National Labor Relations Act Compliance Guide

A comprehensive guide to understanding employee rights under the National Labor Relations Act and the obligations of the employer to protect those rights.



personnel concepts

EMPLOYER KNOWLEDGE SERIES

National Labor Relations Act Compliance Guide

A comprehensive guide to understanding employee rights under the National Labor Relations Act and the obligations of the employer to protect those rights.

To Reorder Call (800) 333-3795 or
visit our website www.personnelconcepts.com
Item # NLRA-KIT

Contents

Chapter 1 - Introduction

Chapter 2 - Unfair Labor Practices

Chapter 3 - Unionization Provisions

Chapter 4 - Social Media

Chapter 5 - Best Practices for Employers

Chapter 6 - Legislative Text

Chapter 7 - Additional Resources

Chapter 1

Introduction

About this Guidebook / Disclaimer

The National Labor Relations Act Compliance Kit is designed to aid companies in complying with employer requirements under the National Labor Relations Act (NLRA). The NLRA guarantees the right of employees to organize and bargain collectively with their employers, and to engage in other protected concerted activity. Employees covered by the NLRA are protected from certain types of employer and union misconduct i.e., to communicate with coworkers about the terms and conditions of employment. The Act protects employees regardless of whether their workplace is unionized. The National Labor Relations Act is enforced by the National Labor Relations Board.

On August 30, 2011, the NLRB issued a final rule requiring employers to post a workplace notice advising employees of their rights under the NLRA. The Regional Offices of the NLRB have found that, more than six decades after its enactment, there is still a lack of basic information about the NLRA. The goal of the posting requirement is to educate employees of their right to choose a union as their exclusive bargaining representative in all phases of the process, from talking as a group about the conditions of the work environment to choosing a union to negotiate employee rights.

The original effective date for posting of this notice was set for November 14, 2011. However, on October 5, 2011, the National Labor Relations Board announced a delayed implementation date of January 31, 2012, to allow for enhanced education and outreach to employers. The effective date was further extended to April 30, 2012.

On April 17, 2012, a federal appeals court in Washington, D.C., blocked the National Labor Relations Board (NLRB) from requiring American businesses to post its NLRA Employee Rights Poster by April 30, issuing a temporary injunction to stop the mandate.

The injunction follows on the heels of a federal court's decision in South Carolina that said the board lacks the authority to mandate the poster. The U.S. Court of Appeals for the District of Columbia now says the poster cannot be required until certain legal issues are resolved. According to the D.C. Circuit Court of Appeals Order, briefing of the appeal is expected to be completed by June 29, 2012, and oral argument is expected to be scheduled in September 2012.

The NLRA protects the rights of employees to:

- Form or join a union
- Bargain collectively for a contract that sets wages, benefits, hours, and other working conditions
- Discuss wages, working conditions or union organizing with co-workers or a union
- Act with co-workers to improve working conditions by raising complaints with an employer or a government agency
- Strike and picket their employer, depending on the purpose or means of the action
- Choose not to join a union or engage in union activities
- Organize coworkers to decertify a union

The Board believes that many employees protected by the NLRA are unaware of their rights under the statute and that the rule will increase knowledge of the NLRA among employees, in order to better enable the exercise of rights under the statute. An intended beneficial side effect may well be the promotion of statutory compliance by employers and unions.

Hours after the decision, NLRB Chairman Mark Gaston Pearce said of the recent rulings, “We continue to believe that requiring employers to post this notice is well within the board’s authority, and that it provides a genuine service to employees who may not otherwise know their rights under our law.” He also pledged that his agency would abide by the injunction.

The NLRB said its regional offices will not implement the rule until the appeal is decided. Further, the labor board will appeal a part of the ruling that raised questions about the rule's enforcement mechanisms, as well as the ruling that said the agency did not have the legal authority to issue the rule. Until then, employers need to make sure they do not violate any of the provisions protecting employee rights under the NLRA and stay informed of future developments.

This guidebook has been designed for the exclusive use of the Purchaser. Copying or reproduction of any kind without permission from the author, Personnel Concepts, is strictly prohibited. Every effort has been made by the author to assure accuracy and completeness of the information contained herein. This guidebook follows the guidelines recommended by the National Labor Relations Board and is provided with the understanding that Personnel Concepts or any of its affiliates cannot be held responsible for errors or omissions, changes in law, regulations or interpretations thereof. This guidebook is not intended to be legal interpretation of any law or regulation.

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting or other professional services. If legal advice or other expert assistance is required, the service of a competent professional must be sought. – From a Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers.

This guidebook and its related products are provided with the understanding that Personnel Concepts or any person or entity involved in creating, producing or distributing this manual and its related products are not liable for any direct, indirect, incidental, special or consequential damages arising out of the use of or inability to use this manual and its related products or out of the breach of any warranty. Personnel Concepts or any authorized distributor's liability to users, if any, shall in no event exceed the total amount paid to Personnel Concepts or any of its authorized distributors for this manual and its related products.

Implementation Procedures

The following implementation procedures are intended to provide specific instructions for correctly utilizing the various components of our National Labor Relations Act Compliance Guide. If you have additional questions about this guidebook or other kit components, please contact Personnel Concepts at 800-333-3795.

1. Post the All-On-One NLRA Compliance Poster (Item #FD-NLRA) in a conspicuous location in an area frequented by employees.

2. Distribute a Labor Law Compliance Poster Acknowledgement form to each employee to sign. Retain the signed copy in the employee's personnel file for the duration of their employment.

3. Review "National Relations Labor Act – A Legal Opinion" and "Frequently Asked Questions" in this chapter to get an overview of employee rights under the NLRA and unionization in the workplace.

4. Review Chapter 2, "Unfair Labor Practices" in order to mitigate violation of the Act's prohibited employer practices. If either a labor organization or an employer fails to perform its obligation to the other party or interferes with the rights that have been given under the Act, an unfair labor practice charge may be filed.

5. Review Chapter 3, "Union Provisions" to ensure that you understand your establishment's obligations under current laws that affect unionization and employer rights during the organization process.

6. To keep abreast of the latest workplace policy issues, review Chapter 4, "Social Media" to make sure that you understand what is classified as "concerted activity" as it pertains to social networking sites. Utilize the "Employer Tips" in the creation and implementation of your social media policy.

7. Distribute the Supervisor Training Sheets to all the appropriate Supervisor/Managers to educate them about the requirements under the NLRA.

8. Refer to Chapter 5, "Best Practices for Employers" for tips on avoiding unionization and responding to union organizing.

9. Reference Chapter 6, "Legislative Text" as needed to see the full text of the regulations.

National Labor Relations Act Compliance A Legal Opinion

I. Overview of National Labor Relations Act (NLRA)

The National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-169, *et seq*., is administered by the National Labor Relations Board (the NLRB or Board). Information regarding the NLRB, NLRB decisions, and other labor-related issues, can be obtained through the NLRB's web site, ww.nlrb.gov. The NLRB also has a toll-free number for employers, employees, and unions to call to obtain information and seek assistance from the Board. The toll-free number is: 1-866-667-NLRB (1-866-667-6572).

II. Jurisdiction of the National Labor Relations Board

For the NLRB to have jurisdiction, the employer must be covered by the NLRA and there must be a "labor dispute." 29 USC 152(9).

A. Covered of Employers

To be covered by the NLRA, the employer's business activity must fall within the statutory meaning of *commerce*, 29 USC 152(6), or *affecting commerce*, 29 USC 152(7). While the employer's interstate commerce must be greater than *de minimis* (see *Pioneer Concrete Co*, 241 NLRB 264, 101 LRRM (BNA) 1012 (1979), *enf'd*, 637 F2d 698, 106 LRRM (BNA) 2387 (9th Cir 1981)), the NLRB will generally have jurisdiction over most employers that are not statutorily excluded. For a list of such exclusions see 29 USC 152(2).

B. Covered Employees

The term *employee* under 29 USC 152(3) is liberally construed, but there are exclusions, including supervisors, managerial employees, agricultural workers, domestics, individuals who work for their parents or spouse, employees covered by the Railway Labor Act, independent contractors, and retired persons. It is important to note that illegal aliens are covered employees if they work and reside in the United States. *Sure-Tan, Inc v NLRB*, 467 US 883 (1984).

Whether an employee falls under the excluded "supervisor" or "manager" exclusion is a frequent area of dispute. Under the NLRA, a "supervisor" or "manager" is "[a]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not a merely routine or clerical nature, but requires the use of independent judgment." 29 USC 152(11).

C. Labor Dispute

A **labor dispute** is "any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment," *id*., and is broadly construed. *See Liner v Jafco, Inc,* 375 US 301 (1964).

D. Concerted Activity

To be protected under Section 7, employee activity must be "concerted" and pursued either for union related purposes or other "mutual aid and protection." *Parexel Int'l, LLC*, 2011 NLRB LEXIS 25 (N.L.R.B. Jan. 28, 2011). "Concerted" means that the activity is undertaken by two or more employees or by one on behalf of others. *Wyndham Resort Development Corp. d/b/a Worldmark By Wyndham*, 2011 NLRB LEXIS 63 (March 2, 2011).

While a single employee acting on that employee's own behalf will generally not be found to be engaged in "concerted activity," an employee may establish that the concerns expressed are the "logical outgrowth" of group activity or concerns of others so the activity is protected. See *NLRB v. Mike Yurosek & Son*, 53 F.3d 261 (9th Cir. 1995), enforcing 310 NLRB 831, 142 LRRM 1348 (1993) (Four employees individually refused overtime, but Board found protected concerted activity because "… the concerns expressed by the individual are the logical outgrowth[s] of the concerns expressed by the group." *Id* at 1038, 140 LRRM at 1003).

III. Protection under Section 7 of the NLRA

Under Section 7 of the NLRA, employees are guaranteed "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 USC 157.

Section 7 rights are enforced through the prohibition of certain conduct by either employers or unions called unfair labor practices.

IV. Overview of Unfair Labor Practices of Employers

There are three broad categories of Unfair Labor Practices (ULPs) under the NLRA. Generally, these three categories arise under Section 8 of the NLRA and are further broken down as follows:

- Section 8(a) lists the ULPs of employers;
- Section 8(b) lists the ULPs of labor organizations; and
- Section 8(c) lists the ULPs that are the result of combined activity of employers and labor organizations.

The remainder of this article discusses in more detail common Unfair Labor Practices committed by employers.

Employer Unfair Labor Practices

I. Section 8(a)(1): Interference, Restraint or Coercion of Rights Under Section 7.

A. The Right to Self-Organization, To Form, Join or Assist Labor Organizations and to Collective Bargaining.

This is the most basic and fundamental right provided under the NLRA. If an employer interferes with employee Section 7 Rights, e.g., right to organize, form, join, or assist a labor organization, the employer has violated the NLRA. This prohibited interference is as follows:

- Section 8(a)(1) prohibits an employer from interfering with employees as they engage in concerted activity;
- Section 8(a)(2) prohibits an employer from dominating or assisting a labor union;
- Section 8(a)(3) prohibits an employer from discriminating against any worker because of union activity;
- Section 8(a)(4) prohibits an employer from punishing a work for filing charges with the Labor Board;
- Section 8(a)(5) requires the employer to bargain collectivity in good faith with the union.

B. The Right to Engage In Other Concerted Activities For The Purpose of Collective Bargaining or Other Mutual Aid or Protection.

Section 7 also protects employees' right to act together as a group without a union to protect activities unrelated to union organization. See e.g. *Mojave Elec. Coop. Inc.*, 327 NLRB 13, 163 LRRM 1288 (1998), enforced, 206 F.3d 1183 (D.C. Cir. 2000) (employee and co-workers petitioned for injunctive relief against harassment by two officials of employer's subcontractor); Tri-County Transportation Inc., 331 NLRB 1153, 171 LRRM 1031 (2002) (Employer violated Act by definitely laying three employees off because they, in concert, filed for unemployment benefits during summer recess).

C. "No-Solicitation" and "No-Distribution" Rules for Employees

The NLRA recognizes the conflicts between employees' section 7 rights to organize and the employer's right to maintain order in the workplace and right to exclude non-employees from its property. Accordingly, there are rules governing workplace solicitation and distribution of literature.

1. Solicitation

Solicitation may be prohibited by the employer only during working time. *Stoddard-Quirk Mfg Co*, 138 NLRB 615, 51 LRRM (BNA) 1110 (1962). *Working time* does not include the employee's free time (i.e., before or after work, during breaks, or at mealtime). *Golub Corp*, 338 NLRB 515 (2002) (off-duty employee had right to solicit for union during nonworking hours in employer's parking lot).

2. Distribution of Union Information

Distribution of written materials may be restricted on work time and in "work areas." *Stoddard-Quirk*.

Distribution cannot be restricted in break rooms, employee rest rooms, parking lots, lockers, or other nonwork areas. These restrictions must be applied consistently and not target just union-related materials. *Metaldyne Corp*, 339 NLRB 352, 174 LRRM (BNA) 1062 (2003) (setting aside election, which employer easily won, because employer discriminatorily enforced valid solicitation/distribution rule).

An employer may lawfully bar employees' non–work-related use of its e-mail system, unless the employer acts in a manner that discriminates against protected activity under the NLRA. *Guard Publ'g Co*, 351 NLRB 1110 (2007), a*ff'd in part and rev'd in part on other grounds*, 571 F3d 53 (DC Cir 2009).

D. Off-Duty Employee Activity on Employer Property

An off-duty employee's section 7 to organize and be on the employer's property must balanced against the employer's property rights. An employer policy that denies employees access to the employer's property during nonworking time is presumptively valid only if (1) the denial of access is limited to the interior of the building and other actual work areas, (2) the policy is clearly disseminated to all employees, and (3) the policy is consistently applied. *Teletech Holdings*, 333 NLRB 402, 166 LRRM (BNA) 1241 (2001).

Any rule prohibiting off-duty employee access to parking lots, gates, and other outside nonworking areas is presumptively invalid. *See also Meijer, Inc v NLRB*, 463 F3d 534 (6th Cir 2006) (affirming order prohibiting employer from banning union solicitation in its parking lots or promulgating or publishing any similar policy).

E. Nonemployee Activity on Employer Property

Employers generally cannot be compelled to permit non-employee individuals, including union agents, to distribute literature or solicit memberships on the employer's property. There are, however, two important exceptions:

1. Inaccessibility Exception

Under the "inaccessibility" exception, an employer violates § 8(a)(1) of the NLRA if it denies a union access to the employer's property where the union has no other reasonable means of communicating its message to employees. See *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 534 (1992). Classic examples of this exception include logging camps, mining camps, and mountain resort hotels. *Lechmere*, 502 US at 539; *see also Nabors Alaska Drilling*, 325 NLRB 574, 158 LRRM (BNA) 1004 (1998) (access granted where employees who drilled for oil were in remote camps in Alaska).

2. Non-discrimination Exception

Under the "non-discrimination" exception, an employer cannot deny union access to its premises while allowing similar distribution or solicitation by non-employee entities other than the union. See *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956).

F. Interrogating Employees About Union Activity

An employer may not interrogate its employees regarding their attitude toward or activities with the union and doing so may violate § 8(a)(1), 29 USC 158(a)(1). See *Richard Mellow Electrical Contractor Corp.*, 327 NLRB 1112, 116 LRRM 1018 (1999) (requiring job applicants to disclose their union membership or affiliation unlawful); *Fixtures Manufacturing Corp.*, 332 NLRB No. 55, 1052 (2000) (asking employee accused of distributing union literature on company time why he was interest in the union).

G. Investigating Misconduct.

An employer may not discipline or discharge an employee for failure to cooperate in an investigatory interview without union representation without violating § 8(a)(1); See *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). Presently, non-unionized workers are not entitled to representation during investigative interviews. *IBM Corporation*, 341 NLRB No. 148 (2004). This issue, may change, however, as the NLRB has flip-flopped on this issue no less than four times over the years depending upon its political make-up.

H. Surveillance and Photographing of Employees

An impression that the employer is engaging in surveillance of protected activity – whether known to the employees or not – will almost always violate § 8(a)(1), 29 USC 158(a)(1). See *Daikichi Corp*, 335 NLRB No. 53, 169 LRRM 1197 (2001) (violation where employee told it was "an open secret that you've joined the union"); *Climatrol*, Inc., 329 NLRB 946

(1999)(violation when employer's agent took photograph of employee talking with union organizer during lunch break).

An employer may, however, show specific justifying circumstances for surveillance without violating the NLRA. See *Cable Car Advertisers*, 324 NLRB 732, 158 LRRM (BNA) 1015 (1997), *enforced*, Nos 97-70069, 97-70253, 1998 US App LEXIS 2921 (9th Cir Feb 20, 1998) (employer did not begin its surveillance until after it learned of union members obstructing access and approaching employer's customers).

I. Wearing of Union Insignia

In general, an employee may wear union buttons, pins, or other insignia on T-shirts, hats, etc., while at work, and this constitutes protected activity. *West Lawrence Care Ctr*, 308 NLRB 1011, 141 LRRM (BNA) 1262 (1992). Special circumstances, however, have permitted restrictions (1) to maintain production and discipline (*Midstate Tel Corp v NLRB*, 706 F2d 401 (2d Cir 1983)); (2) to reduce friction among employees during a lengthy labor dispute (*United Aircraft Corp*, 134 NLRB 1632, 49 LRRM (BNA) 1384 (1961)); (3) for health and safety concerns (*Starwood Hotels & Resorts Worldwide, Inc*, 348 NLRB No 24, 180 LRRM 1321 (Sept 29, 2006)); and (4) to prevent interference with the employer's public image. *Id*.

J. Balancing Employer Threats and Employer's First Amendment Rights

To protect employees' section 7 rights, an employer cannot make threatening or coercive statements or make certain promises. 29 USC 158(a)(1). To be a threat, the statements must be made by someone with actual control and decision-making responsibility, or at least an agent of the employer. *Chalk Metal Co*, 197 NLRB 1133, 80 LRRM (BNA) 1516 (1972).
But the NLRA recognizes that employers also have free speech rights. Accordingly, an employer's "… expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice … if such expression contains no threat of reprisal or force or promise of benefit." 29 USC 158(c). The context in which the statement is made will be reviewed and factored into the Board's determination. *MK Morse Co*, 302 NLRB 924, 138 LRRM (BNA) 1245 (1991).

The types of conduct which have been found to be impermissible threats in violation of § 8(a)(1) includes the following:

- Threats to discharge union adherents, see N*LRB v. Neuhoff Bros. Packers*, 375 F.2d 372 (5th Cir. 1967);
- Threats to close a plan. *NLRB v Taylor Mach Prods*, 136 F3d 507 (6th Cir 1998); but see *DTR Indus v NLRB*, 39 F3d 106 (6th Cir 1994) where court found statements that 50 percent of jobs will be lost to be an objective prediction and not coercive.
- Threats to discontinue existing benefits. See *Pre-Fabricated Steel Consultants*, 322 NLRB No 126, 1996 NLRB LEXIS 832, 155 LRRM (BNA) 1048 (Dec 23, 1996); *Climatrol, Inc.*, 329 NLRB 946, 169 LRRM 1385 (1999) (termination of vacation benefits and holiday pay); *E.W. Grobbel Sons*, 322 NLRB 304, 153 LRRM 1184 (1996) (cancellation of striker's vacation, scheduled during strike); *Prestige Ford, Inc.*, 320 NLRB 1172, 152 LRRM 1287 (1996) (loss of demonstration car privileges);
- Threats implying that voting for the union meant that the employees would be bargaining from scratch, see *Overnight Transport Co*. (Overnight I) Overnight Transp. Co. (Overnight II), 329 NLRB 990, 166 LRRM 1101, enforcement denied and remanded by 280 F.3d 417 (4th Cir. 2002); and
- Changes in practices or rules in response to union activity, see *Golden Mango Corp.*, 336 NLRB No. 128 (2001) (eliminating the use of radios at work stations, directing employees to discontinue conversation at their work stations and eliminating lunch on Sundays).

K. Employer Promises

Employers cannot make bribes or certain promises to an employee for not voting for the union. *Dlubak Corp*, 307 NLRB 1138, 141 LRRM (BNA) 1304 (1992); see *also Midwest Region Blood Servs*, 324 NLRB 166, 158 LRRM (BNA) 1158 (1997) (announcement on day before election of year-end performance bonus invalidated election); *Chicago Tribune*, 326 NLRB 1057, 160 LRRM (BNA) 1127 (1998) (Board found that the employer's hosting of a brunch at a hotel for employees and families three days before a decertification election, at an average per employee cost of $333.32, "would reasonably tend to interfere with employees' free and uncoerced choice." Id. at 1057).

II. Section 8(a)(2): Interference, Restraint or Coercion of Rights Under this Section.

Under Section 8(a)(2), it is an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or to contribute financial or other support to it ...." A violation of this provision occurs when employer assistance to a union interferes with the right of employees to choose their representative. *Hertzka & Knowles v. NLRB*, 503 F.2d 625 (9th Cir. 1974), cert. den., 423 U.S. 875.

III. Section 8(a)(3): Interference, Restraint or Coercion of Rights Under this Section.

A. Discrimination in Hiring, Tenure of Employment or Any Term or Condition of Employment to Encourage or Discourage Membership in Any Labor Organization

The most frequently filed unfair labor practice charges arise under Section 8(a)(3). This section provides that it is an unfair labor practice for an employer to engage in "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage of discourage membership in any labor organization." It is important to note that the NLRA prohibits only that discrimination which "encourages or discourages membership in a labor organization ...." *Radio Officers v. NLRB*, 347 U.S. 17, 43 (1954).

B. Protections Extend to Prospective and Current Employees

The protection against discrimination applies to prospective employees as well as existing workers. Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941). Paid union organizers or "salts" are also protected as "employees" under Section 8(a)(3). NLRB v. Town & Country Electric, 516 U.S. 85 (1995). In Town & Country, the Court affirmed that a paid union organizer who applied for a job and intended to solicit coworkers into supporting a union was protected.

IV. Section 8(a)(4): Discrimination/Retaliation Because of Involvement With NLRB Procedures.

It is unlawful under Section 8(a)(4) "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." This protection extends to testifying in a Board proceeding, filing charges with the Board, and giving a sworn written statement to an NLRB investigator who was investigating claims of unfair labor practices against the employer. *NLRB v. Scrivener*, 405 U.S. 117 (1972).

V. Section 8(a)(5) — Refusal to Bargain with Representatives of Employees.

Generally speaking an employer must bargain in good faith with its employees' union. 29 USC 158(a)(5), (d). The rule of good-faith bargaining has two requirements: (1) that the parties physically appear at bargaining sessions and (2) that they approach negotiations with an eye toward reaching an agreement.

However, good-faith bargaining does not require that either side concede tough bargaining positions or agree to anything in particular. Even though parties must come to the bargaining table willing to reach a final agreement, the NLRA imposes no duty on parties to "agree to a proposal or require the making of a concession." 29 USC 158(d). The NLRA requires only that parties "negotiate in good faith with the view of reaching an agreement if possible." *NLRB v Darlington Veneer Co*, 236 F2d 85, 88 (4th Cir 1956).

Employer Best Practices

Review Handbooks and Policies: Employers may inadvertently violate Section 7 rights by prohibiting protected conduct in employee handbooks or policies. Common examples include restrictions against discussing compensation, restrictions against posting notices in the break room, or restricting the use of social media to complain about wages or working conditions.

Carefully Evaluate Granting or Withholding Benefits: Employers may find themselves in a difficult situation if they have previously promised its employees a benefit or improvement only to discover that the timing of delivering the benefit could be second-guessed by the Board as "suspicious." Further, withholding the benefit in response to union organization efforts could be unlawful. See *Earthgrains Baking Cos*, 339 NLRB 24, 173 LRRM (BNA) 1326 (2003) (finding unlawful employer's statement to its employees that it could not give them anticipated wage increase because union would

file charge).

Delivering the benefit is generally lawful if the employer (1) announced the benefit before the petition, and/or (2) had an established practice of granting the benefit, both as to time and scope. *Crown Tar & Chem Works, Inc v NLRB*, 365 F2d 588 (10th Cir 1966).

Social Media and NLRA: The NLRB has increasingly focused upon cases involving employer's social media policies and employee's use of social media. These cases are fact specific, but generally concern an employee termination related to Facebook postings, blogs, and Tweets about wages and working conditions. The NLRB is also focusing on social media policies considered to be overly broad and, therefore infringing upon NLRA rights. Following the investigation of 14 such cases, the NLRB's acting General Counsel released a report detailing the outcome of investigations to provide assistance to companies and human resource when it comes to social media and the NLRA. Also, the U.S. Chamber of Commerce released a well-written, comprehensive Report, *A Survey of Social Media Issues Before the NLRB.* Both reports are available for download: http://www.michiganemploymentlawadvisor.com/social-media/social-media-and-the-nlrb-two-must-read-reports-for-employers-and-hr-professionals/

The best course of action if an employer is contemplating disciplining or firing an employee for a Facebook posting or related social media use, is to examine the issue of protected concerted activity under the National Labor Relations with their labor and employment counsel to avoid ending up in the NLRB's crosshairs.

Consistent Enforcement of Non-Solicitation Restrictions: Employers commonly rely upon workplace restrictions concerning solicitation during working hours as a means to limit work interruptions. These restrictions, however, also have the potential to curtail union solicitation and distribution activity.

Union organizers and/or members will often point to evidence showing that the employer has permitted all sorts of non-union solicitation and distribution during working time, including commercial solicitations (e.g., sales of Avon, Boy Scout sales, Girl Scout Cookies, and Mary Kay); school fund-raising solicitations, solicitations for political candidates, solicitations for churches and other organizations; and personal solicitations as evidence that the employer no solicitation/no distribution rule violates Section 8(a)(1). It is, therefore, important to uniformly and consistently apply all non-solicitation and distribution policies to avoid the appearance of union discrimination.

Email & Technology Restrictions: Employees generally do not have a statutory right to use an employer's e-mail system for Section 7 purposes. Thus, an employer's technology policy prohibiting employee use of the system for "non-job-related solicitations" does not violate Section 8(a)(1) of the NLRA. *Guard Publ'g Co.*, 351 N.L.R.B. 1110 (N.L.R.B. 2007).

But similar to the need for uniformly applying non-solicitation and non-distribution rules, an employer may violate the NLRA if its policy discriminates along Section 7 lines. In other words, an employer cannot permit employees to use e-mail to solicit for one union but not another, or if it permitted solicitation by antiunion employees but not by pro-union employees. In either case, the employer has drawn a line between permitted and prohibited activities on Section 7 grounds.

Jason Shinn is an employment attorney licensed in Michigan. Since 2001, he has collaborated with employers to comply with state and federal labor and employment laws. He has also lead internal investigations into complaints involving workplace issues and employee misconduct. Further, Mr. Shinn has responded to numerous agency charges, including NLRB, EEOC, and state Department of Civil Rights charges and litigated various employment law issues in state and federal courts.

Mr. Shinn's experience also extends to the operations side of employment matters, including drafting and implementing internal policies and procedures relating to the full spectrum of the employment relationship. He also publishes an employment law blog, www.michiganemploymentlawadvisor.com, which focuses on analysis of issues relevant to employers and human resource professionals.

FAQs About the NLRA

Q: What rights are guaranteed by the National Labor Relations Act?

A: The NLRA protects the rights of employees to:

- Form or join a union
- Bargain collectively for a contract that sets wages, benefits, hours, and other working conditions
- Discuss wages, working conditions or union organizing with co-workers or a union
- Act with co-workers to improve working conditions by raising complaints with an employer or a government agency
- Strike and picket their employer, depending on the purpose or means of the action
- Choose not to join a union or engage in union activities
- Organize coworkers to decertify a union. If employees choose a union as their bargaining representative, the union and employer must bargain in good faith in a genuine effort to reach a binding agreement setting out terms and conditions of employment. The union is required to fairly represent employees in bargaining and enforcing the agreement.

Employers may not:

- Prohibit employees from discussing a union during non-work time, or from distributing union literature during non-work time in non-work areas, such as parking lots or break rooms
- Question employees about their union support or activities in a manner that discourages them from engaging in that activity
- Fire, demote, transfer, reduce hours or take other adverse action against employees who join or support a union or act with co-workers for mutual aid and protection, or who refuse to engage in such activity
- Threaten to close their workplace if employees form or join a union
- Promise or grant promotions, pay raises, or other benefits to discourage or encourage union support
- Prohibit employees from wearing union hats, buttons, t-shirts, and pins in the workplace except under special circumstances
- Spy on or videotape peaceful union activities and gatherings

Unions may not:

- Threaten employees with job loss if they don't support the union
- Refuse to process grievances of employees who criticize union officials or do not join the union
- Act in a discriminatory way when making job referrals from a hiring hall
- Cause or attempt to cause an employer to discriminate against employees because of their union-related activity
- Take other adverse action against employees who do not support the union

Q: Who is covered by the National Labor Relations Act?

A: The NLRA applies to employees in most private-sector workplaces, including manufacturing plants, retail centers, private universities, and health care facilities. Agricultural workers and domestic workers were excluded in the original law and are not covered. Also, exempted are supervisors and independent contractors. The organizing and collective bargaining rights of railway and airline employees are protected by the National Mediation Board, not the NLRB.

The Act does not cover federal, state or local government workers, with the exception of employees of the U.S. Postal Service. The Federal Labor Relations Authority has jurisdiction over federal employees. The organizing and collective bargaining rights of state and local employees are determined by state laws enforced by individual state agencies.

Q: How does the NLRB conduct union elections?

A: To start the election process, a petition must be filed with the nearest NLRB Regional Office showing interest in the union from at least 30% of employees. NLRB agents will then investigate to make sure the Board has jurisdiction, the union is qualified, and there are no existing labor contracts that would bar an election.

The agents will then seek an election agreement between the employer and union setting the time and place for balloting, the ballot language, the size of the unit, and a method to determine who is eligible to vote. Once an agreement is in place, the parties authorize the NLRB Regional Director to conduct the election. If no agreement is reached, the Regional Director can order the election to be held and set the conditions in accordance with the Board's rules and its decisions.

Typically, elections are held within 30 days of a Director's order or authorization. However, an election may be postponed if a party files charges alleging conduct that would interfere with employee free choice in the election, such as threatening loss of jobs or benefits by an employer or a union, granting promotions, pay raises, or other benefits to influence the vote, or making campaign speeches to employees on company time within 24 hours of the election.

When a union is already in place, a competing union may file an election petition if the labor contract has expired or is about to expire, and it can show interest by at least 30% of the employees. This would normally result in a three-way election, with the choices being the incumbent labor union, the challenging one, and "none." If none of the three receives a majority vote, a runoff will be conducted between the top two vote-getters.

Results of an election will be set aside if conduct by the employer or the union created an atmosphere of confusion or fear of reprisals and thus interfered with the employees' freedom of choice. Any party to an election may file objections with the appropriate Regional Director within 7 days of the vote count. In turn, the Regional Director's ruling may be appealed to the Board in Washington. Otherwise, a union that receives a majority of the votes cast is certified as the employees' bargaining representative and entitled to be recognized by the employer as the exclusive bargaining agent for the employees in the unit. Failure to bargain with the union at this point is an unfair labor practice.

Q: What rules govern collective bargaining for a contract?

A: After employees choose a union as a bargaining representative, the employer and union are required to meet at reasonable times to bargain in good faith about wages, hours, vacation time, insurance, safety practices and other mandatory subjects. Some managerial decisions such as subcontracting, relocation, and other operational changes may not be mandatory subjects of bargaining, but the employer must bargain about the decision's effects on unit employees.

It is an unfair labor practice for either party to refuse to bargain collectively with the other, but parties are not compelled to reach agreement or make concessions.

If, after sufficient good faith efforts, no agreement can be reached, the employer may declare impasse, and then implement the last offer presented to the union. However, the union may disagree that true impasse has been reached and file a charge of an unfair labor practice for failure to bargain in good faith. The NLRB will determine whether true impasse was reached based on the history of negotiations and the understandings of both parties.

If the Agency finds that impasse was not reached, the employer will be asked to return to the bargaining table. In an extreme case, the NLRB may seek a federal court order to force the employer to bargain. The parties' obligations do not end when the contract expires. They must bargain in good faith for a successor contract, or for the termination of the agreement, while terms of the expired contract continue.

A party wishing to end the contract must notify the other party in writing 60 days before the expiration date, or 60 days before the proposed termination. The party must offer to meet and confer with the other party and notify the Federal Mediation and Conciliation Service of the existence of a dispute if no agreement has been reached by that time.

Q: How is 'good faith bargaining' determined?

A: There are hundreds, perhaps thousands, of NLRB cases dealing with the issue of the duty to bargain in good faith. In determining whether a party is bargaining in good faith, the Board will look at the totality of the circumstances. The duty to bargain in good faith is an obligation to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement. This implies both an open mind and a sincere desire to reach an agreement as well as a sincere effort to reach a common ground. The additional requirement to bargain in "good faith" was incorporated to ensure that a party did not come to the bargaining table and simply go through the motions. There are objective criteria that the NLRB will review to determine if the parties are honoring their obligation to bargain in good faith, such as whether the party is willing to meet at reasonable times and intervals and whether the party is represented by someone who has the authority to make decisions at the table. Conduct away from the bargaining table may also be relevant. For instance, if an Employer were to make a unilateral change in the terms and conditions of employees employment without bargaining, that would be an indication of bad faith.

Q: What are the rules regarding union dues?

A: The amount of dues collected from employees represented by unions is subject to federal and state laws and court rulings.

The NLRA allows employers and unions to enter into union-security agreements, which require all employees in a bargaining unit to become union members and begin paying union dues and fees within 30 days of being hired.

Even under a security agreement, employees who object to full union membership may continue as 'core' members and pay only that share of dues used directly for representation, such as collective bargaining and contract administration. Known as objectors, they are no longer full members, but are still protected by the union contract. Unions are obligated to tell all covered employees about this option, which was created by a Supreme Court ruling and is known as the Beck right.

An employee may object to union membership on religious grounds, but in that case, must pay an amount equal to dues to a nonreligious charitable organization.

More than 20 states have banned union-security agreements by passing so-called "right to work" laws. In these states, it is up to each employee at a workplace to decide whether or not to join the union and pay dues, even though all workers are protected by the collective bargaining agreement negotiated by the union. These states include Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Iowa, Kansas, Louisiana, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia and Wyoming.

Q: Is it legal to strike or picket an employer?

A: Strikes and picketing are protected by the NLRA as long as they are lawful, a determination that may depend on the purpose of the strike, its timing, or the conduct of the strikers. Such issues often have to be decided by the NLRB. The consequences can be severe. For example, employees who participate in an unlawful strike may be fired and are not entitled to reinstatement.

A lawful strike falls into two classes:

- If the object of a strike is to obtain higher wages, shorter hours, or better working conditions, the striking employees are called "economic strikers."They cannot be discharged, but they can be replaced.
- If the employer has hired bona fide permanent replacements, the strikers are not entitled to immediate reinstatement if they offer unconditionally to return to work. In that case, they are entitled to be recalled to jobs when openings occur.

Employees who strike to protest an unfair labor practice committed by their employer are called "unfair labor practice strikers." Such strikers can be neither discharged nor permanently replaced. When the strike ends, unfair labor practice strikers, absent serious misconduct on their part, are entitled to have their jobs back even if employees hired to do their work have to be discharged. Unfair labor practice strikers have greater rights of reinstatement to their jobs.

If the Board finds that economic strikers or unfair labor practice strikers who have made an unconditional request for reinstatement have been unlawfully denied reinstatement by their employer, the Board may award such strikers back pay starting at the time they should have been reinstated.

A strike that violates a no-strike provision of a contract is not protected by the Act, and the striking employees can be fired. However, a walkout because of conditions abnormally dangerous to health, such as a defective ventilation system in a spray-painting shop, has been held not to violate a no-strike provision.

Strikers who engage in serious misconduct during a strike, such as committing acts of violence or blocking access to a struck workplace, may be refused reinstatement to their former jobs. The U.S. Supreme Court has ruled that a "sit down" strike, when employees simply stay in the plant and refuse to work, depriving the owner of property, is not protected by the law.

Special rules govern strikes at health care institutions, where a labor organization must give at least 10 days written notice of the intent to strike or picket.

Picketing can also be lawful or unlawful depending on its purpose, its timing, or misconduct. For example, a union cannot "threaten, coerce, or restrain" an employer to force it to stop doing business with another employer who is the primary target of a labor dispute. At worksites with more than one employer, such as a construction site, picketing only permitted if the protest is clearly directed exclusively at the primary employer.

Hand-billing is allowed as long as it is "for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer." A recent Board decision found that holding a stationary banner in place at a secondary employer's place of business is more like hand-billing than picketing, and so is generally lawful.

Q: What happens when an employee files an unfair labor practice charge?

A: Behavior by an employer or union that violates the National Labor Relations Act is known as an unfair labor practice. Examples include interfering with employees' rights to organize, firing or threatening to fire an employee for union activity, or refusing to bargain in good faith for a labor contract.

If an employee believes their employer or union has committed an unfair labor practice, they would contact the nearest NLRB regional office, where all cases begin, and ask to speak to an information officer. Charges must be filed within six months of the occurrence.

The NLRB agent will determine if a charge is appropriate and, if so, will help the employee fill out the necessary forms. They will need to provide your name and address, as well as the name and address of the employer or union against which the charge is filed, so that a copy can be sent to them.

If, after collecting and evaluating evidence, the regional agents determine that no violation of the NLRA appears to have taken place, the employee may withdraw the charge or the Regional Office will dismiss it. The dismissal can be appealed to the Office of Appeals in Washington, D.C. (Of approximately 25,000 charges filed each year, about one-third are found to have merit).

If it appears that a violation has occurred, the charged employer or union will be asked to remedy the violation through a voluntary settlement. If they do not, the NLRB will issue a formal complaint on your behalf and the case will be set for a hearing before an NLRB Administrative Law Judge.

A goal of the General Counsel's Office is to complete investigations and issue complaints if settlement is not reached within 7 to 15 weeks of the filing of the charge.

Based on the hearing, the administrative law judge makes findings and recommendations to the National Labor Relations Board in Washington. All parties to the hearing may appeal the administrative law judge's decision to the Board. In turn, the Board's decision is subject to review in a U.S. Court of Appeals.

Q: What can an employee do if they are unhappy with their union?

A: Members who are unhappy with their union can use their internal grievance process to bring their complaints to the union's leadership. If members are still unhappy, the Act contains a provision whereby employees or someone acting on their behalf can file a petition seeking a decertification election, which will determine whether a majority of the employees wish to retain the labor union. Like an election petition, a petition for decertification can only be filed during certain windows, when a contract has expired or is about to expire.

In addition, the Office of Labor-Management Standards (OLMS) of the U.S. Department of Labor administers and enforces most provisions of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA). The LMRDA primarily promotes union democracy and financial integrity through standards for union officer elections and union trusteeships and safeguards for union assets. Additionally, the LMRDA promotes labor union and labor-management transparency through reporting and disclosure requirements for labor unions and their officials, employers, labor relations consultants, and surety companies. The office website is at http://www.dol.gov/olms/.

Q: What Notice must employers post in the workplace?

A: All employers subject to the NLRA must post Notices to employees, in conspicuous places, informing them of their NLRA rights. The Notice contains Board contact information and information concerning basic enforcement procedures.

Important Note: On April 17, 2012, a federal appeals court in Washington, D.C., blocked the National Labor Relations Board (NLRB) from requiring American businesses to post its NLRA Employee Rights Poster by April 30, issuing a temporary injunction to stop the mandate. The NLRB said its regional offices will not implement the rule until the appeal is decided. Further, the labor board will appeal a part of the ruling that raised questions about the rule's enforcement mechanisms, as well as the ruling that said the agency did not have the legal authority to issue the rule.

Q: What does the Notice say?

A: In general, the 11x17-inch Notice contains the following:

A summary of employee rights established under the NLRA, illustrated by examples of general circumstances that constitute violations of employee rights under the NLRA by employers and by unions.

Contact information for the Board and a description of basic enforcement procedures to enable employees to learn more about their NLRA rights and how to enforce them.

An affirmation that unlawful conduct will not be permitted, information about the Board and about filing a charge with the Board, and a statement that the Board will prosecute violators of the NLRA.

A statement that there is a 6-month statute of limitations for filing charges with the Board alleging violations of the NLRA, and advice to employees to contact the Board with specific questions about particular issues.

A summary of the Board's jurisdiction, noting that the NLRA covers most private-sector employers, but excludes public-sector employees, agricultural and domestic workers, independent contractors, workers employed by a parent or spouse, employees of air and rail carriers covered by the Railway Labor Act, and supervisors.

Finally, the Notice clearly states that it is an official government publication.

Q: If an employees speak a language other than English, is the employer obligated to post the Notice in multiple languages?

A: If significant numbers of employees are not proficient in English, the employer must post the Notice in the languages the employees speak.

The Board defines "significant" in terms of foreign-language speakers as 20 percent or more of an employer's workforce:

- If as many as 20 percent of an employer's employees are not proficient in English but speak

the same foreign language, the employer must post the Notice in that language, both physically and electronically (if the employer is otherwise required to post the Notice electronically).

- If an employer's workforce includes two or more groups, each constituting at least 20 percent of the workforce who speak different languages, the employer must post the Notice in the language spoken by the larger (or largest) group. The employer may either post the Notice in the language(s) spoken by the other group(s) or, at the employer's option, distribute copies of the Notice to those employees in their language(s). If such an employer is also required to post the Notice electronically, it must do so in each of those languages.

- If some of an employer's employees speak a language not spoken by employees constituting at least 20 percent of the employer's workforce, the employer is encouraged, but not required, either to provide the Notice to those employees in their respective language or languages or to direct them to the Board's Web site, www.nlrb.gov, where they can obtain copies of the Notice in their respective languages.

Chapter 2

Unfair Labor Practices

Unfair Labor Practices of Employers

The National Labor Relations Act (the Act) creates rights and obligations on the part of unions, employers, and employees. If either a labor organization or an employer fails to perform its obligation to the other party or interferes with the rights that have been given under the Act, an unfair labor practice charge may be filed. For example, it is illegal for an employer to threaten or retaliate against employees for seeking union representation or to refuse to provide a union information that the law requires the employer to provide. Similarly, unions may not try to influence management to discipline employees who did not join the union or refuse to represent employees because they are not union members. In addition, neither an employer nor a union may refuse to bargain with the other in good faith.

The unfair labor practices of employers are listed in Section 8(a) of the National Labor Relations Act; those of labor organizations in Section 8(b). Section 8(e) lists an unfair labor practice that can be committed only by an employer and a labor organization acting together.

Interference with Rights of Employees

Section 8(a)(1) of the Act forbids an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 (Rights of Employees)." Any prohibited interference by an employer with the rights of employees to organize, to form, join, or assist a labor organization, to bargain collectively, to engage in other concerted activities for mutual aid or protection, or to refrain from any or all of these activities, constitutes a violation of this section. This is a broad prohibition on employer interference, and an employer violates this section whenever it commits any of the other employer unfair labor practices.

Examples of violations of rights under this section are:

- Threatening employees with loss of jobs or benefits if they should join or vote for a union.
- Threatening to close down the plant if a union should be organized in it.
- Questioning employees about their union activities or membership in such circumstances as will tend to restrain or coerce the employees.
- Spying on union gatherings, or pretending to spy.
- Granting wage increases deliberately timed to discourage employees from forming or joining a union.

Domination or Illegal Assistance and Support of a Labor Organization

Section 8(a)(2) makes it unlawful for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." This section not only outlaws "company unions" that are dominated by the employer, but also forbids an employer to contribute money to a union it favors or to give a union improper advantages that are denied to rival unions.

A labor organization is considered dominated if the employer has interfered with its formation and has assisted and supported its operation and activities to such an extent that it must be looked at as the employer's creation instead of the true bargaining representative of the employees. Such domination is the result of a combination of factors and has been found to exist where there is not only the factor of the employer getting the organization started, but also such other factors as the employer deciding how the organization will be set up and what it will do, or representatives of management actually taking part in the meetings and activities of the organization and trying to influence its actions and policies.

Certain lesser kinds of employer assistance to a union may constitute unlawful "interference" even if the union is not "dominated" by the employer. For example, an employer may not provide financial support to a union either by direct payments or indirect financial aid. (But an employer does not violate this prohibition by permitting employees to confer with it and/or the union regarding grievances or other union business during working hours without loss of pay.)

When rival unions are competing to organize an employer's employees, the employer is forbidden to give the union it favors privileges it denies to the other union. It is also forbidden to recognize either union once it knows that one of the unions has filed a valid petition with the Board requesting a representation election. When an employer and a union already have an established bargaining relationship, however, the employer is required to continue bargaining with the incumbent even though a rival union is attempting to organize the employees. In these circumstances, the rival's filing of a petition does not prevent continued dealing between the employer and the incumbent unless the incumbent has lost the support of a majority of the employees.

An employer is considered to dominate or give illegal assistance and support in violation of Section 8(a)(2) by:

- Taking an active part in organizing a union or a committee to represent employees.
- Bringing pressure on employees to support a union financially, except in the enforcement of a lawful union-security agreement.
- Allowing one of several unions, competing to represent employees, to solicit on company premises during working hours and denying other unions the same privilege.
- Soliciting and obtaining from employees and applicants for employment, during the hiring procedure, applications for union membership and signed authorizations for the check-off of union dues.

Remedy in cases of domination differs from that in cases of illegal assistance and support. In remedying such unfair labor practices, the NLRB distinguishes between domination of a labor organization and conduct which amounts to no more than illegal assistance. When a union is found to be dominated by an employer, the Board has announced it will order the organization completely disestablished as a representative of employees. But, if the organization is found only to have been supported by employer assistance amounting to less than domination, the Board usually orders the employer to stop such support and to withhold recognition from the organization until such time as it has been certified by the Board as a bona fide representative of employees.

Discrimination Against Employees

Section 8(a)(3) makes it an unfair labor practice for an employer to discriminate against employees "in regard to hire or tenure of employment or any term or condition of employment" for the purpose of encouraging or discouraging membership in a labor organization. In general, the Act makes it illegal for an employer to discriminate in employment because of an employee's union or other group, activity within the protection of the Act. A banding together of employees, even in the absence of a formal organization, may constitute a labor organization for purposes of Section 8(a)(3). It also prohibits discrimination because an employee has refrained from taking part in such union or group activity except where a valid union-security agreement is in effect. Discrimination within the meaning of the Act would include such action as refusing to hire, discharging, demoting, assigning to a less desirable shift or job, or withholding benefits.

The Act does provide that an employee may be discharged for failing to make certain lawfully required payments to the exclusive bargaining representative under a lawful union-security agreement.

Even when there is a valid union-security agreement in effect, an employer may not pay the union the dues and fees owed by its employees. The employer may, however, deduct these amounts from the wages of its employees and forward them to the union for each employee who has voluntarily signed a dues "checkoff" authorization. Such checkoff authorization may be made irrevocable for no more than a year. But employees may revoke their checkoff authorizations after a Board-conducted election in which the union's authority to maintain a union-security agreement has been withdrawn.

The Act does not limit employer's right to discharge for economic reasons. This section does not limit an employer's right to discharge, transfer, or layoff an employee for genuine economic reasons or for such good cause as disobedience or bad work. This right applies equally to employees who are active in support of a union and to those who are not.

In situations in which an employer disciplines an employee both because the employee has violated a work rule and because the employee has engaged in protected union activity, the discipline is unlawful unless the employer can show that the employee would have received the same discipline even if he or she had not engaged in the protected union activity.

An employer who is engaged in good-faith bargaining with a union may lock out the represented employees, sometimes even before impasse is reached in the negotiations, if it does so to further its position in bargaining. But a bargaining lockout may be unlawful if the employer is at that time unlawfully refusing to bargain or is bargaining in bad faith. It is also unlawful if the employer's purpose in locking out its employees is to discourage them in their union loyalties and activities, that is, if the employer is motivated by hostility toward the union. Thus, a lockout to defeat a union's efforts to organize the employer's employees would violate the Act, as would the lockout of only those of its employees who are members of the union. On the other hand, lockouts are lawful that are intended to prevent any unusual losses or safety hazards that would be caused by an anticipated "quickie" strike; whipsaw strike against one employer engaged in multiemployer bargaining justifies a lockout by any of the other employers who are party to the bargaining.

Examples of illegal discrimination under Section 8(a)(3) include:

- Discharging employees because they urged other employees to join a union.

- Refusing to reinstate employees when jobs they are qualified for are open because they took part in a union's lawful strike.

- Granting of "super seniority" to those hired to replace employees engaged in a lawful strike.

- Demoting employees because they circulated a union petition among other employees asking the employer for an increase in pay.

- Discontinuing an operation at one plant and discharging the employees involved followed by opening the same operation at another plant with new employees because the employees at the first plant joined a union.

- Refusing to hire qualified applicants for jobs because they belong to a union. It would also be a violation if the qualified applicants were refused employment because they did not belong to a union, or because they belonged to one union rather than another.

Discrimination for NLRB Activity

Section 8(a)(4) makes it an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." This provision guards the right of employees to seek the protection of the Act by using the processes of the NLRB. Like the previous section, it forbids an employer to discharge, layoff, or engage in other forms of discrimination in working conditions against employees who have filed charges with the NLRB, given affidavits to NLRB investigators, or testified at an NLRB hearing. Violations of this section are in most cases also violations of Section 8(a)(3).

Examples of violations of discrimination for NLRB activity are:

- Refusing to reinstate employees when jobs they are otherwise qualified for are open because they filed charges with the NLRB claiming their layoffs were based on union activity.

- Demoting employees because they testified at an NLRB hearing.

Refusal to Bargain in Good Faith

Section 8(a)(5) makes it illegal for an employer to refuse to bargain in good faith about wages, hours, and other conditions of employment with the representative selected by a majority of the employees in a unit appropriate for collective bargaining. A bargaining representative which seeks to enforce its right concerning an employer under this section must show that it has been designated by a majority of the employees, that the unit is appropriate, and that there has been both a demand that the employer bargain and a refusal by the employer to do so.

Required subjects of bargaining

The duty to bargain covers all matters concerning rates of pay, wages, hours of employment, or other conditions of employment. These are called "mandatory" subjects of bargaining about which the employer, as well as the employees' representative, must bargain in good faith, although the law does not require "either party to agree to a proposal or require the making of a concession." In addition to wages and hours of work, these mandatory subjects of bargaining include but are not limited to such matters as pensions for present employees, bonuses, group insurance, grievance procedures, safety practices, seniority, procedures for discharge, layoff, recall, or discipline, and union security. Certain managerial decisions such as subcontracting, relocation, and other operational changes may not be mandatory subjects of bargaining, even though they affect employees' job security and working conditions. The issue of whether these decisions are mandatory subjects of bargaining depends on the employer's reasons for taking action. Even if the employer is not required to bargain about the decision itself, it must bargain about the decision's effects on unit employees. On "non-mandatory" subjects, that is, matters that are lawful but not related to "wages, hours, and other conditions of employment," the parties are free to bargain and to agree, but neither party may insist on bargaining on such subjects over the objection of the other party.

Duty to bargain defined

An employer who is required to bargain under this section must "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising there under, and the execution of a written contract incorporating any agreement reached if requested by either party."

An employer will be found to have violated Section 8(a)(5) if its conduct in bargaining, viewed in its entirety, indicates that the employer did not negotiate with a good faith intention to reach agreement. However, the employer's good faith is not at issue when its conduct constitutes an out-and-out refusal to bargain on a mandatory subject. For example, it is a violation for an employer, regardless of good faith, to refuse to bargain about a subject that it believes is not a mandatory subject of bargaining, when in fact it is.

Duty to meet and confer

The duty of an employer to meet and confer with the representative of its employees includes the duty to deal with whoever is designated by the employees' representative to carry on negotiations. An employer may not dictate to a union its selection of agents or representatives and the employer must, in general, recognize the designated agent.

Duty to supply information

The employer's duty to bargain includes the duty to supply, on request, information that is "relevant and necessary" to allow the employees' representative to bargain intelligently and effectively with respect to wages, hours, and other conditions of employment.

Multiemployer bargaining

When there is a history of bargaining between a union and a number of employers acting jointly, the employees who are thus represented constitute a multiemployer bargaining unit. Once such a unit has been established, any of the participating employers—or the union—may retire from this multiemployer bargaining relationship only by mutual assent or by a timely submitted withdrawal. Withdrawal is considered timely if unequivocal notice of the withdrawal is given near the termination of a collective-bargaining agreement but before bargaining begins on the next agreement.

*Duty to refrain from unilateral actio*n

Finally, the duty of an employer to bargain includes the duty to refrain from unilateral action, that is, taking action on its own with respect to matters concerning which it is required to bargain, and from making changes in terms and conditions of employment without consulting the employees' representative.

Duty of successor employers

An employer who purchases or otherwise acquires the operations of another may be obligated to

recognize and bargain with the union that represented the employees before the business was transferred. In general, these bargaining obligations exist—and the purchaser is termed a successor employer—when there is a substantial continuity in the employing enterprise despite the sale and transfer of the business. Whether the purchaser is a successor employer is dependent on several factors, including the number of employees taken over by the purchasing employer, the similarity in operations and product of the two employers, the manner in which the purchaser integrates the purchased operations into its other operations, and the character of the bargaining relationship and agreement between the union and the original employer.

Examples of violations of refusing to bargain in good faith are as follows:

- Refusing to meet with the employees' representative because the employees are out on strike.
- Insisting, until bargaining negotiations break down, on a contract provision that all employees will be polled by secret ballot before the union calls a strike.
- Refusing to supply the employees' representative with cost and other data concerning a group insurance plan covering the employees.
- Announcing a wage increase without consulting the employees' representative.
- Failing to bargain about the effects of a decision to close one of the employer's plants.

Entering a Hot Cargo Agreement

Section 8(e), added to the Act in 1959, makes it an unfair labor practice for any labor organization and any employer to enter into what is commonly called a "hot cargo" or "hot goods" agreement. It may also limit the restrictions that can be placed on the subcontracting of work by an employer. The typical hot cargo or hot goods clause in use before the 1959 amendment to the Act provided that employees would not be required by their employer to handle or work on goods or materials going to, or coming from, an employer designated by the union as "unfair." Such goods were said to be "hot cargo" thereby giving Section 8(e) its popular name. These clauses were most common in the construction and trucking industries.

Section 8(e) forbids an employer and a labor organization to make an agreement whereby the employer agrees to stop doing business with any other employer and declares void and unenforceable any such agreement that is made. It should be noted that a strike or picketing, or any other union action, or the threat of it, to force an employer to agree to a hot cargo provision, or to force it to act in accordance with such a clause, has been held by the Board to be a violation of Section 8(b)(4). Exceptions are allowed in the construction and garment industries, and a union may seek, by contract, to keep within a bargaining unit work that is being done by the employees in the unit or to secure work that is "fairly claimable" in that unit.

In the construction industry a union and an employer in the industry may agree to a provision that restricts the contracting or subcontracting of work to be done at the construction site. Such a clause contained in the agreement between the employer and the union typically provides that if work is subcontracted by the employer it must go to an employer who has an agreement with the union. A union in the construction industry may engage in a strike and picketing to obtain, but not to enforce, contractual restrictions of this nature. Similarly, in the garment industry, an employer and a union can agree that work to be done on the goods or on the premises of a jobber or manufacturer, or work that is part of "an integrated process of production in the apparel and closing industry," can be subcontracted only to an employer who has an agreement with the union. This exception, unlike the previous one concerning the construction industry, allows a labor organization in the garment industry, not only to seek to obtain, but also to enforce, such a restriction on subcontracting by striking, picketing, or other lawful actions.

Unfair Labor Practices of Labor Organizations

In much the same way that employers are required to respect the rights of employees and deal fairly with labor organizations acting on behalf of the employees, so too must the labor organizations respect the rights of both the employees and employer.

Restraint and Coercion of Employees

Section 8(b)(1)(A) of the Act forbids a labor organization or its agents "to restrain or coerce employees in the exercise of the rights guaranteed in section 7 (Rights of Employees)." The section also provides that it is not intended to "impair the rights of a labor organization to prescribe its own rules" concerning membership in the labor organization.

Union conduct that is reasonably calculated to restrain or coerce employees in their rights violates the Act whether it succeeds in actually restraining or coercing employees. A union may violate Section 8(b)(1)(A) by coercive conduct of its officers or agents, of pickets on a picket line endorsed by the union, or of strikers who engage in coercion in the presence of union representatives who do not repudiate the conduct.

Unlawful coercion may consist of acts specifically directed at an employee such as physical assaults, threats of violence, and threats to affect an employee's job status. Coercion also includes other forms of pressure against employees such as acts of a union while representing employees as their exclusive bargaining agent. A union that is a statutory bargaining representative owes a duty of fair representation to all the employees it represents. It may exercise a wide range of reasonable discretion in carrying out the representative function, but it violates Section 8(b)(1)(A) if, while acting as the employees' statutory bargaining representative, it takes or withholds action in connection with their employment because of their union activities or for any irrelevant or arbitrary reason such as an employee's race or sex.

Section 8(b)(1)(A) recognizes the right of unions to establish and enforce rules of membership and to control their internal affairs. This right is limited to union rules and discipline that affect the rights of employees as union members and that are not enforced by action affecting an employee's employment. Also, rules to be protected must be aimed at matters of legitimate concern to unions such as the encouragement of members to support a lawful strike or participation in union meetings. Rules that conflict with public policy, such as rules that limit a member's right to file unfair labor practice charges, are not protected. And a union may not fine a member for filing a decertification petition although it may expel that individual for doing so. A rule that prohibits a member from resigning from the union is unlawful. The union may not fine a former member for any protected conduct engaged in after he or she resigns.

Examples of restraint or coercion that violate Section 8(b)(1)(A) when done by a union or its agents include the following:

- Mass picketing in such numbers that non-striking employees are physically barred from entering the plant.
- Acts of force or violence on the picket line, or in connection with a strike.
- Threats to do bodily injury to non-striking employees.
- Threats to employees that they will lose their jobs unless they support the union's activities.
- Statement to employees who oppose the union that the employees will lose their jobs if the union wins a majority in the plant.
- Entering into an agreement with an employer that recognizes the union as exclusive bargaining representative when it has not been chosen by a majority of the employees.
- Fining or expelling members for crossing a picket line that is unlawful under the Act or that violates a no-strike agreement.
- Fining employees for crossing a picket line after they resigned from the union.
- Fining or expelling members for filing unfair labor practice charges with the Board or for participating in an investigation conducted by the Board.

The following are examples of restraint or coercion that violate Section 8(b)(1)(A) when done by a union that is the exclusive bargaining representative:

- Refusing to process a grievance in retaliation against an employee's criticism of union officers.
- Maintaining a seniority arrangement with an employer under which seniority is based on the employee's prior representation by the union elsewhere.
- Rejecting an application for referral to a job in a unit represented by the union based on the applicant's race or union activities.

Restraint and Coercion of Employers

Section 8(b)(1)(B) prohibits a labor organization from restraining or coercing an employer in the selection of a bargaining representative. The prohibition applies regardless of whether the labor organization is the majority representative of the employees in the bargaining unit. The prohibition extends to coercion applied by a union to a union member who is a representative of the employer in the adjustment of grievances.

This section is violated by such conduct as the following:

- Insisting on meeting only with a company's owners and refusing to meet with the attorney the company has engaged to represent the company in contract negotiations, and threatening to strike to force the company to accept its demands.
- Striking members of an employer association that bargains with the union as the representative of the employers to compel the struck employers to sign individual contracts with the union.
- Insisting during contract negotiations that the employer agree to accept working conditions that will be established by a bargaining group to which it does not belong.
- Fining or expelling supervisors for the way they apply the bargaining contract while carrying out their supervisory functions or for crossing a picket line during a strike to perform their supervisory duties.

Causing or Attempting to Cause Discrimination

Section 8(b)(2) makes it an unfair labor practice for a labor organization to cause an employer to discriminate against an employee in violation of Section 8(a)(3) which prohibits an employer from discriminating against an employee in regard to wages, hours, and other conditions of employment for the purpose of encouraging or discouraging membership in a labor organization. It does allow, however, the making of union-security agreements under certain specified conditions.

A union would be in violation of this section, for example, by demanding that an employer discriminate against employees because of their failure to make certain otherwise lawful payments to the union when there is no valid union-security agreement in effect. The section can also be violated by agreements or arrangements with employers that unlawfully condition employment or job benefits on union membership, on the performance of union membership obligations, or on arbitrary grounds. Union conduct affecting an employee's employment in a way that is contrary to provisions of the bargaining contract may likewise be a violation of the section. But union action that causes detriment to an individual employee in that individual's employment does not violate Section 8(b)(2) if it is consistent with nondiscriminatory provisions of a bargaining contract negotiated for the benefit of the total bargaining unit or if it is for some other legitimate purpose.

To find that a union caused an employer to discriminate, it is not necessary to show that any express demand was spoken. A union's conduct, accompanied by statements advising or suggesting that action is expected of an employer, may be enough to find a violation of this section if the union's action can be shown to be a causal factor in the employer's discrimination.

Contracts or informal arrangements with a union under which an employer gives preferential treatment to union members are violations of Section 8(b)(2). It is not unlawful for an employer and a union to enter into an agreement whereby the employer agrees to hire new employees exclusively through the union hiring hall so long as there is neither a provision in the agreement nor a practice in effect that discriminates against nonunion members in favor of union members or otherwise discriminates on the basis of union membership obligations. Both the agreement

and the actual operation of the hiring hall must be nondiscriminatory: referrals must be made without reference to union membership or irrelevant or arbitrary considerations such as race. Referral standards or procedures, even if nondiscriminatory on their face, are unlawful when they continue previously discriminatory conditions of referral. However, a union may, in setting referral standards, consider legitimate aims such as sharing available work and easing the impact of local unemployment. It may also charge referral fees if the amount of the fee is reasonably related to the cost of operating the referral service.

Union-security agreements that require employees to make certain lawfully required payments to the union after they are hired are permitted by this section as previously discussed. Union-security agreements that do not meet all the requirements listed below will not support a discharge. For a union-security agreement to be valid, it must meet all the following requirements:

1. The union must not have been assisted or controlled by the employer
2. The union must be the majority representative of the employees in the appropriate collective-bargaining unit covered by such agreement when made.
3. The union's authority to make such an agreement must not have been revoked within the previous 12 months by the employees in a Board election.
4. The agreement must provide for the appropriate grace period.

A union that attempts to force an employer to enter into an illegal union-security agreement, or that enters into and keeps in effect such an agreement, violates Section 8(b)(2), as does a union that attempts to enforce such an illegal agreement by bringing about an employee's discharge. Even when a union-security provision of a bargaining contract meets all statutory requirements so that it is permitted by Section 8(a)(3), a union may not lawfully require the discharge of employees under the provision unless the employees had been informed of the union-security agreement and of their specific obligation under it. And a union violates Section 8(b)(2) if it tries to use the union-security provisions of a contract to collect payments other than those that lawfully may be required. Assessments, fines, and penalties may not be enforced by application of a union-security agreement.

Examples of violations of Section 8(b)(2) are:

- Causing an employer to discharge employees because they circulated a petition urging a change in the union's method of selecting shop stewards.
- Causing an employer to discharge employees because they made speeches against a contract proposed by the union.
- Making a contract that requires an employer to hire only members of the union or employees "satisfactory" to the union.
- Causing an employer to reduce employees' seniority because they engaged in anti-union acts.
- Refusing referral or giving preference on the basis of race or union activities in making job referrals to units represented by the union.
- Seeking the discharge of an employee under a union-security agreement for failure to pay a fine levied by the union.

Refusal to Bargain in Good Faith

Section 8(b)(3) makes it illegal for a labor organization to refuse to bargain in good faith with an employer about wages, hours, and other conditions of employment if it is the representative of that employer's employees. This section imposes on labor organizations the same duty to bargain in good faith that is imposed on employers by Section 8(a)(5). Both the labor organization and the employer are required to follow the procedure set out in Section 8(d) of the Act before terminating or changing an existing contract.

A labor organization that is the employees' representative must meet at reasonable times with the employer or his designated representative, must confer in good faith on matters pertaining to wages, hours, or other conditions of employment, or the negotiation of an agreement, or any question arising under an agreement, and must sign a written agreement if requested and if one is reached. The obligation does not require the labor organization or the employer to agree to a proposal by the other party or make a concession to the other party, but it does require bargaining with an open mind in an attempt to reach agreement. So, while a union may try in contract negotiations to establish wages and

benefits comparable to those contained in other bargaining agreements in the area, it may not insist on such terms without giving the employer an opportunity to bargain about the terms. Likewise, a union may seek voluntary bargaining on non-mandatory subjects of bargaining, such as a provision for an industry promotion fund, but may not insist on bargaining about such subjects or condition execution of a contract on the reaching of agreement on a non-mandatory subject.

When a union has been bargaining with a group of employers in a multiemployer bargaining unit, it may withdraw at any time from bargaining on that basis and bargain with one of the employers individually if the individual employer and the multiemployer group agree to the union's withdrawal. And even in the absence of employer consent, a union may withdraw from multiemployer bargaining by giving the employers unequivocal notice of its withdrawal near the expiration of the agreement but before bargaining on a new contract has begun.

Section 8(b)(3) not only requires that a union representative bargain in good faith with employers, but also requires that the union carry out its bargaining duty fairly with respect to the employees it represents. A union, therefore, violates Section 8(b)(3) if it negotiates a contract that conflicts with that duty, such as a contract with racially discriminatory provisions, or if it refuses to handle grievances under the contract for irrelevant or arbitrary reasons.

Bargaining in good faith is violated by any of the following:

- Insisting on the inclusion of illegal provisions in a contract, such as a closed shop or a discriminatory hiring hall.
- Refusing to negotiate on a proposal for a written contract.
- Striking against an employer who has bargained, and continues to bargain, on a multiemployer basis to compel it to bargain separately.
- Refusing to meet with the attorney designated by the employer as its representative in negotiations.
- Terminating an existing contract and striking for a new one without notifying the employer, the Federal Mediation and Conciliation Service, and the state mediation service, if any.
- Conditioning the execution of an agreement on inclusion of a non-mandatory provision such as a performance bond.
- Refusing to process a grievance because of the race, sex, or union activities of an employee for whom the union is the statutory bargaining representative.

Prohibited Strikes and Boycotts

Section 8(b)(4) prohibits a labor organization from engaging in strikes or boycotts or taking other specified actions to accomplish certain purposes or "objects" as they are called in the Act. The proscribed action is listed in clauses (i) and (ii), the objects are described in subparagraphs (A) through (D). A union commits an unfair labor practice if it takes any of the kinds of action listed in clauses (i) and (ii) as a means of accomplishing any of the objects listed in the four subparagraphs.

Proscribed action: Inducing or encouraging a strike work stoppage or boycott. This section forbids a union to engage in a strike, or to induce or encourage a strike, work stoppage, or a refusal to perform services by "any individual employed by any person engaged in commerce or in an industry affecting commerce" for one of the objects listed in subparagraphs (A) through (D). The words "induce and encourage" are considered by the U. S. Supreme Court to be broad enough to include every form of influence or persuasion. For example, it has been held by the NLRB that a work stoppage on a picketed construction project was "induced" by a union through its business agents who, when they learned about the picketing, told the job stewards that they (the business agents) would not work behind the picket line. It was considered that this advice not only induced the stewards to leave the job, but caused them to pass the information on to their fellow employees, and that such conduct informed the other employees that they were expected not to work behind the picket line.

The word "person" is defined as including "one or more individuals, labor organizations, partnerships, associations, corporations," and other legal persons. As so defined, the word "person" is broader than the word "employer." For example, a railroad company, although covered by the Railway Labor Act, is excluded from the definition of "employer" in the

National Labor Relations Act and, therefore, neither the railroad company nor its employees are covered by the National Labor Relations Act. But a railroad company is a "person engaged in commerce" as defined above and, therefore, a labor organization is forbidden to "induce or encourage" individuals employed by a railroad company to engage in a strike, work stoppage, or boycott for any of the objects in subparagraphs (A) through (D).

This section also makes it an unfair labor practice for a union to "threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce" for any of the proscribed objects. Even though no direct threat is voiced by the union, there may nevertheless be coercion and restraint that violates this clause. For example, when a union picketed a construction job to bring about the removal of a non-union subcontractor in violation of Section 8(b)(4)(B), the picketing induced employees of several other subcontractors to stop work. When the general contractor asked what could be done to stop the picketing, the union's business agent replied that the picketing would stop only if the non-union subcontractor were removed from the job. The NLRB held this to be "coercion and restraint" within the meaning of the Act.

Unions are also prohibited from engaging in clause (i) or (ii) action to compel an employer or self-employed person to join any labor or employer organization or to force an employer to enter a hot cargo agreement prohibited by Section 8(e).

Examples of violations of this section are:

- In an attempt to compel a beer distributor to join a union, the union prevents the distributor from obtaining beer at a brewery by inducing the brewery's employees to refuse to fill the distributor's orders.
- In an attempt to secure for its members certain stevedoring work required at an employer's unloading operation, the union pickets to force the employer to join an employer association with which the union has a contract.
- A union pickets an employer (one not in the construction and garment industries), or threatens to picket it, to compel that employer to enter into an agreement whereby the employer will only do business with persons who have an agreement with a union.

Section 8(b)(4)(B) contains the Act's secondary boycott provision. A secondary boycott occurs if a union has a dispute with Company A and, in furtherance of that dispute, causes the employees of Company B to stop handling the products of Company A, or otherwise forces Company B to stop doing business with Company A. The dispute is with Company A, called the "primary" employer, the union's action is against Company B, called the "secondary" employer, hence the term "secondary boycott." In many cases the secondary employer is a customer or supplier of the primary employer with whom the union has the dispute. In general, the Act prohibits both the secondary boycott and the threat of it. Examples of prohibited secondary boycotts are:

- Picketing an employer to force it to stop doing business with another employer who has refused to recognize the union.
- Asking the employees of a plumbing contractor not to work on connecting up air conditioning equipment manufactured by a nonunion employer whom the union is attempting to organize.
- Urging employees of a building contractor not to install doors that were made by a manufacturer that is nonunion or that employs members of a rival union.
- Telling an employer that its plant will be picketed if that employer continues to do business with an employer the union has designated as "unfair."

The prohibitions of Section 8(b)(4)(B) do not protect a secondary employer from the incidental effects of union action that is taken directly against the primary employer. Thus, it is lawful for a union to urge employees of a secondary supplier at the primary employer's plant not to cross a picket line there. Section 8(b)(4)(B) also does not proscribe union action to prevent an employer from contracting out work customarily performed by its employees, even though an incidental effect of such conduct might be to compel that employer to cease doing business with the subcontractor.

In order to be protected against the union action that is prohibited, the secondary employer has to be a neutral as concerns the dispute between the union and the primary employer. For secondary boycott purposes an employer is considered an "ally" of the

primary employer and, therefore, not protected from union action in certain situations. One is based on the ownership and operational relationship between the primary and secondary employers. Here, a number of factors are considered, particularly the following: Are the primary and secondary employers owned and controlled by the same person or persons? Are they engaged in "closely integrated operations?" May they be treated as a single employer under the Act? Another test of the "ally" relationship is based on the conduct of the secondary employer. If an employer, despite its claim of neutrality in the dispute, acts in a way that indicates that it has abandoned its "neutral" position, the employer opens itself up to primary action by the union. An example of this would be an employer who, claiming to be a neutral enters into an arrangement with a struck employer whereby it accepts and performs farmed out work of that employer who would normally do the work itself, but who cannot perform the work because its plant is closed by a strike.

When employees of a primary employer and those of a secondary employer work on the same premises, a special situation is involved and the usual rules do not apply. A typical example of the shared site or "common situs" situation is when a subcontractor with whom a union has a dispute is engaged at work on a construction site alongside other subcontractors with whom the union has no dispute. Picketing at a common situs is permissible if directed solely against the primary employer. But it is prohibited if directed against secondary employers regularly engaged at that site. To assist in determining whether picketing at a common situs is restricted to the primary employer and therefore permissible, or directed at a secondary employer and therefore violates the statute, the NLRB and the courts have suggested various guidelines for evaluating the object of the picketing, including the following:

1. Limited to times when the employees of the primary employer are working on the premises.
2. Limited to times when the primary employer is carrying on its normal business there.
3. Confined to places reasonably close to where the employees of the primary employer are working.
4. Conducted so that the picket signs, the banners, and the conduct of the pickets indicate clearly that the dispute is with the primary employer and not with the secondary employer.

These guidelines are known as the Moore Dry Dock standards from the case in which they were first formulated by the NLRB. However, the NLRB has held that picketing at a common situs may be unlawful notwithstanding compliance with the Moore Dry Dock standards if a union's statements or actions otherwise indicate that the picketing has an unlawful objective.

In some situations a company may set aside, or reserve, a certain plant gate, or entrance to its premises, for the exclusive use of a contractor. If a union has a labor dispute with the company and pickets the company's premises, including the gate so reserved, the union may be held to have violated the Act. The U.S. Supreme Court has stated the circumstances under which such a violation may be found as follows:

There must be a separate gate, marked and set apart from other gates; the work done by the employees who use the gate must be unrelated to the normal operations of the employer, and the work must be of a kind that would not, if done when the plant were engaged in its regular operations, necessitate curtailing those operations. However, if the reserved gate is used by employees of both the company and the contractor, the picketing would be considered primary and not a violation.

Section 8(b)(4)(B) also prohibits secondary action to compel an employer to recognize or bargain with a union that is not the certified representative of its employees. If a union takes action described in clause (i) or (ii) against a secondary employer, and the union's object is recognition by the primary employer, the union commits an unfair labor practice under this section. To establish that the union has an object of recognition, a specific demand by the union for recognition need not be shown; a demand for a contract, which implies recognition or at least bargaining, is enough.

Section 8(b)(4)(C) forbids a labor organization from using clause (i) or (ii) conduct to force an employer to recognize or bargain with a labor organization other than the one that is currently certified as the representative of its employees. Section 8(b)(4)(C) has been held not to apply when the picketing union is merely protesting working conditions that are substandard for the area.

Section 8(b)(4)(D) forbids a labor organization from engaging in action described in clauses (i) and (ii) for the purpose of forcing any employer to assign certain work to "employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class." The Act sets up a special procedure for handling disputes over work assignments that will be discussed later in this material.

The final provision in Section 8(b)(4) provides that nothing in Section 8(b)(4) shall be construed "to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer." Such publicity is not protected if it has "an effect of inducing any individual employed by any persons other than the primary employer" to refuse to handle any goods or not to perform services. The Supreme Court has held that this provision permitted a union to distribute handbills at the stores of neutral food chains asking the public not to buy certain items distributed by a wholesaler with whom the union had a primary dispute. Moreover, it has also held that peaceful picketing at the stores of a neutral food chain to persuade customers not to buy the products of a struck employer when they traded in these stores was not prohibited by Section 8(b)(4).

Excessive or Discriminatory Membership Fees

Section 8(b)(5) makes it illegal for a union to charge employees who are covered by an authorized union-security agreement a membership fee "in an amount which the Board finds excessive or discriminatory under all the circumstances." The section also provides that the Board in making its finding must consider among other factors "the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected."

Examples of violations of this section include:

- Charging old employees who do not join the union until after a union-security agreement goes into effect an initiation fee of $15 while charging new employees only $5.

- Increasing the initiation fee from $75 to $250 and thus charging new members an amount equal to about 4 weeks' wages when other unions in the area charge a fee equal to about one-half the employee's first week's pay.

"Featherbedding"

Section 8(b)(6) forbids a labor organization "to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed."

Organizational and Recognitional Picketing by Noncertified Unions

Section 8(b)(7) prohibits a labor organization that is not currently certified as the employees' representative from picketing or threatening to picket with an object of obtaining recognition by the employer (recognitional picketing) or acceptance by his employees as their representative (organizational picketing). The object of picketing is ascertained from all the surrounding facts including the message on the picket signs and any communications between the union and the employer. "Recognitional" picketing as used in Section 8(b)(7) refers to picketing to obtain an employer's initial recognition of the union as bargaining representative of its employees or to force the employer, without formal recognition of the union, to maintain a specific and detailed set of working conditions. It does not include picketing by an incumbent union for continued recognition or for a new contract. Neither does it include picketing that seeks to prevent the employer from undermining area standards of working conditions by operating at less than the labor costs which prevail under bargaining contracts in the area.

Recognitional and organizational picketing are prohibited in three specific instances.

A. When the employer has lawfully recognized another union and a representation election would

be barred by either the provisions of the Act or the Board's Rules, as in the case of a valid contract between the employer and the other union. (A union is considered lawfully recognized when the employer's recognition of the union cannot be attacked under the unfair labor practice provisions of Section 8 of the Act.)

B. When a valid NLRB representation election has been held within the previous 12 months.
C. When a representation petition is not filed "within a reasonable period of time not to exceed thirty days from the commencement of such picketing."

Subparagraph (C) is subject to an exception, called a proviso, which permits picketing "for the purpose of truthfully advising the public (including consumers)" that an employer does not employ union members or have a contract with a labor organization. However, such picketing loses the protection of this proviso if it has a substantial effect on the employer's business because it induces "any individual employed by any other person" to refuse to pick up or deliver goods or to perform other services.

If a charge is filed against the picketing union and a representation petition is filed within a reasonable time after the picketing starts, subparagraph (C) provides for an election to be held forthwith. This election requires neither a hearing nor a showing of interest among the employees. As a consequence the election can be held and the results obtained faster than in a regular election under Section 9(c), and for this reason it is called an "expedited" election. Petitions filed more than a reasonable time after picketing begins and petitions filed during picketing protected by the 8(b)(7)(C) proviso, discussed above, are processed under normal election procedures and the election will not be expedited. The reasonable period in which to file a petition cannot exceed 30 days and may be shorter, when, for instance, picketing is accompanied by violence.

Examples of violations of Section 8(b)(7) are as follows:

- Picketing by a union for organizational purposes shortly after the employer has entered a lawful contract with another union.
- Picketing by a union for organizational purposes within 12 months after a valid NLRB election in which a majority of the employees in the unit voted to have no union.
- Picketing by a union for recognition continuing for more than 30 days without the filing of a representation petition wherein the picketing stops all deliveries by employees of an other employer.

Striking or Picketing a Health Care Institution Without Notice

Labor organization are prohibited from engaging in a strike, picketing, or other concerted refusal to work at any health care institution without first giving at least 10 days' notice in writing to the institution and the Federal Mediation and Conciliation Service.

Chapter 3

Unionization Provisions

The Rights of Employees

The National Labor Rights Act (NLRA) gives employees the right to choose a union as their exclusive bargaining representative in all phases of the process…from talking as a group about the conditions of the work environment to choosing a union to negotiate employee rights. The rights of employees are set forth principally in Section 7 of the Act, which provides as follows:

> Sec. 7. 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, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Examples of the rights protected by this section are the following:

- Forming or attempting to form a union among the employees of a company.
- Joining a union whether the union is recognized by the employer or not.
- Assisting a union to organize the employees of an employer.
- Going out on strike to secure better working conditions.
- Refraining from activity on behalf of a union.

Forming a Union

Where at least 30% of employees of a particular workplace or bargaining unit (a group of employees that share a similar community of interests) agree that they desire union representation (usually done via a petition or by signing "authorization cards") the wheels are set into motion for a union election.

Once the required 30% support is obtained, the authorization cards are then presented to the Regional Office of the National Labor Relations Board (NLRB), the government agency responsible for enforcing the NLRA, along with a representation petition which identifies the union, the employer and the unit of employees it seeks to represent. The NLRB would then schedule an election to be held which the employer could agree to or contest.

If the employer agrees to the election then it is classified as an uncontested election. Uncontested elections fall into 2 categories:

- Consent election
- Stipulated election

In both types the parties waive the pre-election hearing as to whether or not the union is entitled to hold an election. In a consent election, however, questions that arise from the election proceedings (including objections to the election) are decided by the Regional Director and are final. In a stipulated election, such questions are reviewable by the NLRB.

When the employer disputes the union petition it is considered a contested election and the issue is taken to NLRB Regional office where the petition is pending. A hearing is conducted in which both sides present their arguments to the Board including witnesses and documentation to support their case. The Board then decides to either dismiss the petition or schedule an election.

If the Board decides on the election, it is generally set for 30 days out. The employer is then required to give the NLRB an Excelsior List (provides the name and address of all employees in the proposed bargaining unit) within seven days of the NLRB's direction of the election, and at least ten days before the election. The list is then shared with the union so that they may contact the employees. In addition, the employer is required to post an official notice of the election several days prior to the election.

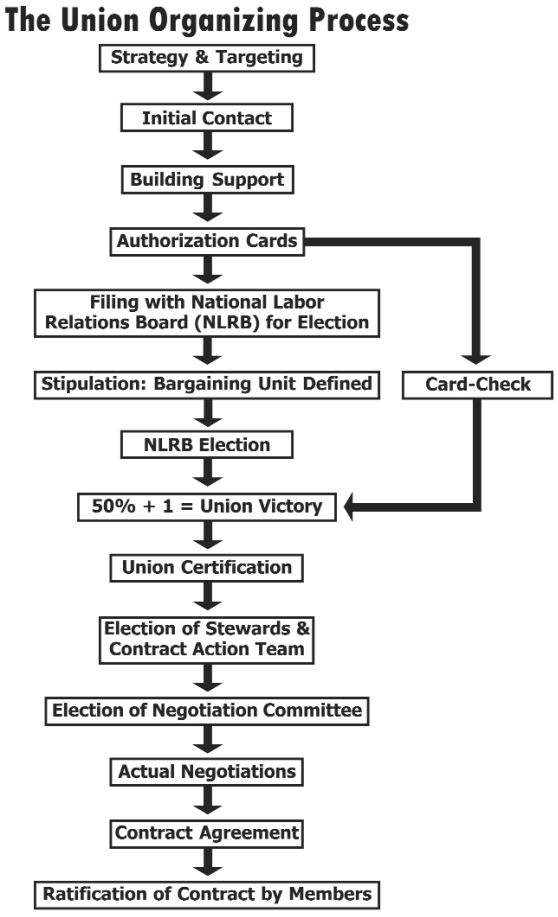
Once the election is set, both sides start campaigning in an effort to convince employees how they should vote. Employers are permitted to prohibit union organizers from coming into the workplace to campaign as long as they do so equally. This means that they can't allow one union solicitation rights

while denying other unions. Likewise, the employer can implement a policy that prohibits pro-union employees from soliciting support and distributing literature during work hours (special rules apply to healthcare entities). If an employer chooses such prohibitions, it is important that they have a written policy communicating these restrictions in place.

The election itself is conducted by NLRB agents. Employees are given the option of voting "yes" for the union or "no" to the union in favor of the employer. The union must receive the majority of votes in order to win. A tie election would go to the employer. For this reason, employers usually encourage as many people in the proposed bargaining unit to vote because then the union would need even more votes to win. For example, if a bargaining unit was comprised of 100 people but only 30 people vote, then the union only needs 16 votes to win. However, if all 100 people vote, the union would need 51 votes in order to win.

After the election, the losing party has the right to contest the election by objecting to conduct which could have affected the election's outcome. For example, a union my claim that the employer violated an employee's section 7 rights whereas an employer may claim that the union unlawfully coerced employees to vote in their favor. The NLRB will then investigate or hold a hearing to address any allegations. If it found that the party that won the election engaged in unfair practices, then the election will be set a side and a new election will be held.

Although this is an overview of how a union formation may occur, different unions utilize various strategies. The Jobs with Justice Organization uses the following chart to depict the flow of a typical union formation scenario:



Union Security

The Act permits, under certain conditions, a union and an employer to make an agreement, called a union-security agreement that requires employees to make certain payments to the union in order to retain their jobs. A union-security agreement cannot require that applicants for employment be members of the union in order to be hired, and such an agreement cannot require employees to join or maintain membership in the union in order to retain their jobs. Under a union-security agreement, individuals choosing to be dues-paying nonmembers may be required, as may employees who actually join the union, to pay full initiation fees and dues within a certain period of time (a "grace period") after the collective-bargaining contract takes effect or after a new employee is hired. However, the most that can be required of nonmembers who inform the union that they object to the use of their payments for nonrepresentational purposes is that they pay their share of the union's costs relating to representational activities (such as collective bargaining, contract administration, and grievance adjustment).

The grace period, after which the union-security agreement becomes effective, cannot be less than 30 days except in the building and construction industry which allows a shorter grace period of 7 full days. A union-security agreement that provides a shorter grace period than the law allows is invalid, and any employee discharged because he or she has not complied with such an agreement is entitled to reinstatement.

Under a union-security agreement, employees who have religious objections to becoming members of a union or to supporting a union financially may be exempt from paying union dues and initiation fees. These employees may, however, be required to make contributions to a nonreligious, non-labor tax exempt organization instead of making payments to a union. Unions representing such employees may also charge them the reasonable cost of any grievances processed at the employees' request.

For a union-security agreement to be valid, it must meet all the following requirements:

1. The union must not have been assisted or controlled by the employer (see Section 8(a)(2)).
2. The union must be the majority representative of the employees in the appropriate collective-bargaining unit covered by such agreement when made.
3. The union's authority to make such an agreement must not have been revoked within the previous 12 months by the employees in a Board election.
4. The agreement must provide for the appropriate grace period.

Section 8(f) of the Act allows an employer engaged primarily in the building and construction industry to sign a union-security agreement with a union without the union's having been designated as the representative of its employees as otherwise required by the Act. The agreement can be made before the employer has hired any employees for a project and will apply to them when they are hired. As noted above, however, the union-security provisions of a collective-bargaining contract in the building and construction industry may become effective with respect to new employees after 7 full days. If the agreement is made while employees are on the job, it must allow existing employees the same 7-day grace period to comply. As with any other union-security agreement, the union involved must be free from employer assistance or control.

Collective-bargaining contracts in the building and construction industry can include the following additional provisions:

1. A requirement that the employer notify the union concerning job openings.
2. A provision that gives the union an opportunity to refer qualified applicants for such jobs.
3. Job qualification standards based on training or experience.
4. A provision for priority in hiring based on length of service with the employer, in the industry, or in the particular geographic area.

These four hiring provisions may lawfully be included in collective-bargaining contracts which cover employees in other industries as well.

Finally, pursuant to Section 14(b) of the Act, individual States may prohibit, and some States have prohibited, certain forms of union-security agreements.

The Right to Strike

Section 7 of the Act states in part, "Employees shall have the right. . . to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Strikes are included among the concerted activities protected for employees by this section. Section 13 also concerns the right to strike. It reads as follows:

> Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

It is clear from a reading of these two provisions that: the law not only guarantees the right of employees to strike, but also places limitations and qualifications on the exercise of that right.

The lawfulness of a strike may depend on the object, or purpose, of the strike, on its timing, or on the conduct of the strikers. The object, or objects, of a strike and whether the objects are lawful are matters that are not always easy to determine. Such issues often have to be decided by the National Labor Relations Board. The consequences can be severe to striking employees and struck employers, involving as they do questions of reinstatement and backpay.

It must be emphasized that the following is only a brief outline. A detailed analysis of the law concerning strikes, and application of the law to all the factual situations that can arise in connection with strikes, is beyond the scope of this material. Employees and employers who anticipate being involved in strike action should proceed cautiously and on the basis of competent advice.

Employees who strike for a lawful object fall into two classes "economic strikers" and "unfair labor practice strikers." Both classes continue as employees, but unfair labor practice strikers have greater rights of reinstatement to their jobs.

If the object of a strike is to obtain from the employer some economic concession such as higher wages, shorter hours, or better working conditions, the striking employees are called economic strikers. They retain their status as employees and cannot be discharged, but they can be replaced by their employer. If the employer has hired bona fide permanent replacements that are filling the jobs of the economic strikers when the strikers apply unconditionally to go back to work, the strikers are not entitled to reinstatement at that time. However, if the strikers do not obtain regular and substantially equivalent employment, they are entitled to be recalled to jobs for which they are qualified when openings in such jobs occur if they, or their bargaining representative, have made an unconditional request for their reinstatement.

Employees who strike to protest an unfair labor practice committed by their employer are called unfair labor practice strikers. Such strikers can be neither discharged nor permanently replaced. When the strike ends, unfair labor practice strikers, absent serious misconduct on their part, are entitled to have their jobs back even if employees hired to do their work have to be discharged.

If the Board finds that economic strikers or unfair labor practice strikers who have made an unconditional request for reinstatement have been unlawfully denied reinstatement by their employer, the Board may award such strikers backpay starting at the time they should have been reinstated.

A strike may be unlawful because an object, or purpose, of the strike is unlawful. A strike in support of a union unfair labor practice, or one that would cause an employer to commit an unfair labor practice, may be a strike for an unlawful object. For example, it is an unfair labor practice for an employer to discharge an employee for failure to make certain lawful payments to the union when there is no union-security agreement in effect (Section 8(a)(3). A strike to compel an employer to do this would be a strike for an unlawful object and, therefore, an unlawful strike.

Furthermore, Section 8(b)(4) of the Act prohibits strikes for certain objects even though the objects are not necessarily unlawful if achieved by other means. An example of this would be a strike to compel Employer A to cease doing business with Employer B. It is not unlawful for Employer A voluntarily to stop doing business with Employer B, nor is it unlawful for a union merely to request that it do so. It is, however, unlawful for the union to strike with an object of

forcing the employer to do so. In any event, employees who participate in an unlawful strike may be discharged and are not entitled to reinstatement.

A strike that violates a no-strike provision of a contract is also not protected by the Act, and the striking employees can be discharged or otherwise disciplined, unless the strike is called to protest certain kinds of unfair labor practices committed by the employer. It should be noted that not all refusals to work are considered strikes and thus violations of no-strike provisions. A walkout because of conditions abnormally dangerous to health, such as a defective ventilation system in a spray-painting shop, has been held not to violate a no-strike provision.

Section 8(d) provides that when either party desires to terminate or change an existing contract, it must comply with certain conditions. If these requirements are not met, a strike to terminate or change a contract is unlawful and participating strikers lose their status as employees of the employer engaged in the labor dispute. If the strike was caused by the unfair labor practice of the employer, however, the strikers are classified as unfair labor practice strikers and their status is not affected by failure to follow the required procedure.

Strikers who engage in serious misconduct in the course of a strike may be refused reinstatement to their former jobs. This applies to both economic strikers and unfair labor practice strikers. Serious misconduct has been held to include, among other things, violence and threats of violence. The U.S. Supreme Court has ruled that a “sitdown” strike, when employees simply stay in the plant and refuse to work, thus depriving the owner of property, is not protected by the law. Examples of serious misconduct that could cause the employees involved to lose their right to reinstatement are:

- Strikers physically blocking persons from entering or leaving a struck plant.
- Strikers threatening violence against nonstriking employees.
- Strikers attacking management representatives.

The Right to Picket

The right to picket is subject to many of the same limitations and qualifications as the right to strike. For example, picketing can be prohibited because of its object or its timing, or misconduct on the picket line. In addition, Section 8(b)(7) declares it to be an unfair labor practice for a union to picket for certain objects whether the picketing accompanies a strike or not.

Collective Bargaining and Representation of Employees

Collective bargaining, one of the keystones of the NLRA, declares in Section 1 that the policy of the United States is to be carried out "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."

Collective Bargaining

Collective bargaining is defined in Section 8(d) as the requirement that an employer and the representative of its employees to meet at reasonable times, to confer in good faith about certain matters, and to put into writing any agreement reached if requested by either party. The parties must confer in good faith with respect to wages, hours, and other terms or conditions of employment, the negotiation of an agreement, or any question arising under an agreement.

These obligations are imposed equally on the employer and the representative of its employees. It is an unfair labor practice for either party to refuse to bargain collectively with the other. The obligation does not, however, compel either party to agree to a proposal by the other, nor does it require either party to make a concession to the other.

Section 8(d) provides further that when a collective-bargaining agreement is in effect no party to the contract shall end or change the contract unless the party wishing to end or change it takes the following steps:

1. The party must notify the other party to the contract in writing about the proposed termination or modification 60 days before the date on which the contract is scheduled to expire. If the contract is not scheduled to expire on any particular date, the notice in writing must be served 60 days before the time when it is proposed that the termination or modification take effect.

2. The party must offer to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed changes.

3. The party must, within 30 days after the notice to the party, notify the Federal Mediation and Conciliation Service of the existence of a dispute if no agreement has been reached by that time. Said party must also notify at the same time any State or Territorial mediation or conciliation agency in the State or Territory where the dispute occurred.

4. The party must continue in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract until 60 days after the notice to the other party was given or until the date the contract is scheduled to expire, whichever is later.

(In the case of a health care institution, the requirement in paragraphs 1 and 4 is 90 days, and in paragraph 3 is 60 days. In addition, there is a 30-day notice requirement to the agencies in paragraph 3 when a dispute arises in bargaining for an initial contract.)

The requirements of paragraphs 2, 3, and 4, above, cease to apply if the NLRB issues a certificate showing that the employees' representative who is a party to the contract has been replaced by a different representative or has been voted out by the employees. Neither party is required to discuss or agree to any change of the provisions of the contract if the other party proposes that the change become effective before the provision could be reopened according to the terms of the contract.

As has been pointed out, any employee who engages in a strike within the notice period loses status as an employee of the struck employer. This loss of status ends, however, if and when that individual is reemployed by the same employer.

The Employee Representative

Section 9(a) of the Act provides that the employee representatives that have been "designated or

selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining."

A unit of employees is a group of two or more employees who share a community of interest and may reasonably be grouped together for purposes of collective bargaining. The determination of what is an appropriate unit for such purposes is, under the Act, left to the discretion of the NLRB. Section 9(b) states that the Board shall decide in each representation case whether, "in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." This broad discretion is, however, limited by several other provisions of the Act. Section 9(b)(1) provides that the Board shall not approve as appropriate a unit that includes both professional and nonprofessional employees, unless a majority of the professional employees involved vote to be included in the mixed unit.

Section 9(b)(2) provides that the Board shall not hold a proposed craft unit to be inappropriate simply because a different unit was previously approved by the Board, unless a majority of the employees in the proposed craft unit vote against being represented separately.

Section 9(b)(3) prohibits the Board from including plant guards in the same unit with other employees. It also prohibits the Board from certifying a labor organization as the representative of a plant guard unit if the labor organization has members who are non-guard employees or if it is "affiliated directly or indirectly" with an organization that has members who are non-guard employees.

Generally, the appropriateness of a bargaining unit is determined on the basis of a community of interest of the employees involved. Those who have the same or substantially similar interests concerning wages, hours, and working conditions are grouped together in a bargaining unit. In determining whether a proposed unit is appropriate, the following factors are also considered:

1. Any history of collective bargaining.
2. The desires of the employees concerned.
3. The extent to which the employees are organized. Section 9(c)(5) forbids the Board from giving this factor controlling weight.

Finally, with regard to units in the health care industry, the Board also is guided by Congress' concern about preventing disruptions in the delivery of health care services, and its directive to minimize the number of appropriate bargaining units.

A unit may cover the employees in one plant of an employer, or it may cover employees in two or more plants of the same employer. In some industries in which employers are grouped together in voluntary associations, a unit may include employees of two or more employers in any number of locations. It should be noted that a bargaining unit can include only persons who are "employees" within the meaning of the Act. The Act excludes certain individuals, such as agricultural laborers, independent contractors, supervisors, and persons in managerial positions, from the meaning of "employees." None of these individuals can be included in a bargaining unit established by the Board. In addition, the Board, as a matter of policy, excludes from bargaining units employees who act in a confidential capacity to an employer's labor relations officials.

Once an employee representative has been designated by a majority of the employees in an appropriate unit, the Act makes that representative the exclusive bargaining agent for all employees in the unit. As exclusive bargaining agent it has a duty to represent equally and fairly all employees in the unit without regard to their union membership or activities. Once a collective-bargaining representative has been designated or selected by its employees, it is illegal for an employer to bargain with individual employees, with a group of employees, or with another employee representative.

Section 9(a) provides that any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted without the intervention of the bargaining representative provided:

1. The adjustment is not inconsistent with the terms of any collective-bargaining agreement then in

effect.
2. The bargaining representative has been given the opportunity to be present at such adjustment.

How a Bargaining Representative is Selected

The Act requires that an employer bargain with the representative selected by its employees. The most common method by which employees can select a bargaining representative is a secret-ballot representation election conducted by the Board.

The NLRB can conduct such an election only when a petition has been filed requesting one. A petition for certification of representatives can be filed by an employee or a group of employees or any individual or labor organization acting on their behalf, or it can be filed by an employer. If filed by or on behalf of employees, the petition must be supported by a substantial number of employees who wish to be represented for collective bargaining and must state that their employer declines to recognize their representative. If filed by an employer, the petition must allege that one or more individuals or organizations have made a claim for recognition as the exclusive representative of the same group of employees.

The Act also contains a provision whereby employees or someone acting on their behalf can file a petition seeking an election to determine if the employees wish to retain the individual or labor organization currently acting as their bargaining representative, whether the representative has been certified or voluntarily recognized by the employer. This is called a decertification election.

Provision is also made for the Board to determine by secret ballot whether the employees covered by a union-security agreement desire to withdraw the authority of their representative to continue the agreement. This is called a union-security deauthorization election and can be brought about by the filing of a petition signed by 30 percent or more of the employees covered by the agreement.

The same petition form is used for any kind of Board election. When the petition is filed, the NLRB must investigate the petition, hold a hearing if necessary, and direct an election if it finds that a question of representation exists. The purpose of the investigation is to determine, among other things, the following:

1. Whether the Board has jurisdiction to conduct an election.
2. Whether there is a sufficient showing of employee interest to justify an election.
3. Whether a question of representation exists.
4. Whether the election is sought in an appropriate unit of employees.
5 Whether the representative named in the petition is qualified.
6. Whether there are any barriers to an election in the form of existing contracts or prior elections.

It should be noted that Section 8(b)(7)(C) provides, among other things, that when a petition is filed within a reasonable period, not to exceed 30 days, after the commencement of recognitional or organizational picketing, the NLRB shall “forthwith” order an election and certify the results. This is so if the picketing is not within the protection of the second proviso to Section 8(b)(7)(C). When an election under Section (8)(b)(7)(C) is appropriate, neither a hearing nor a showing of interest is required, and the election is scheduled sooner than under the ordinary procedure.

Jurisdiction to conduct an election

The jurisdiction of the NLRB to direct and conduct an election is limited to those enterprises that affect commerce.

Showing of interest required

Regarding the showing of interest, it is the policy to require that a petitioner requesting an election for either certification of representatives or decertification show that at least 30 percent of the employees favor an election. The Act also requires that a petition for a union-security deauthorization election be filed by 30 percent or more of the employees in the unit covered by the agreement for the NLRB to conduct an election for that purpose.

Whether the election is sought in an appropriate unit of employees

The showing of interest must be exclusively by employees who are in the appropriate bargaining unit

in which an election is sought.

Existence of question of representation

Section 9(c)(1) authorizes the NLRB to direct an election and certify the results thereof, provided the record shows that a question of representation exists. Petitions for certification of representatives present a question of representation if, among other things, they are based on a demand for recognition by the employee representative and a denial of recognition by the employer. The demand for recognition need not be made in any particular form; in fact, the filing of a petition by the representative itself is considered to be a demand for recognition. The NLRB has held that even a representative that is currently recognized by the employer can file a petition for certification and that such petition presents a question of representation provided the representative has not previously been certified.

A question of representation is also raised by a decertification petition that challenges the representative status of a bargaining agent previously certified or currently recognized by the employer. However, a decertification petition filed by a supervisor does not raise a valid question of representation and must be dismissed.

Who can qualify as bargaining representative

Section 2(4) of the Act provides that the employee representative for collective bargaining can be "any individual or labor organization." A supervisor or any other management representative may not be an employee representative. It is NLRB policy to direct an election and to issue a certification unless the proposed bargaining agent fails to qualify as a bona fide representative of the employees. In determining a union's qualifications as bargaining agent, it is the union's willingness to represent the employees rather than its constitution and bylaws that is the controlling factor. The NLRB's power to certify a labor organization as bargaining representative is limited by Section 9(b)(3) which prohibits certification of a union as the representative of a unit of plant guards if the union "admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards."

Bars to Election

There are several factors that may bar an election from taking place:

Existing collective-bargaining contract

The NLRB has established the policy of not directing an election among employees presently covered by a valid collective-bargaining agreement except in accordance with certain rules. These rules, followed in determining whether or not an existing collective-bargaining contract will bar an election, are called the NLRB contract bar rules. Not every contract will bar an election. Examples of contracts that would not bar an election are:

- The contract is not in writing, or is not signed.
- The contract has not been ratified by the members or the union, if such is expressly required.
- The contract does not contain substantial terms or conditions of employment sufficient to stabilize the bargaining relationship.
- The contract can be terminated by either party at any time for any reason.
- The contract contains a clearly illegal union-security clause.
- The bargaining unit is not appropriate.
- The union that entered the contract with the employer is no longer in existence or is unable or unwilling to represent the employees.
- The contract discriminates between employees on racial grounds.
- The contract covers union members only.
- The contracting union is involved in a basic internal conflict at the highest levels with resulting unstabilizing confusion about the identity of the union.
- The employer's operations have changed substantially since the contract was executed.

Time Provisions

Under the NLRB rules a valid contract for a fixed period of 3 years or less will bar an election for the period covered by the contract. A contract for a fixed period of more than 3 years will bar an election sought by a contracting party during the life of the contract, but will act as a bar to an election sought by an outside party for only 3 years following its effective date. A contract of no fixed period will not act as a

bar at all.

When a petition can be filed if there is an existing contract

If there is no existing contract, a petition can bring about an election if it is filed before the day a contract is signed. If the petition is filed on the same day the contract is signed, the contract bars an election, provided the contract is effective immediately or retroactively and the employer has not been informed at the time of execution that a petition has been filed. Once the contract becomes effective as a bar to an election, no petition will be accepted until near the end of the period during which the contract is effective as a bar. Petitions filed not more than 90 days but over 60 days before the end of the contract-bar period will be accepted and can bring about an election. These time periods for filing petitions involving health care institutions are 120 and 90 days, respectively. Of course, a petition can be filed after the contract expires. However, the last 60 days of the contract-bar period is called an "insulated" period. During this time the parties to the existing contract are free to negotiate a new contract or to agree to extend the old one. If they reach agreement in this period. petitions will not be accepted until 90 days before the end of the new contract-bar period.

Effect of certification

In addition to the contract-bar rules, the NLRB has established a rule that when a representative has been certified by the Board, the certification will ordinarily be binding for at least 1 year and a petition filed before the end of the certification year will be dismissed. In cases in which the certified representative and the employer enter a valid collective-bargaining contract during the year, the contract becomes controlling, and whether a petition for an election can be filed is determined by the Board's contract-bar rules.

Effect of prior election

Section 9(c)(3) prohibits the holding of an election in any collective-bargaining unit or subdivision thereof in which a valid election has been held during the preceding 12-month period. A new election may be held, however, in a larger unit, but not in the same unit or subdivision in which the previous election was held. For example, if all the production and maintenance employees in Company A, including draftsmen in the company's engineering office, are included in a collective-bargaining unit, an election among all the employees in the unit would bar another election among all the employees in the unit for 12 months. Similarly, an election among the draftsmen only would bar another election among the draftsmen for 12 months. However, an election among the draftsmen would not bar a later election during the 12-month period among all the production and maintenance employees including the draftsmen.

When a petition can be filed if there has been a prior election

It is the Board's interpretation that Section 9(c)(3) prohibits only the holding of an election during the 12-month period, but does not prohibit the filing of a petition. Accordingly, the NLRB will accept a petition filed not more than 60 days before the end of the 12-month period. The election cannot be held, of course, until after the 12-month period. If an election is held and a representative certified, that certification is binding for 1 year and a petition for another election in the same unit will be dismissed if it is filed during the 1-year period after the certification. If an election is held and no representative is certified, the election bars another election for 12 months. A petition for another election in the same unit can be filed not more than 60 days before the end of the 12-month period and the election can be held after the 12-month period expires.

The Representation Election

Section 9(c)(1) of the Act provides that if a question of representation exists, the NLRB must make its determination by means of a secret-ballot election. In a representation election employees are given a choice of one or more bargaining representatives or no representative at all. To be certified as the bargaining representative, an individual or a labor organization must receive a majority of the valid votes cast.

An election may be held by agreement between the employer and the individual or labor organization claiming to represent the employees. In such an agreement the parties would state the time and place

agreed on, the choices to be included on the ballot, and a method to determine who is eligible to vote. They would also authorize the NLRB Regional Director to conduct the election.

If the parties are unable to reach an agreement, the Act authorizes the NLRB to order an election after a hearing. The Act also authorizes the Board to delegate to its Regional Directors the determination on matters concerning elections. Under this delegation of authority the Regional Directors can determine the appropriateness of the unit, direct an election, and certify the outcome. Upon the request of an interested party, the Board may review the action of a Regional Director, but such review does not stop the election process unless the Board so orders. The election details are left to the Regional Director. Such matters as who may vote, when the election will be held, and what standards of conduct will be imposed on the parties are decided in accordance with the Board's rules and its decisions.

To be entitled to vote, an employee must have worked in the unit during the eligibility period set by the Board and must be employed in the unit on the date of the election. Generally, the eligibility period is the employer's payroll period just before the date on which the election was directed. This requirement does not apply, however, to employees who are ill, on vacation, or temporarily laid off, or to employees in military service who appear in person at the polls. The NLRB rules take into consideration the fact that employment is typically irregular in certain industries. In such industries eligibility to vote is determined according to formulas designed to permit all employees who have a substantial continuing interest in their employment conditions to vote. Examples of these formulas, which differ from case to case, are:

- In one case, employees of a construction company were allowed to vote if they worked for the employer at least 65 days during the year before the "eligibility date" for the election.
- In another case longshoremen who worked at least 700 hours during a specified contract year, and at least 20 hours in each full month between the end of that year and the date on which the election was directed, were allowed to vote.
- Radio and television talent employees and musicians in the television film, motion picture, and recording industries have been held eligible to vote if they worked in the unit 2 or more days during the year before the date on which the election was directed.

Section 9(c)(3) provides that economic strikers who have been replaced by bona fide permanent employees may be entitled to vote in "any election conducted within 12 months after the commencement of the strike." The permanent replacements are also eligible to vote at the same time. As a general proposition, a striker is considered to be an economic striker unless found by the NLRB to be on strike over unfair labor practices of the employer. Whether the economic striker is eligible to vote is determined on the facts of each case.

Ordinarily, elections are held within 30 days after they are directed. Seasonal drops in employment or any change in operations that would prevent a normal work force from being present may cause a different election date to be set. Normally an election will not be conducted when unfair labor practice charges have been filed based on conduct of a nature which would have a tendency to interfere with the free choice of the employees in an election, except that, in certain cases, the Board may proceed to the election if the charging party so requests.

NLRB elections are conducted in accordance with strict standards designed to give the employee voters an opportunity to freely indicate whether they wish to be represented for purposes of collective bargaining. Election details, such as time, place, and notice of an election, are left largely to the Regional Director who usually obtains the agreement of the parties on these matters. Any party to an election who believes that the Board election standards were not met may, within 7 days after the tally of ballots has been furnished, file objections to the election with the Regional Director under whose supervision the election was held. In most cases, the Regional Director's rulings on these objections may be appealed to the Board for decision.

An election will be set aside if it was accompanied by conduct that the NLRB considers created an atmosphere of confusion or fear of reprisals and thus interfered with the employees' freedom of choice. In any particular case the NLRB does not attempt to determine whether the conduct actually interfered with the employees' expression of free choice, but

rather asks whether the conduct tended to do so. If it is reasonable to believe that the conduct would tend to interfere with the free expression of the employees' choice, the election may be set aside. Examples of conduct the Board considers to interfere with employee free choice are:

- Threats of loss of jobs or benefits by an employer or a union to influence the votes or union activities of employees.
- A grant of benefits or promise to grant benefits to influence the votes or union activities of employees.
- An employer firing employees to discourage or encourage their union activities or a union causing an employer to take such action.
- An employer or a union making campaign speeches to assembled groups of employees on company time within the 24-hour period before the election.
- The incitement of racial or religious prejudice by inflammatory campaign appeals made by either an employer or a union.
- Threats or the use of physical force or violence against employees by an employer or a union to influence their votes.
- The occurrence of extensive violence or trouble or widespread fear of job losses which prevents the holding of a fair election, whether caused by an employer or a union.

Chapter 4

Social Media

Employee Rights in Social Media

In August 2011, the National Labor Relations Board ("NLRB") released a report detailing the outcome of investigations into 14 cases involving the use of social media and employer's social and general media policies. The purpose of releasing the report was to assist companies in the creation and implementation of social media policies.

The main issues that arose from these investigations involved section 7 of the National Labor Relations Act ("the Act"), which protects 'concerted activities' and restricts 'overly broad' drafting and enforcing of social media policies. In addition, the NLRB addressed the issue of using social media as a coercive instrument.

Section 7 of the Act protects employees "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." This includes, but is not limited to talking with co-workers about the terms and conditions of their employment. It also protects circumstances where individual employees seek to start, cause to start or to prepare for group action, when the individual employees bring complaints that are truly group-wide complaints to management's attention. The recent decisions illustrate this protection extends to discussions through social media outlets, such as Facebook and Twitter. Although Section 7 protects concerted activities, it does not protect all speech on these social media outlets.

Concerted Activities

Concerted activities are actions or plans that are attempted/accomplished by a group. One person acting on his own does not constitute a concerted activity. Concerted activity is a protected activity under the Act, but acting alone is not. In all of the cases investigated, the NLRB first considered whether or not the individual was acting in cooperation with co-workers. Even though working with co-workers was enough to meet the requirement, working with others who were not co-workers was not sufficient.

The first case the board reviewed involved an employer unlawfully discharging five employees who had posted comments on Facebook relating to allegations of poor job performance previously expressed by one of their coworkers. The NLRB found that the employees were engaged in protected concerted activity because: (1) the employees had previously had conversations about the issue discussed on Facebook, (2) the employees had escalated the issue to a meeting with management in an attempt to solve the issue, and (3) in preparation for that meeting with management, the employee asked coworkers their input regarding the issue. Because the employees were strictly discussing working conditions, it does not matter that the conversation took place on Facebook–it is still a protected activity. Furthermore, the use of swearing and sarcasm in these posts does not eliminate this protection.

Similarly, the NLRB reviewed a case involving a luxury car dealership unlawfully terminating a salesman for posting pictures of a sales promotion with negative comments attached and posted a picture of the employer's friend that had crashed into the pond. The salesman had previously discussed his concern about the promotion with other salespeople. Most of the salespeople were concerned that they would lose commissions because the promotion only featured cheap snacks, and hotdogs for a luxury car brand, giving the wrong image to the brand in their opinion. The salesperson removed the pictures and comments immediately after the employer had requested him to do so. Soon after, the employee was discharged anyway.

In that case the NLRB concluded the salesman was involved in a protected concerted activity because: (1) he had previously discussed the issue with other employees, (2) the pictures taken illustrated the other employees' frustration with the event, and (3) the Facebook discussion directly came from these events. Even though none of the other employees "commented" on these pictures, the NLRB found the posting of the pictures was still concerted because it illustrated how all of the employees felt.

Yet another example of concerted activity is illustrated in the following case reviewed by the NLRB. It involved the discharge and threat of lawsuits against two employees who participated in a Facebook conversation, initiated by a former coworker, regarding the employer's tax withholding practices. One employee posted that she was upset because she now owed tax money and claimed the employer could

not even do paper work correctly. Another employee "liked" the status (a feature of Facebook and other social media sites), two customers joined the conversation, as did another employee who claimed the owner owed her money. This employee also then called the owner an expletive. The two employees were discharged and one received a letter threatening legal action unless she retracted her comments.

The NLRB concluded that these discussions on Facebook were protected concerted activity because: (1) the conversation related to shared concerns about a term and condition of employment and (2) prior to the Facebook conversation, this shared concern had been brought to the employer's attention. Even though the statements were defamatory, they did not lose protection.

From these cases, we can take away several generally-applicable rules:

1. Employees don't lose Section 7 protection if the issue had been previously discussed with coworkers prior to the discussion moving to Facebook;
2. Asking coworkers for their input on Facebook about work-related issues, in preparation for a meeting, is protected by Section 7 of the Act; and
3. Swearing, sarcasm, and defamation will not eliminate Section 7 protections.

And, there is one final implied rule, not stated above but dictated by prudence:

4. The NLRB's analysis is (and will continue to be) very fact-specific, so trying to get your situations to be as close to the above cases as possible improve the likelihood that an NLRB investigation of your situation will come to the same result.

Non-Concerted Activities

As stated above, the Act does not protect the activity of an employee when the employee was solely acting on his or her own behalf. The NLRB reviewed several investigations where they found no concerted activity protection.

The first investigation the NLRB reviewed involved an employee posting offensive "tweets" (messages) on Twitter. The newspaper employer encouraged employees to open Twitter accounts and to use social media to get news stories out. The employee chose his screen name, controlled the content of his tweets and listed in the biography section that he was employed by the newspaper, including a link to the newspaper's website. The employee tweeted comments critical of the paper's copy editors, was reprimanded, and complied. Several months later, the employee tweeted about homicides, criticizing an area TV station. The following day the web producer for that station emailed the paper; the employee apologized for the tweet. The employee was subsequently suspended and then terminated. The employer newspaper had no social media policy in place.

The NLRB concluded the employee's discharge did not violate the Act because he was terminated for writing inappropriate and offensive tweets that were not concerted protected activity. The messages did not involve co-workers or a collective concern, and the employee ignored his employer's warnings.

Similarly in another reviewed investigation, a bartender who posted a Facebook message about an employer's tipping policy was found to be not involved in a concerted activity. The employee had a conversation with a fellow employee about how they disliked the tipping policy. Subsequently, the employee had a conversation on Facebook with a relative regarding this tipping policy. He stated he hadn't had a raise in 5 years and called the customers derogatory names. No employees responded to the post. About a week later, he was fired.

The NLRB concluded that the Facebook post was not concerted activity because it did not involve other employees. Public forum conversations with non-coworkers is not considered protected concerted activity.

There are essentially only two things to consider when determining if something is protected concerted activity: Is the conversation about something work-related? If so, is it between co-workers? If these threshold requirements are met, it may be a protected concerted activity.
In addition to the NLRB's decisions regarding concerted activity, the NLRB also found many social media policies to be overly broad. A social media policy must be narrowly tailored with a legitimate purpose so as to not infringe upon employees' rights.

In one case, a hospital employer issued a social media policy with several overly broad conditions. Rule 4 of the policy prohibited employees from using any social media that may violate, compromise, or disregard the rights and reasonable expectations as to privacy or confidentiality of any person or entity. Rule 5 prohibited any communication or post that constitutes embarrassment, harassment or defamation of the hospital or of any hospital employee, officer, board member, representative, or staff member. Rule 6 contained a similar prohibition against statements that lack truthfulness or that might damage the reputation or goodwill of the hospital, its staff, or employees. One of the employees complained on Facebook about a co-worker that was constantly late and absent. The employer reprimanded the employee for "talking badly about the hospital" in violation of the hospitals social media policy.

The NLRB concluded Rule 4 provided no guidance to what the employer considered private or confidential. The hospital relied on this rule to charge the employee with violations that were clearly related to her working conditions. Because there were no limitations on Rule 4, it unlawfully prohibited protected behavior and was overbroad.

Similarly, Rules 5 and 6 were overbroad because they contained many terms that would commonly apply to protected criticisms of the employer's labor policies or treatment of employees. Some of the terms the NLRB found to be overly broad in these Rules were:

1. Inappropriate discussions
2. Defamation
3. Disparagement
4. Privacy
5. Confidentiality
6. Contact Information- Company name, address, etc.
7. Logos, photographs, uniform.

Generally, an employer will not want to include these terms in a social media policy unless limiting language or restrictions are used to explain and restrict the meanings of the policy. Additional limiting language that could potentially be used is stating clearly that nothing in the policy will be construed or applied in a manner that improperly interferes with employee's rights under Section 7 of the Act.

Lawful Social Media Provisions

Although the NLRB restricts what provisions a social media policy can contain and how they can be drafted, they have found that some social media policy provisions have been lawful.

For example, an employer grocery store made their public relations office responsible for all official external communications. Employees were expected to maintain confidentiality about sensitive information, and it was imperative that one person should speak for the employer to deliver an appropriate message and avoid giving misinformation. Furthermore, employees were directed to answer all media questions by replying that they were not authorized to comment for the employer or did not have the information being sought, to take the name and number of the media organization, and to call the public affairs office. The NLRB concluded that this media provision was not overly broad because it had a legitimate purpose (seeking to ensure a controlled company message) and limited the contact with the media only to the extent necessary to effect that result.

Similarly, an employer's ban on pressuring coworkers to use social media was not unlawful. This employer (also a supermarket chain) precluded employees from pressuring others to connect or communicate with them via social media. The NLRB concluded this provision could not reasonably be read to restrict section 7 activity because it was sufficiently specific and clearly applied only to harassing. Furthermore, it could not reasonably be interpreted to apply more broadly to restrict employees from attempting to "friend" or otherwise contact colleagues from the purposes of engaging in protected concerted activity.

The NLRB's Approach and Purpose of the Policy

The NLRB wants to ensure that employees and

employers are protected with the increased use of social media in the workplace and at home. The NLRB has stated that it will take special interest in cases involving the use, abuse and restriction of social media by employees and employers. This means that employees and employers should be aware of what is and is not an appropriate use of social media. In reality, this is going to be the responsibility of the employer to stay up to date regarding social media, and train their employees appropriately.

Sometimes, however, organized employees are held to task for the same reason. The NLRB found that an employee union inappropriately used social media in an attempt to coerce employees. In this case, a union business agent and three union organizers visited a non-union subcontractor's worksite. While there, they asked employees questions regarding their immigration status and posted the edited version of this video to the public on Facebook and YouTube.

The NLRB concluded that these actions violated the workers implicit protected right to work for a non-union employer. Furthermore, union threats to call immigration authorities, video-taping employees, and threats infringed on the workers' rights to not participate in a union.

Employer Tips

1. **Not having a Social Media Policy is just as dangerous as having a poor one.**
   As many of the cases above illustrate, having a poorly-tailored social media policy can land you in hot water. Having no social media policy can do the same. Without a social media policy, you open yourself up to the liability of employees misrepresenting the company, harassment between employees, and other issues. For example, without a social media policy employees could inappropriately harass one another via Facebook with no repercussion. **You can avoid this by…**

2. **Narrowly-tailor your Social Media Policy by using limiting language.**
   As stated above, you should have a narrowly-tailored social media policy. You should not use overly broad language and you should only restrict what is necessary to accomplish your goal. For example: If you don't want employees to speak with the media regarding the opinion of the employer, state exactly that, nothing more. Explain the reason as well, such as wanting one official opinion from the company instead of multiple different opinions. Not only should you narrowly tailor your policy to meet this goal, the goal should be clearly defined and its purpose should be explained and legitimate.

3. **Emphasize the legitimate purposes for your Social Media Policy.**
   A company cannot arbitrarily make a social media policy without a legitimate purpose. A legitimate purpose is one that would protect or promote the company without interfering with the rights of its employees. The example of not wanting multiple official opinions for your company would be considered a legitimate purpose and this should be emphasized for the reason of establishing a social media policy.

4. **Include language ensuring the employee of their rights under the NLRA.**
   Make sure that your policy contains language that communicates that the intent of the policy is not to infringe on an employee's rights under the NLRA. For example: "This policy should not be construed or applied in a manner that interferes with employees' rights under the National Labor Relations Act (NLRA)."

5. **Always consult counsel before taking action against an employee.**
   If an employee does violate a provision of your social media policy, you should always consult counsel before taking action. If you do not have counsel, now's a good time to retain some. The NLRB did establish some guidelines throughout the above cases, but they evaluated each situation on a case-by-case basis and will continue to make fact-specific findings on each new case presented to them. In addition, an employer should consult counsel before drafting a social media policy to best avoid overly broad language.

6. **Don't eliminate social media as a tool.**
   After reading the above, it may not even seem worth it to incorporate social media into an employer's business. Although it is a lot of work, social media can provide many benefits to a business. Social media creates more interest in

your company, attracts more people to your website and social media sites, makes it easier for potential and current customers to obtain valuable information about your company, can be targeted to reach your core demographic and allows people to interact with your company building a unique trust and customer loyalty in your company. Additionally, a well-written Social Media Policy with the help of counsel should primarily consist of generally-applicable policies that age well and don't require updating for the next big social media website.

Chapter 5

Best Practices for Employers

Avoiding Unionization

What drives employees to unionize in the first place? Though important, wages and benefits are not always the answer. More often, it's because work has become just that, work, and the employees are there because they must "work to live" rather than "live to work." Here then are the main union-motivational causes listed by human resources researchers:

- Poor supervision, which in turn creates poor employee morale and overall dissatisfaction, along with employee feelings of misunderstanding and lack of being appreciated
- Poor organizational structure, which lacks a clear chain of command that results in confusion of roles and responsibilities—both supervisors and employees might feel lost and powerless
- Failure to communicate, which leads to workplace dissatisfaction as the employees feel they have no voice and aren't getting the responses and answers they seek; not respecting employees and lacking an open-door policy on management's part often contribute
- Failure to get the employees to feel a sense of partnership by not consistently communicating company goals, changes in operations, and company successes and shortcomings
- Retaining poor employees who are a drag on others and breed resentment; worse, advancing "jerks" and poor employees into supervisory or higher positions; also, letting some employees "get away with murder" while sincere employees feel slighted and ignored
- Employee feelings of job insecurity, which is a tough one to avoid in these hard economic times when downsizings are widespread, as are contractions of operations, but reassurances must be conveyed to core employees that their jobs are safe (don't do this like sporting team owners who stand behind their coaches "110 percent" one day and fire them the next!)
- Failure to provide opportunities for advancement, which leads to a stagnant atmosphere, deterioration of enthusiasm, and a feeling of disconnect between employees and management
- Failure to reward and recognize employee contributions and successes, which can breed distrust and resentment

Obviously, then, the answer to staying union-free lies in not just avoiding the pitfalls listed above but also—and mainly—in creating a place of employment where people come to "live to work," or at least to feel they're part of a community that's joining hands to accomplish important goals. Work is as much a social experience as it is a center of economic production, so employers need to maintain policies and a work atmosphere that enable their employees to enjoy their experience rather than dread coming to work. This is admittedly a tall task, and as hard as one might try, be forewarned that, as those weight-loss infomercials often warn, "Results may vary," and even worse, "Results not typical."

What specifically do these highly paid attorneys and HR consultants advise during their training sessions? Recommendations generally fall into these five imperatives:

Conduct an Employee Relations Audit: Best done by an outside consulting agency so it's independent and unbiased, an employee relations audit will turn up what's really on your employees' minds—what drives them and what ticks them off. From the results of the audit, take action to correct whatever is in your power to correct. Aim for a happy, contented workforce, and put policies and procedures—and personnel—in place to ensure future, continual contentment. This initial audit is the single most important step in creating a place of work that renders unions unnecessary, provided the audit's findings are followed through and corrective actions are taken.

Train and/or Rearrange Your Supervisors: Virtually nothing can be more corrosive on your employees' morale than bad, indifferent, hostile or nonexistent supervision. Train your supervisors in both their management tasks and basic human relations; transfer or eliminate through layoff or early retirement supervisors who are deeply resented for all the right reasons, meaning they've earned their resentment. As Texas lawyer Michael Maslanka observes: "I have practiced labor and employment law for almost 30 years; untrained supervisors are the single biggest source of union organizing. Think management training is expensive? Try the alternative."

Review and Update All Policies: Again, you should aim for good if not great employee relationship policies. Make it clear in your policies that you aim to remain union free and back that up with effective, employee-friendly policies. A huge area of concern lies in problem solving and grievance airing. The Equal Employment Opportunity Commission (EEOC) has issued guidance that any system wherein the employee has only one avenue to complain—to his or her direct supervisor—is a system bound to fail. (What if the employee wants to complain about the supervisor?) Multiple avenues of grievance airing, or simply being able to complain to someone with authority rather than a co-worker, will help solve a lot of problems before they fester.

Other policy areas to review and reinforce include harassment and discrimination, health and safety, equal advancement, equal pay for equal work (it is the law), electronic communications (e-mail policy and Web usage), work attire, lunch and break times, overtime pay (and the proper classification of employees as exempt or non-exempt), even work schedules and parking plans. You get the idea—revamp and reinforce wherever necessary so each employee is treated uniformly and fairly with policies that are clear, sensible, understandable and enforceable. Then be sure to enforce the policies equally. Don't let "good old boy" networks develop and don't let anyone play favorites.

Recognize and Reward Employee Achievement: Nothing can be worse than having a staff or workforce that feels unappreciated. Even if the employees are highly compensated and enjoy a great benefits package, restlessness and even resentment can seep in if they are treated as mere cogs in a machine. Often the biggest motivators, however, come not in the form of cash rewards but in honest, sincere recognition for a job well done. In this regard, many firms rely on employee-of-the-month recognitions, but in no time this practice invariably becomes either a popularity contest or a cycle-through-everyone-once charade. While the recognized employee might get a jolt from the award (the first time anyway), the rest of the workers won't necessarily buy in and might see it as a useless exercise. This is not to say you should abandon the practice, but you need to supplement it with a real personal touch. Supervisors should be trained to recognize their employees' work and thank and congratulate them, while also correcting and disciplining them as necessary. Letting some employees get away with murder will lessen and cheapen any goodwill that comes from praising the others for their hard work. You need to develop the reputation—and reality—of running a fair and equal operation for all concerned. Union organizers immediately seize upon and exploit employees' feelings of unfair treatment and favoritism.

Above All, Communicate: Communication is a two-way street, and if you follow the steps above, the result should be a policy that fosters healthy communication by setting up clear channels and procedures, backed by trained, competent supervisors. You will also need to communicate specifically and directly about unions and about card check itself. Make it clear that the employees don't need an outside organization, least of all one that will take a chunk out of their paychecks each month, to speak for them and take over negotiating their job rights. The National Labor Relations Act (NLRA) even permits you to post and distribute a written anti-union policy. In the end, if you've done the previous steps thoroughly, correctly and consistently, you should be able to enlist your employees as your allies in the prevent-unionization struggle. However, if your employees remain disgruntled and not gruntled, as one blogger famously puts it, expect to see a stack of union cards plopped on your desk one day with the announcement, "Welcome to your new union. Let's negotiate."

Responding to Union Organizing

Sometimes, despite an employer's best effort to create an employee-friendly environment, a union will begin organizing in the workplace. When this stage occurs, an employer's focus needs to shift to preventing the union from gaining support. A labor union needs only 30% of employees to sign union cards in order to ask the NLRB to hold an election. As a general practice, unions will wait until they have at least 50% of employees signed up to request an election but they are able to do so after they have 30% support.

During this phase, an employer needs to be responding to employee complaints and attempting to resolve them before the union gains foothold. At the same time, it is important to begin laying the groundwork for the campaigning phase of the unionization. While an employer cannot threaten an employee or present consequences should they join a union, they can educate the employees of how things will change should a union be successful in developing (such as payment of fees). Likewise, it is wise to emphasize the positive aspects of employee relations programs that currently exist in the workplace. Should an employee wish to get their cards back from the union, an employer may tell the employee how to proceed with this process.

Once the election arrangements are made, an employer needs to campaign against the union by showing employees that their best interests are better served by rejecting the union. This can be tricky since saying the wrong thing can violate protections under the NLRA so employers may choose to involve competent legal counsel if they have not already done so. In addition, the employers should implement the following best practices:

Timing and Content of the Campaign should be decided by Management: Although this seems like common sense, some employers fall into the trap of letting the union dictate the details of the campaign. Make sure that the campaign is well thought-out and planned.

Be Proactive, Not Reactive: Employers sometimes feel that they need to respond to every move that the union makes with a move or argument of their own. But good timing and focus are critical elements and will likely produce better results than simply meeting the union pamphlet for pamphlet. Plan out the timing of the release of particular information to the employees and strategically direct the focus of the employees to certain issues.

Open the Campaign with a Strong Speech: A plant manager or other high ranking member of management should give the speech which informs employees that at the end of the campaign they will be asked to vote on a very important decision. The importance of their decision should be emphasized as well as management's interest in their decision. The speech should appeal to the employees' sense of fairness by asking them to keep an open mind throughout the process and weigh both sides.

Word the Speech in a way that Invites Communication: The speech should be worded so that when employees are asked if they have any questions, they also are invited to share their gripes. The information obtained from this solicitation will be helpful in developing campaign materials/arguments.

Create a Campaign Committee: The committee should be made up of about four people who meet frequently throughout the campaign to assess the situation and strategy. Confidentiality within the group is vital and while management support is important, they should not be directly involved in the campaign decision-making process. However, the committee should meet with management regularly to obtain information from them that will assist in strategy.

Give Employees Sufficient Information to make their Decision: Supply employees with the right types of information that will result in them voting against the union. For example, stress the existing employee benefits provided by the company and the company's excellent working conditions. This will also function to highlight the negative aspects of union membership.

Get Employees' Families Involved in the Campaign: Family involvement can be accomplished by sending literature to the home and encouraging employees to share the information with their family. For example,

tell them to discuss with their spouse what would be done in regard to economic loss in the case of a strike situation.

Have a Strong Twenty-Four Hour Speech: This speech is named to reflect the National Labor Relations Board's rule that employers are not allowed to give employees a speech during working hours the day before the election. The speech should reiterate the major themes of the campaign and the conclusion reached that the employees should vote against the union. Where possible, the speech should give a new piece of compelling information that the employees have not yet heard. It is also helpful if information can be given in which the union would have a difficult time refuting before the election.

The main thing for employers to remember is that preventing unionization is a strategy that needs the constant attention of management. Where employees are happy and feel that they have a voice in the company, they will be much less likely to want to bring in a union.

Chapter 6

Legislative Text

National Labor Relations Act

Also cited NLRA or the Act; 29 U.S.C. §§ 151–169 [Title 29, Chapter 7, Subchapter II, United States Code]

FINDINGS AND POLICIES

Section 1. [§ 151.] 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 lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by

(a) impairing the efficiency, safety, or operation of the instrumentalities of commerce;

(b) occurring in the current of commerce;

(c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or

(d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed

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 these obstructions when they have occurred 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.

DEFINITIONS

Sec. 2. [§ 152.] When used in this Act [subchapter]—

(1) The term “person” includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in cases under title 11 of the United States Code [under title 11], or receivers.

(2) 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.

[Pub. L. 93–360, § 1(a), July 26, 1974, 88 Stat. 395, deleted the phrase "or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual" from the definition of "employer."]

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act [this subchapter] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

(4) The term "representatives" includes any individual or labor organization.

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 8 [section 158 of this title].

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

(10) The term "National Labor Relations Board" means the National Labor Relations Board provided for in section 3 of this Act [section 153 of this title].

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

(12) The term "professional employee" means—

(a) any employee engaged in work

(i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work;

(ii) involving the consistent exercise of discretion and judgment in its performance;

(iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of

time;

(iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee, who

(i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and

(ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

(13) In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

(14) The term "health care institution" shall include any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged person.

[Pub. L. 93–360, § 1(b), July 26, 1974, 88 Stat. 395, added par. (14).]

NATIONAL LABOR RELATIONS BOARD

Sec. 3. [§ 153.]

(a) [Creation, composition, appointment, and tenure; Chairman; removal of members] The National Labor Relations Board (hereinafter called the "Board") created by this Act [subchapter] prior to its amendment by the Labor Management Relations Act, 1947 [29 U.S.C. § 141 et seq.], is continued as an agency of the United States, except that the Board shall consist of five instead of three members, appointed by the President by and with the advice and consent of the Senate. Of the two additional members so provided for, one shall be appointed for a term of five years and the other for a term of two years. Their successors, and the successors of the other members, shall be appointed for terms of five years each, excepting that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as Chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

(b) [Delegation of powers to members and regional directors; review and stay of actions of regional directors; quorum; seal] The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 9 [section 159 of this title] to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 [section 159 of this title] and certify the results thereof, except that upon the filling of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

(c) [Annual reports to Congress and the President] The Board shall at the close of each fiscal year make a report in writing to Congress and to the President summarizing significant case activities and operations for that fiscal year.

(d) [General Counsel; appointment and tenure; powers and duties; vacancy] There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than administrative law judges and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10 [section 160 of this title], and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. In case of vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person or persons so designated shall so act

(1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or
(2) after the adjournment sine die of the session of the Senate in which such nomination was submitted.

[The title "administrative law judge" was adopted in 5 U.S.C. § 3105.]

Sec. 4. [§ 154. Eligibility for reappointment; officers and employees; payment of expenses]

(a) Each member of the Board and the General Counsel of the Board shall be eligible for reappointment, and shall not engage in any other business, vocation, or employment. The Board shall appoint an executive secretary, and such attorneys, examiners, and regional directors, and such other employees as it may from time to time find necessary for the proper performance of its duties. The Board may not employ any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions except that any attorney employed for assignment as a legal assistant to any Board member may for such Board member review such transcripts and prepare such drafts. No administrative law judge's report shall be reviewed, either before or after its publication, by any person other than a member of the Board or his legal assistant, and no administrative law judge shall advise or consult with the Board with respect to exceptions taken to his findings, rulings, or recommendations. The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may, at the direction of the Board, appear for and represent the Board in any case in court. Nothing in this Act [subchapter] shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation, or for economic analysis.

[The title "administrative law judge" was adopted in 5 U.S.C. § 3105.]

(b) All of the expenses of the Board, including all necessary traveling and subsistence expenses outside the District of Columbia incurred by the members or employees of the Board under its orders, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the Board or by any individual it designates for that purpose.

Sec. 5. [§ 155. Principal office, conducting inquiries throughout country; participation in decisions or inquiries conducted by member]

The principal office of the Board shall be in the District of Columbia, but it may meet and exercise any or all of its powers at any other place. The Board may, by one or more of its members or by such agents or agencies as it may designate, prosecute any inquiry necessary to its functions in any part of the United States. A member who participates in such an inquiry shall not be disqualified from subsequently participating in a decision of the Board in the same case.

Sec. 6. [§ 156. Rules and regulations] The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act [by subchapter II of chapter 5 of title 5], such rules and regulations as may be necessary to carry out the provisions of this Act [subchapter].

RIGHTS OF EMPLOYEES

Sec. 7. [§ 157.] 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, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

UNFAIR LABOR PRACTICES

Sec. 8. [§ 158.]

(a) [Unfair labor practices by employer] It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title];

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6 [section 156 of this title], an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act [subchapter], or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act [in this subsection] as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) [section 159(a) of this title], in the appropriate collective bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) [section 159(e) of this title] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act [subchapter];

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [section 159(a) of this title].

(b) [Unfair labor practices by labor organization] It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce

(A) employees in the exercise of the rights guaranteed in section 7 [section 157 of this title]: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or

(B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to

discriminate against an employee in violation of subsection (a)(3) [of subsection (a)(3) of this section] or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a) [section 159(a) of this title];

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e) [subsection (e) of this section];

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 [section 159 of this title]: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9 [section 159 of this title];

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection (b) [this subsection] shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act [subchapter]: Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a)(3) [of this section] the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the

Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective-bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this Act [subchapter] any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act [section 159(c) of this title],

(B) where within the preceding twelve months a valid election under section 9(c) of this Act [section 159(c) of this title] has been conducted, or

(C) where such picketing has been conducted without a petition under section 9(c) [section 159(c) of this title] being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: Provided, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) [section 159(c)(1) of this title] or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b) [this subsection].

(c) [Expression of views without threat of reprisal or force or promise of benefit] The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act [subchapter], if such expression contains no threat of reprisal or force or promise of benefit.

(d) [Obligation to bargain collectively] For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) [paragraphs (2) to (4) of this subsection] shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a) [section 159(a) of this title], and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act [sections 158, 159, and 160 of this title], but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this section 8(d) [this subsection] shall be modified as follows:

(A) The notice of section 8(d)(1) [paragraph (1) of this subsection] shall be ninety days; the notice of section 8(d)(3) [paragraph (3) of this subsection] shall be sixty days; and the contract period of section 8(d)(4) [paragraph (4) of this subsection] shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in section 8(d)(3) [in paragraph (3) of this subsection].

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

[Pub. L. 93–360, July 26, 1974, 88 Stat. 395, amended the last sentence of Sec. 8(d) by striking the words "the sixty-day" and inserting the words "any notice" and by inserting before the words "shall lose" the phrase ", or who engages in any strike within the appropriate period specified in subsection (g) of this section." It also amended the end of paragraph Sec. 8(d) by adding a new sentence "Whenever the collective bargaining . . . aiding in a settlement of the dispute."]

(e) [Enforceability of contract or agreement to boycott any other employer; exception] It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: Provided, That nothing in this subsection (e) [this subsection] shall apply to

an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: Provided further, That for the purposes of this subsection (e) and section 8(b)(4)(B) [this subsection and subsection (b)(4)(B) of this section] the terms "any employer," "any person engaged in commerce or an industry affecting commerce," and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other employer," or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, That nothing in this Act [subchapter] shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) [Agreements covering employees in the building and construction industry] It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act [subsection (a) of this section] as an unfair labor practice) because

(1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act [section 159 of this title] prior to the making of such agreement, or

(2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or

(3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or

(4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: Provided, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act [subsection (a)(3) of this section]: Provided further, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e) [section 159(c) or 159(e) of this title].

(g) [Notification of intention to strike or picket at any health care institution] A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of section 8(d) of this Act [subsection (d) of this section]. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

[Pub. L. 93–360, July 26, 1974, 88 Stat. 396, added subsec. (g).]

REPRESENTATIVES AND ELECTIONS

Sec. 9 [§ 159.]

(a) [Exclusive representatives; employees' adjustment of grievances directly with employer] Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual

employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

(b) [Determination of bargaining unit by Board] The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act [subchapter], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not

(1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or

(2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit votes against separate representation or

(3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c) [Hearings on questions affecting commerce; rules and regulations]

(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees

(i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) [subsection (a) of this section], or

(ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a) [subsection (a) of this section]; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a) [subsection (a) of this section]; the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c) [section 160(c) of this title].

(3) No election shall be directed in any bargaining

unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act [subchapter] in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) [of this section] the extent to which the employees have organized shall not be controlling.

(d) [Petition for enforcement or review; transcript] Whenever an order of the Board made pursuant to section 10(c) [section 160(c) of this title] is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f) [subsection (e) or (f) of section 160 of this title], and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

(e) [Secret ballot; limitation of elections]

(1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and labor organization made pursuant to section 8(a)(3) [section 158(a)(3) of this title], of a petition alleging they desire that such authorization be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. [§ 160.]

(a) [Powers of Board generally] The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith.

(b) [Complaint and notice of hearing; six-month limitation; answer; court rules of evidence inapplicable] Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the

charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of title 28, United States Code [section 2072 of title 28].

(c) [Reduction of testimony to writing; findings and orders of Board] The testimony taken by such member, agent, or agency, or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act [subchapter]: Provided, That where an order directs reinstatement of an employee, backpay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2) [subsection (a)(1) or (a)(2) of section 158 of this title], and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become affective as therein prescribed.

[The title "administrative law judge" was adopted in 5 U.S.C. § 3105.]

(d) [Modification of findings or orders prior to filing record in court] Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) [Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides

or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) [Review of final order of Board on petition to court] Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

(g) [Institution of court proceedings as stay of Board's order] The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) [Jurisdiction of courts unaffected by limitations prescribed in chapter 6 of this title] When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by sections 101 to 115 of title 29, United States Code [chapter 6 of this title] [known as the "Norris-LaGuardia Act"].

(i) Repealed.

(j) [Injunctions] The Board shall have power, upon issuance of a complaint as provided in subsection (b) [of this section] charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court,

within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

(k) [Hearings on jurisdictional strikes] Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b) [section 158(b) of this title], the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

(l) [Boycotts and strikes to force recognition of uncertified labor organizations; injunctions; notice; service of process] Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 8(b) [section 158(b) of this title], or section 8(e) [section 158(e) of this title] or section 8(b)(7) [section 158(b)(7) of this title], the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: Provided further, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: Provided further, That such officer or regional attorney shall not apply for any restraining order under section 8(b)(7) [section 158(b)(7) of this title] if a charge against the employer under section 8(a)(2) [section 158(a)(2) of this title] has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: Provided further, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization

(1) in the district in which such organization maintains its principal office, or

(2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b)(4)(D) [section 158(b)(4)(D) of this title].

(m) [Priority of cases] Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of subsection (a)(3) or (b)(2) of section 8 [section 158 of this title], such charge shall be given priority over all other cases except cases of like character in the office where it is filed or to which it is referred and cases given priority under subsection (1) [of this section].

INVESTIGATORY POWERS

Sec. 11. [§ 161.] For the purpose of all hearings and

investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10 [sections 159 and 160 of this title]—

(1) [Documentary evidence; summoning witnesses and taking testimony] The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) [Court aid in compelling production of evidence and attendance of witnesses] In case on contumacy or refusal to obey a subpoena issued to any person, any United States district court or the United States courts of any Territory or possession, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

(3) Repealed. [Immunity of witnesses. See 18 U.S.C. § 6001 et seq.]

(4) [Process, service and return; fees of witnesses] Complaints, orders and other process and papers of the Board, its member, agent, or agency, may be served either personally or by registered or certified mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post office receipt or telegraph receipt therefor when registered or certified and mailed or when telegraphed as aforesaid shall be proof of service of the same. Witnesses summoned before the Board, its member, agent, or agency, shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

(5) [Process, where served] All process of any court to which application may be made under this Act [subchapter] may be served in the judicial district wherein the defendant or other person required to be served resides or may be found.

(6) [Information and assistance from departments] The several departments and agencies of the Government, when directed by the President, shall furnish the Board, upon its request, all records, papers, and information in their possession relating to any matter before the Board.

Sec. 12. [§ 162. Offenses and penalties] Any person who shall willfully resist, prevent, impede, or interfere with any member of the Board or any of its agents or agencies in the performance of duties pursuant to this Act [subchapter] shall be punished by a fine of not more than $5,000 or by imprisonment for not more than one year, or both.

LIMITATIONS

Sec. 13. [§ 163. Right to strike preserved] Nothing in this Act [subchapter], except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike or to affect the limitations or qualifications on that right.

Sec. 14. [§ 164. Construction of provisions]

(a) [Supervisors as union members] Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act [subchapter] shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

(b) [Agreements requiring union membership in violation of State law] Nothing in this Act [subchapter] shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

(c) [Power of Board to decline jurisdiction of labor disputes; assertion of jurisdiction by State and Territorial courts]

(1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act [to subchapter II of chapter 5 of title 5], decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: Provided, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

(2) Nothing in this Act [subchapter] shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.

Sec. 15. [§ 165.] Omitted. [Reference to repealed provisions of bankruptcy statute.]

Sec. 16. [§ 166. Separability of provisions] If any provision of this Act [subchapter], or the application of such provision to any person or circumstances, shall be held invalid, the remainder of this Act [subchapter], or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

Sec. 17. [§ 167. Short title] This Act [subchapter] may be cited as the "National Labor Relations Act."

Sec. 18. [§ 168.] Omitted. [Reference to former sec. 9(f), (g), and (h).]

INDIVIDUALS WITH RELIGIOUS CONVICTIONS

Sec. 19. [§ 169.] Any employee who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment; except that such employee may be required in a contract between such employee's employer and a labor organization in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious, nonlabor organization charitable fund exempt from taxation under section 501(c)(3) of title 26 of the Internal Revenue Code [section 501(c)(3) of title 26], chosen by such employee from a list of at least three such funds, designated in such contract or if the contract fails to designate such funds, then to any such fund chosen by the employee. If such employee who holds conscientious objections pursuant to this section requests the labor organization to use the grievance-arbitration procedure on the employee's behalf, the labor organization is authorized to charge the employee for the reasonable cost of using such procedure.

[Sec. added, Pub. L. 93–360, July 26, 1974, 88 Stat. 397, and amended, Pub. L. 96–593, Dec. 24, 1980, 94 Stat. 3452.]

Chapter 7

Additional Resources

National Labor Relations Board

Field Offices

Albany, New York 12207–235 (518) 431-4155
Leo W. O'Brien Federal Building,
Rm. 342
Clinton Avenue at North Pearl Street

Albuquerque, New Mexico 87102–218 (505) 248-5125
505 Marquette Avenue, NW.
Suite 1820

Anchorage, Alaska 99501-1936 (907) 271–5015
1007 W. Third Ave.
Suite 206

Atlanta, Georgia 30303-1531 (404) 331–2896
233 Peachtree Street, NE
Harris Tower, Suite 1000

Baltimore, Maryland 21202–4026 (410) 962–2822
The Appraisers Building, Eighth Floor
103 South Gay Street

Birmingham, Alabama 35205-2870 (205) 731–1062
3400 Ridge Park Place
1130 South 22nd Street

Boston, Massachusetts 02222–1072 (617) 565–6700
Boston Federal Office Building, Sixth Floor
10 Causeway Street

Brooklyn, New York 11201–4201 (718) 330–7713
One MetroTech Center, 10th Floor
Jay Street & Mytle Ave.

Buffalo, New York 14202–2387 (716) 551-4931
Federal Building, Rm. 901
111 West Huron Street

Chicago, Illinois 60606–5208 (312) 353–7570
200 West Adams Street
Suite 800

Cincinnati, Ohio 45202–3721 (513) 684–3686
Federal Office Building, Rm. 3003
550 Main Street

Cleveland, Ohio 44199–2086 (216) 522–3716
Anthony J. Celebrezze Federal Building, Rm. 1695
1240 East Ninth Street

Commonwealth of the
Northern Mariana Islands (CNMI) (607) 233-NLRB
Saipan, c/o U.S. Dept. of Labor,
lst Floor Kallingal Building (6572)
AAA-4035 Box 100001, Saipan, MP 96950

Denver, Colorado 80202–5433 (303) 844–3551
7th Floor, North Tower
600 17th Street

Des Moines, Iowa 50309–2103 (515) 284–4391
Federal Building, Rm. 439
210 Walnut Street

Detroit, Michigan 48226–2569 (313) 226–3200
Patrick V. McNamara Federal Building,
Rm. 300
477 Michigan Avenue

E1 Paso, Texas 79923 (915) 565-2470
Federal Building, Suite C403
700 East San Antonio Avenue

Fort Worth, Texas 76102–6178 (817) 978-2921
Federal Office Building Rm. 8A24
819 Taylor Street

Grand Rapids, Michigan 49503–3022 (616) 456–2679
Rm. 330
82 Ionia NW.

Hartford, Connecticut 06103–3599 (860) 240–3522
21st Floor
280 Trumbull Street

Hato Rey, Puerto Rico 00918–1720 (809) 766–5347
Federico Degatau Federal Building
U.S. Courthouse, Rm. 591
150 Carlos E. Chardon Avenue

Honolulu, Hawaii 96850–4980 (808) 541-2818
Rm. 7245
300 Ala Moana Boulevard

Houston, Texas 77002–2649 (713) 209-4888
Mickey Leland Federal Building
1919 Smith Street, Suite 1545

Indianapolis, Indiana 46204–157 (317) 269–7430
Minton-Capehart Federal Building,
Rm. 238
575 North Pennsylvania Street

Jacksonville, Florida 32202–4412 (904) 232-3768
Federal Building, Rm. 214
400 West Bay Street
Box 35091

Las Vegas, Nevada 89101–6637 (702) 388–6416
Suite 400
600 Las Vegas Boulevard South

Little Rock, Arkansas 72201–3489 (501) 324-6311
TCBY Tower, Suite 375
425 West Capitol Ave.

Los Angeles, California 90064 (310) 235-7352
11150 W. Olympic Boulevard
Suite 700

Los Angeles, California 90024–5449 (213) 894-5200
888 South Figueroa Street
Ninth Floor

Memphis, Tennessee 38104–3627 (901) 544-0018
Mid-Memphis Tower Building,
Suite 800
1407 Union Avenue

Miami, Florida 33130–1608 (305) 536–5391
Federal Building, Rm. 1320
51 SW. First Avenue

Milwaukee, Wisconsin 53203–2211 (414) 297–3861
Henry S. Reuse Federal Plaza, Suite 700
310 W. Wisconsin Avenue

Minneapolis, Minnesota 55401–2221 (612) 348–1757
Towle Building, Suite 790
330 Second Ave., South

Nashville, Tennessee 37203–3816 (615) 736–5921
810 Broadway,
Third Floor

Newark, New Jersey 07102–2570 (973) 645-2100
20 Washington Place
Fifth Floor

New Orleans, Louisiana 70112–3723 (504) 589–6361
Rm. 610
1515 Poydras Street

New York, New York 10278–0104 (212) 264–0300
Jacob K Javits Federal Building,
Rm. 3614
26 Federal Plaza

Oakland, California 94612–5211 (510) 637-3300
Room 300N
1301 Clay Street

Overland Park, Kansas 66212-4677 (913) 967-3000
Suite 100
8600 Farley Street

Peoria, Illinois 61602–1246 (309) 671–7080
Suite 200
300 Hamilton Boulevard

Philadelphia, Pennsylvania 19106–4404 (215) 597–7601
One Independence Mall
Seventh Floor
615 Chestnut Street

Phoenix, Arizona 85004-3099 (602) 640-2160
Suite 1800
2600 North Central Ave.

Pittsburgh, Pennsylvania 15222–4173 (412) 395-4400
William S. Moorehead Federal Building,
Rm. 1501
1000 Liberty Avenue

Portland, Oregon 97204-3170 (503) 326–3085
601 SW Second Avenue
Suite 1910

St. Louis, Missouri 63103–2829 (314) 539-7770
Room 8.302
1222 Spruce Street

San Antonio, Texas 78205–2040 (210) 472-6140
615 East Houston Street
Room 565

San Diego, California 92101–2939 (619) 557–6184
Suite 418
555 W. Beech Street

San Juan, Puerto Rico (787) 766-5347
LaTorre de Plaza, Suite 1002
525 F.D. Roosevelt Ave.

San Francisco, California 94103–1735 (415) 356-5130
901 Market Street
Suite 400

Seattle, Washington 98174–1078 (206) 220-6300
Henry M. Jackson Federal Building
Rm. 2948
915 Second Avenue

Tampa, Florida 33602-5824 (813) 228–2641
South Trust Plaza, Suite 530
201 E. Kennedy Boulevard

Tulsa, Oklahoma 74103-3027 (918) 581–7951
Room 318
224 South Boulder Avenue

Washington, D.C. 20037–1560 (202) 208-3000
Franklin Court Building, Suite 5530
1099 14th Street

Winston-Salem, North Carolina 27106-3325
(336) 63l–5201
Republic Square, Suite 200
4035 University Parkway
or P.O. Box 11467
Winston-Salem, NC 27116-1467

Organization Chart of NLRB*

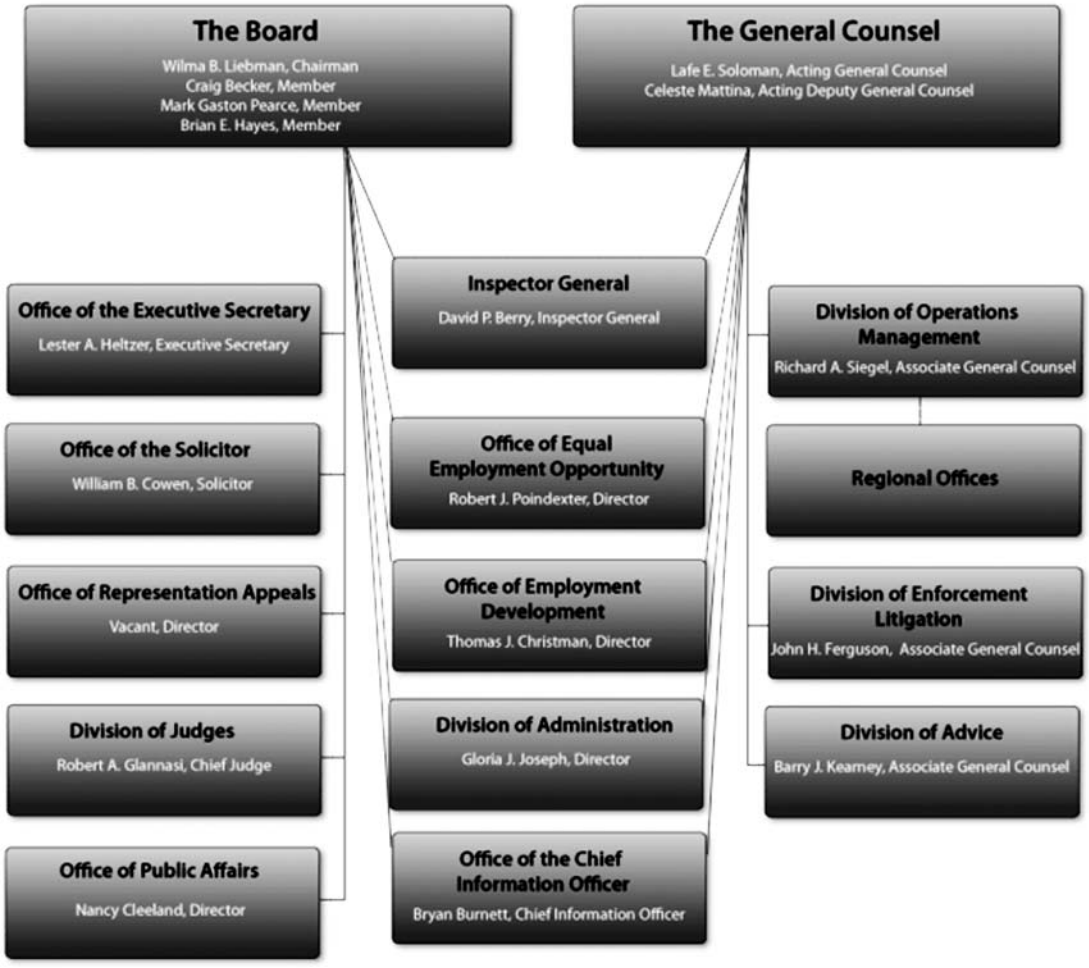


*Chart current as of September 2011