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NLRB

Last year was an active and varied one for the National Labor Relations Board, with rulings addressing employees' use of social media, mandatory arbitration policies prohibiting class or collective actions, and dues checkoff. In this BNA Insights article, attorneys J. Ian Downes, Jennifer L. Burdick, and Alan D. Berkowitz discuss the significant rulings of 2012.

Although NLRB's attempts to implement changes through the rulemaking process stalled in the federal courts—at least temporarily—the board continued to expand the scope of the National Labor Relations Act, particularly as applied to nonunion employers, the attorneys observe. While the D.C. Circuit's *Noel Canning* case has created some uncertainty about NLRB's authority, the board continues to issue decisions until that question is resolved.

Developments Under the National Labor Relations Act

By J. Ian Downes, Jennifer L. Burdick, and Alan D. Berkowitz

The year 2012 was an active one for the National Labor Relations Board. Although its attempts to implement far-reaching reforms through the rulemaking process have stalled in the federal courts, at least temporarily, the board continued to expand the scope of the National Labor Relations Act, particularly as applied to nonunion employers. Among the significant developments were: the first decisions from the board concerning employees' use of social media, the board's decision in *D.R. Horton, Inc.*, holding that mandatory arbitration policies violate the NLRA where they prohibit class or collective actions, the board's reversal of its long-standing rule that an employer's obligation to check off union dues from employees' wages terminates upon expiration of a collective bargaining agreement, and the board's conclusion that an employer's strict policy that internal investigations must remain confidential runs afoul of the NLRA. These and other notable developments are discussed in the article that follows.[1]

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[1] On Jan. 25, 2013, the D.C. Circuit held in *Noel Canning v. NLRB*, No. 12-1115, (17 DLR AA-1, 1/25/13) that President Obama's attempted recess appointments of board members Sharon Block, Terence Flynn, and Richard Griffin in January 2012 were invalid because the Senate was not in "recess" within the meaning of the Recess Appointments Clause of the U.S. Constitution, U.S. Const. art. III, § 2, cl. 3, at the time of the appointments. Because, pursuant to the Supreme Court's decision in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 188 LRRM 2833 (2010) (116 DLR AA-1, 6/18/10), the board must have a quorum of at least three members in order to act, all of the decisions of the board following the purported appointments are null and void. Board Chairman Mark Gaston Pearce issued a statement following the D.C. Circuit's decision indicating that the board considers Members Block and Griffin to have been validly appointed (Member Flynn resigned in mid-2012) and will continue to issue decisions: "The Board respectfully disagrees with today's decision and believes that the President's position in the matter will ultimately be upheld. It

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I. Employee Use of Social Media

Section 7 of the NLRA protects employees' right to ''engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection.'' 29 U.S.C. § 157. The right to engage in concerted activity is referred to as a ''Section 7 right,'' and it is a right held by all employees whether unionized or not. It is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of Section 7 rights. 29 U.S.C. § 158. In 2010 and 2011, a number of administrative law judges addressed the application of Section 7 to the internet and social media such as Facebook and Twitter, generally holding that employees' use of such media, even from personal computers during nonworking hours, may constitute protected concerted activity. In 2012, the board itself addressed a number of these issues, and the board's general counsel continued its attempts to provide guidance to employers and employees concerning this area.

A. Electronic Postings that ''Damage the Company''

Costco Wholesale Corp., 358 N.L.R.B. No. 106, 193 LRRM 1241 (2012). In this case, the board addressed the permissibility of Costco's policy that ''statements posted electronically (such as [to] online message boards or discussion groups) that damage the Company, defame any individual or damage any person's reputation, or violate the policies outlined in the Costco Employee Agreement, may be subject to discipline up to and including termination of employment.'' A unanimous panel of Chairman Pearce and Members Griffin and Block reversed an ALJ's finding that the policy was permissible, holding that ''employees would reasonably construe this rule as one that prohibits Section 7 activity.''

On appeal from one of the first ALJ decisions addressing the NLRA's protection of employee use of social media, the full board held in a 3-1 decision that five nonunion employees of Hispanics United of Buffalo were unlawfully discharged for use of Facebook to engage in alleged ''bullying and harassment.''

The board began its decision by noting that a work rule will violate Section 7, even where it does not explicitly reference protected rights, if: ''(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.''

Costco's rule, the board held, ''clearly encompasses concerted communications protesting [Costco's] treatment of its employees,'' and failed to include any language ''that even arguably suggests that protected communications are excluded from the broad parameters of the rule.'' Costco's ''maintenance of the rule thus has a reasonable tendency to inhibit employees' protected activity and, as such, violates Section 8(a)(1),'' the board said.

B. Facebook Posts Objecting to Co-Worker's Criticism

Hispanics United of Buffalo, Inc., 359 N.L.R.B. No. 37 194 LRRM 1303 (2012) (246 DLR A-1, 12/21/12). On appeal from one of the first ALJ decisions addressing the NLRA's protection of employee use of social media, the full board held in a 3-1 decision that five nonunion employees of Hispanics United of Buffalo were unlawfully discharged for use of Facebook to engage in alleged ''bullying and harassment.'' The five employees were terminated after one employee, Marianna Cole-Rivera, responded to a co-worker's concerns about employee productivity by authoring a Facebook post that stated that ''Lydia Cruz, a coworker feels that we don't help our clients enough. . . . I about had it! My fellow coworkers how do u feel?''

Four employees responded to Cole-Rivera's post, disputing Cruz's alleged assertions that their performance was substandard. In the day following the postings, Hispanics United's executive director terminated Cole-Rivera and her four co-workers on the basis that their posts constituted bullying and harassment in violation of the organization's ''zero tolerance'' policy.

The majority (Chairman Pearce and Members Griffin and Block) concluded that the terminated employees' conduct constituted protected, concerted activity:

> ''[T]here should be no question that the activity engaged in by the five employees was concerted for the 'purpose of mutual aid or protection' as required by Section 7. As set forth in her initial Facebook post, Cole-Rivera alerted fellow employees of another employee's complaint . . . and solicited her coworkers' views about this criticism. By responding to this solicitation with comments of protest, Cole-Rivera's four coworkers made common cause with her, and, together, their actions were concerted . . . because they were undertaken 'with . . . other employees.' The actions of the five employees were also concerted . . . because, as the judge found, they 'were taking a first step towards taking group action to defend themselves against the accusations they could reasonably believe Cruz-Moore was going to make to management.' ''

The majority also held that the posts were protected because ''[t]he board has long held that Section 7 protects employee discussions about their job performance, and the Facebook comments plainly centered on that subject.'' Finally, the board rejected the employer's contention that the employees were terminated pursuant to a valid ''zero tolerance'' policy, holding that, under settled precedent ''legitimate managerial concerns to prevent harassment do not justify policies that discourage the free exercise of Section 7 rights by subjecting employees to discipline on the basis of the subjective reactions of others to their protected activity.''

Member Hayes dissented, finding that the employees' posts were not for mutual aid and protection: ''There is a meaningful distinction between sharing a common viewpoint and joining in a common cause. Only the lat-

should be noted that this order applies to only one specific case, *Noel Canning*, and that similar questions have been raised in more than a dozen cases pending in other courts of appeals. In the meantime, the board has important work to do.'' NLRB announced March 12 that it will ask the U.S. Supreme Court to review the *Noel Canning* decision (48 DLR A-4, 3/12/13).

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ter involves group action for mutual aid and protection. While the Facebook posts evidenced the employees' mutual disagreement with Cruz-Moore's criticism of their job performance, the employees did not suggest or implicitly contemplate doing anything in response to this criticism. The five employees were simply venting to one another in reaction to Cruz-Moore's complaints. This does not constitute concerted activity.''

C. Internet Posts Injuring Employer's ''Image or Reputation''

Karl Knauz Motors, Inc., 358 N.L.R.B. No. 164 (2012) (190 DLR A-2, 9/30/11). On appeal from an ALJ decision that received considerable attention when it was issued, the board, with Member Hayes dissenting in part, addressed the permissibility of a nonunion employer's workplace ''courtesy'' policy and the status of two separate Facebook postings made by a car salesman who later was terminated as a result of those postings.

With regard to the legality of the employer's policy, a majority of Chairman Pearce and Member Block held that the policy, which stated that ''no one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership,'' reasonably tended to ''chill'' employees in the exercise of their Section 7 rights and was therefore unlawful.

The policy's prohibitions, the majority concluded, would be reasonably construed ''as encompassing Section 7 activity, such as employees' protected statements—whether to co-workers, supervisors, managers or third parties who deal with the Respondent—that object to their working conditions and seek the support of others in improving them.'' Further, ''an employee reading this rule would reasonably assume that the Respondent would regard statements of protest or criticism as 'disrespectful' or 'injurious to the image or reputation of the Dealership.''

Member Hayes dissented from this aspect of the decision, holding that the majority's analysis was not an objective one, but ''instead represents the views of the acting general counsel and board members whose post hoc deconstruction of such rules turns on their own labor relations 'expertise.' ''

''Reasonably construed,'' Hayes wrote, ''the rule is nothing more than a common-sense behavioral guideline for employees.'' Additionally, according to Hayes, the majority erred because ''the Board is supposed to ask whether employees would *reasonably* understand a challenged rule to prohibit protected activity, now whether they *could*, in theory, do so.''

Notwithstanding this disagreement, the board was unanimous in its agreement with the ALJ's conclusions concerning the two Facebook posts that led to the complaining employee's termination. The first post at issue included pictures of a BMW launch event, focusing on a hot dog truck that was brought to the event. Under the photo, the employee wrote sarcastic comments implying that dealership's procuring of the hot dog machine did not adequately cater the car-launching event. The second post was a picture of a crashed Land Rover, in an accident that occurred at a separate, but adjacent Land Rover dealership owned by Knauz.

The ALJ determined that the employee's first post constituted concerted activity because it concerned the handling of a sales event that could affect employees' earnings, and therefore related to the terms and conditions of employment. Notably, although no co-workers commented on the employee's post, the ALJ determined that because there was evidence that Knauz employees previously discussed the catering at the event, and the post arose out of that prior conversation at the dealership, it was concerted activity.

Regarding the second post, the ALJ held that this was not concerted activity. This post was not connected to car salesmen's employment or to the employee's discussions with other employees, the ALJ held, and therefore it was neither concerted activity nor related to the terms or conditions of employment. Because he found that the employee was fired for this second post, rather than the post about the sales event, the ALJ held that the employee's termination was not unlawful.

D. The General Counsel's View

Over the past 18 months, NLRB's Office of the General Counsel has published a series of reports concerning the OGC's interpretation of the NLRA as applied to the use of social media, social media policies, and Section 7 rights. *See* OGC Memorandum OM 11-74 (Aug. 18, 2011) (160 DLR AA-1, 8/18/11); Memorandum OM 12-31 (Jan. 24, 2012) (16 DLR A-2, 1/25/12); Memorandum OM 12-59 (May 30, 2012) (105 DLR AA-1, 5/31/12). The first two reports addressed, among other things, specific instances in which employers imposed discipline in response to employee use of social media, concluding generally that employee communications using social media were protected where they invited or consisted of ''concerted'' action and addressed terms and conditions of employment.

The OGC's most recent memorandum attempted to provide guidance to employers in formulating social media and electronic communications policies. The OGC evaluated a number of sample employer policies and in doing so articulated several general principles that it stated it will apply in evaluating whether an employer's policy is overbroad.

Among these were that: 1) a policy that contains a blanket prohibition on the revelation of nonpublic information concerning the employer or personal employee information, including compensation information, is impermissible; and 2) a policy that prohibited employees from posting photos or videos containing the employer's logos and trademarks under any circumstances was also impermissible.

However, the general counsel concluded that an employer's prohibition on the disclosure of ''secret, confidential or attorney-client privileged information'' was a lawful one because it ''is clearly intended to protect the Employer's legitimate interest in safeguarding its confidential proprietary and privileged information.''

II. Limits on Mandatory Arbitration Programs

A. Arbitration Clauses Prohibiting Class Actions

D.R. Horton, Inc., 357 N.L.R.B. No. 184 (2012) (05 DLR AA-1, 1/9/12). In a highly publicized and controversial decision, the board held that an employer violates the NLRA ''when it requires employees covered by the Act, as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours or other working conditions against the employer in any forum, arbitral or judicial.'' According to Chairman Pearce and Member Becker (Member Hayes was recused) ''such an agreement unlawfully restricts employees' Section 7

right to engage in concerted action for mutual aid or protection, notwithstanding the Federal Arbitration Act (FAA), which generally makes employment-related arbitration agreements judicially enforceable.''

The agreement at issue, which was a condition of employment with homebuilder D.R. Horton, provided that ''all disputes and claims relating to the employee's employment . . . will be determined exclusively by final and binding arbitration'' and that the arbitrator ''may hear only Employee's individual claims'' and ''will not have the authority to consolidate the claims of other employees.''

During his employment, Michael Cuda provided notice to Horton that he intended to initiate class arbitration asserting that he and other superintendents had been misclassified under the Fair Labor Standards Act. Horton contested Cuda's notice, citing the language of Cuda's arbitration agreement barring arbitration of collective actions.

Cuda filed an unfair labor practice charge, and the board's general Counsel issued a complaint alleging that Horton violated Section 8(a)(1). An ALJ found that the agreement violated the NLRA because it would reasonably be understood by employees to prohibit the filing of a charge with the board, but dismissed the allegation that the agreement's class action waiver was unlawful. The board reversed this latter finding.

According to the board in *D.R. Horton*, ''an individual who files a class or collective action regarding wages, hours or working conditions, whether in court or before an arbitrator, seeks to initiate or induce group action and is engaged in conduct protected by Section 7.'' Applying the multifactor test articulated in *Lutheran Heritage Villiage-Livonia*, 343 N.L.R.B. 375 (2004) (228 DLR A-1, 11/29/04), the board concluded that ''the agreement at issue here . . . not only bars the exercise of rights at the core of those protected by Section 7, but implicates prohibitions that predate the NLRA and are central to modern Federal labor policy.'' According to the board, ''[i]f a Section 7 right to litigate concertedly exists, then it defies logic to suggest . . . that requiring employees to waive that right does not implicate Section 7.''

Significantly, the board also held that there was no conflict between the rule it announced and the Supreme Court's pronouncements concerning the FAA in *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011) (81 DLR AA-1, 4/27/11). In *Concepcion*, the court held that the FAA preempted a California court's finding that a class action waiver contained in an arbitration clause in a contract of adhesion was unconscionable, because the FAA permits such waivers. The board distinguished *Concepcion* on the basis that the policy of the FAA upon which the Supreme Court relied—''to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings''—was less significant in the context of employment-related claims.

''[W]e need not and do not mandate class arbitration in order to protect employees' rights under the NLRA,'' the board said.

The board concluded its decision by noting: ''[W]e need not and do not mandate class arbitration in order to protect employees' rights under the NLRA. Rather, we hold only that employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in *all* forums, arbitral and judicial. So long as the employer leaves open a judicial forum for class and collective claims, employees' NLRA rights are preserved without requiring availability of class-wide arbitration. Employers remain free to insist that *arbitral* proceedings be conducted on an individual basis.''

Numerous district court decisions have already disagreed with the board's holding, with many suggesting the board's analysis is plainly inconsistent with the Supreme Court's decision in *Concepcion*. However, a small number of courts have concluded that *Horton* validly changed the legal landscape and that arbitration agreements that completely foreclose class or collective actions are impermissible. D.R. Horton has appealed the case to the U.S. Court of Appeals for the Fifth Circuit and the court's eagerly anticipated decision is sure to have wide-ranging impact.

B. Mandatory Arbitration and Right to File ULP Charges

Supply Technologies, LLC, 359 N.L.R.B. No. 38 (2012) (04 DLR A-1, 1/7/13). In this case, a two-member majority (Members Griffin and Block) held that an employer's mandatory grievance-arbitration program unlawfully restricted employees from filing unfair labor practice charges and that the employer violated the NLRA by requiring employees to accept the program and discharging those who refused to do so. Supply Technologies' arbitration program, called ''Total Solutions Management'' or ''TSM,'' required employees to utilize TSM for all claims ''relating to my application for employment, my employment, or the termination of my employment,'' including ''claims under any federal, state or local statute.'' The program agreement further stated that the ''only'' claims that were excluded from TSM were criminal matters and workers' compensation and unemployment claims. The agreement did, however, state that ''both Supply Technologies and [the employee] can still file a charge or complaint with a government agency.''

The majority concluded that ''[g]iven the Agreement's broad scope, its three limited exceptions, and its specific requirement that federal statutory claims must be brought under TSM, reasonable employees reading the Agreement would understand it to restrict their right to file unfair labor practice charges or otherwise access the Board's processes.'' The majority rejected the argument that the program's carve-out of the right to ''file a charge or complaint with a government agency'' was adequate to protect employees' NLRA rights because it did not ''explain that filing an administrative charge is intended to be an exception to the

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broad and nonexhaustive list of claims that . . . 'must' be brought in TSM.''

Member Hayes dissented, finding that TSM's noncoverage of administrative charges and complaints would not reasonably be confusing to employees. Hayes noted that he found the majority's holding 'disturbing' because it distorts established board law concerning facially neutral work rules and ''signals the Board's continued reluctance to endorse any form of mandatory alternative dispute resolution encompassing statutory claims for individual workers in a nonunion setting.'' With regard to this latter point, Hayes noted that ''[a]lthough the Board has never so held, it is difficult to avoid the implication from this case that any private dispute resolution system for individual employees in a nonunion work force is unlawful unless it is nonmandatory.''

III. Attempted Rulemaking by NLRB

A. Posting of NLRA Rights

On Aug. 30, 2011, the board issued a final rule requiring most private employers, both union and nonunion, to post a notice of employee NLRA rights in the workplace. The final rule also requires employers to post a notice on the internet or their intranet if the employer normally posts personnel policies there.

Numerous court challenges to the board's statutory authority to impose the posting requirement were immediately filed, including federal court actions in Washington, D.C., and South Carolina. The notice-posting requirement was originally scheduled to take effect Nov. 14, 2011, but was postponed until Jan. 31, 2012, purportedly ''in order to allow for enhanced education and outreach to employers, particularly those who operate small and medium sized businesses.''

In December 2011, the board postponed the effective date of the posting requirement again at the request of the district court in Washington, D.C., and set a new effective date of April 30, 2012. In March 2012, the U.S. District Court for the District of Columbia upheld the board's power to adopt the posting requirement, holding that nothing in the NLRA shows that ''Congress unambiguously intended to preclude the Board from promulgating a rule that requires employers to post a notice informing employees of their rights under the Act,'' and that the board's rationale for the posting requirement was a reasonable one. *National Ass'n of Mfrs. v. N.L.R.B.*, 846 F. Supp. 2d 34 (D.D.C. 2012) (42 DLR AA-1, 3/2/12).

However, on April 13, 2012, the district court in South Carolina disagreed with the federal court for the D.C. Circuit, holding that ''[b]ased on the statutory scheme, legislative history, history of evolving congressional regulation in the area, and a consideration of other federal labor statutes, the court finds that Congress did not intend to impose a notice-posting obligation on employers, nor did it explicitly or implicitly delegate authority to the Board to regulate employers in this manner.'' *Chamber of Commerce of U.S. v. N.L.R.B.*, 856 F. Supp. 2d 778 (D.S.C. 2012) (72 DLR AA-1, 4/13/12). In light of this conflict, on April 17, 2012, the Court of Appeals for the District of Columbia issued an emergency injunction prohibiting the board from implementing the notice posting requirement until the court decides the case. Oral argument on the appeal was conducted in September 2012, and the case is awaiting decision.

B. Proposed Amendments to Board Election Rules

In June 2011, the board proposed changes to the procedures to be followed prior to and following a secret ballot election to determine whether employees elect to be represented by a union for collective bargaining purposes. In December 2011, the board voted to narrow the scope of the new procedures, adopting six, more limited changes. The revised procedures took effect on April 30, 2012. However, on May 14, 2012, a federal district court in Washington, D.C., invalidated the regulation, holding that a valid quorum of the board did not approve the rule. *Chamber of Commerce of U.S. v. N.L.R.B.*, 193 LRRM 2316, 2012 BL 119207 (D.D.C. May 14, 2012) (93 DLR AA-1, 5/14/12). Following the decision, the board suspended implementation of the procedures indefinitely in order to permit it to ''consider its response'' to the ruling.

IV. Other Notable Decisions of the Board

A. Discussion of Investigations of Employee Misconduct

Banner Health System, 358 N.L.R.B. No. 93 (2012) (147 DLR A-2, 7/31/12). In this case, the board considered whether an employer unlawfully maintained an informal policy of asking employees making complaints concerning workplace misconduct not to discuss the matter with their co-workers while the investigation was ongoing. Reversing the decision of an administrative law judge, a 2-1 majority of the board (Members Griffin and Block), held that the employer had not carried its burden of ''show[ing] that it has a legitimate business justification [in confidentiality] that outweighs employees' Section 7 rights.''

Specifically, the majority ruled that the employer's ''generalized concern with protecting the integrity of its investigations'' was not sufficient to justify its policy. Rather, citing *Hyundai America Shipping Agency*, 357 N.L.R.B. No. 80 (2011), the board concluded that it is an employer's burden ''to first determine whether in any given investigation witnesses needed protection, evidence was in danger of being destroyed, testimony [was] in danger of being fabricated, or there was a need to prevent a cover up'' and that Banner Health System's ''blanket approach clearly failed to meet those requirements.''

Board Member Hayes dissented, finding that the employer's instruction, which was provided verbally by a human resources employee, was not ''an actual work rule,'' but merely a ''suggest[ion] that employees not discuss matters under investigation.'' Hayes contrasted this case with *Hyundai America*, noting that in that case the employer threatened employees with discipline if they discussed the investigation and discharged one employee because he sent emails with management to other employees.

B. Violation of Overbroad Confidentiality Policies

Flex Frac Logistics, LLC, 358 N.L.R.B. No. 127 (2012). In a 2-1 decision, with Members Griffin and Block in the majority, the board found that a confidentiality agreement with an at-will employee that prohibited disclosure of ''personnel information and documents'' ''outside of the organization'' was overbroad. According to the majority, the board ''has repeatedly held that non-

disclosure rules with very similar language are unlawfully overbroad because employees would reasonably believe that they are prohibited from discussing wages or other terms and conditions of employment with nonemployees, such as union representatives—an activity protected by Section 7 of the Act.''

Member Hayes dissented, asserting that, ''[i]nstead of reading the entire rule in context and with appropriate consideration of its obvious legitimate business justification [preventing competitors from discovering the employer's cost structure], the judge and my colleagues have taken a single illustrative phrase from the rule and deemed it to be an invalid restriction of activity protected by Section 7 of the Act.'' Hayes asserted that he ''fail[ed] to see anything in the record to indicate why [employees] would reasonably be inclined to so contort the context and stated purpose of the confidentiality rule as to preclude the discussion of wages.''

Taylor Made Transp. Servs., Inc., 358 N.L.R.B. No. 53 (2012). The board (Members Griffin and Block) concluded that Taylor Made unlawfully suspended and then terminated an employee for violating ''an unlawful rule against disclosing wage rates.'' Citing the general rule that ''discipline imposed pursuant to an unlawfully overbroad rule violates the Act in those situations in which an employee violated the rule by (1) engaging in protected conduct or (2) engaging in conduct that otherwise implicates the concerns underlying Section 7 of the Act,'' the board concluded that it was not required to examine whether the employee's specific conduct constituted concerted activity because she ''clearly was engaged in conduct that otherwise implicates the concerns underlying Section 7 of the Act.''

''[W]age discussions among employees are considered to be at the core of Section 7 rights because wages, 'probably the most critical element in employment,' are 'the grist on which concerted activity feeds,' '' the board said. Member Hayes concurred in the decision, but asserted that he would not reach the issue of whether the employee's conduct implicated Section 7 concerns because she ''engaged in actual protected concerted activity when discussing her own wages with other employees.''

C. Dues Checkoff and Bargaining Contract Expiration

WKYC-TV, Inc., 359 N.L.R.B. No. 30, 194 LRRM 1289 (2012) (244 DLR AA-1, 12/19/12). In *Bethlehem Steel*, 136 N.L.R.B. 1500, 50 LRRM 1013 (1962), the board held that an employer's obligation to check off union dues from an employee's wages terminates upon expiration of the collective bargaining agreement that created the obligation.

In *WKYC-TV*, the board overruled *Bethlehem Steel* in a 3-1 decision, holding that there is no justification for excluding dues checkoff provisions from the general rule that, until a bargaining impasse is reached, an employer may not unilaterally alter the terms and conditions of employment following the expiration of a collective bargaining agreement.

Adopting the reasoning of the Ninth Circuit in *Local Joint Executive Board of Law Vegas v. NLRB*, 657 F.3d 865, 191 LRRM 2609 (9th Cir. 2011) (178 DLR AA-1, 9/14/11), the majority (Chairman Pearce and Members Griffin and Block) concluded that ''like most other terms and conditions of employment, an employer's obligation to check off union dues continues after expiration of a collective-bargaining agreement that establishes such an arrangement.''

''Like most other terms and conditions of employment, an employer's obligation to check off union dues continues after expiration of a collective-bargaining agreement that establishes such an arrangement,'' the board majority concluded.

In so holding, the majority distinguished contract provisions such as arbitration provisions, no-strike clauses and management rights clauses, which do not survive expiration, on the basis that ''in agreeing to each of these arrangements . . . parties have waived rights that they would otherwise enjoy . . . and such waivers are presumed not to survive the contract.''

A dues checkoff, on the other hand, ''does not involve the contractual surrender of any statutory or nonstatutory right,'' and thus ''should be included with the overwhelming majority of terms and conditions of employment that remain in effect even after the contract containing them expires.'' However, ''because employers have long relied on *Bethlehem Steel*,'' the board held that the new rule will only be enforced prospectively.

Member Hayes dissented, asserting that there was no justification for disregarding established law and ''the settled expectations and negotiating practices of those who rely on it.'' Among the reasons for Hayes's view was that, where a dues checkoff is accompanied by a union security provision (which by the express language of the NLRA terminates at contract expiration), the two clauses are intertwined and ''it is unreasonable to think that employees generally would wish to continue having dues deducted from their pay once their employment no longer depends on it.''

Further, Hayes wrote, ''an employer's ability to cease dues checkoff upon contract expiration has long been recognized as a legitimate economic weapon in bargaining,'' and ''[t]o strip employers of that opportunity would significantly alter the playing field that labor and management have come to know and rely on.''

D. Confidential Witness Statements

American Baptist Homes of the West, 359 N.L.R.B. No. 46, 194 LRRM 1406 (Dec. 2012) (01 DLR A-1, 1/2/13). In a 3-1 decision, the board overruled its long-standing rule, established in *Anheuser-Busch, Inc.*, 237 N.L.R.B. 982 (1978), that witness statements obtained during an employer's investigation of employee misconduct need not be disclosed to a union where the employee-witness has been assured that the statement is confidential. Instead, the majority of Chairman Pearce and Members Griffin and Block held that the confidentiality of such statements will be evaluated under the balancing test of *Detroit Edison Co. v. NLRB*, 440 U.S. 201 (1979).

Pursuant to *Detroit Edison*, ''[i]f a party asserts that requested information is confidential, the board balances the union's need for the relevant information against any legitimate and substantial confidentiality interests established by the employer.'' With regard to

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Anheuser-Busch's ''broad, bright-line exception'' for witness statements, the majority held that ''we are not persuaded that there is some fundamental difference between witness statements and other types of information that justifies a blanket rule exempting such statements from disclosure.''

However, because the decision marked a departure from long-standing precedent, the board held that its new rule would only be applied prospectively. Member Hayes dissented, contending that *Anheuser-Busch* ''protects the integrity of the arbitration process, protects employee witnesses who participate in workplace investigations from coercion and intimidation, and enables employers to conduct effective investigations into workplace misconduct.''

E. Disclosure of Authorship of Protected Pro-Union Statements

Fresenius USA Manufacturing, Inc. , 358 N.L.R.B. No. 138 (2012) (189 DLR A-12, 9/28/12). This case arose after a pro-union employee anonymously wrote offensive and threatening statements on union newsletters left in an employee breakroom in an attempt to encourage fellow employees to support the union in an upcoming decertification election. Following an investigation during which the employee denied making the statements, the employer discharged the employee.

The board concluded that the employee's statements were protected and that his denials that he made the statements did not cause him to lose the protection of the NLRA. According to the majority, ''an employee may not be required to [reveal his protected activity] where, as here, the inquiry is unrelated to the employee's job performance or the employer's ability to operate its business.''

Member Hayes dissented, asserting that ''I disagree with [the majority's] statement that an employee has a protected Section 7 right to lie during a lawful interrogation about alleged sexual harassment in order to conceal participation in union activity. Contrary to the majority, I find that sexual harassment by an employee in the workplace is clearly related to an employee's job performance and an employer's ability to operate its business within the requirements of Federal laws.''

F. Off-Duty Access Rules

J.W. Marriott Los Angeles at L.A. Live, 359 N.L.R.B. No. 8, (2012) (193 DLR AA-1, 10/4/12). In *Tri-County Medical Center*, 222 N.L.R.B. 1089 (1976), the board established the rule that ''a rule restricting off-duty employee access is valid only if it (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just those employees engaging in union activity.''

In this case, Marriott generally prohibited employee access to the interior of the hotel when not on duty, but allowed such access with prior approval from an employee's manager. A majority of the board (Chairman Pearce and Member Block) held that this policy was unlawful because Marriott's ''rule is not a uniform prohibition of access; rather, it prohibits off-duty employee access *except* in certain unspecified circumstances subject to a manager's 'prior approval,' giving Respondent broad—indeed, unlimited—discretion 'to decide when and why employees may access the facility.' '' The majority further held that the rule unlawfully chilled Section 7 rights because it ''would be understood by a reasonable employee as prohibiting activity protected under Section 7 of the Act *without* prior management approval.''

Member Hayes dissented, asserting that ''with its ruling today, the majority reaffirms its misreading of *Tri-County* to prohibit employers from allowing commonsense exceptions to off-duty no-access-rules.''

''[T]he end result of the majority's holding,'' Hayes wrote, ''is that a hospital cannot maintain a valid off-duty access rule if it also allows employees to engage in innocuous activities such as picking up paychecks, completing employment-related paperwork or filling out patient information.''

Sodexo America LLC, 358 N.L.R.B. No. 79, 1193 LRRM 1129 (2012) (129 DLR AA-1, 7/5/12). Sodexo, which provided food services to USC University Hospital, maintained a policy that permitted off-duty employees to enter the hospital only for the purpose of visiting patients, seeking medical care themselves, or conducting ''hospital-related business.'' The board, through a majority of Chairman Pearce and Member Griffin, held that Sodexo's policy was unlawful ''because this policy allows the Respondent unlimited discretion to decide when and why employees may access the facility'' and therefore ''does not uniformly prohibit access to off-duty employees seeking entry to the property for any purpose.''

G. Malicious Phone Calls to Stock Analyst

Dresser-Rand, Co., 358 N.L.R.B. No. 34 (2012). In connection with an ongoing labor dispute with Dresser-Rand, members of Local 313, IUE-CWA pursued a strategy of placing telephone calls to stock analysts for the purpose of informing the investment community of the true costs the union believed the labor dispute was imposing on Dresser-Rand.

After a particularly contentious bargaining session, one employee placed a call to an analyst during which he made misstatements concerning the volume of the company's work. After an investigation, Dresser-Rand discharged the employee. In evaluating the legality of the employee's discharge, the board (Chairman Pearce and Member Griffin) agreed with the administrative law judge that ''[b]ecause [the employee's] telephone calls to the investment analysts were designed to apply pressure to the Employer in order to ameliorate his own terms and conditions of employment and the terms and conditions of employment of his coworkers,'' there was sufficient linkage to group action to constitute concerted activity.

However, the majority also agreed with the ALJ that the employee's ''unsubstantiated claim that production at [one of the employer's facilities] had declined by half was made with a malicious frame of mind and a clear intent to damage the value of his employer's stock.'' Because ''[t]he Board holds that the Act does not protect a statement made with reckless disregard for its truth, the employee was validly discharged based on his unprotected comment.

Members Hayes concurred in the ultimate decision, but did not opine on whether the employee's calls to the analysts generally constituted concerted activity.

H. Employee Discipline Mandatory Subject of Bargaining

Alan Ritchey, Inc., 359 N.L.R.B. No. 40 (2012) (249 DLR A-1, 12/28/12). Finding that the issue had never been ''adequately addressed'' by prior board decisions,

a unanimous panel (Chairman Pearce and Members Griffin and Block) held that ''like other terms and conditions of employment, discretionary discipline is a mandatory subject of bargaining and . . . employers may not impose certain types of discipline unilaterally.''

Accordingly, ''an employer must provide its employees' bargaining representative notice and the opportunity to bargain with it in good faith before exercising its discretion to impose certain discipline on employees, absent a binding agreement with the union providing for a process, such as a grievance-arbitration system, to resolve such disputes.''

This obligation, the board held, ''attaches only with regard to the discretionary aspects of certain disciplinary actions that have an inevitable and immediate impact on employees' tenure, status, or earnings, such as suspension, demotion or discharge. Thus, we expect that most warnings, corrective actions, counselings and the like will not require pre-imposition bargaining, assuming they do not automatically result in additional discipline, based on an employer's progressive disciplinary system, that itself would require such bargaining.''

Further, the board ruled, after proving notice and an opportunity to bargain, ''the employer is not required to bargain to agreement or impact at this stage; rather, if the parties have not reach agreement, the duty to bargain continues after imposition. Moreover, the employer has no duty to bargain over those aspects of its disciplinary decision that are consistent with past practice or policy.''

Finally, ''an employer may act unilaterally and impose discipline . . . in any situation that presents exigent circumstances.'' The board held that its new rule will only be applied prospectively.

I. Union's Concern Over Franchisees' ''Alter Ego'' Status

Piggly Wiggly Midwest, LLC, 357 N.L.R.B. No. 191 (2012). In a case arising out of the sale of two unionized grocery stores to franchisees, a majority of the board (Chairman Pearce and Member Becker) held that a union validly requested information concerning the terms of the sales and the services the seller provided to franchisees in order to permit the union to assess its claim that the franchisees were alter egos of the seller.

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In a dissent, Member Hayes asserted that ''because [the requested] information did not relate to unit employees, the Respondent had no duty to provide it absent a demonstration, by the Union, of the relevance of the information.'' This obligation, Member Hayes contended, required the union to ''do more than state the reason and/or authority for its request for information; the union must instead apprise an employer of *facts* tending to support its request for nonunit information by communicating those facts to the employer in its information request.''

The majority rejected Hayes's articulation of the applicable rule, concluding that ''Board precedent does not hold that the duty to provide information that is not presumptively relevant arises only after a union has made a demand and communicated facts to the employer demonstrating that it has an objectively reasonable basis for believing the requested information is necessary . . . [T]he union is not obligated to disclose those facts to the employer at the time of the request; rather, it is sufficient that the general counsel demonstrate at the hearing that the union had, at the relevant time, a reasonable belief.''

J. No-Strike Clause Prohibiting Leafletting and Informational Picketing

DTM Corporation, 358 N.L.R.B. No. 112 (2012). A panel of the board (Members Hayes, Griffin and Block) unanimously held that an employer and the union representing its employees validly entered into a no-strike clause that prohibited, among other things, ''sympathy strike, picketing, leafleting, informational picketing or any other work action that has the purpose or effect of slowing down or interfering with work.''

The board held that, although ''a union may not broadly waive the right of employees to distribute literature on nonworking time in nonworking areas,'' the clause at issue here only limited leafleting and informational picketing that had the purpose or effect of slowing or interfering with work and therefore did not prohibit ''protected distribution in nonworking areas among employees during their nonworking times, [or] informational picketing by off-duty employees on public property for any other purpose.''

K. Post-Discharge Misconduct

Human Services Projects, Inc., 358 N.L.R.B. No. 2 (2012). After affirming an administrative law judge's finding that an employee was unlawfully discharged based on protected conduct, the board (Chairman Pearce and Members Griffin and Flynn) considered whether the employee's threatening conduct at the time of his discharge and his act of threatening another coworker five months after his termination caused him to be ineligible for reinstatement. Applying the ''unfit for service'' standard of *Hawaii Tribune-Herald*, 356 N.L.R.B. No. 63 (2011), the board concluded that while the employee's interactions with his employer's chief financial officer at the time of his discharge did not render him unfit to return to work for the employer, his ''menacing'' conduct toward a co-worker regarding a matter unrelated to his discharge did disqualify him for reinstatement as a child care worker at residential facilities for sex and youth offenders.

L. Tax Liability for Back Pay Awards

Latino Express, Inc., 359 N.L.R.B. No. 44, 195 LRRM 1003 (2012) (246 DLR A-12, 12/21/12). This case arose after the board concluded that an employer unlawfully discharged two employees for engaging in protected activity and awarded back pay. The employees contended that because their back pay awards related to multiple

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years, the payment of the entire award in a lump sum resulted in increased tax liability for them.

In order ''to ensure that an employee who receives lump-sum backpay rather than regular income is truly made whole . . . we shall henceforth routinely require respondents to compensate employees for the adverse tax consequences of receiving one or more lump-sum backpay awards covering periods longer than 1 year,'' the board said.

The board held that it is the general counsel's burden to provide the extent of any adverse tax consequences to the employee. The board also held that an employer who is ordered to pay back pay must file a report with the Social Security Administration ''allocating backpay awards to the appropriate calendar quarters'' to avoid adverse consequences to the affected employee with respect to Social Security benefits.

M. Union Lobbying Expenses

United Nurses and Allied Professionals (Kent Hospital), 359 N.L.R.B. No. 42 (2012). In a 3-1 decision, the board majority (Chairman Pearce and Members Griffin and Block) concluded: 1) that a union did not violate the NLRA by failing to provide the objector with an audit verification letter relating to the charges assessed to the objector; and 2) that a union may lawfully charge a nonmember objector for expenses incurred in connection with lobbying efforts ''to the extent they are germane to collective bargaining, contract administration, or grievance adjustment.''

In reaching this latter conclusion, the majority relied on the Supreme Court's ruling in *Communication Workers v. Beck*, 487 U.S. 735, 128 LRRM 2729 (1988), which the majority concluded established that objecting employees ''may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining agreement and settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union . . . .''

Because ''lobbying, like litigation, is a means rather than an end—a strategic activity that a union undertakes to advance the interests of its members,'' and ''so long as lobbying is used to pursue goals that are germane to collective bargaining, contract administration, or grievance adjustment, it is chargeable to objectors,'' the board said.

Further, the majority held, lobbying expenses that are ''extra-unit'' and ''would not provide a direct benefit to members'' (in this case, the union, which represented employees in Rhode Island, lobbied in favor of bills in Vermont), are nonetheless chargeable where they are ''reciprocal in nature,'' meaning that the ''contributing local reasonably expects other locals to contribute similarly . . . on behalf of the contributing local if and when [similar activity] takes place.'' The board then ''invite[d] all interested parties to file briefs in this case regarding the question of how the Board should define and apply the germaneness standard in the context of lobbying activities.''

Member Hayes dissented from all of the majority's holdings, contending that the lobbying at issue was ''not so related to the Union's representational duties to employees in the objecting employees' bargaining unit as to justify their compelled financial support of them'' and that unions ''should be required to provide *Beck* objectors verification that the financial information disclosed to them has been professionally audited by an independent accountant.''

V. Lessons for Employers

The most notable aspects of the board's jurisprudence in 2012 were its focus on the Section 7 rights of nonunion employees and its consistent protection of employee rights to communicate concerning the terms and conditions of employment, particularly using new technology and social media. Employers that previously gave little, if any, thought to the NLRA must now consider the risk of unfair labor practice charges stemming from the adoption of broadly written social media, confidentiality and internal investigation policies and the imposition of discipline based on those policies.

For unionized employers, the lesson from 2012 seems to be that the board is quite comfortable with revisiting and disregarding long-standing precedent. The board's willingness to do away with settled decisions such as *Bethlehem Steel* and *Anheuser-Busch* demonstrates that the expectations of the parties to collective bargaining relationships will mean little in future cases.