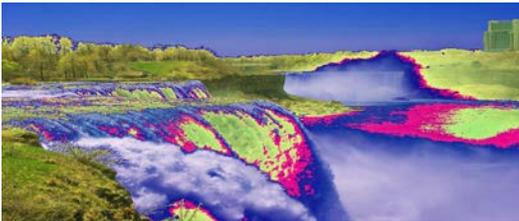




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# NLRB Region 3

## Outreach



**December 2013**

*Tenth Edition*

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### Regional Director's Corner



Since we last issued our newsletter, the Region has been very busy with adjusting to the electronic case tracking system, performing numerous outreach activities, and catching up from the delays caused by the government shutdown. I am pleased to report all our elections, hearings and investigations are on track and timely and we look forward to continuing to meet with you and your constituent groups to discuss the issues they face under the Act and how we can better serve you effectively and efficiently. We are currently planning a conference to be held in the Spring 2014 with Cornell University, and look forward to discussing the new Board and General Counsel agendas during the conference. To assist us in our mutual interest in the timely processing of your charges, I urge you to file your documents with us electronically whenever possible, through our website at [NLRB.gov](http://NLRB.gov). You can also communicate with our staff electronically by contacting them through their email addresses which all are in the same format: first name.lastname@nlrb.gov.

In our last newsletter, we highlighted our Hispanics United of Buffalo case, where the Board found that employees were unlawfully terminated for engaging in protected concerted activity on Facebook. I am pleased to report that the case was settled in circuit court mediation and soon will be closed on compliance. The Region also settled over 90 percent of our meritorious cases and successfully litigated several cases, two of which are discussed in this newsletter.

• **How to File a Charge:**

Anyone may file an unfair labor practice charge with the NLRB. To do so, they must submit a charge form to any Regional Office or, they may file electronically through the Board's website at [www.nlr.gov](http://www.nlr.gov). The form must be completed to identify the parties to the charge as well as a brief statement of the basis for the charge. The charging party must also sign the charge.

• Forms are available for download from the NLRB website. They may also be obtained from an NLRB office. NLRB offices have information officers available to discuss charges in person or by phone, to assist filling out charge forms, and to mail forms.

• You must file the charge and serve it on the charged party within 6 months of the unfair labor practice.

• **When a Charge is Filed:** The NLRB Regional Office will investigate. The charging party is responsible for promptly presenting evidence in support of the charge. Usually evidence will consist of a sworn statement and documentation of key events.

• Please promptly present your evidence in support of any charge you file.

• The Region will ask the charged party to present a response to the charge, and will further investigate the charge to establish all facts.

• After a full investigation, the Region will determine whether or not the charge has merit.

**(Regional Director's Corner Continued)**

As always, I welcome you to contact us to discuss any issues you may have or if you would like us to meet with you or your constituent groups. I wish you all a safe, happy and healthy holiday season and hope to see you soon at one of our outreach events.

Rhonda P. Ley,  
Regional Director, Region 3

**Successful Coffee with the Chairman!**

On September 16, 2013, Region 3 hosted a well-attended "Coffee with the Board" with special guest speaker, and Region 3 alumnus, Board Chairman Mark Gaston Pearce. The local labor community gathered to hear Chairman Pearce's remarks about the newly confirmed 5-member Board. Chairman Pearce's comments were insightful and interesting. We share some photographs from the event below.



### **After the Region Makes a Determination**

If the Region determines that a charge has no merit—that the charged party has not violated the Act—it will dismiss the charge unless the charging party withdraws the charge. The charging party has the right to appeal a dismissal.

If the Region determines that a charge has merit—that the charged party has violated the Act—it will attempt to settle the case. Unless there is a settlement, the Region will proceed to trial before an administrative law judge to obtain a finding of a violation and an order directing the charged party to undertake remedial actions. The charged party has appeal rights, with a final decision subject to appeal to a federal court.

### **Remedies for Violations**

When there has been a violation, the Act does not impose fines or other direct penalties. Rather, it requires a make whole remedy to correct the violation and its effects.

**NLRB** remedies require those who have violated the Act to cease the violation, to inform employees that they will respect their rights, to reinstate employees who have been unlawfully fired, and to pay compensation for lost earnings.

### **Richard F. Griffin, Jr. Sworn in as NLRB General Counsel**

Richard F. Griffin, Jr. was sworn in as General Counsel of the National Labor Relations Board (NLRB) for a four year term. Mr. Griffin was nominated by President Barack Obama in August and was confirmed by the U.S. Senate on October 29, 2013. He replaces Lafe E. Solomon, who had been Acting General Counsel since June 2010.

Before becoming the NLRB's General Counsel, Mr. Griffin was a Board Member with the NLRB from January 9, 2012 through August 2, 2013. Prior to that time, he held leadership roles with the International Union of Operating Engineers, serving as its General Counsel, and was a member of the board of trustees of its Central Pension Fund. Mr. Griffin is a fellow of the College of Labor and Employment Lawyers and started his legal career as Counsel to various Board Members from 1981-1983.

The Office of the General Counsel is independent from the Board and is responsible investigating and prosecuting unfair labor practice cases, conducting secret ballot elections to determine whether employees desire union representation and for the general supervision of the NLRB field offices across the country.

### **The National Labor Relations Board has Five Senate Confirmed Members**

For the first time since August 21, 2003, the National Labor Relations Board has a full complement of five Senate confirmed members. Four new members, all nominated by President Barack Obama and confirmed by the U.S. Senate have been sworn into office. NLRB Chairman Mark Gaston Pearce was also confirmed to an additional five year term on the Board. Biographies of the five members of the Board are below:

Mark Gaston Pearce is currently Chairman of the NLRB, a position he has held since August 2011. He has served as a Member of the NLRB since March 2010. Mr. Pearce was a founding partner at Creighton, Pearce, Johnsen & Giroux and previously a partner at Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria LLP. From 1979 to 1994, he was a district trial specialist for the NLRB in Buffalo, NY. He has served by appointment of the Governor as a Board Member of the New York State Industrial Board of Appeals, and he has taught labor studies courses at Cornell University's School of Industrial Labor Relations Extension. Mr. Pearce received a B.A. from Cornell University and a J.D. from State University of New York at Buffalo. Board Chairman Pearce was sworn in for a term ending August 27, 2018, and the President has designated him to continue to serve as Chairman.

Nancy Schiffer was Associate General Counsel to the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) from 2000 to 2012. Previously, she was Deputy General Counsel to the United Auto Workers (UAW) from 1998 to 2000. She also worked as

## How to File a Representation Petition

Filing NLRB representation petitions can be simple and convenient. An NLRB Information Officer can assist you in completing a petition form. Our contact information is on page one of this newsletter. If you complete the petition yourself, keep in mind these helpful tips:

- Know which Regional office will handle your petition. Region 3 covers all of New York except New York City, Long Island, Orange, Putnam, Rockland and Westchester Counties. Persons may also obtain service at Region 3's Resident Office located in Albany, New York.
- Prepare your petition on our website at: [www.nlr.gov](http://www.nlr.gov) (filing instructions detailed).
- Know the job titles used by the Employer and the employee shift schedules.
- Provide the Region with authorization/membership cards (or other proof of interest) signed and dated by at least 30 percent of the employees in the petitioned-for unit.
- Although 91% of elections are conducted pursuant to election agreements, be prepared for a hearing by knowing: (1) the employer's operations; (2) the community of interests of various employee job categories; and (3) who the "supervisors" are. Hearings are typically held 10-14 days from date the petition was filed.
- Be prepared for the election to be conducted within 42 days from the date the petition was filed.
- Always call the assigned Board agent with questions or concerns.

## (Five Members Continued)

Associate General Counsel for the UAW from 1982 to 1998. Earlier in her career, Ms. Schiffer was a staff attorney in the Detroit Regional Office of the National Labor Relations Board and worked as an attorney in private practice. Ms. Schiffer received her B.A. from Michigan State University and her J.D. from the University of Michigan Law School. Board Member Schiffer was sworn in on August 2, 2013, for a term ending December 16, 2014.

Harry I. Johnson, III was a partner with law firm Arent Fox LLP, a position he held since 2010. Previously, Mr. Johnson worked at the Jones Day law firm as a partner from 2006 to 2010 and as an associate from 1994 to 2005. In 2011, he was recognized by The Daily Journal as one of the "Top Labor & Employment Attorneys in California." Mr. Johnson received a B.A. from Johns Hopkins University, an M.A.L.D. from Tufts University's Fletcher School of Law and Diplomacy, and a J.D. from Harvard Law School. Board Member Johnson was sworn in on August 12, 2013 for a term that expires on August 27, 2015.

Kent Hirozawa was chief counsel to NLRB Chairman Mark Pearce. Before joining the NLRB staff in 2010, Mr. Hirozawa was a partner in the New York law firm Gladstein, Reif and Meginniss LLP, where he advised clients on a variety of legal and strategic issues, including Federal and state labor and employment law matters. Mr. Hirozawa previously served as a field attorney for the NLRB from 1984 to 1986. He was a pro se law clerk for the U.S. Court of Appeals for the Second Circuit from 1982 to 1984. He received a B.A. from Yale University and a J.D. from New York University School of Law. Board Member Hirozawa was sworn in on August 5, 2013 for a term that expires on August 27, 2016.

Philip A. Miscimarra was a partner in the Labor and Employment Group of Morgan Lewis & Bockius LLP, a position he held since 2005. Since 1997, Mr. Miscimarra has been a senior fellow at the University of Pennsylvania's Wharton Business School. Mr. Miscimarra worked at Seyfarth Shaw LLP as a partner from 1990 to 2005 and as an associate from 1987 to 1989. Mr. Miscimarra received a B.A. from Duquesne University, an M.B.A. from the University of Pennsylvania's Wharton School of Business, and a J.D. from the University of Pennsylvania Law School. Board Member Miscimarra was sworn in on August 7, 2013 for a term that expires on December 16, 2017.

It was our pleasure to interview two of the new Board members – Harry I. Johnson, III and Philip A. Miscimarra.

**Section 7 of the National Labor Relations Act (NLRA) gives employees the rights to:**

- Form, join, or assist a union
- Choose representatives to bargain with your employer on your behalf
- Act together with other employees for their benefit and protection
- Choose not to engage in any protected activities

**Non-Union Protected Concerted Activity**

**Q:** Does the NLRA protect activity with other employees for mutual aid or protection, even if you don't currently have a union?

**A:** Yes. For instance, employees not represented by a union, who walked off a job to protest working in the winter without a heater were held by the Supreme Court to have engaged in concerted activity that was protected by the NLRA and that they could not be lawfully discharged for such action.

**Interview With Board Member Harry Johnson, III**

**“I am thrilled to be here and will try my utmost to serve the public.”**



- Q. How did you make your way from Boston where you attended Harvard Law School to California?
- A. After law school I began working at Jones Day in D.C., from 1994-1997. In 1998, I relocated to California, in part to gain some experience living in other areas of the country. The main reason I moved however, was that my girlfriend, now my wife, is a native California girl and wanted to settle there. I stayed with Jones Day in the California office.
- Q. What led you to pursue a career specializing in labor law?
- A. I took an employment law course in law school that I was very interested in. As a first-year associate at Jones Day, I was not assigned to a specific practice department. I rotated around and found labor law to be the most interesting and exciting practice area. Jones Day had a large employment practice and I spent almost 80% of my time practicing straight labor law.
- Q. What if anything surprised you about the Senate confirmation process?
- A. I am a political novice, never been a public official and so had not gone through anything like that process before. We (those of us being confirmed to the Board) met with every Senator who wanted to meet with us. I discovered that Senators are extremely busy people and able to switch gears on very complex issues such as immigration quickly. During the confirmation hearing itself, I tried to look at ease even with the bright lights on my face.
- Q. What goals do you have as a Board member?
- A. I want to be a credit to the Agency and maintain high decisional quality so that in 20 years people will still pay attention to what we have written. The staff is a big part of that. I also value efficiency, and issuing decisions in a timely manner. In addition I want to be an advocate for the Agency personnel out in the field, on the front lines, who interface with the public we serve. We can't lose sight of their critical role in the Agency.
- Q. This is the first time in 10 years that there has been a full complement of five Senate-confirmed Board members. What can we anticipate?

### Don't Tell Me I Can't Talk About My Wages!

The National Labor Relations Act (NLRA) protects the rights of both unionized and non-unionized employees. The NLRA protects employee rights to join and support unions where they work, to participate in protected concerted activities with other employees, and to refrain from participating in such activities. Under the NLRA, two or more employees have the right to act together to raise workplace issues with their employer or to press for changes in wages or other working conditions. Such employee's actions are known as protected concerted activities.

Employer rules which have a tendency to chill employees in the exercise of these rights violate the NLRA. In this regard, the Board has held, among other things, that employers may not prohibit employees from discussing their own wages or attempting to determine what other employees are paid. The mere maintenance and announcing of these rules is a violation, even if these rules are not enforced. Juniper Medical Center Pavilion, 346 NLRB 650 (2006).

### (Interview with Member Johnson, III Continued)

- A. We will be deciding a full docket of cases which include those presenting a number of new issues. We have a steady assembly-line of cases coming through.
- Q. What are the "hot areas" facing the Board in your opinion?
- This remains to be seen, other than I am certain there will continue to be a lot of protected/concerted activity cases.
- Q. How can the Board better serve the public and how do you hope to accomplish that?
- A. I think there is a great opportunity through social media to conduct outreach and publicize the mission of the Agency. The new NLRB mobile app was a great step and will help increase the Agency's visibility. I think I will try to make decisions that are helpful as a guide for parties as to the reasons behind a decision. I have a management background and advised companies to be proactive. With my management background I have insight into how real companies work. If we want to ensure compliance with the Act, the decisions that issue must state a standard, or rule that can be comprehended and followed. I think this should be possible because this Board is comprised of members who are all practitioners with the experience to understand the concepts and implications for unions and employers.
- Q. How do you see the role of the Board changing in the next decade if at all?
- A. People have floated ideas about how the Board should be reformed but I am not aware of any definite legislation percolating down. Throughout the history of the Act there have always been attempts to reform the Board.

### Interview with Board Member Philip A. Miscimarra

- Q. What was your first job out of law school?
- A. I was an associate at Reed Smith Shaw & McClay (now Reed Smith LLP) in Pittsburgh, beginning in 1982. I had significant early career exposure to NLRB Region 6 in Pittsburgh, and I was fortunate to have the opportunity at Reed Smith to work with William Bevan – an extremely talented labor lawyers and still a good friend – who had previously been the Deputy Regional Attorney in NLRB Region 6.
- Q. What led you to pursue a career specializing in labor law?

**REGION 3 STAFF**

All staff can be contacted via email using the following format: [firstname.lastname@nlrb.gov](mailto:firstname.lastname@nlrb.gov)

**Buffalo Office**

- Jesse Feuerstein, Field Attorney
- Renee Hutt, Field Examiner
- Michael Israel, Regional Attorney
- Barbara Keough, Office Manager
- Sandra Larkin, Compliance Officer
- Linda Leslie, Field Attorney
- Rhonda Ley, Regional Director
- Mary Mattimore, Deputy Regional Attorney
- Thomas Miller, Field Examiner
- Paul Murphy, Assistant to the Regional Director
- Patricia Petock, Field Examiner
- Alicia Pender, Field Attorney
- Lillian Richter, Supervisory Field Attorney
- Nicole Roberts, Field Attorney
- Claire Sellers, Field Attorney
- Patricia Wideman, Field Examiner

**Albany Resident Office**

- Barnett Horowitz, Resident Officer
- John Grunert, Field Attorney
- Gregory Lehmann, Field Attorney
- Kelly Moore, Field Examiner
- David Turner, Field Examiner

**(Interview with Member Miscimarra Continued)**

**“The public is always best served if the Board applies legal standards that everyone can understand without resorting to litigation.”**



- A. Multiple factors moved me into a career focusing on labor law. I was raised in Western Pennsylvania, which has a very rich labor-management relations history. In college, I worked as a pianist, arranger and musical director, represented by Local 60-471 of the American Federation of Musicians. In graduate school, I worked at a research center devoted to labor relations and human resources issues: the Industrial Research Unit at the University of Pennsylvania’s Wharton Business School (now the Wharton Center for Human Resources). And when I attended the University of Pennsylvania Law School, the faculty included three incredible labor law scholars: Professors Robert Gorman, Clyde Summers, and Howard Lesnick.
- Q. How does your MBA degree assist in understanding labor law?
- A. I have always been fascinated by the degree to which labor and management issues are interdependent: almost all employees work within some type of organization, and all organizations can accomplish their objectives only through the people who are employed there. Employees also have important rights that often require balancing the interests of employees, unions and employers. I found that my MBA has always contributed to my understanding of these matters.
- Q. What if anything surprised you about the Senate confirmation process?
- A. Prior to my confirmation hearing, many Senators and Committee staff members met with all five then-pending NLRB nominees at the same time. Notwithstanding the controversy and divergent views that have been associated with the NLRB for so many years, all of the nominees were extremely gracious in our dealings with one another, and I found that the senators and staff members were also very respectful and constructive in these meetings.
- Q. What goals do you have as a Board member?
- A. I want to apply the law in a manner consistent with the Act, to work constructively with my fellow members, and to effectively serve all of the parties that are subject to the Act.
- Q. This is the first time in 10 years that there has been a full complement of five Senate confirmed Board members – what can we anticipate?

**Learn More: Visit Us Online!**

The NLRB website, [www.nlr.gov](http://www.nlr.gov), contains a great deal of additional information about the protections of the Act, Board policies and procedures, and how to contact the nearest Regional Office.

**Region 3 Has its Own Web Page**

You can now access link the [Region 03 Web Page](#) through the NLRB website, [www.nlr.gov](http://www.nlr.gov) using the find your Regional Office link. Or use the link provided in this article.

On the [Region 03 Web Page](#) you can find upcoming events that are planned in Region 3 as well as recent outreach activities and Regional Office news.

**(Interview with Member Miscimarra Continued)**

- A. I anticipate that the Board will be extremely busy based on some important cases that have been pending for some time. Many decisions will involve agreement among all of the participating Board members. However, in areas where members do not agree, the current Board consists of extremely experienced labor lawyers with very diverse backgrounds, and where each Board member already has significant experience resolving disagreements over difficult issues in bargaining and other contexts. So I believe our decisions are likely to reflect a thorough and thoughtful consideration of different views.
- Q. What are the “hot areas” facing the Board in your opinion?
- A. It is difficult to suggest that any pending issue is more important than others, because every case is “hot” for the parties awaiting a Board decision. Our docket includes many issues that have already garnered significant attention, including the Roundy’s case (dealing with union access to private property). There is also the possibility of further rulemaking regarding representation election issues, which has been publicly discussed many times in the past two years by Chairman Pearce. Many other pending cases continue to involve the extent to which social media policies and other employer rules are permissible or whether they unlawfully restrict protected activities. Of course, there is also significant ongoing interest in the Supreme Court Noel Canning litigation dealing with prior recess appointments to the Board.
- Q. How can the Board better serve the public and how do you hope to accomplish that?
- A. The public is always best served if the Board applies legal standards that everyone can understand without resorting to litigation. I hope to work with fellow members to render decisions that will hopefully diminish the need for litigation before the Board and the courts. This may involve continuing to give effect to some NLRA principles that have been unchanged for decades, often with Congressional approval, which tends to foster greater predictability.
- Q. How do you see the role of the Board changing in the next decade if at all?
- A. One fascinating aspect about labor law is the fact that so many NLRB cases are not that different from cases decided 50 or 60 years ago by the Board. Yet, other cases involve applying the Act in circumstances that could not possibly have been envisioned when the Act was adopted in 1935. Much of the Board’s work in the next decade (and even in the next weeks and months) will involve trying to deal with both types of cases and all of the cases that fall in between, while remaining faithful to the balance struck by Congress in the statute that we have the responsibility to enforce.

## Our New Electronic Filing System is in Place

The entire Agency has transitioned from its old Case Automated Tracking System (CATS) to an integrated web-based database and case management system code-named "NxGen." In NxGen, all case documents will be uploaded into the system so that they may be retrieved electronically. Documents not received electronically must be manually scanned into the system. Accordingly, we ask that whenever possible you submit documents to us in electronic form. Your assistance will be greatly appreciated!!

## NLRB Launches Mobile App

The NLRB announced the launch of a new mobile app, available free of charge for iPhone and Android users. The app provides employers, employees and unions with information regarding their rights and obligations under the National Labor Relations Act.

"The National Labor Relations Act guarantees the right of workers to join together, with or without a union, to improve their working lives," notes NLRB Chairman Mark Gaston Pearce. "The promise of the law can only be fulfilled when employers and employees understand their rights and obligations. With this app, we are using 21st Century technology to inform and educate the public about the law and their rights."

Last year, the NLRB received more than 82,000 public inquiries regarding workplace issues. "It is clear that the American people have questions about the law," Pearce said. "This app can help provide the answers."

The app provides information for employers, employees and unions, with sections describing the rights enforced by the National Labor Relations Board, along with contact information for NLRB regional offices across the country. The app also details the process the NLRB uses in elections held to determine whether employees wish to be collectively represented.

## Litigation News

Region 3 received favorable administrative law judge (ALJ) decisions since the last newsletter. If you are interested, you can find the full text of the decisions on the Board's website, [www.nlrb.gov](http://www.nlrb.gov) under the "cases & decisions" tab.

In E.I. DuPont de Nemours, Case 3-CA-90637, the Region achieved a full win on the merits. This case presented a novel issue never litigated before, involving whether a make-whole remedy of reinstatement and backpay should be sought for an employee who was discharged because of perceived inconsistent answers he provided during investigative interviews at which he was unlawfully denied a Weingarten representative. The case is pending before the Board on the General Counsel's exceptions to the ALJ's failure to grant a reinstatement remedy. The case was litigated in the Buffalo office by attorney Jesse Feuerstein.

The Region secured a partial win before the Board in Local 471, Rochester Regional Joint Board, 360 NLRB No. 5 (July 16, 2013). The Board found, in agreement with the ALJ, that Respondent violated Section 8(b)(1)(A) and (2) by unlawfully retaliating against a member who supported a rival union. The Board reversed the ALJ on the second allegation, where the ALJ had found that Respondent had negotiated a change in a contractual provision involving banquet staffing assignments to

## NLRB Releases Videos on Website

In its continuing effort to enhance the public's ability to transact business with the Agency, the NLRB now features the following videos on our site at [www.nlr.gov](http://www.nlr.gov):

“**Introduction to the NLRB Public Website**, which provides viewers with a guided tour of the Agency's website; **How to use CiteNet**, which explains how to use the Agency's electronic legal research database of Board and court decisions dating from 1002; and the “**Representation Case**” video, which is designed to inform the public about the role of the Agency in conducting elections.

## (Litigation News Continued)

favor a union steward and disadvantage a dissident union member. The case was litigated by attorney Al Norek from the Albany Resident Office.

In **Olean General Hospital**, Case 03-CA-097918, the General Counsel alleged that Olean General violated Section 8(a)(1) and (5) of the Act by unilaterally implementing a program in which bargaining unit nurses acted as clinical teachers for nursing students from Alfred State University. The primary issue was whether it was sufficiently different from similar programs with other nursing schools, to require notice and an opportunity to bargain with the union. The General Counsel also alleged that Olean General failed to provide information to the union concerning the program with Alfred State and concerning a survey that was conducted at the hospital by the Joint Commission on Accreditation of Healthcare Organizations and the deficiencies in that survey. The ALJ found that Olean General violated Section 8(a) (1) and (5) of the Act on all the allegations alleged by the General Counsel. The case is pending before the Board on exceptions. The case was litigated in the Buffalo office by attorney Linda Leslie.

The Region also received a full win in **Mountainside Farms, a Division of Worcestercreameries Corp.**, Case 03-CA-097023 in a decision by ALJ Kenneth Chu. The General Counsel alleged that Mountainside Farms violated Section 8(a)(1) and (5) of the Act by unilaterally implementing a new health insurance plan and changing the wages of unit employees before bargaining with the union to a good faith impasse. The case presented difficult issues involving whether the parties were at impasse during the course of bargaining. In addition, the case involved an analysis of whether impasse was broken even if it had occurred. The ALJ determined that Mountainside Farms violated the Act when it unilaterally implemented changes in its health insurance coverage, employee contributions to the health plan and wage rates when the parties were not at impasse. The case was litigated by attorney Greg Lehmann from the Albany Resident Office. The Employer has filed exceptions to the Board.

## Workplace Rules, an Evolving Discussion

By: **Barney Horowitz, Albany Resident Officer**

Few areas of the law have received more recent attention than the subject of the rules and policies that govern the workplace. In part this can be attributed to the advent of social media and the creation by employers of new policies to address this modern phenomenon. Perhaps a larger reason is the ubiquity of these concerns which are applicable to virtually every private sector workplace regardless of whether the employees are currently represented by a union or seeking to be. Whatever the reason, a number of cases have issued since the start of the year that provide some guidance.

### Our Service Standards

- We will attempt to answer your questions about the case, consistent with the confidentiality rights of the other persons and the Privacy Act.
- If necessary we will provide bilingual services if we are given sufficient notice of that need.
- We will provide the same treatment to all persons regardless of race, sex, religion, national origin, age, political affiliation, sexual orientation or disability.
- Our facilities are accessible to persons with disabilities. Please let us know if you will need an accommodation.

If you wish, you may be represented by an attorney or other representative of your choice.

### (Workplace Rules Continued)

In DirectTV, 359 NLRB No. 54 (2013), the Board found four work rules maintained by the Employer to be unlawful: a prohibition on contact with the media; a restriction on communication with Board agents; a confidentiality clause that prohibited disclosure of “employee records”; and a prohibition on the release of “company information.” The first two rules were struck as they limited clearly protected communications, and the latter two because they were too open-ended and ambiguous and could be reasonably understood as limiting communications to which employees had a Section 7 right. Interestingly, the Board upheld a rule restricting the use of company equipment including e-mail, relying on Register Guard, 351 NLRB 1110 (2007), but with Members Pearce and Griffin questioning whether Register Guard was correctly decided.

In Quicken Loans, 359 NLRB No. 141 (June 21, 2013), the Board found the Employer’s non-disparagement handbook rule was unlawful because employees would reasonably construe its broad prohibitions as encompassing Section 7 activity. It also found the rule that precluded disclosure on the grounds of confidentiality of “personal information of co-workers” and “handbooks, personnel files, personnel information such as home phone numbers, cell phone numbers, addresses, and email addresses” was overbroad.

A case from 2012, Banner Health System, 358 NLRB No. 93 (July 30, 2012), generated much comment after the Board held that the Employer could not maintain or enforce a rule precluding employees from discussing with each other ongoing investigations. The Board held that the Employer’s concern for the integrity of its investigations was insufficient to outweigh employees’ Section 7 rights.

In a subsequent memorandum (GC 13-04, March 19, 2013) the Acting General Counsel provided some valuable guidance as to what would cleanse an unlawful policy by stating it had authorized settlement of an unlawful rule with the addition of a few words that limited the employee's obligation to maintain confidentiality to only those employer investigations where such confidentiality was reasonably required. The Division of Advice Memorandum in Verso Paper (Case 30-CA-089350) is also instructive. Footnote 7 sets forth language on modifying a rule to lawfully advise employees about confidentiality concerns.

In a 2012 case, D.R. Horton, 357 NLRB No. 184 (January 3, 2012), the Board invalidated mandatory arbitration agreements that include class action waivers as an infringement of an employee’s Section 7 right to engage in concerted activities. The case has been controversial. There have since been numerous administrative law judge decisions striking down these class action waivers, e.g. Gamestop Corp, JD(SF) 42-13 (August 29, 2013) and Cellular Sales of Missouri, JD-57-13 (August 19, 2013). However, in

**Contact the Region:**

There is always an information officer available at an NLRB Regional Office to answer general inquiries or to discuss a specific workplace problem or question. The information officer can offer information about the Act and advice as to whether it appears to be appropriate to file an unfair labor practice charge. If filing a charge does appear to be appropriate, the information officer can assist in completing the charge form.

The information officer at Region 3 may be reached by telephone at:

1-866-667-6572  
(Toll free)

or

716-551-4931 (Buffalo)  
518-431-4155 (Albany)

**Para información en Español llame al:**

1-866-667-6572  
(Toll free)

**TOLL FREE NUMBER:**

The Agency also has a toll free telephone number that offers a general description of the Agency's mission, referrals to other related agencies and access to an Information Officer based upon the caller's telephone number. A Spanish language option is also available. Toll free access is available by dialing:

(TTY) 1-866-315-NLRB (1-866-315-6572) for hearing impaired.

**(Workplace Rules Continued)**

matters unrelated to the NLRA, several circuits have declined to follow the D.R. Horton principles. Most recently, on December 3, 2013, the Fifth Circuit reversed the Board's decision in D.R. Horton, holding that the Board wrongly concluded that D.R. Horton violated the Act by requiring employees to sign an arbitration agreement that prohibited an employee from pursuing claims in a collective or class action. The Court found that the Board failed to give "proper weight" to the Federal Arbitration Act. However, it also upheld the Board's ruling requiring D.R. Horton to clarify that the arbitration agreement does not preclude employees from pursuing unfair labor practices with the Board. This case may ultimately end up before the Supreme Court.

These are just a few of the more recent work rule/policy cases. As we go forward with a full Board, there will be no shortage of material for the next newsletter edition on the subject.

**Welcome Aboard!**

**Region 3 Extends a Warm Welcome to the Following New Staff Members**



Tom Miller originally joined Region 3 in June of 2011 as a Co-Op Student Field Examiner. He then returned to Indiana University of Pennsylvania and received an M.A. in Employment and Labor Relations. In May of 2012, he was hired by Region 14 in St. Louis, Missouri as a Field Examiner. In August of 2013, he returned to Region 3. The Region is excited to have him back!

Region 3 is happy to welcome new field attorney Alicia Pender. Alicia is a 2013 graduate of Washington University in St. Louis Law School, where she was a member of the Labor and Employment Law Society, the Women's Law Caucus, and served as Secretary of the Black Law Students Association. During law school, Alicia interned at the New York State Office of the Attorney General both in the Litigation Bureau in Albany, NY and the Labor Bureau in Manhattan. She was a summer law clerk for the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW). She also interned part-time for the American Civil Liberties Union of Missouri and was research assistant to labor and family law professor Marion G. Crain, Vice



**(Workplace Rules Continued)**

Provost and Director of the Center for the Interdisciplinary Study of Work and Social Capital. Prior to attending law school, Alicia graduated from Vassar College with a major in French and Francophone Studies and a minor in Chinese Language. Alicia is very excited to kick off her legal career at Region 3 in Buffalo!

Region 3 is delighted to welcome John Grunert, a new field attorney joining us in the Albany Resident Office. Prior to joining the Agency, John served as an attorney for the Communications Workers of America in New York. John attended New York Law School, where he graduated cum laude and participated in the Labor & Employment Law Society. John also attended the Cornell University School of Industrial and Labor Relations, where he earned a B.S. During law school, John clerked at the CWA union in New York and the United Food and Commercial Workers International Union in Washington, DC. John also completed a post-graduate fellowship at the firm of Lewis, Clifton & Nikolaidis P.C. John is originally from Long Island and he is excited to be in Albany to begin work with the Board.



**Farewell!**

Aaron Sukert transferred to Cleveland, Region 8 and Kevin Kitchen accepted a promotion to Supervisory Attorney in Region 29, Brooklyn. The Region would like to wish them the best of luck!

**Rhonda P. Ley, Regional Director**  
National Labor Relations Board, Region 3