolution, best known as the CPR Institute, "and the only acceptable level of design is an ADR program that will reach unbiased compromises and/or decisions that companies will implement, and employees will embrace immediately."

Adds Hanft, "Those neutrals can be found at established neutral organizations, such as CPR, which have such safeguards in place."

[The CPR Institute, which, among other things, maintains lists of neutrals to resolve commercial disputes and provides ADR case administration services, produces this newsletter with John Wiley; Hanft is publisher but did not participate in the writing or editing of this article.]

Leetham, who also worked extensively on development and design of a multistep ADR program at engineering and construction giant Bechtel Inc., says she believes that employment

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arbitration works for individuals. "It's not necessarily the case that a jury will be more favorable to an employee, and the arbitrator is not," she says.

Leetham adds that in the programs in which she has worked, when employees proceed without attorneys, the company also will not send lawyers into the ADR process to level out the processes, including selection.

EMBARRASSMENT OVER REMEDIES?

Confidentiality is more complicated.

Critics have decried the closed-door nature of cases, and say that the result is an emphasis that insulates corporate and personal embarrassment rather than remedies for victims.

But it's not that clear cut. Complainants often want to be free from the glare of a public court process to protect their own privacy and, often, career prospects.

Confidentiality may harm the efforts of any complainant depending on the situation, but the biggest concern is for so-called downstream victims—those who have complaints about the same harasser but don't about know about the repeated conduct that has been adjudicated in a private arbitration.

At the same time, there is a misconception. Employment arbitration rules, depending on the source, may default to being confidential. But confidentiality usually isn't mandatory.

Parties generally may agree to remove confidentiality, and reject nondisclosure agreements. In fact, in the wake of the public revelation of bad conduct, legislatures are considering moves to bar the use of nondisclosures in sexual harassment cases.

"Arbitrators routinely misunderstand the providers' rules and issue protective orders regarding confidentiality, all the time believing the rules require it," say Cliff Palefsky, name partner in San Francisco McGuinn Hill & Palefsky, which represents employees. "A blog post [reporting the result] is a lot different than allowing the media in to see the hearing and testimony."

[For an examination of this issue, including a review of legislative proposals, see "#MeToo, Confidentiality, and the Conflict Resolution Field: A Discussion on the Impact and the Future of the Practice" on Page 99 of this issue.]

EPIC REWRITES

Though *Epic Systems*' backing for mandatory arbitration as an accompaniment to class waivers doesn't raise the confidentiality and neutral selection issues as starkly as #MeToo, the Court's opinion will require a review of practice points that will affect those issues, principally surrounding the contracts that invoke arbitration.

In fact, #MeToo likely will provide the first factor for contract revision. Employers need to consider carving out from employment arbitration charges brought on sexual harassment and discrimination claims—though, to be sure, *Epic Systems* permits requiring arbitration across the board.

In addition to the negative publicity that now goes with mandatory arbitration for such cases, the mere presence of the requirement for those hot-charged matters could affect employee buy-in and participation for other workplace disputes.

The carve-outs, in turn, raise questions as to why companies don't drop employment arbitration altogether. Microsoft Corp., Uber, and Lyft have all waived application of their employment arbitration agreements to harassment claims. See Anna M. Hershenberg, Uber Eliminates Mandatory Arbitration of, and NDAs for, Sexual Assault and Harassment Claims, *CPR Speaks* blog (May 16)(available at https://bit.ly/2J68nFt).

At least three major law firms have dropped employment arbitration entirely. Id. Some management-side attorneys worry about a slippery slope.

General opt-outs are less problematic contract provisions. Employees, in-house counsel say, often don't use them. And the opt-outs can be restricted to the arbitration process itself, while still requiring dispute resolution through the class waiver and the company's ADR program.

Finally, some class waivers likely have been written in the alternative—that is, if the waiver was found ineffective by a court, then alternative resolution paths would be used.

That alternative route was justified; at least two federal circuit courts outlawed class waivers by following the National Labor Relations Board in the *In re D.R. Horton* case, both of which were part of the consolidated *Epic Systems* decision overturning that view.

In other words, a new precision is needed for arbitration provisions in employment agreements, because the setting has changed. Any new ambiguities will be challenged.

THREE MORE CASES

And even before *Epic Systems* was decided, those challenges kept coming, and the stream of arbitration cases to the Supreme Court continued to flow. Three cases have been accepted for the new term. One case is a broader application issue, concerning whether FAA Sec. 1 exempts agreements with independent contractors from the statute's coverage. *New Prime v. Oliveira*, No. 17-340.

But the case also is expected to revisit arbitrability determinations—who decides how the case is adjudicated, the court or arbitrator? For more on *New Prime*, see Ginsey Varghese, Supreme Court Will Decide Independent Contractor Arbitration Case, 36 *Alternatives* 56 (April 2018)(available at https://bit.ly/2J619FP).

On April 30, the Court agreed to drill down once again on class arbitration, and decide whether a court determination allowing the process using state law can stand. *Lamps Plus Inc. v Varela*, No. 17-988 (see article on page 98 of this issue.)

And in late June, as its current year ended, the Court took a third case for the 2018–2019

The End

The dispute: Will the Supreme Court's reasoning in consumer law on allowing mandatory predispute arbitration teamed with class waivers survive the nation's labor laws?

The final answer: Yes.

Is it really final? Some people are wary of legislation that is popping up around the country and in Washington. It's more #NotMe than *Epic Systems*. For now, the law is clear: Employers may prevent employees from filing class action cases in workplace disputes.

term, *Henry Schein Inc. v. Archer and White Sales Inc.,* No. 17-1272, on whether the FAA permits courts "to decline to enforce an agreement delegating questions of arbitrability to an arbitrator if the court concludes the claim of arbitrability is 'wholly groundless.'"

Down the road, says Roger Jacobs, a mediator and arbitrator in Roseland, N.J., and New York (and an *Alternatives* editorial board member), arbitration in joint employment issues could follow independent contractors to courts—those situations where franchisees and franchisers, or joint venture partners, both affect employees by their rules even if the complainant was hired by and works for the franchisee or one of the partners exclusively, and not the corporate parent that is the source of the work setting. Those situations call for precise drafting, and also may need revision post-*Epic Systems*.

Still in the pipeline are the so-called PAGA cases—those where employees subject to contracts with mandatory arbitration clauses file suit under a private attorney general's act as a class.

Because employees in those suits are substituting for the state itself, courts have found that the class waiver doesn't apply. The U.S. Supreme Court late last year declined to hear an appeal in a California case refusing to enforce the mandatory arbitration clause in the face of a PAGA challenge, *Betancourt v. Prudential Overall Supply*, No. E064326 (Cal. App. 4d. March 17, 2017) (available at https://bit.ly/2Mcx19y).

Bills to enact laws with a similar effect to California's have been introduced in Connecticut, Illinois, New York, and Vermont, with plans for an Oregon introduction. Kriston Capps, The Supreme Court Just Made It Even Harder to Sue Your Employer, *Citylab* (May 1, updated May 21)(available at https://bit.ly/2IzHb1S).

MORE CLASSES

In addition to PAGA, plaintiffs' attorneys have been working on alternatives to class actions that could fall under a category of "be careful what you wish" for their management-side opponents.

A class of employees decertified by a California federal court bombarded national health club 24-Hour Fitness with hundreds of individual arbitrations earlier in the decade, forcing the company to settle all at once.

The decertification—over the claims' content and unrelated to the class waiver issue—pushed the company to be more aggressive about defending its arbitration clauses, though the Supreme Court didn't accept its case as part of the consolidated *Epic Systems* cases decided in May. Jessica Goodheart, "Why 24 Hour Fitness Is Going to the Mat against Its Own Employees," *Fast Company* (March 13)(available at http://bit.ly/2pkDPIm).

Ultimately, costs will bring companies to end the litigation or multiple arbitrations regardless of whether an official class is established. "At some point it becomes inefficient to handle" multiple repeat cases, says Roger Jacobs, adding, "Everybody makes economic decisions, and that's probably more controlling than the court decisions in a lot of these cases."

Some arbitration veterans say that an increased use of the process as a result of mandatory clauses could invigorate the demand for appellate arbitration processes, which until now usually have been a tool for wealthy parties in big ticket commercial cases.

NEW DAY

Lawyers who represent management are hailing the new day of employment arbitration under the May 21 *Epic Systems* decision, removing the class actions they and their clients loathe.

Evan M. Tager, a Washington, D.C., Mayer Brown partner who has argued many arbitration cases on employers' behalf, says, "The Court reaffirmed in the strongest possible terms that conditioning the enforcement of arbitration provisions on the availability of class-like procedures frustrates the purposes of arbitration and is not permissible absent a clear congressional command."

He also praises the Court for an expansive opinion that may preclude future challenges in two areas. Tager explains,

> In holding that Section 7 of the [National Labor Relations Act] does not override the FAA's command that arbitration agreements be enforced according to their terms, the Court could have begun and ended with the observation that Section 7 does not refer to either arbitration or class actions. But it went further and held that the term 'other concerted activities' in Section 7 does not cover class-wide procedures and that the [National Labor Relations Board] was not entitled to *Chevron* deference in concluding otherwise. That is a fairly momentous holding because it suggests that the Board could not prohibit employers from barring class actions outside the arbitration context (although a state legislature still could).

NLRA Sec. 7 states that "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in *other concerted activities* for the purpose of collective bargaining or other mutual aid or protection. …" [*Alternatives*' emphasis on the language to which Tager referred.]

On Tager's second point, the court's newest member, Justice Gorsuch, who authored the majority opinion, is a longtime critic of *Chevron U. S. A. Inc. v. Natural Resources Defense Council Inc.*, 467 U. S. 837 (1984).

Chevron provides Court deference to agency determinations made in the areas of the agency's expertise. But in *Epic Systems*, Gorsuch writes that the NLRB's decision that launched the case, *In re Horton*, didn't meet the *Chevron* deference standards.

"[T]he Court's discussion of *Chevron* looks like the beginning of an effort to chip away at that doctrine," says Tager, who worked on Mayer Brown's amicus brief on behalf of the U.S. Chamber of Commerce in the consolidated cases. He adds, "The Court reasoned that *Chevron* has no role to play except when traditional canons of statutory interpretation are incapable of resolving a statutory ambiguity. That is very rarely the case."

Epic Systems involves arbitration contract clauses that kick in due to class waivers which prohibit employees from joining class processes—litigation or arbitration—in favor of mandatory, predispute, individualized arbitration to resolve disputes with their employers.

The questions in the cases surrounded challenges involving the workers' pay; two of the cases involved white collar employees.

The May decision is actually on three cases—*NLRB v. Murphy Oil* (No. 16-307), from the Fifth U.S. Circuit Court of Appeals; *Ernst & Young v. Morris* (No. 16-300), from the Ninth Circuit, and the Seventh Circuit's *Epic Systems*—that the Court consolidated into its 2017-2018 term's kickoff argument on Oct. 2, with four attorneys arguing the case on behalf of the parties in all three cases. The long-

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contested issue began with the release in 2012 of the *In re Horton* opinion.

That NLRB administrative decision, which found that class waivers illegally violated the National Labor Relations Act's Sec. 7 allowing employees to take concerted action to confront their employer, was overturned repeatedly by the Fifth U.S. Circuit Court of Appeals in numerous cases.

The NLRB ruled that class waivers were eliminated by the FAA's Sec. 2 savings clause, which enforces arbitration agreements "save upon such grounds as exist at law or in equity for the revocation of any contract."

The Fifth Circuit rejected that view on the ground it infringed on the Federal Arbitration Act, a position strongly echoed in the Gorsuch majority *Epic Systems* opinion.

The class waivers in question apply from collectively bargained rank-and file to executive suites, but not management. While unions can agree to mandatory predispute arbitration on behalf of their members, the cases involved white-collar employees and nonunion workers with little bargaining power.

The Court had definitively permitted mandatory arbitration contract clauses accompanied by class waivers for products and services contracts where consumers have virtually no bargaining power. See *AT&T Mobility LLC v. Concepcion*, 563 U. S. 333 (2011)(available at https://bit.ly/2KJc8RE)(Evan Tager and Mayer Brown represented AT&T Mobility).

Epic Systems now settles how arbitration is used in workplace matters.

KEY HOLDINGS

Mark Kantor, a Washington, D.C., neutral who closely follows the Court's arbitration work, notes that the key holdings were (a) the rejection of the FAA Sec. 2 Savings Clause application because it only recognizes defenses that apply to any contract, therefore demanding equal treatment for arbitration contracts; (b) the denial of the NLRB's ability to make class waivers illegal as a protected "concerted activit[y]," and (c) the rejection of *Chevron* deference application.

The implications of the latter two points, according to Kantor, who is a Georgetown University Law Center adjunct professor, will extend beyond labor law. "Those principles," according to Kantor, "will undermine attempts by many U.S. federal agencies to interpret their general regulatory authority under their own organic statutes to permit them to limit or prohibit mandatory arbitration agreements."

The Trump administration already has reversed Obama-era prohibitions on mandatory predispute arbitration, including nursing home contracts at the Centers for Medicare and Medicaid.

Kantor points out that a future administration seeking to restore such rules won't be able to rely on National Labor Relations Act-style support, but instead will need to "seek legislative authority" that is a direct authorization.

That means future moves to restrict class waivers and mandatory arbitration will need action urged by Associate Justice Ruth Bader Ginsburg in her *Epic Systems* dissent, where she wrote, "Congressional correction of the Court's elevation of the FAA over workers' rights to act in concert is urgently in order."

Mark Kantor also noted that the NLRB's ruling might have disappeared on its own with Trump administration appointees now installed as commissioners ready to reverse the Obama-era *In re D.R. Horton* administrative decision.

In his majority opinion, Gorsuch stated, "The respective merits of class actions and private arbitration as means of enforcing the law are questions constitutionally entrusted not to the courts to decide but to the policymakers in the political branches where those questions remain hotly contested."

CHANGED CONCEPT

Along with the new future it provides, the Supreme Court decision also demands a reassessment of arbitration history.

The case "is really about how dramatic the changes in the arbitration process have been since the F.A.A. was enacted in 1925," explains Chappaqua, N.Y., arbitrator Paul Bennett Marrow. He continues:

> In their respective opinions, Justices Gorsuch (majority) and Ginsburg (dissent) both agree that until Congress says otherwise, the draftsman is free to include in an arbitration clause a restriction against class actions. Back in 1925 the concept of a class action as we know it today had yet to be born. And no one seriously believed that employment matters were the proper subject for an arbitration.

Marrow warns, however, that Justice Gorsuch's "declaration that a literal interpretation of the language in the FAA 'honors' Congress's policy judgment as expressed in 1925" may point the way to renewed opposition. The statement, notes Marrow, "is likely to serve as the proverbial straw needed to break the camel's back."

He states that *Epic Systems* supporters

> need to be on the lookout for a re-engineered/reinvigorated effort to force Congress to take a position, one way or the other. To date Congress has tried to pass the buck to administrative agencies and *Epic Systems* is the death knell to that approach. Given the refusal of organizations such as the American Arbitration Association and JAMS to administer an arbitration with a restriction against class actions, *Epic Systems* and all the jurisprudence that proceeds it, is likely to grease the skids for both an increase in the number of ad hoc proceedings and a push to legislative reform.

BROKEN BEDROCK?

Those working on the consolidated cases from the plaintiffs' side, while perhaps not surprised, are still outraged at the loss of the ability of employees to team up in court actions, which they saw as a bedrock part of the National Labor Relations Act's concerted activities.

"The very first line of the opinion highlights the dishonesty of it all," says Cliff Palefsky, who worked on an amicus brief filed in the consolidated cases on behalf of 10 labor unions and the National Employment Lawyers Association, and who has been active on the employees' side in the cases for years. "[It says] 'Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration?'"

Palefsky and employee-side attorneys maintain that workers are not bargaining when mandatory arbitration is a condition of employment. Management-side attorneys speak to the *Epic Systems* decision as one that allows all parties to choose.

Palefsky isn't buying it. The Court "took a statute that Congress expressly said doesn't apply to employment and used it to preempt the nation's most significant labor and civil rights laws," he says, concluding, "It was an intellectually and legally indefensible political assault on worker's rights."

FEARING MORE LEGISLATION

People who work in commercial contract arbitration exclusively, with no attachment to employment or consumer processes, frequently lean to the plaintiffs' view.

They often cringe when mandatory arbitration and class waivers arise in seminars and events. They say that they fear that as political winds shift, there will be blowback, and the restrictions will affect commercial processes that they and their business clients have counted on for years to deal with complicated disputes.

Nowhere does that view arise more often than with overseas practitioners who work on cases in the United States. Robert A. de By, a partner and chair of the international arbitration practice at Connon Wood who works out of the firm's London and San Diego offices, says that Congress could get involved and warns that the ripple effects could be extreme.

"Our arbitration world suffers badly by not openly confronting such societal problems caused by (labor) arbitration," notes de By in an email, adding,

> The employers' win in *Epic Systems* only makes that worse. For, ultimately, it is Congress that determines the laws regarding arbitration, not Justice Gorsuch, and the bill (pun intended) will soon become due.

The "very important" international commercial arbitration field, he adds, "will suffer if arbitration is diminished or harmed by restrictive legislation because some people rather than acknowledging societal problems in the labor arbitration sphere and deal with them, defend the indefensible."

De By concludes that "the remedy that Congress may impose as a result may be far worse overall for arbitration, and sadly may hit commercial arbitration as well."

Plaintiffs' lawyers have pointed out that arbitration has its costs to employers, too, and, if employees proceed with small claims on their own in arbitration, the costs to defend could be huge. See the *Fast Company* and *Law360* articles above. See also, Marcia Coyle, "Plaintiffs Plot 'Way Around' Supreme Court's Ruling against Worker Class Actions," *Nat'l Law J.* (May 25)(available at https://bit.ly/2sSINh7) (discussing the use of "non-mutual offensive collateral estoppel" in multiple arbitrations).

The *Law360* article discusses an American Arbitration Association seminar just 48 hours after the decision that saw lawyers on both sides agree that stacking up arbitrations was possible, and the costs could bring employers to faster, comprehensive settlements.

Emails to the AAA and JAMS requesting general comment on ADR practice post-*Epic Systems* weren't responded to ahead of *Alternatives*' deadline.

REFINING PRACTICES

Whether more workplace conflict is diverted to resolution methods via human-resources departments' open-door policies or mediation remains to be seen.

But a growth in the presence of mandatory arbitration ensures that there will be more court cases that dive into finer points involving use of the process—though the extent of arbitration use is now clearer, there will always be questions about ADR limits and parameters. See the discussion above on the two new Supreme Court cases.

Management-side attorneys have advised tightening up drafting points discussed above, and some appear to have been preparing for the Court's *Epic Systems* moment for years.

Christopher Murray, an Indianapolis shareholder in Ogletree Deakins—the firm that brought *In re D.R. Horton* to the Fifth Circuit where it was overturned, leading to the *Epic Systems* decision (the firm also submitted an amicus brief on behalf of trade associations in the consolidated cases)—says, "This is a good decision for parties interested in any form of alternative dispute resolution because it confirms those parties are best situated to agree on the procedures to be used to resolve their disputes quickly, effectively, and fairly, and courts are generally not permitted under the FAA to second-guess those procedures."

The decision provided an opportunity clearly long in planning for Murray—who authored May's *Alternatives* cover story, "No Longer Silent: How Accurate Are Recent Criticisms of Employment Arbitration?" 38 *Alternatives* 65 (May 2018) (available at https://bit.ly/2rYmned), and who co-chairs Ogletree's Arbitration and ADR Practice Group—and his firm. Ogletree announced a new clause drafting product just a few hours after the decision was announced on May 21.

The firm's DIY Arbitration Agreements is "an automated tool that quickly prepares custom arbitration agreements with class action waivers based on employers' requirements and preferences," promising to deliver contract clauses "in under five minutes." The tool is available at https://bit.ly/2JLTtYS.

A COMPELLING CASE

The principal tool as a result of *Epic Systems*, of course, is the case itself, as an enforcement vehicle to compel arbitration.

At press time last month, the case produced more than a dozen commercial database citations that either grant requests to compel arbitration, or make that request of courts—many in class cases. The parties seeking arbitration, and getting it, include well-known companies like United HealthGroup Inc. and Uber Technologies Inc.

* * *

Ultimately, says Rodan & Fields' Michelle Leetham, good employment dispute resolution programs will avoid making barriers to entry high, attempting to shift costs, or taking away substantive rights—the same overreaching that ran programs aground before *Epic Systems*.

"Transparency is really important," she says, adding, "A level playing field is really important."

Leetham says her company is ready for the post-*Epic Systems* era. But she says that its program won't need tweaking, explaining that the early program steps have resolved all of its matters so far, and the company and its employees have not needed to go to the arbitration step.

"The bottom line is that ADR could resolve situations in much more creative ways than court," she says.

* * *

CPR Institute summer intern Jill Russell, a Tulane University Law School student, contributed research to this article.

Employment Due Process Protocol

The following protocol is offered by the undersigned individuals, members of the Task Force on Alternative Dispute Resolution in Employment, as a means of providing due process in the resolution by mediation and binding arbitration of employment disputes involving statutory rights. The signatories were designated by their respective organizations, but the protocol reflects their personal views and should not be construed as representing the policy of the designating organizations.

Genesis

This Task Force was created by individuals from diverse organizations involved in labor and employment law to examine questions of due process arising out of the use of mediation and arbitration for resolving employment disputes. In this protocol we confine ourselves to statutory disputes.

The members of the Task Force felt that mediation and arbitration of statutory disputes conducted under proper due process safeguards should be encouraged in order to provide expeditious, accessible, inexpensive and fair private enforcement of statutory employment disputes for the 100,000,000 members of the workforce who might not otherwise have ready, effective access to administrative or judicial relief. They also hope that such a system will serve to reduce the delays which now arise out of the huge backlog of cases pending before administrative agencies and courts and that it will help forestall an even greater number of such cases.

A. Pre or Post Dispute Arbitration

The Task Force recognizes the dilemma inherent in the timing of an agreement to mediate and/or arbitrate statutory disputes. It did not achieve consensus on this difficult issue. The views in this spectrum are set forth randomly, as follows:

Employers should be able to create mediation and/or arbitration systems to resolve statutory claims, but any agreement to mediate and/or arbitrate disputes should be informed, voluntary, and not a condition of initial or continued employment.

Employers should have the right to insist on an agreement to mediate and/or arbitrate statutory disputes as a condition of initial or continued employment.

Postponing such an agreement until a dispute actually arises, when there will likely exist a stronger re-disposition to litigate, will result in very few agreements to mediate and/or arbitrate, thus negating the likelihood of effectively utilizing alternative dispute resolution and overcoming the problems of administrative and judicial delays which now plague the system.

Employees should not be permitted to waive their right to judicial relief of statutory claims arising out of the employment relationship for any reason.

Employers should be able to create mediation and/or arbitration systems to resolve statutory claims, but the decision to mediate and/or arbitrate individual cases should not be made until after the dispute arises.

The Task Force takes no position on the timing of agreements to mediate and/or arbitrate statutory employment disputes, though it agrees that such agreements be knowingly made. The focus of this protocol is on standards of exemplary due process.

B. Right of Representation

1. Choice of Representative

Employees considering the use of or, in fact, utilizing mediation and/or arbitration procedures should have the right to be represented by a spokesperson of their own choosing. The mediation and arbitration procedure should so specify and should include reference to institutions which might offer assistance, such as bar associations, legal service associations, civil rights organizations, trade unions, etc.

2. Fees for Representation

The amount and method of payment for representation should be determined between the claimant and the representative. We recommend, however, a number of existing systems which provide employer reimbursement of at least a portion of the employee's attorney fees, especially for lower paid employees. The arbitrator should have the authority to provide for fee reimbursement, in whole or in part, as part of the remedy in accordance with applicable law or in the interests of justice.

3. Access to Information

One of the advantages of arbitration is that there is usually less time and money spent in pre-trial discovery. Adequate but limited pre-trial discovery is to be encouraged and employees should have access to all information reasonably relevant to mediation and/or arbitration of their claims. The employees' representative should also have reasonable pre-hearing and hearing access to all such information and documentation.

Necessary pre-hearing depositions consistent with the expedited nature of arbitration should be available. We also recommend that prior to selection of an arbitrator, each side should be provided with the names, addresses and phone numbers of the representatives of the parties in that arbitrator's six most recent cases to aid them in selection.

C. Mediator and Arbitrator Qualification

1. Roster Membership

Mediators and arbitrators selected for such cases should have skill in the conduct of hearings, knowledge of the statutory issues at stake in the dispute, and familiarity with the workplace and employment environment. The roster of available

mediators and arbitrators should be established on a non-discriminatory basis, diverse by gender, ethnicity, background, experience, etc. to satisfy the parties that their interest and objectives will be respected and fully considered.

Our recommendation is for selection of impartial arbitrators and mediators. We recognize the right of employers and employees to jointly select as mediator and/or arbitrator one in whom both parties have requisite trust, even though not possessing the qualifications here recommended, as most promising to bring finality and to withstand judicial scrutiny. The existing cadre of labor and employment mediators and arbitrators, some lawyers, some not, although skilled in conducting hearings and familiar with the employment milieu is unlikely, without special training, to consistently possess knowledge of the statutory environment in which these disputes arise and of the characteristics of the non-union workplace.

There is a manifest need for mediators and arbitrators with expertise in statutory requirements in the employment field who may, without special training, lack experience in the employment area and in the conduct of arbitration hearings and mediation sessions. Reexamination of rostering eligibility by designating agencies, such as the American Arbitration Association®, may permit the expedited inclusion in the pool of this most valuable source of expertise.

The roster of arbitrators and mediators should contain representatives with all such skills in order to meet the diverse needs of this caseload.

Regardless of their prior experience, mediators and arbitrators on the roster must be independent of bias toward either party. They should reject cases if they believe the procedure lacks requisite due process.

2. Training

The creation of a roster containing the foregoing qualifications dictates the development of a training program to educate existing and potential labor and employment mediators and arbitrators as to the statutes, including substantive, procedural and remedial issues to be confronted and to train experts in the statutes as to employer procedures governing the employment relationship as well as due process and fairness in the conduct and control of arbitration hearings and mediation sessions.

Training in the statutory issues should be provided by the government agencies, bar associations, academic institutions, etc., administered perhaps by the designating agency, such as the AAA®, at various locations throughout the country. Such training should be updated periodically and be required of all mediators and arbitrators. Training in the conduct of mediation and arbitration could be provided by a mentoring program with experienced panelists.

Successful completion of such training would be reflected in the resume or panel cards of the arbitrators supplied to the parties for their selection process.

3. Panel Selection

Upon request of the parties, the designating agency should utilize a list procedure such as that of the AAA or select a panel composed of an odd number of mediators and arbitrators from its roster or pool. The panel cards for such individuals should be submitted to the parties for their perusal prior to alternate striking of the names on the list, resulting in the designation of the remaining mediator and/or arbitrator.

The selection process could empower the designating agency to appoint a mediator and/or arbitrator if the striking procedure is unacceptable or unsuccessful. As noted above, subject to the consent of the parties, the designating agency should provide the names of the parties and their representatives in recent cases decided by the listed arbitrators.

4. Conflicts of Interest

The mediator and arbitrator for a case has a duty to disclose any relationship which might reasonably constitute or be perceived as a conflict of interest. The designated mediator and/or arbitrator should be required to sign an oath provided by the designating agency, if any, affirming the absence of such present or preexisting ties.

5. Authority of the Arbitrator

The arbitrator should be bound by applicable agreements, statutes, regulations and rules of procedure of the designating agency, including the authority to determine the time and place of the hearing, permit reasonable discovery, issue subpoenas, decide arbitrability issues, preserve order and privacy in the hearings, rule on evidentiary matters, determine the close of the hearing and procedures for post-hearing submissions, and issue an award resolving the submitted dispute.

The arbitrator should be empowered to award whatever relief would be available in court under the law. The arbitrator should issue an opinion and award setting forth a summary of the issues, including the type(s) of dispute(s), the damages and/or other relief requested and awarded, a statement of any other issues resolved, and a statement regarding the disposition of any statutory claim(s).

6. Compensation of the Mediator and Arbitrator

Impartiality is best assured by the parties sharing the fees and expenses of the mediator and arbitrator. In cases where the economic condition of a party does not permit equal sharing, the parties should make mutually acceptable arrangements to achieve that goal if at all possible. In the absence of such agreement, the arbitrator should determine allocation of fees. The designating agency, by negotiating the parties' share of costs and collecting such fees, might be able to reduce the bias potential of disparate contributions by forwarding payment to the mediator and/or arbitrator without disclosing the parties' share therein.

D. Scope of Review

The arbitrator's award should be final and binding and the scope of review should be limited.

Dated: May 9, 1995

Signatories

Christopher A. Barreca, *Co-Chair*
Partner
Paul, Hastings, Janofsky & Walker
Rep., Council of Labor & Employment Section
American Bar Association

Max Zimny, *Co-Chair*
General Counsel, International
Ladies' Garment Workers' Union Association
Rep., Council of Labor & Employment Section
American Bar Association

Arnold Zack, Co-Chair
President, Nat. Academy of Arbitrators

Carl E. VerBeek
Management Co-Chair Union Co-Chair
Partner
Varnum Riddering Schmidt & Howlett
Arbitration Committee of Labor & Employment Section
ABA

Robert D. Manning
Angoff, Goldman, Manning, Pyle, Wanger & Hiatt, P.C.
Union Co-Chair
Arbitration Committee of Labor & Employment Section
ABA

Charles F. Ipavec, Arbitrator
Neutral Co-Chair
Arbitration Committee of Labor & Employment Section,
ABA

George H. Friedman
Senior Vice President
American Arbitration Association

Michael F. Hoellering
General Counsel
American Arbitration Association

W. Bruce Newman
Rep., Society of Professionals in Dispute Resolution

Wilma Liebman
Special Assistant to the Director Federal Mediation
& Conciliation

Joseph Garrison, President
National Employment Lawyers Association

Lewis Maltby
Director, Workplace Rights Project
American Civil Liberties Union

Ellenoff Grossman & Schole LLP

www.egsllp.com
Amanda M. Fugazy, Esq.
Mohammad B. Shihabi, Esq.

Company Dispute Resolution Program Agreement

The Company (the "Company") has a Dispute Resolution Program. The Company's Dispute Resolution Program provides that all disputes, of whatever nature, concerning (1) your employment with or termination from the Company, or (2) the interpretation or application of this Employment Dispute Resolution Program, this Agreement, or any Agreement you may have with the Company shall be resolved by final and binding arbitration before one arbitrator designated by the American Arbitration Association ("AAA"), pursuant to the then prevailing rules of the AAA for the resolution of employment disputes, in the New York County, New York, whose decision shall be final and binding and subject to confirmation in a court of competent jurisdiction.

All disputes arising under this Dispute Resolution Program shall be adjudicated pursuant to New York law, without regards to its conflict of laws principals. Notwithstanding the foregoing, any disputes regarding the validity, coverage or enforceability of this Dispute Resolution Agreement shall be governed by the Federal Arbitration Act. This shall include, but not be limited to disputes concerning workplace discrimination, wage and/or overtime claims and/or all other statutory claims.

Additionally, pursuant to this Dispute Resolution Program, you may not participate in a representative capacity or as a member of any class of claims pertaining to any claim subject to the arbitration provision in this Dispute Resolution Program. There is no right or authority for any claims subject to this arbitration policy to be arbitrated on a class or collective action basis or on any basis involving claims brought in a purported representative capacity on behalf of any other person or group of people similarly situated. Such claims are prohibited. Furthermore, claims brought by or against either you or the Company may not be joined or consolidated in the arbitration with claims brought by or against any other person or entity unless otherwise agreed to in writing by all parties involved.

We endeavor to provide you some additional important information regarding the Dispute Resolution Program below.

This sample is published solely for the informational interest of friends and clients of Ellenoff Grossman & Schole LLP and should in no way be relied upon or construed as legal advice.

Commented [A1]: Arbitration Agreements should specify the forum, rules and procedures that govern the process. Arbitral institutions, such as the American Arbitration Association ("AAA"), specify their own rules that give arbitrators significant ability to determine, for example, the enforceability of the agreement, the applicable rules and procedures, and the arbitrator's own jurisdiction.

Specifying the arbitral forum is especially important to ensure enforceability of the arbitration agreement. As an example, an Appellate Court in New Jersey recently held that an arbitration agreement that failed to identify any forum or process for conducting the arbitration was invalid due to lack of mutual assent. *See Flanzman v. Jenny Craig, Inc.*, No. A-2580-17T1, 2018 WL 5914420 (N.J. Super. Ct. App. Div. Nov. 13, 2018).

Commented [A2]: The Federal Arbitration Act ("FAA") governs arbitration clauses, including those featured in either a stand-alone agreement or in an employment contract or other employment agreement.

The FAA preempts state rules that discriminate against arbitration. *See Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 197 L. Ed. 2d 806 (2017).

The FAA also nullifies New York State's prohibition against mandatory arbitration of sexual harassment claims pursuant to N.Y. C.P.L.R. § 7515, which states that the New York statute does not apply when it's requirements are "inconsistent with federal law."

Commented [A3]: In *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 200 L. Ed. 2d 889 (2018), the Supreme Court made it clear that employers may include class-action waivers in their arbitration agreements with employees.

Other Important Information:

Establishment of the Dispute Resolution Program does not affect an employee's right to pursue, in accordance with applicable law, any administrative agency process that may be available to the employee.

All of the Company's personnel are specifically prohibited from taking any retaliatory action against an employee who has sought to use the Dispute Resolution Program. Violations of this rule will be treated with the utmost seriousness. Any employee who believes that he or she has been retaliated against for using the Dispute Resolution Program should immediately notify his or her direct supervisor. If the direct supervisor is unavailable or the employee believes it would be inappropriate to contact that person, the employee should contact the Owner. Any and all members of the Company management team will handle the matter in a timely and confidential manner.

No claims may be initiated or maintained on a class, collective or representative action basis under the Dispute Resolution Program. Any claim purporting to be brought as a class action, collective action or representative action will be decided under the Dispute Resolution Program as an individual claim.

Adoption of the Dispute Resolution Program and an employee's use of the Dispute Resolution Program will not affect an employee's status as an at-will employee, and will not limit the Company's ability to take disciplinary or other personnel action against the employee.

If the employee believes he or she has a claim as a result of using the Dispute Resolution Program, the employee may institute proceedings under the Dispute Resolution Program, but may not sue in court.

If any provision of the Dispute Resolution Program is for any reason found by any court to be invalid or unenforceable, such judgment shall not affect, impair, or invalidate the remaining provisions of the Dispute Resolution Program, but shall be confined and limited to the provision of the Dispute Resolution Program directly involved in the controversy in which such judgment was rendered.

What Arbitration Means

Arbitration is a final and legally binding process in which a dispute is presented to a neutral third party, the arbitrator, for a final and binding decision. The arbitrator renders a decision after considering the evidence and arguments presented by both parties. Arbitration is less formal than a court trial and generally is quicker. It is, however, an orderly proceeding, governed by rules of procedure and legal standards of conduct.

This sample is published solely for the informational interest of friends and clients of Ellenoff Grossman & Schole LLP and should in no way be relied upon or construed as legal advice.

Commented [A4]: Employers should be wary of including provisions that effectively waive an employee's right to file discrimination charges with federal, state or local administrative agencies such as the Equal Employment Opportunity Commission ("EEOC").

To avoid any doubt, provisions such as this one makes clear that the arbitration agreement does not prevent the employee from filing charges with any federal, state or local administrative agency.

Commented [A5]: Explicitly state that the arbitration agreement does not affect the at-will employment status of your employees.

Commented [A6]: Explaining the arbitration process to the employee supports enforcement of the arbitration agreement.

Making a Request for Arbitration

To make a request for arbitration under the Dispute Resolution Program, an employee must submit a written request to the attention of the Owner and the AAA. The party requesting arbitration must pay the AAA Initial Case Management Fee of three hundred dollars and no cents ($300.00), or other amount as set by AAA, made payable to AAA. Employees may obtain a copy of the request form from your direct supervisor and/or the Owner.

Commented [A7]: The AAA's current, non-refundable filing fee is capped at is $300.

Time Period for Making a Request

A request for arbitration under the Dispute Resolution Program must be filed within six (6) months of the time that the complained-of action or actions took place, or during such longer period as is allowed by any statute of limitations applicable to the claim. If an employee or the Company does not file his/her or its request for arbitration within the required period, he/she or it will forfeit any further right to make use of the Dispute Resolution Program and will be foreclosed from bringing an action in any court with respect to the claim.

* * *

I understand and agree that any dispute involving my employment with or termination from the Company or the interpretation or application of this Agreement or any other agreement I may have with the Company shall be resolved by final and binding arbitration before one arbitrator designated by the American Arbitration Association, pursuant to the then prevailing rules of the AAA for the resolution of employment disputes, in the AAA office closest to my place of work, whose decision shall be final and binding and subject to confirmation in a court of competent jurisdiction. This shall include, but not be limited to disputes concerning workplace discrimination, wage and/or overtime claims and/or all other statutory claims.

I further understand and agree that pursuant to this Arbitration Agreement, I cannot participate in a representative capacity or as a member of any class of claims pertaining to any claim subject to the arbitration provision in this Agreement. There is no right or authority for any claims subject to this arbitration policy to be arbitrated on a class or collective action basis or on any basis involving claims brought in a purported representative capacity on behalf of any other person or group of people similarly situated. Such claims are prohibited. Furthermore, claims brought by or against either me or the Company may not be joined or consolidated in the arbitration with claims brought by or against any other person or entity unless otherwise agreed to in writing by all parties involved.

Commented [A8]: Employees should explicitly acknowledge their agreement to the terms of the arbitration agreement to ensure enforceability.

This is what sets the arbitration agreement apart from a similar policy embedded into an employee handbook.

The explicit acknowledgment reinforces that the arbitration agreement is a binding contract, as opposed to an employee handbook, which is not typically a "contract."

I understand that this is a legally binding Agreement. I understand and agree to be bound by its terms and conditions.

Accepted and Agreed:

_____
Signature

_____
Date

_____
Print Name

Workshop D: JANUS
Janus' Impacts on New York's Public Sector Employers, Employees and Unions

Nathaniel G. Lambright, Esq. / Moderator
Blitman & King LLP, Syracuse, NY

Melanie Wlasuk, Esq.
PERB, Albany, NY

Seth Greenberg, Esq.
Greeenberg Burzichelli Greenberg P.C., New Hyde Park, NY

Paul J. Sweeney, Esq.
Coughlin & Gerhart, LLP, Binghamton, NY

THE HISTORY OF AGENCY FEE DEDUCTIONS AND THE TAYLOR LAW

***The following summary of the history of agency fee deductions and the Taylor Law, with relevant caselaw, was researched and compiled by PERB Administrative Law Judges Brittany Sergent and William Weisblatt.

PRE-1977

Pre-1977, PERB held in caselaw that the negotiation of agency fees was a prohibited subject of negotiations. During this time-frame, the Taylor Law did not define the term "agency fee." There was, however, the definition of "membership dues deduction" in § 201 of the Civil Service Law (Taylor Law), which provides that it is:

> the obligation or practice of a government to deduct from the salary of a public employee with his consent an amount for the payment of his membership dues in an employee organization. Such term also means the obligation or practice of a government to transmit the sums so deducted to an employee organization.

This definition has remained the same since Volume 1 of PERB's Official Reports; then it was codified in § 201.3; currently, it is § 201.2(a).

Relevant Caselaw:

- *Monroe-Woodbury Teachers Assoc*, 3 PERB ¶ 3104 (1970). Discusses General Municipal Law § 93-b, which (at the time) provided that dues may be deducted from an employee's salary only upon written authorization from the employee, and that such authorization may be withdrawn at any time. The Association's proposal was violative of the letter and spirit of this section of the General Municipal Law.

- *Erie County*, 5 PERB ¶ 3021 (1972). The agreement to and enforcement of a "maintenance of membership" provision in a CBA, which prohibits union members from discontinuing membership in the union during the term of the agreement, is contrary to § 202 rights and violates §§ 209-a.1(a) and (c) of the Act.
- *Farrigan v. Helsby*, 42 AD2d 265 (1973). Negotiation of an agency fee is a prohibited subject of negotiations. Forced dues payment by nonmembers was seen by the third department as coercing employees into supporting a union that they did not wish to form, join, or participate in.
- *Opinion of Counsel*, 8 PERB ¶ 5003 (1975). Discusses an employee's right to revoke dues deduction authorization at any time pursuant to Section 93-b of the General Municipal Law.

1977—1992

In 1977, *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) was issued by the United States Supreme Court, legalizing agency fees in the public sector. In response, the New York State Legislature amended § 208.3(b) of the Taylor Law, adding language that permitted public employers and unions to negotiate over agency fees. The 1977 version of § 208.3(b) was as follows:

> Notwithstanding provisions of and restrictions of sections two hundred two and two hundred nine-a of this article, section ninety-three-b of the general municipal law and section six-a of the state finance law, every employee organization that has been recognized or certified as the exclusive representative of employees within a negotiating unit of other than state employees shall be entitled to negotiate as part of any agreement entered into pursuant to this

> article to have deductions from the wage or salary of employees of such negotiating unit who are not members of said employee organization the amount equivalent to the dues levied by such employee organization and the fiscal or disbursing officer of the local government or authority involved shall make such deductions and transmit the sum so deducted to such employee organization. Provided, however, that the foregoing provisions of this subdivision shall only be applicable in the case of an employee organization which has established and maintained a procedure providing for the refund to any employee demanding the return (of) any part of an agency shop fee deduction which represents the employee's pro rata share of expenditures by the organization in aid of activities or causes of a political or ideological nature only incidentally related to terms and conditions of employment.

Corresponding language was also added in General Municipal Law § 93-b to permit negotiation between employers and unions over agency fees, as follows:

> Where a collectively negotiated agreement between a public employer other than the state and a recognized or certified employee organization entered into pursuant to article fourteen of the civil service law provides for an agency shop fee deduction, the fiscal or disbursing officer of such public employer is hereby authorized to deduct from the salary of any employee represented by such employee organization for the purpose of collective negotiations who has not authorized the deduction of membership dues in such employee organization pursuant to subdivision one of this section, an agency shop fee deduction in the amount equivalent to the dues levied by such employee organization. The fiscal or disbursing officer is further authorized to accumulate such fees and transmit the fees so accumulated to the employee organization.

The definition of the term “agency shop fee deduction” was also added to the Civil Service Law (Taylor Law) in § 201, stating that it is:

> the obligation or practice of a government to deduct from the salary of a public employee who is not a member of the certified or recognized employee organization which represents such employee for the purpose of collective negotiations conducted pursuant to this article, an

amount equivalent to the amount of dues payable by a member. Such term also means the obligation or practice of a government to transmit the sums so deducted to an employee organization.

Relevant Caselaw:

- *Town of Haverstraw*, 11 PERB ¶ 3109 (1978). Deduction of agency fees is a mandatory subject of negotiation.
- *United University Professions (Eson)*, 11 PERB ¶ 3068 (1978). A union is not permitted to charge a nonmember for part of the costs of arbitrating disputes that concern the amount of an agency shop fee.
- *United University Professions (Eson)*, 12 PERB ¶ 3117 (1979). Use of agency shop fees for benefits available only to members of the union violates § 209-a.2(a) of the Act.
- *Mineola Union Free School District*, 20 PERB ¶ 4622 (1987). The refusal to transmit agency fees constitutes a violation of § 209-a.1(d) of the Act as it is a unilateral alteration of a mandatory subject of negotiation.
- *United University Professions (Barry, Eson, and Gallup),* 20 PERB ¶ 3039 (1987). Agency fee refund procedures that are improper pursuant to Civil Service Law

  § 208.3(a) also constitute an improper practice pursuant to § 209-a.2(a).
- *Opinion of Counsel,* 22 PERB ¶ 5004 (1989). Maintenance of membership provisions that require current union members to remain members during the contract term or some other specified time are *per se* improper.

- *Opinion of Counsel,* 22 PERB ¶ 5006 (1989). The right to a refund of the part of dues that are used for political or ideological purposes is a statutory right only to non-members of the union. Members of the union do not share this right.
- *CSEA Local 1000 (Stanley)*, 23 PERB ¶ 3052 (1990). In general, PERB does not exercise jurisdiction over internal union affairs relating to membership in a union. PERB has found that a union is free to set its own membership requirements so long as the requirements do not conflict with the purposes and policies of the Act and do not affect terms and conditions of employment.

1992—2018

In 1992, the New York State Legislature amended § 208.3(b) of the Taylor Law (rights accompanying certification or recognition) and General Municipal Law § 93-b to codify agency fee deductions, for all municipalities except the State. Section 208.3(b) was amended as follows:

> Notwithstanding provisions of and restrictions of sections two hundred two and two hundred nine-a of this article and section ninety-three-b of the general municipal law ~~and section six-a of the state finance law~~, every employee organization that has been recognized or certified as the exclusive representative of employees within a negotiating unit of other than state employees shall be entitled ~~to negotiate as part of any agreement entered into pursuant to this article~~ to have ~~deductions~~ deducted from the wage or salary of employees of such negotiating unit who are not members of said employee organization the amount equivalent to the dues levied by such employee organization and the fiscal or disbursing officer of the local government or authority involved shall make such deductions and transmit the sum so deducted to such employee organization. Provided, however, that the foregoing provisions of this subdivision shall only be applicable in the case of an employee organization which has established and maintained a procedure providing for the

refund to any employee demanding the return of any part of an agency shop fee deduction which represents the employee's pro rata share of expenditures by the organization in aid of activities or causes of a political or ideological nature only incidentally related to terms and conditions of employment. Nothing herein shall be deemed to require an employee to become a member of such employee organization.

General Municipal Law § 93-b was amended to reflect this change as follows:

~~Where a collectively negotiated agreement between a public employer other than the state and a recognized or certified employee organization entered into pursuant to article fourteen of the civil service law provides for an agency shop fee deduction~~, Notwithstanding the provisions of and restrictions of sections two hundred two and two hundred nine-a of the civil service law but subject to the provisions of paragraph (b) of subdivision three of section two hundred eight of such law, every employee organization that has been recognized or certified as the exclusive representative of employees within a negotiating unit of other than state employees shall be entitled to have deducted from the wage or salary of the employees in such negotiating unit who are not members of said employee organization the amount equivalent to the dues levied by such employee organization, and the fiscal or disbursing officer of such public employer ~~is hereby authorized to~~ shall deduct from the salary of any employee represented by such employee organization for the purpose of collective negotiations who has not authorized the deduction of membership dues in such employee organization pursuant to subdivision one of this section, an agency shop fee deduction in the amount equivalent to the dues levied by such employee organization. The fiscal or disbursing officer is further authorized to accumulate such fees and transmit the fees so accumulated to the employee organization.

Relevant Caselaw:

- *County of Yates,* 27 PERB ¶ 3080 (1994). Employer must respond to an information request made by union for agency fee payers' social security numbers, as long as the privacy rights of those individuals were not infringed.

- *City of Troy,* 28 PERB ¶ 4533 (1995). It is a *per se* violation of (a) to cease dues deduction. This is true even if there are irregularities or even serious issues with the custodianship of the cards. The only defense to the *per se* (a) would have been if the City properly invoked its contractual rights to challenge the authenticity of each of the cards. It did not put in that effort, so its proffered defense to (a) was dismissed. Cessation of dues deduction is not a violation of (b) because it is not an act of domination.
- *City of Troy*, 28 PERB ¶ 3027 (1995) (Affirming, reversing and modifying the ALJ decision below). Cessation of dues deduction can also be a violation of § 209-a.1(d) because unlawful economic pressure during negotiations is inimical to good faith relations. The Board has the power to order a remedial schedule where necessary. The board also notes that § 208.3(b) of the Act controls the City's agency shop fee deduction obligations, not the provisions of any contract negotiated at a time when the applicable law was different from that governing at the date the deductions were stopped.
- *Verona Teachers Assn*, 29 PERB ¶ 3074 (1996). Where bargaining agent fails to adhere to its own procedures for allowing an objector to get their money back, the remedy is to order them to adhere to their procedures, not automatically return the money that should have been returned.
- *Marlboro v. Faculty Ass'n*, 29 PERB ¶ 3007 (1996). An improper practice charge alleging that an agency fee procedure is illegal must specifically identify the part of the procedure claimed to be illegal.

- *Hammondsport*, 29 PERB ¶ 3063 (1996). PERB may inquire into the status of whether an employee is a member of the bargaining unit in order to determine whether or not the employer is obligated to deduct an agency fee for that employee.
- *County of Erie and Sheriff*, 30 PERB ¶ 4572 (1997) (Dismissed on other grounds by the Board in 30 PERB ¶ 3063). The failure to deduct agency fees and dues is a violation of § 209-a.1(a).
- *Faculty Association of Jamestown Comm Coll*, 32 PERB ¶ 4614 (1999). Failure to respond to inquiry about agency fee rebates is an improper taking of agency fee and a violation of the union's duty to respond to unit employees.
- *CSEA (Hartog),* 32 PERB ¶ 3080 (1999). When making agency fee refunds to objectors, the union must provide an itemized audited statement of the complete receipts and expenditures of a union along with the basis for the determination of the amount of the refund. Three months for this disclosure is not an unreasonable period of time and does not violate the Act.
- *Greenburgh No 11,* 33 PERB ¶ 3059 (2000). Each biweekly deduction of an agency fee could be considered a separate violation of the Act, giving rise to a new cause of action with each deduction.
- *Seidemann v. Bowen & PSC/CUNY,* 40 PERB ¶ 7526 (U.S. Court of Appeals, 2d Circuit, 2007). A clear discussion of agency fee history and structure; terrific discussion of Abood and Hudson, 475 US 292 (1986), which laid the foundations for assessing the constitutionality of what pro rata share of dues was returned to

agency fee payers; finding that defendant PSC in SUNY/CUNY's procedure for pro rata dues deduction return to agency fee payers was unconstitutional.

- *Scheffer v. CSEA*, 43 PERB ¶ 7506 (U.S. Court of Appeals, 2d Circuit, 2010). Contains a good discussion of the agency fee structure in New York and its constitutionality pre-Janus.
- *County of Chenango and Sheriff*, 45 PERB ¶ 3003 (2012). Board overturns its earlier decision in *County of Ulster,* 38 PERB ¶ 3033 (2005), and finds that interest arbitration proposal relating to dues deduction is arbitrable because it is directly related to compensation under § 209.4(g) of the Act. By definition, a mandatory agency fee deduction decreases the level of compensation received by unit employees from the Joint Employer and places a financial obligation on an employee arising out of his or her employment.

2018 and beyond (post-Janus)

No more agency fees.

Amendments to the Taylor Law

Effective April 12, 2018

(New additions in **bold** text)

***Compiled by PERB Administrative Law Judge William Weisblatt.

§ 208 Rights Accompanying Certification or Recognition

1. A public employer shall extend to an employee organization certified or recognized pursuant to this article the following rights:

(a) to represent the employees in negotiations notwithstanding the existence of an agreement with an employee organization that is no longer certified or recognized, and in the settlement of grievances; and

(b) to membership dues deduction, upon presentation of dues deduction authorization cards signed by individual employees. **A public employer shall commence making such deductions as soon as practicable, but in no case later than thirty days after receiving proof of a signed dues deduction authorization card; and such dues shall be transmitted to the certified or recognized employee organization within thirty days of the deduction. A public employer shall accept a signed authorization to deduct from the salary of a public employee an amount for the payment of his or her dues in any format permitted by article three of the state technology law. The right to such membership dues deduction shall remain in full force and effect until:**

(i) an individual employee revokes membership in the employee organization in writing in accordance with the terms of the signed authorization; or

(ii) the individual employee is no longer employed by the public employer, provided that if such employee is, within a period of one year, employed by the same public employer in a position represented by the same employee organization, the right to such dues deduction shall be automatically reinstated.

(c) Should the individual employee who has signed a dues deduction authorization card either be removed from a public employer's payroll or otherwise placed on any type of involuntary or voluntary leave of absence, whether paid or unpaid, such public employee's membership in an employee organization shall be continued upon that public employee's return to the payroll or restoration to active duty from such a leave of absence.

……

4.(a) Within thirty days of a public employee first being employed or reemployed by a public employer, or within thirty days of being promoted or transferred to a new bargaining unit, the public employer shall notify the employee organization, if any, that represents that bargaining unit of the employee's name, address, job title, employing agency, department or other operating unit, and work location; and

(b) Within thirty days of providing the notice in paragraph a of this subdivision, a public employer shall allow a duly appointed representative of the employee organization that represents that bargaining unit to meet with such employee for a reasonable amount of time during his or her work time without charge to leave credits, unless otherwise specified within an agreement bargained collectively under article fourteen of the civil service law, provided however that arrangements for such meeting must be scheduled in consultation with a designated representative of the public employer.

5.(a) If any clause, sentence, paragraph, or subdivision of this section shall be adjudged by a court of competent jurisdiction to be unconstitutional or otherwise invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, or subdivision of this section directly involved in the controversy in which such judgment shall have been rendered.

(b) If any clause, sentence, paragraph, or part of a signed authorization shall be adjudged by a court of competent jurisdiction to be unconstitutional or otherwise invalid, such determination shall not affect, impair or invalidate the remainder of such signed authorization but shall be confined in its operation to the clause, sentence, paragraph, or part of the signed authorization directly involved in the controversy in which such judgment shall have been rendered.

§ 209-a. Improper Employer Practices; improper employee organization practices; application

.....

2. Improper employee organization practices. It shall be an improper practice for an employee organization or its agents deliberately

(a) to interfere with, restrain or coerce public employees in the exercise of the rights granted in section two hundred two, or to cause, or attempt to cause, a public employer to do so **provided, however, that an employee organization does not interfere with, restrain or coerce public employees when it limits its services to and representation of non-members in accordance with this subdivision;**

(b) to refuse to negotiate collectively in good faith with a public employer, provided it is the duly recognized or certified representative of the employees of such employer; or

(c) to breach its duty of fair representation to public employees under this article. **Notwithstanding any law, rule or regulation to the contrary, an employee organization's duty of fair representation to a public employee it represents but who is not a member of the employee organization shall be limited to the negotiation or enforcement of the terms of an agreement with the public employer. No provision of this article shall be construed to require an employee organization to provide representation to a non-member**

(i) during questioning by the employer,

(ii) in statutory or administrative proceedings or to enforce statutory or regulatory rights, or

(iii) in any stage of a grievance, arbitration or other contractual process concerning the evaluation or discipline of a public employee where the non-member is permitted to proceed without the employee organization and be represented by his or her own advocate.

Nor shall any provision of this article prohibit an employee organization from providing legal, economic or job-related services or benefits beyond those provided in the agreement with a public employer only to its members.

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Bierman v. Dayton, 8th Cir.(Minn.), August 14, 2018

138 S.Ct. 2448
Supreme Court of the United States

Mark JANUS, Petitioner
v.
AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, et al.

No. 16–1466.
|
Argued Feb. 26, 2018.
|
Decided June 27, 2018.

Synopsis
Background: Governor of Illinois brought action seeking declaration that Illinois statute authorizing public-sector unions to assess "agency fees," that is, a charge for the proportionate share of union dues attributable to activities germane to the union's duties as collective-bargaining representative, from non-member public employees on whose behalf the union negotiated, violated the First Amendment. The United States District Court for the Northern District of Illinois, No. 15 C 1235, Robert W. Gettleman, J., dismissed the Governor as a plaintiff while simultaneously granting public employee's motion to file his own complaint, and subsequently dismissed the action. Employee appealed. The United States Court of Appeals for the Seventh Circuit, Posner, Circuit Judge, 851 F.3d 746, affirmed. Certiorari was granted.

Holdings: The Supreme Court, Justice Alito, held that:

[1] Illinois' agency-fee scheme violated the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern;

[2] employee had Article III standing;

[3] rational-basis review did not apply to employee's First Amendment challenge to Illinois' agency-fee scheme;

[4] State's interest in labor peace did not justify Illinois' agency-fee scheme;

[5] Illinois' agency-fee scheme could not be justified on ground it was needed to prevent nonmembers from being free riders;

[6] *Pickering* framework for determining whether public employee speech was protected by First Amendment did not apply to analysis of employee's challenge to Illinois' agency-fee scheme;

[7] public-sector agency-shop arrangements violate the First Amendment, overruling *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261; and

[8] stare decisis did not counsel against overruling *Abood*.

Reversed and remanded.

Justice Sotomayor filed a dissenting opinion.

Justice Kagan filed a dissenting opinion, in which Justice Ginsburg, Justice Breyer, and Justice Sotomayor joined.

West Headnotes (54)

[1] **Constitutional Law**
Dues and fees
Labor and Employment
Validity
Labor and Employment
Non-Members; Fair Share

Illinois' agency-fee scheme, under which public employees were forced to subsidize a union, even if they chose not to join and strongly objected to the positions the union took in collective bargaining and related activities, violated the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern. U.S.C.A. Const.Amend. 1; S.H.A. 5 ILCS 315/3(g), 315/6(e).

1 Cases that cite this headnote

[2] **Constitutional Law**

Public employment in general

State employee, who refused to join union representing the employees in his unit because he disagreed with public policy positions it had advocated, had Article III standing to bring action alleging that Illinois law authorizing public-sector unions to collect from nonmembers "agency fees," namely a charge for proportionate share of union dues attributable to union's activities as collective-bargaining representative, was coerced political speech forbidden by First Amendment; employee was injured in fact by Illinois' agency-fee scheme, his injuries could be redressed by favorable court decision, and district court had not granted employee's motion to intervene in Governor's suit challenging the scheme, which the court dismissed for lack of standing, but instead treated employee's complaint as the operative complaint in a new lawsuit. U.S.C.A. Const. Art. 3, § 2, cl. 1; U.S.C.A. Const.Amend. 1; S.H.A. 5 ILCS 315/3(g), 315/6(e).

Cases that cite this headnote

[3] **Constitutional Law**
Freedom of Speech, Expression, and Press

The First Amendment, made applicable to the States by the Fourteenth Amendment, forbids abridgment of the freedom of speech. U.S.C.A. Const.Amends. 1, 14.

1 Cases that cite this headnote

[4] **Constitutional Law**
Freedom of Speech, Expression, and Press
Constitutional Law
Right to refrain from speaking

Freedom of speech includes both the right to speak freely and the right to refrain from speaking at all. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[5] **Constitutional Law**
Expressive association

The right to eschew association for expressive purposes is protected by the First Amendment. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[6] **Constitutional Law**
Constitutional Rights in General
Constitutional Law
Compelled or forced speech, support, or participation

If there is any fixed star in the constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein, and compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[7] **Constitutional Law**
Compelled or forced speech, support, or participation

Measures compelling speech are at least as threatening as laws involving restrictions on what can be said. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[8] **Constitutional Law**
Purpose of constitutional protection
Constitutional Law

Compelled or forced speech, support, or participation

Free speech serves many ends, as it is essential to the democratic form of government, and it furthers the search for truth, and whenever the Federal Government or a State prevents individuals from saying what they think on important matters or compels them to voice ideas with which they disagree, it undermines these ends. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[9] **Constitutional Law**
Compelled or forced speech, support, or participation

Compelling a person to subsidize the speech of other private speakers raises First Amendment concerns. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[10] **Constitutional Law**
Compelled or forced speech, support, or participation

To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[11] **Constitutional Law**
Public Employees and Officials
Constitutional Law
Public Employees and Officials

A significant impingement on First Amendment rights occurs when public employees are required to provide financial support for a union that takes many positions during collective bargaining that have powerful political and civic consequences. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[12] **Constitutional Law**
Compelled or forced speech, support, or participation

Because the compelled subsidization of private speech seriously impinges on First Amendment rights, it cannot be casually allowed. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[13] **Constitutional Law**
Expressive association
Constitutional Law
Compelled or forced speech, support, or participation

Under exacting scrutiny test for the compulsory subsidization of commercial speech, which is a less demanding test than the strict scrutiny that might be thought to apply outside the commercial sphere, a compelled subsidy must serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[14] **Constitutional Law**
Dues and fees

Rational-basis review, a form of minimal scrutiny foreign to Supreme Court's free-speech jurisprudence, did not apply to state employee's claim alleging that Illinois law authorizing public-sector unions to collect from nonmembers "agency fees," namely a charge for proportionate share of union dues attributable to

union's activities as collective-bargaining representative, was coerced political speech forbidden by First Amendment. U.S.C.A. Const.Amend. 1; S.H.A. 5 ILCS 315/3(g), 315/6(e).

Cases that cite this headnote

[15] **Constitutional Law**
Labor organizations; collective bargaining
Labor and Employment
Validity
Labor and Employment
Non-Members; Fair Share

Even if State's interest in "labor peace," meaning the avoidance of conflict and disruption that might occur if state employees in a unit were represented by more than one union, was a compelling interest under First Amendment, it did not justify Illinois' agency-fee scheme, under which public-sector unions could charge nonmembers for proportionate share of union dues attributable to union's activities as collective-bargaining representative; labor peace could readily be achieved through means significantly less restrictive of associational freedoms than assessing agency fees, as shown by fact that federal law did not permit agency fees, yet nearly a million federal employees were union members, and millions of public employees in states prohibiting agency fees were represented by unions that served as exclusive representatives. U.S.C.A. Const.Amend. 1; 5 U.S.C.A. §§ 7102, 7111(a), 7114(a); S.H.A. 5 ILCS 315/3(g), 315/6(e).

5 Cases that cite this headnote

[16] **Constitutional Law**
Labor organizations; collective bargaining
Labor and Employment
Validity
Labor and Employment
Non-Members; Fair Share

Illinois' agency-fee scheme, under which public-sector unions could charge nonmembers for proportionate share of union dues attributable to union's activities as collective-bargaining representative, could not be justified under the First Amendment on ground it was needed to prevent nonmembers from being free riders who enjoyed benefits of union representation without shouldering the costs; benefits to unions of being designated as exclusive representative, including obtaining information about employees and having dues and fees deducted directly from employee wages, greatly outweighed any extra burden imposed by duty of providing fair representation for nonmembers, and any unwanted burden imposed by representing nonmembers in grievance proceedings could be eliminated through means significantly less restrictive of associational freedoms than imposing agency fees. U.S.C.A. Const.Amend. 1; S.H.A. 5 ILCS 315/3(g), 315/6(b–f).

1 Cases that cite this headnote

[17] **Constitutional Law**
Compelled or forced speech, support, or participation

Private speech often furthers the interests of nonspeakers, but that does not alone empower the state to compel the speech to be paid for. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[18] **Labor and Employment**
Union membership

A union's duty of providing fair representation for nonmembers entails an obligation not to act solely in the interests of the union's own members.

Cases that cite this headnote

[19] **Labor and Employment**
Union membership

Under its duty of providing fair representation for nonmembers, a union may not negotiate a collective-bargaining agreement that discriminates against nonmembers.

Cases that cite this headnote

[20] **Labor and Employment**
Grievances in general

When a union controls the grievance process, it may, as a practical matter, effectively subordinate the interests of an individual employee to the collective interests of all employees in the bargaining unit.

1 Cases that cite this headnote

[21] **Labor and Employment**
Duty to Act Impartially and Without Discrimination; Fair Representation

A union's duty of fair representation of nonmembers is a necessary concomitant of the authority that a union seeks when it chooses to serve as the exclusive representative of all the employees in a unit.

1 Cases that cite this headnote

[22] **Constitutional Law**
Dues and fees
Labor and Employment
Validity
Labor and Employment
Non-Members; Fair Share

First Amendment, as originally understood, did not allow forced subsidies such as those authorized by Illinois' agency-fee scheme, under which public-sector unions could charge nonmembers for proportionate share of union dues attributable to union's activities as collective-bargaining representative; there was no accepted founding-era practice that even remotely resembled the compulsory assessment of agency fees from public-sector employees, and prominent members of the founding generation condemned laws requiring public employees to affirm or support beliefs with which they disagreed. U.S.C.A. Const.Amend. 1; S.H.A. 5 ILCS 315/3(g), 315/6(e).

Cases that cite this headnote

[23] **Constitutional Law**
Public or private concern; speaking as "citizen"

Public employee speech is largely unprotected by the First Amendment if it is part of what the employee is paid to do, or if it involved a matter of only private concern. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[24] **Constitutional Law**
Efficiency of public services

When a public employee speaks as a citizen on a matter of public concern, the employee's speech is protected by the First Amendment unless the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees outweighs the interests of the employee, as a citizen, in commenting upon matters of public concern. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[25] **Constitutional Law**

Dues and fees

The *Pickering* framework for determining whether public employee speech was protected by First Amendment did not apply to Supreme Court's analysis of First Amendment challenge to Illinois' agency-fee scheme, under which public-sector unions could charge nonmembers for proportionate share of union dues attributable to union's activities as collective-bargaining representative; *Pickering* was developed for use in a very different context, in cases that involved one employee's speech and its impact on that employee's public responsibilities, while Illinois' scheme involved a blanket requirement that all employees subsidize speech with which they may not agree. U.S.C.A. Const.Amend. 1; S.H.A. 5 ILCS 315/3(g), 315/6(e).

2 Cases that cite this headnote

[26] **Constitutional Law**
Exercise of police power; relationship to governmental interest or public welfare

A speech-restrictive law with widespread impact gives rise to far more serious concerns than could any single supervisory decision, and thus, when such a law is at issue, the government must shoulder a correspondingly heavier burden and is entitled to considerably less deference in its assessment that a predicted harm justifies a particular impingement on First Amendment rights. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[27] **Constitutional Law**
Public or private concern; speaking as "citizen"

If the speech in question is part of a public employee's official duties, the employer may insist that the employee deliver any lawful message. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[28] **Constitutional Law**
Dues and fees

Public-sector union speech in collective-bargaining and grievance proceedings funded by the agency fees of nonmember government employees was not part of the official job duties of the union officers who engaged in the speech, and thus, under the First Amendment, such speech would not be treated like the speech of the government employer; when a union negotiated with the government employer or represented employees in disciplinary proceedings, the union spoke for the employees, not the employer. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[29] **Constitutional Law**
Public or private concern; speaking as "citizen"

In general, when public employees are performing their job duties, their speech may be controlled by their employer. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[30] **Constitutional Law**
Speech by labor organization

Public-sector union speech in collective bargaining, including speech about wages and benefits, involved matters of great public concern, and thus was subject to First Amendment protections; in addition to affecting how public money was spent, union speech in collective bargaining addressed many other important matters, such as education, child welfare, healthcare, and minority rights.

U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[31] **Constitutional Law**
Speech by labor organization

Public-sector union speech in the handling of grievances may be of substantial public importance and may be directed at the public square, and thus may be subject to First Amendment protections. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[32] **Constitutional Law**
Dues and fees
Labor and Employment
Validity
Labor and Employment
Non-Members; Fair Share

The State's proffered interest in bargaining with an adequately funded exclusive bargaining agent was insufficient to justify the heavy burden on nonmembers' First Amendment interests inflicted by Illinois' agency-fee scheme, under which public-sector unions could charge nonmembers for proportionate share of union dues attributable to union's activities as collective-bargaining representative; the State could not require all employees to support the union irrespective of whether they shared its views. U.S.C.A. Const.Amend. 1; S.H.A. 5 ILCS 315/3(g), 315/6(e).

Cases that cite this headnote

[33] **Constitutional Law**
Public Employees and Officials

The State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[34] **Constitutional Law**
Labor organizations; collective bargaining

The State may require that a union serve as exclusive bargaining agent for its employees, a significant impingement on First Amendment associational freedoms that would not be tolerated in other contexts. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[35] **Constitutional Law**
Public Employees and Officials

Nothing in the *Pickering* line of cases requires Supreme Court to uphold every speech restriction the government imposes as an employer. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[36] **Constitutional Law**
Dues and fees

Public-sector agency-shop arrangements, under which public-sector unions charge nonmembers for proportionate share of union dues attributable to union's activities as collective-bargaining representative, violate the First Amendment; overruling *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[37] **Courts**
Previous Decisions as Controlling or as Precedents

Stare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.

2 Cases that cite this headnote

[38] **Courts**
Previous Decisions as Controlling or as Precedents

Supreme Court will not overturn a past decision unless there are strong grounds for doing so, but stare decisis is not an inexorable command.

1 Cases that cite this headnote

[39] **Courts**
Constitutional questions

The doctrine of stare decisis is at its weakest when Supreme Court interprets the Constitution because the Court's interpretation can be altered only by constitutional amendment or by overruling its prior decisions.

Cases that cite this headnote

[40] **Courts**
Previous Decisions as Controlling or as Precedents

Stare decisis applies with perhaps least force of all to decisions that wrongly denied First Amendment rights. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[41] **Courts**
Constitutional questions

Supreme Court has not hesitated to overrule past decisions offensive to the First Amendment, a fixed star in the constitutional constellation, if there is one. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[42] **Courts**
Decisions of Same Court or Co-Ordinate Court

Factors that Supreme Court should take into account in deciding whether to overrule a past decision include the quality of the past decision's reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision.

1 Cases that cite this headnote

[43] **Courts**
Constitutional questions

Stare decisis did not counsel against overruling *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261, which wrongly held public-sector agency-shop arrangements, under which public-sector unions charge nonmembers for proportionate share of union dues attributable to union's activities as collective-bargaining representative, did not violate the First Amendment; *Abood* was poorly reasoned, its proponents had abandoned its reasoning, it failed to see that designation of a union as exclusive representative and imposition of agency fees were not inextricably linked, it conflicted with other First Amendment decisions, its line between chargeable and

nonchargeable union expenditures had proven to be impossible to draw with precision, and subsequent developments had eroded its underpinnings. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[44] **Courts**
Decisions of Same Court or Co-Ordinate Court

An important factor in determining whether a Supreme Court precedent should be overruled is the quality of its reasoning.

Cases that cite this headnote

[45] **Courts**
Decisions of Same Court or Co-Ordinate Court

The fact that the rationale of a past decision does not withstand careful analysis is a reason for Supreme Court to overrule it, and that is even truer when the defenders of the precedent do not attempt to defend its actual reasoning.

Cases that cite this headnote

[46] **Courts**
Previous Decisions as Controlling or as Precedents

A relevant consideration in the stare decisis calculus is the workability of the precedent in question.

1 Cases that cite this headnote

[47] **Courts**
Constitutional questions

Public-sector unions' view of agency fee arrangements as an entitlement, under which public-sector unions charge nonmembers for proportionate share of union dues attributable to union's activities as collective-bargaining representative, was an insufficient reliance interest to outweigh the countervailing interest that nonmembers shared in having their constitutional rights fully protected, and thus did not warrant continued adherence to *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261, which wrongly held that such arrangements did not violate the First Amendment; public-sector unions had been on notice for years regarding Supreme Court's misgivings about *Abood*, which did not provide a clear or easily applicable standard, and unions could protect themselves if an agency-fee provision was crucial to their bargain. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[48] **Courts**
Previous Decisions as Controlling or as Precedents

In some cases, reliance provides a strong reason for adhering to established precedents.

Cases that cite this headnote

[49] **Courts**
Constitutional questions

That over 20 States had enacted statutes authorizing agency fee provisions, under which public-sector unions charged nonmembers for proportionate share of union dues attributable to union's activities as collective-bargaining representative, was not a compelling interest for Supreme Court to continue to adhere to *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261, which wrongly held that such arrangements did not violate the First

Amendment, since if it were, then legislative acts could prevent the Court from overruling its own precedents, thereby interfering with its duty to say what the law is, and States could keep their labor-relations systems exactly as they were, only they could not force nonmembers to subsidize public-sector unions. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[50] **Constitutional Law**
Constitutional Rights in General

Judges should not override citizens' choices or pick the winning side, unless the Constitution commands that they do so.

Cases that cite this headnote

[51] **Constitutional Law**
Judicial Authority and Duty in General

When a federal or state law violates the Constitution, the American doctrine of judicial review requires Supreme Court to enforce the Constitution.

Cases that cite this headnote

[52] **Constitutional Law**
First Amendment in General

The very purpose of the First Amendment was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[53] **Constitutional Law**
Waiver in general
Constitutional Law
Presumptions regarding estoppel or waiver
Labor and Employment
Non-Members; Fair Share

Neither an agency fee representing proportionate share of union dues attributable to public-sector union's activities as collective-bargaining representative, nor any other payment to the union, may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay; by agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[54] **Constitutional Law**
Waiver in general

To be effective, a government employee's waiver of First Amendment rights, by agreeing to pay agency fee representing proportionate share of union dues attributable to public-sector union's activities as collective-bargaining representative, must be freely given and shown by clear and compelling evidence; unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

West Codenotes

Held Unconstitutional
S.H.A. 5 ILCS 315/3(g), 315/6(e)

***2455** *Syllabus*[*]

Illinois law permits public employees to unionize. If a majority of the employees in a bargaining unit vote to be represented by a union, that union is designated as the exclusive representative of all the employees, even those who do not join. Only the union may engage in collective ***2456** bargaining; individual employees may not be represented by another agent or negotiate directly with their employer. Nonmembers are required to pay what is generally called an "agency fee," *i.e.*, a percentage of the full union dues. Under *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 235–236, 97 S.Ct. 1782, 52 L.Ed.2d 261, this fee may cover union expenditures attributable to those activities "germane" to the union's collective-bargaining activities (chargeable expenditures), but may not cover the union's political and ideological projects (nonchargeable expenditures). The union sets the agency fee annually and then sends nonmembers a notice explaining the basis for the fee and the breakdown of expenditures. Here it was 78.06% of full union dues.

Petitioner Mark Janus is a state employee whose unit is represented by a public-sector union (Union), one of the respondents. He refused to join the Union because he opposes many of its positions, including those taken in collective bargaining. Illinois' Governor, similarly opposed to many of these positions, filed suit challenging the constitutionality of the state law authorizing agency fees. The state attorney general, another respondent, intervened to defend the law, while Janus moved to intervene on the Governor's side. The District Court dismissed the Governor's challenge for lack of standing, but it simultaneously allowed Janus to file his own complaint challenging the constitutionality of agency fees. The District Court granted respondents' motion to dismiss on the ground that the claim was foreclosed by *Abood*. The Seventh Circuit affirmed.

Held :

1. The District Court had jurisdiction over petitioner's suit. Petitioner was undisputedly injured in fact by Illinois' agency-fee scheme and his injuries can be redressed by a favorable court decision. For jurisdictional purposes, the court permissibly treated his amended complaint in intervention as the operative complaint in a new lawsuit. *United States ex rel. Texas Portland Cement Co. v. McCord*, 233 U.S. 157, 34 S.Ct. 550, 58 L.Ed. 893, distinguished. Pp. 2462 – 2463.

2. The State's extraction of agency fees from nonconsenting public-sector employees violates the First Amendment. *Abood* erred in concluding otherwise, and *stare decisis* cannot support it. *Abood* is therefore overruled. Pp. 2463 – 2486.

(a) *Abood* 's holding is inconsistent with standard First Amendment principles. Pp. 2463 – 2469.

(1) Forcing free and independent individuals to endorse ideas they find objectionable raises serious First Amendment concerns. *E.g.*, *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 633, 63 S.Ct. 1178, 87 L.Ed. 1628. That includes compelling a person to subsidize the speech of other private speakers. *E.g.*, *Knox v. Service Employees*, 567 U.S. 298, 309, 132 S.Ct. 2277, 183 L.Ed.2d 281. In *Knox* and *Harris v. Quinn*, 573 U.S. ——, 134 S.Ct. 2618, 189 L.Ed.2d 620, the Court applied an "exacting" scrutiny standard in judging the constitutionality of agency fees rather than the more traditional strict scrutiny. Even under the more permissive standard, Illinois' scheme cannot survive. Pp. 2463 – 2466.

(2) Neither of *Abood* 's two justifications for agency fees passes muster under this standard. First, agency fees cannot be upheld on the ground that they promote an interest in "labor peace." The *Abood* Court's fears of conflict and disruption if employees were represented by more than one union have proved to be unfounded: Exclusive representation of all the employees in a unit and the exaction of agency fees are not inextricably linked. To the ***2457** contrary, in the Federal Government and the 28 States with laws prohibiting agency fees, millions of public employees are represented by unions that effectively serve as the exclusive representatives of all the employees. Whatever may have been the case 41 years ago when *Abood* was decided, it is thus now undeniable that "labor peace" can readily be achieved through less restrictive means than the assessment of agency fees.

Second, avoiding "the risk of 'free riders,' " *Abood, supra*, at 224, 97 S.Ct. 1782, is not a compelling state interest. Free-rider "arguments ... are generally insufficient to overcome First Amendment objections," *Knox, supra*, at 311, 132 S.Ct. 2277, and the statutory requirement that unions represent members and nonmembers alike does not justify different treatment. As is evident in non-agency-fee jurisdictions, unions are quite willing to represent nonmembers in the absence of agency fees. And their duty of fair representation is a necessary concomitant of the authority that a union seeks when it chooses to be the exclusive representative. In any event, States can avoid free riders through less restrictive means than the imposition of agency fees. Pp. 2466 – 2469.

(b) Respondents' alternative justifications for *Abood* are similarly unavailing. Pp. 2469 – 2474.

(1) The Union claims that *Abood* is supported by the First Amendment's original meaning. But neither founding-era evidence nor dictum in *Connick v. Myers*, 461 U.S. 138, 143, 103 S.Ct. 1684, 75 L.Ed.2d 708, supports the view that the First Amendment was originally understood to allow States to force public employees to subsidize a private third party. If anything, the opposite is true. Pp. 2469 – 2472.

(2) Nor does *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811, provide a basis for *Abood*. *Abood* was not based on *Pickering*, and for good reasons. First, *Pickering* 's framework was developed for use in cases involving "one employee's speech and its impact on that employee's public responsibilities," *United States v. Treasury Employees*, 513 U.S. 454, 467, 115 S.Ct. 1003, 130 L.Ed.2d 964, while *Abood* and other agency-fee cases involve a blanket requirement that all employees subsidize private speech with which they may not agree. Second, *Pickering* 's framework was designed to determine whether a public employee's speech interferes with the effective operation of a government office, not what happens when the government compels speech or speech subsidies in support of third parties. Third, the categorization schemes of *Pickering* and *Abood* do not line up. For example, under *Abood*, nonmembers cannot be charged for speech that concerns political or ideological issues; but under *Pickering*, an employee's free speech interests on such issues could be overcome if outweighed by the employer's interests. Pp. 2472 – 2474.

(c) Even under some form of *Pickering*, Illinois' agency-fee arrangement would not survive. Pp. 2473 – 2478.

(1) Respondents compare union speech in collective bargaining and grievance proceedings to speech "pursuant to [an employee's] official duties," *Garcetti v. Ceballos*, 547 U.S. 410, 421, 126 S.Ct. 1951, 164 L.Ed.2d 689, which the State may require of its employees. But in those situations, the employee's words are really the words of the employer, whereas here the union is speaking on behalf of the employees. *Garcetti* therefore does not apply. Pp. 2473 – 2474.

(2) Nor does the union speech at issue cover only matters of private concern, which the State may also generally regulate ***2458** under *Pickering*. To the contrary, union speech covers critically important and public matters such as the State's budget crisis, taxes, and collective bargaining issues related to education, child welfare, healthcare, and minority rights. Pp. 2474 – 2477.

(3) The government's proffered interests must therefore justify the heavy burden of agency fees on nonmembers' First Amendment interests. They do not. The state interests asserted in *Abood*—promoting "labor peace" and avoiding free riders—clearly do not, as explained earlier. And the new interests asserted in *Harris* and here—bargaining with an adequately funded agent and improving the efficiency of the work force—do not suffice either. Experience shows that unions can be effective even without agency fees. Pp. 2476 – 2478.

(d) *Stare decisis* does not require retention of *Abood*. An analysis of several important factors that should be taken into account in deciding whether to overrule a past decision supports this conclusion. Pp. 2477 – 2486.

(1) *Abood* was poorly reasoned, and those arguing for retaining it have recast its reasoning, which further undermines its *stare decisis* effect, *e.g.*, *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 363, 130 S.Ct. 876, 175 L.Ed.2d 753. *Abood* relied on *Railway Employes v. Hanson*, 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112, and *Machinists v. Street*, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141, both of which involved private-sector collective-bargaining agreements where the government merely authorized agency fees. *Abood* did not appreciate the very different First Amendment question that arises when a State *requires* its employees to pay agency fees. *Abood* also judged the constitutionality of public-sector agency fees using *Hanson* 's deferential standard, which is inappropriate in deciding free speech issues. Nor did *Abood* take into account the difference between the effects of agency fees in public- and private-sector collective bargaining, anticipate administrative problems with classifying union expenses as chargeable or nonchargeable, foresee practical problems faced by nonmembers wishing to challenge those decisions, or understand the inherently political nature of public-sector bargaining. Pp. 2479 – 2481.

(2) *Abood* 's lack of workability also weighs against it. Its line between chargeable and nonchargeable expenditures has proved to be impossible to draw with precision, as even respondents recognize. See, *e.g.*, *Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507, 519, 111 S.Ct. 1950, 114 L.Ed.2d 572. What is more, a nonmember objecting to union chargeability determinations will have much trouble determining the accuracy of the union's reported expenditures, which are often expressed in extremely broad and vague terms. Pp. 2480 – 2482.

(3) Developments since *Abood*, both factual and legal, have "eroded" the decision's "underpinnings" and left it an outlier among the Court's First Amendment cases. *United States v. Gaudin*, 515 U.S. 506, 521, 115 S.Ct. 2310, 132 L.Ed.2d 444. *Abood* relied on an assumption that "the principle of exclusive representation in the public sector is dependent on a union or agency shop," *Harris*, 573 U.S., at —— – ——, 134 S.Ct., at 2634, but experience has shown otherwise. It was also decided when public-sector unionism was a relatively new phenomenon. Today, however, public-sector union membership has surpassed that in the private sector, and that ascendency corresponds with a parallel increase in public spending. *Abood* is also an anomaly in the Court's First Amendment jurisprudence, where exacting scrutiny, ***2459** if not a more demanding standard, generally applies. Overruling *Abood* will also end the oddity of allowing public employers to compel union support (which is not supported by any tradition) but not to compel party support (which is supported by tradition), see, *e.g.*, *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547. Pp. 2482 – 2484.

(4) Reliance on *Abood* does not carry decisive weight. The uncertain status of *Abood*, known to unions for years; the lack of clarity it provides; the short-term nature of collective-bargaining agreements; and the ability of unions to protect themselves if an agency-fee provision was crucial to its bargain undermine the force of reliance. Pp. 2484 – 2486.

3. For these reasons, States and public-sector unions may no longer extract agency fees from nonconsenting employees. The First Amendment is violated when money is taken from nonconsenting employees for a public-sector union; employees must choose to support the union before anything is taken from them. Accordingly, neither an agency fee nor any other form of payment to a public-sector union may be deducted from an employee, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. Pp. 2486.

851 F.3d 746, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C.J., and KENNEDY, THOMAS, and, GORSUCH, JJ., joined. SOTOMAYOR, J., filed a dissenting opinion. KAGAN, J., filed a dissenting opinion, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined.

Attorneys and Law Firms

William L. Messenger, Springfield, VA, for Petitioner.

Noel J. Francisco, Solicitor General, for the United States as amicus curiae, by special leave of the Court, supporting the Petitioner.

David L. Franklin, Solicitor General, Chicago, IL, for the State Respondents.

David C. Frederick, Washington, DC, for the Respondent AFSCME Council 31.

Dan K. Webb, Joseph J. Torres, Lawrence R. Desideri, Winston & Strawn LLP, Chicago, IL, Jacob H. Huebert, Jeffrey M. Schwab, Liberty Justice Center, Chicago, IL, William L. Messenger, Aaron B. Solem, c/o National Right to Work Legal Defense Foundation, Inc., Springfield, VA, for Petitioner.

Lisa Madigan, Attorney General, State of Illinois, David L. Franklin, Solicitor General, Counsel of Record, Brett E. Legner, Deputy Solicitor General, Frank H. Bieszczat, Jane Flanagan, Sarah A. Hunger, Richard S. Huszagh, Lindsay Beyer Payne, Andrew Tonelli, Assistant Attorneys General, Chicago, IL, for Respondents Lisa Madigan and Michael Hoffman.

John M. West, Bredhoff & Kaiser, PLLC, Washington, DC, Judith E. Rivlin, Teague P. Paterson, AFSCME, Washington, DC, David C. Frederick, Derek T. Ho, Benjamin S. Softness, Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., Washington, DC, for Respondent American Federation of State, County, and Municipal Employees, Council 31.

Opinion

Justice ALITO delivered the opinion of the Court.

[1] Under Illinois law, public employees are forced to subsidize a union, even if ***2460** they choose not to join and strongly object to the positions the union takes in collective bargaining and related activities. We conclude that this arrangement violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern.

We upheld a similar law in *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977), and we recognize the importance of following precedent unless there are strong reasons for not doing so. But there are very strong reasons in this case. Fundamental free speech rights are at stake. *Abood* was poorly reasoned. It has led to practical problems and abuse. It is inconsistent

with other First Amendment cases and has been undermined by more recent decisions. Developments since *Abood* was handed down have shed new light on the issue of agency fees, and no reliance interests on the part of public-sector unions are sufficient to justify the perpetuation of the free speech violations that *Abood* has countenanced for the past 41 years. *Abood* is therefore overruled.

I

A

Under the Illinois Public Labor Relations Act (IPLRA), employees of the State and its political subdivisions are permitted to unionize. See Ill. Comp. Stat., ch. 5, § 315/6(a) (West 2016). If a majority of the employees in a bargaining unit vote to be represented by a union, that union is designated as the exclusive representative of all the employees. §§ 315/3(s)(1), 315/6(c), 315/9. Employees in the unit are not obligated to join the union selected by their co-workers, but whether they join or not, that union is deemed to be their sole permitted representative. See §§ 315/6(a), (c).

Once a union is so designated, it is vested with broad authority. Only the union may negotiate with the employer on matters relating to "pay, wages, hours [,] and other conditions of employment." § 315/6(c). And this authority extends to the negotiation of what the IPLRA calls "policy matters," such as merit pay, the size of the work force, layoffs, privatization, promotion methods, and non-discrimination policies. § 315/4; see § 315/6(c); see generally, *e.g., Illinois Dept. of Central Management Servs. v. AFSCME, Council 31*, No. S–CB–16–17 etc., 33 PERI ¶ 67 (ILRB Dec. 13, 2016) (Board Decision).

Designating a union as the employees' exclusive representative substantially restricts the rights of individual employees. Among other things, this designation means that individual employees may not be represented by any agent other than the designated union; nor may individual employees negotiate directly with their employer. §§ 315/6(c)-(d), 315/10(a)(4); see *Matthews v. Chicago Transit Authority*, 2016 IL 117638, 402 Ill.Dec. 1, 51 N.E.3d 753, 782; accord, *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 683–684, 64 S.Ct. 830, 88 L.Ed. 1007 (1944). Protection of the employees' interests is placed in the hands of the union, and therefore the union is required by law to provide fair representation for all employees in the unit, members and nonmembers alike. § 315/6(d).

Employees who decline to join the union are not assessed full union dues but must instead pay what is generally called an "agency fee," which amounts to a percentage of the union dues. Under *Abood*, nonmembers may be charged for the portion of union dues attributable to activities that are "germane to [the union's] duties as collective-bargaining representative," but nonmembers may not be required to fund ***2461** the union's political and ideological projects. 431 U.S., at 235, 97 S.Ct. 1782; see *id.*, at 235–236, 97 S.Ct. 1782. In labor-law parlance, the outlays in the first category are known as "chargeable" expenditures, while those in the latter are labeled "nonchargeable."

Illinois law does not specify in detail which expenditures are chargeable and which are not. The IPLRA provides that an agency fee may compensate a union for the costs incurred in "the collective bargaining process, contract administration[,] and pursuing matters affecting wages, hours [,] and conditions of employment." § 315/6(e); see also § 315/3(g). Excluded from the agency-fee calculation are union expenditures "related to the election or support of any candidate for political office." § 315/3(g); see § 315/6(e).

Applying this standard, a union categorizes its expenditures as chargeable or nonchargeable and thus determines a nonmember's "proportionate share," § 315/6(e); this determination is then audited; the amount of the "proportionate share" is certified to the employer; and the employer automatically deducts that amount from the nonmembers' wages. See *ibid.*; App. to Pet. for Cert. 37a; see also *Harris v. Quinn*, 573 U.S. ——, —— – ——, 134 S.Ct. 2618, 2633–2634, 189 L.Ed.2d 620 (2014) (describing this process). Nonmembers need not be asked, and they are not required to consent before the fees are deducted.

After the amount of the agency fee is fixed each year, the union must send nonmembers what is known as a *Hudson* notice. See *Teachers v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986). This notice is supposed to provide nonmembers with "an adequate explanation of the basis for the [agency] fee." *Id.*, at 310, 106 S.Ct. 1066. If nonmembers "suspect that a union has improperly put certain expenses in the [chargeable] category," they may challenge that determination. *Harris, supra*, at ——, 134 S.Ct., at 2633.

As illustrated by the record in this case, unions charge nonmembers, not just for the cost of collective bargaining *per se,* but also for many other supposedly connected activities. See App. to Pet. for Cert. 28a–39a. Here, the nonmembers were told that they had to pay for "[l]obbying," "[s]ocial and recreational activities," "advertising," "[m]embership meetings and conventions," and "litigation," as well as other unspecified "[s]ervices" that "may ultimately inure to the benefit of the members of the local bargaining unit." *Id.*, at 28a–32a. The total chargeable amount for nonmembers was 78.06% of full union dues. *Id.*, at 34a.

B

Petitioner Mark Janus is employed by the Illinois Department of Healthcare and Family Services as a child support specialist. *Id.*, at 10a. The employees in his unit are among the 35,000 public employees in Illinois who are represented by respondent American Federation of State, County, and Municipal Employees, Council 31 (Union). *Ibid.* Janus refused to join the Union because he opposes "many of the public policy positions that [it] advocates," including the positions it takes in collective bargaining. *Id.*, at 10a, 18a. Janus believes that the Union's "behavior in bargaining does not appreciate the current fiscal crises in Illinois and does not reflect his best interests or the interests of Illinois citizens." *Id.*, at 18a. Therefore, if he had the choice, he "would not pay any fees or otherwise subsidize [the Union]." *Ibid.* Under his unit's collective-bargaining agreement, however, he was required to pay an agency fee of $44.58 per month, *id.*, at 14a—which would amount to about $535 per year.

***2462** Janus's concern about Illinois' current financial situation is shared by the Governor of the State, and it was the Governor who initially challenged the statute authorizing the imposition of agency fees. The Governor commenced an action in federal court, asking that the law be declared unconstitutional, and the Illinois attorney general (a respondent here) intervened to defend the law. App. 41. Janus and two other state employees also moved to intervene—but on the Governor's side. *Id.*, at 60.

Respondents moved to dismiss the Governor's challenge for lack of standing, contending that the agency fees did not cause him any personal injury. *E.g., id.*, at 48–49. The District Court agreed that the Governor could not maintain the lawsuit, but it held that petitioner and the other individuals who had moved to intervene had standing because the agency fees unquestionably injured them. Accordingly, "in the interest of judicial economy," the court dismissed the Governor as a plaintiff, while simultaneously allowing petitioner and the other employees to file their own complaint. *Id.*, at 112. They did so, and the case proceeded on the basis of this new complaint.

The amended complaint claims that all "nonmember fee deductions are coerced political speech" and that "the First Amendment forbids coercing any money from the nonmembers." App. to Pet. for Cert. 23a. Respondents moved to dismiss the amended complaint, correctly recognizing that the claim it asserted was foreclosed by *Abood*. The District Court granted the motion, *id.*, at 7a, and the Court of Appeals for the Seventh Circuit affirmed, 851 F.3d 746 (2017).

Janus then sought review in this Court, asking us to overrule *Abood* and hold that public-sector agency-fee arrangements are unconstitutional. We granted certiorari to consider this important question. 582 U.S. ——, 138 S.Ct. 54, 198 L.Ed.2d 780 (2017).

II

[2] Before reaching this question, however, we must consider a threshold issue. Respondents contend that the District Court lacked jurisdiction under Article III of the Constitution because petitioner "moved to intervene in [the Governor's] jurisdictionally defective lawsuit." Union Brief in Opposition 11; see also *id.*, at 13–17; State Brief in Opposition 6; Brief for Union Respondent i, 16–17; Brief for State Respondents 14, n. 1. This argument is clearly wrong.

It rests on the faulty premise that petitioner intervened in the action brought by the Governor, but that is not what happened. The District Court did not grant petitioner's motion to intervene in that lawsuit. Instead, the court essentially treated petitioner's amended complaint as the operative complaint in a new lawsuit. App. 110–112. And when the case is viewed in that way, any Article III issue vanishes. As the District Court recognized—and as respondents concede—petitioner was injured in fact by Illinois' agency-fee scheme, and his injuries can be redressed by a favorable court decision. *Ibid.*; see Record 2312–2313, 2322–2323. Therefore, he clearly has Article III standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555,

560–561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). It is true that the District Court docketed petitioner's complaint under the number originally assigned to the Governor's complaint, instead of giving it a new number of its own. But Article III jurisdiction does not turn on such trivialities.

The sole decision on which respondents rely, *United States ex rel. Texas Portland Cement Co. v. McCord*, 233 U.S. 157, 34 S.Ct. 550, 58 L.Ed. 893 (1914), actually ***2463** works against them. That case concerned a statute permitting creditors of a government contractor to bring suit on a bond between 6 and 12 months after the completion of the work. *Id.*, at 162, 34 S.Ct. 550. One creditor filed suit before the 6–month starting date, but another intervened within the 6–to–12–month window. The Court held that the "[t]he intervention [did] not cure th[e] vice in the original [prematurely filed] suit," but the Court also contemplated treating "intervention ... as an original suit" in a case in which the intervenor met the requirements that a plaintiff must satisfy—*e.g.*, filing a separate complaint and properly serving the defendants. *Id.*, at 163–164, 34 S.Ct. 550. Because that is what petitioner did here, we may reach the merits of the question presented.

III

In *Abood*, the Court upheld the constitutionality of an agency-shop arrangement like the one now before us, 431 U.S., at 232, 97 S.Ct. 1782, but in more recent cases we have recognized that this holding is "something of an anomaly," *Knox v. Service Employees*, 567 U.S. 298, 311, 132 S.Ct. 2277, 183 L.Ed.2d 281 (2012), and that *Abood* 's "analysis is questionable on several grounds," *Harris*, 573 U.S., at ——, 134 S.Ct., at 2632; see *id.*, at —— – ——, 134 S.Ct., at 2632–2634 (discussing flaws in *Abood* 's reasoning). We have therefore refused to extend *Abood* to situations where it does not squarely control, see *Harris, supra*, at —— – ——, 134 S.Ct., at 2638–2639, while leaving for another day the question whether *Abood* should be overruled, *Harris, supra*, at ——, n. 19, 134 S.Ct., at 2638, n. 19; see *Knox, supra*, at 310–311, 132 S.Ct. 2277.

We now address that question. We first consider whether *Abood* 's holding is consistent with standard First Amendment principles.

A

[3] [4] [5] [6] The First Amendment, made applicable to the States by the Fourteenth Amendment, forbids abridgment of the freedom of speech. We have held time and again that freedom of speech "includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977); see *Riley v. National Federation of Blind of N. C., Inc.*, 487 U.S. 781, 796–797, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988); *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 559, 105 S.Ct. 2218, 85 L.Ed.2d 588 (1985); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256–257, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974); accord, *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 9, 106 S.Ct. 903, 89 L.Ed.2d 1 (1986) (plurality opinion). The right to eschew association for expressive purposes is likewise protected. *Roberts v. United States Jaycees*, 468 U.S. 609, 623, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984) ("Freedom of association ... plainly presupposes a freedom not to associate"); see *Pacific Gas & Elec., supra*, at 12, 106 S.Ct. 903 ("[F]orced associations that burden protected speech are impermissible"). As Justice Jackson memorably put it: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or *force citizens to confess by word or act their faith therein*." *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) (emphasis added).

Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned. Suppose, for example, ***2464** that the State of Illinois required all residents to sign a document expressing support for a particular set of positions on controversial public issues—say, the platform of one of the major political parties. No one, we trust, would seriously argue that the First Amendment permits this.

[7] Perhaps because such compulsion so plainly violates the Constitution, most of our free speech cases have involved restrictions on what can be said, rather than laws compelling speech. But measures compelling speech are at least as threatening.

[8] Free speech serves many ends. It is essential to our democratic form of government, see, *e.g.*, *Garrison v.*

Louisiana, 379 U.S. 64, 74–75, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964), and it furthers the search for truth, see, *e.g.*, *Thornhill v. Alabama*, 310 U.S. 88, 95, 60 S.Ct. 736, 84 L.Ed. 1093 (1940). Whenever the Federal Government or a State prevents individuals from saying what they think on important matters or compels them to voice ideas with which they disagree, it undermines these ends.

When speech is compelled, however, additional damage is done. In that situation, individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, one of our landmark free speech cases said that a law commanding "involuntary affirmation" of objected-to beliefs would require "even more immediate and urgent grounds" than a law demanding silence. *Barnette*, *supra*, at 633, 63 S.Ct. 1178; see also *Riley*, *supra*, at 796–797, 108 S.Ct. 2667 (rejecting "deferential test" for compelled speech claims).

[9] [10] [11] Compelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns. *Knox*, *supra*, at 309, 132 S.Ct. 2277; *United States v. United Foods, Inc.*, 533 U.S. 405, 410, 121 S.Ct. 2334, 150 L.Ed.2d 438 (2001); *Abood*, *supra*, at 222, 234–235, 97 S.Ct. 1782. As Jefferson famously put it, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical." A Bill for Establishing Religious Freedom, in 2 Papers of Thomas Jefferson 545 (J. Boyd ed. 1950) (emphasis deleted and footnote omitted); see also *Hudson*, 475 U.S., at 305, n. 15, 106 S.Ct. 1066. We have therefore recognized that a " 'significant impingement on First Amendment rights' " occurs when public employees are required to provide financial support for a union that "takes many positions during collective bargaining that have powerful political and civic consequences." *Knox*, *supra*, at 310–311, 132 S.Ct. 2277 (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 455, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984)).

[12] Because the compelled subsidization of private speech seriously impinges on First Amendment rights, it cannot be casually allowed. Our free speech cases have identified "levels of scrutiny" to be applied in different contexts, and in three recent cases, we have considered the standard that should be used in judging the constitutionality of agency fees. See *Knox*, *supra* ; *Harris*, *supra* ; *Friedrichs v. California Teachers Assn.*, 578 U.S. ——, 136 S.Ct. 1083, 194 L.Ed.2d 255 (2016) (*per curiam*) (affirming decision below by equally divided Court).

[13] In *Knox*, the first of these cases, we found it sufficient to hold that the conduct in question was unconstitutional under even the test used for the compulsory subsidization of commercial speech. 567 U.S., at 309–310, 321–322, 132 S.Ct. 2277. Even though commercial speech has ***2465** been thought to enjoy a lesser degree of protection, see, *e.g.*, *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y.*, 447 U.S. 557, 562–563, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), prior precedent in that area, specifically *United Foods*, *supra*, had applied what we characterized as "exacting" scrutiny, *Knox*, 567 U.S., at 310, 132 S.Ct. 2277, a less demanding test than the "strict" scrutiny that might be thought to apply outside the commercial sphere. Under "exacting" scrutiny, we noted, a compelled subsidy must "serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Ibid.* (internal quotation marks and alterations omitted).

In *Harris*, the second of these cases, we again found that an agency-fee requirement failed "exacting scrutiny." 573 U.S., at ——, 134 S.Ct., at 2641. But we questioned whether that test provides sufficient protection for free speech rights, since "it is apparent that the speech compelled" in agency-fee cases "is not commercial speech." *Id.*, at ——, 134 S.Ct., at 2639.

[14] Picking up that cue, petitioner in the present case contends that the Illinois law at issue should be subjected to "strict scrutiny." Brief for Petitioner 36. The dissent, on the other hand, proposes that we apply what amounts to rational-basis review, that is, that we ask only whether a government employer could reasonably believe that the exaction of agency fees serves its interests. See *post*, at 2489 (KAGAN, J., dissenting) ("A government entity could reasonably conclude that such a clause was needed"). This form of minimal scrutiny is foreign to our free-speech jurisprudence, and we reject it here. At the same time, we again find it unnecessary to decide the issue of strict scrutiny because the Illinois scheme cannot survive under even the more permissive standard applied in *Knox* and *Harris*.

In the remainder of this part of our opinion (Parts III–B and III–C), we will apply this standard to the justifications for agency fees adopted by the Court in *Abood*. Then, in Parts IV and V, we will turn to alternative rationales proffered by respondents and their *amici*.

B

[15] In *Abood*, the main defense of the agency-fee

arrangement was that it served the State's interest in "labor peace," 431 U.S., at 224, 97 S.Ct. 1782. By "labor peace," the *Abood* Court meant avoidance of the conflict and disruption that it envisioned would occur if the employees in a unit were represented by more than one union. In such a situation, the Court predicted, "inter-union rivalries" would foster "dissension within the work force," and the employer could face "conflicting demands from different unions." *Id.*, at 220–221, 97 S.Ct. 1782. Confusion would ensue if the employer entered into and attempted to "enforce two or more agreements specifying different terms and conditions of employment." *Id.*, at 220, 97 S.Ct. 1782. And a settlement with one union would be "subject to attack from [a] rival labor organizatio [n]." *Id.*, at 221, 97 S.Ct. 1782.

We assume that "labor peace," in this sense of the term, is a compelling state interest, but *Abood* cited no evidence that the pandemonium it imagined would result if agency fees were not allowed, and it is now clear that *Abood* 's fears were unfounded. The *Abood* Court assumed that designation of a union as the exclusive representative of all the employees in a unit and the exaction of agency fees are inextricably linked, but that is simply not true. *Harris, supra,* at ——, 134 S.Ct., at 2640.

***2466** The federal employment experience is illustrative. Under federal law, a union chosen by majority vote is designated as the exclusive representative of all the employees, but federal law does not permit agency fees. See 5 U.S.C. §§ 7102, 7111(a), 7114(a). Nevertheless, nearly a million federal employees—about 27% of the federal work force—are union members.[1] The situation in the Postal Service is similar. Although permitted to choose an exclusive representative, Postal Service employees are not required to pay an agency fee, 39 U.S.C. §§ 1203(a), 1209(c), and about 400,000 are union members.[2] Likewise, millions of public employees in the 28 States that have laws generally prohibiting agency fees are represented by unions that serve as the exclusive representatives of all the employees.[3] Whatever may have been the case 41 years ago when *Abood* was handed down, it is now undeniable that "labor peace" can readily be achieved "through means significantly less restrictive of associational freedoms" than the assessment of agency fees. *Harris, supra,* at ——, 134 S.Ct., at 2639 (internal quotation marks omitted).

C

[16] In addition to the promotion of "labor peace," *Abood* cited "the risk of 'free riders' " as justification for agency fees, 431 U.S., at 224, 97 S.Ct. 1782. Respondents and some of their *amici* endorse this reasoning, contending that agency fees are needed to prevent nonmembers from enjoying the benefits of union representation without shouldering the costs. Brief for Union Respondent 34–36; Brief for State Respondents 41–45; see, *e.g.*, Brief for International Brotherhood of Teamsters as *Amicus Curiae* 3–5.

Petitioner strenuously objects to this free-rider label. He argues that he is not a free rider on a bus headed for a destination that he wishes to reach but is more like a person shanghaied for an unwanted voyage.

Whichever description fits the majority of public employees who would not subsidize a union if given the option, avoiding free riders is not a compelling interest. As we have noted, "free-rider arguments ... are generally insufficient to overcome First Amendment objections." *Knox*, 567 U.S., at 311, 132 S.Ct. 2277. To hold otherwise across the board would have startling consequences. Many private groups speak out with the objective of obtaining government action that will have the effect of benefiting nonmembers. May all those who are thought to benefit from such efforts be compelled to subsidize this speech?

[17] Suppose that a particular group lobbies or speaks out on behalf of what it thinks are the needs of senior citizens or veterans or physicians, to take just a few examples. Could the government require that all seniors, veterans, or doctors pay for that service even if they object? It has never been thought that this is permissible. "[P]rivate speech often furthers the interests of nonspeakers," but "that does not alone empower the state to compel the ***2467** speech to be paid for." *Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507, 556, 111 S.Ct. 1950, 114 L.Ed.2d 572 (1991) (Scalia, J., concurring in judgment in part and dissenting in part). In simple terms, the First Amendment does not permit the government to compel a person to pay for another party's speech just because the government thinks that the speech furthers the interests of the person who does not want to pay.[4]

Those supporting agency fees contend that the situation here is different because unions are statutorily required to "represen[t] the interests of all public employees in the unit," whether or not they are union members. § 315/6(d); see, *e.g.*, Brief for State Respondents 40–41, 45; *post,* at 2490 (KAGAN, J., dissenting). Why might this matter?

We can think of two possible arguments. It might be

argued that a State has a compelling interest in requiring the payment of agency fees because (1) unions would otherwise be unwilling to represent nonmembers or (2) it would be fundamentally unfair to require unions to provide fair representation for nonmembers if nonmembers were not required to pay. Neither of these arguments is sound.

First, it is simply not true that unions will refuse to serve as the exclusive representative of all employees in the unit if they are not given agency fees. As noted, unions represent millions of public employees in jurisdictions that do not permit agency fees. No union is ever compelled to seek that designation. On the contrary, designation as exclusive representative is avidly sought.[5] Why is this so?

Even without agency fees, designation as the exclusive representative confers many benefits. As noted, that status gives the union a privileged place in negotiations over wages, benefits, and working conditions. See § 315/6(c). Not only is the union given the exclusive right to speak for all the employees in collective bargaining, but the employer is required by state law to listen to and to bargain in good faith with only that union. § 315/7. Designation as exclusive representative thus "results in a tremendous increase in the power" of the union. *American Communications Assn. v. Douds*, 339 U.S. 382, 401, 70 S.Ct. 674, 94 L.Ed. 925 (1950).

In addition, a union designated as exclusive representative is often granted special privileges, such as obtaining information about employees, see § 315/6(c), and having dues and fees deducted directly from employee wages, §§ 315/6(e)-(f). The collective-bargaining agreement in this case guarantees a long list of additional privileges. See App. 138–143.

[18] These benefits greatly outweigh any extra burden imposed by the duty of providing fair representation for nonmembers. What this duty entails, in simple terms, is an obligation not to "act solely in the interests of [the union's] own members." ***2468** Brief for State Respondents 41; see *Cintron v. AFSCME, Council 31*, No. S–CB–16–032, p. 1, 34 PERI ¶ 105 (ILRB Dec. 13, 2017) (union may not intentionally direct "animosity" toward nonmembers based on their "dissident union practices"); accord, *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 271, 129 S.Ct. 1456, 173 L.Ed.2d 398 (2009); *Vaca v. Sipes*, 386 U.S. 171, 177, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967).

[19] What does this mean when it comes to the negotiation of a contract? The union may not negotiate a collective-bargaining agreement that discriminates against nonmembers, see *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192, 202–203, 65 S.Ct. 226, 89 L.Ed. 173 (1944), but the union's bargaining latitude would be little different if state law simply prohibited public employers from entering into agreements that discriminate in that way. And for that matter, it is questionable whether the Constitution would permit a public-sector employer to adopt a collective-bargaining agreement that discriminates against nonmembers. See *id.*, at 198–199, 202, 65 S.Ct. 226 (analogizing a private-sector union's fair-representation duty to the duty "the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates"); cf. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 69, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006) (recognizing that government may not "impose penalties or withhold benefits based on membership in a disfavored group" where doing so "ma [kes] group membership less attractive"). To the extent that an employer would be barred from acceding to a discriminatory agreement anyway, the union's duty not to ask for one is superfluous. It is noteworthy that neither respondents nor any of the 39 *amicus* briefs supporting them—nor the dissent—has explained why the duty of fair representation causes public-sector unions to incur significantly greater expenses than they would otherwise bear in negotiating collective-bargaining agreements.

[20] What about the representation of nonmembers in grievance proceedings? Unions do not undertake this activity solely for the benefit of nonmembers—which is why Illinois law gives a public-sector union the right to send a representative to such proceedings even if the employee declines union representation. § 315/6(b). Representation of nonmembers furthers the union's interest in keeping control of the administration of the collective-bargaining agreement, since the resolution of one employee's grievance can affect others. And when a union controls the grievance process, it may, as a practical matter, effectively subordinate "the interests of [an] individual employee ... to the collective interests of all employees in the bargaining unit." *Alexander v. Gardner–Denver Co.*, 415 U.S. 36, 58, n. 19, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974); see *Stahulak v. Chicago*, 184 Ill.2d 176, 180–181, 234 Ill.Dec. 432, 703 N.E.2d 44, 46–47 (1998); *Mahoney v. Chicago*, 293 Ill.App.3d 69, 73–74, 227 Ill.Dec. 209, 687 N.E.2d 132, 135–137 (1997) (union has " 'discretion to refuse to process' " a grievance, provided it does not act "arbitrar[ily]" or "in bad faith" (emphasis deleted)).

In any event, whatever unwanted burden is imposed by the representation of nonmembers in disciplinary matters

can be eliminated "through means significantly less restrictive of associational freedoms" than the imposition of agency fees. *Harris*, 573 U.S., at ——, 134 S.Ct., at 2639 (internal quotation marks omitted). Individual nonmembers could be required to pay for that service or could be denied ***2469** union representation altogether.[6] Thus, agency fees cannot be sustained on the ground that unions would otherwise be unwilling to represent nonmembers.

[21] Nor can such fees be justified on the ground that it would otherwise be unfair to require a union to bear the duty of fair representation. That duty is a necessary concomitant of the authority that a union seeks when it chooses to serve as the exclusive representative of all the employees in a unit. As explained, designating a union as the exclusive representative of nonmembers substantially restricts the nonmembers' rights. *Supra*, at 2460 – 2461. Protection of their interests is placed in the hands of the union, and if the union were free to disregard or even work against those interests, these employees would be wholly unprotected. That is why we said many years ago that serious "constitutional questions [would] arise" if the union were *not* subject to the duty to represent all employees fairly. *Steele, supra*, at 198, 65 S.Ct. 226.

In sum, we do not see any reason to treat the free-rider interest any differently in the agency-fee context than in any other First Amendment context. See *Knox*, 567 U.S., at 311, 321, 132 S.Ct. 2277. We therefore hold that agency fees cannot be upheld on free-rider grounds.

IV

Implicitly acknowledging the weakness of *Abood* 's own reasoning, proponents of agency fees have come forward with alternative justifications for the decision, and we now address these arguments.

A

[22] The most surprising of these new arguments is the Union respondent's originalist defense of *Abood*. According to this argument, *Abood* was correctly decided because the First Amendment was not originally understood to provide *any* protection for the free speech rights of public employees. Brief for Union Respondent 2–3, 17–20.

As an initial matter, we doubt that the Union—or its members—actually want us to hold that public employees have "*no* [free speech] rights." *Id.*, at 1. Cf., *e.g.*, Brief for National Treasury Employees Union as *Amicus Curiae* in *Garcetti v. Ceballos*, O.T. 2005, No. 04–473, p. 7 (arguing for "broa[d]" public-employee First Amendment rights); Brief for AFL–CIO as *Amicus Curiae* in No. 04–473 (similar).

It is particularly discordant to find this argument in a brief that trumpets the importance of *stare decisis*. See Brief for Union Respondent 47–57. Taking away free speech protection for public employees would mean overturning decades of landmark precedent. Under the Union's theory, *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), and its progeny would fall. Yet *Pickering*, as we will discuss, is now the foundation for respondents' chief defense of *Abood*. And indeed, *Abood* itself would have to go if public employees have no free speech rights, since *Abood* holds that the First Amendment prohibits the exaction of agency fees for political or ideological purposes. ***2470** 431 U.S., at 234–235, 97 S.Ct. 1782 (finding it "clear" that "a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment"). Our political patronage cases would be doomed. See, *e.g.*, *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990); *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980); *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). Also imperiled would be older precedents like *Wieman v. Updegraff*, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216 (1952) (loyalty oaths), *Shelton v. Tucker*, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960) (disclosure of memberships and contributions), and *Keyishian v. Board of Regents of Univ. of State of N. Y.*, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967) (subversive speech). Respondents presumably want none of this, desiring instead that we apply the Constitution's supposed original meaning only when it suits them—to retain the part of *Abood* that they like. See Tr. of Oral Arg. 56–57. We will not engage in this halfway originalism.

Nor, in any event, does the First Amendment's original meaning support the Union's claim. The Union offers no persuasive founding-era evidence that public employees were understood to lack free speech protections. While it observes that restrictions on federal employees' activities have existed since the First Congress, most of its

historical examples involved limitations on public officials' outside business dealings, not on their speech. See *Ex parte Curtis*, 106 U.S. 371, 372–373, 1 S.Ct. 381, 27 L.Ed. 232 (1882). The only early *speech* restrictions the Union identifies are an 1806 statute prohibiting military personnel from using " 'contemptuous or disrespectful words against the President' " and other officials, and an 1801 directive limiting electioneering by top government employees. Brief for Union Respondent 3. But those examples at most show that the government was understood to have power to limit employee speech that threatened important governmental interests (such as maintaining military discipline and preventing corruption)—not that public employees' speech was entirely unprotected. Indeed, more recently this Court has upheld similar restrictions even while recognizing that government employees possess First Amendment rights. See, *e.g.*, *Brown v. Glines*, 444 U.S. 348, 353, 100 S.Ct. 594, 62 L.Ed.2d 540 (1980) (upholding military restriction on speech that threatened troop readiness); *Civil Service Comm'n v. Letter Carriers*, 413 U.S. 548, 556–557, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973) (upholding limits on public employees' political activities).

Ultimately, the Union relies, not on founding-era evidence, but on dictum from a 1983 opinion of this Court stating that, "[f]or most of th[e 20th] century, the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights." *Connick v. Myers*, 461 U.S. 138, 143, 103 S.Ct. 1684, 75 L.Ed.2d 708; see Brief for Union Respondent 2, 17. Even on its own terms, this dictum about 20th-century views does not purport to describe how the First Amendment was understood in 1791. And a careful examination of the decisions by this Court that *Connick* cited to support its dictum, see 461 U.S., at 144, 103 S.Ct. 1684, reveals that none of them rested on the facile premise that public employees are unprotected by the First Amendment. Instead, they considered (much as we do today) whether particular speech restrictions were "necessary to protect" fundamental government interests. *Curtis*, *supra*, at 374, 1 S.Ct. 381.

***2471** The Union has also failed to show that, even if public employees enjoyed free speech rights, the First Amendment was nonetheless originally understood to allow forced subsidies like those at issue here. We can safely say that, at the time of the adoption of the First Amendment, no one gave any thought to whether public-sector unions could charge nonmembers agency fees. Entities resembling labor unions did not exist at the founding, and public-sector unions did not emerge until the mid–20th century. The idea of public-sector unionization and agency fees would astound those who framed and ratified the Bill of Rights.[7] Thus, the Union cannot point to any accepted founding-era practice that even remotely resembles the compulsory assessment of agency fees from public-sector employees. We do know, however, that prominent members of the founding generation condemned laws requiring public employees to affirm or support beliefs with which they disagreed. As noted, Jefferson denounced compelled support for such beliefs as " 'sinful and tyrannical,' " *supra*, at 2464, and others expressed similar views.[8]

In short, the Union has offered no basis for concluding that *Abood* is supported by the original understanding of the First Amendment.

B

[23] **[24]** The principal defense of *Abood* advanced by respondents and the dissent is based on our decision in *Pickering*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811, which held that a school district violated the First Amendment by firing a teacher for writing a letter critical of the school administration. Under *Pickering* and later cases in the same line, employee speech is largely unprotected if it is part of what the employee is paid to do, see *Garcetti v. Ceballos*, 547 U.S. 410, 421–422, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006), or if it involved a matter of only private concern, see *Connick*, *supra*, at 146–149, 103 S.Ct. 1684. On the other hand, when a public employee speaks as a citizen on a matter of public concern, the employee's speech is protected unless " 'the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees' outweighs 'the interests of the [employee], as a citizen, in commenting upon matters of public concern.' " *Harris*, 573 U.S., at ——, 134 S.Ct., at 2642 (quoting *Pickering*, *supra*, at 568, 88 S.Ct. 1731). *Pickering* was the centerpiece of the defense of *Abood* in *Harris*, see 573 U.S., at —— – ——, 134 S.Ct., at 2653–2656 (KAGAN, J., dissenting), and we found the argument unpersuasive, see ***2472** *id.*, at —— – ——, 134 S.Ct., at 2641–2643. The intervening years have not improved its appeal.

1

[25] As we pointed out in *Harris*, *Abood* was not based on *Pickering*. 573 U.S., at ——, and n. 26, 134 S.Ct., at 2641, and n. 26. The *Abood* majority cited the case exactly once—in a footnote—and then merely to acknowledge that "there may be limits on the extent to which an employee in a sensitive or policymaking position may freely criticize his superiors and the policies they espouse." 431 U.S., at 230, n. 27, 97 S.Ct. 1782. That aside has no bearing on the agency-fee issue here.[9]

Respondents' reliance on *Pickering* is thus "an effort to find a new justification for the decision in *Abood*." *Harris, supra*, at ——, 134 S.Ct., at 2641. And we have previously taken a dim view of similar attempts to recast problematic First Amendment decisions. See, *e.g.*, *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 348–349, 363, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010) (rejecting efforts to recast *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990)); see also *Citizens United*, *supra*, at 382–385, 130 S.Ct. 876 (ROBERTS, C.J., concurring). We see no good reason, at this late date, to try to shoehorn *Abood* into the *Pickering* framework.

2

Even if that were attempted, the shoe would be a painful fit for at least three reasons.

[26] First, the *Pickering* framework was developed for use in a very different context—in cases that involve "one employee's speech and its impact on that employee's public responsibilities." *United States v. Treasury Employees*, 513 U.S. 454, 467, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995). This case, by contrast, involves a blanket requirement that all employees subsidize speech with which they may not agree. While we have sometimes looked to *Pickering* in considering general rules that affect broad categories of employees, we have acknowledged that the standard *Pickering* analysis requires modification in that situation. See 513 U.S., at 466–468, and n. 11, 115 S.Ct. 1003. A speech-restrictive law with "widespread impact," we have said, "gives rise to far more serious concerns than could any single supervisory decision." *Id.*, at 468, 115 S.Ct. 1003. Therefore, when such a law is at issue, the government must shoulder a correspondingly "heav[ier]" burden, *id.*, at 466, 115 S.Ct. 1003, and is entitled to considerably less deference in its assessment that a predicted harm justifies a particular impingement on First Amendment rights, see *id.*, at 475–476, n. 21, 115 S.Ct. 1003; accord, *id.*, at 482–483, 115 S.Ct. 1003 (O'Connor, J., concurring in judgment in part and dissenting in part). The end product of those adjustments is a test that more closely resembles exacting scrutiny than the traditional *Pickering* analysis.

The core collective-bargaining issue of wages and benefits illustrates this point. Suppose that a single employee complains that he or she should have received a 5% raise. This individual complaint would ***2473** likely constitute a matter of only private concern and would therefore be unprotected under *Pickering*. But a public-sector union's demand for a 5% raise for the many thousands of employees it represents would be another matter entirely. Granting such a raise could have a serious impact on the budget of the government unit in question, and by the same token, denying a raise might have a significant effect on the performance of government services. When a large number of employees speak through their union, the category of speech that is of public concern is greatly enlarged, and the category of speech that is of only private concern is substantially shrunk. By disputing this, *post*, at 2493 – 2494, the dissent denies the obvious.

[27] Second, the *Pickering* framework fits much less well where the government compels speech or speech subsidies in support of third parties. *Pickering* is based on the insight that the speech of a public-sector employee may interfere with the effective operation of a government office. When a public employer does not simply restrict potentially disruptive speech but commands that its employees mouth a message on its own behalf, the calculus is very different. Of course, if the speech in question is part of an employee's official duties, the employer may insist that the employee deliver any lawful message. See *Garcetti*, 547 U.S., at 421–422, 425–426, 126 S.Ct. 1951. Otherwise, however, it is not easy to imagine a situation in which a public employer has a legitimate need to demand that its employees recite words with which they disagree. And we have never applied *Pickering* in such a case.

Consider our decision in *Connick*. In that case, we held that an assistant district attorney's complaints about the supervisors in her office were, for the most part, matters of only private concern. 461 U.S., at 148, 103 S.Ct. 1684. As a result, we held, the district attorney could fire her for making those comments. *Id.*, at 154, 103 S.Ct. 1684. Now, suppose that the assistant had not made any critical comments about the supervisors but that the district attorney, out of the blue, demanded that she circulate a

memo praising the supervisors. Would her refusal to go along still be a matter of purely private concern? And if not, would the order be justified on the ground that the effective operation of the office demanded that the assistant voice complimentary sentiments with which she disagreed? If *Pickering* applies at all to compelled speech—a question that we do not decide—it would certainly require adjustment in that context.

Third, although both *Pickering* and *Abood* divided speech into two categories, the cases' categorization schemes do not line up. Superimposing the *Pickering* scheme on *Abood* would significantly change the *Abood* regime.

Let us first look at speech that is not germane to collective bargaining but instead concerns political or ideological issues. Under *Abood*, a public employer is flatly prohibited from permitting nonmembers to be charged for this speech, but under *Pickering*, the employees' free speech interests could be overcome if a court found that the employer's interests outweighed the employees'.

A similar problem arises with respect to speech that *is* germane to collective bargaining. The parties dispute how much of this speech is of public concern, but respondents concede that much of it falls squarely into that category. See Tr. of Oral Arg. 47, 65. Under *Abood*, nonmembers may be required to pay for all this speech, but *Pickering* would permit that practice only if the employer's interests outweighed those of the employees. Thus, recasting *Abood* as an application of *Pickering* ***2474** would substantially alter the *Abood* scheme.

For all these reasons, *Pickering* is a poor fit indeed.

V

Even if we were to apply some form of *Pickering*, Illinois' agency-fee arrangement would not survive.

A

[28] [29] Respondents begin by suggesting that union speech in collective-bargaining and grievance proceedings should be treated like the employee speech in *Garcetti, i.e.*, as speech "pursuant to [an employee's] official duties," 547 U.S., at 421, 126 S.Ct. 1951. Many employees, in both the public and private sectors, are paid to write or speak for the purpose of furthering the interests of their employers. There are laws that protect public employees from being compelled to say things that they reasonably believe to be untrue or improper, see *id.*, at 425–426, 126 S.Ct. 1951, but in general when public employees are performing their job duties, their speech may be controlled by their employer. Trying to fit union speech into this framework, respondents now suggest that the union speech funded by agency fees forms part of the official duties of the union officers who engage in the speech. Brief for Union Respondent 22–23; see Brief for State Respondents 23–24.

This argument distorts collective bargaining and grievance adjustment beyond recognition. When an employee engages in speech that is part of the employee's job duties, the employee's words are really the words of the employer. The employee is effectively the employer's spokesperson. But when a union negotiates with the employer or represents employees in disciplinary proceedings, the union speaks for the *employees*, not the employer. Otherwise, the employer would be negotiating with itself and disputing its own actions. That is not what anybody understands to be happening.

What is more, if the union's speech is really the employer's speech, then the employer could dictate what the union says. Unions, we trust, would be appalled by such a suggestion. For these reasons, *Garcetti* is totally inapposite here.

B

[30] Since the union speech paid for by agency fees is not controlled by *Garcetti*, we move on to the next step of the *Pickering* framework and ask whether the speech is on a matter of public or only private concern. In *Harris*, the dissent's central argument in defense of *Abood* was that union speech in collective bargaining, including speech about wages and benefits, is basically a matter of only private interest. See 573 U.S., at —— – ——, 134 S.Ct., at 2654–2655 (KAGAN, J., dissenting). We squarely rejected that argument, see *id.*, at —— – ——, 134 S.Ct., at 2642–2643, and the facts of the present case substantiate what we said at that time: "[I]t is impossible to argue that the level of ... state spending for employee benefits ... is not a matter of great public concern," *id.*, at —— – ——, 134 S.Ct., at 2642–2643.

Illinois, like some other States and a number of counties and cities around the country, suffers from severe budget problems.[10] As of 2013, Illinois had nearly ***2475** $160 billion in unfunded pension and retiree healthcare liabilities.[11] By 2017, that number had only grown, and the State was grappling with $15 billion in unpaid bills.[12] We are told that a "quarter of the budget is now devoted to paying down" those liabilities.[13] These problems and others led Moody's and S & P to downgrade Illinois' credit rating to "one step above junk"—the "lowest ranking on record for a U.S. state."[14]

The Governor, on one side, and public-sector unions, on the other, disagree sharply about what to do about these problems. The State claims that its employment-related debt is " 'squeezing core programs in education, public safety, and human services, in addition to limiting [the State's] ability to pay [its] bills.' " Securities Act of 1933 Release No. 9389, 105 S.E.C. Docket 3381 (2013). It therefore "told the Union that it would attempt to address th[e financial] crisis, at least in part, through collective bargaining." Board Decision 12–13. And "the State's desire for savings" in fact "dr[o]ve [its] bargaining" positions on matters such as health-insurance benefits and holiday, overtime, and promotion policies. *Id.*, at 13; *Illinois Dept. of Central Management Servs. v. AFSCME, Council 31*, No. S–CB–16–17 etc., 33 PERI ¶ 67 (ILRB Dec. 13, 2016) (ALJ Decision), pp. 26–28, 63–66, 224. But when the State offered cost-saving proposals on these issues, the Union countered with very different suggestions. Among other things, it advocated wage and tax increases, cutting spending "to Wall Street financial institutions," and reforms to Illinois' pension and tax systems (such as closing "corporate tax loopholes," "[e]xpanding the base of the state sales tax," and "allowing an income tax that is adjusted in accordance with ability to pay"). *Id.*, at 27–28. To suggest that speech on such matters is not of great public concern—or that it is not directed at the "public square," *post*, at 2495 (KAGAN, J., dissenting)—is to deny reality.

In addition to affecting how public money is spent, union speech in collective bargaining addresses many other important matters. As the examples offered by respondents' own *amici* show, unions express views on a wide range of subjects—education, child welfare, healthcare, and minority rights, to name a few. See, *e.g.*, Brief for American Federation of Teachers as *Amicus Curiae* 15–27; Brief for Child Protective Service Workers et al. as *Amici Curiae* 5–13; Brief for Human Rights Campaign et al. as *Amici Curiae* 10–17; Brief for National Women's Law Center et al. as *Amici Curiae* 14–30. What unions have to say on these matters in the context of collective bargaining is of great public importance.

Take the example of education, which was the focus of briefing and argument in ***2476** *Friedrichs*. The public importance of subsidized union speech is especially apparent in this field, since educators make up by far the largest category of state and local government employees, and education is typically the largest component of state and local government expenditures.[15]

Speech in this area also touches on fundamental questions of education policy. Should teacher pay be based on seniority, the better to retain experienced teachers? Or should schools adopt merit-pay systems to encourage teachers to get the best results out of their students?[16] Should districts transfer more experienced teachers to the lower performing schools that may have the greatest need for their skills, or should those teachers be allowed to stay where they have put down roots?[17] Should teachers be given tenure protection and, if so, under what conditions? On what grounds and pursuant to what procedures should teachers be subject to discipline or dismissal? How should teacher performance and student progress be measured—by standardized tests or other means?

Unions can also speak out in collective bargaining on controversial subjects such as climate change,[18] the Confederacy,[19] sexual orientation and gender identity,[20] evolution,[21] and minority religions.[22] These are sensitive political topics, and they are undoubtedly matters of profound " 'value and concern to the public.' " *Snyder v. Phelps*, 562 U.S. 443, 453, 131 S.Ct. 1207, 179 L.Ed.2d 172 (2011). We have often recognized that such speech " 'occupies the highest rung of the hierarchy of First Amendment values' " and merits " 'special protection.' " *Id.*, at 452, 131 S.Ct. 1207.

What does the dissent say about the prevalence of such issues? The most that it is willing to admit is that "some" issues that arise in collective bargaining "raise important non-budgetary disputes." *Post*, at 2496. Here again, the dissent refuses to recognize what actually occurs in public-sector collective bargaining.

[31] Even union speech in the handling of grievances may be of substantial public importance and may be directed at the "public square." *Post*, at 2495. For instance, the Union respondent in this case recently filed a grievance seeking to compel Illinois to appropriate $75 million to fund a 2% wage increase. *State v.* ***2477** *AFSCME Council 31*, 2016 IL 118422, 401 Ill.Dec. 907, 51 N.E.3d 738, 740–742, and n. 4. In short, the union speech at issue in this case is overwhelmingly of substantial public concern.

C

[32] The only remaining question under *Pickering* is whether the State's proffered interests justify the heavy burden that agency fees inflict on nonmembers' First Amendment interests. We have already addressed the state interests asserted in *Abood*—promoting "labor peace" and avoiding free riders, see *supra,* at 2465 – 2469—and we will not repeat that analysis.

In *Harris* and this case, defenders of *Abood* have asserted a different state interest—in the words of the *Harris* dissent, the State's "interest in bargaining with an adequately funded exclusive bargaining agent." 573 U.S., at ——, 134 S.Ct., at 2648 (KAGAN, J., dissenting); see also *post,* at 2489 – 2490 (KAGAN, J., dissenting). This was not "the interest *Abood* recognized and protected," *Harris, supra,* at ——, 134 S.Ct., at 2648 (KAGAN, J., dissenting), and, in any event, it is insufficient.

Although the dissent would accept without any serious independent evaluation the State's assertion that the absence of agency fees would cripple public-sector unions and thus impair the efficiency of government operations, see *post,* at 2490 – 2491, 2492 - 2493, ample experience, as we have noted, *supra,* at 2465 - 2466, shows that this is questionable.

Especially in light of the more rigorous form of *Pickering* analysis that would apply in this context, see *supra,* at 2472 – 2473, the balance tips decisively in favor of the employees' free speech rights.[23]

[33] [34] [35] We readily acknowledge, as *Pickering* did, that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." 391 U.S., at 568, 88 S.Ct. 1731. Our analysis is consistent with that principle. The exacting scrutiny standard we apply in this case was developed in the context of commercial speech, another area where the government has traditionally enjoyed greater-than-usual power to regulate speech. See ***2478** *supra,* at 2464 –2465. It is also not disputed that the State may require that a union serve as exclusive bargaining agent for its employees—itself a significant impingement on associational freedoms that would not be tolerated in other contexts. We simply draw the line at allowing the government to go further still and require all employees to support the union irrespective of whether they share its views. Nothing in the *Pickering* line of cases requires us to uphold every speech restriction the government imposes as an employer. See *Pickering, supra,* at 564–566, 88 S.Ct. 1731 (holding teacher's dismissal for criticizing school board unconstitutional); *Rankin v. McPherson,* 483 U.S. 378, 392, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987) (holding clerical employee's dismissal for supporting assassination attempt on President unconstitutional); *Treasury Employees,* 513 U.S., at 477, 115 S.Ct. 1003 (holding federal-employee honoraria ban unconstitutional).

VI

[36] For the reasons given above, we conclude that public-sector agency-shop arrangements violate the First Amendment, and *Abood* erred in concluding otherwise. There remains the question whether *stare decisis* nonetheless counsels against overruling *Abood*. It does not.

[37] [38] "*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee,* 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). We will not overturn a past decision unless there are strong grounds for doing so. *United States v. International Business Machines Corp.,* 517 U.S. 843, 855–856, 116 S.Ct. 1793, 135 L.Ed.2d 124 (1996); *Citizens United,* 558 U.S., at 377, 130 S.Ct. 876 (ROBERTS, C.J., concurring). But as we have often recognized, *stare decisis* is " 'not an inexorable command.' " *Pearson v. Callahan,* 555 U.S. 223, 233, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009); see also *Lawrence v. Texas,* 539 U.S. 558, 577, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003); *State Oil Co. v. Khan,* 522 U.S. 3, 20, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997); *Agostini v. Felton,* 521 U.S. 203, 235, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997); *Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 63, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996); *Payne, supra,* at 828, 111 S.Ct. 2597.

[39] [40] [41] The doctrine "is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions." *Agostini, supra,* at 235, 117 S.Ct. 1997. And *stare decisis* applies with perhaps

least force of all to decisions that wrongly denied First Amendment rights: "This Court has not hesitated to overrule decisions offensive to the First Amendment (a fixed star in our constitutional constellation, if there is one)." *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 500, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007) (Scalia, J., concurring in part and concurring in judgment) (internal quotation marks omitted); see also *Citizens United, supra,* at 362–365, 130 S.Ct. 876 (overruling *Austin,* 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652); *Barnette,* 319 U.S., at 642, 63 S.Ct. 1178 (overruling *Minersville School Dist. v. Gobitis,* 310 U.S. 586, 60 S.Ct. 1010, 84 L.Ed. 1375 (1940)).

[42] Our cases identify factors that should be taken into account in deciding whether to overrule a past decision. Five of these are most important here: the quality of *Abood* 's reasoning, the workability of the rule it established, its consistency with other related decisions, developments ***2479** since the decision was handed down, and reliance on the decision. After analyzing these factors, we conclude that *stare decisis* does not require us to retain *Abood*.

A

[43] [44] An important factor in determining whether a precedent should be overruled is the quality of its reasoning, see *Citizens United,* 558 U.S., at 363–364, 130 S.Ct. 876; *id.,* at 382–385, 130 S.Ct. 876 (ROBERTS, C.J., concurring); *Lawrence,* 539 U.S., at 577–578, 123 S.Ct. 2472, and as we explained in *Harris*, *Abood* was poorly reasoned, see 573 U.S., at —— – ——, 134 S.Ct., at 2632–2634. We will summarize, but not repeat, *Harris* 's lengthy discussion of the issue.

Abood went wrong at the start when it concluded that two prior decisions, *Railway Employes v. Hanson,* 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112 (1956), and *Machinists v. Street,* 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961), "appear[ed] to require validation of the agency-shop agreement before [the Court]." 431 U.S., at 226, 97 S.Ct. 1782. Properly understood, those decisions did no such thing. Both cases involved Congress's "*bare authorization* " of *private-sector* union shops under the Railway Labor Act. *Street, supra,* at 749, 81 S.Ct. 1784 (emphasis added).[24] *Abood* failed to appreciate that a very different First Amendment question arises when a State *requires* its employees to pay agency fees. See *Harris, supra,* at ——, 134 S.Ct., at 2632.

Moreover, neither *Hanson* nor *Street* gave careful consideration to the First Amendment. In *Hanson*, the primary questions were whether Congress exceeded its power under the Commerce Clause or violated substantive due process by authorizing private union-shop arrangements under the Commerce and Due Process Clauses. 351 U.S., at 233–235, 76 S.Ct. 714. After deciding those questions, the Court summarily dismissed what was essentially a facial First Amendment challenge, noting that the record did not substantiate the challengers' claim. *Id.,* at 238, 76 S.Ct. 714; see *Harris, supra,* at ——, 134 S.Ct., at 2632. For its part, *Street* was decided as a matter of statutory construction, and so did not reach any constitutional issue. 367 U.S., at 749–750, 768–769, 81 S.Ct. 1784. *Abood* nevertheless took the view that *Hanson* and *Street* "all but decided" the important free speech issue that was before the Court. *Harris,* 573 U.S., at ——, 134 S.Ct., at 2632. As we said in *Harris*, "[s]urely a First Amendment issue of this importance deserved better treatment." *Ibid.*

Abood 's unwarranted reliance on *Hanson* and *Street* appears to have contributed to another mistake: *Abood* judged the constitutionality of public-sector agency ***2480** fees under a deferential standard that finds no support in our free speech cases. (As noted, *supra,* at 2464 – 2465, today's dissent makes the same fundamental mistake.) *Abood* did not independently evaluate the strength of the government interests that were said to support the challenged agency-fee provision; nor did it ask how well that provision actually promoted those interests or whether they could have been adequately served without impinging so heavily on the free speech rights of nonmembers. Rather, *Abood* followed *Hanson* and *Street,* which it interpreted as having deferred to "*the legislative assessment* of the important contribution of the union shop to the system of labor relations established by Congress." 431 U.S., at 222, 97 S.Ct. 1782 (emphasis added). But *Hanson* deferred to that judgment in deciding the Commerce Clause and substantive due process questions that were the focus of the case. Such deference to legislative judgments is inappropriate in deciding free speech issues.

If *Abood* had considered whether agency fees were actually needed to serve the asserted state interests, it might not have made the serious mistake of assuming that one of those interests—"labor peace"—demanded, not only that a single union be designated as the exclusive representative of all the employees in the relevant unit, but also that nonmembers be required to pay agency fees. Deferring to a perceived legislative judgment, *Abood* failed to see that the designation of a union as exclusive

representative and the imposition of agency fees are not inextricably linked. See *supra*, at 2465 – 2466; *Harris, supra*, at 2465 – 2466, 134 S.Ct., at 2640.

Abood also did not sufficiently take into account the difference between the effects of agency fees in public- and private-sector collective bargaining. The challengers in *Abood* argued that collective bargaining with a government employer, unlike collective bargaining in the private sector, involves "inherently 'political' " speech. 431 U.S., at 226, 97 S.Ct. 1782. The Court did not dispute that characterization, and in fact conceded that "decisionmaking by a public employer is above all a political process" driven more by policy concerns than economic ones. *Id.*, at 228, 97 S.Ct. 1782; see *id.*, at 228–231, 97 S.Ct. 1782. But (again invoking *Hanson*), the *Abood* Court asserted that public employees do not have "weightier First Amendment interest[s]" against compelled speech than do private employees. *Id.*, at 229, 97 S.Ct. 1782. That missed the point. Assuming for the sake of argument that the First Amendment applies at all to private-sector agency-shop arrangements, the individual interests at stake still differ. "In the public sector, core issues such as wages, pensions, and benefits are important political issues, but that is generally not so in the private sector." *Harris*, 573 U.S., at ——, 134 S.Ct., at 2632.

Overlooking the importance of this distinction, "*Abood* failed to appreciate the conceptual difficulty of distinguishing in public-sector cases between union expenditures that are made for collective-bargaining purposes and those that are made to achieve political ends." *Id.*, at ——, 134 S.Ct., at 2632. Likewise, "*Abood* does not seem to have anticipated the magnitude of the practical administrative problems that would result in attempting to classify public-sector union expenditures as either 'chargeable' ... or nonchargeable." *Ibid.* Nor did *Abood* "foresee the practical problems that would face objecting nonmembers." *Id.*, at ——, 134 S.Ct., at 2633.

[45] In sum, as detailed in *Harris*, ***2481** *Abood* was not well reasoned.[25]

B

[46] Another relevant consideration in the *stare decisis* calculus is the workability of the precedent in question, *Montejo v. Louisiana*, 556 U.S. 778, 792, 129 S.Ct. 2079, 173 L.Ed.2d 955 (2009), and that factor also weighs against *Abood*.

1

Abood 's line between chargeable and nonchargeable union expenditures has proved to be impossible to draw with precision. We tried to give the line some definition in *Lehnert*. There, a majority of the Court adopted a three-part test requiring that chargeable expenses (1) be " 'germane' " to collective bargaining, (2) be "justified" by the government's labor-peace and free-rider interests, and (3) not add "significantly" to the burden on free speech, 500 U.S., at 519, 111 S.Ct. 1950, but the Court splintered over the application of this test, see *id.*, at 519–522, 111 S.Ct. 1950 (plurality opinion); *id.*, at 533–534, 111 S.Ct. 1950 (Marshall, J., concurring in part and dissenting in part). That division was not surprising. As the *Lehnert* dissenters aptly observed, each part of the majority's test "involves a substantial judgment call," *id.*, at 551, 111 S.Ct. 1950 (opinion of Scalia, J.), rendering the test "altogether malleable" and "no[t] principled," *id.*, at 563, 111 S.Ct. 1950 (KENNEDY, J., concurring in judgment in part and dissenting in part).

Justice Scalia presciently warned that *Lehnert* 's amorphous standard would invite "perpetua[l] give-it-a-try litigation," *id.*, at 551, 111 S.Ct. 1950, and the Court's experience with union lobbying expenses illustrates the point. The *Lehnert* plurality held that money spent on lobbying for increased education funding was not chargeable. *Id.*, at 519–522, 111 S.Ct. 1950. But Justice Marshall—applying the same three-prong test—reached precisely the opposite conclusion. *Id.*, at 533–542, 111 S.Ct. 1950. And *Lehnert* failed to settle the matter; States and unions have continued to "give it a try" ever since.

In *Knox*, for example, we confronted a union's claim that the costs of lobbying the legislature and the electorate about a ballot measure were chargeable expenses under *Lehnert*. See Brief for Respondent in *Knox v. Service Employees*, O.T. 2011, No. 10–1121, pp. 48–53. The Court rejected this claim out of hand, 567 U.S., at 320–321, 132 S.Ct. 2277, but the dissent refused to do so, *id.*, at 336, 132 S.Ct. 2277 (opinion of BREYER, J.). And in the present case, nonmembers are required to pay for unspecified "[l]obbying" expenses and for "[s]ervices" that "may ultimately inure to the benefit of the members of the local bargaining unit." App. to Pet. for Cert. 31a–32a. That formulation is broad enough to encompass

just about anything that the union might choose to do.

Respondents agree that *Abood* 's chargeable-nonchargeable line suffers from "a vagueness problem," that it sometimes "allows what it shouldn't allow," and that "a firm[er] line c[ould] be drawn." Tr. of Oral Arg. 47–48. They therefore argue that we should "consider revisiting" this part of *Abood*. Tr. of Oral Arg. 66; see Brief for Union Respondent 46–47; Brief for State Respondents 30. This concession ***2482** only underscores the reality that *Abood* has proved unworkable: Not even the parties defending agency fees support the line that it has taken this Court over 40 years to draw.

2

Objecting employees also face a daunting and expensive task if they wish to challenge union chargeability determinations. While *Hudson* requires a union to provide nonmembers with "sufficient information to gauge the propriety of the union's fee," 475 U.S., at 306, 106 S.Ct. 1066, the *Hudson* notice in the present case and in others that have come before us do not begin to permit a nonmember to make such a determination.

In this case, the notice lists categories of expenses and sets out the amount in each category that is said to be attributable to chargeable and nonchargeable expenses. Here are some examples regarding the Union respondent's expenditures:

Category	Total Expense
Salary and Benefits	$14,718,708
Office Printing, Supplies, and Advertising	$148,272
Postage and Freight	$373,509
Telephone	$214,820
Convention Expense	$268,855

See App. to Pet. for Cert. 35a–36a.

How could any nonmember determine whether these numbers are even close to the mark without launching a legal challenge and retaining the services of attorneys and accountants? Indeed, even with such services, it would be a laborious and difficult task to check these figures.[26]

The Union respondent argues that challenging its chargeability determinations is not burdensome because the Union pays for the costs of arbitration, see Brief for Union Respondent 10–11, but objectors must still pay for the attorneys and experts needed to mount a serious challenge. And the attorney's fees incurred in such a proceeding can be substantial. See, *e.g.*, *Knox v. Chiang*, 2013 WL 2434606, *15 (E.D.Cal., June 5, 2013) (attorney's fees in *Knox* exceeded $1 million). The Union respondent's suggestion that an objector could obtain adequate review without even showing up at an arbitration, see App. to Pet. for Cert. 40a–41a, is therefore farfetched.

C

Developments since *Abood*, both factual and legal, have also "eroded" the decision's "underpinnings" and left it an outlier among our First Amendment cases. *United* ***2483**

States v. Gaudin, 515 U.S. 506, 521, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995).

1

Abood pinned its result on the "unsupported empirical assumption" that "the principle of exclusive representation in the public sector is dependent on a union or agency shop." *Harris*, 573 U.S., at ——, 134 S.Ct., at 2634; *Abood*, 431 U.S., at 220–222, 97 S.Ct. 1782. But, as already noted, experience has shown otherwise. See *supra*, at 2465 – 2466.

It is also significant that the Court decided *Abood* against a very different legal and economic backdrop. Public-sector unionism was a relatively new phenomenon in 1977. The first State to permit collective bargaining by government employees was Wisconsin in 1959, R. Kearney & P. Mareschal, Labor Relations in the Public Sector 64 (5th ed. 2014), and public-sector union membership remained relatively low until a "spurt" in the late 1960's and early 1970's, shortly before *Abood* was decided, Freeman, Unionism Comes to the Public Sector, 24 J. Econ. Lit. 41, 45 (1986). Since then, public-sector union membership has come to surpass private-sector union membership, even though there are nearly four times as many total private-sector employees as public-sector employees. B. Hirsch & D. Macpherson, Union Membership and Earnings Data Book 9–10, 12, 16 (2013 ed.).

This ascendance of public-sector unions has been marked by a parallel increase in public spending. In 1970, total state and local government expenditures amounted to $646 per capita in nominal terms, or about $4,000 per capita in 2014 dollars. See Dept. of Commerce, Statistical Abstract of the United States: 1972, p. 419; CPI Inflation Calculator, BLS, http://data.bls.gov/cgi-bin/cpicalc.pl. By 2014, that figure had ballooned to approximately $10,238 per capita. ProQuest, Statistical Abstract of the United States: 2018, pp. 17, Table 14, 300, Table 469. Not all that increase can be attributed to public-sector unions, of course, but the mounting costs of public-employee wages, benefits, and pensions undoubtedly played a substantial role. We are told, for example, that Illinois' pension funds are underfunded by $129 billion as a result of generous public-employee retirement packages. Brief for Jason R. Barclay et al. as *Amici Curiae* 9, 14. Unsustainable collective-bargaining agreements have also been blamed for multiple municipal bankruptcies. See Brief for State of Michigan et al. as *Amici Curiae* 10–19. These developments, and the political debate over public spending and debt they have spurred, have given collective-bargaining issues a political valence that *Abood* did not fully appreciate.

2

Abood is also an "anomaly" in our First Amendment jurisprudence, as we recognized in *Harris* and *Knox*. *Harris*, *supra*, at ——, 134 S.Ct., at 2627; *Knox*, 567 U.S., at 311, 132 S.Ct. 2277. This is not an altogether new observation. In *Abood* itself, Justice Powell faulted the Court for failing to perform the " 'exacting scrutiny' " applied in other cases involving significant impingements on First Amendment rights. 431 U.S., at 259, 97 S.Ct. 1782; see *id.*, at 259–260, and n. 14, 97 S.Ct. 1782. Our later cases involving compelled speech and association have also employed exacting scrutiny, if not a more demanding standard. See, *e.g.*, *Roberts*, 468 U.S., at 623, 104 S.Ct. 3244; *United Foods*, 533 U.S., at 414, 121 S.Ct. 2334. And we have more recently refused, even in agency-fee cases, to extend *Abood* beyond circumstances where it directly controls. See *Knox*, *supra*, at 314, 132 S.Ct. 2277; *Harris*, *supra*, at —— – ——, 134 S.Ct., at 2639.

***2484** *Abood* particularly sticks out when viewed against our cases holding that public employees generally may not be required to support a political party. See *Elrod*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547; *Branti*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574; *Rutan*, 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d 52; *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712, 116 S.Ct. 2353, 135 L.Ed.2d 874 (1996). The Court reached that conclusion despite a "long tradition" of political patronage in government. *Rutan*, *supra*, at 95, 110 S.Ct. 2729 (Scalia, J., dissenting); see also *Elrod*, 427 U.S., at 353, 96 S.Ct. 2673 (plurality opinion); *id.*, at 377–378, 96 S.Ct. 2673 (Powell, J., dissenting). It is an odd feature of our First Amendment cases that political patronage has been deemed largely unconstitutional, while forced subsidization of union speech (which has no such pedigree) has been largely permitted. As Justice Powell observed: "I am at a loss to understand why the State's decision to adopt the agency shop in the public sector should be worthy of *greater* deference, when challenged on First Amendment grounds, than its decision to adhere to the *tradition* of political patronage." *Abood*, *supra*, at 260, n. 14, 97 S.Ct. 1782 (opinion concurring in

judgment) (citing *Elrod, supra*, at 376–380, 382–387, 96 S.Ct. 2673 (Powell, J., dissenting); emphasis added). We have no occasion here to reconsider our political patronage decisions, but Justice Powell's observation is sound as far as it goes. By overruling *Abood*, we end the oddity of privileging compelled union support over compelled party support and bring a measure of greater coherence to our First Amendment law.

D

[47] [48] In some cases, reliance provides a strong reason for adhering to established law, see, *e.g.*, *Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 202–203, 112 S.Ct. 560, 116 L.Ed.2d 560 (1991), and this is the factor that is stressed most strongly by respondents, their *amici*, and the dissent. They contend that collective-bargaining agreements now in effect were negotiated with agency fees in mind and that unions may have given up other benefits in exchange for provisions granting them such fees. Tr. of Oral Arg. 67–68; see Brief for State Respondents 54; Brief for Union Respondent 50; *post*, at 2498 – 2501 (KAGAN, J., dissenting). In this case, however, reliance does not carry decisive weight.

For one thing, it would be unconscionable to permit free speech rights to be abridged in perpetuity in order to preserve contract provisions that will expire on their own in a few years' time. "The fact that [public-sector unions] may view [agency fees] as an entitlement does not establish the sort of reliance interest that could outweigh the countervailing interest that [nonmembers] share in having their constitutional rights fully protected." *Arizona v. Gant*, 556 U.S. 332, 349, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009).

For another, *Abood* does not provide "a clear or easily applicable standard, so arguments for reliance based on its clarity are misplaced." *South Dakota v. Wayfair, Inc.*, *ante*, at 20, —— U.S. ——, 138 S.Ct. 2080, —— L.Ed.2d ——, 2018 WL 3058015 (2018); see *supra*, at 2480 – 2482.

This is especially so because public-sector unions have been on notice for years regarding this Court's misgivings about *Abood*. In *Knox*, decided in 2012, we described *Abood* as a First Amendment "anomaly." 567 U.S., at 311, 132 S.Ct. 2277. Two years later in *Harris*, we were asked to overrule *Abood*, and while we found it unnecessary to take that step, we cataloged *Abood* 's many weaknesses. In ***2485** 2015, we granted a petition for certiorari asking us to review a decision that sustained an agency-fee arrangement under *Abood*. *Friedrichs v. California Teachers Assn.*, 576 U.S. ——, 136 S.Ct. 2545, 195 L.Ed.2d 880 (2016). After exhaustive briefing and argument on the question whether *Abood* should be overruled, we affirmed the decision below by an equally divided vote. 578 U.S. ——, 136 S.Ct. 1083, 194 L.Ed.2d 255 (2016) (*per curiam*). During this period of time, any public-sector union seeking an agency-fee provision in a collective-bargaining agreement must have understood that the constitutionality of such a provision was uncertain.

That is certainly true with respect to the collective-bargaining agreement in the present case. That agreement initially ran from July 1, 2012, until June 30, 2015. App. 331. Since then, the agreement has been extended pursuant to a provision providing for automatic renewal for an additional year unless either party gives timely notice that it desires to amend or terminate the contract. *Ibid*. Thus, for the past three years, the Union could not have been confident about the continuation of the agency-fee arrangement for more than a year at a time.

Because public-sector collective-bargaining agreements are generally of rather short duration, a great many of those now in effect probably began or were renewed since *Knox* (2012) or *Harris* (2014). But even if an agreement antedates those decisions, the union was able to protect itself if an agency-fee provision was essential to the overall bargain. A union's attorneys undoubtedly understand that if one provision of a collective-bargaining agreement is found to be unlawful, the remaining provisions are likely to remain in effect. See *NLRB v. Rockaway News Supply Co.*, 345 U.S. 71, 76–79, 73 S.Ct. 519, 97 L.Ed. 832 (1953); see also 8 R. Lord, Williston on Contracts § 19:70 (4th ed. 2010). Any union believing that an agency-fee provision was essential to its bargain could have insisted on a provision giving it greater protection. The agreement in the present case, by contrast, provides expressly that the invalidation of any part of the agreement "shall not invalidate the remaining portions," which "shall remain in full force and effect." App. 328. Such severability clauses ensure that "entire contracts" are not "br[ought] down" by today's ruling. *Post*, at 2499, n. 5 (KAGAN, J., dissenting).

[49] In short, the uncertain status of *Abood*, the lack of clarity it provides, the short-term nature of collective-bargaining agreements, and the ability of unions to protect themselves if an agency-fee provision was crucial to its bargain all work to undermine the force

of reliance as a factor supporting *Abood*.[27]

We recognize that the loss of payments from nonmembers may cause unions to experience unpleasant transition costs in the short term, and may require unions to make adjustments in order to attract and ***2486** retain members. But we must weigh these disadvantages against the considerable windfall that unions have received under *Abood* for the past 41 years. It is hard to estimate how many billions of dollars have been taken from nonmembers and transferred to public-sector unions in violation of the First Amendment. Those unconstitutional exactions cannot be allowed to continue indefinitely.

[50] [51] [52] All these reasons—that *Abood* 's proponents have abandoned its reasoning, that the precedent has proved unworkable, that it conflicts with other First Amendment decisions, and that subsequent developments have eroded its underpinnings—provide the " 'special justification[s]' " for overruling *Abood*. *Post,* at 2497 (KAGAN, J., dissenting) (quoting *Kimble v. Marvel Entertainment, LLC,* 576 U.S. ——, ——, 135 S.Ct. 2401, 2409, 192 L.Ed.2d 463 (2015)).[28]

VII

For these reasons, States and public-sector unions may no longer extract agency fees from nonconsenting employees. Under Illinois law, if a public-sector collective-bargaining agreement includes an agency-fee provision and the union certifies to the employer the amount of the fee, that amount is automatically deducted from the nonmember's wages. § 315/6(e). No form of employee consent is required.

[53] [54] This procedure violates the First Amendment and cannot continue. Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed. *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); see also *Knox,* 567 U.S., at 312–313, 132 S.Ct. 2277. Rather, to be effective, the waiver must be freely given and shown by "clear and compelling" evidence. *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 145, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967) (plurality opinion); see also *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.,* 527 U.S. 666, 680–682, 119 S.Ct. 2219, 144 L.Ed.2d 605 (1999). Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met.

* * *

Abood was wrongly decided and is now overruled. The judgment of the United States Court of Appeals for the Seventh Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

***2487** Justice SOTOMAYOR, dissenting.

I join Justice Kagan's dissent in full. Although I joined the majority in *Sorrell v. IMS Health Inc.,* 564 U.S. 552, 131 S.Ct. 2653, 180 L.Ed.2d 544 (2011), I disagree with the way that this Court has since interpreted and applied that opinion. See, *e.g., National Institute of Family and Life Advocates v. Becerra, ante,* p. ——, —— U.S. ——, 138 S.Ct. 2361, ——L.Ed.2d ——, 2018 WL 3116336 (2018). Having seen the troubling development in First Amendment jurisprudence over the years, both in this Court and in lower courts, I agree fully with Justice KAGAN that *Sorrell*—in the way it has been read by this Court—has allowed courts to "wiel[d] the First Amendment in ... an aggressive way" just as the majority does today. *Post,* at 2501.

Justice KAGAN, with whom Justice GINSBURG, Justice BREYER, and Justice SOTOMAYOR join, dissenting.

For over 40 years, *Abood v. Detroit Bd. of Ed.,* 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977), struck a stable balance between public employees' First Amendment rights and government entities' interests in running their workforces as they thought proper. Under that decision, a government entity could require public employees to pay a fair share of the cost that a union incurs when negotiating on their behalf over terms of employment. But no part of that fair-share payment could go to any of the union's political or ideological activities.

That holding fit comfortably with this Court's general framework for evaluating claims that a condition of public employment violates the First Amendment. The Court's decisions have long made plain that government entities

have substantial latitude to regulate their employees' speech—especially about terms of employment—in the interest of operating their workplaces effectively. *Abood* allowed governments to do just that. While protecting public employees' expression about non-workplace matters, the decision enabled a government to advance important managerial interests—by ensuring the presence of an exclusive employee representative to bargain with. Far from an "anomaly," *ante,* at 2463, the *Abood* regime was a paradigmatic example of how the government can regulate speech in its capacity as an employer.

Not any longer. Today, the Court succeeds in its 6–year campaign to reverse *Abood*. See *Friedrichs v. California Teachers Assn.*, 578 U.S. ——, 136 S.Ct. 1083, 194 L.Ed.2d 255 (2016) (*per curiam*); *Harris v. Quinn*, 573 U.S. ——, 134 S.Ct. 2618, 189 L.Ed.2d 620 (2014); *Knox v. Service Employees*, 567 U.S. 298, 132 S.Ct. 2277, 183 L.Ed.2d 281 (2012). Its decision will have large-scale consequences. Public employee unions will lose a secure source of financial support. State and local governments that thought fair-share provisions furthered their interests will need to find new ways of managing their workforces. Across the country, the relationships of public employees and employers will alter in both predictable and wholly unexpected ways.

Rarely if ever has the Court overruled a decision—let alone one of this import—with so little regard for the usual principles of *stare decisis*. There are no special justifications for reversing *Abood.* It has proved workable. No recent developments have eroded its underpinnings. And it is deeply entrenched, in both the law and the real world. More than 20 States have statutory schemes built on the decision. Those laws underpin thousands of ongoing contracts involving millions of employees. Reliance interests do not come any stronger than those surrounding ***2488** *Abood*. And likewise, judicial disruption does not get any greater than what the Court does today. I respectfully dissent.

I

I begin with *Abood,* the 41–year–old precedent the majority overrules. That case involved a union that had been certified as the exclusive representative of Detroit's public school teachers. The union's collective-bargaining agreement with the city included an "agency shop" clause, which required teachers who had not joined the union to pay it "a service charge equal to the regular dues required of [u]nion members." *Abood,* 431 U.S., at 212, 97 S.Ct. 1782. A group of non-union members sued over that clause, arguing that it violated the First Amendment.

In considering their challenge, the Court canvassed the purposes of the "agency shop" clause. It was rooted, the Court understood, in the "principle of exclusive union representation"—a "central element" in "industrial relations" since the New Deal. *Id.*, at 220, 97 S.Ct. 1782. Significant benefits, the Court explained, could derive from the "designation of a single [union] representative" for all similarly situated employees in a workplace. *Ibid.* In particular, such arrangements: "avoid[ ] the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment"; "prevent[ ] inter-union rivalries from creating dissension within the work force"; "free[ ] the employer from the possibility of facing conflicting demands from different unions"; and "permit [ ] the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations." *Id.*, at 220–221, 97 S.Ct. 1782. As proof, the Court pointed to the example of exclusive-representation arrangements in the private-employment sphere: There, Congress had long thought that such schemes would promote "peaceful labor relations" and "labor stability." *Id.*, at 219, 229, 97 S.Ct. 1782. A public employer like Detroit, the Court believed, could reasonably make the same calculation.

But for an exclusive-bargaining arrangement to work, such an employer often thought, the union needed adequate funding. Because the "designation of a union as exclusive representative carries with it great responsibilities," the Court reasoned, it inevitably also entails substantial costs. *Id.*, at 221, 97 S.Ct. 1782. "The tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones." *Ibid.* Those activities, the Court noted, require the "expenditure of much time and money"—for example, payment for the "services of lawyers, expert negotiators, economists, and a research staff." *Ibid.* And there is no way to confine the union's services to union members alone (and thus to trim costs) because unions must by law fairly represent all employees in a given bargaining unit—union members and non-members alike. See *ibid.*

With all that in mind, the Court recognized why both a government entity and its union bargaining partner would gravitate toward an agency-fee clause. Those fees, the Court reasoned, "distribute fairly the cost" of collective

bargaining "among those who benefit"—that is, *all* employees in the work unit. *Id.*, at 222, 97 S.Ct. 1782. And they "counteract[ ] the incentive that employees might otherwise have to become 'free riders.' " *Ibid.* In other words, an agency-fee provision prevents employees from reaping all the "benefits of union representation"—higher pay, a better retirement plan, and so forth—while ***2489** leaving it to others to bear the costs. *Ibid.* To the Court, the upshot was clear: A government entity could reasonably conclude that such a clause was needed to maintain the kind of exclusive bargaining arrangement that would facilitate peaceful and stable labor relations.

But the Court acknowledged as well the "First Amendment interests" of dissenting employees. *Ibid.* It recognized that some workers might oppose positions the union takes in collective bargaining, or even "unionism itself." *Ibid.* And still more, it understood that unions often advance "political and ideological" views outside the collective-bargaining context—as when they "contribute to political candidates." *Id.*, at 232, 234, 97 S.Ct. 1782. Employees might well object to the use of their money to support such "ideological causes." *Id.*, at 235, 97 S.Ct. 1782.

So the Court struck a balance, which has governed this area ever since. On the one hand, employees could be required to pay fees to support the union in "collective bargaining, contract administration, and grievance adjustment." *Id.*, at 225–226, 97 S.Ct. 1782. There, the Court held, the "important government interests" in having a stably funded bargaining partner justify "the impingement upon" public employees' expression. *Id.*, at 225, 97 S.Ct. 1782. But on the other hand, employees could not be compelled to fund the union's political and ideological activities. Outside the collective-bargaining sphere, the Court determined, an employee's First Amendment rights defeated any conflicting government interest. See *id.*, at 234–235, 97 S.Ct. 1782.

II

Unlike the majority, I see nothing "questionable" about *Abood* 's analysis. *Ante*, at 2463 (quoting *Harris*, 573 U.S., at ——, 134 S.Ct., at 2632). The decision's account of why some government entities have a strong interest in agency fees (now often called fair-share fees) is fundamentally sound. And the balance *Abood* struck between public employers' interests and public employees' expression is right at home in First Amendment doctrine.

A

Abood 's reasoning about governmental interests has three connected parts. First, exclusive representation arrangements benefit some government entities because they can facilitate stable labor relations. In particular, such arrangements eliminate the potential for inter-union conflict and streamline the process of negotiating terms of employment. See 431 U.S., at 220–221, 97 S.Ct. 1782. Second, the government may be unable to avail itself of those benefits unless the single union has a secure source of funding. The various tasks involved in representing employees cost money; if the union doesn't have enough, it can't be an effective employee representative and bargaining partner. See *id.*, at 221, 97 S.Ct. 1782. And third, agency fees are often needed to ensure such stable funding. That is because without those fees, employees have every incentive to free ride on the union dues paid by others. See *id.*, at 222, 97 S.Ct. 1782.

The majority does not take issue with the first point. See *ante*, at 2478 (It is "not disputed that the State may require that a union serve as exclusive bargaining agent for its employees" in order to advance the State's "interests as an employer"). The majority claims that the second point never appears in *Abood*, but is willing to assume it for the sake of argument. See *ante*, at 2476 – 2477; but see *Abood*, 431 U.S., at 221, 97 S.Ct. 1782 (The tasks of an exclusive representative "often entail expenditure of much time and money"). So the majority stakes everything on the ***2490** third point—the conclusion that maintaining an effective system of exclusive representation often entails agency fees. *Ante*, at 2477 – 2478 (It "is simply not true" that exclusive representation and agency fees are "inextricably linked"); see *ante*, at 2467.

But basic economic theory shows why a government would think that agency fees are necessary for exclusive representation to work. What ties the two together, as *Abood* recognized, is the likelihood of free-riding when fees are absent. Remember that once a union achieves exclusive-representation status, the law compels it to fairly represent all workers in the bargaining unit, whether or not they join or contribute to the union. See *supra*, at

2488 – 2489. Because of that legal duty, the union cannot give special advantages to its own members. And that in turn creates a collective action problem of nightmarish proportions. Everyone—not just those who oppose the union, but also those who back it—has an economic incentive to withhold dues; only altruism or loyalty—as *against* financial self-interest—can explain why an employee would pay the union for its services. And so emerged *Abood* 's rule allowing fair-share agreements: That rule ensured that a union would receive sufficient funds, despite its legally imposed disability, to effectively carry out its duties as exclusive representative of the government's employees.

The majority's initial response to this reasoning is simply to dismiss it. "[F]ree rider arguments," the majority pronounces, "are generally insufficient to overcome First Amendment objections." *Ante,* at 2466 (quoting *Knox,* 567 U.S., at 311, 132 S.Ct. 2277). "To hold otherwise," it continues, "would have startling consequences" because "[m]any private groups speak out" in ways that will "benefit[ ] nonmembers." *Ante,* at 2466 – 2467. But that disregards the defining characteristic of *this* free-rider argument—that unions, unlike those many other private groups, must serve members and non-members alike. Groups advocating for "senior citizens or veterans" (to use the majority's examples) have no legal duty to provide benefits to all those individuals: They can spur people to pay dues by conferring all kinds of special advantages on their dues-paying members. Unions are—by law—in a different position, as this Court has long recognized. See, *e.g.*, *Machinists v. Street,* 367 U.S. 740, 762, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961). Justice Scalia, responding to the same argument as the majority's, may have put the point best. In a way that is true of no other private group, the "law *requires* the union to carry" non-members—"indeed, requires the union to *go out of its way* to benefit [them], even at the expense of its other interests." *Lehnert v. Ferris Faculty Assn.,* 500 U.S. 507, 556, 111 S.Ct. 1950, 114 L.Ed.2d 572 (1991) (opinion concurring in part and dissenting in part). That special feature was what justified *Abood* : "Where the state imposes upon the union a duty to deliver services, it may permit the union to demand reimbursement for them." 500 U.S., at 556, 111 S.Ct. 1950.

The majority's fallback argument purports to respond to the distinctive position of unions, but still misses *Abood* 's economic insight. Here, the majority delivers a four-page exegesis on why unions will seek to serve as an exclusive bargaining representative even "if they are not given agency fees." *Ante,* at 2467; see *ante,* at 2467 – 2469. The gist of the account is that "designation as the exclusive representative confers many benefits," which outweigh the costs of providing services to non-members. *Ante,* at 2467. But that response avoids the key question, which is whether unions without agency fees will be *able to* (not whether they will *want to*) carry on as an effective exclusive representative. ***2491** And as to that question, the majority again fails to reckon with how economically rational actors behave—in public as well as private workplaces. Without a fair-share agreement, the class of union non-members spirals upward. Employees (including those who love the union) realize that they can get the same benefits even if they let their memberships expire. And as more and more stop paying dues, those left must take up the financial slack (and anyway, begin to feel like suckers)—so they too quit the union. See Ichniowski & Zax, Right–to–Work Laws, Free Riders, and Unionization in the Local Public Sector, 9 J. Labor Economics 255, 257 (1991).[1] And when the vicious cycle finally ends, chances are that the union will lack the resources to effectively perform the responsibilities of an exclusive representative—or, in the worst case, to perform them at all. The result is to frustrate the interests of every government entity that thinks a strong exclusive-representation scheme will promote stable labor relations.

Of course, not all public employers will share that view. Some would rather not bargain with an exclusive representative. Others would prefer that representative to be poorly funded—to serve more as a front than an effectual bargaining partner. But as reflected in the number of fair-share statutes and contracts across the Nation, see *supra,* at 2487 – 2488, many government entities think that effective exclusive representation makes for good labor relations—and recognize, just as *Abood* did, that representation of that kind often depends on agency fees. See, *e.g.*, *Harris,* 573 U.S., at ——, 134 S.Ct., at 2656–2658 (Kagan, J., dissenting) (describing why Illinois thought that bargaining with an adequately funded exclusive representative of in-home caregivers would enable the State to better serve its disabled citizens). *Abood* respected that state interest; today's majority fails even to understand it. Little wonder that the majority's First Amendment analysis, which involves assessing the government's reasons for imposing agency fees, also comes up short.

B

1

In many cases over many decades, this Court has addressed how the First Amendment applies when the government, acting not as sovereign but as employer, limits its workers' speech. Those decisions have granted substantial latitude to the government, in recognition of its significant interests in managing its workforce so as to best serve the public. *Abood* fit neatly with that caselaw, in both reasoning and result. Indeed, its reversal today creates a significant anomaly—an exception, applying to union fees alone, from the usual rules governing public employees' speech.

***2492** "Time and again our cases have recognized that the Government has a much freer hand" in dealing with its employees than with "citizens at large." *NASA v. Nelson*, 562 U.S. 134, 148, 131 S.Ct. 746, 178 L.Ed.2d 667 (2011) (internal quotation marks omitted). The government, we have stated, needs to run "as effectively and efficiently as possible." *Engquist v. Oregon Dept. of Agriculture*, 553 U.S. 591, 598, 128 S.Ct. 2146, 170 L.Ed.2d 975 (2008) (internal quotation marks omitted). That means it must be able, much as a private employer is, to manage its workforce as it thinks fit. A public employee thus must submit to "certain limitations on his or her freedom." *Garcetti v. Ceballos*, 547 U.S. 410, 418, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006). Government workers, of course, do not wholly "lose their constitutional rights when they accept their positions." *Engquist*, 553 U.S., at 600, 128 S.Ct. 2146. But under our precedent, their rights often yield when weighed "against the realities of the employment context." *Ibid.* If it were otherwise—if every employment decision were to "bec[o]me a constitutional matter"—"the Government could not function." *NASA*, 562 U.S., at 149, 131 S.Ct. 746 (internal quotation marks omitted).

Those principles apply with full force when public employees' expressive rights are at issue. As we have explained: "Government employers, like private employers, need a significant degree of control over their employees' words" in order to "efficient[ly] provi[de] public services." *Garcetti*, 547 U.S., at 418, 126 S.Ct. 1951. Again, significant control does not mean absolute authority. In particular, the Court has guarded against government efforts to "leverage the employment relationship" to shut down its employees' speech as private citizens. *Id.*, at 419, 126 S.Ct. 1951. But when the government imposes speech restrictions relating to workplace operations, of the kind a private employer also would, the Court reliably upholds them. See, *e.g.*, *id.*, at 426, 126 S.Ct. 1951; *Connick v. Myers*, 461 U.S. 138, 154, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983).

In striking the proper balance between employee speech rights and managerial interests, the Court has long applied a test originating in *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). That case arose out of an individual employment action: the firing of a public school teacher. As we later described the *Pickering* inquiry, the Court first asks whether the employee "spoke as a citizen on a matter of public concern." *Garcetti*, 547 U.S., at 418, 126 S.Ct. 1951. If she did not—but rather spoke as an employee on a workplace matter—she has no "possibility of a First Amendment claim": A public employer can curtail her speech just as a private one could. *Ibid.* But if she did speak as a citizen on a public matter, the public employer must demonstrate "an adequate justification for treating the employee differently from any other member of the general public." *Ibid.* The government, that is, needs to show that legitimate workplace interests lay behind the speech regulation.

Abood coheres with that framework. The point here is not, as the majority suggests, that *Abood* is an overt, one-to-one "application of *Pickering*." *Ante*, at 2473 – 2474. It is not. *Abood* related to a municipality's labor policy, and so the Court looked to prior cases about unions, not to *Pickering* 's analysis of an employee's dismissal. (And truth be told, *Pickering* was not at that time much to look at: What the Court now thinks of as the two-step *Pickering* test, as the majority's own citations show, really emerged from *Garcetti* and *Connick*—two cases post-dating ***2493** *Abood*. See *ante*, at 2471 – 2472.)[2] But *Abood* and *Pickering* raised variants of the same basic issue: the extent of the government's authority to make employment decisions affecting expression. And in both, the Court struck the same basic balance, enabling the government to curb speech when—but only when—the regulation was designed to protect its managerial interests. Consider the parallels:

Like *Pickering*, *Abood* drew the constitutional line by analyzing the connection between the government's managerial interests and different kinds of expression. The Court first discussed the use of agency fees to subsidize the speech involved in "collective bargaining, contract administration, and grievance adjustment." 431 U.S., at 225–226, 97 S.Ct. 1782. It understood that expression (really, who would not?) as intimately tied to the workplace and employment relationship. The speech was about "working conditions, pay, discipline, promotions, leave, vacations, and terminations," *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 391, 131 S.Ct. 2488, 180 L.Ed.2d 408 (2011); the speech occurred

(almost always) in the workplace; and the speech was directed (at least mainly) to the employer. As noted earlier, *Abood* described the managerial interests of employers in channeling all that speech through a single union. See 431 U.S., at 220–222, 224–226, 97 S.Ct. 1782; *supra*, at 2460. And so *Abood* allowed the government to mandate fees for collective bargaining—just as *Pickering* permits the government to regulate employees' speech on similar workplace matters. But still, *Abood* realized that compulsion could go too far. The Court barred the use of fees for union speech supporting political candidates or "ideological causes." 431 U.S., at 235, 97 S.Ct. 1782. That speech, it understood, was "unrelated to [the union's] duties as exclusive bargaining representative," but instead was directed at the broader public sphere. *Id.*, at 234, 97 S.Ct. 1782. And for that reason, the Court saw no legitimate managerial interests in compelling its subsidization. The employees' First Amendment claims would thus prevail—as, again, they would have under *Pickering*.

Abood thus dovetailed with the Court's usual attitude in First Amendment cases toward the regulation of public employees' speech. That attitude is one of respect—even solicitude—for the government's prerogatives as an employer. So long as the government is acting as an employer—rather than exploiting the employment relationship for other ends—it has a wide berth, comparable to that of a private employer. And when the regulated expression concerns the terms and conditions of employment—the very stuff of the employment relationship—the government really cannot lose. There, managerial interests are obvious and strong. And so government employees are ... just employees, even though they work for the government. Except that today the government does lose, in a first for the law. Now, the government can constitutionally adopt all policies regulating core workplace speech in pursuit of managerial goals—save this single one.

2

The majority claims it is not making a special and unjustified exception. It offers two main reasons for declining to apply ***2494** here our usual deferential approach, as exemplified in *Pickering*, to the regulation of public employee speech. First, the majority says, this case involves a "blanket" policy rather than an individualized employment decision, so *Pickering* is a "painful fit." *Ante*, at 2472. Second, the majority asserts, the regulation here involves compelling rather than restricting speech, so the pain gets sharper still. See *ante*, at 2472 – 2473. And finally, the majority claims that even under the solicitous *Pickering* standard, the government should lose, because the speech here involves a matter of public concern and the government's managerial interests do not justify its regulation. See *ante*, at 2474 – 2477. The majority goes wrong at every turn.

First, this Court has applied the same basic approach whether a public employee challenges a general policy or an individualized decision. Even the majority must concede that "we have sometimes looked to *Pickering* in considering general rules that affect broad categories of employees." *Ante*, at 2472. In fact, the majority cannot come up with any case in which we have *not* done so. All it can muster is one case in which *while* applying the *Pickering* test to a broad rule—barring any federal employee from accepting any payment for any speech or article on any topic—the Court noted that the policy's breadth would count against the government at the test's second step. See *United States v. Treasury Employees*, 513 U.S. 454, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995). Which is completely predictable. The inquiry at that stage, after all, is whether the government has an employment-related interest in going however far it has gone—and in *Treasury Employees*, the government had indeed gone far. (The Court ultimately struck down the rule because it applied to speech in which the government had no identifiable managerial interest. See *id.*, at 470, 477, 115 S.Ct. 1003.) Nothing in *Treasury Employees* suggests that the Court defers only to ad hoc actions, and not to general rules, about public employee speech. That would be a perverse regime, given the greater regularity of rulemaking and the lesser danger of its abuse. So I would wager a small fortune that the next time a general rule governing public employee speech comes before us, we will dust off *Pickering*.

Second, the majority's distinction between compelling and restricting speech also lacks force. The majority posits that compelling speech always works a greater injury, and so always requires a greater justification. See *ante*, at 2463 – 2464. But the only case the majority cites for that reading of our precedent is possibly (thankfully) the most exceptional in our First Amendment annals: It involved the state forcing children to swear an oath contrary to their religious beliefs. See *ibid.* (quoting *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943)). Regulations challenged as compelling expression do not usually look anything like that—and for that reason, the standard First Amendment rule is that the "difference between compelled speech and

compelled silence" is "without constitutional significance." *Riley v. National Federation of Blind of N. C., Inc.*, 487 U.S. 781, 796, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988); see *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977) (referring to "[t]he right to speak and the right to refrain from speaking" as "complementary components" of the First Amendment). And if anything, the First Amendment scales tip the opposite way when (as here) the government is not compelling actual speech, but instead compelling a subsidy that others will use for expression. See Brief for Eugene Volokh et al. as *Amici Curiae* 4–5 (offering many examples to show that the ***2495** First Amendment "simply do[es] not guarantee that one's hard-earned dollars will never be spent on speech one disapproves of").[3] So when a government mandates a speech subsidy from a public employee—here, we might think of it as levying a tax to support collective bargaining—it should get at least as much deference as when it restricts the employee's speech. As this case shows, the former may advance a managerial interest as well as the latter—in which case the government's "freer hand" in dealing with its employees should apply with equal (if not greater) force. *NASA*, 562 U.S., at 148, 131 S.Ct. 746.

Third and finally, the majority errs in thinking that under the usual deferential approach, the government should lose this case. The majority mainly argues here that, at *Pickering* 's first step, "union speech in collective bargaining" is a "matter of great public concern" because it "affect [s] how public money is spent" and addresses "other important matters" like teacher merit pay or tenure. *Ante*, at 2474, 2476 (internal quotation marks omitted). But to start, the majority misunderstands the threshold inquiry set out in *Pickering* and later cases. The question is not, as the majority seems to think, whether the public is, or should be, interested in a government employee's speech. Instead, the question is whether that speech is about and directed to the workplace—as contrasted with the broader public square. *Treasury Employees* offers the Court's fullest explanation. The Court held there that the government's policy prevented employees from speaking as "citizen[s]" on "matters of public concern." 513 U.S., at 466, 115 S.Ct. 1003 (quoting *Pickering*, 391 U.S., at 568, 88 S.Ct. 1731). Why? Because the speeches and articles "were addressed to a public audience, were made outside the workplace, and involved content largely unrelated to their Government employment." 513 U.S., at 466, 115 S.Ct. 1003; see *id.*, at 465, 470, 115 S.Ct. 1003 (repeating that analysis twice more). The Court could not have cared less whether the speech at issue was "important." *Ante*, at 2475 – 2476. It instead asked whether the speech was truly *of* the workplace—addressed *to* it, made *in* it, and (most of all) *about* it.

Consistent with that focus, speech about the terms and conditions of employment—the essential stuff of collective bargaining—has never survived *Pickering* 's first step. This Court has rejected all attempts by employees to make a "federal constitutional issue" out of basic "employment matters, including working conditions, pay, discipline, promotions, leave, vacations, and terminations." *Guarnieri*, 564 U.S., at 391, 131 S.Ct. 2488; see *Board of Comm'rs, Wabaunsee Cty. v. Umbehr*, 518 U.S. 668, 675, 116 S.Ct. 2342, 135 L.Ed.2d 843 (1996) (stating that public employees' "speech on merely private employment matters is unprotected"). For that reason, even the Justices who originally objected to *Abood* conceded that the use of agency fees for bargaining on "economic issues" like "salaries and pension benefits" would not raise significant First Amendment questions. 431 U.S., at 263, n. 16, 97 S.Ct. 1782 (Powell, J., concurring in judgment). ***2496** Of course, most of those issues have budgetary consequences: They "affect[ ] how public money is spent." *Ante*, at 2475. And some raise important non-budgetary disputes; teacher merit pay is a good example, see *ante*, at 2476. But arguing about the terms of employment is still arguing about the terms of employment: The workplace remains both the context and the subject matter of the expression. If all that speech really counted as "of public concern," as the majority suggests, the mass of public employees' complaints (about pay and benefits and workplace policy and such) *would* become "federal constitutional issue[s]." *Guarnieri*, 564 U.S., at 391, 131 S.Ct. 2488. And contrary to decades' worth of precedent, government employers would then have far less control over their workforces than private employers do. See *supra*, at 2491 – 2493.

Consider an analogy, not involving union fees: Suppose a government entity disciplines a group of (non-unionized) employees for agitating for a better health plan at various inopportune times and places. The better health plan will of course drive up public spending; so according to the majority's analysis, the employees' speech satisfies *Pickering* 's "public concern" test. Or similarly, suppose a public employer penalizes a group of (non-unionized) teachers who protest merit pay in the school cafeteria. Once again, the majority's logic runs, the speech is of "public concern," so the employees have a plausible First Amendment claim. (And indeed, the majority appears to concede as much, by asserting that the results in these hypotheticals should turn on various "factual detail[s]" relevant to the interest balancing that occurs at the *Pickering* test's *second* step. *Ante*, at 2477, n. 23.) But in fact, this Court has always understood such cases to end

at *Pickering* 's *first* step: If an employee's speech is about, in, and directed to the workplace, she has no "possibility of a First Amendment claim." *Garcetti*, 547 U.S., at 418, 126 S.Ct. 1951; see *supra*, at 2492. So take your pick. Either the majority is exposing government entities across the country to increased First Amendment litigation and liability—and thus preventing them from regulating their workforces as private employers could. Or else, when actual cases of this kind come around, we will discover that today's majority has crafted a "unions only" carve-out to our employee-speech law.

What's more, the government should prevail even if the speech involved in collective bargaining satisfies *Pickering* 's first part. Recall that the next question is whether the government has shown "an adequate justification for treating the employee differently from any other member of the general public." *Garcetti*, 547 U.S., at 418, 126 S.Ct. 1951; *supra*, at 2492. That inquiry is itself famously respectful of government interests. This Court has reversed the government only when it has tried to "leverage the employment relationship" to achieve an outcome unrelated to the workplace's "effective functioning." *Garcetti*, 547 U.S., at 419, 126 S.Ct. 1951; *Rankin v. McPherson*, 483 U.S. 378, 388, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987). Nothing like that is true here. As *Abood* described, many government entities have found agency fees the best way to ensure a stable and productive relationship with an exclusive bargaining agent. See 431 U.S., at 220–221, 224–226, 97 S.Ct. 1782; *supra*, at 2488 – 2489. And here, Illinois and many governmental *amici* have explained again how agency fees advance their workplace goals. See Brief for State Respondents 12, 36; Brief for Governor Tom Wolf et al. as *Amici Curiae* 21–33. In no other employee-speech case has this Court dismissed such work-related interests, as the majority does here. See ***2497** *supra*, at 2489 – 2491 (discussing the majority's refusal to engage with the logic of the State's position). Time and again, the Court has instead respected and acceded to those interests—just as *Abood* did.

The key point about *Abood* is that it fit naturally with this Court's consistent teaching about the permissibility of regulating public employees' speech. The Court allows a government entity to regulate that expression in aid of managing its workforce to effectively provide public services. That is just what a government aims to do when it enforces a fair-share agreement. And so, the key point about today's decision is that it creates an unjustified hole in the law, applicable to union fees alone. This case is *sui generis* among those addressing public employee speech—and will almost surely remain so.

III

But the worse part of today's opinion is where the majority subverts all known principles of *stare decisis*. The majority makes plain, in the first 33 pages of its decision, that it believes *Abood* was wrong.[4] But even if that were true (which it is not), it is not enough. "Respecting *stare decisis* means sticking to some wrong decisions." *Kimble v. Marvel Entertainment, LLC*, 576 U.S. ——, ——, 135 S.Ct. 2401, 2409, 192 L.Ed.2d 463 (2015). Any departure from settled precedent (so the Court has often stated) demands a "special justification—over and above the belief that the precedent was wrongly decided." *Id.*, at ——, 135 S.Ct., at 2409 (internal quotation marks omitted); see, *e.g.*, *Arizona v. Rumsey*, 467 U.S. 203, 212, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984). And the majority does not have anything close. To the contrary: all that is "special" in this case—especially the massive reliance interests at stake—demands retaining *Abood*, beyond even the normal precedent.

Consider first why these principles about precedent are so important. *Stare decisis*—"the idea that today's Court should stand by yesterday's decisions"—is "a foundation stone of the rule of law." *Kimble*, 576 U.S., at ——, 135 S.Ct., at 2409 (quoting *Michigan v. Bay Mills Indian Community*, 572 U.S. ——, ——, 134 S.Ct. 2024, 2036, 188 L.Ed.2d 1071 (2014)). It "promotes the evenhanded, predictable, and consistent development" of legal doctrine. *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). It fosters respect for and reliance on judicial decisions. See *ibid.* And it "contributes to the actual and perceived integrity of the judicial process," *ibid.*, by ensuring that decisions are "founded in the law rather than in the proclivities of individuals," *Vasquez v. Hillery*, 474 U.S. 254, 265, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986).

And *Abood* is not just any precedent: It is embedded in the law (not to mention, as I'll later address, in the world) in a way not many decisions are. Over four decades, this Court has cited *Abood* favorably many times, and has affirmed and applied its central distinction between the costs of collective bargaining (which the government can charge to all employees) and those of political activities (which it cannot). See, *e.g.*, *Locke v. Karass*, 555 U.S. 207, 213–214, 129 S.Ct. 798, 172 L.Ed.2d 552 (2009); *Lehnert*, 500 U.S., at 519, 111 S.Ct. 1950; *Teachers v.*

Hudson, 475 U.S. 292, 301–302, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986); ***2498** *Ellis v. Railway Clerks*, 466 U.S. 435, 455–457, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984). Reviewing those decisions not a decade ago, this Court—unanimously—called the *Abood* rule "a general First Amendment principle." *Locke*, 555 U.S., at 213, 129 S.Ct. 798. And indeed, the Court has relied on that rule when deciding cases involving compelled speech subsidies outside the labor sphere—cases today's decision does not question. See, *e.g.*, *Keller v. State Bar of Cal.*, 496 U.S. 1, 9–17, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990) (state bar fees); *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 230–232, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000) (public university student fees); *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457, 471–473, 117 S.Ct. 2130, 138 L.Ed.2d 585 (1997) (commercial advertising assessments); see also n. 3, *supra*.

Ignoring our repeated validation of *Abood*, the majority claims it has become "an outlier among our First Amendment cases." *Ante*, at 2482. That claim fails most spectacularly for reasons already discussed: *Abood* coheres with the *Pickering* approach to reviewing regulation of public employees' speech. See *supra*, at 2492 – 2494. Needing to stretch further, the majority suggests that *Abood* conflicts with "our political patronage decisions." *Ante*, at 2484. But in fact those decisions strike a balance much like *Abood* 's. On the one hand, the Court has enabled governments to compel policymakers to support a political party, because that requirement (like fees for collective bargaining) can reasonably be thought to advance the interest in workplace effectiveness. See *Elrod v. Burns*, 427 U.S. 347, 366–367, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976); *Branti v. Finkel*, 445 U.S. 507, 517, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980). On the other hand, the Court has barred governments from extending that rule to non-policymaking employees because that application (like fees for political campaigns) can't be thought to promote that interest, see *Elrod*, 427 U.S., at 366, 96 S.Ct. 2673; the government is instead trying to "leverage the employment relationship" to achieve other goals, *Garcetti*, 547 U.S., at 419, 126 S.Ct. 1951. So all that the majority has left is *Knox* and *Harris*. See *ante*, at 2483 – 2484. Dicta in those recent decisions indeed began the assault on *Abood* that has culminated today. But neither actually addressed the extent to which a public employer may regulate its own employees' speech. Relying on them is bootstrapping—and mocking *stare decisis*. Don't like a decision? Just throw some gratuitous criticisms into a couple of opinions and a few years later point to them as "special justifications."

The majority is likewise wrong to invoke "workability" as a reason for overruling *Abood*. *Ante*, at 2480 – 2481. Does *Abood* require drawing a line? Yes, between a union's collective-bargaining activities and its political activities. Is that line perfectly and pristinely "precis[e]," as the majority demands? *Ante*, at 2480 – 2481. Well, not quite that—but as exercises of constitutional linedrawing go, *Abood* stands well above average. In the 40 years since *Abood*, this Court has had to resolve only a handful of cases raising questions about the distinction. To my knowledge, the circuit courts are not divided on any classification issue; neither are they issuing distress signals of the kind that sometimes prompt the Court to reverse a decision. See, *e.g.*, *Johnson v. United States*, 576 U.S. ——, —S.Ct. ——, —— L.Ed.2d —— (2015) (overruling precedent because of frequent splits and mass confusion). And that tranquility is unsurprising: There may be some gray areas (there always are), but in the mine run of cases, everyone knows the difference between politicking and collective bargaining. The majority cites some disagreement in two of the classification cases this Court decided ***2499** —as if non-unanimity among Justices were something startling. And it notes that a dissenter in one of those cases called the Court's approach "malleable" and "not principled," *ante*, at 2481—as though those weren't stock terms in dissenting vocabulary. See, *e.g.*, *Murr v. Wisconsin*, 582 U.S. ——, ——, 137 S.Ct. 1933, 1950–1951, 198 L.Ed.2d 497 (2017) (ROBERTS, C.J., dissenting); *Dietz v. Bouldin*, 579 U.S. ——, ——, 136 S.Ct. 1885, 1897, 195 L.Ed.2d 161 (2016) (THOMAS, J., dissenting); *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. ——, ——, 135 S.Ct. 1257, 1281, 191 L.Ed.2d 314 (2015) (Scalia, J., dissenting). As I wrote in *Harris* a few Terms ago: "If the kind of hand-wringing about blurry lines that the majority offers were enough to justify breaking with precedent, we might have to discard whole volumes of the U.S. Reports." 573 U.S., at ——, 134 S.Ct., at 2652.

And in any event, one *stare decisis* factor—reliance—dominates all others here and demands keeping *Abood*. *Stare decisis*, this Court has held, "has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision." *Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 202, 112 S.Ct. 560, 116 L.Ed.2d 560 (1991). That is because overruling a decision would then "require an extensive legislative response" or "dislodge settled rights and expectations." *Ibid.* Both will happen here: The Court today wreaks havoc on entrenched legislative and contractual arrangements.

Over 20 States have by now enacted statutes authorizing

fair-share provisions. To be precise, 22 States, the District of Columbia, and Puerto Rico—plus another two States for police and firefighter unions. Many of those States have multiple statutory provisions, with variations for different categories of public employees. See, *e.g.*, Brief for State of California as *Amicus Curiae* 24–25. Every one of them will now need to come up with new ways—elaborated in new statutes—to structure relations between government employers and their workers. The majority responds, in a footnote no less, that this is of no proper concern to the Court. See *ante*, at 2485, n. 27. But in fact, we have weighed heavily against "abandon[ing] our settled jurisprudence" that "[s]tate legislatures have relied upon" it and would have to "reexamine [and amend] their statutes" if it were overruled. *Allied–Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768, 785, 112 S.Ct. 2251, 119 L.Ed.2d 533 (1992); *Hilton*, 502 U.S., at 203, 112 S.Ct. 560.

Still more, thousands of current contracts covering millions of workers provide for agency fees. Usually, this Court recognizes that "[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights." *Payne*, 501 U.S., at 828, 111 S.Ct. 2597. Not today. The majority undoes bargains reached all over the country.[5] It prevents the parties from fulfilling other commitments they have made based on those agreements. It forces the parties—immediately—to renegotiate once-settled terms and create new tradeoffs. It does so knowing that many of the parties will have to revise (or redo) multiple contracts simultaneously. (New York City, for example, has agreed to agency fees in 144 contracts with 97 public-sector unions. See Brief for New York City Municipal Labor Committee as *Amicus Curiae* 4.) It does ***2500** so knowing that those renegotiations will occur in an environment of legal uncertainty, as state governments scramble to enact new labor legislation. See *supra*, at 2472. It does so with no real clue of what will happen next—of how its action will alter public-sector labor relations. It does so even though the government services affected—policing, firefighting, teaching, transportation, sanitation (and more)—affect the quality of life of tens of millions of Americans.

The majority asserts that no one should care much because the canceled agreements are "of rather short duration" and would "expire on their own in a few years' time." *Ante*, at 2484, 2485. But to begin with, that response ignores the substantial time and effort that state legislatures will have to devote to revamping their statutory schemes. See *supra*, at 2472. And anyway, it misunderstands the nature of contract negotiations when the parties have a continuing relationship. The parties, in renewing an old collective-bargaining agreement, don't start on an empty page. Instead, various "long-settled" terms—like fair-share provisions—are taken as a given. Brief for Governor Tom Wolf et al. 11; see Brief for New York City Sergeants Benevolent Assn. as *Amicus Curiae* 18. So the majority's ruling does more than advance by a few years a future renegotiation (though even that would be significant). In most cases, it commands new bargaining over how to replace a term that the parties never expected to change. And not just new bargaining; given the interests at stake, complicated and possibly contentious bargaining as well. See Brief for Governor Tom Wolf et al. 11.[6]

The majority, though, offers another reason for not worrying about reliance: The parties, it says, "have been on notice for years regarding this Court's misgivings about *Abood*." *Ante*, at 2484. Here, the majority proudly lays claim to its 6–year crusade to ban agency fees. In *Knox*, the majority relates, it described *Abood* as an "anomaly." *Ante*, at 2484 (quoting 567 U.S., at 311, 132 S.Ct. 2277). Then, in *Harris*, it "cataloged *Abood* 's many weaknesses." *Ante*, at 2484. Finally, in *Friedrichs*, "we granted a petition for certiorari asking us to" reverse *Abood*, but found ourselves equally divided. *Ante*, at 2485. "During this period of time," the majority concludes, public-sector unions "must have understood that the constitutionality of [an agency-fee] provision was uncertain." *Ibid*. And so, says the majority, they should have structured their affairs accordingly.

But that argument reflects a radically wrong understanding of how *stare decisis* operates. Justice Scalia once confronted a similar argument for "disregard[ing] reliance interests" and showed how antithetical it was to rule-of-law principles. *Quill Corp. v. North Dakota*, 504 U.S. 298, 320, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992) (concurring opinion). He noted first what we always tell lower courts: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [they] should follow the case which directly ***2501** controls, leaving to this Court the prerogative of overruling its own decisions." *Id.*, at 321, 112 S.Ct. 1904 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989); some alterations omitted). That instruction, Justice Scalia explained, was "incompatible" with an expectation that "private parties anticipate our overrulings." 504 U.S., at 320, 112 S.Ct. 1904. He concluded: "[R]eliance upon a square, unabandoned holding of the Supreme Court is *always* justifiable reliance." *Ibid. Abood* 's holding was square. It was unabandoned before today. It was, in other words, the law—however much some were working overtime to make it not. Parties, both unions and

governments, were thus justified in relying on it. And they did rely, to an extent rare among our decisions. To dismiss the overthrowing of their settled expectations as entailing no more than some "adjustments" and "unpleasant transition costs," *ante,* at 2485, is to trivialize *stare decisis.*

IV

There is no sugarcoating today's opinion. The majority overthrows a decision entrenched in this Nation's law—and in its economic life—for over 40 years. As a result, it prevents the American people, acting through their state and local officials, from making important choices about workplace governance. And it does so by weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy.

Departures from *stare decisis* are supposed to be "exceptional action[s]" demanding "special justification," *Rumsey,* 467 U.S., at 212, 104 S.Ct. 2305—but the majority offers nothing like that here. In contrast to the vigor of its attack on *Abood,* the majority's discussion of *stare decisis* barely limps to the finish line. And no wonder: The standard factors this Court considers when deciding to overrule a decision all cut one way. *Abood* 's legal underpinnings have not eroded over time: *Abood* is now, as it was when issued, consistent with this Court's First Amendment law. *Abood* provided a workable standard for courts to apply. And *Abood* has generated enormous reliance interests. The majority has overruled *Abood* for no exceptional or special reason, but because it never liked the decision. It has overruled *Abood* because it wanted to.

Because, that is, it wanted to pick the winning side in what should be—and until now, has been—an energetic policy debate. Some state and local governments (and the constituents they serve) think that stable unions promote healthy labor relations and thereby improve the provision of services to the public. Other state and local governments (and their constituents) think, to the contrary, that strong unions impose excessive costs and impair those services. Americans have debated the pros and cons for many decades—in large part, by deciding whether to use fair-share arrangements. Yesterday, 22 States were on one side, 28 on the other (ignoring a couple of in-betweeners). Today, that healthy—that democratic—debate ends. The majority has adjudged who should prevail. Indeed, the majority is bursting with pride over what it has accomplished: Now those 22 States, it crows, "can follow the model of the federal government and 28 other States." *Ante,* at 2485, n. 27.

And maybe most alarming, the majority has chosen the winners by turning the First Amendment into a sword, and using it against workaday economic and regulatory policy. Today is not the first time the Court has wielded the First Amendment in such an aggressive way. See, *e.g.*, *National Institute of Family and Life Advocates* ***2502** *v. Becerra, ante,* p. ——, —— U.S. ——, 138 S.Ct. 2361, 138 L.Ed.2d 2361, 2018 WL 3116336 (2018) (invalidating a law requiring medical and counseling facilities to provide relevant information to users); *Sorrell v. IMS Health Inc.,* 564 U.S. 552, 131 S.Ct. 2653, 180 L.Ed.2d 544 (2011) (striking down a law that restricted pharmacies from selling various data). And it threatens not to be the last. Speech is everywhere—a part of every human activity (employment, health care, securities trading, you name it). For that reason, almost all economic and regulatory policy affects or touches speech. So the majority's road runs long. And at every stop are black-robed rulers overriding citizens' choices. The First Amendment was meant for better things. It was meant not to undermine but to protect democratic governance—including over the role of public-sector unions.

All Citations

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 See Bureau of Labor Statistics (BLS), Labor Force Statistics From the Current Population Survey (Table 42) (2017), https://www.bls.gov/cps/tables.htm (all Internet materials as visited June 26, 2018).

2 See Union Membership and Coverage Database From the Current Population Survey (Jan. 21, 2018), unionstats.com.

3 See National Conference of State Legislatures, Right–to–Work States (2018), http://www.ncsl.org/research/labor-and-employment/right-to-work-laws-and-bills.aspx# chart; see also, *e.g.,* Brief for Mackinac Center for Public Policy as *Amicus Curiae* 27–28, 34–36.

4 The collective-action problem cited by the dissent, *post,* at 2489 – 2490, is not specific to the agency-fee context. And contrary to the dissent's suggestion, it is often not practical for an entity that lobbies or advocates on behalf of the members of a group to tailor its message so that only its members benefit from its efforts. Consider how effective it would be for a group that advocates on behalf of, say, seniors, to argue that a new measure should apply only to its dues-paying members.

5 In order to obtain that status, a union must petition to be recognized and campaign to win majority approval. Ill. Comp. Stat., ch. 5, § 315/9(a) (2016); see, *e.g., County of Du Page v. Illinois Labor Relations Bd.,* 231 Ill.2d 593, 597–600, 326 Ill.Dec. 848, 900 N.E.2d 1095, 1098–1099 (2008). And unions eagerly seek this support. See, *e.g.,* Brief for Employees of the State of Minnesota Court System as *Amici Curiae* 9–17.

6 There is precedent for such arrangements. Some States have laws providing that, if an employee with a religious objection to paying an agency fee "requests the [union] to use the grievance procedure or arbitration procedure on the employee's behalf, the [union] is authorized to charge the employee for the reasonable cost of using such procedure." *E.g.,* Cal. Govt.Code Ann. § 3546.3 (West 2010); cf. Ill. Comp. Stat., ch. 5, § 315/6(g) (2016). This more tailored alternative, if applied to other objectors, would prevent free ridership while imposing a lesser burden on First Amendment rights.

7 Indeed, under common law, "collective bargaining was unlawful," *Teamsters v. Terry,* 494 U.S. 558, 565–566, 110 S.Ct. 1339, 108 L.Ed.2d 519 (1990) (plurality opinion); see N. Citrine, Trade Union Law 4–7, 9–10 (2d ed. 1960); Notes, Legality of Trade Unions at Common Law, 25 Harv. L. Rev. 465, 466 (1912), and into the 20th century, every individual employee had the "liberty of contract" to "sell his labor upon such terms as he deem[ed] proper," *Adair v. United States,* 208 U.S. 161, 174–175, 28 S.Ct. 277, 52 L.Ed. 436 (1908); see R. Morris, Government and Labor in Early America 208, 529 (1946). So even the concept of a private third-party entity with the power to bind employees on the terms of their employment likely would have been foreign to the Founders. We note this only to show the problems inherent in the Union respondent's argument; we are not in any way questioning the foundations of modern labor law.

8 See, *e.g.,* Ellsworth, The Landholder, VII (1787), in Essays on the Constitution of the United States 167–171 (P. Ford ed. 1892); Webster, On Test Laws, Oaths of Allegiance and Abjuration, and Partial Exclusions from Office, in A Collection of Essays and Fugitiv[e] Writings 151–153 (1790).

9 Justice Powell's separate opinion did invoke *Pickering* in a relevant sense, but he did so only to acknowledge the State's relatively greater interest in regulating speech when it acts as employer than when it acts as sovereign. *Abood v. Detroit Bd. of Ed.,* 431 U.S. 209, 259, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977) (concurring in judgment). In the very next sentence, he explained that "even in public employment, a significant impairment of First Amendment rights must survive exacting scrutiny." *Ibid.* (internal quotation marks omitted). That is the test we apply today.

10 See Brief for State of Michigan et al. as *Amici Curiae* 9–24. Nationwide, the cost of state and local employees' wages and benefits, for example, is nearly $1.5 trillion—more than half of those jurisdictions' total expenditures. See Dept. of Commerce, Bureau of Economic Analysis, National Data, GDP & Personal Income, Table 6.2D, line 92 (Aug. 3, 2017), and Table 3.3, line 37 (May 30, 2018), https://www.bea.gov/iTable/iTable.cfm?reqid=19&step=2#reqid=19&step=2&isuri=1&1921 =survey. And many States and cities struggle with unfunded pension and retiree healthcare liabilities and other budget issues.

11 PEW Charitable Trusts, Fiscal 50: State Trends and Analysis (updated May 17, 2016), http://www.pewtrusts.org/en/research-and-analysis/data-visualizations/2014/fiscal-50# ind4.

12 See Brief for Jason R. Barclay et al. as *Amici Curiae* 9; M. Egan, How Illinois Became America's Most Messed–Up State, CNN Money (July 1, 2017), https://cnnmon.ie/2tp9NX5.

13 Brief for Jason R. Barclay et al. as *Amici Curiae* 9.

14 E. Campbell, S & P, Moody's Downgrade Illinois to Near Junk, Lowest Ever for a U.S. State, Bloomberg (June 1, 2017), https://bloom.bg/2roEJUc.

15 See National Association of State Budget Officers, Summary: Spring 2018 Fiscal Survey of States 2 (June 14, 2018), http://www.nasbo.org; ProQuest Statistical Abstract of the United States: 2018, pp. 306, Table 476, 321, Table 489.

16 See Rogers, School Districts 'Race to the Top' Despite Teacher Dispute, Marin Independent J., June 19, 2010.

17 See Sawchuk, Transferring Top Teachers Has Benefits: Study Probes Moving Talent to Low–Performing Schools, Education Week, Nov. 13, 2013, pp. 1, 13.

18 See Tucker, Textbooks Equivocate on Global Warming: Stanford Study Finds Portrayal 'Dishonest,' San Francisco Chronicle, Nov. 24, 2015, p. C1.

19 See Reagan, Anti–Confederacy Movement Rekindles Texas Textbook Controversy, San Antonio Current, Aug. 4, 2015.

20 See Watanabe, How To Teach Gay Issues in 1st Grade? A New Law Requiring California Schools To Have Lessons About LGBT Americans Raises Tough Questions, L.A. Times, Oct. 16, 2011, p. A1.

21 See Goodstein, A Web of Faith, Law and Science in Evolution Suit, N.Y. Times, Sept. 26, 2005, p. A1.

22 See Golden, Defending the Faith: New Battleground in Textbook Wars: Religion in History, Wall St. J., Jan. 25, 2006, p. A1.

23 Claiming that our decision will hobble government operations, the dissent asserts that it would prevent a government employer from taking action against disruptive non-unionized employees in two carefully constructed hypothetical situations. See *post,* at 2495 – 2497. Both hypotheticals are short on potentially important details, but in any event, neither would be affected by our decision in this case. Rather, both would simply call for the application of the standard *Pickering* test.
In one of the hypotheticals, teachers "protest merit pay in the school cafeteria." *Post,* at 2496. If such a case actually arose, it would be important to know, among other things, whether the teachers involved were supposed to be teaching in their classrooms at the time in question and whether the protest occurred in the presence of students during the student lunch period. If both those conditions were met, the teachers would presumably be violating content-neutral rules regarding their duty to teach at specified times and places, and their conduct might well have a disruptive effect on the educational process. Thus, in the dissent's hypothetical, the school's interests might well outweigh those of the teachers, but in this hypothetical case, as in all *Pickering* cases, the particular facts would be very important.
In the other hypothetical, employees agitate for a better health plan "at various inopportune times and places." *Post,* at 2496. Here, the lack of factual detail makes it impossible to evaluate how the *Pickering* balance would come out. The term "agitat[ion]" can encompass a wide range of conduct, as well as speech. *Post,* at 2496. And the time and place of the agitation would also be important.

24 No First Amendment issue could have properly arisen in those cases unless Congress's enactment of a provision allowing, but not requiring, private parties to enter into union-shop arrangements was sufficient to establish governmental action. That proposition was debatable when *Abood* was decided, and is even more questionable today. See *American Mfrs. Mut. Ins. Co. v. Sullivan,* 526 U.S. 40, 53, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999); *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 357, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974). Compare, *e.g., White v. Communications Workers of Am., AFL–CIO, Local 1300,* 370 F.3d 346, 350 (C.A.3 2004) (no state action), and *Kolinske v. Lubbers,* 712 F.2d 471, 477–478 (C.A.D.C.1983) (same), with *Beck v. Communications Workers of Am.,* 776 F.2d 1187, 1207 (C.A.4 1985) (state action), and *Linscott v. Millers Falls Co.,* 440 F.2d 14, 16, and n. 2 (C.A.1 1971) (same). We reserved decision on this question in *Communications Workers v. Beck,* 487 U.S. 735, 761, 108 S.Ct. 2641, 101 L.Ed.2d 634 (1988), and do not resolve it here.

25 Contrary to the dissent's claim, see *post,* at 2497, and n. 4, the fact that "[t]he rationale of [*Abood*] does not withstand careful analysis" *is* a reason to overrule it, *e.g., Lawrence v. Texas,* 539 U.S. 558, 577, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003). And that is even truer when, as here, the defenders of the precedent do not attempt to "defend [its actual] reasoning." *Citizens United v. Federal Election Comm'n,* 558 U.S. 310, 363, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010); *id.,* at 382–385, 130 S.Ct. 876 (ROBERTS, C.J., concurring).

26 For this reason, it is hardly surprising that chargeability issues have not arisen in many Court of Appeals cases. See *post,* at 2498 - 2499 (KAGAN, J., dissenting).

27 The dissent emphasizes another type of reliance, namely, that "[o]ver 20 States have by now enacted statutes authorizing [agency-fee] provisions." *Post,* at 2499. But as we explained in *Citizens United,* "[t]his is not a compelling interest for *stare decisis*. If it were, legislative acts could prevent us from overruling our own precedents, thereby interfering with our duty 'to say what the law is.' " 558 U.S., at 365, 130 S.Ct. 876 (quoting *Marbury v. Madison,* 1 Cranch 137, 177, 2 L.Ed. 60 (1803)). Nor does our decision " 'require an extensive legislative response.' " *Post,* at 2499. States can keep their labor-relations systems exactly as they are—only they cannot force nonmembers to subsidize public-sector unions. In this way, these States can follow the model of the federal government and 28 other States.
* * *

28 Unfortunately, the dissent sees the need to resort to accusations that we are acting like "black-robed rulers" who have shut down an "energetic policy debate." *Post,* at 2501 – 2502. We certainly agree that judges should not "overrid[e] citizens' choices" or "pick the winning side," *ibid.*—unless the Constitution commands that they do so. But when a federal or state law violates the Constitution, the American doctrine of judicial review requires us to enforce the Constitution. Here, States with agency-fee laws have abridged fundamental free speech rights. In holding that these laws violate the Constitution, we are simply enforcing the First Amendment as properly understood, "[t]he very purpose of [which] was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 638, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943).

1 The majority relies on statistics from the federal workforce (where agency fees are unlawful) to suggest that public employees do not act in accord with economic logic. See *ante,* at 2465. But first, many fewer federal employees pay dues than have voted for a union to represent them, indicating that free-riding in fact pervades the federal sector. See, *e.g.,* R. Kearney & P. Mareschal, Labor Relations in the Public Sector 26 (5th ed. 2014). And second, that sector is not typical of other public workforces. Bargaining in the federal sphere is limited; most notably, it does not extend to wages and benefits. See *Fort Stewart Schools v. FLRA,* 495 U.S. 641, 649, 110 S.Ct. 2043, 109 L.Ed.2d 659 (1990). That means union operating expenses are lower than they are elsewhere. And the gap further widens because the federal sector uses large, often national, bargaining units that provide unions with economies of scale. See Brief for International Brotherhood of Teamsters as *Amicus Curiae* 7. For those reasons, the federal workforce is the wrong place to look for meaningful empirical evidence on the issues here.

2 For those reasons, it is not surprising that the "categorization schemes" in *Abood* and *Pickering* are not precisely coterminous. *Ante,* at 2473. The two cases are fraternal rather than identical twins—both standing for the proposition that the government receives great deference when it regulates speech as an employer rather than as a sovereign. See *infra* this page and 2493 – 2494.

3 That's why this Court has blessed the constitutionality of compelled speech subsidies in a variety of cases beyond *Abood,* involving a variety of contexts beyond labor relations. The list includes mandatory fees imposed on state bar members (for professional expression); university students (for campus events); and fruit processors (for generic advertising). See *Keller v. State Bar of Cal.,* 496 U.S. 1, 14, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990); *Board of Regents of Univ. of Wis. System v. Southworth,* 529 U.S. 217, 233, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000); *Glickman v. Wileman Brothers & Elliott, Inc.,* 521 U.S. 457, 474, 117 S.Ct. 2130, 138 L.Ed.2d 585 (1997); see also *infra,* at 2497 – 2498.

4 And then, after ostensibly turning to *stare decisis,* the majority spends another four pages insisting that *Abood* was "not well reasoned," which is just more of the same. *Ante,* at 2480 – 2481; see *ante,* at 2479 – 2481.

5 Indeed, some agency-fee provisions, if canceled, could bring down entire contracts because they lack severability clauses. See *ante,* at 2485 (noting that unions could have negotiated for that result); Brief for Governor Tom Wolf et al. as *Amici Curiae* 11.

6 In a single, cryptic sentence, the majority also claims that arguments about reliance "based on [*Abood* 's] clarity are misplaced" because *Abood* did not provide a "clear or easily applicable standard" to separate fees for collective bargaining from those for political activities. *Ante,* at 2484 - 2485. But to begin, the standard for separating those activities was clear and workable, as I have already shown. See *supra,* at 2498 – 2499. And in any event, the reliance *Abood* engendered was based not on the clarity of that line, but on the clarity of its holding that governments and unions could generally agree to fair-share arrangements.

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Speaker Biographies

STANLEY D. BAUM, ESQ.
BIOGRAPHY

Stanley Baum is Of Counsel to the Manhattan law firm of Cary Kane LLP. He practices in the areas of ERISA, employee benefits, disability, and employment law for employers, individuals and unions. Mr. Baum is the author of the ERISA Lawyer Blog (http://www.erisalawyerblog.com).

Mr. Baum received his J.D. from the University of Pennsylvania. He received a B.S. in accounting from the Wharton School of the University of Pennsylvania, graduating summa cum laude. He also received an LL.M. in taxation from the New York University School of Law.

Mr. Baum is the co-chairperson of the New York State Bar Association's Labor & Employment Law Section Committee on Employment Benefits and Compensation.

ANDREW D. BOBREK, ESQ.
BIOGRAPHY

Andy works at Bond, Schoeneck and King, PLLC with a diverse group of employers, including small family businesses, large public companies, governments, entrepreneurs, not-for-profit service organizations and renowned institutions of higher education to help them minimize their risk by achieving and maintaining legal compliance in all labor and employment concerns.

In his practice, Andy defends employers against claims of employment discrimination, workplace harassment and unlawful retaliation. He has defended employers in both federal and state court litigation as lead counsel, and in administrative proceedings before the U.S. Equal Employment Opportunity Commission (EEOC) and the New York State Division of Human Rights (NYSDHR). Andy has conducted numerous internal investigations for employers on a variety of workplace issues for both private and public sector clients, and has performed customized in-house training on topics such as union avoidance, harassment avoidance, workplace diversity and "wage and hour" compliance.

Andy also focuses his practice on assisting employers with minimum wage, overtime and other compensation issues arising under the Fair Labor Standards Act (FLSA) and New York Labor Law (NYLL) and with navigating the complex array of other wage and hour issues (e.g., accrual and payout of vacation time, employee wage deductions, employee meal breaks). Andy also regularly represents and counsels owners, contractors and subcontractors to ensure compliance on prevailing wage projects under the New York Labor Law (Article 8 and Article 9 project work) and under federal law (Davis Bacon project work). He has defended employers facing wage and hour claims in both administrative proceedings and court actions, and has represented clients facing governmental audits of their wage and hour practices.

As part of his traditional labor law practice, Andy counsels and represents employers in disputes arising from collective bargaining relationships - regularly serving as lead counsel in arbitration proceedings - and has defended unfair labor practice claims before the National Labor Relations Board (NLRB) and the New York Public Employment Relations Board (PERB). Andy also assists clients with labor contract negotiations. He additionally counsels employers on union avoidance strategies and has helped clients craft and implement effective strategies to counter union organizing campaigns and win NLRB elections.

Andy frequently speaks in front of groups on various labor and employment law matters across New York State and recently was a featured speaker at the national conference of a leading association in the higher education sector. He is also a former President of the Central New York Chapter of the Labor and Employment Relations Association (LERA).

Prior to attending law school, Andy worked as a Congressional Aide to former U.S. Representative James T. Walsh (Syracuse, New York). Among his duties, he served as a liaison to individuals and businesses seeking assistance with matters before federal administrative agencies. In addition, Andy assisted with various federal legislative matters, including the federal appropriations process, and possesses a wealth of experience in the realm of congressional and intergovernmental affairs.

SARAH J. BURGER, ESQ.
BIOGRAPHY

Sarah J. Burger is the Founding Member of Burger Law Group PLLC. Burger Law Group PLLC is based in the Capital Region of New York and in Boston, Massachusetts. Ms. Burger is admitted to practice in Massachusetts and New York, the U.S. District Courts, Northern, Southern, Eastern and Western Districts of New York, the U.S. District Court, District of Massachusetts and the U.S. Court of Appeals for the Second Circuit.

Ms. Burger concentrates her practice in employment and labor law litigation and counseling, as well as general business counseling. She primarily represents individual employees in a wide variety of labor and employment law matters including discrimination, retaliation, whistleblower, unpaid wage and overtime disputes and the negotiation and drafting of employment agreements.

Ms. Burger is an active member of the New York State Bar Association, Labor Section, Boston Bar Association, Labor Section, Saratoga County Bar Association, National Employment Lawyers Association (NELA), National and New York Chapters and is a member of the NELA/NY executive board, as well as the legislative committee.

Ms. Burger obtained her Juris Doctor from Villanova University School of Law and her Bachelor of Arts from Drexel University, First Honors. She has been recognized as a rising star by Super Lawyers for Labor and Employment Law in 2014 - 2018.

She also serves on the Board of Directors of Heading for Home, Racehorse Retraining and Adoption Center, Inc.

THEODORE K. CHENG, ESQ.
BIOGRAPHY

Theo Cheng is an independent, full-time arbitrator and mediator, focusing on commercial, intellectual property (IP), technology, entertainment, and labor/employment disputes. He has conducted over 500 arbitrations and mediations, including business disputes, breach of contract and negligence actions, trade secret theft, employment discrimination claims, wage-and-hour disputes, and IP infringement contentions. Mr. Cheng has been appointed to the rosters of the American Arbitration Association (AAA), the CPR Institute, Resolute Systems, and the Silicon Valley Arbitration & Mediation Center's List of the World's Leading Technology Neutrals. He serves on the AAA's Council and the Boards of the New Jersey State Bar Association Dispute Resolute Section and the Association for Conflict Resolution–Greater New York Chapter. He is also the President of the Justice Marie L. Garibaldi American Inn of Court for ADR, the Chair-Elect of the New York State Bar Association (NYSBA) Dispute Resolution Section, and the Secretary of the Copyright Society of the U.S.A. The *National Law Journal* named him a 2017 ADR Champion.

Mr. Cheng has over 20 years of experience as an IP and general commercial litigator with a focus on trademarks, copyrights, patents, and trade secrets. He has handled a broad array of business disputes and counseled high net-worth individuals and small to middle-market business entities in industries as varied as high-tech, telecommunications, entertainment, consumer products, fashion, food and hospitality, retail, and financial services. In 2007, the National Asian Pacific American Bar Association named him one of the Best Lawyers Under 40.

Mr. Cheng received his A.B. *cum laude* in Chemistry and Physics from Harvard University and his J.D. from New York University School of Law, where he served as the editor-in-chief of the Moot Court Board. He was a senior litigator at several prominent national law firms, including Paul, Weiss, Rifkind, Wharton & Garrison LLP, Proskauer Rose LLP, and Loeb & Loeb LLP. He was also a marketing consultant in the brokerage operations of MetLife Insurance Company, where he held Chartered Life Underwriter and Chartered Financial Consultant designations and a Series 7 General Securities Representative registration. Mr. Cheng began his legal career serving as a law clerk to the Honorable Julio M. Fuentes of the U.S. Court of Appeals for the Third Circuit and the Honorable Ronald L. Buckwalter of the U.S. District Court for the Eastern District of Pennsylvania.

Mr. Cheng frequently writes and speaks on ADR and intellectual property issues. He has a regular column called *Resolution Alley* in the *NYSBA Entertainment, Arts and Sports Law Journal*, which addresses the use of ADR in those industries. He also writes the quarterly column *The ADR Mosaic* in the Minority Corporate Counsel Association's *Diversity & the Bar Magazine*, which addresses ADR and diversity issues.

JAE W. CHUN, ESQ.
BIOGRAPHY

Jae represents labor unions and multiemployer pension and welfare plans at the table and in court. He is an Executive Committee member of the NYSBA's Labor Section, where he co-chairs the Ethics Committee. He is also a long-standing member of the New York City Bar's Judiciary Committee and the AFL-CIO Lawyers Coordinating Committee. Jae enjoys speaking about labor issues, and has done so for the American Bar Association, NYU Law School, Cornell Law School, Teamsters Lawyers, AFL-CIO Lawyers, the City Bar, and the NYSBA. He is a 2001 graduate of the Cornell Law School, and a 1996 *summa cum laude* graduate of Binghamton University, where he majored in philosophy.

PETER D. CONRAD, ESQ.
BIOGRAPHY

Peter D. Conrad began his legal career as a trial attorney and hearing officer at the National Labor Relations Board.

Peter joined Proskauer's Labor & Employment Law Department in 1980 and became a partner in 1986. He has represented employers in numerous industries (including health care, higher education, financial services, trucking, pharmaceutical, petrochemical, telecommunications, legal services, publishing, retail, broadcasting, entertainment, hotel and professional sports) in the full range of unfair labor practice and election proceedings before the NLRB. In the nearly 30 years that Peter has handled matters at the NLRB, he has confronted virtually every issue that a labor lawyer practicing in this area could expect to see, from the straightforward discharge for union activity, to the most complex secondary boycott, successorship and refusal-to- bargain situations, representing some of the firm's most prestigious clients.

The remainder of Peter's time is devoted to the related areas of union avoidance and corporate campaigns (defending employers against organizational activity in its many forms), as well as arbitration, negotiation, and litigation under collective bargaining agreements. Although primarily engaged in a more traditional labor relations practice, Peter also represents companies in employment discrimination cases (before state and federal administrative agencies and in the courts), workers' compensation and unemployment insurance proceedings, and general client counseling in all areas of labor relations and employment law.

The clients that Peter represents on a regular basis include T-Mobile USA, United Parcel Service, Consolidated Edison Company of New York, Barneys New York, Delaware North Companies, Castle Oil Corporation, and Otis Elevator Company, to name a few.

As a member of the interdepartmental Sports Law Group, Peter also has done work over the years for the National Basketball Association, the National Hockey League, Major League Baseball and the Major Indoor Soccer League, primarily in matters pending at the NLRB, including the 1995 attempted decertification of the National Basketball Players' Association and the much more recent season-long lockout by the NHL in 2004/2005.

Practices
Hiring & Terminations, Labor-Management Relations, Strategic Corporate Planning

Education
State University of New York at Buffalo School of Law, J.D., 1977
State University of New York at Buffalo, B.A., 1973

Admissions & Qualifications
New York

Court Admissions
U.S. Court of Appeals, Second Circuit
U.S. District Court, New York, Eastern District
U.S. District Court, New York, Southern District

PAUL T. ESPOSITO, ESQ.
BIOGRAPHY

Mr. Esposito is a Principal at Slevin & Hart, P.C. and advises employee benefit plan clients in all aspects of welfare and retirement plan administration under ERISA, the Internal Revenue Code, the Affordable Care Act ("ACA"), HIPAA and other state and federal laws. Mr. Esposito also consults with clients on welfare and retirement plan design and legal compliance issues, with special emphasis in the areas of ACA compliance, fiduciary responsibilities, withdrawal liability, service provider contract negotiation and 401(k) plan design and administration. Mr. Esposito also has represented clients on numerous IRS audits, DOL investigations, determination of tax-exempt status for plans, and matters in connection with the IRS EPCRS program.

Mr. Esposito received his J.D. from George Washington University Law School in 2006 and his undergraduate degree from Princeton University with a B.A. from the Woodrow Wilson School of Public and International Affairs in 2002. He is a member of the American Bar Association, the National Association of Public Plan Attorneys, and the New York State Bar Association and its Committee on Employee Benefits and Compensation. Mr. Esposito is admitted to practice in New York and the District of Columbia.

PROFESSOR SAMUEL ESTREICHER
BIOGRAPHY

Samuel Estreicher is a nationally and internationally reknown counsel and expert on the wide range of issues affecting the employment relationship, including designing ADR systems, conducting internal company investigations, advising clients in OFCCP, EEO and NLRA compliance and representing clients in individual, global HR management, and class EEO and wage and hour litigation. Cross-border labor and arbitration issues are also a specialty. Sam's appellate practice includes victory in the Supreme Court in the *Circuit City v. Adams* litigation, broadening the availability of employment arbitration; victory in the Second Circuit on the independent-contractor status of franchisee-drivers in the New York City black car industry and overturning an interest arbitration award in *The Daily News* litigation; and amicus representation (in the Supreme Court) of Chrysler Corp., Ford Motors, General Motors the Cato Institute, the Center for Public Resources, the U.S. Chamber of Commerce, the Society for Human Resources Management, the National Association of Manufacturers, the Black Alliance for Educational Options, the American Jewish Committee, and the Council for Employment Law Equity. He has also directed the NYU School of Law's Supreme Court Clinic, serving as co-counsel for the prisoner in *Giles v. California*, an important self-incrimination clause case.

One of the leading authorities in labor and employment law, Sam is also the Dwight D. Opperman Professor of Law at New York University Law School. He served as the Chief Reporter of the American Law Institute's Restatement of Employment law, which was published in July 2015. A a prolific scholar, has published several books, including leading casebooks in labor law and employment discrimination and employment law; edited conference volumes on sexual harassment, employment ADR processes, and cross-global labor and employment law; and authored more than 150 articles in professional and academic journals. Additionally, Sam has led more than 100 workshops for federal and state judges, U.S. Department of Labor lawyers, EEOC lawyers, court law clerks, employment mediators and practitioners generally. Sam has received numerous awards recognizing his expertise, including the Labor and Employment Relations Association's prestigious Susan C. Eaton Outstanding Scholar-Practitioner Award and was also named one of the nation's "Top 50 Most Powerful Employment Attorneys" by *Human Resources* magazine. He has been of counsel to a number of major law firms including Jones Day and Morgan Lewis. His columns appear in the New York Law Journal, Bloomberg View, and Justia Verdict. In 2016, the UN General Assembly selected him as a member of the UN Internal Justice Council, an independent body responsible for monitoring the organization's internal justice system for employees and contractors.

Memberships

- American Bar Association, former secretary of the Labor and Employment Law Section
- Association of the Bar for the City of New York, former Chair of the Committee on Labor and Employment Law
- American Arbitration Association
- American Law Institute

Other Distinctions

- Dwight D. Opperman Professor of Law, New York University School of Law
- Director, Center for Labor and Employment Law, New York University School of Law
- Co-Director, Opperman Institute of Judicial Administration, New York University School of Law

- Susan C. Eaton Outstanding Scholar-Practitioner Award, Labor and Employment Relations Association (2010)

- Recognized as one of "The Nation's '50 Most Powerful Employment Attorneys,'" *Human Resources Executive* magazine

- Chief Reporter, *Restatement Third of Employment Law*, American Law Institute

- 2012 Samuel M. Kaynard Award for Excellence in the Fields of Labor and Employment Law, Hofstra University School of Law

- Member, Administrative Tribunal, Asian Development Bank

- Fellow, College of Labor and Employment Lawyers

- Member, Arbitration/Mediation Panels of the American Arbitration Association and Center for Public Resources

Bar Admissions

- New York

- Washington, D.C.

- Various federal courts, including U.S. Supreme Court

Education

- Columbia University School of Law, J.D., 1975
  Editor-in-chief, *Columbia Law Review*

- Cornell University, M.S.in Labor Relations,1974
  Herbert H. Lehman Fellow

- Columbia College, A.B., 1970
  Joseph Pulitzer Fund Scholar

Selected Prior Experience

- Director, Supreme Court Clinic, New York University School of Law

- Law Clerk to Justice Lewis F. Powell, Jr., U.S. Supreme Court

- Law Clerk to Harold Leventhal, U.S. Court of Appeals for the District of Columbia Circuit

KAREN P. FERNBACH, ESQ.
BIOGRAPHY

In 1977, upon graduation from St. John's University School of Law, Ms. Fernbach commenced her career with the National Labor Relations Board. In December, 2011, after serving as the Regional Attorney for the Manhattan Region for over 23 years, she was appointed Regional Director of the Manhattan Region. She held this position until her retirement from the NLRB in August, 2017. Currently, Ms. Fernbach is employed as a Visiting Assistant Professor at Hofstra Law School where she teaches Labor Law, Employment Law, Collective Bargaining and Advanced Labor Law and is a Faculty Advisor for the Hofstra Labor and Employment Law Journal. She is also an Adjunct Professor at St. Johns School of Law where she teaches labor law, selected topics in labor law and has taught labor and employment arbitration.

In 2015, Ms. Fernbach was installed as a fellow of The College of Labor and Employment Lawyers which accepts the most accomplished fellows of the labor and employment law community. In May, 2013, Ms. Fernbach was selected as a distinguished Higginbotham Fellow, a program established by the American Arbitration Association whose mission is to advance diversity among alternative dispute resolution mediators and arbitrators. Ms. Fernbach was trained as an arbitrator and mediator and has experience mediating labor disputes in the federal sector.

Ms. Fernbach has been a featured panelist at many labor and employment law conferences including the NYS Bar Association, the NYC Bar Association, the ABA Bar Association, the College of Labor and Employment Lawyers, LERA- both the NYC and Long Island Chapters, PLI, the American Conference Institute, Cornell ILR Institute and at labor and employment law conferences held by Hofstra Law School, St. John's Law School, and NYU Law School. .

AMANDA M. FUGAZY, ESQ.
BIOGRAPHY

Amanda M. Fugazy, a member of Ellenoff Grossman & Schole LLP, is head of the firm's Labor & Employment Law group. As such, Ms. Fugazy represents businesses and executives in litigation, and provides counseling and preventative education with regard to wage-hour compliance, employment discrimination, harassment, labor relations, leave laws, internal investigations, employment contracts and manuals, severance agreements, arbitration, mediation, and labor and employment aspects of corporate and real estate transactions.

Ms. Fugazy is one of the most experienced practitioners in New York in the highly litigated area of wage and hour law, having litigated dozens of federal and state court cases involving claims under the Fair Labor Standards Act and the New York Labor Law. Because of her experience in this area, Ms. Fugazy was invited by the mediation office of the Federal Court for the Southern District of New York to speak as an expert on wage and hour laws, and was named one of the "Top Women in Metro NY Foodservice & Hospitality" by *Total Food Service* magazine in 2017.

One of Ms. Fugazy's strengths is valuing and resolving cases. As such, Ms. Fugazy also serves as a mediator, and has successfully resolved many cases by appointment through the Federal Court for the Southern District of New York.

Ms. Fugazy also has extensive experience in developing and delivering custom tailored management and employee-training seminars, and is routinely asked to serve as guest speaker by trade groups on a variety of employment related topics, including, but not limited to, illegal harassment, hiring, disciplining, firing, exterritorial application of US employment laws, wage hour compliance, employment discrimination, interviewing, family medical leave, administering a collective bargaining agreement, and matters pertaining to unions.

Ms. Fugazy received her B.A. from The George Washington University, where she currently sits on the Student Affairs Advisory Council, and her J.D. from St. John's University School of Law.

Ms. Fugazy is admitted to practice in the State of New York, the United States Court of Appeals for the Second Circuit, and the United States District Courts for the Southern and Eastern Districts of New York.

SETH H. GREENBERG, ESQ.
BIOGRAPHY

Seth Greenberg is a partner at Law Offices of Greenberg Burzichelli Greenberg, P.C., where he represents labor unions, employees, and their health and welfare funds in all aspects of labor and employment law, including collective bargaining, discipline and discharge, wages and hours, discrimination, contract disputes, seniority and promotion. He also routinely counsels clients concerning the civil service law, pensions and employee benefits, as well as other federal and state laws.

Seth is the immediate past Chair of the New York State Bar Association's Labor and Employment Law Section. He previously served as Co-Chair of its Committee on Continuing Legal Education, Chair of the Committee on Public Sector Labor Relations, and was founding administrator/contributor to "Labor & Employment N.Y.," the Section's first official blog. A member of the American Bar Association, Seth has also been a participant in the ABA's Pro Bono Military Project *Operation Standby*, through which military attorneys may seek attorney-to-attorney advice to further assist their service member clients.

Seth has presented at law schools, various bar association programs, trade group seminars, and other professional organizations on a wide range of labor and employment matters. He is also the author of several Section Journal articles and is a contributor to the treatise *Lefkowitz on Public Sector Labor and Employment Law, 4th Ed.* Seth has also been named a *New York Super Lawyer* in Employment and Labor Law every year since 2014.

Seth graduated from The George Washington University and earned his J.D. from St. John's University School of Law.

Seth resides in Plainview with his wife and four children, where he serves as a trustee on the Board of Education for the Plainview-Old Bethpage Central School District and is an active member of the community.

JAMES L. HALLMAN, ESQ.
BIOGRAPHY

James L. Hallman began his college career at Hofstra University in the summer of 1999. Mr. Hallman triple majored in Political Science, Sociology and Africana Studies and earned his B.A. in May of 2004.

In 2006, Mr. Hallman began pursuit of his law degree at Rutgers School of Law – Newark. He graduated from Rutgers in May of 2009, and after law school, joined the New York City Law Department's Labor and Employment Law Division as Assistant Corporation Counsel (ACC), where his work focused on civil rights and labor and employment cases. As an ACC, he routinely defended the City of New York, its entities and employees, in claims arising under the various federal, state and local laws. Mr. Hallman was responsible for handling all aspects of the litigation process for each of his cases, from commencement through trial. Notably, in 2012 and 2013, he brought two highly publicized federal cases to trial, where he obtained defense verdicts in both cases.

In 2014, Mr. Hallman joined New York City's Department of Health and Mental Hygiene as the Agency's Equal Employment Opportunity Director / Chief Diversity Officer. As EEO Director, it was Mr. Hallman's responsibility to ensure that all prospective and current employees were provided working environments that were free of discrimination, retaliation and harassment. In his role as Chief Diversity Officer, Mr. Hallman was responsible for the implementation and enforcement of the Agency's diversity and inclusion policies. He and his staff regularly partnered with various internal units and external entities to create and implement different diversity initiatives, which included strategies for recruitment, retention, training, and professional development at all levels.

In 2016, Mr. Hallman transitioned to the New York City Department of Transportation (DOT) as Executive Agency Counsel, but again serving in the dual role of Chief Diversity Officer / Equal Employment Opportunity (EEO) Director. Mr. Hallman was promoted to Assistant Commissioner of EEO, Diversity & Inclusion in May, 2018. In his role, Mr. Hallman provides counsel to DOT's Commissioner, General Counsel, Human Resources Division, and other Executive Staff on labor and employment-related legal issues, including but not limited to EEO, FMLA and other protected leaves, ADEA, ADA reasonable accommodations, diversity management, recruitment, hiring, retention, training, succession planning, performance reviews, and discipline. He is also charged with developing, implementing, and monitoring the Agency's strategic diversity and inclusion plan.

ELIZABETH E. HUNTER, ESQ.
BIOGRAPHY

Elizabeth Hunter is a partner in Frumkin & Hunter LLP, with offices in White Plains, New York and Goshen, New York.

She handles a wide range of matters on behalf of employees and employers, with a concentration in employment discrimination, harassment, and retaliation; ERISA and employee benefits; wage-and-hour; and whistleblower claims. Ms. Hunter has represented clients in all phases of employment and employee benefits matters, including successful appeals at United States Court of Appeals for the Second Circuit and the New York Appellate Division, Second Department. Ms. Hunter has also successfully negotiated and litigated disability access cases.

Ms. Hunter has written and spoken on ERISA and employment discrimination topics for various organizations, including the New York Law Journal, the National Employment Lawyers Association national conference and New York chapter conference, the New York State Bar Association, the Practicing Law Institute, and Lorman Education Services.

Ms. Hunter was previously an associate attorney with Sapir & Frumkin LLP, where she handled all aspects of employment and employee benefits matters. She also worked previously as a law clerk for the U.S. Department of Labor Office of Administrative Law Judges, where she handled cases under federal whistleblower statutes, including the Sarbanes-Oxley Act and various health and safety laws, as well as under federal wage-and-hour and workers' compensation statutes. She was also an intern of the Legal Aid Society-Employment Law Center in San Francisco, where she focused on gender and disability discrimination, and family and medical leave issues. Ms. Hunter also served as a judicial extern for U.S. Magistrate Judge Joseph C. Spero in the Northern District of California.

Ms. Hunter is a magna cum laude graduate of Wellesley College. She received her law degree from the University of California at Berkeley, graduating as a member of the Order of the Coif. She was awarded the Best Brief Award, as well as the American Jurisprudence Award in Corporations, and the Prosser Award in Property. While in law school, she was a senior articles editor for the Berkeley Journal of Employment and Labor Law, a member of the California Law Review, and a volunteer for the Workers' Rights Clinic.

Ms. Hunter is admitted to practice in New York and California, as well as the federal courts for the Southern, Eastern, and Northern Districts of New York, the Northern District of California, the Second Circuit Court of Appeals, and the Ninth Circuit Court of Appeals.

She is a member of the National Employment Lawyers Association, the American Bar Association, the New York State Bar Association, the Women's Bar Association of Orange and Sullivan Counties, and the Orange County Bar Association. She has served as an officer of the Women’s Bar Association of Orange and Sullivan Counties for the last four years.

She was named a Super Lawyer, Rising Star from 2013-215, and a Super Lawyer in 2016-2018.

COLIN M. LEONARD, ESQ.
BIOGRAPHY

Colin is a management-side labor and employment law attorney at Bond Schoeneck & King, PLLC who works with clients throughout Central New York, the Mohawk Valley and the Southern Tier of New York.

His practice includes traditional labor-related work, including collective bargaining, labor arbitrations and agency matters before the NLRB and PERB. Colin also represents employers in federal and state anti-discrimination litigation and counsels human resources professionals on wide-ranging legal issues, including wage and hour, employee discipline and the New York State Labor Law.

Colin has experience assisting employers manage downsizing situations, when compliance with state and federal statutes relating to employment losses is critical. In particular, he has worked closely with employers in managing WARN-related risks resulting from plant closings and mass layoffs. Colin has represented employers in claims brought by unions and employees asserting violations of the New York State WARN Act. He helps employers conduct risk assessments and adverse impact analyses relating to layoffs, so that an employer can proceed with planned downsizing consistent with applicable law.

Employers regularly engage Colin to conduct workplace training. This includes union avoidance training for management and supervisors, FMLA training for HR professionals and workplace harassment training for employees and supervisors. Colin is a regular presenter for groups including the Central New York Chapter of the Society of Human Resource Management, the Human Resource Association of the Twin Tiers and the Southern Tier Association for Human Resources.

Honors & Affiliations

- Listed in
  - *New York Super Lawyers 2018*, Employment and Labor
- New York State Bar Association, Labor and Employment Section
  - Managing Editor, New York State Bar Association, Labor and Employment Law Journal
- Onondaga County Bar Association
- Labor and Employment Relations Association, CNY Chapter, Immediate Past President

Education

- University of Connecticut School of Law (J.D., with honors, 2001)
- Middlebury College (B.A., with honors, 1993)

Bar/Court Admissions

- New York
- Connecticut
- U.S. District Court for the Northern District of New York
- U.S. District Court for the Western District of New York

Practices

- School Districts
- Municipalities
- Labor and Employment

HONORABLE VALERIE BRATHWAITE NELSON
BIOGRAPHY

Justice Valerie Brathwaite Nelson was appointed to the Appellate Division of the Supreme Court, Second Judicial Department in 2016.

She began her judicial career by serving for two years as a Judge of Civil Court of New York. She thereafter served for eleven years as Justice of the Supreme Court of the State of New York. Justice Brathwaite Nelson is married to Nicholas J. Nelson, Ph.D. and they are the proud parents of three children. She attended Syracuse University where she majored in political science and graduated in three years earning a Bachelor of Arts degree. After college, she attended law school at George Washington University, located in Washington, D.C, earning a Juris Doctor degree. She was admitted to the practice of law in New York and to the practice law before the United States Supreme Court, as well as various other courts.

In appointing Justice Brathwaite Nelson to the Appellate Division, Governor Andrew M. Cuomo noted her distinguished career in his press release and said, "Before becoming a jurist, Justice Brathwaite Nelson served in a variety of public and private legal capacities, beginning as a Law Clerk with U.S. Congresswoman Shirley Chisholm." The Governor also noted that Justice Brathwaite Nelson's experience further includes serving as a Law Clerk for the Occupational Safety and Health Review Commission, as an Attorney with the National Labor Relations Board and as a senior associate Attorney with a major private law firm before establishing her own private law practice.

Justice Brathwaite Nelson has been the recipient of a host of honors and recognitions including, the Women of Achievement Pacesetter Award, United States Congressional Awards, a New York State Senate Award, New York State Assembly Awards, the Queens Borough President's Award and New York City Council Outstanding Service Awards. Justice Brathwaite Nelson is a member of the NYSBA Committee on Courts of Appellate Jurisdiction, the NYSBA Judicial Section and the NYSBA Labor and Employment Law Section. She has served as a speaker at the NYS Judicial Institute and she is a board member of Judicial Friends and a board member of the Macon B. Allen Black Bar Association. Justice Brathwaite Nelson's active participation and leadership in various other professional and community organizations includes, service as a past member of the NYS Continuing Legal Education Board, as the past first vice-president of the York College Community Advisory Council, as a past member of Community Board Twelve in Queens and as a past Girl Scout Troop Leader.

SUSAN R. RITZ, ESQ.
BIOGRAPHY

Susan Ritz has practiced employment law since 1985. She is a partner in the Manhattan law firm of Ritz Clark & Ben-Asher LLP. Ms. Ritz handles all forms of employment-related matters, including advising employees and partners regarding their rights, duties and entitlement to benefits; handling contract, severance agreement and partnership dispute negotiations; and representing employees and partners in negotiations, mediations, administrative proceedings, arbitrations and lawsuits encompassing a full panoply of employment-related issues, with special emphasis on claims of unlawful harassment, retaliation and employment discrimination on the basis of race, sex, gender, national origin, age, disability, religion, marital status, sexual orientation and other protected classes.

Ms. Ritz provides neutral mediation services, and conducts impartial internal investigations on behalf of employers into alleged discriminatory conduct. She also advises non-profits and employers on employment-related issues, reviews and revises Staff Manuals for employers and represents employers in contract and severance negotiations. She offers harassment and discrimination prevention training to management and employees, as well.

Ms. Ritz has received many accolades, including *The Best Lawyers in America (*for 23 years), *Super Lawyers* (for 12 years) and Lawdragon 500. She is rated AV by Martindale Hubbell and was selected for its 2011 Inaugural Edition of the Bar Register of Preeminent Women Lawyers. AVVO.com gives her a rating of ten out of ten. She is also a fellow of the College of Labor and Employment Lawyers and a member of the Litigation Counsel of America. Ms. Ritz has published articles and lectured widely, including for the National Employment Lawyers Association/NY, Practising Law Institute, ALI-CLE, American Bar Association, College of Labor and Employment Lawyers, New York State Bar Association, New York City Bar Association and at CUNY School of Law. She serves as a *pro bono* mediator for the United States District Court for the Southern District of New York.

Before beginning her law practice, Ms. Ritz served as the law clerk to New York Supreme Court Justice Kristin Booth Glen. Ms. Ritz graduated *cum laude* from New York University School of Law, where she was a Root-Tilden Scholar and a member of the Order of the Coif. She graduated from Brown University with an Honors B.A. in Ethics and Political Philosophy. Ms. Ritz is admitted to practice in the state and federal courts of the state of New York, the Second Circuit and the United States Supreme Court.

ROBERT T. SCHOFIELD, ESQ.
BIOGRAPHY

Robert Schofield is a partner in Whiteman Osterman & Hanna's Labor and Employment, Education and Litigation Practice Groups. His areas of expertise include public sector labor and employment law, education law, and general litigation, as well as State Court practice. Mr. Schofield has been with Whiteman Osterman & Hanna since 2000.

Prior to joining the firm, Mr. Schofield was the confidential law clerk to the Hon. Justices Bernard J. Malone, Jr. and Joseph Harris of the New York State Supreme Court and had previously served as an Appellate Court Attorney with the New York State Supreme Court, Appellate Division, Third Department. He is admitted to practice in the State of New York as well as in the United States District Courts for the Northern and Southern Districts of New York, the Second Circuit U.S. Court of Appeals, and the U.S. Supreme Court. He is a graduate of Syracuse University's College of Law, holds a Master of Public Administration degree from its Maxwell School of Citizenship and Public Affairs, as well as a Bachelor of Arts degree from Plattsburgh State University.

He is a former President of the Albany County Bar Association, the Vice President (3d Jud. Dist.) of the New York State Bar Association, and a member of the Appellate Division's Committee on Character and Fitness for admission to the bar. He has served as President of LERA's Capital District chapter, Chairman and President of Habitat for Humanity of the Capital District, Chair of the Capital Region Chamber's Albany-Colonie Chamber of Commerce, and has been recognized as one of the Albany Business Review's "40 Under Forty" young business leaders, as a *Super Lawyer*, and in *Best Lawyers in America*.

HOWARD T. SCHRAGIN, ESQ.
BIOGRAPHY

HOWARD SCHRAGIN is a seasoned labor and employment attorney who handles a wide range of labor and employment matters on behalf of employees and employers, including employment discrimination, harassment, retaliation, single plaintiff, class and collective wage and hour claims (overtime and unpaid compensation), wage and hour compliance, disability and other leave-related issues, wrongful termination, contract disputes, restrictive covenants and employee benefits. Mr. Schragin's extensive experience representing individuals and management gives him a unique perspective in employment disputes which helps to obtain the best results for his clients. Mr. Schragin is equally adept at resolving complicated and sensitive employment disputes through negotiation and mediation and vigorously representing his clients in litigation and administrative proceedings.

Prior to founding Sapir Schragin LLP, Mr. Schragin worked as a Senior Attorney with one of the nation's preeminent labor and employment law firms where he worked closely with Donald Sapir. Prior to that, Mr. Schragin worked for a number of other prominent labor and employment law firms, where he counseled and advised clients across a multitude of industries on a variety of workplace, and represented clients in all phases of employment related litigation in federal and state courts and before administrative agencies. He also served as an Assistant Corporation Counsel for the New York City Law Department where he litigated employment and civil rights actions brought in federal and state courts against the City of New York, its agencies and employees.

Mr. Schragin is a member of the New York State Bar Association, Labor and Employment Law Section, Wage and Hour Committee and a contributor the NYSBA LEL blog. He has written and spoken for various organizations on a range of employment law topics, including the Family and Medical Leave Act, Americans with Disabilities Act, separation agreements and restrictive covenants, employment hiring practices, genetic discrimination, pre-employment drug, medical and psychological testing, electronic and digital media in the workplace and human resources best practices. Mr. Schragin was also a frequent contributor to the New York Employment Newsletter. Mr. Schragin's publications also include *U.S. Shoe Corp. v. United States: A Victory for U.S.-Canada Maritime Trade, 19 Fordham Int. L. J. 1764 (1996)*, and he was also a contributor to the *Year in Review, Labor and Employment Developments Around the World*, American Bar Association, 2005

Bar Admissions

- New York, 1998
- U.S. District Court Southern District of New York
- U.S. District Court Eastern District of New York

MELISSA LARDO STEWART, ESQ.
BIOGRAPHY

MELISSA LARDO STEWART is a partner at Outten & Golden LLP in New York, where she represents employees in class action wage and discrimination cases. She has represented workers across many industries and job functions, including retail, sales, food service, hospitality, financial services, accounting, and telecommunications. She has prosecuted wage theft claims on behalf of workers who were required to work off-the-clock, subjected to time-shaving, wrongly classified as exempt from overtime protections, and improperly treated as independent contractors. Ms. Stewart also currently represents employees and applicants in class and collective action gender and age discrimination cases.

Before Ms. Stewart joined Outten & Golden LLP in November 2013, she clerked for the Honorable James Orenstein in the Eastern District of New York and the Honorable Dickinson R. Debevoise in the District of New Jersey, and represented workers and labor unions as an associate at Woodley & McGillivary in Washington, D.C. She graduated *magna cum laude* from Fordham University School of Law in 2009.

KATE M. SWEARENGEN, ESQ.
BIOGRAPHY

Kate Swearengen is an associate at Cohen, Weiss and Simon LLP.

Ms. Swearengen practices in the areas of labor and employment law. She advises union clients primarily in the nursing, security, entertainment and social services sectors and in federal and municipal employment, and represents them in state and federal court litigation, administrative hearings and arbitral proceedings. She also counsels and litigates on behalf of individual clients with respect to various employment matters.

Ms. Swearengen graduated from Columbia Law School in 2011 and with honors from Princeton University in 2004.

PAUL J. SWEENEY, ESQ.
BIOGRAPHY

Mr. Sweeney joined Coughlin & Gerhart, LLP, in 1992, following active duty as a Marine Corps judge advocate. He is a partner in the firm and has served on the firm's Management Committee. As the leader of the firm's Labor & Employment Law Practice Group, Mr. Sweeney defends employers against liability, discrimination and disability claims, and represents employers in contract negotiations, arbitration, discipline and administrative proceedings before the National Labor Relations Board, the Public Employment Relations Board, and the Occupational Safety & Health Administration. In addition, he represents clients in complex business, construction, and real estate disputes.

Mr. Sweeney edits the *New York Employment Law Letter*, a monthly publication that helps employers understand new laws, regulations and court cases. He has received an "AV Preeminent" peer review rating from *Martindale-Hubbell* and has been named for inclusion in the *Best Lawyers in America* and the *New York Super Lawyers* publications. He is a member of the Federation of Defense and Corporate Counsel. Mr. Sweeney serves as a mediator for the U.S. District Court for the Northern District of New York and sits on the Northern District's ADR Committee.

Mr. Sweeney is active in several bar associations and serves on the Executive Committee of the New York State Bar Association's Labor & Employment Law Section and is the immediate past Treasurer of the Northern District of New York – Federal Court Bar Association. His community involvement includes his service on the Broome County Board of Ethics, the board of directors of the Family & Children's Society of Broome and Tioga Counties and the board of directors of the Southern Tier Chapter of the American Red Cross.

Mr. Sweeney retired as a colonel in the Marine Corps Reserve with more than 29 years of active duty and reserve service, including a combat deployment to Fallujah, Iraq. Prior to his retirement, he served as the senior Marine Reserve attorney in the Office of the Counsel for the Commandant of the Marine Corps and was the officer-in-charge of Marine Reserve attorneys who supported the Commandant, the Chairman of the Joint Chiefs of Staff and the DOD Office of General Counsel. His personal awards include the Legion of Merit, the Defense Meritorious Service Medal, and the Meritorious Service Medal, with gold star device.

Mr. Sweeney received his Bachelor of Arts degree, *in cursu honorum*, from Fordham University and his Juris Doctor degree from Brooklyn Law School.

MELANIE WLASUK, ESQ.
BIOGRAPHY

Melanie Wlasuk is the Director of Public Employment Practices and Representation at the New York State Public Employment Relations Board (PERB), a position she has held since July of 2016. Prior to becoming Director, Wlasuk served as an Administrative Law Judge with PERB for nine years. Before joining PERB, Wlasuk was General Counsel for Service Employees International Union, Local 200United, based in Syracuse, New York.

Wlasuk is a graduate of Syracuse University's Newhouse School of Public Communications and the Syracuse University College of Law.