National Labor Relations Board

Region 18 Hot Dish

Volume VII, Issue 2 December 2013

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And Then There Were 5: NLRB Board Members Confirmed

by Marlin O. Osthus, Regional Director

After years of operating without a full complement of five Board members as well as with an Acting General Counsel, the National Labor Relations Board is finally operating with Presidential appointees who have been confirmed by the Senate. Chairman Mark Gaston Pierce told lawyers attending the annual conference of the American Bar Association's Section of Labor and Employment Law in New Orleans, "We are all in place and we're ready to go."

In addition to Chairman Pierce, those serving on the five-member Board include Kent Hirozawa, Harry Johnson. Philip Miscimarra and Nancy Schiffer. Hirozawa and Schiffer previously represented unions either in private practice or on staff, while Johnson and Miscimarra practiced in firms representing management. The new General Counsel is Richard Griffin, who most recently served on the Board as a recess appointment.

A number of significant issues loom on the horizon. Perhaps the most significant issue is what the Supreme Court will decide in *NLRB v. Noel Canning Division of Noel Corp.*, 705 F.3d 490 (D.C.Cir. 2013). The question facing the Court is whether President Obama's recess appointments of Sharon Block, Terrance Flynn and Richard Griffin to the Board were constitutionally valid. If the Court finds the recess appointments unconstitutional, the 317 published and 520 unpublished decisions by the Board when the recess appointees served are likely invalid. The Supreme Court will hear arguments in *Noel Canning* on January 13, 2014.

Another issue confronting the fully-functioning Board are the changes to representation case procedures.

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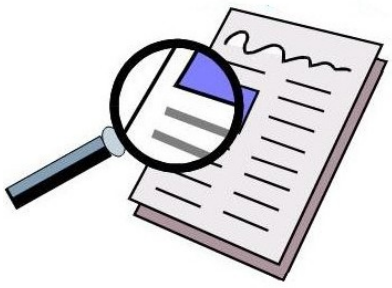
Employer Policies Gone Too Far?

by Nichole Burgess-Peel, Supervisory Attorney

Most employers, whether union or non-union, have employee handbooks containing work rules and policies. During the course of investigations, we often must determine whether certain employee work rules and handbook policies are unlawful. Thus, this topic is of increasing interest to employees, unions, and employers alike.

Overview and Guiding Principles

The starting point for analyzing employee work rules begins with Section 7 of the Act – protected employee rights. The general rule is that employees have the right to communicate with each other regarding their terms and conditions of employment, whether that communication occurs around the water cooler (old school), or on Facebook (new school). The seminal case on work rules is *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). This case employs a two step test in determining the validity of these rules. Under step one, a rule is unlawful if it explicitly restricts Section 7 activities. If the rule does not explicitly restrict protected activities, under step two,



a rule will still violate the Act if employees would reasonably construe the language to prohibit Section 7 activity, the rule was promulgated in response to Section 7 activity, or the rule has been applied to restrict the exercise of Section 7 rights.

In analyzing the lawfulness of a rule, the Region will not read particular phrases in isolation. Further, a rule does not violate the Act because it could *conceivably be read* to restrict Section 7 activity. There is no presumption of improper interference with employee rights.

Social Media

In general, employees have the right to use social media to communicate and share information regarding working conditions through postings, pictures and videos. Policies which include broad prohibitions on the content of postings — for example, policies which state the social media activities that are "inconsistent with, or would negatively impact the employer's reputation" — are overbroad because they have a reasonable tendency to inhibit employees' protected activity. The Board has found that restrictions on identifying employers in a personal profile and prohibitions on using logos or photos of the employers' stores are unlawful. Further, policies which prohibit employees from communicating with third parties, including the media, through social media or other outlets, are generally unlawful. However, prohibitions on pressuring co-workers to use social media are generally lawful.

In recent years, the Acting General Counsel has produced three memoranda on this subject,

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The Life of A Representation Petition

by Carol M. Collins, Election Clerk

Have you ever wondered why the Region asks for certain things when you file a representation petition? Have you ever wondered what happens between the Agent's phone calls, or once the stipulated election agreement is signed? In this first installment of Behind the Lines, your Hot Dish editors asked Election Clerk Carol Collins to explain the process of a petition. Stay tuned for next month's installment, which will address another aspect of Region 18's work.

Filing an RC or RD Petition

The petition form solicits contact information and information about the bargaining unit. The one page form can be found on the NLRB website at www.nlrb.gov.

A petition form must be accompanied by a showing of interest. For an RC petition, the showing of interest are authorization cards collected by the Union. For an RD petition, it is a list of employee signatures wishing to decertify the union, collected by the RD Petitioner. The showing of interest must reflect at least 30% of the employees desire to either certify or decertify the union.

Because petitions take priority over unfair labor practice charges, petitions should be submitted as early in the day as possible. With our new case management system, it takes longer to docket a petition, and a petition should be docketed and served the same day it is received.

A routine letter stating that the petition has been received will be sent when the petition is given a case number. Then it will be assigned to an agent.

As with an unfair labor practice charge, signed petitions can be faxed, mailed, or dropped off in the Region 18 office. Hard copies of the petition and notice of hearing are still sent via U.S. mail, but when a petition is docketed, it is always faxed to the Employer. This is why the fax numbers must be provided on the petition form. RD petitions are faxed to the Union as well. This allows the parties to receive the petition and the notice of hearing as soon as possible so that the terms of an election can be discussed.

Election Agreements

If the parties agree on the terms of an election and the unit description, then they will enter into an election agreement. When the parties sign and return the agreement to the agent the hearing will be canceled.

Upon receipt from all parties, the election agreement is conformed and mailed to all parties. It is important that anyone signing the election agreement print their name and title under their signature so that the conformed copy will reflect the correct information.

The *Excelsior* List

After the parties reach an election agreement, the Employer will be asked to provide a list of the employees who are eligible to vote. This list is referred to as the *Excelsior* list as required by *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966).

The Employer has no more than 7 days to provide the *Excelsior* list, which can be emailed, faxed, mailed, dropped off, or e-filed through the Agency's website.

Once the Region receives the list, it is immediately served upon the Union (via fax) and, when necessary, the RD Petitioner (via U.S. mail). They must have the list at least 10 days prior to the date of the election. Thus, in expedited elections the Employer may have to provide the list in fewer than 7 days.

The *Excelsior* list should be in alphabetical order and contain first and last names, and addresses of eligible voters. It should not include personal information, such as phone numbers, social security numbers, or dates of birth.

If the election agreement calls for two polling sites or multiple bargaining units, there should be a copy of the voting list for each site or each agreed-upon unit.

Issues with the *Excelsior* list are often discussed and resolved by the parties and the agent before the election.

Ballots And Notices

If there is a need for foreign language notices or ballots, the parties must notify the agent as early as possible. Spanish is translated within the Region, but for other languages, translation requests have to be made from an outside agency and this takes extra time to prepare.

Notices are mailed to the Employer about two weeks prior to the election. These notices lay out the date, time, and place of the election, as well as a unit description. They are to be posted 3 full working days prior to the election.

Challenges and Objections

If there are determinative challenges the parties must submit their position on the eligibility of the voters. The Region will resolve the eligibility through an investigation or hearing.

After an election, there is a 7-day period for the parties to file objections. If no objections are filed, the certification issues and the case is closed. The showing of interest is returned to the Petitioner at this time. If objections are filed, the Region holds a hearing to determine whether the objectionable conduct warrants setting aside the results of the election.

Outreach: Want A Speaker For Your Organization?

The NLRB is continuing its efforts to reach community groups with information about the Agency. Regional staff members are available to speak to organizations, large and small, at your request. We regularly provide speakers to make presentations to colleges, high schools, technical schools, labor unions, employer associations, staff of legal services or other civil rights agencies, or any other groups with a particular interest in the nation's labor laws.

The Region has given presentations on introductory and general information such as the history of the Agency and the National Labor Relations Act, how to file charges and petitions with the Agency, and how the Agency investigates cases. The Region has also given more in-depth presentations on specific issues such as succesorship, the duty of fair representation, *Beck* Rights, protected concerted activity in a non-union workplace, etc.

Please contact the Region's Outreach Coordinator, Chinyere Ohaeri at 612-348-1766 or via email at Chinyere.Ohaeri@nlrb.gov to make arrangements for a speaker. Last year we addressed several groups throughout the region and this year we plan to address many more.

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These changes were made in December 2011 by Board Members Pearce and then-member Craig Becker (then-member Brian Hayes dissented). However, because Becker was a recess appointment, the U.S. Court of Appeals for the District of Columbia has deferred action on an appeal by the Board until the *Noel Canning* controversy is decided. The appeal by the Board was filed after a U.S. District Court concluded that the rules were not properly adopted. Thus, the changes remain suspended. The changes made in December 2011, however, were not all of the changes considered by the Board at the time. Thus, with a Senate-confirmed Board in place, it could now consider whether to adopt additional changes to representation case procedures.

Of course change is not limited to headquarters. Since the last issue of our region's newsletter, the Milwaukee, Wisconsin office (previously Region 30) has become part of Region 18. As a result, the territory covered by Region 18 now includes all of Wisconsin and the Upper Peninsula of Michigan. Leading the Milwaukee Subregional Office is Officer-In-Charge Ben Mandelman, who has held a variety of positions in the Milwaukee office since starting his career with the Agency. Ben oversees a staff of 18 employees, with the assistance of Deputy Regional Attorney Percy Courseault III, Supervisory Attorney Anita O'Neil, and Office Manager Gail Bosnjak. Charges arising in the geographical area that has been traditionally served by the Milwaukee office will continue to be docketed and investigated by the Milwaukee staff. We hope that in future editions of this newsletter you were learn more about the Milwaukee staff and some of their more interesting and challenging cases.

Finally, the **Eighth Circuit Court of Appeals recently enforced two Board decisions arising out of complaints issued by Region 18.** The Eighth Circuit decision is *NLRB v. Relco Locomotives, Inc.*, Nos. 12-2111 and 12-2447 (August 20, 2013).

In enforcing the NLRB decisions, the Court found that in each case Relco illegally terminated four employees for union and/or concerted protected activity. In addition, with regard to two of the employees in the second case, the Court affirmed the Board's decision that they were also discharged because of their testimony in support of the complaint in *Relco I*. The Board decisions are reported at 358 NLRB No. 32 and 358 NLRB No. 37 (2012).

One of the more interesting conclusions of the Court is that speech protected by Section 8(c) may nevertheless constitute evidence of animus. To quote the Court decision:

> Section 8(c) is designed to shield employers from claims that rest solely on an employer's communication that it disfavors unionization (citation omitted). That does not mean that these remarks be excised when considering whether the employer has evinced a hostility to unions. Otherwise 8(c) would effectively prevent an employer's statement of hostility to unions from being used as proof of such an attitude.

The Court also rejected Respondent's *Noel Canning* challenge, concluding that the challenge is non-jurisdictional in nature; that Respondent failed to timely raise the challenge; and that there are no "extraordinary circumstances" permitting the Court to hear Respondent's belated challenge (Judge Smith dissenting as to this issue).

The Region has recommended that contempt proceedings be initiated, because as of the date of writing this article, Relco has failed to abide by the Court's decision.

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including discussions of social media policies. These memos include OM 12-59; OM 12-31, and OM 11-74, each of which can be found on our website: www.nlrb.gov.

Confidentiality

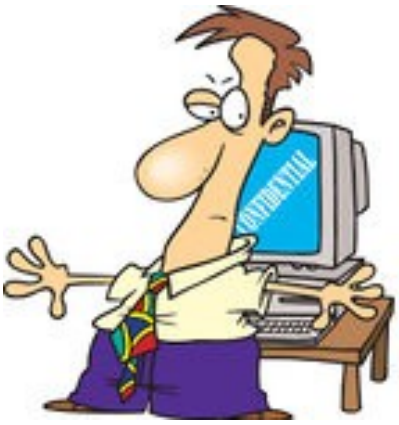
Policies which state that terms and conditions of employment are "confidential" are typically unlawful. It is quite common for employers to attempt to prohibit employees from discussing their wages by categorizing wage or personnel information as confidential. Again, employees have a right under Section 7 to discuss their terms and conditions of employment including, but not limited to, wages, hours, disciplinary issues, terminations, vacations, sick time, problems with supervisors, etc. Open employee discussions about these subjects are often the precursor to engaging in protected concerted activity. Thus, prohibitions on sharing these types of information are typically unlawful. On the other hand, the Board has held that confidentiality policies aimed at protecting truly confidential information such as trade secrets, proprietary information, client information, employer production processes, etc., are lawful.

Employment At-Will Policies

This is an area that has received increased attention in recent years. Region 28 issued complaint in *American Red Cross Arizona Blood Services*, and the administrative law judge who heard the case found the violation. JD 04-12, (February 1, 2012). The language at issue in that case was found in the employer's handbook and read, "I further agree that the at-will employment relationship cannot be amended, modified or altered in any way." The ALJ concluded that by agreeing that the at-will agreement could not be changed in any way, the employee was essentially waiving his or her right to advocate concertedly to change his or her at-will status. Further, the ALJ opined that the clause premised employment on an employee's agreement not to enter into any contract, to make any efforts, or to engage in conduct that could result in union representation and in a collective-bargaining agreement which would amend, modify or alter the at-will relationship. The ALJ reasoned that this provision therefore would reasonably tend to chill employees in their exercise of Section 7 rights.

The Division of Advice has also addressed the at-will issue in a number of cases. For example, in *SWH Corp. d/b/a Mimi's Café*, Advice Memorandum dated October 31, 2012, Advice concluded that a policy stating that "[n]o representative of the Company has authority to enter into any agreement contrary to the ...'employment at-will' relationship" would not reasonably be interpreted to restrict an employee's Section 7 right to engage in concerted attempts to change his at-will status. Instead, Advice concluded that the policy merely highlights the Employer's policy that its own representatives are not authorized to modify an employee's at-will status.

Clearer examples of lawful policies are those which indicate that the only certain individuals, i.e. the President of the Company, the CEO, etc., have the authority to make agreements for employment other than at-will. These policies typically indicate that such agreements must be in writing. Both of these requirements are consistent with the negotiation and signing of a collective bargaining agreement that changes the at-will status of employment, typically through the addition of a "just cause" provision.



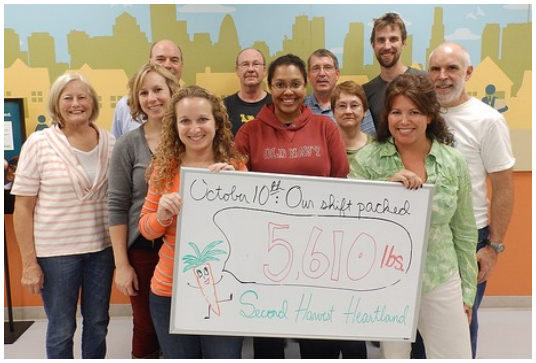
In investigating cases, the best practice is to get a copy of employee handbooks to ensure compliance with the NLRA. Thus, employers should make efforts to ensure that their handbooks do not contain policies which would chill employees in their exercise of protected rights.

Combined Federal Campaign Inspires Agents to Give Back

By Abby E. Schneider, Field Attorney

Each year, Region 18 participates in the **Combined Federal Campaign.** The CFC is the federal government's single, comprehensive annual charity drive. It is made up of 165 local campaigns across the country that organize the annual fundraising effort in Federal workplaces so the Federal donor will only be solicited once in the workplace and will have the opportunity to make charitable contributions through payroll deduction. The campaign offers donors a choice of over 2,500 local, national, and international charities or federations and is the largest and most successful workplace philanthropic fundraiser in the world.

This year, Region 18 dove in. In addition to the traditional monetary drive, Board agents and staff volunteered time and energy to support **Second Harvest Heartland**, a local organization that distributes food to food shelves, after school programs, and more. Twelve Region 18-ers spent a few hours breaking down 50-lb bags of white onions and creating 5-lb bags that could be more easily dispersed and delivered to families in need. As documented with photographic evidence, the group packaged 5,610 lbs of onions!



On December 5, Region 18 will host presentations from **Store to Door**, an organization that does grocery shopping and delivery for seniors who are homebound due to various health and mobility issues, and **Minnesota Indian Women's Resource Center**, an organization that provides aid to various American Indian communities and causes.

Region 18 Participates in "Labor Week" with the Mexican Consulate

By Rachel A. Centinario, Field Attorney

On August 26, 2013, Region 18's Minneapolis and Des Moines offices had the honor of presenting on behalf of the NLRB at "Labor Week," a week-long conference held by Mexican Consulates nationwide for members of the Mexican and Latino communities. Minneapolis's **Field Examiner Martha Armstrong** and **Field Attorney Rachel Centinario** demonstrated their bilingual skills by delivering a presentation in Spanish on workers' rights under the NLRB in both union and non-union settings at the Mexican Consulate in Saint Paul, Minnesota. **Jennifer Hadsall,** Resident Officer in Des Moines, delivered a similar presentation at the Mexican Consulate in Omaha, Nebraska, on behalf of Region 14's Subregional Overland Park office. The presentations were a success, with dozens of attendees able to learn more about their rights under the Act. The week was filled with presentations by various other federal, state, and local agencies and organizations, providing employees with a wealth of information on their rights as employees. This was the first year Region 18 was involved in this event, and we are looking forward to participating annually. The presentations during Labor Week were followed by an event in Region 18's Minneapolis office on September 23, 2013, during which Consuls Alberto Fierro and Jorge Ernesto Espejel Montes and **Regional Director Marlin Osthus** signed a Memorandum of Understanding that strengthens the commitment between the NLRB Regional Office and the Mexican community in working together to provide outreach, educational opportunities, and training on workers' rights under the Act. This Memorandum of Understanding reflects Regional commitment to carry out action in support of the Letter of Agreement executed on July 23, 2013, by **Acting General Counsel Lafe Solomon** and Mexican Ambassador Eduardo Medina-Mora Icaza.

VISIT US ON THE WEB

NLRB AGENCY WEBSITE

WWW.NLRB.GOV

REGION 18 WEBSITE

http://www.nlrb.gov/category/regions/region-18

DID YOU KNOW?

Every day there is someone here to answer your questions.

The **information officer** is responsible for incoming phone calls and visitors. We rotate the responsibility daily, and make an effort to answer all inquiries before the close of business.

The **information officer** cannot offer legal advice, but can provide information about NLRB procedures and the NLRA, refer you to the appropriate government agencies, and log questions for future reference.

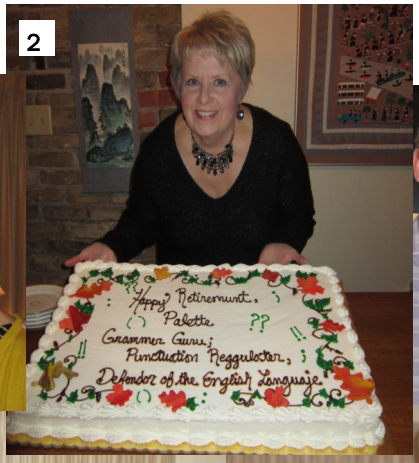
Each day, an agent is responsible for serving as the Region's Information Officer (I.O.). In this series, we share particularly interesting and informative I.O. questions and answers.

Dear Abby...

I am available to come in any time for an affidavit, but my attorney is busy and can't come when I want to come. Can I go ahead and come without my attorney?

I'm sorry, but I can't talk with you unless your attorney gives me permission to talk with you directly without him or her being present. ABA Model Rule 4.2 is the Skip Counsel Rule, designed to preserve the integrity of the attorney-client relationship by protecting a represented person from being taken advantage of by an attorney who is representing the opposing side of the case. This rule applies to NLRB investigations as well; although Board agents do not represent any party to a case, once a Board Agent knows that an individual is represented, all communication must go through that individual's legal counsel. This practice serves to protect the attorney-client relationship and ensure that a represented party will not be questioned outside the presence of his or her attorney. Therefore, any request to communicate directly with a represented party must go through the party's counsel even if the individual party has approached the Agent voluntarily and wants to talk. In order for a Board agent to speak directly with a represented party, that party's attorney must first provide written permission to the Board agent.

A Fond Farewell for Paulette Jamison



Picture 1: Paulette Jamison with husband Steve and daughters Jenny and Kerri
Picture 2: Paulette with her grammar-queen cake
Picture 3: Jim Fox, Nichole Burgess-Peel, Martha Armstrong, and Rachel Centinario

Picture 4: Clockwise: Jennifer Hadsall, Rachel Centinario, Nicholas Heisick, Chinyere Ohaeri, Marlin Osthus, Sue Shaughnessy, Rachael Simon-Miller, Olga Bestilny, Abby Schneider, Paulette Jamison, Nichole Burgess-Peel, Bernadette Grenzer, Carol Collins
Picture 5: Marlin Osthus and Paulette

Paulette Jamison *started work in Region 18 on August 23, 1971. 42 years, 2 months, 1 week, and 2 days later, she said farewell and launched into the long-awaited world of retirement.*

Q: As a new employee, what did you most look forward to?
A: The most exciting thing about starting my job with the NLRB was the number of people who worked there (about 35), many of whom were from other parts of the country. I also truly enjoyed the variety of the work and was proud to be part of the Federal Government.

Q: What are the biggest changes you saw during your NLRB years?
A: The office is so different today than it was in 1971. When I first started, all of the field examiners and attorneys were men; today there are as many women as there are men in those positions. Back then, people could smoke at their desks if they wished. Anyone could walk into the Federal Building and the office---there were no magnetometers or security officers. The workload was also different at that time---we had many more petitions than unfair labor practice charges. Today the opposite is true. Of course, the biggest changes have come with technology. When I started, we used typewriters, carbon paper, stencils, and a mimeograph machine; we had a copier, but you could only copy one page at a time and you had to collate reports by hand. We sent important messages by telegraph. The professionals dictated all their memos, letters, reports, and briefs; we took them in shorthand and transcribed them. Then came dictaphones, self-correcting typewriters, a more advanced copier, and a primitive fax machine. Then came computers and email and more advanced copiers and fax machines, followed by scanners. Today everything is done on the computer, and the office maintains its files electronically. All of this technology has changed the way people do their jobs and the speed with which things can be accomplished. During my 42 years with the NLRB, I have seen approximately 120 full-time employees leave the office.

Q: What positions did you hold in Region 18?
A: I worked approximately five months in the steno pool before becoming the election clerk, a position I held for seven years. I then spent one year as Secretary to the Assistant to the Regional Director before being promoted to Secretary to the Regional Attorney, a position I held for about 23 years. The last 11 years of my time with the NLRB were spent as Secretary to the Regional Director. I was fortunate, in that I always worked for extremely competent and hard-working people whom I liked and respected.

Q: What would you say to someone starting at the NLRB tomorrow?
A: I would wish them "Good Luck," as it's not always easy being a Federal employee, especially in these difficult times. But I would also tell them that the NLRB is a well-run agency that has always attracted intelligent, talented, caring, and dedicated people who believe in what they do.

Q: What will you miss most, and what are you most looking forward to in retirement?
A: I will definitely miss my coworkers the most; I hope to stop in and visit them from time to time. I'm looking forward to having the flexibility to spend more time with my three grandchildren, to read, to play golf and tennis, to renew old friendships, and to do some traveling with my husband. I'm also looking forward to sleeping in and staying inside on those cold, snowy days.