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**INSIDE
THIS
ISSUE:**

Marty's Soapbox, Board Nominees	1, 2
Lawful or Unlawful Handbilling?	3
Application of Special Remedies	4,5
NLRB Website	6
Judy Garlington Retirement	7
Birmingham Bits, Introducing Lanita Cravey	8
Alabama Labor-Mgt Conference, Food Drive	9
Filing Charges and Petitions, Reader Comment and Feedback	10
Speakers, Office Contact Information	11, 12

Region 10

PERSPECTIVE

An Outreach publication issued by Region 10, National Labor Relations Board, Atlanta, Georgia, our Birmingham, Alabama Resident Office and Knoxville, Tennessee Resident Agent.

Marty's Soapbox

RD Martin Arlook



WHY A DIFFERENT YARDSTICK?

In the RC, RM and RD elections the Agency runs, as is the case in political elections, the union, the person, the entity or the proposition that receives a majority (in some cases a plurality) of the *votes cast*, prevails. However, when it comes to UD elections, i.e. those conducted to determine whether a union's authority to enter into a union security agreement should be rescinded, a majority of *those eligible* to vote is required in order to carry that result. Of course, since Georgia, Alabama and Tennessee, the states within Region 10's jurisdiction, are all right-to-work states, UD elections could only be conducted in Federal enclaves therein. Nevertheless, why the disparate criterion?

In the political sphere, could many be actually elected if the standard were a majority of eligible, i.e. registered, voters? Does not such a standard reward those who choose to stay home over those who exercise their democratic right to cast a ballot? Surprisingly and somewhat illogically, in my view, the phrase "majority of the employees eligible to vote" is not found where one would rightly expect, under the Act's heading, "Representatives and Elections," specifically Section 9(e) thereof which deals only with UD elections. Rather, those words are found in that part of the Act dealing with "Unfair Labor Practices," namely, in the first proviso to Section 8(a)(3) which allows for a union security agreement unless a UD election was held and a majority of those *eligible to vote* rescinded the union's authority to make such an agreement. Clearly, the utilization of this unique voting standard makes it considerably more difficult to excise a union security clause from a collective bargaining agreement than it is to win a political election or vote a union in or out; an anomaly or purposeful?

President Obama Nominates Craig Becker, Mark Pearce and Brian Hayes to Board

President Barack Obama has nominated Craig Becker, Mark Pearce, and Brian Hayes as members of the NLRB. None of the three nominations have as yet been confirmed by the Senate.

Mr. Becker currently serves as Associate General Counsel to both the Service Employees International Union and the American Federation of Labor & Congress of Industrial Organizations. He graduated summa cum laude from Yale College in 1978 and received his J.D. in 1981 from Yale Law School, where he was an Editor of the Yale Law Journal. After law school he clerked for the Honorable Donald P. Lay, Chief Judge of the United States Court of Appeals for the Eighth Circuit. For the past 27 years, he has practiced and taught labor law. He was a Professor of Law at the UCLA School of Law between 1989 and 1994 and has also taught at the University of Chicago and Georgetown Law Schools. He has published numerous articles on labor and employment law in scholarly journals, including the Harvard Law Review and Chicago Law Review, and has argued labor and employment law cases in virtually every federal court of appeals and before the United States Supreme Court.

Mr. Pearce has been a labor lawyer for his entire career. He is one of the founding partners of the Buffalo, New York law firm of Creighton, Pearce, Johnsen & Giroux where he practices union-side labor and employment law before state and federal courts and agencies, including the N.Y.S. Public Employment Relations Board, Equal Employment Opportunity Commission, the U.S. Department of Labor, and the National Labor Relations Board. Pearce in 2008 was appointed by the NYS Governor to serve as a Board Member on the New York State Industrial Board of Appeals, an independent quasi-judicial agency responsible for review of certain rulings and compliance orders of the NYS Department of Labor in matters including wage-and-hour law. Pearce has taught several courses in the labor studies program at Cornell University's School of Industrial Labor Relations Extension. He is a Fellow in the College of Labor and Employment Lawyers. Prior to 2002, Pearce practiced union-side labor law and employment law at Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria LLP. From 1979 to 1994, he was an attorney and District Trial Specialist for the NLRB in Buffalo, NY. Pearce received his J.D. from State University of New York, and his B.A. from Cornell University.

Mr. Hayes currently serves as the Republican Labor Policy Director for the U.S. Senate Committee on Health, Education, Labor and Pensions (HELP). Previously, Mr. Hayes was in private legal practice for over twenty-five years. His practice was devoted exclusively to representing management clients in all aspects of labor and employment law. He has represented employers in scores of cases before the National Labor Relations Board, the Equal Employment Opportunity Commission, and various state fair employment practice agencies. He has served as chief trial counsel in the full range of employment claims in both state and Federal courts. Mr. Hayes has extensive experience in negotiating labor contracts on behalf of management clients, as well as representing clients in arbitrations, mediations and other forms of alternative dispute resolution. He has argued a number of significant labor cases before the Federal Courts of Appeal; and regularly counseled clients regarding compliance with the full range of state and Federal labor laws including OSHA, FMLA, Title VII and the Fair Labor Standards Act. Before entering private practice, Mr. Hayes clerked for the Chief Judge of the National Labor Relations Board and thereafter served as Counsel to the Chairman of the NLRB. In addition to his private practice Mr. Hayes was a member of the adjunct faculty at Western New England Law School where he taught classes in Labor Law, Collective-Bargaining, Arbitration and Employment Litigation. He is a member of the Massachusetts and District of Columbia bars, and the American Bar Association and its Labor and Employment Law Section. Mr. Hayes earned his undergraduate degree from Boston College and his law degree from Georgetown University Law Center.

Lawful Handbilling or Unlawful Secondary Activity?

By FA Frank Rox.

Area standards handbilling and/or picketing have been an ongoing part of the Region 10 labor scene for several years. Often these efforts have included banners containing the words “Shame on You” and handbills containing pictures of rats and a union’s definition of a rat in a “labor context”. In many cases, it has not been clear, without further inquiry, as to the identity of the employer with whom the union had its primary dispute. On other occasions, there has been some accompanying contemporaneous picketing but usually the cases have involved just handbilling and bannering. So, is this conduct legal or illegal?

These cases typically involve balancing a union’s right, under the First Amendment of the U.S. Constitution, to publicize its claim that an employer is not paying its employees area standard wages and benefits and a neutral employer’s right to enjoy the use of its property without becoming embroiled in a labor dispute over which it has no control. Because of the unsettled nature of the law in these cases, Regions are under instructions, pursuant to OM Memorandum 06-42 and GC Memorandum 07-11, to submit to the Division of Advice all possible meritorious cases involving union bannering or the display of an inflated rat. Of course, if other inflated objects or the use of “street theater” is employed by a union, that particular factual scenario must also be presented to Advice. Typical evidence obtained by the Region in this type of investigation includes the following:

- Location of the banner/rat, including distance from the neutral’s entrances
- Language on the banner,, and language, if any, on or near the rat
- Whether union agents are present, and if so, where in relation to the banner/rat
- Whether bannering or rats are accompanied by hand-billing
- If hand billing is being conducted concurrently, language on the handbill
- Other access to the neutral facility where bannering is not present
- Whether banner/rat follows lawful or unlawful picketing, and the duration of any hiatus between them
- Whether bannering /rat is ongoing to date
- Duration and time of banner/rat is displayed in relation to when neutral employees, suppliers, or customer are present.
- Is bannering activity having any impact on the neutral, and if so, the nature of the impact
- Additional evidence indicating whether the banner/rat activity is confrontational – e.g. – accompanying threats, blocking ingress or egress, patrolling, noise , and size to the banner or rat.

In addition to the above, within the past several months the Region was required to determine what recent efforts the union had engaged in to determine whether the employer, in fact, was or was not paying area standard wages and benefits and if those efforts did or did not support the union’s claims on its handbills.

Finally, a related issue was recently raised as to whether an employer had committed unlawful conduct by calling the police in response to such bannering. Generally, calling the police in response to protected conduct is considered unlawful absent good cause. Given the outstanding question as to whether bannering is protected conduct, an argument was raised that calling the police in such situations is not unlawful. The question remains unsettled as the investigation failed to establish that the employer had, in fact, called the police.

The General Counsel's Special Remedies Initiative: A View from the Ground BY FA John Doyle

Where violations of the Act occur, such as unlawful discharge of Union supporters, interrogations of employees about union activities, other coercive statements to employees, or refusals to bargain in good faith, the Board's ordinary remedies include the posting of a Notice to Employees, backpay with interest, reinstatement, and, of course, a directive to cease the unlawful conduct. Sometimes these cures are insufficient to restore employees' confidence in their rights, as unlawful conduct by an employer or union can have a lingering effect in the workplace.

For this reason, the Board's General Counsel, Ronald Meisburg, has made it a priority for field offices to identify circumstances where it is appropriate to seek additional remedies, such as preliminary injunctions, notice readings, union access to bulletin boards at employer facilities, supplying unions updated listings of the names and addresses of employees eligible to vote in NLRB elections, and expedited bargaining schedules. In this issue of the *Perspective*, we will update you about the recent use of certain special remedies, and some noteworthy ordinary remedies, that have come about recently in the Region.

Case and type:

Tuscaloosa Resources, Inc., Interference with Union Organizing Campaign

Remedies achieved:

Notice to Employees posted and read

On April 30, 2009, the Regional Director approved a settlement agreement that brought about a notice reading in addition to the posting of a notice to employees. The Regional Director had issued a complaint seeking a notice reading, updated names and addresses, and the furnishing of bulletin boards at the facility for use by individuals designated by the union to post materials. The Region was in the process of seeking authorization from the General Counsel to seek a preliminary injunction when the case settled.

Case and type:

Atlantic Services and Southeastern Industrial – allegedly unlawful hiring practices

Remedies achieved:

Hiring of two individuals, consideration of three applicants for employment, back pay, conclusion of a strike

On May 29, 2009, the Regional Director approved a settlement agreement that resulted in two joint employers, who were performing electrical contracting work on a job-site in Gadsden, Alabama, making offers of employment to Jackie Barclay and Terry Sweeney, two union electricians whom the union claimed were denied hire because of their union affiliation, and giving consideration for employment to three other union electricians, Michael Prickett, Edward Richter, and David Usry.
(CONTINUED ON NEXT PAGE)

The General Counsel's Special Remedies Initiative: A View from the Ground (CONTINUED FROM PAGE 4)

The settlement resulted in the payment of a total of \$25,000 in back pay to Mr. Barclay and Mr. Sweeney, and to Tony Land, Andrew Gorecki, and Christopher Sweeney, whom the employers had hired, but whose hiring the charges alleged the employers had delayed due to union activities on the job-site. Following the Regional Director's approval of the settlement agreement, the union involved concluded a strike it had staged against the employers and participants returned to work. The Region had decided to prosecute an administrative complaint in the proceeding, prior to settlement.

Case and type:

Decatur Cold Storage, Interference with Union Organizing Campaign

Remedies achieved:

Back pay and Notice to Employees posting

On August 3, 2009 the Regional Director approved a settlement agreement that resulted in the payment of \$30,000 in back pay to Patrick Medlock and Lloyd Cuskaden, whom the Regional Director determined had been discharged in January 2009 because of their union organizing activities. The settlement included the posting of a Notice to Employees. The Region was preparing to undertake administrative litigation in the matter and to seek authorization from the General Counsel to seek a preliminary injunction from the United States District Court prior to settlement.

Case and type:

United Plywood. Interference with Union Organizing Campaign

Remedies achieved:

Notice to Employees posting and reading, bulletin board access, names and addresses, back pay

On August 31, 2009 the Regional Director approved a settlement agreement that provided for a notice reading, the employer furnishing bulletin boards for employees designated by the union to post materials, updated names and addresses to the union, and the payment of \$13,500 to Kenneth Stewart, whom the Regional Director had concluded was discharged because of his efforts to seek union representation at his work place. At the time of the settlement, the Region was prepared to issue administrative complaint and to seek authorization for injunction proceedings.

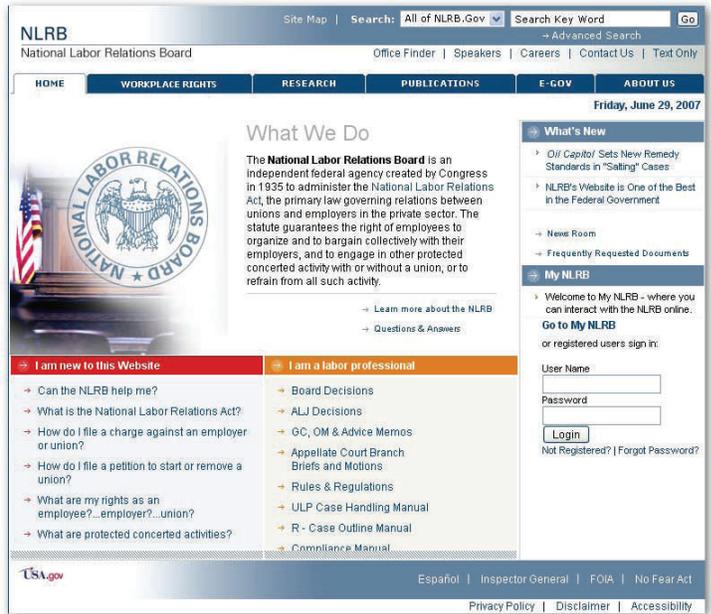
The Region remains committed to looking beyond standard remedies to find ways to meaningfully remedying violations of the Act and restoring employee confidence in their rights under the Act where appropriate.

Have you recently visited the NLRB online?

Our highly recognized website is user friendly and contains a wealth of useful information. Most case-related documents may now be filed through the website with the field offices, as well as the Division of Judges, General Counsel’s Office of Appeals, and the Board’s Executive Secretary’s Office. The redesigned website also provides several options for conducting legal research.

Here’s a quick peek:

From the “I am a labor professional” section on the homepage, you will find links to great resources, including:



1. Casehandling Manuals: a great place to begin any research project as they contain the Board’s policies and procedures for unfair labor practice, representation, and compliance cases.
2. Rules and Regulations: provide the procedural guidelines for the Board’s processes, including various deadlines and how different documents may be submitted and served on other parties, including which documents may be filed or Served by fax.
3. Decisions by the Board, ALJs, and Regional Directors: the most recent legal precedents and how they are being applied.
4. General Counsel Memoranda: the GC’s stance on novel issues and legal issues of particular interest dating back to 1973. Find insight into what the GC looks for in a quality investigation – for example, see GC 08-06 which includes checklists for investigation of different types of ULP allegations.
5. Operations Management Memoranda: updates to the Agency’s policies in memos dating back to 1985 – for example, see OM 08-54, Grosvenor Orlando Associates, LTD, which describes a discriminatee’s obligation to search for work after a discharge.
6. Advice Memoranda: information on the General Counsel’s position on issues for which there is not clear legal precedent.

Here’s a link to a video tour of the website: http://www.nlr.gov/nlr/shared_files/media/SiteTour/SiteTour.html



Waving Goodbye



Field Examiner Judy Garlington Years of Service 1974-2009



Thanks for your great service. Have a wonderful retirement!

On November 3, 2009, Region 10 will be waving good-bye to **Senior Field Examiner Judy Garlington**, after 35 years of dedicated service to the National Labor Relations Board. Judy began her career at the Board's headquarters in Washington, D.C. in 1974, as a dictating machine transcribing operator. Soon thereafter, Judy was promoted to a paralegal position working for Board Member John A. "Doc" Penello. In November 1976, Judy joined the Region 10 staff as a clerical employee. In 1980, Judy became the first Region 10 clerical employee to successfully complete the Agency's bridge program, an accomplishment which resulted in her promotion to a professional employee. Over the next 29 years, in addition to her duties as a field examiner, Judy served as both a local and national officer for the National Labor Relations Board Union (NLRBU), with eight of those years as a national executive committee member.

After working long enough to see computers take the place of dictating machines and countless Board members come and go, Judy is looking forward to joining her new husband in South Georgia. Her immediate retirement plans include a Part II honeymoon to Cape Town, South Africa. Upon returning home, she plans to pursue her love of the out-of-doors and start a vegetable garden, enjoy her horses and dogs and take a well-deserved break. Long term plans include pursuing her interest in local broadcast radio. Above all else, Judy eagerly looks forward to having time to fully devote to her family, including the upcoming arrival of a new great-granddaughter.



Birmingham Bits



C. Douglas
Marshall
Resident
Officer

This issue will not feature Region 10 alums but instead will look at the humanitarian/charitable side of the agents in the Birmingham office.

Greg Powell, field attorney, was chairman of the Sickle Cell 13th Annual Walk in Birmingham and this and other fund raisers of the Foundation provide support for the 13 county area in central Alabama. Greg also volunteers and helps prepare and serve lunch every fifth Sunday at the Men's Fire Shelter. This program serves homeless men, many of whom have substance abuse problems, and they feed 200 every lunch. Other church and civic groups staff the other Sundays.

Field Examiner Belinda Bennett has long volunteered through the New Rising Star Church to counsel economically challenged individuals and recently designed and presented a program to 100 individuals on identity theft, managing credit cards and wise, proper use of debit cards to manage limited resources.

Introducing Our Newest Field Examiner

Our newest Field Examiner is Lanita Cravey, a native of Opp, Alabama. Lanita graduated from Birmingham-Southern College in 2000 with a Bachelor of Science Degree. After graduation, she joined the United States Navy and received her commission in December 2000 via Officer Candidate School in Pensacola, Florida. Lanita served in the U.S. Navy for three years.

In 2003, Lanita began working in the Birmingham Resident Office of the National Labor Relations Board. While working full-time, she earned a Masters Degree of Business Administration in 2007 from the University of Alabama in Birmingham. In April 2009, Lanita was converted to her current position as a Labor Management Relations Examiner via the Bridge Program.



Lanita is a member of the Alabama and Northwest Florida chapter of the Crohn's and Colitis Foundation of America and active in fund raising and educational efforts in support thereof. Lanita Cravey has championed the Crohn's & Colitis Walk, a fund raiser for the Alabama & N.W. Florida Chapter of the Crohn's and Colitis Foundation of America (CCFA). There is no known cure and it affects 1 of every 200 people. The inaugural walk last year and the second annual walk in the Birmingham area raised over \$92,000 and had over 300 walkers present. Lanita and other agents in the Birmingham office designed T shirts and walked as a team raising funds for the event.

Lanita and her six year old son, Luke, enjoy spending quality time together playing sports, swimming, fishing, and engaging in any activities near the beach.

Region 10 Attends Alabama Governor's Labor/Management Conference

The 25th Annual Governor's Labor/Management Conference was held at the Grand Hotel at Point Clear, Alabama June 7-11, 2009.

The Region's Birmingham Resident Office has provided a public service information exhibit at the conference since its early years. This year's exhibit, staffed by **Field Examiner, Lanita Cravey**, included a video presentation of the agency's mission and web site as well as informative brochures.

The Conference, which is jointly hosted by the Alabama Department of Labor and the Federal Mediation and Conciliation Service, had its beginning in May 1985. The Conference brings together labor and management employees in a relaxed atmosphere to discuss issues of a common nature. Speakers are selected to present issues common to both management and labor such as FMLA, drug testing, workplace security, and health care cost, etc. American made products are highlighted and especially Alabama produced goods. Delegate and guest attendance has grown to over 500, making Alabama's Labor Management Conference one of the most successful in the South.

Donating to Those in Need

The Region and Resident Office are proud to announce their recent involvement in the "Feds Feed Families" drive, which involved a call by the Office of Personnel Management's for a nationwide goal of gathering one million pounds of food for those in need from June 1 through August 28, 2009. The Region and Resident Office efforts, respectively were ably led by **Field Attorneys Lisa Henderson** and **Kathy Chahrouri**.



Throughout the month of August, in response to Lisa's continued encouragement, staff members and management in Atlanta, piled cans, boxes and bags into two large barrels delivered by the Atlanta Community Food Bank. By time the drive ended just before Labor Day, the Regional Office had collected 419 pounds of macaroni and cheese, pasta, peanut butter, canned tuna, soup, juice boxes, cereal and other non-perishables to be distributed throughout our community.

Inspired by Lisa's efforts in Atlanta both this year and in past years, Kathy coordinated a joint effort between the Resident Office and an EEOC office located in the same building to assist in the drive. Throughout the month of August, she encouraged employees to donate generously with weekly emails and brightly colored progress charts decorating the office. By the end of the drive, employees of the Birmingham Resident Office had collected over 200 pounds of food to be donated to the Birmingham Community Food Bank. Combined with the 100 pounds of food collected by the EEOC, the joint effort resulted in over 300 pounds of food for those in need in the Birmingham local community. Because of the success of this joint effort, EEOC has invited the Birmingham Resident Office to join with them in some of their upcoming annual holiday charitable projects. Our Resident Office agents look forward to working together with their fellow federal employees to brighten the coming holidays for those in need.

The Region thanks Lisa and Kathy for their superb leadership in spearheading these efforts.

Filing Charges or Petitions

Unfair labor practice and petition forms are available for download from the NLRB Website at www.nlr.gov. Forms may also be obtained from any NLRB regional office.

Pre-filing assistance is available daily from 8:00 am to 4:30 pm in Atlanta (eastern time) and Birmingham (central time) in person or by phone. (See page 11 for contact information.) Our information officers can provide information as to which forms to use, how they should be completed, and generally discuss unfair labor practice and representation issues.



READER QUESTIONS, COMMENTS AND FEEDBACK

We need your help in providing the best Perspective possible! Accordingly, we invite your questions, suggestions, comments and feedback. Please forward them to **ARD Chip Harrell**, at claude.harrell@nlrb.gov. Disclaimer: We cannot respond to questions on active cases and any responses by us are not intended to constitute specific legal guidance. We reserve the right to limit or edit any submissions.

We have two questions for this edition:

1. What is the status of EFCA?

According Senate Majority Leader Harry Reid, the debate over health care reform has pushed consideration of the Employee Free Choice Act (EFCA) off the Senate docket, possibly for the rest of the year.

2. What restrictions may a labor organization have on resignations from union membership?

The short answer to this question is none. Generally, employees are free to resign from union membership at any time and any restriction to limit or prevent such resignations by unions or employers is unlawful. These prohibitions do not apply, however, to the payment of union dues. All of the states within Region 10 are Right to Work states. In Right to Work states any agreement for compulsory union membership is unlawful. An exception is made for federal enclaves, which generally involve military bases. Even in Right to Work states employees may voluntarily choose to join a union. Often when they join, they sign agreements in which they agree to pay dues. Those agreements can lawfully require the continuation of dues payments for certain periods even after members resign from the union. Generally, there is an annual window period during which members must express their desire to no longer pay dues. Labor organizations when confronted with an untimely request to cease collecting dues must advise the employee of the dates of such window periods.

Contact Information

Region 10, Atlanta Regional Office
 Suite 1000, The Harris Tower
 233 Peachtree St, NE
 Atlanta, Georgia 30303
 Phone: (404) 331-2896
 Toll-Free Phone: (866) 667-NLRB (6572)
 Fax: (404) 331-2858 (50 page limit on faxes)
 Web: www.nlr.gov
 For the Hearing Impaired: (866) 315-6572

Birmingham Resident Office
 Ridge Park Place, Suite 3400
 1130 South 22nd Street
 Birmingham, Alabama 35205
 Phone: (205) 933-2018
 Fax: (205) 933-3017 (50 page limit on faxes)

*** Please contact the Region if you wish to be added to or deleted from our newsletter distribution list.*

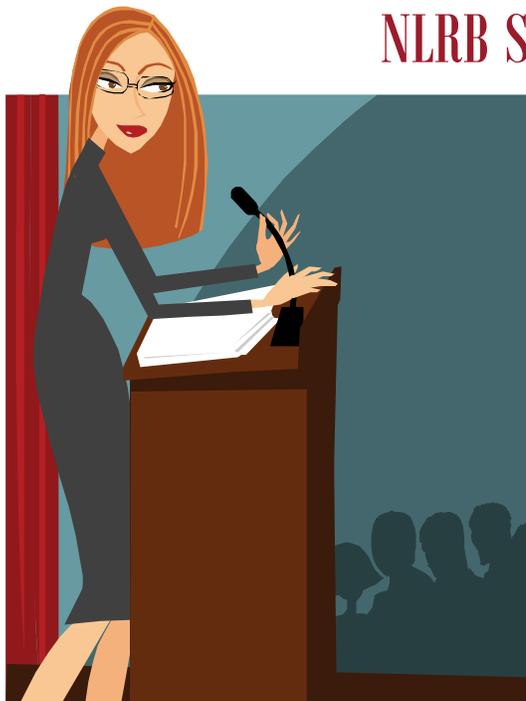
If you would like to receive future copies of the newsletter by email, please notify us at NLRBRegion10@nlrb.gov.

The National Labor Relations Board is an independent federal agency created by Congress in 1935 to administer the National Labor Relations Act, the primary law governing relations between unions and employers in the private sector. The statute guarantees the right of employees to organize and to bargain collectively with their employers, and to engage in other protected concerted activity with or without a union, or to refrain from all such activity. The NLRA extends rights to most private sector employees, to their employers, and to unions/labor organizations. The NLRA protects workers who form, join, support or assist unions, also known as labor organizations, and protects groups of workers (two or more employees) who engage in protected concerted activities without a union seeking to modify their wages or working conditions. The Act protects non-union and union employees against employer and union discrimination based on union-related activities or other protected concerted activities.

Employees, who wish to pursue workplace organization issues or allegations of unfair labor practices may seek assistance from the nearest regional NLRB office. Employers and Unions who wish to pursue allegations of unfair labor practices may do the same. The Agency has 51 regional, sub-regional, or resident offices to serve the public.



NLRB Speakers are Available for Your Group



Members of the Region’s staff are available to make presentations before any employer or union group, classroom group, legal services clinic or service agency, or labor relations association, to describe the Act’s protections, how the Region investigates and resolves unfair labor practice charges, processes representation petitions, or any NLRB topic of interest.

To arrange for a speaker and to discuss possible topics, please do not hesitate to telephone Regional Outreach Coordinator Jason Hardman (404) 331-2888.

October 2009 Issue Contributors: Editor Chip Harrell

Lisa Henderson, Doug Marshall, John Doyle, Lanita Cravey, Kathy Chahrouri, Frank Rox, Judy Garlington, Diane Williams, Kerstin Meyers, Martin Arlook

Region 10 Atlanta Regional and Birmingham Resident Office Directory

AGENT	TELEPHONE #	E-MAIL
Arlook, Martin M., Regional Director	(404) 331-2862	Martin.Arlook@nlrb.gov
Harrell, Claude T. (Chip) Assistant to the Regional Director	(404) 331-2865	Claude.Harrell@nlrb.gov
Bulls, Mary L. Regional Attorney	(404) 331-2829	Mary.Bulls@nlrb.gov
Hymon, Gaye Nell, Deputy Regional Attorney	(404) 331-2870	Gaye.Hymon@nlrb.gov
Williams, Diane B., Supervisory Field Examiner	(404) 331-2877	Diane.Williams@nlrb.gov
Heath, Ouida Y., Office Manager	(404) 331-5457	Ouida.Heath@nlrb.gov
Phillips, Marsha L., Assistant Office Manager	(404) 331-2866	Marsha.Phillips@nlrb.gov
Cline, Sally R., Field Attorney	(404) 331-2893	Sally.Cline@nlrb.gov
Edinger, Alex, Field Examiner Resident Agent	(865) 573-4879 (Knoxville, TN)	Alex.Edinger@nlrb.gov
Hampton, Ellen K., Field Attorney	(404) 331-2854	Ellen.Hampton@nlrb.gov
Hardman, Jason, Field Examiner	(404) 331-2888	Jason.Hardman@nlrb.gov
Harrison, Richard W., Field Examiner	(404) 331-2884	Richard.Harrison@nlrb.gov
Henderson, Lisa Y., Field Attorney	(404) 331-2889	Lisa.Henderson@nlrb.gov
Meyers, Kerstin I., Field Attorney	(404) 331-4626	Kerstin.Meyers@nlrb.gov
Rich, Lauren, Field Attorney	(404) 331-2882	Lauren.Rich@nlrb.gov
Robinson-F. Elaine, Field Attorney	(404) 331-9685	Elaine.Robinson-Fraction@nlrb.gov
Rox, Frank F., Field Attorney	(404) 331-4600	Frank.Rox@nlrb.gov
Wiley, Carla L., Field Attorney	(404) 331-2857	Carla.Wiley@nlrb.gov
Williams, Jeffrey, Field Attorney	(404) 331-2899	Jeffrey.Williams@nlrb.gov
BIRMINGHAM, AL	RESIDENT OFFICE	
Marshall, C. Douglas, Resident Officer	(205) 933-3021	Douglas.Marshall@nlrb.gov
Bennett, Belinda C., Field Examiner	(205) 933-3015	Belinda.Bennett@nlrb.gov
Chahrouri, Katherine, Field Attorney	(205) 933-3016	Katherine.Chahrouri@nlrb.gov
Cravey, Lanita, Field Examiner	(205) 933-3012	Lanita.Cravey@nlrb.gov
Doyle, John, Field Attorney	(205) 933-3011	John.Doyle@nlrb.gov
McCarty, P. Linn, Field Examiner	(205) 933-3014	Patrick.McCarty@nlrb.gov
Newman, Morris J., Compliance Officer	(205) 933-3013	Morris.Newman@nlrb.gov
Powell, Gregory, Field Attorney	(205) 933-3022	Gregory.Powell@nlrb.gov