

**2012 UPDATE TO**

**DAU-SCHMIDT, MALIN, CORRADA, CAMERON & FISK**

**LABOR LAW  
IN THE  
CONTEMPORARY WORKPLACE**

By

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## *Preface to the 2012 UPDATE*

This electronic “UPDATE” is intended to be used in conjunction with our casebook—Dau-Schmidt, Malin, Corrada, Cameron & Fisk, *Labor Law in the Contemporary Workplace* (The Labor Law Group, 2009). The UPDATE contains notes on and/or edited versions of major labor law cases and developments since 2009. Page references in the UPDATE indicate the page or pages of the casebook where the new material should be inserted or, in some cases, now-outdated material should be omitted.

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**CHAPTER 1: THE EVOLUTION OF THE CONTEMPORARY WORKPLACE****B. A BRIEF HISTORY OF AMERICAN LABOR LAW****2. The Labor Relations System of the Industrial Era****C. The Middle of the Industrial Period (1932-1950):  
The New Deal, World War II, and Its Immediate Aftermath****IV. The Taft-Hartley Amendments to the NLRA****b.) Provisions of the Taft-Hartley Amendments**

*Add a new note 4 on page 73:*

4. *The Board's Quorum Requirement:* As previously mentioned, the Taft-Hartley Act increased the size of the National Labor Relations Board from three members to five, but allowed the Board to delegate its authority to groups of three members. The Act specified the Board's quorum requirement under these procedures as follows:

“The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. ... A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof.” 29 U.S.C. § 153(b).

In December of 2007, the Board found itself with only four members and, expecting two more vacancies by the end of the month, delegated its powers to a group of three members. On December 31, the appointment of one of the three-member group expired, but the others continued to decide cases as a two-member quorum of a three-member group. This situation continued for the next 27 months, during which time the two-member quorum decided more than 500 cases. Two of these decisions sustained unfair labor practice complaints against the company New Process Steel, L.P., which sought review, challenging the “two-member Board's” authority to issue orders. The Seventh Circuit ruled for the Board, concluding that the two members constituted a valid quorum of a three-member group to which the Board had legitimately delegated its powers. *New Process Steel, L.P. v. N.L.R.B.*, 564 F.3d 840 (7<sup>th</sup> Cir. 2009). However in June of 2010, the Supreme Court reversed 5 to 4, holding that Section 3(b) requires that a delegee group maintain a membership of three in order to exercise the delegated authority of the Board. *New Process Steel, L.P. v. N.L.R.B.*, 130 S.Ct. 2635 (June 17, 2010). The Court, per Justice Stevens, reasoned that this reading of § 3(b) is the only way to give full effect to all of the provisions of § 3(b) and that if Congress had intended to authorize two members to act on an ongoing basis, it could have used straightforward language to this effect. The dissent, per Justice Kennedy, argued that the Board's interpretation was a reasonable interpretation of the Act and that the majority's interpretation, requiring that the delegee group maintain three members, had added a requirement that was not in the language of the statute.

## **D. The Late Industrial Period (1947-1970): Post-War America**

### **II. Labor Legislation of Post-War America: The Landrum-Griffin Act and Public Relations Acts**

#### **b.) Public Sector Labor Relations Acts**

*Add to the bottom of page 85:*

The Great Recession of 2008 caused a drop in tax revenues and an increase in government budget deficits across the country. At first much of this short-fall was made up for by federal stimulus money designed to maintain state services and employment in the depths of the recession. However, once the stimulus money ran out, state and local governments began to look for ways to cut their budgets and meet balanced budget requirements—including public servant wage cuts and lay-offs. Rising concerns about the federal budget deficit resulted in considerable Republican success in the 2010 election, including retaking the House of Representatives and many governorships and state legislative houses. With great concern over the economy and budget, and new found political power, the Republican party was poised to promote or undertake not only significant cuts in government services and employment, but also a larger agenda limiting public employee rights.

The larger agenda against public employee rights was prepared by conservative activists financed by billionaires. The billionaire Koch brothers not only financed Republican candidates across the country, but also financed “research” and opinion columns to support their cause. Model legislation to eliminate or limit public employee collective bargaining, regulate the terms of public employment, prohibit public employee dues check-off, reverse prevailing wage legislation and make union security agreements unenforceable, were drafted by the American Legislative Exchange Council (ALEC, also funded in part by the Koch brothers) and distributed to Republican state legislators across the country. William Cronin, *Who’s Really Behind Recent Republican Legislation in Wisconsin and Elsewhere? (Hint: It Didn’t Start Here)*, <http://scholarcitizen.williamcronin.net/2011/03/15/alec/>. This legislative agenda was driven as much by a desire to silence organized political opposition by working people as it was to eliminate public employee collective bargaining. It amounts to the largest power grab by the upper class since the end of the artisanal period when Andrew Carnegie and other budding industrialists sought to destroy the trade guilds.

Although this battle is currently being fought out over many states, the fight that has captured the nation’s imagination is the one in Wisconsin. As you will recall, Wisconsin is the state that passed the first public sector collective bargaining act in the United States in 1959. In 2010, Scott Walker, with substantial support from the Koch brothers, was swept into office as Wisconsin’s governor, along with Republican majorities in both the Wisconsin House and Senate. Despite projected budget deficits, Governor Walker and the Wisconsin Republicans passed a \$117 million package of business tax breaks upon taking office. They then turned to addressing Wisconsin’s projected budget shortfall and proposed a “budget” which not only substantially trimmed public employment rolls and cut remaining employees’ wages and benefits

7%, but also stripped the public employees of the right to collectively bargain over any issue other than wage increases less than the rate of inflation. Although the public employee unions accepted the wage and benefit cuts, Walker and the Republicans insisted that taking away the employees' collective bargaining rights was a necessary part of their budget plan. The debate over the "budget bill" was very contentious with 14 Democratic Senators fleeing the state in an attempt to block passage and daily demonstrations of up to 100,000 demonstrators outside the state capital building. Despite these efforts the Republicans passed the restrictions on collective bargaining and Walker signed them into law. Although the bill was initially struck down for being passed in violation of Wisconsin's open meeting law, it was ultimately upheld by the Wisconsin Supreme Court in a 4 to 3 party-line vote. *Wisconsin ex rel. Ozanne v. Fitzgerald*, 798 N.W.2d 436 (Wis. 2011). Opponents of the law felt that the Republicans had exceeded their electoral mandate in passing the law, while supporters felt that the Democratic Senators who fled the state had abandoned their Senatorial responsibilities. Both sides availed themselves of the recall provisions in Wisconsin's Constitution, resulting in Governor Walker and several state senators from both parties being subject to recall elections. Although Governor Walker retained his position as Governor, the Democrats won control of the Wisconsin Senate through the recall elections as a check on further excesses by Walker. Judge Conley of Wisconsin's Western District has since struck down the provisions requiring annual recertification and barring automatic dues deduction as violative of the equal protection clause, but this decision is under appeal. *Wis. Educ. Ass'n Council v. Walker*, 824 F. Supp. 2d 856 (W.D. Wis. 2012). In Judge Conley's opinion, there was no rational basis for the Act's imposition of these limitations on unions representing general public employees (which Walker considers political opponents) but not unions representing public safety employees (which supported Walker). See *id.* at 860. Similar, but less dramatic fights were undertaken in state legislatures across the country resulting in significant restrictions on public employee collective bargaining in several states including Indiana, Ohio, Michigan, New Jersey, Massachusetts, Missouri, Tennessee, Idaho, Nevada, Nebraska, Illinois and Oklahoma.

### **3. The Rise of the New Information Technology and the Global Economy: The Market Driven Workforce and the Challenges of Organizing in the Contemporary Workplace**

#### **C. Opportunities for Unions in the New Economic Environment**

*On page 101, after the second full sentence, insert:*

The Employee Free Choice Act languished during the first two years of the Obama administration and now seems dead after Republicans regained control of the House in the 2010 elections.

*On page 101, after the first partial paragraph, insert:*

What reforms to the National Labor Relations Act do you think Congress should adopt?

*On page 101, omit the first full paragraph.*

## Chapter 2: Boundaries of Collective Representation

### B. Who Is an ‘Employee’?

#### 1. Contingent Workers

##### a. Independent contractors

*Insert the following new paragraph in the Notes section on page 127:*

5. “*Death*” of an outside salesmen? In certain lines of work, special rules govern whether a worker will be classified as having rights traditionally associated with being an “employee.” For example, Section 13(a)(1) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 213(a)(1), exempts from the statute’s overtime requirements anyone who works “in the capacity of outside salesman” as such term is defined by regulations issued from time to time by the U.S. Secretary of Labor. Furthermore, Section 3(k) of the FLSA, 29 U.S.C. § 203(k), defines the terms “sale” and “sell” to include “any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.” The Department of Labor (DOL) promulgated three pertinent regulations: a first regulation that defines “outside salesman” to be any employee who is “customarily and regularly engaged away from the employer’s place or places of business” in performing Section 3(k) duties; a second regulation that clarifies that a “sale” within the meaning of Section 3(k) includes “the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property”; and a third regulation identifying “[p]romotion work” as “one type of activity often performed by persons who make sales, which may or may not be exempt outside sales work, depending on the circumstances under which it is performed.” 29 C.F.R. §§ 541.500(a)(1)-(2), 541.501(b), 541.503(a).

SmithKline Beecham Corp. develops, manufactures, and sells prescription drugs. Like other pharmaceutical companies, SmithKline promotes its products to physicians through a direct marketing process called “detailing.” In this process, employees known as pharmaceutical sales representatives, or “detailers,” call on physicians and provide them with information in hopes of persuading them to write prescriptions for the company’s drugs. Detailers do not take orders, consummate sales, exchange products, or otherwise enter into contracts of sale. Instead, their role is to stimulate sales by getting doctors to write prescriptions for patients, who in turn present those prescriptions at pharmacies where the drugs are purchased and delivered. Customarily, neither SmithKline nor its competitors pays overtime to detailers. Nor did the DOL interpret its own regulations as requiring it to bring enforcement actions challenging this practice. In 2009, however, the DOL took the position for the first time – in appellate litigation – that detailers are not outside salesmen, and therefore, should be considered nonexempt. In 2012, the Supreme Court disagreed. Writing for a 5 to 4 majority, Justice Alito concluded that “the most reasonable interpretation” of the Doll’s regulations is that detailers are outside salesmen, and therefore, should be considered exempt. *See Christopher v. SmithKline Beecham Corp.*, \_\_\_ S. Ct \_\_\_, 2012 WL 2196779 (June 18, 2012). In dissent, Justice Breyer argued that detailers sell nothing. The most that a detailer can do is obtain a “nonbinding commitment” from a physician to advise her patient to take a particular drug. “Like a ‘definite maybe,’ an ‘impossible solution,’ or a

‘theoretical experience,’ a ‘nonbinding commitment’ seems to claim more than it can deliver.” *Id.* at 17 (Breyer, J., dissenting).

Do you agree with Justice Alito or Justice Breyer? Does being classified as an “outside salesmen” mean that detailers are independent contractors, or something else? After *SmithKline*, when and how can an agency like the DOL change its interpretation of its own regulations? What effect, if any, might this decision have deciding who is an “employee” under the NLRA?

### 3. Apprentices, graduate students, trainees, and house staff

***Substitute the following paragraph for the first paragraph in Note 1 on page 151:***

1. In 2010, the Board signaled yet another course change in *New York Univ. II*, 356 N.L.R.B. No. 7 (2010), when it granted the union’s petition for review of a regional director’s order dismissing an election petition affecting the same bargaining unit that had been addressed in *New York Univ. I*, 332 N.L.R.B. 1205 (2000) – the decision overruled by *Brown*. Writing for the majority, Members Becker and Pearce, over the dissent of Member Hayes, noted some changes in “unit placement” in the years since *New York Univ. I*, including the university’s reclassification of graduate teaching assistants as “adjunct faculty,” for whom there was already a separate bargaining unit, rather than as TAs. The majority also noted that the union had raised “compelling reasons for reconsideration” of *Brown* that echoed the dissent of Members Liebman and Walsh in that decision:

The Petitioner points out that *Brown University* overruled the decision in *New York University*, which had been issued just 4 years earlier. The Petitioner argues that the decision in *Brown University* is based on policy considerations extrinsic to the labor law we enforce and thus not properly considered in determining whether the graduate students are employees. The Petitioner also offered to present evidence of collective-bargaining experience in higher education as well as expert testimony demonstrating that, even giving weight to the considerations relied on by the Board in *Brown University*, the graduate students are appropriately classified as employees under the Act. Finally, the Petitioner argues that the decision in *Brown University* is inconsistent with the broad definition of employee contained in the Act and prior Board and Supreme Court precedent.

In 2012, with *New York Univ. II* still pending, the Board invited the filing of amicus briefs, and invited both parties and amici to address four issues: (1) whether *Brown University* should be modified or overruled; (2) if *Brown University* is modified or overruled, whether the Board should continue to find that graduate research assistants engaged in research funded by external grants are not statutory employees on the ground that they do not perform a service for the university; (3) if graduate student assistants are found to be statutory employees, the circumstances, if any, under which a separate bargaining unit of graduate student assistants would be appropriate; and (4) if graduate student assistants are found to be statutory employees, the standard that should be applied to determine (a) whether such assistants constitute temporary employees and (b) the appropriate bargaining unit placement of assistants determined to be temporary employees.

#### 4. Transborder Workers

***Add the following to the end of Note 1 on page 160:***

But seven years later, Professor Cameron counted at least 44 reported decisions in which federal and state courts refused to follow, declined to extend, distinguished, or recognized the limits of, the holding in *Hoffman*, mostly under employments laws other than the NLRA. The main reason: courts seem reluctant to interpret federal and state wage and hour and anti-discrimination statutes in a manner that gives “offending employers an undeserved windfall for breaking the law.” See Christopher David Ruiz Cameron, *The Borders of Collective Representation: Comparing the Rights of Undocumented Workers to Organize Under United States and International Labor Standards*, 44 USF L. Rev. 431, 450 & n.90 (2009).

Under the NLRA, however, *Hoffman*’s holding that the Board lacks remedial authority to award back pay to undocumented workers whose rights have been violated remains firmly in place. Even the Obama Board, led by two strong critics of Hoffman – Chairman Liebman and Member Pearce – has held that its holding cannot be distinguished on the ground that the employer, rather than the employees involved, violated IRCA by failing to ask the 7 employees in question for documentation when they were hired. See *Mezonos Maven Bakery, Inc.*, 357 NLRB No. 47 (2011).

***Insert the following as the new third paragraph of Note 1 on page 164:***

In general, the distinction made by *Hoffman* between documented employees, who are entitled to legal remedies, and undocumented employees, who are not so entitled, is unusual by international labor standards. (In the global arena, the corresponding terms would be “regular” and “irregular” workers.) In fact, according to one study of international labor law as codified in 18 separate instruments – including ILO Conventions Nos. 87 and 98, the DFPRW, and the IACHR, among others – the term “employee” is not to be found. Instead, rights are guaranteed to “everyone,” “every person,” or “workers.” See Christopher David Ruiz Cameron, *The Borders of Collective Representation: Comparing the Rights of Undocumented Workers to Organize Under United States and International Labor Standards*, 44 USF L. Rev. 431, 438-39 (2009).

***Insert the following new paragraph in the Notes section on page 160:***

3. In 2010, Arizona set into motion a wave of state-based efforts to ramp up enforcement of federal immigration laws by enacting S.B. 1070,<sup>1</sup> which, among other things, makes it a misdemeanor for an alien to be present in the state without carrying the required federal

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<sup>1</sup> See Support Our Law Enforcement and Safe Neighborhoods Act, as amended by H.B. 2162 (“S.B. 1070”).

documents; authorizes jail time for seeking work under such circumstances; and requires state law enforcement officers to attempt to determine an individual's immigration status during a lawful stop, detention, or arrest when the officer had reasonable suspicion that the individual is undocumented. The latter provision was sometimes called the "show your papers" rule. In 2011, five states – Alabama, Georgia, Indiana, South Carolina, and Utah – passed omnibus legislation patterned after S.B. 1070. See National Conference of State Legislatures, State Omnibus Immigration Legislation and Challenges (Apr. 18, 2012), *reported at* <http://www.ncsl.org/issues-research/immig/omnibus-immigration-legislation.aspx>. Critics, including labor leaders, attacked these laws on the grounds that they encourage racial profiling and should be preempted by federal constitutional principles, immigration policy, or both. But in 2012, in *Arizona v. United States*, \_\_\_ S. Ct. \_\_\_, 2012 WL 2368661 (June 25, 2012), the U.S. Supreme Court declared preempted and unenforceable all but the "show your papers" rule of S.B. 1070 – thereby casting doubt on most attempts by the states to regulate undocumented immigration.

What effect, if any, will the invalidation of most of S.B. 1070 have on the enforcement of the National Labor Relations Act? On the enforcement of other federal or state employment laws? On the willingness of undocumented workers to seek work in states like Arizona? On the willingness of employers who use undocumented labor to hire such workers?

## Chapter 3: Collective Action and Representation

### B. Concerted Activity for Mutual Aid and Protection

*Add a new note 4 on p. 218:*

4. Does it matter whether or not there is a labor dispute at the heart of the controversy? A labor dispute is defined in the Act as a “controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment.” 29 U.S.C. § 152(9). In *Northeast Bev. Corp. v. NLRB*, 554 F.3d 133, 138 (D.C. Cir. 2009), several employees left their jobs to go to the union hall to find out about the status of their employment as a result of a company merger. The NLRB held there was a labor dispute and the employee walkout was protected, but the D.C. Circuit disagreed, finding that “a mere quest for information is not a labor dispute.” *Id.* at 140. The court distinguished *Washington Aluminum* because there the employees were seeking to change their working conditions. *Id.* However, where employees leave the job and their interest in information stems from concern about employer discrimination against union supporters, the employee action is protected. See *Fortuna Enterprises v. NLRB*, 665 F.3d 1295, 1301 (D.C. Cir. 2011).

*Add to note 3 on p. 227:*

The Board overturned an ALJ decision finding that an employee had not engaged in concerted activity when confronting a supervisor in front of other workers. *Wyndham Resort Dev. Corp.*, 356 NLRB No. 104 (Mar. 2, 2011). The ALJ had found that an employee’s complaint about the employer’s change in dress code made to a supervisor in front of other employees but without prior consultation or conferral with those employees did not constitute “concerted activity.” *Id.* at 7. The Board reversed stating that “the Board has consistently found activity concerted when, in front of their coworkers, single employees protest changes to employment terms common to all employees. The Board reasons that an employee who protests publicly in a group meeting is engaged in initiating group action. The concerted nature of an employee’s protest may (but need not) be revealed by evidence that the employee used terms like “us” or “we” when voicing complaints, even when the employee had not solicited coworkers’ views beforehand.” *Id.* at 8. The Board concluded that the employee had sought to induce group action by using terms like “us” and “we.”

At least one court, in interpreting its State law equivalent of the NLRA, has found that an employee may be engaged in concerted activity regardless of immigration status. See *Sandoval v. Rizzuti Farms, Ltd.*, 2009 U.S. Dist. LEXIS 37631 (E. D. Wash.). Does this result square with *Hoffman Plastics*, *supra*, Chapter 2? The decision was upheld on reconsideration:

After review, the Court finds that while the [Washington State Norris Laguardia] Act was modeled after the NLRA, making *Hoffman* informative, the Act is nevertheless distinguishable from the NLRA for three (3) reasons: first, the Act is not bound by the same constraints as the NLRA, *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756, 105 S. Ct. 2380, 85 L. Ed. 2d 728 (1985) (discussing a state's ability to use its police powers to protect workers); second, the Act is enforced via private causes of action whereas the NLRA is enforced primarily through the actions of the National Labor Relations Board (NLRB), *compare Krystad v. Lau*, 65 Wn.2d 827, 846, 400 P.2d 72 (1965), *with Hoffman*, 535 U.S. at 151; and third, the Act provides a broad range of remedies to deter employer misconduct, whereas the NLRB's discretion to provide a remedy is limited by other federal policies. The Court finds that these distinctions, coupled with the lack of any limitations based on immigration status or citizenship in the plain language of the Act, persuasive in determining that *Hoffman* is inapplicable here.

*Sandoval v. Rizutti Farms*, 2009 U.S. Dist. LEXIS 60745 (Jul. 15, 2009).

***Add to note 4 on p. 227:***

The Board recently found that employer's preemptive strike to discharge an employee before she could discuss wages with other employees was in fact a violation of the Act despite the fact that no actual concerted activity had yet taken place. According to the Board, "in order to prevent [an employee] from having further conversations with employees about wages and discrimination in the setting of wages is the type of unlawful intent alleged in the complaint—'to discourage employees from engaging in these or other concerted activities.'" *Parexel Int'l, LLC*, 356 NLRB No. 82, at 7-8 (2011). *See also Taylor Made Transportation Svcs*, 358 NLRB No. 53 (June 7, 2012).

## **2. Mutual Aid and Protection**

***Add to discussion of Weingarten on p. 229:***

An employer violated the Act when it discharged an employee for secretly audiotaping a meeting that the employee reasonably believed would result in discipline. The employer had denied a request by the employee to have a union representative present during the meeting. *Stephens Media, LLC*, 356 NLRB No. 63 (2011).

***Please note that the notes following Eastex and the Fischl Reading are on pages 249-251, but should have been on p. 241 before "C. Unprotected Conduct".***

***Add as a new note 5 on p. 251:***

5. Does an employer requirement that an employee agree to a mandatory arbitration agreement precluding class actions or joint arbitration interfere with “mutual aid and support” in violation of the Act? Recently, the Board reversed a Board ALJ (*D.R. Horton, Inc.*, 2011 WL 2451721 (Jun. 16, 2011)) who found that such arbitration agreements do not constitute per se violations of Section 7 protection of concerted activity for mutual aid and protection, especially given federal policy in favor of arbitration. The NLRB instead in early 2012, *D.R. Horton, Inc.*, 357 N.L.R.B. No. 184 (2012), held that an employer violates Section 8(a)(1) when it requires employees covered by the Act, as a condition of their employment, to sign an agreement that precludes them from filing in any forum – arbitral or judicial – “joint, class, or collective claims” addressing their wages, hours or other working conditions. Such an agreement unlawfully restricts employees’ Section 7 right to engage in concerted action for mutual aid or protection.

The case arose because the employer, a home builder, required all employees to sign a “mutual arbitration agreement” requiring submission of statutory claims to arbitration, but limiting submission to individual claims and purporting to divest the arbitrator of authority “to consolidate the claims of other employees” and “to fashion a proceeding as a class or collective action or to award relief to a group of employees in one arbitration proceeding.” Michael Cuda, a superintendent, retained a lawyer and attempted to initiate a claim in arbitration on behalf of a nationwide class of company superintendents; he contended that they had been misclassified as exempt under the Fair Labor Standards Act. The employer refused. Cuda responded by filing an unfair labor practice charge. The NLRB General Counsel issued a complaint based on the long-established theory that filing civil litigation on behalf of a group of employees is a form of concerted activity protected by Section 7. See *Spandsco Oil & Royalty Co.*, 42 N.L.R.B. 942 (1942) (filing of lawsuit under FLSA by three employees); *Salt River Valley Water Users Ass’n*, 99 NLRB 849 (1952) (circulating of petition among co-workers designating one of them as agent seeking back wages under FLSA), *enforced*, 206 F.2d 325 (9th Cir. 1953); see also *Brady v. NFL*, 644 F.3d 661, 673 (8th Cir. 2011) (“a lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment is ‘concerted activity’ under § 7”) (emphasis in original).

Chairman Pearce and Member Becker spoke for the Board; Member Hayes recused himself and did not participate in the decision. Because the Board had only three members as of the date *Horton* was issued, issues regarding its authority to decide the case under the three-member quorum rule articulated in *New Process Steel LP v. NLRB*, 130 S. Ct. 2635 (2010), are expected to be raised during enforcement proceedings, which are pending.

### 3. Unprotected Conduct

#### *Add to note 1 on p. 246:*

“Employees are permitted some leeway for impulsive behavior when engaged in concerted activity, but this leeway is balanced against an employer’s right to maintain order and respect.” *Piper Realty Co.*, 313 NLRB 1289, 1290 (1994). The Board has often applied four factors to determine whether conduct occurring in connection with otherwise protected activity is of a nature sufficient to remove it from the Act’s protection. The four factors are as follows: (1) place of discussion, (2) subject matter of discussion, (3) nature of employee outburst, and (4)

whether the outburst was provoked by an employer's unfair labor practice. *Atlantic Steel*, 245 NLRB 814, 816 (1979). However, an employee may lose protection because of "egregious behavior, including displaying 'an opprobrious or abusive manner.'" *Verizon Wireless*, 349 NLRB 640, 646 (2007).

The Board overturned an ALJ decision that three of the four *Atlantic Steel* criteria were not enough to protect an employee whose profane and menacing outburst was too flagrant to deserve protection. According to the Board, although the employee uttered a number of profanities at the employer, they were stated in a single, brief outburst and the employer had also uttered profanities in the past. The Board thus found employee reaction protected. *Plaza Auto Ctr., Inc.*, 355 NLRB No. 85 (Aug. 16, 2010).

***Add to note 4 on pp. 248-49:***

*Social Media.* In 2011 and 2012, the Office of the General Counsel released three operations memoranda reviewing at least 14 cases involving uses of Facebook, Twitter, or YouTube that implicated rights of employees to "engage in other concerted activities for the purpose of . . . mutual aid or protection." See Memorandum to All Regional Directors from Anne Purcell, Associate General Counsel, Regarding Report of Acting General Counsel Concerning Social Media, No. OM-11-74 (Aug. 18, 2011), *updated*, Memorandum to All Regional Directors from Anne Purcell, Associate General Counsel, Regarding Report of Acting General Counsel Concerning Social Media, No. OM-12-31 (Jan. 24, 2012), *updated*, Memorandum to All Regional Directors from Anne Purcell, Associate General Counsel, Regarding Report of Acting General Counsel Concerning Social Media, No. OM-12-59 (May 30, 2012). Although none of these cases has yet to result in a reported Board decision, their handling by the General Counsel suggests that the NLRA gives employees some leeway to express their views, even in ways that employers may find rude, discourteous, or disloyal.

In several cases, the Division of Advice concluded that employees were not engaged in NLRA-protected activity when they used Facebook to post individual grievances or gripes relating to their employment that did not arise out of, or call for, concerted activity by other employees. But in other cases, there was clear evidence that employees used social media to engage in concerted activity within meaning of the *Meyers* cases, which remain settled Board law. See *Meyers Industries (Meyers I)*, 268 N.L.R.B. 493 (1984), *rev'd sub nom. Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 948 (1985), *on remand, Meyers Industries (Meyers II)*, 281 N.L.R.B. 882 (1986), *aff'd sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied*, 487 U.S. 1205 (1988). Under this law, activity is found to be concerted when a single employee acts "with or on the authority of other employees, and not solely by and on behalf of the employee himself."

In one "textbook example," *Hispanics United of Buffalo, Inc., Hispanics United of Buffalo, Inc.*, Case No. 3-CA-27872 (Sept. 2, 2011) (Arthur Amcham, A.L.J.), a non-profit social services provider discharged employees who had answered a co-worker's Facebook post with comments in a discussion about whether employees had done enough to assist their clients. This was a "textbook" example because the discussion had been initiated by one employee who

was seeking assistance from her fellow employees. She had sought advice about staffing levels and job performance prior to meeting with the non-profit's executive director. According to the ALJ, who sided with the charging party, the fact that the discussion occurred via the internet did not change the concerted nature of this activity. *See, e.g., Valley Hospital Medical Center*, 351 N.L.R.B. 1250, 1252-54 (2007), *enforced sub nom. Nevada Service Employees Union Local 1107 v. NLRB*, 358 F. Appx. 783 (9th Cir. 2009).

The General Counsel's Office observed that a number of defenses may be raised by employers who have disciplined employees for using social media to engage in concerted activity – and that these defenses may be limited. For example, one common defense is that the employee engaged in opprobrious behavior, such as calling his supervisor a “scumbag” or other epithet. This does not necessarily deprive the employee of protection. *See, supra, Atlantic Steel*. Another common defense is disloyalty, as in the case of a sales employee of a luxury auto dealer who was fired for posting on his Facebook page photos and commentary criticizing the employer for staging a sales event where customers were served hot dogs, cookies, and snacks – rather than more substantial refreshments befitting a luxury auto dealer. The salesperson did not necessarily lose the protection of Act; the inquiry in such cases is whether a communication is related to an ongoing labor dispute and whether it is “not so disloyal, reckless or maliciously untrue” as to lose the Act's protection under *Jefferson Standard*. *See NLRB v. IBEW (Jefferson Standard)*, 346 U.S. 464 (1953).

The General Counsel's Office also noted that an employer's broad policy statements regarding social media will be scrutinized to see if any of the following red flags are raised: employees would reasonably construe the broad policy language to prohibit Section 7 activity; the rule was promulgated in response to union activity; or the rule has been applied to restrict exercise of Section 7 rights. *See, e.g., Lutheran Heritage Village-Livonia*, 343 N.L.R.B. 646 (2004). For example, an employer violated Section 8(a)(1) by promulgating a policy broadly prohibiting employees from posting any media pictures of themselves that depict the company's logo, uniforms, or vehicles, including ambulances, because the policy would prohibit employees from engaging in certain forms of protected activity, such as wearing company tee shirts while picketing or protesting working conditions. But a grocery chain did not violate the Act by maintaining a handbook provision reminding employees that only an official company spokesperson can speak for company. *But see Kinder-Care Learning Centers*, 299 N.L.R.B. 1171 (1990) (holding employees have Section 7 right to discuss wages and working conditions with reporters). In another case, the union violated the Act by posting to YouTube and Facebook a video recording in which union agents, without identifying themselves, entered the job site and interrogated the employees of a non-union construction contractor about their employment, immigration status, and Social Security numbers; asked workers for identification; and told them to return in hour if they had to go home to retrieve pertinent documents. These actions were seen as coercing employees in the exercise of their Section 7 rights.

In the Third Advice Memorandum just released in May 2012, the General Counsel addresses specific employer policies on social media that the GC finds overly broad and expansive violating the NLRA in the areas of confidential information (*Target Corp., Case 29-CA-030713*), privacy and online decorum (*McKesson Corp., Case 06-CA-066504*), and official contacts with third parties (*DISH Network, Case 16-CA-066142*). In only one of the cases did the

GC find that an entire employer policy was permissible, and that was in a case where the employer redrafted its initial policy. *See Advice Memo OM-59 at 19-23 (Walmart, Case 11-CA-067171)*. The GC attached the lawful policy, reproduced here:

Social Media Policy  
Updated: May 4, 2012

At [Employer], we understand that social media can be a fun and rewarding way to share your life and opinions with family, friends and co-workers around the world. However, use of social media also presents certain risks and carries with it certain responsibilities. To assist you in making responsible decisions about your use of social media, we have established these guidelines for appropriate use of social media.

This policy applies to all associates who work for [Employer], or one of its subsidiary companies in the United States ([Employer]).

Managers and supervisors should use the supplemental Social Media Management Guidelines for additional guidance in administering the policy.

#### GUIDELINES

In the rapidly expanding world of electronic communication, social media can mean many things. Social media includes all means of communicating or posting information or content of any sort on the Internet, including to your own or someone else's web log or blog, journal or diary, personal web site, social networking or affinity web site, web bulletin board or a chat room, whether or not associated or affiliated with [Employer], as well as any other form of electronic communication.

The same principles and guidelines found in [Employer] policies and three basic beliefs apply to your activities online. Ultimately, you are solely responsible for what you post online. Before creating online content, consider some of the risks and rewards that are involved. Keep in mind that any of your conduct that adversely affects your job performance, the performance of fellow associates or otherwise adversely affects members, customers, suppliers, people who work on behalf of [Employer] or [Employer's] legitimate business interests may result in disciplinary action up to and including termination.

Know and follow the rules

Carefully read these guidelines, the [Employer] Statement of Ethics Policy, the [Employer] Information Policy and the Discrimination & Harassment Prevention Policy, and ensure your postings are consistent with these policies. Inappropriate postings that may include discriminatory remarks, harassment, and threats of violence or similar inappropriate or unlawful conduct will not be tolerated and may subject you to disciplinary action up to and including termination.

### Be respectful

Always be fair and courteous to fellow associates, customers, members, suppliers or people who work on behalf of [Employer]. Also, keep in mind that you are more likely to resolve work related complaints by speaking directly with your co-workers or by utilizing our Open Door Policy than by posting complaints to a social media outlet. Nevertheless, if you decide to post complaints or criticism, avoid using statements, photographs, video or audio that reasonably could be viewed as malicious, obscene, threatening or intimidating, that disparage customers, members, associates or suppliers, or that might constitute harassment or bullying. Examples of such conduct might include offensive posts meant to intentionally harm someone's reputation or posts that could contribute to a hostile work environment on the basis of race, sex, disability, religion or any other status protected by law or company policy.

### Be honest and accurate

Make sure you are always honest and accurate when posting information or news, and if you make a mistake, correct it quickly. Be open about any previous posts you have altered. Remember that the Internet archives almost everything; therefore, even deleted postings can be searched. Never post any information or rumors that you know to be false about [Employer], fellow associates, members, customers, suppliers, people working on behalf of [Employer] or competitors.

### Post only appropriate and respectful content

Maintain the confidentiality of [Employer] trade secrets and private or confidential information. Trade secrets may include information regarding the development of systems, processes, products, know-how and technology. Do not post internal reports, policies, procedures or other internal business-related confidential communications.

Respect financial disclosure laws. It is illegal to communicate or give a "tip" on inside information to others so that they may buy or sell stocks or securities. Such online conduct may also violate the Insider Trading Policy.

Do not create a link from your blog, website or other social networking site to a [Employer] website without identifying yourself as a [Employer] associate.

Express only your personal opinions. Never represent yourself as a spokesperson for [Employer]. If [Employer] is a subject of the content you are creating, be clear and open about the fact that you are an associate and make it clear that your views do not represent those of [Employer], fellow associates, members, customers, suppliers or people working on behalf of [Employer]. If you do publish a blog or post online related to the work you do or subjects associated with [Employer], make it clear that you are not speaking on behalf of [Employer]. It is best to include a disclaimer such as "The postings on this site are my own and do not necessarily reflect the views of [Employer]."

### Using social media at work

Refrain from using social media while on work time or on equipment we provide, unless it is work-related as authorized by your manager or consistent with the Company Equipment Policy. Do not use [Employer] email addresses to register on social networks, blogs or other online tools utilized for personal use.

### Retaliation is prohibited

[Employer] prohibits taking negative action against any associate for reporting a possible deviation from this policy or for cooperating in an investigation. Any associate who retaliates against another associate for reporting a possible deviation from this policy or for cooperating in an investigation will be subject to disciplinary action, up to and including termination.

### Media contacts

Associates should not speak to the media on [Employer's] behalf without contacting the Corporate Affairs Department. All media inquiries should be directed to them.

### For more information

If you have questions or need further guidance, please contact your HR representative.

*Id. at 22-23.*

### ***Add to note 3 on p. 250:***

In *Atl. Scaffolding Co.*, 356 NLRB No. 113 (2011), the employees delivered a letter demanding an increase in pay and per diem rate to their supervisor and refused to work. They were then ordered to take buses to the parking lot, and then, when ordered, some went to a vacant lot across the street. Later the employees were asked to leave the vacant lot and complied. The employees did not return the following day and were discharged for job abandonment. The Board found the work stoppage was peaceful, there was no attempt to deny anyone access to the property, and the employees moved when asked. Further, there was no cognizable interference with production. The employer cited *Cambro* and *Quietflex* saying that the employee's absence from their jobs interfered with the employer's ability to get work done. The Board found the case to be distinguishable from *Cambro* and *Quietflex* because those cases were on employer property and even when the employees were asked to leave, they did not. Also, in those cases the employer was deprived of property for an unreasonable period of time. In *Atl. Scaffolding Co.*, the Board found that there was no need for *Quietflex* balancing because time and interference were minimal.

## C. Defining Labor Organizations and Labor Unions

### 1. Employer Domination, Support, and Interference

#### *Add to note 1 on p. 269:*

The TEAM Act would have amended “the National Labor Relations Act to declare that, where no labor organization is the representative of an employer's employees, it shall not be an unfair labor practice for the employer to establish, assist, maintain, or participate in an organization or entity: (1) in which employees participate to at least the same extent as management representatives to address matters of mutual interest (including issues of quality, productivity, and efficiency); and (2) which cannot negotiate, enter into, or amend collective bargaining agreements.”

#### *Add to note 2 on pp. 269-70:*

Employers can create “Advisory Committees” to help improve plant operations. The employer can provide space for the meeting, hold meetings during work time and pay the meeting attendees. However, the committee’s main purpose cannot be the discussion and proposal of terms and conditions of employment. In *Stabilus Inc.*, 355 NLRB No. 161, at 235-47 (2010), the employer drafted an Operating Structure and Guidelines (OSG) that created committees and established operational committee topics: operations, safety, quality, productivity, training, scheduling, preventive maintenance, overtime, supplies, and staffing. The document provided that no member had veto power and decisions were to be by consensus, but that any member could select a discussion topic and it would then be prioritized by the facilitator, a human resources representative. Further, each committee had the authority to directly implement a course of action “subject to budgetary or financial restraints.” The Board, in a case in which it found a number of violations of the Act, upheld an ALJ decision that the advisory committees were not labor organizations because they did not deal with the employer regarding terms and conditions of employment. Although many issues were raised in the committees, some even related to working conditions, the ALJ found, and the Board agreed, that the primary focus of the committees was not terms and conditions of employment. *Id.* at 246-47.

*Board Can Infer “Dealing With.”* In *DaNite Sign Co.*, 356 NLRB No. 124 (2011), the employer implemented a “moving forward team” (MFT) whose purpose was to facilitate employee consultation with the employer about terms and conditions of employment. The employees were selected by the employer and gave input on merit wage increases, health insurance, and the content of a survey regarding compensation. Although there were no actual back and forth dealings between the MFT and the employer, the Board found that the MFT was a labor organization and that the employer was dominating and interfering because the MFT was created for the purpose of dealing with the employer. The Board relied on *Hunter Douglas, Inc.*

v. *NLRB*, 804 F.2d 808 (3d Cir. 1986), holding that the Board “is entitled to draw ‘legitimate inferences from proven facts.’”

## 2. Exclusive Representation and Majority Rule

### A. The Issue of Minority Unions

*Add before notes on p. 279:*

*Members-Only Bargaining.* Pursuant to Professor Morris’s arguments above in *The Blue Eagle at Work*, unions and scholars alike are pushing for a Board interpretation through rulemaking that the NLRA allows an employer to bargain with a minority union when there is no majority. Of course, the union would not be the exclusive representative, but would only bargain with the employer over terms applied to union members. The argument, as fleshed out in the excerpt above, is that the NLRA allows such bargaining and that *Bernhard Altmann* only prohibits recognition of a minority union as the *exclusive* representative of the entire work unit. In 2007, seven unions filed a rulemaking petition urging the rule. In 2010, the NLRB received amicus briefs on the subject from various labor law professors (including some co-authors of this text) led by Professor Morris. See Catherine Fisk & Xenia Tashlitsky, *Imagine a World Where Employers Are Required to Bargain with Minority Unions: Thoughts on the Arguments for and Against Members-Only Bargaining*, ABA Labor and Employment Section Mid-Winter Meeting, available at [www2.americanbar.org](http://www2.americanbar.org); 27 ABA J. OF LAB. & EMP. LAW No. 1 (forthcoming 2011). See also Petition of United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, and other labor organizations, as “interested persons” under 29 U.S.C. § 2(1), 29 C.F.R. § 102.124, 5 U.S.C. § 551(2), and 5 U.S.C. § 553(3) in the matter of rulemaking regarding members-only minority-union collective bargaining (Aug. 14, 2007).

The rulemaking petition and the excerpt from *The Blue Eagle* present some interesting technical questions. Must the statute be read so that the exclusivity principle of section 9 explicitly limits the duty to bargain of section 8(a)(5) only to those unions selected by a majority? Or can the statute be read to allow members-only bargaining unless there is a certification under section 9? Regardless of which side has the better of the arguments about the language and original intent of the statute, what weight should the Board and the reviewing courts give to the longstanding practice of allowing collective bargaining only based on the exclusivity principle? Is this an area where the Board should be able to innovate (by rulemaking or otherwise) in the absence of statutory amendment? Given the fact that every proposed amendment to the NLRA has been filibustered for 40 years, should the Board have greater or lesser authority than other independent agencies to change practice through interpretation rather than waiting for Congress to amend the statute?

On August 26, 2011, the Board denied the two petitions on members-only minority union collective bargaining. According to the Board,

After careful consideration, we have decided to deny the above petitions, without passing on the merits of the arguments set out therein. Our decision is

based on our judgment respecting the most effective allocation of the Board's limited resources. The petitions call for a significant reinterpretation of the National Labor Relations Act, and would require the dedication of substantial Board resources to study the issues raised by the petitions and the significant legal and policy considerations presented thereby. We have determined that the resources that would be required to address the petitions are better allocated to the adjudication of cases and to the rulemaking proceedings currently in progress at the Board.

The order was signed by Chairman Liebman and Members Becker, Pearce, and Hayes, with the notation that Member Hayes questioned the Board's authority to promulgate the proposed rule, although he agreed that "the Board's limited resources are better allocated to case adjudication." The Board's action thus allows for future consideration of the issue without prejudice.

## **B. Exclusive Representation and Its Obligations**

*Add as a new note 5 on p. 293:*

*The Impact of Members-Only Bargaining on the Regime of Exclusive Representation:* Assume the rulemaking petition currently before the Board on members-only (minority union) is ultimately successful, what would be its effect in a workplace? Would it foment a healthy level of pluralism in the workplace, by allowing only those employees who want unionization and collective bargaining to choose it without forcing it on those who do not? Or would it promote divisiveness of the sort that the *Emporium Capwell* majority feared? Would members-only bargaining lead to unsustainable levels of administrative complexity for employers, by requiring them to have multiple negotiations with different unions and individual employees and thus different personnel processes for different groups? Or is the administrative complexity argument exaggerated because employers have many different personnel policies for different types of employees anyway and, of course, it would be up to the employer whether to extend terms negotiated by the union to employees who did not join the union?

*Add a new note 6 on p. 293:*

6. The State of Tennessee recently amended its public sector law governing collective negotiation with teachers to abolish exclusive representation. *See* Tennessee Professional Educators Collaborative Conferencing Act of 2011. Tenn. Code Ann. §§ 49-5-601 et seq. Under § 49-5-605, if at least 15% of the professional employees (i.e. teachers) submit a written request for collaborative conferencing between October 1 and November 1, then the school board must appoint a committee consisting of equal numbers of board members and professional employees to conduct a confidential poll of the employees. The poll must ask the employees whether they wish to undertake collaborative conferencing with the board of education and provide options of "yes" and "no" responses. The poll must ask employees who vote yes which professional organization they wish to represent them in collaborative conferencing. The options must include, "unaffiliated." Employees who mark "no" in response to the question whether they wish to engage in collaborate conferencing are given the same options as the employees who mark

"yes," but are also given the option "none of the above" which they select if they want to opt out of collaborative conferencing even if a majority vote for it. If a majority of the employees vote for collaborative conferencing, then the school board appoints a committee of between seven and eleven representatives. The employees are entitled to the same number of representatives. Each organization that received at least 15% of the votes is entitled to the number of representative proportionate to the percentage of votes it received. If the option of "unaffiliated" received at least 15% of the votes, it is entitled to proportionate representation. The joint school board - employee committee that conducted the election selects the representative(s) of the "unaffiliated." All representatives of the constituent organizations remain as such for three years at which time the process begins anew with a new poll conducted by a joint school board - employee committee.

What do you think of this approach to the idea of exclusive representation and to collective negotiation? Will it be a benefit or burden to employees in creating more bargaining options, but less collective strength? Do you think this approach could be a model for the private sector?

## Chapter 4: Establishing Collective Representation

### B. Regulation of Access

#### 1. Employee access to coworkers

*Insert the following after Note 5 on page 303:*

In 2002, the U.S. Court of Appeals for the District of Columbia Circuit granted the employer's petition for review and denied enforcement of the Board's order in *New York New York II*. See 313 F.3d 585 (D.C. Cir. 2002). On remand, the NLRB was directed squarely to address the question it had avoided below: whether the employees of a contractor working on property under another employer's control are "employees" possessing Section 7 rights within the meaning of the Act. The question was important, because the Supreme Court had never addressed it either. *Id.* at 588, 590. In 2011, over eight years later, the Board finally did so in *New York New York III*.

#### NEW YORK NEW YORK III

356 N.L.R.B. No. 119 (2011)

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER AND PEARCE:

These cases require us to revisit issues arising when the off-duty employees of an onsite contractor seek access to the premises of the property owner to distribute handbills in support of their organizing efforts.

Today, we adopt an access standard that reflects the specific status of such workers as statutorily protected employees exercising their own rights under the National Labor Relations Act, but not employees of the property owner. We reject both the view that these workers enjoy precisely the same access rights as the employees of the property owner (under *Republic Aviation*) and the view that the property owner may deny access to these workers except in the limited circumstances when even "nonemployee" union organizers must be permitted on the property (under *Lechmere* and *Babcock & Wilcox*). Instead, we strike an accommodation between the contractor employees' rights under federal labor law and the property owner's state-law property rights and legitimate managerial interests. The Supreme Court instructed us to seek such an accommodation in *Hudgens v. NLRB*, 424 U.S. 507, 521 (1976) (holding that the "accommodation between employees' rights and employers' property rights . . . must be obtained with as little destruction of one as is consistent with the maintenance of the other"). We conclude that such an accommodation is possible.

#### FACTS

Ark has contracted to provide food service to NYNY's guests and customers in three sit-down restaurants and a food court consisting of 10 fast food outlets as well as through banquet catering and room service. Ark also provides food service to employees of NYNY and of its

contractors (including Ark's own employees) in NYNY's Employee Dining Room. Ark's is a large operation, employing approximately 900 people and operating 7 days per week, 24 hours per day within the hotel.

In 1997, Ark employees working on NYNY's premises initiated a campaign to obtain representation by the Union, which already represented NYNY's employees. Among other actions in pursuit of representation, on three occasions in July 1997 and April 1998, off-duty Ark employees entered onto NYNY's property (i.e., their regular worksite) to distribute handbills to Ark's and NYNY's customers. The handbills described Ark's lack of a union contract as "unfair" and compared the wages and benefits of the nonunion Ark employees to the wages and benefits of unionized employees doing comparable work at other hotels and casinos on the Las Vegas Strip. The handbills requested that customers tell Ark's managers that Ark should "recognize and negotiate a fair contract with its workers." The handbills distributed by Ark employees in July 1997 (but not those distributed in April 1998) expressly disclaimed any dispute with NYNY.

The handbills were distributed at three access points – at NYNY's porte-cochere (the covered sidewalk and driveway just outside NYNY's main entrance) and directly in front of two Ark-operated restaurants within the hotel, America and Gonzales y Gonzales.<sup>9</sup> On all three occasions, the Ark employees refused NYNY's requests that they leave the property. NYNY summoned the Las Vegas police, who issued trespassing citations to the employees and escorted them off the property. These incidents resulted in the unfair labor practice charges at issue here, which allege that NYNY violated Section 8(a)(1) by prohibiting the Ark employees from distributing handbills on its premises.

### ANALYSIS

The narrow issue in this case is whether NYNY violated Section 8(a)(1) of the Act when it prohibited off-duty Ark employees from distributing handbills to customers of Ark and NYNY at three locations on NYNY's property. We must address the broader legal and policy questions raised by the factual pattern here, which encompasses two circumstances that pull in opposite directions: the Ark employees were *not* employees of NYNY, but they *were* regularly employed on NYNY's property by its contractor.

#### A.

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<sup>9</sup> On July 9, 1997, several Ark employees distributed handbills at the porte-cochere. On April 7, 1998, several Ark employees handbilled at the restaurants' entrances. As represented by the Union's counsel at oral argument, the Respondent's assertion that the porte-cochere was not an appropriate location for the Ark employees' handbilling, because it was too far from their worksites, led to the April 7, 1998 handbilling at the restaurants' entrances. Upon being prohibited from handbilling at the restaurants' entrances as well, the handbillers returned to the porte-cochere on April 9, 1998.

As a preliminary point, it is clear that the undisputed lack of an employment relationship between the Ark employees and NYNY is not dispositive here. The Act clearly regulates the relationship between an employer (such as NYNY) and employees of other employers (such as the employees of Ark). The Act contains not only a broad definition of the term “employee,” but one whose breadth is aimed directly at the question at issue. The Act provides that

[t]he term “employee” shall include any employee, and *shall not be limited to the employees of a particular employer*, unless the Act explicitly states otherwise.

Section 2(3), 29 U.S.C. § 152(3) (emphasis added).

The precise terms of the Act’s prohibitions also make clear that an employer’s action toward the employees of other employers can constitute an unfair labor practice. The prohibition at issue in this case, contained in Section 8(a)(1), provides that it is an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.” The prohibition is not limited to interference with the rights of *his* employees. In contrast, the prohibition in Section 8(a)(5) is so limited, providing that it is an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of *his* employees” (emphasis added.) Finally, further evidence of Congress’ clear intent regarding this issue is found in the Act’s definition of the statutory term “labor dispute” to include “any controversy concerning . . . the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.”

In each of these ways, Congress made clear in the text of the Act that the term “employee” does not refer to a relationship between individual workers and a single employer and, specifically, that the prohibition contained in Section 8(a)(1) of the Act extends to actions by employers affecting employees of other employers. As the Supreme Court explained:

This was not fortuitous phrasing. It had reference to the controversies engendered by constructions placed upon the Clayton Act and kindred state legislation in relation to the functions of workers’ organizations and the desire not to repeat those controversies.... The broad definition of “employee,” “unless the Act explicitly states otherwise,” as well as the definition of “labor dispute” in § 2(9), expressed the conviction of Congress “that disputes may arise regardless of whether the disputants stand in the proximate relation of employer and employee.”

*Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 192 (1941).

Based on these clear textual indications of Congress’ intent, the Board as well as the courts have held in a wide variety of contexts that “an employer under Section 2(3) of the Act may violate Section 8(a) not only with respect to its own employees but also by actions affecting employees who do not stand in such an immediate employer/employee relationship.” *International Shipping Assn.*, 297 N.L.R.B. 1059, 1059 (1990).

The Ark employees, then, are statutorily protected employees, and NYNY is a covered employer that can, under certain circumstances, be held to violate the Ark employees' statutory rights, even though the Ark employees are not employees of NYNY.

We seek to establish an access standard that reflects the specific status of the Ark employees as protected employees who are not employees of the property owner, but who are regularly employed on the property. Neither *Lechmere* nor *Republic Aviation* involved this category of persons. Neither case, in the court's words, "yields [a] definitive answer" here.

Our answer is reached by analyzing the statutory rights of such workers and the property rights and managerial interests of the property owner, seeking an accommodation between the two. In employing this form of analysis, we are guided by the Supreme Court's observation that

[u]nder the [National Labor Relations] Act, the task of the Board, subject to review by the courts, is to resolve conflicts between § 7 rights and private property rights, "and to seek a proper accommodation between the two."

After *Lechmere*, the Board – with the approval of both the Sixth Circuit and the District of Columbia Circuit, the latter in a decision that came after the remand decision here – has employed such an analysis in cases analogous to this one involving the access rights of off-duty employees of the employer/property owner who are employed at locations separate from where they seek access. See *Hillhaven Highland House*, 336 N.L.R.B. 646 (2001) (establishing test governing access rights of offsite employees), enforced, *First Healthcare Corp. v. NLRB*, 344 F.3d 523 (6th Cir. 2003); *ITT Industries, Inc. v. NLRB*, 413 F.3d 64 (D.C. Cir. 2005) (affirming Board test adopted in *Hillhaven*).

In seeking the proper accommodation here, we thus do not write on a blank slate. Under *Republic Aviation*, it is well established that an employer that operates on property it owns ordinarily violates the Act if it bars its employees from distributing union literature during their nonwork time in nonwork areas of its property. Moreover, such an employer's off-duty employees have a presumptive right to return to their work site and gain access to exterior, nonwork areas for purposes of otherwise protected solicitation under *Tri-County Medical Center*, 222 NLRB 1089 (1976), and *Nashville Plastic Products*, 313 NLRB 462 (1993). Finally, the employer's off-duty employees who are employed at another location presumptively have the same rights as off-duty employees who work at the location at issue. *Hillhaven Highland House*. Under these precedents, as the court of appeals recognized, if NYNY had barred its own employees from engaging in the expressive activity engaged in by the Ark employees in the same locations, it would have violated the Act. In conducting the analysis here, then, we ask whether the relevant rights and interests are different in this case because the employees are not employees of the property owner (even though they are regularly employed on the property) and, if so, how that affects the proper accommodation.

## B.

We turn now to a closer, more practical examination of the Section 7 rights involved in this case and the property rights and managerial interests with which they must be

accommodated. As we will explain, the balance here tips in favor of finding that NYNY unlawfully excluded the off-duty Ark employees from its property.

We begin by considering the Ark employees' rights and interests in relation to the specific activity they engaged in on NYNY's property. As part of a campaign to win union representation for themselves, the Ark employees distributed handbills to Ark's and NYNY's customers, seeking their support in getting Ark to "recognize and negotiate a fair contract with its workers."

Indeed, the Ark employees were not "outsiders," in contrast to the union organizers in *Babcock & Wilcox* and *Lechmere*. This distinction is relevant in considering both the weight of the employees' rights and the extent to which their exercise interferes with the owner's rights and interests (as discussed below). The Ark employees were regularly employed on NYNY's property by the company's contractor. The hotel and casino complex was their workplace. They worked not only inside Ark's restaurants but throughout the premises, providing room service, carrying supplies, and servicing and patronizing NYNY's employee cafeteria. As the Supreme Court has observed, the workplace is the "one place where employees clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees." *Eastex*, 437 U.S. at 574. It seems unlikely, as a practical matter, that Ark employees would view the limits of Ark's leasehold as setting the boundaries for engaging in Section 7 activity at work. Yet NYNY's argument – which would have the Board treat Ark employees no differently from union organizers – suggests that the hotel could bar an Ark employee from handing a union card to a fellow employee in the hotel's parking lot, as they walked together through the hotel to the restaurant, or as they sat together at lunch in NYNY's employee cafeteria.

[N]either the circuit nor the Board has ever drawn a substantive distinction between solicitation of fellow employees and solicitation of nonemployees. *Stanford Hospital & Clinics v. NLRB*, 325 F.3d 334, 343 (D.C. Cir. 2003); *see also Santa Fe Hotel & Casino*, 331 N.L.R.B. 723, 728-29 (2000) (holding that employer unlawfully prohibited off-duty employees from handbilling customers at entrances to hotel and casino, seeking support in persuading employer to bargain for first contract).

Indeed, in the context of this case, the intended audience of the Ark employees is a factor that strengthens, rather than weakens, their statutory claim to access, certainly with respect to the areas in front of the Ark-operated restaurants. At those locations, Ark employees were uniquely able to identify and communicate with the relevant subset of NYNY customers – those considering whether to patronize an Ark restaurant – with difficulty and expense. *See Scott Hudgens*, 230 N.L.R.B. at 416 (explaining that intended audience of picketers, potential customers of store, "became established as such only when individual shoppers decided to enter the store"). For this reason, the location of the expressive activity here – the very threshold of the employees' own workplace – has been a central site of protected Section 7 activity since the passage of the Act. Wholly excluding the Ark handbillers from these uniquely effective locations would place a serious burden on the exercise of their Section 7 rights to communicate with the relevant members of the public.

In sum, we find that the statutorily-recognized interests of the Ark employees, as implicated here, are much more closely aligned to those of NYNY's own employees (who, under our law, would have been entitled to the access sought) than they are to the interests of the union organizers at issue in *Lechmere* and *Babcock & Wilcox*. As we have explained, despite their lack of an employment relationship with NYNY, the Ark employees are statutorily protected employees, who were exercising their own Section 7 rights of self-organization, not rights derived from those of other employees. They were not strangers or outsiders to NYNY's property; rather, they worked there regularly, for an employer with a close economic relationship to NYNY. Finally, they sought access to locations that were uniquely suited to the effective exercise of their statutory rights.

We turn now to a consideration of NYNY's interests in denying off-duty Ark employees access to portions of its property outside Ark's leasehold for purposes of distributing literature. Most fundamentally, there is no question that – countervailing considerations of federal labor law aside – NYNY, as the property owner, had a right to exclude the Ark employees. “[O]ne of the essential sticks in the bundle of property rights is the right to exclude others.” *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 82 (1980). Any rule derived from federal labor law that requires a property owner to permit unwanted access to his property for a nonconsensual purpose necessarily impinges on the right to exclude. We must, and do, give weight to that fact. As a corollary, it also seems clear that, purely from the perspective of state property law, the Ark employees were trespassers at the moment they began to distribute handbills. Whatever their status as NYNY's invitees at other times and for other purposes, there is no suggestion that the off-duty Ark employees had an invitation from NYNY that privileged them to distribute handbills to the public in the locations involved here. This fact, too, must be taken into account, although it cannot be dispositive consistent with the well-established principle that state law property rights sometimes must yield to the imperatives of federal labor law.

Apart from its state law property right to exclude, NYNY also has a legitimate interest in preventing interference with the use of its property. Whether that interest is deemed a property right or a “management interest,” perhaps ultimately derived from property ownership, it is entitled to appropriate weight. Indeed, even under *Republic Aviation*, an employer can impose restrictions on its own employees' solicitation and distribution if the restrictions are shown to be necessary to maintain production and discipline. See *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 492-493 (1978); *Republic Aviation*, 324 U.S. at 803 n.10. On the records here, however, the judges found, and we agree, that the Ark employees' handbilling did *not* interfere with operations or discipline at NYNY's complex. The handbilling did not adversely affect the ability of customers to enter, leave, or fully use the facility or the ability of Ark or NYNY employees to perform their work, and it was not a violation of any rule that NYNY attempts to defend as necessary to ensure operations or discipline.

We must nevertheless consider the fact that the Ark employees had no employment relationship with NYNY and ask whether that fact might justify a prophylactic rule limiting their access, despite the lack of any disruption or misconduct in this case.

Given the voluntary and mutually beneficial arrangement between NYNY and Ark, NYNY reasonably could have anticipated that Ark employees would seek access to its property

for Section 7 activity (access that, under existing law, NYNY would have been compelled to grant to its own employees), and NYNY was free to negotiate contractual terms with Ark sufficient to protect its interests in relation to Ark's employees. In fact, NYNY's contract with Ark did exactly that, requiring Ark to make all reasonable efforts to ensure that Ark employees abide by any reasonable rules and regulations as New York New York] may, from time to time, reasonably adopt for the safety, care and cleanliness of [Ark's premises, or the Hotel or for the preservation of good order thereon or to assure the operation of a first-class resort hotel facility.

NYNY's contract with Ark also imposed specific requirements on the contractor in relation to its employees, including that they be subject to drug testing. Furthermore, NYNY's control over Ark's employees, through its relationship with Ark, extended specifically to their off-duty, on-premises conduct, for example, to barring them from wearing their uniforms and entering the bars inside the hotel.

Even absent the express contractual commitment on the part of Ark to use its employment authority to enforce NYNY's rules and so protect against disruption of the hotel's operations, NYNY and Ark share an economic interest in ensuring that Ark employees do nothing that might interfere with the operations of the hotel. NYNY is simply wrong, then, when it argues that "there existed no means for NYNY to regulate or control the infringement on its private property other than through reliance on state trespass laws."

NYNY's ability to protect its operational and property interests in relation to its contractors' employees is the rule, not the exception. The Board's case law reflects long and extensive experience with contractual relationships between employer/contractors and property owners. Our experience suggests that such a relationship ordinarily permits the property owner to quickly and effectively intervene, both through the employer and directly, to prevent any inappropriate conduct by the employer's employees on the owner's property. As the judge found in one case affirmed by the Board, "[a]n employer receiving contracted labor services will of necessity exercise sufficient control over the operations of . . . the contractor at its facility so that it will be in a position to take action to prevent disruption of its own operations." *Southern California Gas Co.*, 302 N.L.R.B. 456, 461 (1991). Property owners often give directions to employees of contractors through the contractors' onsite managers and supervisors. Contractor employees, then, are ordinarily deterred from engaging in misconduct not only by the presence of their own employer on site (whose managers and supervisors are just as likely as those of the owner to immediately respond to any disruptive behavior), but also by the property owner's ability to direct the employer's managers and supervisors to take action. In specific instances, such as when they observe misconduct, property owners themselves often direct contractors' employees without the mediation of the contractor/employer's agents. Finally, property owners can exercise their authority to direct contractors to remove employees from the premises and not permit them to return. Such exclusion by the owner may result in the contractor terminating the employee. The owner need not even make a request of the contractor, in many instances, as the contractor has every incentive not to permit its employees to interfere with the owner's operations and thereby jeopardize its contract.

These cases support our conclusion that property owners ordinarily are able to protect their property and operational interests, in relation to employees of contractors working on their

premises, without resort to state trespass law. Like these property owners, NYNY is very differently situated with respect to Ark employees seeking access to its property than were the property owners in *Lechmere* and *Babcock & Wilcox* faced with union organizers who sought access to their property.

### C.

The Board's task is thus to find an accommodation between the Ark employees' Section 7 interests and NYNY's property rights and managerial interests as we have analyzed them. Careful consideration of the questions asked by the court of appeals, and of our own case law and experience, leads us to conclude that the property owner generally has the legal right and practical ability to fully protect its interests through its contractual and working relationship with the contractor (as this case illustrates), but the contractors' employees have no parallel ability to protect their statutory rights and legitimate interests in and around their workplace without our intervention.

Nevertheless, our decision is a relatively narrow one. We address only the situation where, as here, a property owner seeks to exclude, from nonworking areas open to the public, the off-duty employees of a contractor who are regularly employed on the property in work integral to the owner's business, who seek to engage in organizational handbilling directed at potential customers of the employer and the property owner.<sup>48</sup>

We conclude that the property owner may lawfully exclude such employees only where the owner is able to demonstrate that their activity significantly interferes with his use of the property or where exclusion is justified by another legitimate business reason, including, but not limited to, the need to maintain production and discipline (as those terms have come to be defined in the Board's case law). Thus, any justification for exclusion that would be available to an employer of the employees who sought to engage in Section 7 activity on the employer's property would also potentially be available to the nonemployer property owner, as would any justification derived from the property owner's interests in the efficient and productive use of the property. The standard we adopt today is thus analogous to that adopted in *Hillhaven Highland House*, which was enforced by the District of Columbia Circuit.

We leave open the possibility that in some instances property owners will be able to demonstrate that they have a legitimate interest in imposing reasonable, nondiscriminatory, narrowly-tailored restrictions on the access of contractors' off-duty employees, greater than those lawfully imposed on its own employees. We express no view today, however, on precisely which unique restrictions on contractor employees' access might be lawful, although they will be evaluated consistent with the accommodation of interests we have engaged in here. Such determinations are best made on a case-by-case basis.

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<sup>48</sup> We conclude that this case does not require us to decide whether the Ark employees would be entitled to access to all other or, indeed, any other nonwork areas of the hotel and casino.

In adopting this test, we decline to condition access to the property on a showing by the off-duty employees (or by the General Counsel on their behalf) that they lack a reasonable alternative means, however defined, of communicating with their intended audience.

As a general matter, the test we adopt today seeks to place the Ark employees and similarly situated, protected employees at a point on the spectrum of accommodation between Section 7 rights and property rights that reflects the similarities and differences between them and other access seekers considered in the Supreme Court's and our prior jurisprudence, as well as the similarities and differences between NYNY and other property owners who wish to exclude the protected employees from their property. As in *Hillhaven Highland House*, we have sought a nuanced resolution of the legal issue presented to us, rather than simply fitting the Ark employees into some preexisting category.

E.

Applying the test adopted here, we conclude that NYNY violated Section 8(a)(1) by excluding the handbilling Ark employees from its property. NYNY has not demonstrated that the handbilling significantly interfered with its use of the property or that exclusion was justified by some other legitimate business reason, such as the need to maintain operations or discipline. Because NYNY had no preexisting restrictions on access applicable to the Ark employees, we need not consider what, if any, restrictions short of a blanket prohibition on distribution NYNY lawfully might have imposed.

MEMBER HAYES, dissenting in part:

In determining that the Respondent violated the Act by excluding employees of food concessionaire Ark Las Vegas Restaurants from soliciting customer support for their organizational campaign in the interior of Respondent's hotel and casino complex, [my colleagues] apply a test that artificially equates the Section 7 rights of a contractor's employees with those of the property owner's employees, pays only lip service to the owner's property interests, and gives no consideration to the critical factor of alternative means of communication.

The majority's purported balancing test affords as much, if not more, protection to the efforts of Ark employees to engage in union organizational activity on the Respondent's premises as the Respondent's own employees would have. Applying what I believe to be the correct test, and in the absence of a sufficient record regarding the existence of less intrusive reasonable alternative means of communication, I would find that the Respondent acted unlawfully only when it excluded Ark handbillers from the nonwork porte-cochere area outside the main entrance to the hotel and casino complex.

The inevitable result of the majority's analysis represents no real accommodation of competing interests. There will be no case-by-case balancing. The contractor employees' rights to engage in organizational activity will trump the property owner's rights every time, subject only to the suggested possibility that in some future case a property owner may be able to justify the imposition of "reasonable, non-discriminatory, narrowly-tailored restrictions on the access of contractors' employees, greater than those lawfully imposed on its own employees."

In my view, the appropriate balancing test must be drawn from the *Babcock* framework, inasmuch as it involves nonemployees of the property owner. The fact that they work regularly and exclusively for their employer on the property of another should be considered in that test, but it cannot elevate those nonemployees to equal standing with the property owner's own employees vis-à-vis the assertion of Section 7 rights, nor can it abnegate the owner's exclusionary property rights. In this particular case, I would find based on the existing record that the Respondent has failed to prove the availability of reasonable nontrespassory means for Ark handbillers to communicate their message. I therefore conclude that the Respondent unlawfully excluded Ark employees from engaging in minimally intrusive handbilling activity on the Respondent's property in the porte-cochere area. In a future case with different facts, particularly as to reasonable nontrespassory alternative means of communication, I would not require that a property owner's rights should yield at all.

#### NOTES

1. This case presents a question that is increasingly common in entertainment centers, shopping malls, and other multi-use facilities: when and where must off-duty employees of an onsite contractor have access to the premises of the property owner to distribute handbills in support of their organizing efforts? The challenge in such cases is to strike the proper balance between the right to access sought by workers and the right to exclude sought by property owners. In attempting to strike that balance, the majority leaned toward characterizing the access sought by Ark employees as akin to that of employees of the property owner under *Republic Aviation*; the dissent leaned toward characterizing the right to exclude as akin to that of property owners dealing with trespassers under *Lechmere*. Who do you think got it right, and why?

2. The Board expressly reserved judgment as to whether Ark employees would be entitled to access to "all other or, indeed, any other nonwork areas" of the hotel. Even a casual visitor to Las Vegas knows that slot machines and card tables are positioned directly in the path of every hotel guest as soon as she enters the building. Nearly every pathway to a lobby, front desk, elevator bank, or connected building passes through a casino area. Are these pathways work areas or non-work areas? Should employees be permitted to pass out handbills to guests or other workers who use them?

3. The events giving rise to this litigation first occurred in 1997. Fourteen years and three Board decisions later, it still is not certain that either the outcome or the applicable law is settled, because yet another petition for review is pending in the D.C. Circuit. Does this make sense to you? What role, if any, should the passage of time play in the analysis of Board members and judges who are trying to determine if employees' Section 7 rights were violated? Can you think of any reforms that could reduce such delays?

4. Owners of multi-use facilities may assert their property rights by summoning the police to remove or arrest handbillers as trespassers. Such assertions are often met by the filing of unfair labor practice charges. Invoking the right to petition the government for redress of grievances – here, that handbillers are illegally on private property and should be removed or

arrested by the authorities – may an employer defend against a ULP charge on First Amendment grounds? *See Venetian Casino Resort LLC*, 357 N.L.R.B. No. 147 (2011).

***Insert the following as the new last paragraph at the end of Note 3 on page 316:***

It is unclear whether the relatively new twist on discrimination principles enunciated by *Register Guard* will remain good law much longer. In *Roundy's Inc.*, 356 N.L.R.B. No. 27 (2010), the Board agreed to revisit the issue, and invited interested parties to submit amicus briefs addressing it.

## **D. Other Types of Coercion**

***Replace the existing discussions of interrogation and polling as well surveillance – which contain some errors and omissions – with the following new text on pages 346-47:***

### **1. Interrogation and polling**

Interrogation of employees as to their affiliation with or participation in union activity is unlawful only if, considered in light of all the circumstances, it would reasonably tend to coerce them. *See Rossmore House*, 269 N.L.R.B. 1176 (1984), *review denied*, *Hotel Employees & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). To determine whether interrogation is coercive, the Board examines at least four factors: the time and place of interrogation; the personnel involved in the interrogation; the nature of the information sought; and the employer's known preferences about unionization. *See Charlotte Union Bus Station, Inc.*, 135 N.L.R.B. 228 (1962); *see also Lorben v. NLRB*, 345 F.2d 346 (2d Cir. 1965).

Polling employees to determine the extent of support for union representation is permissible if the following conditions are satisfied: the polling must be conducted by secret ballot; the purpose of polling is to determine the union's claim of majority support; employees must have been notified of such purpose; adequate assurances against reprisals have been given; and the employer has not created a coercive atmosphere or committed unfair labor practices. *See Struksnes Constr. Co.*, 165 N.L.R.B. 1062 (1967).

The potential for coercion in questioning workers about their union sympathies can pose a serious problem for an employer who is gathering evidence from employees in order to prepare for proceedings before the NLRB or other tribunals. Here too the Board has established the conditions that must be satisfied: the purpose of the questioning must be communicated to the employees being questioned; assurances against reprisals must be given; employee participation must be voluntary; the questioning must be free from anti-union animus; the questioning must not be coercive in nature; the questions must be relevant to the issues in litigation; the subjective state of mind of the employees questioned must not be probed; and the questions must not otherwise interfere with Section 7 rights. *See Johnnie's Poultry Co.*, 146 N.L.R.B. 770 (1964), *enf. denied on other grounds*, 344 F.2d 617 (8th Cir. 1965).

## 2. Surveillance

Surveillance of employees who are engaged in protected activities in the open and on or near the employer's premises is lawful. *See, e.g., Roadway Package System*, 302 N.L.R.B. 961 (1991); *Southwire Co.*, 277 N.L.R.B. 377 (1985), *enfd*, 820 F.2d 453 D.C. Cir. 1987); *Porta Systems Corp.*, 238 N.L.R.B. 192 (1978), *enfd*, 625 F.2d 399 (2d Cir. 1980). For example, a supervisor's conspicuous observation of employees who openly meet with a union organizer within 100 feet of the employer's property, and under an expressway, is not unlawful, if the employees do not attempt to conceal their activities. *See Basic Metal & Salvage Co.*, 322 N.L.R.B. 462 (1996). But conspicuous surveillance that causes intimidation of employees, or otherwise interferes with their protected activities, may be unlawful. *See Carry Cos. of Ill.*, 311 N.L.R.B. 1058 (1993), *enfd*, 30 F.3d 922 (7th Cir. 1994).

Surveillance by means of videorecording or photographing employees, however, deserves special mention, because the Board has set a "lower threshold" for finding such surveillance unlawful under Section 8(a)(1). *Allie-Kiski Medical Center*, 339 N.L.R.B. 361, 365 (2003). Although the employer has the right to maintain security measures necessary to further legitimate business interests during union activity, videorecording and photographing such activity can be justified only if the surveillance serves a legitimate security objective, *see National Steel & Shipbuilding Co.*, 324 N.L.R.B. 499 (1997), *enfd*, 156 F.3d 1268 (D.C. Cir. 1998), or if the employer can demonstrate a reasonable basis to believe that misconduct would occur, *see NLRB v. Colonial Haven Nursing Home*, 542 F.2d 691 (7th Cir. 1976).

In responding to a union organizing campaign, an employer may engage in the tactic of soliciting employees to participate in recorded interviews in which they may be asked to express anti-union views. Is this a form of surveillance? May an employee voluntarily consent to such recording, and would such consent preclude a finding of coercion or interference? The following case considers these questions.

***Replace existing Note 1 with the following new Note 1 on page 350:***

1. Review the five factors governing the proper solicitation of employees to participate in making anti-union videorecordings articulated by the Board and cited with approval by the Second Circuit in *Allegheny Ludlum*. Is taking into account these five factors sufficient to protect employees from having to make an "observable choice" about the merits of unionization? Should the same factors apply to union as opposed to employer solicitation of such videorecording? *See Pepsi-Cola Bottling Co.*, 289 N.L.R.B. 736 (1988), *overruled*, *Randall Warehouse of Ariz., Inc.*, 328 N.L.R.B. 1034 (1999), *overruled on remand*, 347 N.L.R.B. No. 56 (2009).

***Add a new Note 4 at the end of the Notes on page 351:***

4. *Remedies*. The typical remedies for unlawful interrogation or polling, and for unlawful surveillance, are the issuance of a cease and desist order against the employer and the posting of a notice to employees announcing the unlawfulness of the employer's conduct. Critics of the Act have long complained that such "make whole" remedies are insufficient, either

to compensate injured employees or to deter future employer misconduct. In 2010, the acting general counsel of the NLRB, in a “GC memo,” agreed, at least in the context of union organizing campaigns. The memo announced that henceforth more effective remedies should be sought for unfair labor practices that are “ancillary” to discriminatory discharge in cases where the employer is trying to “nip in the bud” the union’s organizing efforts; interrogation, surveillance, and interference with employee communication were specifically identified as ancillary ULPs. These remedies could include notice reading, as well as “access” remedies, such as granting the union use of employer bulletin boards – electronic, internet, or otherwise – and a list of the names and addresses of bargaining unit employees “for a longer and earlier time period than would be required” under *Excelsior Underwear*, supra p. 322. See Memorandum by Acting General Counsel Lafe E. Solomon to All Regional Directors Regarding Effective Remedies in Organizing Campaigns, No. GC 11-01 (Dec. 20, 2010).

*Insert the following as a new subsection on page 351:*

#### **4. Use of Social Media**

##### **a. Social Media in General**

The rise of social media – Facebook, MySpace, Twitter, and their equivalents – is a sign of our times. According to Facebook, the site’s more than 901 million active users have established more than 125 billion “friend” connections, and during the first quarter of 2012 alone, they generated a daily average of 3.2 billion “likes” and other posted comments. See <http://newsroom.fb.com/content/default.aspx?NewsAreaId=22>. Naturally, much of this content concerns what is happening in the user’s workplace. The user may criticize the boss, the company, the terms and conditions of employment, or even co-workers; some of this criticism may be characterized as concerted activity protected by the Act.

Although a growing volume of cases have been filed testing the potential Section 7 rights of employees who post on social media content critical of their employers, the NLRB has yet to decide any of them. By June 2011, every one of the agency’s 32 regional offices had at least one pending case regarding either an employee’s use of social media or an employer’s policies concerning such use. See Lawrence E. Dubé, *Social Media Use Cases on Agenda of Every NLRB Regional Office*, 79 U.S.L.W. (BNA) 2799 (Jun. 28, 2011). In 2011 and 2012, this case load prompted the Acting General Counsel to issue three separate operations memoranda reviewing a total of at least 35 cases involving uses of Facebook, Twitter, or YouTube that implicated rights of employees to “engage in other concerted activities for the purpose of . . . mutual aid or protection.”<sup>2</sup> The handling of these cases by the Acting General Counsel suggests

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<sup>2</sup> See Memorandum to All Regional Directors from Anne Purcell, Associate General Counsel, Regarding Report of Acting General Counsel Concerning Social Media, No. OM-11-74 (Aug. 18, 2011) (14 cases); Memorandum to All Regional Directors from Anne Purcell, Associate General Counsel, Regarding Report of Acting General Counsel Concerning Social Media, No. OM-12-31 (Jan. 24, 2012) (14 cases); Memorandum to All Regional Directors from Anne Purcell, Associate General Counsel, Regarding Report of Acting General Counsel Concerning Social Media, No. OM-12-59 (May 30, 2012) (7 cases).

that the NLRA gives employees some leeway to express their views, even in ways that employers may find rude, discourteous, or disloyal.

Below is a summary of the cases treated by the three operations memoranda issued by the Acting General Counsel.

In several cases, the Division of Advice concluded that employees were not engaged in NLRA-protected activity when they used Facebook to post individual grievances or gripes relating to their employment that did not arise out of, or call for, concerted activity by other employees. But in other cases, there was clear evidence that employees used social media to engage in concerted activity within meaning of the *Meyers* cases, which remain settled Board law. Under this law, activity is found to be concerted when a single employee acts “with or on the authority of other employees, and not solely by and on behalf of the employee himself.” See *Meyers Industries (Meyers I)*, 268 N.L.R.B. 493 (1984), *rev’d sub nom. Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 948 (1985), *on remand, Meyers Industries (Meyers II)*, 281 N.L.R.B. 882 (1986), *aff’d sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied*, 487 U.S. 1205 (1988).

In one “textbook example,” a non-profit social services provider discharged employees who had answered a co-worker’s Facebook post with comments in a discussion about whether employees had done enough to assist their clients. *Hispanics United of Buffalo, Inc.*, Case No. 3-CA-27872 (Sept. 2, 2011) (Arthur Amcham, A.L.J.). *Hispanics United* is the agency’s first written decision by an administrative law judge dealing with employee discipline for use of social media. It was a “textbook” example because the discussion had been initiated by one employee who was seeking assistance from her fellow employees. She had sought advice about staffing levels and job performance prior to meeting with the non-profit’s executive director. According to the ALJ, who sided with the charging party, the fact that the discussion occurred via the internet did not change the concerted nature of this activity. See, e.g., *Valley Hospital Medical Center*, 351 N.L.R.B. 1250, 1252-54 (2007), *enforced sub nom. Nevada Service Employees Union Local 1107 v. NLRB*, 358 F. Appx. 783 (9th Cir. 2009).

### **b. Employer’s Rules Concerning Use of Social Media**

The Acting General Counsel also noted that an employer’s broad policy statement or work rule regarding employees’ use of social media will be scrutinized to see if it can reasonably be construed to prohibit Section 7 activity, in which case such statement or rule would be presumptively in violation of the Act. The Board uses a two-step inquiry to determine if a work rule would have such a prohibited effect. See *Lutheran Heritage Village-Livonia*, 343 N.L.R.B. 646 (2004). First, a rule is clearly unlawful if it explicitly restricts Section 7 protected activities. Second, if the rule does not explicitly restrict protected activities, it will be found to violate Section 8(a)(1) only upon a showing that (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

For example, an employer violated Section 8(a)(1) by promulgating a policy broadly prohibiting employees from posting any media pictures of themselves that depict the company’s

logo, uniforms, or vehicles, including ambulances, because such policy would interfere with employees' right to engage in certain forms of protected activity, such as wearing company tee shirts while picketing or protesting working conditions. But a grocery chain did not violate the Act by maintaining a handbook provision reminding employees that only an official company spokesperson can speak for company. *But see Kinder-Care Learning Centers*, 299 N.L.R.B. 1171 (1990) (holding employees have Section 7 right to discuss wages and working conditions with reporters). In another case, the union violated the Act by posting to YouTube and Facebook a video recording in which union agents, without identifying themselves, entered the job site and interrogated the employees of a non-union construction contractor about their employment, immigration status, and Social Security numbers; asked workers for identification; and told them to return in hour if they had to go home to retrieve pertinent documents. These actions were seen as coercing employees in the exercise of their Section 7 rights.

By contrast, Walmart did not violate the Act by promulgating a two-page social media policy that gives employees clear notice of prohibited behavior "without burdening protected communications about terms and conditions of employment." According to a Division of Advice memorandum that was posted on the NLRB's website the same date as the Associate General Counsel's latest operations memo, *see Walmart*, No. 11-CA-67171 (May 30, 2012), an unnamed former employee filed an unfair labor practice charge asserting that the company promulgated a July 2010 social media policy that violated the NLRA. The former employee also alleged the company fired him illegally because of comments he posted on his Facebook page. But Walmart adopted a revised policy after the charge was filed, and the acting general counsel found the revision to be lawful. Finding that the substitution of the lawful rule made it unnecessary to resolve the legality of the Walmart policy that preceded it, the Acting General Counsel also rejected the employee's discharge claim because his online comments were not work-related or protected under the NLRA.

Walmart's two-page policy, bearing a notation that it had been updated, applies to all "associates" of Walmart Stores Inc. and subsidiaries in the United States. The policy forbids "inappropriate postings" including "discriminatory remarks, harassment, and threats of violence or similar inappropriate or unlawful conduct." The policy also prohibits communications that "reasonably could be viewed as malicious, obscene, threatening, or intimidating" as well as those that "disparage" individuals, including employees, "or that might constitute harassment or bullying." Employees are instructed by the Walmart policy to "be fair and courteous" to fellow employees and others and are told they "are more likely" to resolve work-related complaints by speaking directly to co-workers or using a Walmart open-door policy "than by posting complaints to a social media outlet." Violations, the policy warns, may result in discipline or discharge of an employee.

According to the associate general counsel, it was helpful that Walmart's revised policy provided "sufficient examples of prohibited conduct so that, in context, employees would not reasonably read the rules to prohibit Section 7 activity." Moreover, he found the rule lawful "since it prohibits plainly egregious conduct, such as discrimination and threats of violence, and there is no evidence that the Employer has used the rule to discipline Section 7 activity." Finally, he concluded that the retailer's revised social media policy maintains the confidentiality

of trade secrets and other confidential information without violating the NLRA, because employees “have no protected right to disclose trade secrets.”

For more information about employer policy cases like Walmart’s, see Lawrence E. Dubé, *NLRB’s Solomon Tackles Social Media Cases, Giving Wal-Mart Policy Revision a Green Light*, <http://www.bna.com/nlrbs-solomon-tackles-n12884909814/>.

### **c. Employer’s Potential Defenses**

A number of defenses may be raised by employers who have disciplined employees for using social media to engage in concerted activity. The three operations memoranda, however, suggest that these defenses are limited. One common defense is that the employee engaged in opprobrious behavior, such as calling his supervisor a “scumbag” or other epithet. This does not necessarily deprive the employee of protection. See *Atlantic Steel Co.*, 245 N.L.R.B. 814 (1978) (applying 4-factor test as to place of discussion, subject matter of discussion, nature of employee’s outburst, and whether outburst was “in any way” provoked by employer’s ULP). Another common defense is disloyalty, as in the case of a sales employee of a luxury auto dealer who was fired for posting on his Facebook page photos and commentary criticizing the employer for staging a sales event where customers were served hot dogs, cookies, and snacks – rather than more substantial refreshments befitting a luxury auto dealer. The salesperson did not necessarily lose the protection of Act; the inquiry in such cases is whether a communication is related to an ongoing labor dispute and whether it is “not so disloyal, reckless or maliciously untrue” as to lose the Act’s protection under *NLRB v. IBEW (Jefferson Standard)*, 346 U.S. 464 (1953).

## **5. Use of Predispute Arbitration Agreements**

In contrast to the world of collective bargaining, where the use of arbitration to adjust contract grievances is well-established, see *infra* Chapter 7, the non-union workplace has struggled to reconcile the rights of individual employees to bring statutory and other work-related claims in courts of law with the growing preference of employers that such claims be brought exclusively in arbitration. Starting in 1991, the Supreme Court issued a series of decisions in which the Federal Arbitration Act was interpreted to require that doubts about the enforceability of mandatory, predispute arbitration agreements made outside the collective bargaining context be resolved in favor of enforcement. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); see also Ann C. Hodges, Ann C. Hodges, *Can Compulsory Arbitration Be Reconciled with Section 7 Rights?*, 38 Wake Forest L. Rev. 173, 187–200 (2003) (tracing doctrinal developments). As a result, more individual employees were precluded from presenting to juries and judges their claims for employment discrimination, unpaid wages or overtime, and other violations of federal and state workplace regulations. Because arbitration decisions are usually final and binding, these employees were also precluded from seeking appellate review to correct mistakes of law.

Some twenty years later, however, it has become less clear whether such agreements can be enforced if and when they interfere with the Section 7 rights of non-union workers to pursue class action claims related to wages, hours, and or other working conditions.

In mid-2011, the Supreme Court decided *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), which held that the Federal Arbitration Act (FAA) of 1925, 9 U.S.C. §§ 1-9, preempts California's judicial rule regarding the unconscionability of class arbitration waivers in consumer contracts.

The case arose out of a standardized cellular telephone contract between a consumer couple, the Concepcions, and a nationwide service provider, AT&T. The contract provided for arbitration of all disputes, but did not permit classwide arbitration. After the Concepcions were charged sales tax on the retail value of phones provided free under their service contract, they sued AT&T in federal district court in California. Their suit was consolidated with a class action alleging, *inter alia*, that AT&T had engaged in false advertising and fraud by charging sales tax on “free” phones. The district court denied the company’s motion to compel arbitration under the Concepcions' contract. Relying on the California Supreme Court's decision in *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005), it found the arbitration provision unconscionable because it disallowed classwide proceedings. The Ninth Circuit affirmed, but the Supreme Court reversed. Writing for a 5 to 4 majority, Justice Scalia explained that Section 2 of the FAA, which makes arbitration agreements “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract,” preempts California law in this area. California is free to establish standards regarding the enforceability of contracts, but is not free to have different rules for the enforceability of contracts to arbitrate.

But in early 2012, the NLRB decided *D.R. Horton, Inc.*, 357 N.L.R.B. No. 184 (2012). *Horton* held that an employer violates Section 8(a)(1) when it requires employees covered by the Act, as a condition of their employment, to sign an agreement that precludes them from filing in any forum – arbitral or judicial – “joint, class, or collective claims” addressing their wages, hours or other working conditions. Such an agreement unlawfully restricts employees’ Section 7 right to engage in concerted action for mutual aid or protection.

The case arose because the employer, a home builder, required all employees to sign a “mutual arbitration agreement” requiring submission of statutory claims to arbitration, but limiting submission to individual claims and purporting to divest the arbitrator of authority “to consolidate the claims of other employees” and “to fashion a proceeding as a class or collective action or to award relief to a group of employees in one arbitration proceeding.” Michael Cuda, a superintendent, retained a lawyer and attempted to initiate a claim in arbitration on behalf of a nationwide class of company superintendents; he contended that they had been misclassified as exempt under the Fair Labor Standards Act. The employer refused. Cuda responded by filing an unfair labor practice charge. The General Counsel issued a complaint based on the long-established theory that filing civil litigation on behalf of a group of employees is a form of concerted activity protected by Section 7. *See Spandsco Oil & Royalty Co.*, 42 N.L.R.B. 942 (1942) (filing of lawsuit under FLSA by three employees); *Salt River Valley Water Users Ass’n*, 99 NLRB 849 (1952) (circulating of petition among co-workers designating one of them as agent seeking back wages under FLSA), *enforced*, 206 F.2d 325 (9th Cir. 1953); *see also Brady v. NFL*, 644 F.3d 661, 673 (8th Cir. 2011) (“a lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment is ‘concerted activity’ under § 7”) (emphasis in original).

*Concepcion* was distinguished by the Board on three grounds. See 357 N.L.R.B. No. 184, at 11-12. First, informality and the other advantages of arbitration identified by the Supreme Court would not be lost. Whereas the arbitration agreement at stake in *Concepcion* involved tens of thousands of potential consumer plaintiffs, the arbitration agreement at stake in *Horton* involved only “employers and their own employees.” The average number of employees employed by a single employer is 20; in fact, most class-wide employment litigation “involves only a specific subset of an employer’s employees.” *Id.* at 11-12. So “class-wide arbitration is thus far less cumbersome and more akin to an individual arbitration proceeding along each of the dimensions considered [there] -- speed, cost, informality, and risk – when the class is so limited in size.” Second, there is no direct conflict between the FAA and the NLRA. Both statutes must and can be accommodated. The holding in *Horton* “covers only one type of contract, that between an employer and its covered employees.” Accordingly, any intrusion on the policies underlying the FAA would be similarly limited. Finally, if there is a direct conflict between the NLRA and the FAA, then the FAA would have to yield as contrary to the public policy protecting employees’ concerted activities for mutual aid or protection. To the extent that the FAA requires giving effect to such an agreement, it would conflict with the Norris-LaGuardia Act. The Norris-LaGuardia Act, in turn – passed 7 years *after* the FAA – repealed “[a]ll acts and parts of act in conflict” with the later statute.”

Chairman Pearce and Member Becker spoke for the Board; Member Hayes recused himself and did not participate in the decision. Because the Board had only three members as of the date *Horton* was issued, issues regarding its authority to decide the case under the three-member quorum rule articulated in *New Process Steel LP v. NLRB*, 130 S. Ct. 2635 (2010), are expected to be raised during enforcement proceedings, which are pending.

#### NOTES

1. *Advice, but not consent.* Although the Board has yet to decide any social media cases, during the summer of 2011, the Division of Advice issued three memoranda advising that employers who fired employees for posting job-related complaints online did not violate Section 8(a)(1), which prohibits an employer from interfering with, restraining, or coercing an employee in the exercise of rights guaranteed by Section 7. In each case, Associate General Counsel Barry J. Kearney concluded that in each case the online comments were individual gripes rather than “concerted activities,” and thus fell outside the protection of the statute. See *JT's Porch Saloon & Eatery Ltd.*, Case No. 13-CA-46689 (N.L.R.B. Div. of Advice, Jul. 7, 2011); *Martin House*, Case No. 34-CA-12950 (N.L.R.B. Div. of Advice, Jul. 19, 2011); *Wal-Mart*, Case No. 17-CA-25030 (NLRB Div. of Advice, Jul. 19, 2011). Generally speaking, an activity is “concerted” if it involves the participation of at least two employees, or if a single employee acts on behalf of other employees. See *Interboro Contractors Inc.*, 157 NLRB 1295, 1298 (1966), *enforced*, 388 F.2d 495 (2d Cir. 1967); see also *NLRB v. City Disposal Systems Inc.*, 465 U.S. 822 (1984).

Suppose a customer service employee working in one of the stores of a major national retailer posted on his Facebook page this comment: “Wuck Falmart! I swear if this tyranny doesn't end in this store they are about to get a wakeup call because lots are about to quit!” After two co-workers responded by posting brief comments, the customer service employee replied

that he was “chewed out” for putting merchandise in the wrong place. He also posted, “I’m talking to [Store Manager] about this shit cuz if it don’t change Walmart can kiss my royal white ass.” After learning of the Facebook posting, the store manager placed the customer service employee on a one-day “decision day” suspension, which made him ineligible for promotion for the next 12 months. The customer employee claimed his co-workers were supportive of his complaints; in fact, another employee acknowledged making the remark that the customer service employee should “hang in there.” Was this enough to create concerted activity? *See Wal-Mart*, Case No. 17-CA-25030 (NLRB Div. of Advice, Jul. 19, 2011).

2. *Another Penny for their thoughts?* Under what circumstances might disciplining employees for posting on their Facebook pages messages critical of the employer actually constitute an unfair labor practice under Section 8(a)(1)? Recall Penny, the employee who was discharged for using Enderby’s email system to send a message supporting the Programmers Union. Suppose that, in protest, five programmers posted to their own Facebook pages messages supporting Penny and criticizing Enderby for its workload assignment and staffing practices – and were discharged for the postings. Would firing the five programmers constitute an unfair labor practices? What guidance should the Division of Advice give to Regional Directors? *See Office of Public Affairs, National Labor Relations Board, Complaint Issued Against New York Nonprofit for Unlawfully Discharging Employees Following Facebook Posts*, Jun. 28, 2011, *available at* <http://www.nlr.gov/news/complaint-issued-against-new-york-nonprofit-unlawfully-discharging-employees-following-facebook>.

## **E. Protection Against Discrimination**

*Add to note 2 on pp. 362-63:*

According to *Tradesmen Int’l.*, 351 NLRB 399 (2007), status as a paid union salt does not create an improper conflict of interest or any true dual employment situation and it also does not violate salt entitlement to protection from discrimination. *Id.* at 425. Further, *Tradesmen* states, “an ALJ may properly use an employer’s attitudes about unions as one factor in evaluating the record and drawing inferences regarding the employer’s motivation.” *Id.*

*Add to note 4 on p. 363:*

According to the Equal Employment Opportunity Commission (EEOC), the government agency that administers Title VII and other workplace antidiscrimination laws, retaliation is one of the most common reasons for litigation. This could be a product of the broad application of retaliation law. The United States Supreme Court has recently issued a number of decisions on retaliation involving discrimination laws, and those decisions have generally been expansive interpretations of retaliation provisions of those laws. The Court broadly applied Title VII retaliation law to include employees who oppose discriminatory conduct. *Crawford v. Metro. Gov’t of Nashville & Davidson County*, 555 U.S. 271 (2009). Recently, the Court extended Title VII retaliation protection to third party targets of retaliation based on another person’s

protected activity. *Thompson v. North American Stainless, LP*, 131 S. Ct. 863 (US Jan. 24, 2011). Also, in *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (US Mar. 22, 2011), the Court held that the anti-retaliation provision of the Fair Labor Standards Act (FLSA) applies to the “filing” of oral complaints.

*Add to note 3 on p. 370:*

For a more recent case, consider the actions of Boeing Company, in the news for the better part of the last year. An official of The Boeing Company apparently made statements to the press that could hardly be ignored by the union or the NLRB in light of *Darlington*. High-level officials at Boeing allegedly announced they were transferring a production line from the State of Washington (the home of Boeing) to South Carolina because of a history of strikes that have shut down production. One Boeing official indicated that “Boeing cannot afford to have a work stoppage every three years.” After much negative media attention and severe questioning by conservative politicians, the Board General Counsel nonetheless issued a complaint against Boeing on April 20, 2011. For details related to the complaint, see *Boeing Co.*, 2011 WL 2597601 (Jun. 30, 2011)(NLRB Ruling Denying Respondent Boeing Co.’s Motion to Dismiss the Complaint). The NLRB asserted, et al., that Boeing officials’ statements evidence anti-union animus thereby discouraging membership in the Union in violation of Section 8(a)(3) of the Act. Boeing contested the claim, stating that the South Carolina production line is a *new* line, not a transferred one, and that no Washington State Boeing jobs are adversely affected. NLRB’s complaint came with criticism from Senators who say that not allowing companies to open new sites in right-to-work states, such as South Carolina, will push business overseas. In June, 2011 the Board granted employee intervenors leave to file briefs on the matter after the Board ALJ had earlier granted sixteen state attorneys general leave to write amicus curiae briefs regarding the Boeing case. *Boeing Co.*, 2011 WL 2451725 (Jun. 20, 2011). In July 2011, the multi-million dollar South Carolina plant, the size of ten football fields, began production and the workers had already rebuked efforts of the Machinists to organize the workforce. The *Boeing* case was ultimately settled in December, 2011 after unprecedented involvement by Congress in the investigatory details of the case. The Board approved the union’s request to withdraw the ULP charge after reaching a settlement under which it entered into a new four-year collective bargaining agreement with Boeing and obtained commitments that the company will build a new line of 737 MAX aircraft in Washington state. See Office of Public Affairs, *NLRB Acting General Counsel Announces Closing of Boeing Case*, Dec. 9, 2011, available at <http://www.nlr.gov/news/nlr-acting-general-counsel-announces-close-boeing-case>; see also Julius Getman, *The Boeing Case: Creating Outrage Out of Very Little*, 27 ABA J. Lab. & Emp. Law 99 (2011).

An interesting question arising in the Boeing case involved the possible remedy in case of violation. Several of these had been discussed in the context of settlement talks between Boeing

and the NLRB. Boeing argued that with its substantial investment in South Carolina it could hardly return production to Washington. Alternative possibilities included a Boeing agreement to return foreign production to the U.S., a promise to locate future production in Washington state (in exchange for an IAM “no-strike” pledge), or a Boeing agreement to “card check” recognition at the South Carolina plant. What does the *Darlington* case suggest about what the remedy should be? Is this the kind of case that should now be decided under a *Transportation Management* “mixed motive” analysis? Who should prevail, though, if the employer’s primary economic argument is potential strike delays? Doesn’t that make the employer’s rationale one of complete anti-union motivation? Wasn’t this the basic issue, although less directly stated, in the *Adkins Transfer* case above?

## **F. Routes to Union Recognition**

### **1. Appropriate Bargaining Units**

*Add to note 2 on pp. 374-75:*

In *Specialty HealthCare and Rehabilitation Center of Mobile*, 357 N.L.R.B. No. 83 (Aug. 26, 2011), the NLRB overruled *Park Manor Care Center*. The Board stated it would apply its traditional community of interest criteria in determining appropriate bargaining units in nursing homes and would no longer use the “pragmatic or empirical community of interests approach” of *Park Manor*. The Board criticized *Park Manor*:

[W]e are simply unable to understand how a “‘pragmatic or empirical community of interests’ approach” differs meaningfully from our traditional community-of-interest approach. The traditional community-of-interest test is intended, as the Act requires, to assure employees the “fullest freedom in exercising the rights guaranteed by th[e] Act,” rather than to satisfy an abstract notion of the most appropriate unit, and is thus pragmatic. In addition, it has always been informed by empirical knowledge acquired by the Board about the industry and workplace at issue. The approach suggested in *Park Manor* has actually led in the opposite direction because, rather than directing attention to the facts in the particular case and those concerning the industry as it exists at present, it proposes a backward-looking standard using facts and analysis already over two decades out of date. This approach is both confusing and misguided.

The Board held that a unit limited to certified nursing assistants (CNAs) was appropriate. The Board reasoned that CNAs have distinct training, certification from the state, supervision, uniforms, pay rates, work assignments, shifts and work areas. Unlike all the other employees in a non-professional service and maintenance unit, the CNAs work in the employer’s nursing department. Their primary duty is direct hands-on patient care which subjects them to unique risks and responsibilities.

*Add the following after Virginia Manufacturing Co. pages 383-386.*

4. In *Specialty HealthCare and Rehabilitation Center of Mobile*, 357 N.L.R.B. No. 83 (Aug. 26, 2011), the NLRB purported to clarify its approach to determining appropriate bargaining units. In the context of determining whether certified nursing assistants formed an appropriate bargaining unit at a skilled nursing home, the Board declared:

When the proposed unit describes employees readily identifiable as a group and when consideration of the traditional factors demonstrates that the employees share a community of interest, both the Board and courts of appeals have necessarily required a heightened showing to demonstrate that the proposed unit is nevertheless inappropriate because it does not include additional employees. Although different words have been used to describe this heightened showing, in essence, a showing that the included and excluded employees share an overwhelming community of interest has been required.

The Board thus adopted a two-prong approach in evaluating the bargaining unit specified in a union's representation petition. First, the Board will ask whether the employees in the proposed unit share a readily identifiable community of interests. If they do, the Board will ask whether the party seeking a larger unit has met its burden to establish that the additional employees share an overwhelming community of interests with the employees in the petitioned-for unit.

Although the Board purported to be applying established precedent, its decision may have far-reaching consequences. In *The Nieman Marcus Group, Inc., d/b/a/ Bergdorf Goodman*, Case No. 02-RC-076954 (NLRB Regional Director May 4, 2012), the Regional Director for Region 2 in New York directed an election in a bargaining unit limited to "[a]ll full-time and regular part-time women's shoes associates in the 2<sup>nd</sup> Floor Designer Shoes Department and in the 5<sup>th</sup> Floor Contemporary Shoes Department employer in the Employer's retail store located at 754 Fifth Avenue, New York, New York." The Regional Director rejected employer arguments for a wall-to-wall unit encompassing all employees in the store, for a unit encompassing all sales associates and sales assistants, and for a unit encompassing all sales associates. The Regional Director reasoned that the other sales associates did not have the same background and experience in selling shoes as the employees in the petitioned-for unit. Although all sales employees had the same health insurance benefits and were subject to the same vacation and holiday policies, evaluation forms and probationary periods, and used a common employee cafeteria, the shoe sales associates were paid on a draw versus commission basis while other sales associates were paid a base plus commission. Applying *Specialty HealthCare*, the Regional Director concluded that the employer had failed to show that the other sales associates shared an overwhelming community of interest with their colleagues in the shoe departments. On May 30, 2012, the Board unanimously granted the employer's petition for review of the regional director's decision, stating that the petition "raises substantial issues warranting review."

## 2. Representation Elections

*Add to the end of the subsection, before 3. Bargaining Orders, on p. 390:*

Under new rules proposed by the Board during the summer of 2011, the Board election procedures described in the casebook text would be streamlined and expedited. By a 3 to 1 vote, the NLRB promulgated a 146-page notice of rulemaking. See National Labor Relations Board, Notice of Proposed Rulemaking: Representation – Case Procedures, 29 C.F.R. Parts 101-103 (RIN 3142-AA08), 76 Fed. Reg. 36812 (Jun. 22, 2011), *reported at* <http://www.gpo.gov/fdsys/pkg/FR-2011-06-22/pdf/2011-15307.pdf>. Hearings were scheduled for July 18-19, 2011, in Washington, D.C.

According to Chairman Liebman, who was joined by Members Becker and Pearce, the purpose of the new rules is to “remove unnecessary barriers to the fair and expeditious resolution of questions concerning representation” by doing three things: reducing the time between the filing of the election petition and the actual balloting; placing in the hands of Regional Directors more final decisions regarding commonly disputed election issues; and limiting the availability of Board review until after the voting has occurred. Elaborating separately, Chairman Liebman added that, although the Board has revised its representation rules from time to time, “the current rules still seem to build in unnecessary delays, to encourage wasteful litigation, to reflect old-fashioned communication technologies, and to allow haphazard case-processing, by not adopting best practices.” Statement by Chairman Wilma B. Liebman on Representation-Case Procedures Rulemaking, Jun. 22, 2011, *available at* <http://www.nlr.gov/node/526>. In dissent, Member Hayes found no showing that the Board needs to conduct representation elections more rapidly. “In truth the ‘problem’ which my colleagues seek to address through these rules revisions is not that the representation election process generally takes too long,” he said. “It is that unions are not winning more elections.” Dissent to Proposed Representation-Case Rulemaking by Member Hayes, *available at* <https://www.nlr.gov/sites/default/files/documents/525/dissent.pdf> (Hayes, Member, dissenting).

After making several attempts in 2011 and 2012, and after receiving extensive comments from management and labor representatives pursuant to published notice of rulemaking detailed above, the Board issued two sets of potentially far-reaching rules: a first set designed to streamline the processing of election petitions, and a second set designed to inform employees of their Section 7 rights in the workplace. *See* Explanation of Election Process Changes, <http://www.nlr.gov/node/3608> (accessed April 1, 2012). After some postponements, these rules would have been effective on April 30, 2012, but their validity was called into question by separate federal court challenges. As a result, the effectiveness of both sets of rules has been postponed again until those challenges are resolved.

As to the processing of election petitions, the NLRB promulgated six amendments to the rules under which the regional director must process such petitions. In general, the rules are intended to speed processing by postponing consideration of challenges to the petition until after the election is held. The amendments provide as follows:

- Amendment #1 states explicitly that the purpose of the hearing is to determine whether a question concerning representation (QCR) exists. It also the hearing officer the discretion to limit the hearing to relevant matters – thereby postponing to after the election questions regarding voter eligibility, unit determination, supervisory status, and the like.
- Amendment #2 gives the hearing officer the discretion to control the filing, subject matter, and timing of post-hearing briefs – if any briefs are to be filed – because in most cases, the issues are routine, and briefs only delay proceedings and increase litigation costs.
- Amendment #3 eliminates the need for multiple appeals by consolidating into a single post-election appeal both pre-election issues (e.g., voter eligibility) and post-election issues (e.g., party’s conduct during campaign); saves the parties from having to file and brief appeals that become moot; and conforms NLRB procedures for interlocutory appeals with the interlocutory procedures of state and federal courts.
- Amendment #4 eliminates the 25-day waiting period during which regional director typically refrains from setting an election date to permit the parties to take their appeals to the NLRB. Because the amendments are designed to eliminate most pre-election appeals, this waiting period is now unnecessary.
- Amendment #5 permits interlocutory appeals from decisions of the regional director to the NLRB only under “extraordinary circumstances where it appears that the issue will otherwise evade review.”
- Finally, amendment #6 codifies a long-established practice by which the regional director decides challenges and objections to elections through investigation – without a hearing – when no substantial or material factual issues are in dispute.

In May 2012, Judge James E. Boasberg of the U.S. District Court for the District of Columbia enjoined implementation of these new rules on the ground that the Board lacked the quorum necessary to promulgate them. *See Chamber of Commerce v. NLRB*, \_\_\_ F. Supp. 2d \_\_\_, 2012 WL 1664028 (D.D.C. 2012). In response, the NLRB announced that it was temporarily suspending implementation of the new rules. *See Office of Public Affairs, NLRB Suspends Implementation of Representation Case Amendments Based on Court Ruling* (May 15, 2012), available at <http://www.nlr.gov/news/nlr-suspends-implementation-representation-case-amendments-based-court-ruling>.

As to informing employees of their Section 7 rights, the NLRB promulgated a set of rules requiring private sector employers to notify employees of their rights to form and join unions, to engage in collective bargaining, to undertake concerted activity for mutual aid or protection, and to exercise other Section 7 rights – including the right not to do any of these things – as guaranteed by the NLRA. *See National Labor Relations Board, Notification of Employee Rights Under the National Labor Relations Act*, 76 Fed. Reg. 54006 (published Aug. 30, 2011), codified at 29 C.F.R. §§ 104.201-104.220.

The notification would take the form of an 11- by 17-inch poster similar to that which must be posted by federal contractors under rules promulgated by the U.S. Department of Labor. (Similar notices are required to be posted by federal and state agencies charged with enforcing fair labor standards and equal employment opportunity legislation.) A translated version of the poster would be required to be posted in any workplace where at least 20% of the employees are not proficient in English.

In March 2012, Judge Amy Berman Jackson of the U.S. District Court for the District of Columbia held that the Board had the authority to promulgate the new rules, *see National Ass'n of Mfrs. v. NLRB*, \_\_\_ F. Supp. 2d \_\_\_, 2012 WL 691535 (D.D.C. 2012). but in April 2012, Judge David C. Norton of the U.S. District Court for the District of South Carolina disagreed.<sup>3</sup> *See Chamber of Commerce v. NLRB*, \_\_\_ F. Supp. 2d \_\_\_, 2012 WL 1245677 (D.S.C. 2012). In light of these conflicting decisions, the U.S. Court of Appeals for the District of Columbia Circuit temporarily enjoined implementation of the new rules, and the NLRB announced that it would suspend implementation while appeals in these cases are pending. *See Office of Public Affairs, NLRB Chairman Mark Gaston Pearce on Recent Decisions Regarding Employee Rights Posting* (Apr. 17, 2012), available at <http://www.nlr.gov/news/nlr-chairman-mark-gaston-pearce-recent-decisions-regarding-employee-rights-posting>.

#### **4. Voluntary Recognition and Other Methods Outside the NLRA's Processes**

##### **A. Recognition/Organizational Picketing**

###### ***Add a note 7 on p. 423:***

*What happens to an employee who participates in picketing?* Employees engaging in picketing which violates Section 8(b)(7)(C) of the NLRA are not required to be reinstated by the employer and are not entitled to any other remedy. *Exec. Mgmt. Servs.*, 355 NLRB No. 33 (May 11, 2010). Both the courts and the Board have recognized that employee picketing that is not prohibited by the Act is considered protected by the Act, meaning that the employer cannot take retaliatory action. *Civil Serv. Emp. Ass'n. v. NLRB*, 569 F.3d 88, 92 (2d Cir. 2009). However, the effect would presumably be different depending on the object of the picketing. For example, unfair labor practice strikers who make unconditional offers to return to work are entitled to immediate reinstatement to their former positions whether or not replacements for them have been hired. *Grinnell Fire Protections Systems Co.*, 335 NLRB 473, 475 (2001). Presuming this principle applies to picketing employees in addition to striking employees, then the consequences to an employee are determined by the motive behind the picketing.

###### ***Add to note 3 on p. 433:***

In 2010, Arizona, South Carolina, South Dakota, and Utah passed state constitutional amendments requiring secret ballot elections, thereby closing the voluntary recognition pathway. In January 2011, the NLRB threatened legal action against these states, and in May filed a suit against Arizona to overturn its amendment on the basis that it is preempted by federal law. As

the complaint states, “[t]he NLRA permits but does not require secret ballot elections for the designation, selection, or authorization of a collective bargaining representative where, for example, employees successfully petition their employer to voluntarily recognize their designated representative on the basis of reliable evidence of majority support.” See *NLRB Initiates Litigation Against the State of Arizona on Amendment Limiting Method for Choosing Union Representation*, www.nlr.gov (May 6, 2011).

**Add a note 5 on p. 447:**

5. *Dana Corp. Reconsidered*: On August 27, 2010, the Board, in a 3 to 2 vote, agreed to reconsider its 2007 decision in *Dana Corp. Lamons Gasket Co.*, 355 NLRB 763. In a concurring opinion favoring grant of review, Chairman Liebman cited with approval the work of two scholars who criticized *Dana Corp.* as an example of the Board “living in administrative law exile.” See Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with its Structure and Function and Suggestions for Reform*, 58 Duke L. J. 2013 (2009).

**Add the following case after notes on p. 447:**

**LAMONS GASKET CO.**

357 N.L.R.B. No. 72 (2011)

**DECISION ON REVIEW AND ORDER**

"[A] bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed." *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 705, 64 S. Ct. 817, 88 L. Ed. 1020 (1944). Consistent with that principle, it was settled Board law from 1966 to 2007 that an employer's voluntary recognition of a union, based on a showing of uncoerced majority support for representation, barred the processing of an election petition for a reasonable period of time, in order to permit the employees' chosen representative to serve in that capacity and seek to negotiate a collective-bargaining agreement with the employer. The "recognition bar" applied only after "good-faith recognition of a union by the employer based on an unassisted and uncoerced showing of interest from a majority of unit employees." *Smith's Food & Drug Centers, Inc.*, 320 NLRB 844, 846 (1996). During that 41-year period, no member of the Board dissented from the application of the recognition bar under circumstances such as those existing in this case and its application was uniformly sustained in the courts of appeals.

Four years ago, in *Dana Corp.*, 351 NLRB 434 (2007), a sharply divided Board rejected this longstanding principle, established in *Keller Plastics Eastern*, 157 NLRB 583 (1966), in favor of a "modified" recognition bar, under which a minority of employees are permitted immediately to challenge the freely expressed will of the majority. *Dana* established a 45-day "window period" after voluntary recognition during which employees may file a decertification petition supported by a 30-percent showing of interest. *Dana* further required that, in order to start the running of the 45-day window period after voluntary recognition, employers must post

an official Board notice informing employees of their newly created right to seek an election within the 45-day period to oust the lawfully recognized union. *Id.* at 441-443. Wholly absent from the majority decision in *Dana* was any empirical evidence supporting the majority's suspicion that the showing of majority support that must underlie any voluntary recognition is not freely given or is otherwise invalid in a significant number of cases, or that the existing statutory mechanisms for preventing coercion in the solicitation of support and recognition based on coerced support are inadequate.

We granted review to consider the experiences of employers, employees, unions, and the Board under *Dana*. Based on our consideration of the record and the briefs of the parties and amici, as well as of publicly available data concerning the Board's processing of cases arising under *Dana*, we find that the approach taken in *Dana* was flawed, factually, legally, and as a matter of policy. Accordingly, we overrule *Dana* and return to the previously well-established rule barring an election petition for a reasonable period of time after voluntary recognition of a representative designated by a majority of employees. We also define, for the first time, the benchmarks for determining a "reasonable period of time."

## I. FACTS

On July 13, 2003, Lamons Gasket (the Employer) and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (the Union) entered into an agreement detailing the conditions under which the Employer would voluntarily recognize the Union as the representative of its employees at several facilities, including the facility in Houston, Texas. The agreement provided, *inter alia*, that the Employer would voluntarily recognize the Union upon presentation of proof of majority support for representation by the Union in the form of authorization cards signed by employees. On November 5, 2009, after presentation of signed cards from a majority of the unit employees to an arbitrator and the arbitrator's verification of the majority, the Employer voluntarily recognized the Union as the exclusive representative of a unit of production, maintenance, and warehouse employees at the Houston facility. As required by *Dana*, the Employer notified the Board's Region 16 that it had recognized the Union, and the Region transmitted a notice to the Employer to post in its facility notifying employees of the recognition and of their right to seek a decertification election within 45 days.

On November 23, the Employer posted the notice. On December 9, Michael E. Lopez (the Petitioner) filed a timely petition for a decertification election, supported by a showing of interest among at least 30 percent of the employees in the unit. On January 20, 2010, the Employer and the Union began bargaining for an initial collective-bargaining agreement. On July 21, the Regional Director issued a Decision and Direction of Election, finding that *Dana* was controlling and that the "voluntary recognition and the timely filed decertification petition raise a question [concerning representation]." The Union filed a request for review.

The Employer and the Union reached a collective-bargaining agreement on August 8. On August 26, the decertification election was held and the ballots were impounded because of the pending request for review. On August 27, the Board granted the Union's request for review and solicited briefs from the parties and amici.

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### III. DISCUSSION

Congress has expressly recognized the legality of employers' voluntary recognition of their employees' freely chosen representative, as well as the place of such voluntary recognition in the statutory system of workplace representation. Nevertheless, the extraordinary process established in *Dana* was, fundamentally, grounded on a suspicion that the employee choice which must precede any voluntary recognition is often not free and uncoerced, despite the law's requirement that it be so. The evidence now before us as a result of administering the *Dana* decision during the past 4 years demonstrates that the suspicion underlying the decision was unfounded. Without an adequate foundation, *Dana* thus imposed an extraordinary notice requirement, informing employees only of their right to reconsider their choice to be represented, under a statute commanding that the Board remain strictly neutral in relation to that choice. The decision in *Dana* thus undermined employees' free choice by subjecting it to official question and by refusing to honor it for a significant period of time, without sound justification. *Dana* was thus an unwarranted departure from the principle that "a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed." *Franks Bros.*, 321 U.S. at 705. Prior to *Dana* and *MV Transportation*, 337 NLRB 770 (2002), which we also overrule today, the Board uniformly implemented that principle in a variety of contexts. The statutory policies that underlie the bars interposed in those contexts extend to voluntary recognition. For these reasons, as fully explained below, we conclude that *Dana* has been shown to be unnecessary and, in fact, to disserve the purposes of the Act.

*A. Congress Has Expressly Recognized Employers' Voluntary Recognition  
of Their Employees' Freely Chosen Representative  
as a Lawful Element of the System of Representation Created by the NLRA*

Federal labor law not only permits, but expressly recognizes two paths employees may travel to obtain representation for the purpose of collective bargaining with their employer. As the Supreme Court observed, a "Board election is not the only method by which an employer may satisfy itself as to the union's majority status." *United Mine Workers v. Arkansas Oak Flooring Co.*, 351 U.S. 62, 72 fn. 8, 76 S. Ct. 559, 100 L. Ed. 941 (1956). In fact, as the *Dana* majority acknowledged, "Voluntary recognition itself predates the National Labor Relations Act and is undisputedly lawful under it." 351 NLRB at 436.

Voluntary recognition must be based on evidence of majority support for representation. Absent majority support, voluntary recognition is unlawful. *Ladies' Garment Workers' v. NLRB (Bernhard-Altman)*, 366 U.S. 731, 81 S. Ct. 1603, 6 L. Ed. 2d 762 (1961). Voluntary recognition based on support that was induced by either union or employer coercion is unlawful, as is the coercion. . . .

The evidence of majority support that must underlie voluntary recognition may take many forms. The *Dana* majority referred to voluntary recognition as "card-based recognition,"

characterization. Voluntary recognition may be, and has been, based on evidence of majority support as informal as employees walking into the owner's office and stating they wish to be represented by a union, . . . and as formal as a secret-ballot election conducted by a third party such as the American Arbitration Association. . . .

Clear evidence of Congress' intentions concerning the relationship between voluntary recognition and Board-supervised elections is contained in Section 9(c)(1)(A)(i) of the Act. In that section, Congress provided that employees could file a petition for an election, alleging that a substantial number of employees wish to be represented and "that their employer declines to recognize their representative." That language makes unmistakably clear that Congress recognized the practice of voluntary recognition and strongly suggests that Congress believed Board-supervised elections were necessary only when an employer had declined to recognize its employees' chosen representative.

Congress was well aware of the practice of voluntary recognition when it adopted the Act in 1935, because the practice long predated the Act. That is significant because Congress not only expressly recognized the practice in Section 9(c)(1)(A)(i), but also gave no indication anywhere in the Act that it intended to supplant that process with or subordinate it to Board-supervised elections. Importantly, Section 8(a)(5) of the Act requires an employer to bargain collectively with "the representatives of his employees," but does not specify that such representatives must be chosen in a Board-supervised election. Rather, Section 8(a)(5) states that the employer's obligation to bargain with its employees' representative is "subject to the provisions of section 9(a)." Section 9(a) similarly does not limit the exclusive representative of employees to representatives chosen in a Board-supervised election. Rather, Section 9(a) provides that "[r]epresentatives *designated or selected* for the purposes of collective bargaining by the majority of the employees" shall be the exclusive collective-bargaining representatives (emphasis supplied). In enacting the Taft-Hartley amendments in 1947, Congress considered, but rejected, an amendment to Section 8(a)(5) that would have permitted the Board to find that an employer had unlawfully refused to bargain only with "a union 'currently recognized by the employer or certified as such [through an election] under section 9.'" *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 598, 89 S. Ct. 1918, 23 L. Ed. 2d 547 (1969) (citing H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 41 (1947)). The purpose of the rejected amendment was to prevent the Board from issuing a bargaining order in favor of a union that had been *neither* voluntarily recognized nor selected in a Board-supervised election. Significantly, the proposed amendment did not so much as question the practice of voluntary recognition, but, in fact, equated voluntary recognition with certification after an election.

As the legislative history of the Taft-Hartley amendments demonstrates, voluntary recognition is not simply permitted under the Act, but its grant imposes statutory duties on the part of both the employer and the union, which have for over 75 years been enforced by the Board. "Once voluntary recognition has been granted to a majority union," the Board explained in *Brown & Connolly, Inc.*, supra, 237 NLRB at 275, "the Union becomes [the] exclusive collective-bargaining representative of the employees, and withdrawal or renegeing from the commitment to recognize before a reasonable time for bargaining has elapsed violates the employer's bargaining obligation." In other words, voluntary recognition, no less than certification, creates a legally recognized and enforceable relationship between the employer and

the recognized representative.

To be sure, the Act provides that the Board can *certify* a representative, with the attendant legal advantages thereof (including a 12-month bar) only after a Board-supervised election. Nevertheless, far from being the suspect and underground process the *Dana* majority characterized it to be, voluntary recognition has been woven into the very fabric of the Act since its inception and has, until the decision in *Dana*, been understood to be a legitimate means of giving effect to the uncoerced choice of a majority of employees. . . .

*B. Experience Has Demonstrated that the Dana Procedures Are Unnecessary*

In the 41 years between *Keller Plastics* and *Dana*, although individual Board members occasionally disagreed over the application of the recognition bar in particular cases, no Board Member challenged the existence of the bar itself. During those 41 years, there were no changes in the language of the Act or in its interpretation that would support limiting application of the recognition bar. As the majority in *Dana* essentially conceded when it granted review, the only change was the perception that unions were increasingly seeking voluntary recognition and doing so successfully.

Without some reason to think that Board doctrine was failing to promote statutory policies, the increased use of a recognition method that predates the Act itself and is not only lawful, but woven expressly into the Act's representation procedures, was a dubious basis for reexamining precedent. Yet, *Dana* did that and more: through adjudication, the *Dana* Board created an entirely new category of representation case and new filing and notice-posting requirements.

Four years ago, when *Dana* was decided, the majority stated, "There is good reason to question whether card signings . . . accurately reflect employees' true choice concerning union representation." *Dana*, 351 NLRB at 439. The majority cited no empirical evidence for that sweeping statement. Now, however, we have considerable empirical evidence, and it establishes that the *Dana* majority's assertion was wrong.

As of May 13, 2011, the Board had received 1,333 requests for *Dana* notices. In those cases, 102 election petitions were subsequently filed and 62 elections were held. In 17 of those elections, the employees voted against continued representation by the voluntarily recognized union, including 2 instances in which a petitioning union was selected over the recognized union and 1 instance in which the petition was withdrawn after objections were filed. Thus, employees decertified the voluntarily recognized union under the *Dana* procedures in only 1.2 percent of the total cases in which *Dana* notices were requested.<sup>11</sup> Those statistics demonstrate that, contrary to

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<sup>11</sup> For supporting data, see "Voluntary Recognition Case Processing," available at [www.nlr.gov/what-we-do/conduct-elections](http://www.nlr.gov/what-we-do/conduct-elections).

Our dissenting colleague suggests that we should consider only those cases in which, after voluntary recognition and the posting of a *Dana* notice, a petition for an election was filed. He suggests that this is appropriate because we "know nothing" about the cases where no petition was filed. But we do know something about those cases: no petition was filed in any of them despite the posting of an official

the *Dana* majority's assumption, the proof of majority support that underlay the voluntary recognition during the past 4 years was a highly reliable measure of employee sentiment.

The Petitioner and supporting amici argue that the percentage of cases in which the recognized union was rejected is not insignificant. But whenever voters are given a chance to revisit their choice--whether that choice was expressed in an election or by signing cards--some individuals will likely change their minds. There is no reason to think that the same small degree of "buyer's remorse" would not occur after a secret-ballot election--and, in fact, it has. *Brooks v. NLRB*, 348 U.S. 96, 97, 75 S. Ct. 176, 99 L. Ed. 125 (1954), illustrates that very point. In *Brooks*, the union won a Board election by a vote of 8 to 5, but a week later, the employees presented the employer with a petition signed by nine employees stating that they no longer wanted union representation. The Court nevertheless held that the employer could not question the certified union's majority status for a period of 1 year. See also *Gissel*, supra, 395 U.S. at 604 (recognizing that a voter "may think better of his choice" shortly after an election). Thus, the fact that in a small percentage of cases, a vote held a month or two after a majority of employees have expressed their desire to be represented produces a contrary result says little about the validity of those employees' initial choice to vote yes or sign a card.

The *Dana* decision itself has produced the data that was absent from the majority's opinion, and that data demonstrates that the empirical assumption underlying the decision was erroneous. As the Supreme Court has explained, the "constant process of trial and error . . . differentiates perhaps more than anything else the administrative from the judicial process." *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 265, 95 S. Ct. 959, 43 L. Ed. 2d 171 (1975), quoting *NLRB v. Seven-Up Bottling Co. of Miami*, 344 U.S. 344, 349, 73 S. Ct. 287, 97 L. Ed. 377 (1953). The "process of trial and error" has been followed here, and it supports overruling *Dana*.

### *C. Dana Compromises the Neutrality of the Board and Undermines the Purposes of the Act*

Although *Dana* rhetorically aimed for a "finer balance" of interests, the procedures it created to achieve that balance actually placed the Board's thumb decidedly on one side of what should be a neutral scale. *Dana* subjected the majority's choice to an extraordinary, mandatory notice informing employees of their right to seek a decertification election--a notice that casts doubt on the majority's choice by suggesting that voluntary recognition is inherently suspect. The "Act is wholly neutral when it comes to [employees'] basic choice" of whether to be represented, *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 278, 94 S. Ct. 495, 38 L. Ed. 2d 495 (1973), but the notice scheme established in *Dana* is not.

Setting to one side the remedial notices that the Board requires be posted after an employer or labor organization violates the Act and the balanced notice informing employees about the details of an upcoming election, after *Dana*, the Board required that employees be notified of only two of their many rights under Section 7: (1) their right not to join and to limit their financial support of their lawfully chosen representative; and (2) their newly created right to file

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government notice informing employees of their right to file a petition if they do not wish to be represented. The 1-percent change in employee sentiment reflected in the data simply cannot be understood, as the dissent posits, as a 25-percent change.

a petition seeking to decertify their recently chosen and lawfully, voluntarily recognized representative. Moreover, the Board required that an official Board notice be posted *only* for the latter purpose. This notice scheme is starkly at odds with both the express terms of Section 7, which vest in employees the right "to form, join, or assist labor organizations" and the right "to refrain from any or all such activities," as well as with the Board's statutory role as an impartial "referee" administering Federal labor law. *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108, 90 S. Ct. 821, 25 L. Ed. 2d 146 (1970).

In no other context does the Board require that employees be given notice of their right to change their minds about a recent exercise of statutory rights. For example, when an employer withdraws recognition from employees' representative based on objective, but non-electoral evidence that the majority of employees no longer desire to be represented, the Board does not require that the employer post notice of employees' right to file a petition for an election to compel the employer to once again recognize the representative. This is the case even when the choice may have future consequences employees may not be fully aware of. Using the same example, when an employer withdraws recognition, the Board does not require that the employer post a notice informing employees that if they do not file a petition for an election to compel the employer to once again recognize the representative, the employer will be free to unilaterally change their terms and conditions of employment.

The *Dana* notice, understood in context, clearly suggests to employees that the Board considers their choice to be represented suspect and signals to employees that their choice should be reconsidered through the filing of a petition. Such administrative action is not appropriate under the Act.

*D. The Statutory Policies Underlying the Board's System of Bars  
Extend to Voluntary Recognition*

As we noted above, the Supreme Court recognized more than half a century ago that "a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed." *Franks Bros.*, supra, 321 U.S. at 705. Underlying that principle is the recognition that "[a] union should be given ample time for carrying out its mandate on behalf of its members, and should not be under exigent pressure to produce hothouse results or be turned out." *Brooks*, supra, 348 U.S. at 100. Taken together, the *Franks* and *Brooks* decisions provided the underlying foundations for the "general Board policy of protecting validly established bargaining relationships during their embryonic stages." *NLRB v. Cayuga Crushed Stone, Inc.*, 474 F.2d 1380, 1384 fn. 5 (2d Cir. 1973).

In accordance with the logic of *Franks* and *Brooks*, the Board, with court approval, gradually developed a coherent body of jurisprudence--of which the recognition bar was but one element prior to *Dana*--barring election petitions or other challenges to a union's representative status for a reasonable period after a legally recognized and enforceable bargaining relationship was established. Such bars applied in the following circumstances.

First, after a duty to bargain is imposed on an employer as a result of Board certification after an election, a petition for a new election is barred for a period of 1 year, as is withdrawal of

recognition by the employer. The former result is compelled by the Act and the latter is the result of Board precedent. . . .

Second, the Board precludes any challenge to the union's representative status for a reasonable period of time after the Board has issued a bargaining order against an employer as a remedy for unfair labor practices or when the employer has unlawfully withdrawn recognition or wholly refused to bargain. . . .

Third, prior to *Dana*, the Board precluded any challenge to a union's representative status for a reasonable period of time after an employer voluntarily recognized the union based on a showing of majority support outside a Board-supervised election. . . .

Finally, prior to *MV Transportation*, which we also overrule today, when a new employer assumed an operation and the conditions for successorship were satisfied so that the new employer also assumed a legally enforceable duty to recognize and bargain with a union that represented its predecessor's employees, the Board barred any challenge to the union's representative status for a similar reasonable period of time. *St. Elizabeth Manor, Inc.*, 329 NLRB 341 (1999).

Although the decisions cited above arose in different contexts--certification following a Board-supervised election, remedial bargaining orders, voluntary recognition, and successorship--they share the same animating principle: that a newly created bargaining relationship should be given a reasonable chance to succeed before being subject to challenge. "The common thread running through these decisions is that when a bargaining relationship has been initially established, or has been restored after being broken, it must be given a reasonable time to work and a fair chance to succeed." . . . The recognition bar was thus not an anomaly.

In *Keller Plastics*, *supra*, the Board applied the principles found in *Franks* and *Brooks* to hold that a legally enforceable bargaining relationship born out of voluntary recognition was also entitled to be insulated for a reasonable period of time from challenge to the union's majority status. The Board held that the parties' "negotiations can succeed . . . and the policies of the Act can thereby be effectuated, only if the parties can normally rely on the continuing representative status of the lawfully recognized union for a reasonable period of time." 157 NLRB at 587. In *Keller*, the Board held that an employer could not withdraw recognition, even if it had a good-faith doubt about the union's continued majority support, for a reasonable period of time. In *Sound Contractors*, *supra*, 162 NLRB 364, the Board extended *Keller Plastics* to representation cases, holding that a petition seeking to challenge the recognized union's status is barred for a reasonable period of time following the recognition. *Id.* at 365. Between *Keller Plastics* and *Dana*, the Board, repeatedly and without dissent, applied the recognition bar in cases like this one. The appellate courts also uniformly and repeatedly endorsed the recognition bar, relying on the Supreme Court's decisions in *Franks* and *Brooks* in doing so.

*Dana* did not wholly eliminate the recognition bar. Rather, it provides for a suspension of the bar pending confirmation of the employees' original, uncoerced choice through either a Board-supervised decertification election or a failure of at least 30 percent of employees to support a petition for such an election following what amounts to an official Board invitation to

file such a petition. *Dana's* holding thus rests on the notion that the policy underlying the system of bars does not extend to voluntary recognition based on an uncoerced showing of majority support for representation, unless that majority support is confirmed by either an election or a form of knowing waiver of the right to request an election. That notion was erroneous.

The *Dana* majority focused narrowly on a comparison of the moment an employee signs an authorization card with the moment an employee marks a ballot and drops it in the ballot box. But the important policy choice at issue here requires a broader focus, considering the place of employees' choice in the statutory scheme and the existing means of protecting the integrity of the procedures used to register employees' choice. First, and most importantly, we must consider the purpose of the employees' choice and its place in the statutory scheme. Employees are choosing whether to be represented "for the purpose of collective bargaining" with their employer. In deciding whether to insulate the uncoerced choice of employees to be represented for that statutorily protected purpose for a reasonable period of time, it is surely relevant that their employer, the party that will sit on the other side of the table in bargaining with their chosen representative, has voluntarily agreed to recognize the employees' representative and engage in such bargaining. In other words, both the statutory protection of employees' choice concerning representation and the provision of a government-supervised, but non-exclusive means of making that choice--the Board-supervised election--are merely elements in a Federally sanctioned system of private ordering. "The object of th[e] Act," the Supreme Court observed in *H.K. Porter*, supra, 397 U.S. at 103, "was not to allow governmental regulation of the terms and conditions of employment, but rather to insure that employers and their employees could work together to establish mutually satisfactory conditions." This congressional "solicitude for the collective-bargaining process," the Board recognized in *International Paper Co.*, 319 NLRB 1253, 1270 (1995), enf. denied on other grounds, 115 F.3d 1045, 325 U.S. App. D.C. 142 (D.C.Cir. 1997), "reflects a recognition that the process and the promotion of an autonomous relationship between the parties is the fundamental construct of the National Labor Relations Act." We believe that the fact that the parties to the congressionally created system of private ordering have entered into it voluntarily is highly relevant to the policy question of whether we should bar any challenge to employees' representative in that system for a reasonable period of time. This is because imposition of such a bar following voluntary recognition is more likely to advance the statutory purpose of preventing "industrial strife or unrest" and "encouraging the practice and procedure of collective bargaining." Sec. 1. We find this to be true both as a matter of logic and experience. Indeed, we find statutory support for this position both in the terms of Section 9(c)(1)(A)(i) discussed above and in section 1 where Congress made express the statutory aim of "encouraging practices fundamental to the friendly adjustment of industrial disputes." The simple fact is that bargaining after voluntary recognition is more likely to achieve the underlying "purpose" of the statutory "promotion of collective bargaining as a method of defusing and channeling conflict between labor and management." *First National Maint. Corp. v. NLRB*, 452 U.S. 666, 674, 101 S. Ct. 2573, 69 L. Ed. 2d 318 (1981). n27 "The establishment of a successful collective-bargaining relationship is best accomplished by the parties themselves--the employer, the union, and the unit employees." *Smith Food & Drug*, supra, 320 NLRB at 847 (Chairman Gould, concurring).

Second, the policy choice before us requires consideration not simply of the means through which individual employees register their choice (signing an authorization card v.

marking a ballot), but also of the rules used to aggregate those choices. In this regard, a more demanding standard is imposed on voluntary recognition than on certification following a Board-supervised election. In the latter, the ordinary rule universally used in elections for political office governs, i.e., a majority of the votes cast determines the outcome. *RCA Mfg. Co.*, 2 NLRB 159, 177-178 (1936). In order for voluntary recognition to be lawful, however, it must be based on a showing that a majority of *all* employees in the unit wish to be represented. See *Bernhard-Altman*, supra, 366 U.S. at 734 fn. 4, 737-738. In fiscal year 2010, turnout in Board-supervised elections was 80.7 percent. In other words, on average, the choice of only 40 percent plus one of employees in a unit could bind all of their coworkers for a period of at least 12 months after an election while it took at least 50 percent to obtain representation pursuant to voluntary recognition.

Third, the policy choice before us requires consideration of both the contents of the rules preventing coercion of employees' choice and their enforcement mechanisms. In this regard, an employee who believes that a voluntarily recognized union lacks majority support, or that such support was not voluntary, is not without recourse. As pointed out in the dissent in *Dana*, recognition of a minority union violates Section 8(a)(2) and 8(b)(1)(A), and the remedy is to order the employer not to recognize or bargain with the union, and the union not to accept recognition, until the union is certified by the Board following a Board-supervised election. See *Bernhard-Altman*, supra, 366 U.S. 731; *Dairyland USA Corp.*, 347 NLRB 310, 313-314 (2006), *enfd.* 273 Fed. Appx. 40 (2d Cir. 2008). If an employer that has violated Section 8(a)(2) by recognizing a union absent uncoerced majority support subsequently enters into a contract with the union and deducts dues or fees pursuant to a union-security clause, it is jointly and severally liable along with the union to repay such deductions. See, e.g., *Dairyland*, supra, 347 NLRB at 314. Coercion by an employer or a union during the organizing campaign violates Section 8(a)(1) and 8(b)(1)(A). Significantly, anyone--including any employee--may file an unfair labor practice charge alleging such conduct. The Board's General Counsel then investigates and, if probable cause is found, prosecutes. Moreover, employees have 6 months following any unlawful coercion or improper recognition to file a charge, while objections to conduct affecting the results of an election must be filed within 7 days of the tally. See Sec. 102.69(a) of the Board's Rules. The majority in *Dana* did not explain why these existing safeguards, which, in critical respects, are more protective of freedom of choice than those used in Board-supervised elections, are inadequate to insure that voluntary recognition truly rests on employees' free choice. For these reasons, we conclude that the policies underlying the Board's system of bars extend to a new collective-bargaining relationship lawfully established by voluntary recognition without the imposition of the extraordinary procedures created by *Dana*.

*Dana* characterized its modifications of the recognition bar as the result of a balance of free choice and stability in bargaining relationships. See 351 NLRB at 434. However, the modifications have proved unnecessary to protect free choice and thus unnecessarily undermine the Act's purpose of encouraging collective bargaining with employees' freely chosen representative. As the dissent in *Dana* observed, "Although the parties will technically have an obligation to bargain upon recognition, the knowledge that an election petition may be filed gives the employer little incentive to devote time and attention to bargaining during the first 45

days following recognition." 351 NLRB at 447.<sup>30</sup> Our experience under *Dana* makes clear that this period of uncertainty ordinarily extends beyond the 45 days expected by the dissent. Our records reveal that the average time between an employer informing the Regional Office of voluntary recognition and the employer posting the *Dana* notice is 18.7 days. Adding the 45 days the window for filing a petition must remain open, this means that meaningful bargaining is likely to be delayed at least 63 days, not including the time between recognition and when the employer informs the Regional Office that recognition has been granted. If an employer refused to agree on dates for bargaining to begin for that length of time, we likely would find a failure to bargain in good faith. Yet *Dana* virtually guarantees such a delay in serious bargaining and the resulting undermining of the "nascent relationship between the employer and the lawfully recognized union." *Smith's Food*, supra, 320 NLRB at 845-846. The lengthy period of uncertainty created by *Dana* thus unnecessarily interferes with the bargaining process, rendering successful collective bargaining less likely.

The potential for uncertainty and delay in serious bargaining created by *Dana* actually disserves the very employee free choice the majority sought to protect, because employees who support the union do so because they want meaningful representation as soon as practicable. The recognition bar "effectuates rather than impedes employee free choice." *Smith's Food & Drug*, supra, 320 NLRB at 848 (Chairman Gould, concurring). This is because, "[w]hen employees execute authorization cards during a union organizing drive, their hope is to obtain union representation as soon as possible. The Board provides no benefit to these employees by delaying the implementation of their designation in order to reconfirm through an election the desires they have already expressed." *Id.*

#### *E. A Return To Formerly Settled Law Is Warranted*

*Dana* represented a major change in Board law, one that was based on the majority's suspicion of voluntary recognition--suspicion that, based on the empirical evidence acquired since 2007, we conclude was unwarranted. We therefore overrule *Dana* and return to the previously settled rule that an employer's voluntary recognition of a union, based on a showing of the union's majority status, bars an election petition for a reasonable period of time.

As in *UGL-UNICCO*, supra, also decided today, which defined the reasonable period of bargaining during which the "successor bar" will apply, we alter the rule of *Keller Plastics* in one respect. Drawing on the Board's decision in *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001), we define a reasonable period of bargaining, during which the recognition bar will

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<sup>30</sup> Several of the amicus unions' descriptions of their experiences under *Dana* validate this concern, as does the game-theoretical model of collective bargaining proposed by amicus Kenneth G. Dau-Schmidt. Professor Dau-Schmidt proposes, based on theoretical and empirical studies of games, that when parties know their bargaining relationship will continue for a reasonable period of time, each party has an incentive to bargain cooperatively, rather than to seek benefits only for itself at the expense of the other party. In such a stable relationship, each party would reasonably believe that its cooperation in the short term might be rewarded by future cooperation from the other party. By contrast, if there is no reasonable certainty that the bargaining relationship will continue for a reasonable period of time, each party has an incentive to pursue its short-term self-interest and the parties may thus act in a manner that makes both less well off than they would be had they cooperated.

apply, to be no less than 6 months after the parties' first bargaining session and no more than 1 year. In determining whether a reasonable period has elapsed in a given case, we will apply the multifactor test of *Lee Lumber* and impose the burden of proof on the General Counsel to show that further bargaining should be required.

While we overrule *Dana*, we have made no changes to established law regarding secret-ballot elections. An election remains the only way for a union to obtain Board certification and its attendant benefits. Neither the pre-*Dana* law nor the law after today equates the processes of voluntary recognition and certification following a Board-supervised election. We merely restore settled law on the recognition bar, from which *Dana* was a brief and unwarranted detour. Our decision reflects important values: fidelity to congressional purpose, the neutrality of the Board, and the consistency and coherence of Board doctrine. Each of these obligations strongly supports overruling *Dana* and we do so today. Our dissenting colleague repeatedly asserts that our decision reflects "ideological bias." We will not respond in kind because the statutory, doctrinal and policy grounds for our decision are fully set forth above. The rule that we return to today was adopted by the Board in 1966 and was repeatedly reaffirmed by Board Members appointed by Republican and Democratic Presidents during the subsequent 41 years until it was reversed in *Dana*. Notwithstanding the dissent's heated rhetoric, we take some comfort in aligning ourselves with this long line of distinguished public servants.

We will apply this new rule retroactively in all pending cases, except those in which an election was held and the ballots have been opened and counted, consistent with the Board's established approach in representation proceedings.

[Dissenting Opinion by Member Hayes is omitted.]

## Chapter 5: Collective Bargaining

### B. Models of the Collective Bargaining Process

#### 1. The National Labor Relations Act

*Add a new note 7 on page 466:*

7. Generally, when a collective bargaining agreement expires but negotiations for a successor agreement continue and impasse has not been reached, the employer remains obligated to continue the wages, benefits and working conditions specified in the expired contract until a new agreement or impasse is reached. But what of the contract's "dues checkoff" term, which requires the employer, upon receipt of written authorization from an employee, to deduct union dues from the employee's pay and transmit those dues to the union? Since 1962, the NLRB has held that an employer need not continue the dues checkoff following expiration of the contract even though the parties have not reached impasse. *Bethlehem Steel Co.*, 136 N.L.R.B. 1500 (1962), *remanded on other grounds sub nom. Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615 (3d Cir. 1963). In *Hacienda Hotel, Inc.*, 355 N.L.R.B. No. 154 (2010), with one Board member recused, the four remaining Board members voted to continue to apply *Bethlehem Steel*, but two of the four Board members indicated that in an appropriate case, if joined by a third Board member, they would overrule that decision and its progeny and hold that the employer may not cease dues checkoff before bargaining to impasse.

Members Hayes and Schaumber, in a concurring opinion, defended *Bethlehem Steel*. They argued that dues checkoff exists only by contract, as compared to wages, benefits, hours and working conditions which exist at the commencement of a bargaining relationship before any contract is reached. They further maintained that cessation of dues checkoff is a legitimate employer economic weapon that is part and parcel of the bargaining process. They also urged that dues checkoff does not affect employee wages and working conditions but rather provides an administrative mechanism for the union's collection of dues.

Chairman Liebman and Member Pierce, in a concurring opinion, called for *Bethlehem Steel* to be overruled. They urged that the source of wages and benefits that continue after contract expiration but before impasse is the same contract that is the source of the dues checkoff obligation. They further disputed whether revoking dues checkoff is a legitimate economic weapon, arguing that unilateral revocation represented a failure to bargain in good faith. They urged that the characterization of dues checkoff as an administrative mechanism rather than a matter directly affecting employee compensation or working conditions was irrelevant because other administrative mechanisms such as access to bulletin boards may not be changed unilaterally prior to bargaining to impasse.

### D. Interpreting "Good Faith" as Objective Rules of Conduct

#### 1. The Duty to Supply Information under the NLRA

***Add to note 3 on page 495:***

Sometimes it can be difficult to determine whether the employer has claimed inability to pay and, thereby, triggered its duty to supply financial information. In *Stella D'oro Biscuit Co.*, 355 N.L.R.B. No. 158 (2010), the company was acquired by Brynwood Partners, a private equity firm, with a view to improving the company's financial condition over five to ten years and selling it at a profit. During negotiations for a new contract, the company demanded concessions, stated that the company was losing \$1.5 million per year, that the firm had invested \$3 million in new equipment and was willing to fund continued losses in the short term but that if it could not turn the company around to make a profit it would take its "toy," i.e., its financial subsidies and go home, closing the plant. The company negotiators told the union bargaining team that the employees' choices were to have jobs at lower pay or have no jobs at all.

The Board majority of Chairman Liebman and Member Pearce held that the company had claimed inability to pay and was obligated to provide the union with financial data. The Board noted that the company was seeking a five-year contract and that its willingness to subsidize losses did not extend for the full five years. The Board emphasized that the company based its claim for concessions on its current financial condition and represented that its unprofitability endangered its survival. Dissenting Member Schaumber maintained that the employer only claimed an unwillingness to pay, rather than an inability to pay. In his view, the employer made clear that it had the funding to yield to the union's demands but would not do so if wages and benefits were not restructured to achieve profitability.

***Add a new note 6 to page 495:***

6. When a union requests information concerning employees in the bargaining unit, the request is presumed to be relevant to the union's carrying out its responsibilities as exclusive bargaining representative. The burden is on the employer to rebut the presumption or otherwise show why disclosure is not appropriate. However, when the union requests information concerning persons outside the bargaining unit, the union has the burden of demonstrating relevance. In *New York & Presbyterian Hospital v. NLRB*, 2011 WL 2314955 (D.C. Cir. June 14, 2011), the court enforced the Board's order that the employer, a hospital affiliated with Columbia University, provide the union with the names, dates of hire or termination, job duties, departments or areas or work, shifts and whether they were full or part time, for all nurse practitioners performing services at the hospital who were employed by Columbia. Although the individuals were not employees of the hospital, and thus were not in the bargaining unit represented by the union, the court agreed with the Board that the information was relevant to the union's investigation as to whether the Columbia employees were performing bargaining unit work in violation of the union's contract with the hospital. The court also observed that, although an employer is not required to provide information that it does not have, it is required to provide whatever relevant information it does have and the employer had much of the requested information because of its role in accrediting the nurse practitioners to work in the hospital.

In *Public Service Co. of New Mexico*, 356 N.L.R.B. No. 160 (2011), the union grieved the termination of an employee for allegedly violating the employer's Personal Rules of Conduct, Do the Right Thing Policy and laws and administrative regulations. The union

requested information concerning discipline issued to two supervisors for violating the Personal Rules of Conduct, Do the Right Things Policy and New Mexico laws and regulations in connection with a gas leak. The Board held that the union established the relevance of its information request because the supervisors were subject to the same policies and regulations as bargaining unit employees and, therefore, the union could argue in the grievance over the employee's termination that the contract required that the employee's treatment not be disparate from that of the supervisors.

#### **D. Interpreting "Good Faith" as Objective Rules of Conduct**

##### **3. Other Per Se Violations under the NLRA**

*Add the following note 3 on page 505, renumbering existing note 3 as note 4 and existing note 4 as note 5.*

3. In *Mercy Health Partners*, 358 N.L.R.B. No. 69 (June 26, 2012), the employer decided to consolidate pre-registration work at its hospitals and to have the work performed at one of its hospitals that was not unionized. The employer's director of labor relations called a meeting with the five employees who performed the pre-registration work at one of its hospitals that was unionized and advised them of the work relocation. The employer advised the employees that they would have 72 hours to decide whether to accept a layoff, to bump a junior employee at the hospital or to accept one of the newly created positions at the non-unionized hospital with nearly the same wages and benefits as they were currently receiving. She distributed a letter summarizing the information and advising employees that if they had questions they should consult their labor relations manager or their union representative.

The Board majority held that the employer engaged in direct dealing with the employees with respect to a mandatory subject of bargaining, i.e., the effects of the work relocation decision on members of the bargaining unit. Member Hays dissented, arguing that the employer did not deal with the employees but instead simply announced a pre-determined decision and did, in fact, bargain effects with the union.

#### **G. Subjects of Bargaining**

##### **3. The Public Sector**

*Add the following to the end of the section on page 541.*

In 2011, numerous states amended their public sector collective bargaining statutes to narrow the scope of bargaining. Wisconsin prohibited bargaining for public employees, except for most law enforcement personnel and municipal firefighters, over all subjects except increases in base wages, limited to the increase in the cost of living during the 12 month period ending six months before the collective bargaining agreement's expiration date. Wisconsin also prohibited bargaining over health insurance for law enforcement and firefighters. New Jersey suspended bargaining over health insurance for four years and Massachusetts established a new procedure whereby municipalities may change health insurance benefits. Idaho limited negotiations for

teachers to “compensation,” which it defined as salary and benefits, including insurance, leave time, and sick leave; while Indiana limited collective bargaining for teachers to wages and salary and wage-related fringe benefits including insurance, retirement benefits, and paid time off. Michigan added to an already lengthy list of prohibited subjects of bargaining for educational personnel decision and impact bargaining with respect to: placement of teachers; reductions in force and recalls; performance evaluation systems; the development, content, standards, procedures, adoption and implementation of a policy regarding employee discharge or discipline; the format, timing and number of classroom visits; the development, content, standards, procedures, adoption and implementation of the method of employee compensation; decisions about how an employee performance evaluation is used to determine performance-based compensation; and the development, format, content and procedures of notice to parents and legal guardians of pupils taught by a teacher who has been rated as ineffective. Illinois made length of the school day and length of the school year in the Chicago Public Schools a permissive, rather than mandatory, subject of bargaining. For additional information, see Martin H. Malin, *The Upheaval in Public Sector Labor Law: A Search for Common Elements*, 27 *ABA J. Lab. & Emp. L.* 149 (2012).

## **H. Bargaining Remedies**

### ***Add a new note 5 on page 545:***

5. When an employer makes a change to a mandatory subject of bargaining without bargaining with the union, the NLRB typically orders the employer to cease making unilateral changes and to bargain with the union upon request. If the change is detrimental to the employees, the NLRB typically also orders the employer to restore the status quo ante, i.e., rescind the change, and make the affected employee whole. If the change is beneficial to the employees, the NLRB conditions the remedy of rescinding the change on the union’s expressly requesting it. Unilateral changes in health insurance plans often bring a mix of changes that are detrimental to employees and changes that are beneficial to employees. In such cases, the Board conditions its order that the employer rescind the change on the union’s requesting rescission.

In *Brooklyn Hospital Center*, 344 N.L.R.B. 404 (2005), the Board held that make whole relief for unilateral changes to health insurance policies would only be provided in cases where the union requested that the changes be rescinded. In *Goya Foods of Florida*, 356 N.L.R.B. No. 184 (2011), the Board overruled *Brooklyn Hospital Center*, and held that it will order make whole relief whenever the employer unilaterally changes health insurance, even if the union does not request rescission of the change. The Board reasoned that employees who were adversely affected by the unlawful changes by, for example, incurring greater deductibles or co-pays or paying higher premiums, were entitled to be compensated for their losses, even if the union decides, after the fact, that there were sufficient advantages to the new insurance plan to warrant not seeking its rescission. The Board further reasoned that awarding make whole relief would deter breaches of the duty to bargain in good faith.

## Chapter 6: Economic Weapons

### A. Introduction

*At the top of p. 553, add at the end of the carry-over paragraph discussing the work time lost to stoppages:*

In 2011, the annual total number of major work stoppages was 19, up from five in 2009, the year which recorded the lowest number since the U.S. Bureau of Labor Statistics began compiling data in 1947 on the amount of working time lost to work stoppages. News Release, U.S. Bureau of Labor Statistics, Work Stoppages Summary (2012), <http://www.bls.gov/news.release/wkstp.nr0.htm>. The amount of work time lost to work stoppages has not exceeded one percent since 2001. News Release, U.S. Bureau of Labor Statistics, Work Stoppages Involving 1,000 or More Workers, 1947-2011 (Table 1) (2012), <http://www.bls.gov/news.release/wkstp.t01.htm>.

### B. Constitutional Protections for Strikes and Picketing

#### A. Picketing

*Add a new note 7 on p. 566:*

7. *New First Amendment Challenges to Differential Treatment of Labor Picketing.* The contrast between the lax First Amendment protection for labor protest and the higher level of protection for civil rights and political protest has recently become controversial. Because of the extensive federal regulation of labor picketing and the lax constitutional protection for it, many state statutes regulating picketing explicitly exempt labor picketing in order to avoid federal preemption challenges. *Chicago v. Mosley* is an example of such laws. In a few recent cases, state courts have held that the differential treatment of labor picketing in state law violates the First Amendment, relying on *Mosley*. In one such case, a court held that a shopping mall's standards for noncommercial expressive activity violated the California Constitution by discriminating between labor and non-labor speech. *Best Friends Animal Society v. Macerich Westside Pavilion Property LLC*, 193 Cal. App. 4th 168, 173 (2011). Similarly, in *State v. Borowski*, 231 Ore. App. 511, 516 (2009), a court invalidated a state's standards for agricultural protests because the statute exempted from various criminal penalties only labor protesters who engaged in picketing.

Another set of recent challenges to state regulation of labor protest have relied on *Mosley* to argue that state statutes protecting labor protest violate the First Amendment because they treat labor-related picketing or speech differently than other speech. One pair of cases held that state laws regulating the issuance of injunctions in labor disputes (so-called "little Norris-LaGuardia Acts") are unconstitutional, although these decisions have been appealed. *See, e.g., Ralphs Grocery Co. v. United Food and Commercial Workers Union Local 8*, 186 Cal. App. 4th 1078 (2010), *review granted and opinion superseded by*, 239 P.3d 651 (Cal. 2011); *Ralphs Grocery Co. v. United Food and Commercial Workers Union Local 8*, 192 Cal. App. 4th 200 (2010), *review granted and opinion superseded by*, 250 P.3d 179 (Cal. 2011).

**Add to note 5 on p. 565:**

When does labor speech cross the line from advocacy to defamation? In *Fechko Excavating, Inc. v. Ohio Valley & S.*, an employer challenged a union's rhetoric, which accused the employer of cheating on stone bedding specifications and bringing down the industry standards. 2009 Ohio 5155, P24 (2009). The appellate court affirmed the dismissal of Fechko's defamation claims because the union made the heated statements in the context of a labor dispute in order to inform the public and local government members that the company was a non-union employer. *Id.* at P28.

In *Overhill Farms, Inc. v. Lopez*, an employer challenged its employees' rhetoric, which accused the company of harboring racist opinions and engaging in mass layoffs for racist and ageist reasons. 190 Cal. App. 4th 1248, 1252 (2010). The appellate court agreed that Overhill had borne its burden of showing a probability of winning on defamation and held that, unlike a general statement accusing a person of racism, a charge of racially motivated employment termination was a provably false fact. *Id.*

**Add to note 5 on p. 570.**

Although the district court denied the union's motion to dismiss the RICO suit in the *Smithfield* case and the case ultimately settled, *Smithfield Foods, Inc. v. Commercial Workers Int'l*, 593 F. Supp. 2d 840 (E.D. Va. 2008), three other courts have held that RICO may not be used to challenge corporate campaigns or ordinary union organizing activity because the labor activists' conduct is not a predicate act (such as extortion). See, e.g., *Cook-Illinois Corp. v. Teamsters' Local 777*, 2012 WL 1655976 (N.D. Ill., May 2012); *Cintas Corp. v. Unite Here*, 601 F. Supp. 2d 571 (S.D.N.Y.), *aff'd*, 355 F. App'x 508 (2d Cir. 2009); *Wackenhut Corp. v. SEIU*, 593 F. Supp. 2d 1289 (S.D. Fla. 2009).

On the history and contemporary uses of RICO against labor unions, see James J. Brudney, *Collateral Conflict: Employer Claims of RICO Extortion Against Union Comprehensive Campaigns*, 83 S. Cal. L. Rev. 731 (2010).

**Add a new note 6 on p. 583:**

6. It has long been settled that the statutory protection for the right to strike includes the right to be free from employer retaliation for engaging in a legal strike. In addition, employers are prohibited from threatening to retaliate against employees because of their having engaged in a strike or other protected concerted activity. In *General Electric Company*, 215 NLRB 520 (1974), the Board set aside an election because the employer, citing concerns about possible future strikes, stated that the plant's nonunion status was a primary factor in choosing to locate a production line for a new motor there. The Board distinguished an employer's right to take defensive action when threatened with an imminent strike from threats to transfer work "merely because of the possibility of a strike at some speculative future date." *Id.* The NLRA prohibits employer conduct designed to forestall employees from exercising their right to strike in the future, including permanent subcontracting of bargaining unit work (*Century Air Freight*, 284 NLRB 730 (1987)) or discharging or laying off employees in retaliation for past or anticipated

future strikes (*Westpac Electric*, 321 NLRB 1322 (1996), *National Fabricators*, 295 NLRB 1095 (1989)).

Major controversy over this principle erupted in 2011 after a vice president of the Boeing Company told news media that the company had decided to locate production of the Dreamliner aircraft in its South Carolina plant that had recently voted to decertify the union instead of locating production in its unionized Washington state plant because the Washington employees had gone on strike during the past several rounds of collective bargaining: “The overriding factor” in the decision, the executive told the *Seattle Times*, “was that we cannot afford to have a work stoppage, you know, every three years.” The Acting General Counsel of the NLRB issued a complaint alleging Boeing violated sections 8(a)(1) and 8(a)(3) by making coercive statements and threats to employees for engaging in statutorily protected activities, and by deciding to place the second line at a non-union facility, and establish a parts supply program nearby, in retaliation for past strike activity and to chill future strike activity by its union employees. <http://www.nlr.gov/category/case-number/19-ca-032431> (visited July 10, 2012).

The case sparked a firestorm of controversy before it ultimately settled. Some of the legal issues were straightforward: if the company did in fact decide to locate production in South Carolina to retaliate against its Washington employees for striking and to deter either them or the South Carolina workers from striking in the future, did that interfere with, restrain or coerce employees in the exercise of their section 7 rights or did it discriminate against employees based on the exercise of section 7 rights? Is a retaliatory decision to locate new work a violation of the Act, or does it only violate the Act if the company moves existing work? Some of the questions the case raised were not straightforward: what is an effective and statutorily authorized remedy for the decision? Could the Board order Boeing to locate the work in Washington after the company had already invested millions of dollars to put the work in South Carolina? If not, what remedy could the Board order to make the workers whole?

***In part B on p. 583 and C on p. 605, on the question whether the NLRA requires individual picketing employees to follow the § 8(g) notice requirements, add the following:***

In *Civil Serv. Employees Ass’n v. NLRB*, 569 F.3d 88, 89 (2d Cir. 2009), the NLRB had concluded that employees who picketed for collective bargaining purposes without following the § 8(g) notice requirements were exposed to discharge, notwithstanding the protections of § 7, but the court of appeals disagreed. While *unions* were subject to sanctions for striking or picketing without observing the § 8(g) notice requirements, *employees* were subject to sanctions only in cases of strikes and not in cases of picketing (unless the employees were union agents and violated § 8(b)). *Id.* at 94.

#### **D. Work Stoppages in the Public Sector**

***Add at the end of note 1 on p. 609 (on the “Blue Flu”):***

Can employers discipline employees for promoting a slow-down among public sector workers? Three police union members urged other officers to write fewer tickets in order to

place the county under pressure through loss of revenue. *Douglas v. Dekalb County*, 308 Fed. Appx. 396, 397 (11<sup>th</sup> Cir. 2009). The appellate court affirmed the police department's power to discipline the officers despite their claim that their conduct was protected by the First Amendment as freedom of speech and freedom of association because Georgia statute barred public employees from promoting strikes, which included slow-downs. *Id.* at 399.

***Add in the note on Remedies for Unlawful Strikes on p. 610:***

Can courts fine unions for promoting a strike among public-sector workers? A public school teachers' union ignored a state employment relation board's order to rescind/disavow its strike vote. *Commonwealth Empl. Rels. Bd. v. Boston Teachers Union*, 74 Mass. App. Ct. 500, 503 (2009). Finding no constitutional right to public sector strikes, the appellate court enforced the order and fined the union because state law barred the inducement or encouragement of strikes or work stoppages among public employees. *Id.* at 506.

**E. Employer Weapons**

**1. Lockouts**

***Add a new note 4 on p. 633:***

The most highly publicized lockouts (or threatened lockouts) in recent times are those in major professional sports, including the 161-day lockout in 2011 that shortened the 2011-2012 National Basketball Association season and the 18-week lockout in 2011 in the National Football League. Owners in professional baseball and hockey also threatened lockouts in 2011. Why did or might the owners in these sports resort to lockouts when the players did not strike? Why did the 2011 lockouts commence in the off-season?

In both football and basketball, the players voted to decertify their union and filed antitrust claims against the owners alleging that the lockout and the related refusal to draft new players was an unlawful conspiracy in restraint of trade. The significance of the decertification of the union was to remove the exemption from antitrust liability that employers enjoy when their employees are unionized; absent the antitrust exemption, both the employers and the unions might be prohibited from colluding to set terms of compensation. In both instances, the owners defended on the ground that the disbanding of the union was a sham. In *Brady v. National Football League*, 644 F.3d 651 (8<sup>th</sup> Cir. 2011), the court of appeals held that the Norris-LaGuardia Act prohibited the issuance of an injunction against the NFL lockout and declined to address the question whether the disbanding of the union rendered the owners subject to antitrust liability for colluding to lock out the players. Among the major legal issues arising out of the lockouts are those concerning the owners' efforts to protect their own revenue stream from television and other sources. For example, the NFL owners negotiated a TV broadcast contract that pays them millions of dollars even if no games are played, and NFL players insist that the revenue should be shared with them. What labor regulation, if any, should govern what employers can do to remain profitable during a lockout?

**F. Secondary Activity**

*Add hypothetical (g) on p. 691:*

(g) A representative of the Carpenters Union meets with a real estate developer to discuss hiring union contractors to build a new development. The union representative says that the developer can avoid “problems, including protests, work stoppages, and delivery issues” if the contractors use union labor. Are these statements coercive? See *NLRB v. Metro. Reg’l Council of Carpenters*, 316 Fed. Appx. 150, 157 (3d Cir. 2009) (finding statements coercive).

## Chapter 7: Life under the Collective Bargaining Agreement

### B. Workplace Self Governance under the Collective Bargaining Agreement

#### 1. Enforcing the Agreement to Arbitrate

##### *Add to note 4 on page 718:*

In *Granite Rock Co. v. International Brotherhood of Teamsters*, 130 S. Ct. 2847 (2010), the Supreme Court held that the question whether a ratification vote was valid and thus whether a contract was validly formed was to be decided by a court rather than an arbitrator. Following the expiration of a collective bargaining agreement and an impasse in negotiations, the local union called a strike on June 9, 2004. On July 2, 2004, the parties reached a tentative agreement. The local submitted the agreement to a ratification vote. Meanwhile, the international objected that the local had not obtained a back-to-work agreement holding harmless the union and the employees for damages that may have occurred during the strike and ordered the local to continue the strike until it received such an agreement. The local went back on strike on July 5. The employer sued for an injunction and damages, alleging that the strike breached the no strike clause in the new contract which it claimed had been ratified on July 2. The local called off the strike, mooting the injunction claim and asked the court to order the claim for damages to arbitration where the arbitrator would consider whether the contract was properly ratified on July 2 or at the second ratification vote.

The Court held that whether the contract was ratified on July 2 determined whether any contract, and thus any obligation to arbitrate, had been formed as of the time that the local resumed the strike. The Court reasoned:

The parties agree that the CBA's arbitration clause pertains only to disputes that "arise under" the agreement. Accordingly, to hold the parties' ratification-date dispute arbitrable, the Court of Appeals had to decide whether the dispute could be characterized as "arising under" the CBA. [T]he Court of Appeals relied upon the ratification dispute's relationship to Granite Rock's claim that Local breached the CBA's no-strike clause (a claim the Court of Appeals viewed as clearly "arising under" the CBA) to conclude that the arbitration clause is certainly susceptible of an interpretation that covers Local's formation-date defense.

The Court of Appeals overlooked the fact that this theory of the ratification dispute's arbitrability fails if the CBA was not formed at the time the unions engaged in the acts that gave rise to Granite Rock's strike claims. If, as Local asserts, the CBA containing the parties' arbitration clause was not ratified, and thus not formed, until August 22, there was no CBA for the July no-strike dispute to "arise under," and thus no valid basis for the Court of Appeals' conclusion that Granite Rock's July 9 claims arose under the CBA and were thus arbitrable along with, by extension, Local's formation date defense to those claims.

### 3. A Glimpse at Arbitral Common Law

#### **Add to A Note on the Railway Labor Act on page 740:**

In *Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers and Trainmen*, 120 S.Ct. 584 (2010), the Supreme Court held that the Railway Labor Act's requirement that a claim (grievance) be discussed in a conference prior to its submission to arbitration before the National Railroad Adjustment Board is not jurisdictional in nature and the NRAB erred in dismissing claims sua sponte where the record did not contain evidence that the claims had been conferenced. The Court reasoned that the requirement of conferencing was a claims processing rule, akin to a statute of limitations, was not jurisdictional in nature and could be waived by the parties' failure to raise it or cured while holding the arbitration in abeyance.

#### **C. The Collective Bargaining Agreement and the Norris-LaGuardia Act**

##### **1. Enjoining Breaches of the No Strike Clause**

#### ***Add to note 2 on page 752:***

In *Granite Rock Co. v. International Brotherhood of Teamsters*, 130 S.Ct. 2847 (2010), the Supreme Court held that there is no cause of action under Section 301 for intentional interference with a contract's no strike obligation. After a local union reached tentative agreement with the employer and the union members ratified the agreement ending a strike, the international directed the local to resume the strike unless and until the employer agreed to hold harmless the union and the employees for any damages incurred during the strike. The employer sued the international for *inter alia* intentional interference with the local's obligation under the no strike clause under the new contract. The Court held that Section 301 encompasses contractual claims, not tort claims, and reasoned that the employer failed to show that its remedies available for breach of contract or otherwise were sufficiently defective to warrant implying a claim for intentional interference under Section 301.

#### **E. The Interplay between the Contractual Grievance Procedure and "External" Public Law**

##### **1. The Grievance Procedure and the NLRB**

#### ***Following the second full paragraph on page 785, add the following:***

In Memorandum GC 11-05 (Jan. 20, 2011), the NLRB's Acting General Counsel opined that *Olin* should be modified and indicated that the General Counsel will urge the Board to defer to arbitration awards in Section 8(a)(1) and (3) cases only where the party seeking deferral demonstrates that the contract incorporated the statutory right or the parties presented the statutory issue to the arbitrator and the arbitrator correctly enunciated the statutory principles involved and applied them in deciding the issue. The General Counsel reasoned that *Olin* is inconsistent with recent Supreme Court decisions mandating the arbitration of individual statutory claims which require such arbitration only where the parties have agreed to arbitrate

such claims and regard the agreement as merely substituting the arbitral forum for the judicial and not waiving substantive rights.

## 2. Grievance Arbitration and Statutory Claims

*In place of Wright v. Universal Maritime Service Corp. on page 800, substitute:*

**14 PENN PLAZA, LLC v. PYETT**  
129 S.Ct. 1456 (2009)

JUSTICE THOMAS delivered the opinion of the Court:

The question presented by this case is whether a provision in a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate claims arising under the Age Discrimination in Employment Act of 1967 (ADEA) is enforceable. The United States Court of Appeals for the Second Circuit held that this Court's decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), forbids enforcement of such arbitration provisions. We disagree and reverse the judgment of the Court of Appeals.

I

Respondents are members of the Service Employees International Union, Local 32BJ (Union). Since the 1930's, the Union has engaged in industry-wide collective bargaining with the Realty Advisory Board on Labor Relations, Inc. (RAB), a multiemployer bargaining association for the New York City real-estate industry. The agreement between the Union and the RAB is embodied in their Collective Bargaining Agreement for Contractors and Building Owners (CBA). The CBA requires union members to submit all claims of employment discrimination to binding arbitration under the CBA's grievance and dispute resolution procedures:

“§ 30 NO DISCRIMINATION. There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any other characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the New York State Human Rights Law, the New York City Human Rights Code, ... or any other similar laws, rules, or regulations. All such claims shall be subject to the grievance and arbitration procedures (Articles V and VI) as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.”

Petitioner 14 Penn Plaza LLC is a member of the RAB. It owns and operates the New York City office building where, prior to August 2003, respondents worked as night lobby watchmen and in other similar capacities. Respondents were directly employed by petitioner Temco Service Industries, Inc. (Temco), a maintenance service and cleaning contractor. In August 2003, with the Union's consent, 14 Penn Plaza engaged Spartan Security, a unionized

security services contractor and affiliate of Temco, to provide licensed security guards to staff the lobby and entrances of its building. Because this rendered respondents' lobby services unnecessary, Temco reassigned them to jobs as night porters and light duty cleaners in other locations in the building. Respondents contend that these reassignments led to a loss in income, caused them emotional distress, and were otherwise less desirable than their former positions.

At respondents' request, the Union filed grievances challenging the reassignments. The grievances alleged that petitioners: (1) violated the CBA's ban on workplace discrimination by reassigning respondents on account of their age; (2) violated seniority rules by failing to promote one of the respondents to a handyman position; and (3) failed to equitably rotate overtime. After failing to obtain relief on any of these claims through the grievance process, the Union requested arbitration under the CBA.

After the initial arbitration hearing, the Union withdrew the first set of respondents' grievances-the age-discrimination claims-from arbitration. Because it had consented to the contract for new security personnel at 14 Penn Plaza, the Union believed that it could not legitimately object to respondents' reassignments as discriminatory. But the Union continued to arbitrate the seniority and overtime claims, and, after several hearings, the claims were denied.

In May 2004, while the arbitration was ongoing but after the Union withdrew the age-discrimination claims, respondents filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging that petitioners had violated their rights under the ADEA. Approximately one month later, the EEOC issued a Dismissal and Notice of Rights, which explained that the agency's " 'review of the evidence ... fail[ed] to indicate that a violation ha[d] occurred,' " and notified each respondent of his right to sue.

Respondents thereafter filed suit against petitioners in the United States District Court for the Southern District of New York, alleging that their reassignment violated the ADEA and state and local laws prohibiting age discrimination. Petitioners filed a motion to compel arbitration of respondents' claims pursuant to § 3 and § 4 of the Federal Arbitration Act (FAA). The District Court denied the motion because under Second Circuit precedent, "even a clear and unmistakable union-negotiated waiver of a right to litigate certain federal and state statutory claims in a judicial forum is unenforceable."

The Court of Appeals affirmed. According to the Court of Appeals, it could not compel arbitration of the dispute because *Gardner-Denver*, which "remains good law," held "that a collective bargaining agreement could not waive covered workers' rights to a judicial forum for causes of action created by Congress."

## II

### A

[T]he Union and the RAB, negotiating on behalf of 14 Penn Plaza, collectively bargained in good faith and agreed that employment-related discrimination claims, including claims brought under the ADEA, would be resolved in arbitration. This freely negotiated term between

the Union and the RAB easily qualifies as a “conditio[n] of employment” that is subject to mandatory bargaining. The decision to fashion a CBA to require arbitration of employment-discrimination claims is no different from the many other decisions made by parties in designing grievance machinery

Respondents, however, contend that the arbitration clause here is outside the permissible scope of the collective-bargaining process because it affects the “employees’ individual, non-economic statutory rights.” We disagree. Parties generally favor arbitration precisely because of the economics of dispute resolution. As in any contractual negotiation, a union may agree to the inclusion of an arbitration provision in a collective-bargaining agreement in return for other concessions from the employer. Courts generally may not interfere in this bargained-for exchange. “Judicial nullification of contractual concessions ... is contrary to what the Court has recognized as one of the fundamental policies of the National Labor Relations Act—freedom of contract.”

As a result, the CBA’s arbitration provision must be honored unless the ADEA itself removes this particular class of grievances from the NLRA’s broad sweep. It does not. This Court has squarely held that the ADEA does not preclude arbitration of claims brought under the statute.

In *Gilmer*, the Court explained that “[a]lthough all statutory claims may not be appropriate for arbitration, ‘having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.’ ” The Court determined that “nothing in the text of the ADEA or its legislative history explicitly precludes arbitration.” The Court also concluded that arbitrating ADEA disputes would not undermine the statute’s “remedial and deterrent function.”

The *Gilmer* Court’s interpretation of the ADEA fully applies in the collective-bargaining context. Nothing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative. This Court has required only that an agreement to arbitrate statutory antidiscrimination claims be “explicitly stated” in the collective-bargaining agreement. The CBA under review here meets that obligation. Respondents incorrectly counter that an individual employee must personally “waive” a “[substantive] right” to proceed in court for a waiver to be “knowing and voluntary” under the ADEA. As explained below, however, the agreement to arbitrate ADEA claims is not the waiver of a “substantive right” as that term is employed in the ADEA,

Examination of the two federal statutes at issue in this case, therefore, yields a straightforward answer to the question presented: The NLRA provided the Union and the RAB with statutory authority to collectively bargain for arbitration of workplace discrimination claims, and Congress did not terminate that authority with respect to federal age-discrimination claims in the ADEA. Accordingly, there is no legal basis for the Court to strike down the arbitration clause in this CBA, which was freely negotiated by the Union and the RAB, and which clearly and unmistakably requires respondents to arbitrate the age-discrimination claims at issue in this appeal. Congress has chosen to allow arbitration of ADEA claims. The Judiciary must respect that choice.

## B

The CBA's arbitration provision is also fully enforceable under the *Gardner-Denver* line of cases. Respondents interpret *Gardner-Denver* and its progeny to hold that “a union cannot waive an employee's right to a judicial forum under the federal antidiscrimination statutes” because “allowing the union to waive this right would substitute the union's interests for the employee's antidiscrimination rights.” The “combination of union control over the process and inherent conflict of interest with respect to discrimination claims,” they argue, “provided the foundation for the Court's holding [in *Gardner-Denver* ] that arbitration under a collective-bargaining agreement could not preclude an individual employee's right to bring a lawsuit in court to vindicate a statutory discrimination claim.” We disagree.

## 1

The holding of *Gardner-Denver* is not as broad as respondents suggest. The employee in that case was covered by a collective-bargaining agreement that prohibited “discrimination against any employee on account of race, color, religion, sex, national origin, or ancestry” and that guaranteed that “[n]o employee will be discharged ... except for just cause.” The agreement also included a “multistep grievance procedure” that culminated in compulsory arbitration for any “differences aris[ing] between the Company and the Union as to the meaning and application of the provisions of this Agreement” and “any trouble aris[ing] in the plant.”

The employee was discharged for allegedly producing too many defective parts while working for the respondent as a drill operator. He filed a grievance with his union claiming that he was “ ‘unjustly discharged’ ” in violation of the “ ‘just cause’ ” provision within the CBA. Then at the final prearbitration step of the grievance process, the employee added a claim that he was discharged because of his race.

The arbitrator ultimately ruled that the employee had been “ ‘discharged for just cause,’ ” but “made no reference to [the] claim of racial discrimination.” After obtaining a right-to-sue letter from the EEOC, the employee filed a claim in Federal District Court, alleging racial discrimination in violation of Title VII of the Civil Rights Act of 1964. The District Court issued a decision, affirmed by the Court of Appeals, which granted summary judgment to the employer because it concluded that “the claim of racial discrimination had been submitted to the arbitrator and resolved adversely to [the employee].”

This Court reversed the judgment on the narrow ground that the arbitration was not preclusive because the collective-bargaining agreement did not cover statutory claims. As a result, the lower courts erred in relying on the “doctrine of election of remedies” to bar the employee's Title VII claim. “That doctrine, which refers to situations where an individual pursues remedies that are legally or factually inconsistent” with each other, did not apply to the employee's dual pursuit of arbitration and a Title VII discrimination claim in district court. The employee's collective-bargaining agreement did not mandate arbitration of statutory antidiscrimination claims. “As the proctor of the bargain, the arbitrator's task is to effectuate the intent of the parties.” Because the collective-bargaining agreement gave the arbitrator “authority

to resolve only questions of contractual rights,” his decision could not prevent the employee from bringing the Title VII claim in federal court “regardless of whether certain contractual rights are similar to, or duplicative of, the substantive rights secured by Title VII.” *See id.*, at 46, n. 6 (“[W]e hold that the federal policy favoring arbitration does not establish that an arbitrator’s resolution of a *contractual* claim is dispositive of a statutory claim under Title VII” (emphasis added)).

## 2

We recognize that apart from their narrow holdings, the *Gardner-Denver* line of cases included broad dicta that was highly critical of the use of arbitration for the vindication of statutory antidiscrimination rights. That skepticism, however, rested on a misconceived view of arbitration that this Court has since abandoned.

First, the Court in *Gardner-Denver* erroneously assumed that an agreement to submit statutory discrimination claims to arbitration was tantamount to a waiver of those rights. The Court was correct in concluding that federal antidiscrimination rights may not be prospectively waived, but it confused an agreement to arbitrate those statutory claims with a prospective waiver of the substantive right. The decision to resolve ADEA claims by way of arbitration instead of litigation does not waive the statutory right to be free from workplace age discrimination; it waives only the right to seek relief from a court in the first instance. The suggestion in *Gardner-Denver* that the decision to arbitrate statutory discrimination claims was tantamount to a substantive waiver of those rights, therefore, reveals a distorted understanding of the compromise made when an employee agrees to compulsory arbitration.

The timeworn “mistrust of the arbitral process” harbored by the Court in *Gardner-Denver* thus weighs against reliance on anything more than its core holding.

Second, *Gardner-Denver* mistakenly suggested that certain features of arbitration made it a forum “well suited to the resolution of contractual disputes,” but “a comparatively inappropriate forum for the final resolution of rights created by Title VII.” According to the Court, the “factfinding process in arbitration” is “not equivalent to judicial factfinding” and the “informality of arbitral procedure ... makes arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts.” The Court also questioned the competence of arbitrators to decide federal statutory claims. In the Court’s view, “the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts.”

These misconceptions have been corrected. For example, the Court has “recognized that arbitral tribunals are readily capable of handling the factual and legal complexities of antitrust claims, notwithstanding the absence of judicial instruction and supervision” and that “there is no reason to assume at the outset that arbitrators will not follow the law.” An arbitrator’s capacity to resolve complex questions of fact and law extends with equal force to discrimination claims brought under the ADEA. Moreover, the recognition that arbitration procedures are more streamlined than federal litigation is not a basis for finding the forum somehow inadequate; the

relative informality of arbitration is one of the chief reasons that parties select arbitration. Parties “trad[e] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.”

Third, the Court in *Gardner-Denver* raised in a footnote a “further concern” regarding “the union’s exclusive control over the manner and extent to which an individual grievance is presented.” The Court suggested that in arbitration, as in the collective-bargaining process, a union may subordinate the interests of an individual employee to the collective interests of all employees in the bargaining unit.

We cannot rely on this judicial policy concern as a source of authority for introducing a qualification into the ADEA that is not found in its text. Absent a constitutional barrier, “it is not for us to substitute our view of ... policy for the legislation which has been passed by Congress.”

The conflict-of-interest argument also proves too much. Labor unions certainly balance the economic interests of some employees against the needs of the larger work force as they negotiate collective-bargain agreements and implement them on a daily basis. But this attribute of organized labor does not justify singling out an arbitration provision for disfavored treatment. This “principle of majority rule” to which respondents object is in fact the central premise of the NLRA. *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 62 (1975). “In establishing a regime of majority rule, Congress sought to secure to all members of the unit the benefits of their collective strength and bargaining power, in full awareness that the superior strength of some individuals or groups might be subordinated to the interest of the majority.” It was Congress’ verdict that the benefits of organized labor outweigh the sacrifice of individual liberty that this system necessarily demands. Respondents’ argument that they were deprived of the right to pursue their ADEA claims in federal court by a labor union with a conflict of interest is therefore unsustainable; it amounts to a collateral attack on the NLRA.

In any event, Congress has accounted for this conflict of interest in several ways. [T]he NLRA has been interpreted to impose a “duty of fair representation” on labor unions, which a union breaches “when its conduct toward a member of the bargaining unit is arbitrary, discriminatory, or in bad faith.” Thus, a union is subject to liability under the NLRA if it illegally discriminates against older workers in either the formation or governance of the collective-bargaining agreement, such as by deciding not to pursue a grievance on behalf of one of its members for discriminatory reasons. Given this avenue that Congress has made available to redress a union’s violation of its duty to its members, it is particularly inappropriate to ask this Court to impose an artificial limitation on the collective-bargaining process.

In addition, a union is subject to liability under the ADEA if the union itself discriminates against its members on the basis of age. Union members may also file age-discrimination claims with the EEOC and the National Labor Relations Board, which may then seek judicial intervention under this Court’s precedent. In sum, Congress has provided remedies for the situation where a labor union is less than vigorous in defense of its members’ claims of discrimination under the ADEA.

### III

Respondents argue that the CBA operates as a substantive waiver of their ADEA rights because it not only precludes a federal lawsuit, but also allows the Union to block arbitration of these claims. Petitioners contest this characterization of the CBA, and offer record evidence suggesting that the Union has allowed respondents to continue with the arbitration even though the Union has declined to participate. But not only does this question require resolution of contested factual allegations, it was not fully briefed to this or any court and is not fairly encompassed within the question presented. Thus, although a substantive waiver of federally protected civil rights will not be upheld, we are not positioned to resolve in the first instance whether the CBA allows the Union to prevent respondents from “effectively vindicating” their “federal statutory rights in the arbitral forum.”

#### IV

We hold that a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

Justice SOUTER, with whom Justice STEVENS, Justice GINSBURG, and Justice BREYER join, dissenting.

The issue here is whether employees subject to a collective-bargaining agreement (CBA) providing for conclusive arbitration of all grievances, including claimed breaches of the Age Discrimination in Employment Act of 1967 (ADEA) lose their statutory right to bring an ADEA claim in court. Under the 35-year-old holding in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), they do not, and I would adhere to *stare decisis* and so hold today.

*Gardner-Denver* considered the effect of a CBA's arbitration clause on an employee's right to sue under Title VII. One of the employer's arguments was that the CBA entered into by the union had waived individual employees' statutory cause of action subject to a judicial remedy for discrimination in violation of Title VII. [W]e unanimously held that “the rights conferred” by Title VII (with no exception for the right to a judicial forum) cannot be waived as “part of the collective bargaining process,” *id.* at 51. We stressed the contrast between two categories of rights in labor and employment law. There were “statutory rights related to collective activity,” which “are conferred on employees collectively to foster the processes of bargaining [, which] properly may be exercised or relinquished by the union as collective-bargaining agent to obtain economic benefits for union members.” *Ibid.* But “Title VII ... stands on plainly different [categorical] ground; it concerns not majoritarian processes, but an individual's right to equal employment opportunities.” *Ibid.* Thus, as the Court previously realized, *Gardner-Denver* imposed a “seemingly absolute prohibition of union waiver of employees' federal forum rights.” *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 80 (1998).

We supported the judgment with several other lines of complementary reasoning. First, we explained that antidiscrimination statutes “have long evinced a general intent to accord parallel or overlapping remedies against discrimination,” and Title VII's statutory scheme carried

“no suggestion ... that a prior arbitral decision either forecloses an individual's right to sue or divests federal courts of jurisdiction.” *Gardner-Denver*, 415 U.S. at 47. We accordingly concluded that “an individual does not forfeit his private cause of action if he first pursues his grievance to final arbitration under the nondiscrimination clause of a collective-bargaining agreement.” *Id.* at 49.

Second, we rejected the District Court's view that simply participating in the arbitration amounted to electing the arbitration remedy and waiving the plaintiff's right to sue. We said that the arbitration agreement at issue covered only a contractual right under the CBA to be free from discrimination, not the “independent statutory rights accorded by Congress” in Title VII. *Id.* at 49-50. Third, we rebuffed the employer's argument that federal courts should defer to arbitral rulings. We declined to make the “assumption that arbitral processes are commensurate with judicial processes,” *id.* at 56, and described arbitration as “a less appropriate forum for final resolution of Title VII issues than the federal courts,” *id.*, at 58.

Finally, we took note that “[i]n arbitration, as in the collective bargaining process, the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit,” *ibid.* n. 19, a result we deemed unacceptable when it came to Title VII claims. In sum, *Gardner-Denver* held that an individual's statutory right of freedom from discrimination and access to court for enforcement were beyond a union's power to waive.

Our analysis of Title VII in *Gardner-Denver* is just as pertinent to the ADEA in this case. Once we have construed a statute, stability is the rule, and “we will not depart from [it] without some compelling justification.” There is no argument for abandoning precedent here, and *Gardner-Denver* controls.

## II

The majority evades the precedent of *Gardner-Denver* as long as it can simply by ignoring it. The Court never mentions the case before concluding that the ADEA and the National Labor Relations Act “yiel[d] a straightforward answer to the question presented,” that is, that unions can bargain away individual rights to a federal forum for antidiscrimination claims. If this were a case of first impression, it would at least be possible to consider that conclusion, but the issue is settled and the time is too late by 35 years to make the bald assertion that “[n]othing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative.” In fact, we recently and unanimously said that the principle that “federal forum rights cannot be waived in union-negotiated CBAs even if they can be waived in individually executed contracts ... assuredly finds support in” our case law, *Wright*, 525 U.S. at 77, and every Court of Appeals save one has read our decisions as holding to this position

Equally at odds with existing law is the majority's statement that “[t]he decision to fashion a CBA to require arbitration of employment-discrimination claims is no different from the many other decisions made by parties in designing grievance machinery.” That is simply impossible to square with our conclusion in *Gardner-Denver* that “Title VII ... stands on plainly different ground” from “statutory rights related to collective activity”: “it concerns not

majoritarian processes, but an individual's right to equal employment opportunities.”

When the majority does speak to *Gardner-Denver*, it misreads the case in claiming that it turned solely “on the narrow ground that the arbitration was not preclusive because the collective-bargaining agreement did not cover statutory claims.” That, however, was merely one of several reasons given in support of the decision, and we raised it to explain why the District Court made a mistake in thinking that the employee lost his Title VII rights by electing to pursue the contractual arbitration remedy. One need only read *Gardner-Denver* itself to know that it was not at all so narrowly reasoned, and later cases have made this abundantly clear.

Nor, finally, does the majority have any better chance of being rid of another of *Gardner-Denver's* statements supporting its rule of decision, set out and repeated in previous quotations: “in arbitration, as in the collective-bargaining process, a union may subordinate the interests of an individual employee to the collective interests of all employees in the bargaining unit,” an unacceptable result when it comes to “an individual's right to equal employment opportunities.” The majority tries to diminish this reasoning, and the previously stated holding it supported, by making the remarkable rejoinder that “[w]e cannot rely on this judicial policy concern as a source of authority for introducing a qualification into the ADEA that is not found in its text.” It is enough to recall that respondents are not seeking to “introduc[e] a qualification into” the law; they are justifiably relying on statutory-interpretation precedent decades old, never overruled, and serially reaffirmed over the years. With that precedent on the books, it makes no sense for the majority to claim that “judicial policy concern[s]” about unions sacrificing individual antidiscrimination rights should be left to Congress.

Congress apparently does not share the Court's demotion of *Gardner-Denver's* holding to a suspect judicial policy concern: “Congress has had [over] 30 years in which it could have corrected our decision ... if it disagreed with it, and has chosen not to do so. We should accord weight to this continued acceptance of our earlier holding.”

### III

On one level, the majority opinion may have little effect, for it explicitly reserves the question whether a CBA's waiver of a judicial forum is enforceable when the union controls access to and presentation of employees' claims in arbitration, which “is usually the case.” But as a treatment of precedent in statutory interpretation, the majority's opinion cannot be reconciled with the *Gardner-Denver* Court's own view of its holding, repeated over the years and generally understood, and I respectfully dissent.

(The separate dissenting opinion of JUSTICE STEVENS has been omitted.)

### Notes

1. In the *Steelworkers Trilogy*, the Court regarded grievance arbitration as a substitute for workplace strife and a vehicle for workplace self-governance. The Court contrasted grievance arbitration with commercial arbitration which the Court regarded as a substitute for litigation.

How does the Court view grievance arbitration in *Pyett*? What are the implications, if any, for the Court's change in perspective?

2. In *Kravar v. Triangle Services, Inc.*, 2009 WL 1392595 (S.D.N.Y. May 19, 2009), the court faced the same SEIU Local 32BJ – RAB collective bargaining agreement. The court refused to compel the plaintiff to arbitrate her claim of disability discrimination under the Americans with Disabilities Act. The court found that under the collective bargaining agreement, the union had the exclusive right to advance a grievance to arbitration and that the union refused to process the plaintiff's disability discrimination claim. The court concluded that the union's refusal to arbitrate the plaintiff's disability discrimination claim meant that if not allowed to proceed in court, she would not be able to bring her claim in any forum. Under the circumstances, the court opined, the collective bargaining agreement amounted to a waiver of plaintiff's substantive rights and was not enforceable. However, in *Duraku v. Tishman Speyer Properties, Inc.*, 714 F.Supp.2d 470 (S.D.N.Y. 2010), the court required plaintiffs to arbitrate their discrimination claims in light of a February 2010 supplemental agreement between RAB and Local 32BJ that expressly provides that an employee may proceed to arbitration if the union declines to do so.

3. In *Mathews v. Denver Newspaper Agency*, 2009 WL 1231776 (D. Colo. May 4, 2009), *rev'd*, 2011 WL 1901341 (10<sup>th</sup> Cir. May 17, 2011), the plaintiff grieved his demotion on grounds that included allegations of national origin discrimination and retaliation for filing a prior discrimination complaint. The collective bargaining agreement contained a non-discrimination clause but did not obligate employees to bring their statutory claims through the grievance procedure. Plaintiff arbitrated represented by his own attorney rather than a union advocate and the arbitrator denied his grievance. The district court interpreted *Pyett* as modifying *Gardner-Denver* and concluded, in light of the arbitration, that plaintiff's Title VII and 1981 actions were barred by the doctrine of *res judicata*. The Court of Appeals for the Tenth Circuit, however, reversed. The court held that *Gardner-Denver* controlled and that the arbitration concerned only the plaintiff's claims under the contract, reasoning and quoting *Pyett*:

That Mathews' contractual rights and statutory rights were coterminous is of no moment: As the Supreme Court has recently reaffirmed, “[b]ecause the collective-bargaining agreement gave the arbitrator ‘authority to resolve only questions of contractual rights,’ his decision could not prevent the employee from bringing the Title VII claim in federal court ‘regardless of whether certain contractual rights are similar to, or duplicative of, the substantive rights secured by Title VII.’ “

4. In *Miami Dolphins, Ltd. v. Newson*, 2011 WL 1671631 (W.D.Pa. May 3, 2011), Newson, a player for the Miami Dolphins football team, filed a claim under the Pennsylvania workers compensation statute for an injury he sustained in Pennsylvania. The collective bargaining agreement between the National Football League and the NFL Players Association required that in any state where a club was excluded from workers compensation coverage, the team would either obtain voluntary coverage or guarantee equivalent benefits to its players which would be determined under the contract's non-injury grievance procedure. Because Florida excluded the club from coverage, the NFL and NFLPA agreed that Dolphins' players

would be entitled to the benefits equivalent to those set forth in the Florida Workers' Compensation Law with disputes to be resolved by a member of a three arbitrator local panel that the parties established for such claims. The Dolphins asked the court to enforce the arbitration agreement by enjoining Newson from proceeding on his Pennsylvania workers compensation claim. The court refused to do so, observing that an arbitration proceeding was pending concerning whether Newson breached the contract by filing the Pennsylvania claim and reasoning, *inter alia* that there could not be a clear and unmistakable waiver of the claim under the Pennsylvania statute as long as the arbitration proceeding was pending.

5. Is waiver of the judicial forum for statutory claims and submission of those claims to the grievance procedure a mandatory subject of bargaining? If so, may an employer insist on such a waiver to the point of impasse? If the parties are at impasse, may the employer unilaterally impose such a waiver on the employees?

***On page 809, add to the notes following Collins v. New York City Transit Authority the following:***

In *Mathews v. Denver Newspaper Agency*, 2011 WL 1901341 (10<sup>th</sup> Cir. May 17, 2011), the Court of Appeals for the Tenth Circuit refused to follow the Second Circuit's approach in *Collins*. The court reasoned, "In light of the Supreme Court's clear directive [in *Gardener-Denver*] to accord weight to prior arbitral decisions on a case-by-case basis, a per se standard is inappropriate."

## **Chapter 8: Unions And Activism: Expanding the Boundaries of the Modern Labor Law Practice**

### **B. Labor Organizations and Community and Political Action**

#### **1. State and Local Initiatives on Workplace Justice**

##### ***Add to note 1 on p. 823:***

Controversy over the appropriate scope of federal preemption of local efforts to regulate working conditions has intensified as some localities try to impose greater regulation on labor standards and others try to regulate the hiring of immigrants lacking proper work authorizations. See Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153 (2011); Catherine L. Fisk, *The Anti-Subordination Principle of Labor and Employment Law Preemption*, 5 HARV. L. & POLICY REV. 17 (2011). Labor law preemption of state and local law is covered in Chapter 10.

Preemption of state and local efforts to regulate working conditions has been a significant issue not only with respect to federal labor law but also with respect to federal immigration law and local efforts to regulate or restrict immigrant labor. Arizona, Alabama and some other states and localities have enacted harsh measures restricting the employment of unauthorized immigrant workers, as well as prohibiting them from entering into contracts and engaging in other aspects of daily life, including sending their children to school. Arizona S.B. 1070, Ariz. Laws 2010 ch. 113, Ariz. Rev. Stat. § 11-1051; Acts of Alabama 2011-535, Ala. Code § 31-13-1. The U.S. Supreme Court held that federal immigration law preempts most provisions of the Arizona law, S.B. 1070, in an opinion that suggests core provisions of the Alabama law would also be preempted by federal law. *Arizona v. United States*, \_\_\_ S. Ct. \_\_\_ (June 25, 2012). However, the Court also has upheld against preemption challenges some state and local laws restricting the hiring of unauthorized immigrants. *Chamber of Commerce v. Whiting*, 563 U.S. \_\_\_ (2011).

**In note 4 on p. 824:** The chapter referred to is chapter 4.

#### **1. Corporate Campaigns**

##### ***Add just before section A at the top of p. 825:***

In light of the vogue for corporations to advertise their corporate culture and to market their corporate social responsibility campaigns, unions have begun to conceptualize corporate campaigns as “corporate social responsibility campaigns” and to tout the role of unions in providing transparency and accountability in corporate claims about social responsibility. How, if at all, should the expansion of corporations’ own conceptions of their social responsibility and their marketing of themselves as being socially responsible affect the legality of what unions and their members can do in publicizing corporate practices?

##### ***Add a new note 4 on p. 835:***

4. Among the various forms of alleged employer retaliation against employees for engaging in union activity, none has generated more high-profile recent legal controversy than the use of employer-instigated workplace immigration raids to arrest undocumented workers. As noted above, under the Immigration Reform and Control Act of 1986 it is illegal for employers to *knowingly* hire undocumented immigrant workers. An unscrupulous employer can, however, turn a blind eye to the immigration status of workers until the workers assert their labor rights, at which point the employer can trigger a raid of its own worksite and the arrest of its employees, but assert that it did not know its workers were unauthorized. Employer sanctions for violation of IRCA are relatively rare, but worksite raids, which typically entail mass arrest of workers followed by criminal prosecution and/or rapid removal from the United States, are not. Stephen Lee, *Private Immigration Screening in the Workplace*, 61 *Stan. L. Rev.* 1103 (2009). How should the immigration law prohibitions on unauthorized work be reconciled with the labor law rights of all workers? How, if at all, should immigration authorities prevent the strategic use of immigration enforcement to quell worker organizing and facilitate exploitative working conditions?

***Add to note 2 on p. 838:***

Although the district court denied the union's motion to dismiss the RICO suit in the *Smithfield* case and the case ultimately settled, *Smithfield Foods, Inc. v. Commercial Workers Int'l*, 593 F. Supp. 2d 840 (E.D. Va. 2008), two other courts have held that RICO may not be used to challenge corporate campaigns because the labor activists' conduct is not a predicate act (such as extortion). See, e.g., *Cintas Corp. v. Unite Here*, 601 F. Supp. 2d 571 (S.D.N.Y.), *aff'd*, 355 F. App'x 508 (2d Cir. 2009); *Wackenhut Corp. v. SEIU*, 593 F. Supp. 2d 1289 (S.D. Fla. 2009).

On the history and contemporary uses of RICO against labor unions, see James J. Brudney, *Collateral Conflict: Employer Claims of RICO Extortion Against Union Comprehensive Campaigns*, 83 *S. CAL. L. REV.* 731 (2010).

## **1. New Forms of Labor Organizations**

### **A. Worker Centers**

***Add a new note 4 on p. 845:***

1. *How should worker centers and unions work together?* Some have suggested that the first step for successful labor organizing among low-wage and immigrant workers is developing a worker center. Chesa Boudin & Rebecca Scholtz, *Strategic Options for Development of a Worker Center*, 13 *HARV. LATINO L. REV.* 91, 104 (2010). Although worker centers often serve as precursors, they also offer unique advantages over traditional unions. As most worker centers are not subject to the NLRA, they afford the freedom to engage in creative organizing strategies. Additionally, worker centers allow their members to tailor the organization to meet their goals and foster a sense of community. Finally, they promote democratic governance and provide leadership training. *Id.* at 104-105. As traditional unions and worker centers are not mutually exclusive, a group of workers can enlist the assistance of both to reach its goals. Worker groups

are likelier to attract union assistance when they have built a strong organizing committee and assembled a basic campaign plan. *Id.* at 125. For a practical guide to coalition-building strategies between traditional unions and community organizations, see Lisa Ranghelli, *Joining Forces: Community Organizations and Labor Unions Form New Collaborations*, THE HYAMS FOUNDATION, INC. (2005), <http://www.hyamsfoundation.org/documents/Joining%20Forces.pdf>.

Over the last 20 years, so-called “community unions” (modest-sized, community-based organizations of low-wage workers that focus on work/wage issues through service, advocacy, and organizing) have mostly succeeded in raising wages and improving conditions via public policy, not direct intervention in labor markets. Janice Fine, *Community Unions and the Revival of the American Labor Movement*, 33.1 POLITICS & SOCIETY 153, 153 (2005), <http://www.publicpolicy.umb.edu/~pubpol/documents/Fine.pdf>. This is because low-wage workers have greater political than economic power. *Id.*

***Add a new note 5 on p. 845:***

1. *What are the antitrust implications of enlisting the assistance of a community organization in a labor dispute?* Occasionally, employers may counter creative coalitions between labor and other community groups under federal antitrust law. Paul Salvatore & Brian Rauch Proskauer Rose LLP, *Taking A Page From The Unions’ Playbook: Employers Litigating Against Union Corporate Campaigns*, 15.4 METROPOLITAN CORPORATE COUNSEL 49 (2007). Although labor groups are generally exempt from antitrust regulations, they may lose their exemptions by exceeding the scope of unions’ traditional roles and activities, most notably by colluding with non-labor organizations or engaging in secondary boycotts not subject to NLRA protection during corporate campaigns. Under federal antitrust law, courts may subject a union that conspires with religious/community organizations to the same scrutiny as a union that conspires with other non-labor groups.

***Add a new note 3 on p. 848:***

3. The victory secured by Comité de Jornaleros in the trial court was eventually upheld by the Ninth Circuit *en banc*, which held that the Redondo Beach ordinance prohibiting solicitation was not narrowly tailored to serve the city’s articulated interest in facilitating traffic flow. *Comité de Jornaleros v. City of Redondo Beach*, 657 F.3d 936 (9th Cir. 2011) (*en banc*).

## **5. Unions and the Regulation of Political Activity**

***Before the last paragraph of the Note on Laws Regulating Elections and Political Spending on p. 852, add the following paragraph:***

In *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010), the Supreme Court overruled *McConnell* in part and held that certain provisions of the McCain-Feingold Act violate the First Amendment. The Court struck down the restrictions on independent expenditures by corporations and unions, but upheld the disclosure requirements. As a result, corporations are now free to make unlimited political expenditures from their general treasuries for candidates and issues. Unions are too, although federal labor law restricts unions’ expenditures of money for purposes not germane to collective bargaining (see *infra*, Part D.2)

and no similar legal restrictions exist for corporations. Scholars have argued that corporate shareholders ought to have the same rights to opt out of financially supporting corporate political spending that employees represented by a union have to opt out of union political spending. See Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After Citizens United*, 112 COLUM. L. REV. 800 (2012) (surveying the law regulating union and corporate political spending under campaign finance law and the law regulating employee opt-out rights under federal labor law, and suggesting that laws requiring public sector employees to contribute to pension plans that invest in corporate securities may be unconstitutional because of the first amendment rights of corporations to spend on politics without allowing shareholders to opt out); Victor Brudney, *Business Corporations and Stockholders' Rights Under the First Amendment*, 91 YALE L. J. 235 (1981) (surveying the law and arguing that for publicly held business corporations not engaged in the communications business, the First Amendment does not preclude laws requiring stockholder consent for some or all noncommercial speech).

The Supreme Court has signaled a re-orientation of the law governing rights of employees to opt out of union political spending in *Knox v. Service Employees International Union Local 1000*, \_\_\_ S. Ct. \_\_\_ (June 25, 2012), excerpted in Part D.2. *infra*.

## **D. Regulation of Internal Union Governance and Finances Under the NLRA**

### **1. Union Security and Union Dues**

#### **B. Contemporary Issues**

***Add the following paragraph at the end of the paragraph that appears at the bottom of p. 872:***

As you will see, the heart of the dispute in *Davenport v. Washington Education Association* is whether the default rule should be that unions can charge employees they represent for all the union activities, thus forcing dissenting employees to opt out of supporting the union's expenditures that are not germane to collective bargaining (as is the current law), or whether the default rule should be that unions can gather money from employees to support the full range of union activity, including organizing, political expenditures, and contract bargaining and administration only if employees opt in. Most of the recent legal challenges – both in litigation and through legislation like that at issue in *Davenport* – have focused on moving the law to require that employees opt in rather than allowing unions and employers to negotiate a contract that requires employees to opt out. The Supreme Court's most recent case on this issue, *Knox v. Service Employees International Union Local 1000*, \_\_\_ S. Ct. \_\_\_ (June 25, 2012) (excerpted below), suggests that a majority of the Court may be poised to require opt in (at least for public sector employees) as a matter of federal constitutional requirement rather than, as in *Davenport*, as a matter of legislative enactment.

***Add the following at the end of note 3 on p. 882:***

In assessing the impact of union security and dues collection on union strength, consider the example of public sector unions in Nebraska. Under Nebraska law, “[a]ny employee may

choose his or her own representative in any grievance or legal action regardless of whether or not an exclusive collective-bargaining agent has been certified. If an employee who is not a member of the labor organization chooses to have legal representation from the labor organization in any grievance or legal action, such employee shall reimburse the labor organization for his or her pro rata share of the actual legal fees and court costs incurred by the labor organization in representing the employee in such grievance or legal action.” Neb. Rev. Stat. 48-838. One would expect this provision would weaken unions, but it appears to have had the opposite effect at least among teachers’ unions. According to one observer, all public school districts in Nebraska are unionized and every teacher in a dues-paying member, even though Nebraska is a right-to-work state.

## 2. Union Security Under Federal Labor Laws

*Add the following on p. 886 after the Notes:*

The Supreme Court’s most recent pronouncement on the rights of employees to refuse to support union expenditures with which they disagree is the following. Although the issue in the case was a narrow and technical question whether the union was obligated to send a separate *Hudson* notice when it levied a special assessment during the middle of a year as to which it had already sent a notice and allowed employees to opt out, the dictum in the case raises the possibility that the Court may be poised to require opt in as a matter of First Amendment law, rather than the opt out regime that has existed since Taft-Hartley.

### **KNOX v. SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 1000**

\_\_ S. Ct. \_\_ (2012)

Justice ALITO delivered the opinion of the Court.

I  
A

Under California law, public-sector employees in a bargaining unit may decide by majority vote to create an “agency shop” arrangement under which all the employees are represented by a union selected by the majority. Cal. Govt.Code Ann. § 3502.5(a) (West 2010). While employees in the unit are not required to join the union, they must nevertheless pay the union an annual fee to cover the cost of union services related to collective bargaining (so-called chargeable expenses).

Our prior cases have recognized that such arrangements represent an “impingement” on the First Amendment rights of nonmembers. *Teachers v. Hudson*; *Davenport v. Washington Ed. Assn.* Thus, in *Abood v. Detroit Bd. of Ed.*, we held that a public-sector union, while permitted to bill nonmembers for chargeable expenses, may not require nonmembers to fund its political and ideological projects. And in *Hudson*, we identified procedural requirements that a union must meet in order to collect fees from nonmembers without violating their rights. The First Amendment, we held, does not permit a public-sector union to adopt procedures that have the

effect of requiring objecting nonmembers to lend the union money to be used for political, ideological, and other purposes not germane to collective bargaining. In the interest of administrative convenience, however, we concluded that a union “cannot be faulted” for calculating the fee that nonmembers must pay on the basis of its expenses during the preceding year.

*Hudson* concerned a union's regular annual fees. The present case, by contrast, concerns the First Amendment requirements applicable to a special assessment or dues increase that is levied to meet expenses that were not disclosed when the amount of the regular assessment was set.

## B

In June 2005, respondent, the Service Employees International Union, Local 1000 (SEIU), sent out its regular *Hudson* notice informing employees what the agency fee would be for the year ahead. The notice set monthly dues at 1% of an employee's gross monthly salary but capped monthly dues at \$45. Based on the most recently audited year, the SEIU estimated that 56.35% of its total expenditures in the coming year would be dedicated to chargeable collective-bargaining activities. Thus, if a nonunion employee objected within 30 days to payment of the full amount of union dues, the objecting employee was required to pay only 56.35% of total dues. The SEIU's notice also included a feature that was not present in *Hudson*: The notice stated that the agency fee was subject to increase at any time without further notice.

During this time, the citizens of the State of California were engaged in a wide-ranging political debate regarding state budget deficits, and in particular the budget consequences of growing compensation for public employees backed by powerful public-sector unions. On June 13, 2005, Governor Arnold Schwarzenegger called for a special election to be held in November 2005, where voters would consider various ballot propositions aimed at state-level structural reforms. Two of the most controversial issues on the ballot were Propositions 75 and 76. Proposition 75 would have required unions to obtain employees' affirmative consent before charging them fees to be used for political purposes. Proposition 76 would have limited state spending and would have given the Governor the ability under some circumstances to reduce state appropriations for public-employee compensation. The SEIU joined a coalition of public-sector unions in vigorously opposing these measures. Calling itself the “Alliance for a Better California,” the group would eventually raise more than \$10 million, with almost all of it coming from public employee unions, including \$2.75 million from state worker unions, \$4.7 million from the California Teachers Association, and \$700,000 from school workers unions.

On July 30, shortly after the end of the 30-day objection period for the June *Hudson* notice, the SEIU proposed a temporary 25% increase in employee fees, which it billed as an “Emergency Temporary Assessment to Build a Political Fight-Back Fund.” The proposal stated that the money was needed to achieve the union's political objectives, both in the special November 2005 election and in the November 2006 election. According to the proposal, money in the Fight-Back Fund would be used “for a broad range of political expenses, including television and radio advertising, direct mail, voter registration, voter education, and get out the vote activities in our work sites and in our communities across California.” The proposal

specifically stated that “[t]he Fund will not be used for regular costs of the union—such as office rent, staff salaries or routine equipment replacement, etc.” And it concluded: “Each of us must do our part to turn back these initiatives which would allow the Governor to destroy our wages and benefits and even our jobs, and threaten the well-being of all Californians.”

Petitioners filed this class-action suit on behalf of 28,000 nonunion employees who were forced to contribute money to the Political Fight–Back Fund.

### III

#### A

The First Amendment creates an open marketplace in which differing ideas about political, economic, and social issues can compete freely for public acceptance without improper government interference. The government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves. Closely related to compelled speech and compelled association is compelled funding of the speech of other private speakers or groups.

#### B

When a State establishes an “agency shop” that exacts compulsory union fees as a condition of public employment, the dissenting employee is forced to support financially an organization with whose principles and demands he may disagree. Because a public-sector union takes many positions during collective bargaining that have powerful political and civic consequences, the compulsory fees constitute a form of compelled speech and association that imposes a significant impingement on First Amendment rights. Our cases to date have tolerated this impingement, and we do not revisit today whether the Court's former cases have given adequate recognition to the critical First Amendment rights at stake.

The primary purpose of permitting unions to collect fees from nonmembers, we have said, is to prevent nonmembers from free-riding on the union's efforts, sharing the employment benefits obtained by the union's collective bargaining without sharing the costs incurred. Such free-rider arguments, however, are generally insufficient to overcome First Amendment objections. Consider the following examples:

If a community association engages in a clean-up campaign or opposes encroachments by industrial development, no one suggests that all residents or property owners who benefit be required to contribute. If a parent-teacher association raises money for the school library, assessments are not levied on all parents. If an association of university professors has as a major function bringing pressure on universities to observe standards of tenure and academic freedom, most professors would consider it an outrage to be required to join. If a medical association lobbies against regulation of fees, not all doctors who share in the benefits share in the costs.

Acceptance of the free-rider argument as a justification for compelling nonmembers to pay a portion of union dues represents something of an anomaly—one that we have found to be justified by the interest in furthering labor peace. But it is an anomaly nevertheless.

Similarly, requiring objecting nonmembers to opt out of paying the nonchargeable portion of union dues—as opposed to exempting them from making such payments unless they opt in—represents a remarkable boon for unions. Once it is recognized, as our cases have, that a nonmember cannot be forced to fund a union's political or ideological activities, what is the justification for putting the burden on the nonmember to opt out of making such a payment? Shouldn't the default rule comport with the probable preferences of most nonmembers? And isn't it likely that most employees who choose not to join the union that represents their bargaining unit prefer not to pay the full amount of union dues? An opt-out system creates a risk that the fees paid by nonmembers will be used to further political and ideological ends with which they do not agree. But a union should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining.

Although the difference between opt-out and opt-in schemes is important, our prior cases have given surprisingly little attention to this distinction. Indeed, acceptance of the opt-out approach appears to have come about more as a historical accident than through the careful application of First Amendment principles.

[The opinion then summarizes the Supreme Court's cases on the rights of dissenting employees to opt out of union political expenditures.]

#### IV

By authorizing a union to collect fees from nonmembers and permitting the use of an opt-out system for the collection of fees levied to cover nonchargeable expenses, our prior decisions approach, if they do not cross, the limit of what the First Amendment can tolerate. The SEIU, however, asks us to go farther. It asks us to approve a procedure under which (a) a special assessment billed for use in electoral campaigns was assessed without providing a new opportunity for nonmembers to decide whether they wished to contribute to this effort and (b) nonmembers who previously opted out were nevertheless required to pay more than half of the special assessment even though the union had said that the purpose of the fund was to mount a political campaign and that it would not be used for ordinary union expenses. This aggressive use of power by the SEIU to collect fees from nonmembers is indefensible.

The SEIU argues that we should not be troubled by its failure to provide a new notice because nonmembers who objected to the special assessment but were nonetheless required to pay it would have been given the chance to recover the funds in question by opting out when the next annual notice was sent. If the special assessment was used entirely or in part for nonchargeable purposes, they suggest, the percentage of the union's annual expenditures for chargeable purposes would decrease, and therefore the amount of the dues payable by objecting nonmembers the following year would also decrease. This decrease, however, would not fully recompense nonmembers who did not opt out after receiving the regular notice but would have opted out if they had been permitted to do so when the special assessment was announced. And in any event, even a full refund would not undo the violation of First Amendment rights. As we have recognized, the First Amendment does not permit a union to extract a loan from unwilling

nonmembers even if the money is later paid back in full. Here, for nonmembers who disagreed with the SEIU's electoral objectives, a refund provided after the union's objectives had already been achieved would be cold comfort.

The SEIU's treatment of nonmembers who opted out when the initial *Hudson* notice was sent ran afoul of the First Amendment. The SEIU required these employees to pay 56.35% of the special assessment, just as they had been required to pay 56.35% of the regular annual dues. But the union proclaimed that the special assessment would be used to support an electoral campaign and would not be used for ordinary union expenses. Accordingly, there is no reason to suppose that 56.35% of the new assessment was used for properly chargeable expenses. On the contrary, if the union is to be taken at its word, virtually all of the money was slated for nonchargeable uses.

The procedure accepted in *Hudson* is designed for use when a union sends out its regular annual dues notices. The procedure is predicated on the assumption that a union's allocation of funds for chargeable and nonchargeable purposes is not likely to vary greatly from one year to the next. No such assumption is reasonable, however, when a union levies a special assessment or raises dues as a result of events that were not anticipated or disclosed at the time when a yearly *Hudson* notice was sent. Accordingly, use of figures based on an audit of the union's operations during an entire previous year makes no sense.

Nor would it be feasible to devise a new breakdown of chargeable and nonchargeable expenses for the special assessment. Determining that breakdown is problematic enough when it is done on a regular annual basis because auditors typically do not make a legal determination as to whether particular expenditures are chargeable. Instead, the auditors take the union's characterization for granted and perform the simple accounting function of ensuring that the expenditures which the union claims it made for certain expenses were actually made for those expenses. Thus, if a union takes a very broad view of what is chargeable—if, for example, it believes that supporting sympathetic political candidates is chargeable and bases its classification on that view—the auditors will classify these political expenditures as chargeable. Objecting employees may then contest the union's chargeability determinations, but the onus is on the employees to come up with the resources to mount the legal challenge in a timely fashion. This is already a significant burden for employees to bear simply to avoid having their money taken to subsidize speech with which they disagree, and the burden would become insupportable if unions could impose a new assessment at any time, with a new chargeability determination to be challenged.

The SEIU argues that objecting nonmembers who were required to pay 56.35% of the special assessment, far from subsidizing the union's political campaign, actually received a windfall. According to the union's statistics, the actual percentage of regular dues and fees spent for chargeable purposes in 2005 turned out to be quite a bit higher (66.26%), and therefore, even if all of the money obtained through the special assessment is classified as nonchargeable, the union's total expenditures for 2005 were at least 66.26% chargeable. This argument is unpersuasive for several reasons.

First, the SEIU's understanding of the breadth of chargeable expenses is so expansive that

it is hard to place much reliance on its statistics. In its brief, the SEIU argues broadly that all funds spent on lobbying the electorate are chargeable. But lobbying the electorate is nothing but another term for supporting political causes and candidates, and we have never held that the First Amendment permits a union to compel nonmembers to support such political activities.

The sweep of the SEIU's argument is highlighted by its discussion of the use of fees paid by objecting nonmembers to defeat Proposition 76. According to the SEIU, these expenditures were germane to the implementation of its contracts because, if Proposition 76 had passed, it would have effectively permitted the Governor to abrogate the Union's collective bargaining agreements under certain circumstances, undermining the Union's ability to perform its representation duty of negotiating effective collective bargaining agreements.

If we were to accept this broad definition of germaneness, it would effectively eviscerate the limitation on the use of compulsory fees to support unions' controversial political activities. Public-employee salaries, pensions, and other benefits constitute a substantial percentage of the budgets of many States and their subdivisions. As a result, a broad array of ballot questions and campaigns for public office may be said to have an effect on present and future contracts between public-sector workers and their employers. If the concept of germaneness were as broad as the SEIU advocates, public-sector employees who do not endorse the unions' goals would be essentially unprotected against being compelled to subsidize political and ideological activities to which they object.

Second, even if the SEIU's statistics are accurate, it does not follow that it was proper for the union to charge objecting nonmembers 56.35%—or any other particular percentage—of the special assessment. Unless it is possible to determine in advance with some degree of accuracy the percentage of union funds that will be used during an upcoming year for chargeable purposes—and the SEIU argues that this is not possible—there is at least a risk that, at the end of the year, unconsenting nonmembers will have paid either too much or too little. Which side should bear this risk?

The answer is obvious: the side whose constitutional rights are not at stake. Given the existence of acceptable alternatives, a union cannot be allowed to commit dissenters' funds to improper uses even temporarily. Thus, if unconsenting nonmembers pay too much, their First Amendment rights are infringed. On the other hand, if unconsenting nonmembers pay less than their proportionate share, no constitutional right of the union is violated because the union has no constitutional right to receive any payment from these employees. See *Davenport*. The union has simply lost for a few months the “extraordinary” benefit of being empowered to compel nonmembers to pay for services that they may not want and in any event have not agreed to fund.

As we have noted, by allowing unions to collect any fees from nonmembers and by permitting unions to use opt-out rather than opt-in schemes when annual dues are billed, our cases have substantially impinged upon the First Amendment rights of nonmembers. In the new situation presented here, we see no justification for any further impingement. The general rule—individuals should not be compelled to subsidize private groups or private speech—should prevail.

Public-sector unions have the right under the First Amendment to express their views on political and social issues without government interference. See, e.g., *Citizens United v. Federal Election Comm'n*. But employees who choose not to join a union have the same rights. The First Amendment creates a forum in which all may seek, without hindrance or aid from the State, to move public opinion and achieve their political goals. First Amendment values would be at serious risk if the government could compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that the government favors. Therefore, when a public-sector union imposes a special assessment or dues increase, the union must provide a fresh *Hudson* notice and may not exact any funds from nonmembers without their affirmative consent.

Justice SOTOMAYOR, with whom Justice GINSBURG joins, concurring in the judgment.

When a public-sector union imposes a special assessment intended to fund solely political lobbying efforts, the First Amendment requires that the union provide nonmembers an opportunity to opt out of the contribution of funds. I therefore concur in the Court's judgment.

I concur only in the judgment, however, because I cannot agree with the majority's decision to address unnecessarily significant constitutional issues well outside the scope of the questions presented and briefing. By doing so, the majority breaks our own rules and, more importantly, disregards principles of judicial restraint that define the Court's proper role in our system of separated powers.

Petitioners did not question the validity of our precedents, which consistently have recognized that an opt-out system of fee collection comports with the Constitution. They did not argue that the Constitution requires an opt-in system of fee collection in the context of special assessments or dues increases or, indeed, in any context. Not surprisingly, respondents did not address such a prospect.

The majority thus decides, for the very first time, that the First Amendment *does* require an opt-in system in some circumstances: the levying of a special assessment or dues increase. The majority announces its novel rule without any analysis of potential countervailing arguments and without any reflection on the reliance interests our old rules have engendered.

The majority's choice to reach an issue not presented by the parties, briefed, or argued, disregards our rules. And it ignores a fundamental premise of our adversarial system: “ ‘that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.’ ” *NASA v. Nelson*, 562 U.S. —, —, n. 10, (2011) (opinion for the Court by ALITO, J.) (quoting *Carducci v. Regan*, 714 F.2d 171, 177 (C.A.D.C.1983) (opinion for the court by SCALIA, J.)); see also *Jefferson v. Upton*, 560 U.S. —, — (SCALIA, J., joined by THOMAS, J., dissenting) (slip op., at 8) (The majority's “refusal to abide by standard rules of appellate practice is unfair to the ... Circuit,” which did not pass on this question, “and especially to the respondent here, who suffers a loss in this Court without *ever* having an opportunity to address the merits of the ... question the Court decides”).

To make matters worse, the majority's answer to its unasked constitutional question is not even clear. After today, must a union undertaking a special assessment or dues increase obtain affirmative consent to collect “*any funds*” or solely to collect funds for *nonchargeable* expenses? May a nonmember opt not to contribute to a special assessment, even if the assessment is levied to fund uncontestably chargeable activities? Does the majority's new rule allow for any distinction between nonmembers who had earlier objected to the payment of nonchargeable expenses and those who had not? What procedures govern this new world of fee collection?

Justice BREYER, with whom Justice KAGAN joins, dissenting.

In *Teachers v. Hudson*, this Court unanimously held that “the Union cannot be faulted for calculating its fee on the basis of its expenses during the preceding year.” That is precisely what the union has done in this case. I see no reason to modify *Hudson*'s holding as here applied. I consequently dissent.

For the last 25 years unions and employers across the Nation have relied upon this Court's statements in *Hudson* in developing administratively workable systems that (1) allow unions to pay the costs of fulfilling their representational obligations to both members and nonmembers alike, while (2) simultaneously protecting the nonmembers' constitutional right not to support ideological causes not germane to the union's duties as collective-bargaining agent.

The union here followed a basic administrative system that ensures that the fee charged to objecting nonmembers matches their pro rata share of the union's chargeable expenditures, but it achieves that match only over a period of several years. At the end of 2004, independent auditors determined the amount of chargeable (*e.g.*, collective-bargaining related) expenditures and the amount of nonchargeable (*e.g.*, non-germane political) expenditures that the union actually made during 2004. The union then used the resulting proportion (which was about 56% chargeable, 44% nonchargeable) as the basis for apportioning the next year's dues. Thus in June 2005, the union sent all represented employees a *Hudson* notice setting forth that (roughly) 56 to 44 figure. It provided time for nonmembers to object or to challenge the figure or underlying data. And it then applied the resulting figure to determine the percentage of the total fee that objecting nonmembers would have to pay during the next fee-year, which ran from July 2005 to June 2006. At the end of 2005, auditors again examined the union's actual expenditures made during 2005. And the union then used those newly audited figures to determine the chargeable percentage for the fee-year 2006–2007. Since political expenditures during calendar year 2005 turned out to be lower than in 2004, the new chargeable share amounted to about 69% of the total fee bill.

This system does not put typical objectors to any disadvantage. If, say, in Year One total expenses were \$1 million, collective-bargaining expenses amounted to \$600,000, and political expenses amounted to \$400,000, then the union cannot charge objecting nonmembers more than 60% of normal dues in Year Two. If in Year Two collective-bargaining expenses turned out to be a lesser share of total expenses, say 30%, then the union cannot charge objecting nonmembers more than 30% of the total fee in Year Three. Normally, what the objecting nonmembers lose on the swings they will gain on the roundabouts.

This kind of basic administrative system is imperfect. The nature of a union's expenditures, including nonchargeable political expenditures, varies from year to year, for political needs differ at different stages of political cycles. Thus, last year's percentages will often fail to match this year's expenditures patterns. And the possibility that an objecting nonmember's funds will temporarily help the union pay for a nonchargeable political expenditure (say, in Year Two) is always present—though in this case that did not happen.

Nonetheless this kind of system enjoys an offsetting administrative virtue. It bases fees upon audited accounts, thereby avoiding the difficulties and disagreements that would surround an effort to determine the relevant proportions by trying to measure union expenditures as they occur or by trying to make predictions about the nature of future expenditures. It consequently gives workers reliable information. It gives workers advance notice of next year's payable charge. It gives nonmembers a reasonably prompt opportunity to object. And, where the chargeable share of next year's expenses (Year Two) turns out to be lower than last year's (Year One), it provides offsetting compensation in the form of a lower payable share for the following year (Year Three).

And no party here has challenged the constitutional validity of that basic administrative system.

If the union's basic administrative system does not violate the Constitution, then how could its special assessment have done so?

The special assessment as administered here has worked no constitutional harm upon those nonunion employees who raised a general objection at the beginning of the year. The union has honored their objections by subtracting from their special payments the same 44% that it subtracts from each of their ordinary monthly payments. And we know that the special assessment here did not even work temporary constitutional harm. That is because audited figures showed that the union's total nonchargeable (*e.g.*, political) expenses for that year ended up as a *lower* percentage of total expenses than the previous year. Hence the objecting nonmembers ended up being charged too little, not too much, even with the special assessment thrown into the mix.

In the event, the union's chargeable expenses for 2005—including the funds raised pursuant to the special assessment—amounted to *more* than 56% of its total expenditures. Chargeable expenses amounted to ... 69% of the total budget. Objecting nonmembers ... paid 56% of normal fees, even though the chargeable share that year was 69%. That is to say, they paid less than what the Constitution considers to be their fair share.

In the particular example before us these general problems are camouflaged by the fact that the union itself said that the assessment was to be used for political purposes. Hence it is tempting to say that 100% of the assessment is not chargeable. But future cases are most unlikely to be so clear; disputes will arise over union predictions (say, that only 20% of the special assessment will be used for political purposes); and the Court will then perhaps understand the wisdom of *Hudson'* s holding.

[T]he Court suggests that the Constitution prohibits the union's classification of money spent lobbying the electorate as a chargeable expense. But California state law explicitly permits the union to classify some lobbying expenses as chargeable. See Cal. Govt. Code Ann. § 3515.8 (West 2010) (a nonmember's fair share includes “the costs of support of lobbying activities designed to foster policy goals and collective negotiations and contract administration”); see also *Lillebo v. Davis*, 222 Cal.App.3d 1421, 1442 (1990) (construing § 3515.8 narrowly, but explaining that “[w]e cannot fathom how a union's lobbying the Legislature for improvement of the conditions of employment of the members of its bargaining unit ... could not be considered to be part of its role as representative ...”). No one has attacked the constitutionality of California's law; no brief argues the question; and this Court does not normally find state laws unconstitutional without, at least, giving those who favor the law an opportunity to argue the matter.

A stronger case can be made for allowing nonmember employees *who did not object* at the beginning of the dues year to object (for the first time) to a special assessment. That is because, unlike the nonmember who objected initially, the union will not permit that initially nonobjecting nonmember to withhold anything from the special assessment fee. Nonetheless, there are powerful reasons not to allow the nonmember who did not object initially to the annual fee to object now for the first time to the midyear special assessment.

For one thing, insofar as a new objection permits the new objector to withhold only the portion of the fee that will pay for nonchargeable expenses (as the logic of the concurring Justices would suggest), the administrative problems that I earlier discussed apply. That is to say, unions, arbitrators, and courts will have to determine, on the basis of a prediction, *how much* of the special assessment the new objector can withhold. I concede that many administrative problems could be overcome were the new objector allowed to withhold only the same 44% of the fee that the union here permitted initial objectors to withhold (a figure based on 2004 audited accounts). But no Member of the Court takes that approach.

For another thing, as I have previously pointed out, the Court would permit nonmembers who did not object at the beginning of the year (like those who did then object) to object to (and to pay *none* of) *every* special assessment, including those made to raise money to pay additional *collective-bargaining expenses*. This approach may avoid the uncertainty and resulting disputes inherent in an effort to limit withholding to the nonchargeable portion of the fee. But the price of avoiding those disputes is to reduce the financial contribution the union will receive even when a special assessment pays only for unexpected but perfectly legitimate collective-bargaining expenses.

I recognize that allowing objections only once a year is only one possible way to administer a fee-charging system. In principle, one might allow nonmembers to pose new objections to their dues payments biannually, or quarterly, or even once a month, as actual expenses do, or do not, correspond to initial union predictions. But for constitutional purposes the critical fact is that annual objection is at least one reasonably practical way to permit the principled objector to avoid paying for politics with which he disagrees. And that is so whether ordinary or special assessments are at stake.

The [majority's] decision is particularly unfortunate given the fact that each reason the Court offers in support of its "opt-in" conclusion seems in logic to apply, not just to special assessments, but to ordinary yearly fee charges as well. At least, its opinion can be so read. And that fact virtually guarantees that the opinion will play a central role in an ongoing, intense political debate.

The debate is generally about whether, the extent to which, and the circumstances under which a union that represents nonmembers in collective bargaining can require those nonmembers to help pay for the union's (constitutionally chargeable) collective-bargaining expenses. Twenty-three States have enacted "right to work" laws, which, in effect, prevent unions from requiring nonmembers to pay any of those costs. See Dept. of Labor, Wage and Hour Division, State Right-to-Work Laws (Jan.2009), online at <http://www.dol.gov/whd/state/righttowork.htm> (as visited June 18, 2012, and available in Clerk of Court's case file). Other States have rejected the "right to work" approach and permit unions to require contributions from nonmembers, while protecting those nonmembers' right to opt out of supporting the union's political activities. *E.g.*, Cal. Govt.Code Ann. §§ 3502.5(a), 3515.8. Still others have enacted compromise laws that assume a nonmember does not wish to pay the nonchargeable portion of the fee unless he or she affirmatively indicates a desire to do so. See Wash. Rev.Code § 42.17A.500 (2010) (providing that a union cannot use a nonmember's agency fee for political purposes "unless affirmatively authorized by the individual"). The debate about public unions' collective-bargaining rights is currently intense.

The question of how a nonmember indicates a desire not to pay constitutes an important part of this debate. Must the union assume that the nonmember does not intend to pay unless he affirmatively indicates his desire to pay, by "opting in"? Or, may the union assume that the nonmember is willing to pay unless the nonmember indicates a desire not to pay, by "opting out"? Where, as here, nonchargeable political expenses are at issue, there may be a significant number of represented nonmembers who do not feel strongly enough about the union's politics to indicate a choice either way. That being so, an "opt-in" requirement can reduce union revenues significantly, a matter of considerable importance to the union, while the additional protection it provides primarily helps only those who are politically near neutral. See generally Sunstein & Thaler, Libertarian Paternalism is not an Oxymoron, 70 U. Chi. L.Rev. 1159, 1161 (2003) (explaining that default rules play an important role when individuals do not have "well-defined preferences"). Consequently, the Court, which held recently that the Constitution *permits* a State to impose an opt-in requirement, see *Davenport*, 551 U.S., at 185, has never said that it *mandates* such a requirement. There is no good reason for the Court suddenly to enter the debate, much less now to decide that the Constitution resolves it.

#### NOTES

1. *Knox* requires public sector unions to obtain permission from employees *before* making a special assessment to fund political activities. Would the same rule apply if the special assessment were designated as necessary for contract negotiation and administration, rather than political activity?

2. If opt-in is constitutionally mandated for any special assessment, regardless of the purpose to which the funds will be put, what is the constitutional basis for distinguishing between special assessments (opt in required) and annual dues and fees (opt out permitted)?

3. If the next step post-*Knox* is to mandate opt in for all public sector union dues and fees, consider the arguments whether the same First Amendment concept of compelled speech can be applied to private sector union fundraising.

4. Note the difference in the way that the majority and Justice Breyer's dissent characterize whether political spending by public sector unions may be germane to collective bargaining. If a teachers' or public safety officers' union has negotiated a collective bargaining agreement with the representatives of the government entity and, under the terms of the public sector labor law, the agreement must be approved by the legislature, is lobbying the legislature to seek approval of the agreement germane (and therefore chargeable to dissenting employees)? Can the majority opinion be read to support either the conclusion that it is chargeable or that it is not? If, as happened in Wisconsin in 2011, legislation is introduced to entirely eliminate collective bargaining rights for public sector employees, what light does *Knox* shed on whether a union may spend dues to defeat the legislation?

5. If corporations have a First Amendment right under *Citizens United* to raise and spend money on politics without consent of shareholders (or employees or other corporate stakeholders), what is the continuing viability of the earlier *Davenport* holding that unions have no similar First Amendment right to raise and spend money on politics? If corporations are entities with First Amendment speech rights, regardless of the contrary views of their shareholders or employees, why do unions not have the same right as entities?

6. Many public employees have pension plans in which, as a condition of employment, the state takes a portion of their wages and either directly invests it, or requires it to be invested, in shares of stock in publicly traded corporations. Under *Citizen's United* this money is now available for corporate political activity including the direct support of particular candidates some public employees might not support. Currently there are no reporting requirements so that the employees can know to what political ends their retirement savings might be used and no opt out procedure so they can avoid such use. Isn't this forced association in violation of the First Amendment? Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights after Citizens United*, 112 COLUM. L. REV. 800 (2012). Should we require corporations to account for political spending in much the same way we require unions to account for such spending? Could we give dissenting share-holders the right to opt out of political expenditures, and receive an annual dividend equal to the percent the firm corporations spend on politics, in much the same way we allow dissenting employees to opt out of union political spending? Would mutual funds comprised of shares that opt-out of political spending be an attractive retirement investment?

***Add a new note 6 on p. 892:***

6. What light does the majority opinion in *Knox* shed on the Scalia footnote in *Davenport*?

***Add a new note 4 on p. 902 (and thus the existing note 4 will become note 5):***

4. *Doing Non-Union Work.* Issues about union discipline of members arise not in the context of strikes, as in *Allis-Chalmers*, *Pattern Makers*, and the Hollywood guilds, but also in the construction industry and other short-term employment when union members may be tempted to work non-union. Construction unions authorize fines of members who work for non-union contractors in areas in which union contractors compete. The LMRDA requires unions to create internal grievance procedures to challenge discipline. A member who is disciplined must exhaust his union's internal procedures before bringing suit. Failure to exhaust internal remedies precludes a suit unless the dissatisfied member proves that the union's procedures fail to comply with LMRDA § 411(a)(5), which requires notice of charges, time to prepare a defense, and opportunity to receive a hearing. *McPhetridge v. IBEW, Local Union No. 53*, 578 F.3d 886, 889 (8th Cir. 2009). This may involve a showing that the hearing falls short of "full and fair," that the trier of fact is hostile, or that the appeal is futile. *Id.* at 890 (declining to grant an injunction against disciplining union members for working for non-union contractors).

## E. Union Governance and Elections Under the LMRDA

*Add a new section on p. 905 before the Notes*

**Union Mergers and Reorganizations.** In recent years, a number of large and small unions have proposed or effected mergers or reorganizations in order to gain the strength of numbers, the ability to negotiate large national or regional contracts with large national and regional employers, and to minimize jurisdictional disputes among unions representing employees in the same economic sector, craft or industry in the same geographic area. For example, the SEIU (a large union which represents clerical, health care, service, and building maintenance workers) was created through a process the gradual merger of smaller separate unions in the service, clerical, health care, and building maintenance industries. It has periodically reorganized its local affiliates in ways that created large local unions representing employees in the same industry across a region or state in place of smaller, geographically specific local unions. See UHW-W Urges Members to Boycott SEIU Advisory Vote on Reorganization, Daily Lab. Report A-11 (Nov. 26, 2008); SEIU Plans to Hold Advisory Vote Among California Health Care Workers A-8 (Sept. 15, 2008). UNITE (the union representing workers in the garment industry and needle trades) merged with HERE (the hotel and restaurant employees' union) because both represent low-wage, immigrant workers in urban areas. In some cases, the mergers are controversial and litigation ensues. Jurisdictional Disputes Dominate Opening Sessions of UNITE HERE Convention B-1 (July 1, 2009). The LMRDA stipulates the processes unions must use to approve a merger and to restructure their operations.

In reviewing a matter of governance under LMRDA § 411, including a merger, the election of union leadership, reorganizations, and changes to the union constitution and by-laws, courts often defer to unions. This is because, "[w]hile the rights guaranteed under Section 411 are designed to ensure that unions adhere to certain basic democratic principles, courts are instructed not to read the broad language of Section 411(a) as a mandate for courts to impose on labor unions whatever procedures or practices they regard as democratic. ... Federal courts have applied a long-standing policy of avoiding judicial interference in a union's self-governance and internal affairs." *Shelley v. Am. Postal Workers Union*, 2011 U.S. Dist. LEXIS 38376 (D.D.C. Apr. 8, 2011) (declining to grant a preliminary injunction delaying a CBA ratification vote in order to allow the objectors to communicate their concerns to fellow union members).

A court may agree to enjoin a union from removing *elected* officials. In *Babler v. Futhey*, the court enjoined the retaliatory removal of officers who opposed union policies and exercised LMRDA rights. 618 F.3d 514, 525 (6th Cir. 2010). Because the removal might chill free speech and discourage LMRDA enforcement, the public interest weighed in favor of protecting officers' rights over noninterference with internal union management. *Id.* However, a court is unlikely to enjoin a union from removing *appointed* officials. In *Vasquez v. Central States Joint Bd.*, the court declined to enjoin the alleged removal of officers for opposing union corruption. 692 F. Supp. 2d 968, 976 (N.D. Ill. 2010). "To the extent the [LMRDA] limits action taken as part of a purposeful and deliberate attempt ... to suppress dissent within the union, it doesn't do that at the expense of the freedom of an elected union leader to choose a staff whose views are compatible with his own." *Id.*

#### 4. Union Disclosure

*Add the following paragraph on p. 909 just before section 5:*

In 2011, the U.S. Department of Labor proposed a rule defining the required disclosure obligation under section 203. The proposed rule would require disclosure of any agreement to retain a consultant to engage in any actions, conduct or communications on behalf of an employer that would directly or indirectly persuade workers concerning their rights to organize and bargain collectively, regardless of whether or not the consultant has direct contact with workers. The proposed rule would also require disclosure of any agreement under which a consultant plans or orchestrates a campaign or program to avoid or counter a union organizing or collective bargaining effort. In essence, the proposed rule would narrow an exception to the disclosure requirement under which lawyers and labor relations consultants hired to "advise" an employer in conducting a union avoidance campaign are exempt from the disclosure requirement unless the lawyer or consultant itself communicates directly with the employees orally or in writing. According to the DoL the new rule is necessary because the current interpretation of section 203 "has resulted in significant underreporting of employer and consultant persuader agreements. Better disclosure is critical to helping workers make informed decisions about their right to organize and bargain collectively." "News Release: US Labor Department announces proposed rule concerning reporting on use of labor relations consultants," available at <http://www.dol.gov/opa/media/press/olms/olms20110924.htm> (visited July 9, 2012). The DoL notes that the rule does not require disclosure of the substantive information provided by the consultant, only the fact that the consultant was hired, the purpose of the hiring agreement, and the fees paid pursuant to the agreement.

According to the AFL-CIO, the underreporting of the use of union avoidance consultants in organizing campaigns is possible under current law because the employers claim that the consultants (often lawyers) are providing legal or labor relations advice to the company rather than being hired to persuade the employees. In organized labor's view, the so-called "advice" exception has effectively swallowed the disclosure rule. Employees should have a right know (through DoL disclosure requirements) whether the employer has hired any entity to advise it in a union avoidance campaign, regardless of whether the consultant communicates directly to the

employees or simply creates a campaign that is executed by the employer's supervisory employees. According to the AFL-CIO, the union avoidance consultants are hired to persuade employees: they often script supervisors' conversations with employees and train supervisors how to elicit (and shape) employees' attitudes toward unions by asking carefully framed questions and reading employees' verbal and non-verbal reactions. "The provision of such materials constitutes an activity aimed at influencing employees rather than labor relations advice for the employer," the [AFL-CIO said in a news report], but 'the consultants creating such anti-union materials' do not have to submit reports under the current interpretation of the advice exemption if the employer's supervisors distribute the consultants' materials. ... 'Any pretense that the consultants are instructing the supervisors on how to comply with the law is conclusively refuted by the empirical evidence showing a strong correlation between the hiring of a consultant and unlawful behavior by the supervisors.'" Gayle Cinquegrani, "Persuader Proposal Would Give Unions An Advantage in Organizing, Employers Say," *Bloomberg/BNA Human Resources Report* (Nov. 11, 2011), available at <http://www.bna.com/persuader-proposal-give-n12884904356> (visited July 9, 2012).

Management, not surprisingly, strenuously opposed the new rule, insisting that it would dissuade companies from obtaining legitimate labor relations advice. *Id.* In addition, the ABA asserted in its comment on the proposed rule that the rule would require lawyers and their clients to disclose confidential information in violation of Rule 1.6 of the Model Rules of Professional Conduct, including "the identity of the client as well as other information related to the legal representation, including, for example, the nature of the representation and the amount of legal fees paid by the client to the lawyer." [http://www.americanbar.org/content/dam/aba/uncategorized/2011/2011sep21\\_dolpersuaderrule.c.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/2011/2011sep21_dolpersuaderrule.c.authcheckdam.pdf) (visited July 9, 2012).

#### NOTES

1. What is the purpose of the Section 431 required disclosure, which compels unions to file with DoL copies of the union constitution, bylaws and annual financial reports?

2. What is the purpose of the Section 203 required disclosure of "persuader" agreements? Does the current rule, which exempts any agreement in which the lawyer or consultant is hired only to advise and requires disclosure only when the consultant is itself directly communicating with the employees, adequately serve the statutory purpose?

3. When the "persuader" is a lawyer or law firm, should the facts that the law firm has been retained and the amount of fees paid be deemed confidential? What about the subject matter of the representation? Generally, the fact that a lawyer has been hired, and the identity of the client are not privileged under the attorney-client privilege, although the scope of confidentiality under Model Rule 1.6 is broader. But Model Rule 1.6(b)(6) provides that lawyers may reveal confidential information "to comply with other law or court order." The ABA's comment did not explain why lawyers should not be required to disclose the fact of representation, the identity of the client, and the fees paid in connection with the persuader rule. What might such arguments be? What are the counter arguments?

## Chapter 9: Ending the Collective Bargaining Relationship

### B. Withdrawal of Recognition

*Add to note 5 on p. 935:*

After *Levitz*, the standard for employer conduct during a decertification effort is high. In *Bradford Printing & Finishing, LLC*, 356 NLRB No. 109 (Mar. 25, 2011), the Board found that continuous statements by the employer that a union is “unnecessary” along with an ongoing refusal to recognize and bargain with the union is “conduct [that] tainted the employee petition.” Therefore, the employer was precluded from using an employee petition as a reason for its refusal to recognize and bargain with the union.

### ]C. Decertification

**Add a new note 4 at the bottom of p. 946:**

*Union-initiated Decertification: The Curious Case of the National Football League.* When union certification brings benefits to the employer based on its relationship with the union, such as certain antitrust immunity, union-initiated decertification may give the union needed leverage in collective bargaining. For example, analyze the events of 2011:

On March 11, 2011, a collective bargaining agreement between the League and a union representing professional football players expired. The League had made known that if a new agreement was not reached before the expiration date, then it would implement a lockout of players, during which the athletes would not be paid or permitted to use club facilities. The League viewed a lockout as a legitimate tactic under the labor laws to bring economic pressure to bear on the players as part of the bargaining process. . . .

The players, aware of the League's strategy, opted to terminate the union's status as their collective bargaining agent as of 4:00 p .m. on March 11, just before the agreement expired. Later that day, the Players filed an action in the district court alleging that the lockout planned by the League would constitute a group boycott and price-fixing agreement that would violate § 1 of the Sherman Antitrust Act. The complaint explained that “the players in the NFL have determined that it is not in their interest to remain unionized if the existence of such a union would serve to allow the NFL to impose anticompetitive restrictions with impunity.” The plaintiffs also alleged other violations of the antitrust laws and state common law.

The League proceeded with its planned lockout on March 12, 2011. The Players moved for a preliminary injunction in the district court, urging the court to enjoin the lockout as an unlawful group boycott that was causing irreparable harm to the Players. The district court granted a preliminary injunction, and the League appealed.

*NFL v. Brady*, 644 F.3d 661 (8<sup>th</sup> Cir. 2011). The Eighth Circuit vacated the district court's injunction as being in violation of the Norris LaGuardia Act. *Id.* Note that such a decertification leverage strategy would be quite risky if done by workers more expendable than professional athletes in high-demand sports.

#### **D. Successorship**

##### ***Add to note 1 on p. 955:***

Note that the presence of a “successor clause” in the collective bargaining agreement may affect the analysis. When an employer integrated operations and employees of one of its wholly owned subsidiaries into two other wholly-owned subsidiaries, the court enforced an arbitrator award against the employer on the basis that the restructuring triggered the collective bargaining agreement's successorship clause. The court even allowed the employer to be “created” as a party by the arbitrator. *See Equitable Resources Inc. v. United Steel, Local 8-512*, 621 F.3d 538 (6th Cir. 2010).

##### ***Add to note 2 on p. 955:***

*MV Transportation Overruled:* In 2010, the Board agreed to reconsider its decision in *MV Transportation* and to consider returning to the rule set out in *St. Elizabeth Manor*. It issued a notice and invitation to file briefs on whether or not it should modify or overrule *MV Transportation*. *See UGL-UNICCO Serv. Co.*, 355 NLRB No. 155 (Aug. 27, 2010). The Board subsequently overruled *MV Transportation* by its decision in *Lamons Gasket Co.*, 357 NLRB No. 72 (2011), returning to the law as set out in *St. Elizabeth Manor*, 329 NLRB 341 (1999). As the Board explained in *Lamons Gasket*:

Finally, prior to *MV Transportation*, which we also overrule today, when a new employer assumed an operation and the conditions for successorship were satisfied so that the new employer also assumed a legally enforceable duty to recognize and bargain with a union that represented its predecessor's employees, the Board barred any challenge to the union's representative status for a similar reasonable period of time. *St. Elizabeth Manor, Inc.*, 329 NLRB 341 (1999).

The complete decision in *Lamons Gasket Co.* is set out, *supra*, 2012 Update Chapter 4F.

##### ***Add to note 3 on p.965:***

*Employer Authority to Remove Jobs from a Bargaining Unit.* The Board has recognized that removing a job classification from a bargaining unit does not fall under “initial terms and conditions” which the employer is able to unilaterally change without bargaining with the union.

In *O.G.S Techs*, 356 NLRB No. 92 (Feb. 11, 2011), the Board found that an employer “may not remove job classifications from an existing bargaining unit absent reaching agreement with the unit employees’ collective bargaining representative. . . .” However, an employer may make such a unilateral change in the bargaining unit if it carries the heavy burden of showing in a unit clarification hearing or as an 8(a)(5) defense “that the failure to remove the classification would have rendered the unit inappropriate.”

## **F. Rejection of Collective Bargaining Agreements in Bankruptcy**

### **2. The law responds**

*Add the following to the end of the second paragraph in Note 1 on page 993:*

Moreover, according to at least one empirical study, in considering applications to reject union contracts that turn on step 3, bankruptcy courts nearly always interpret “necessary” in a manner that results in rejection. See Andrew B. Dawson, *Collective Bargaining Agreements in Corporate Reorganization*, 84 AM. BANKR. L.J. 103, 104 (2010); see also Babette A. Ceccotti, *Lost in Transformation: The Disappearance of Labor Policies in Applying Section 1113 of the Bankruptcy Code*, 15 AM. BANKR. INST. L. REV. 415, 427-35 (2007) (documenting tendency of bankruptcy courts to subordinate labor policies to bankruptcy policies in considering applications to reject); cf. William T. Bodoh & Beth A. Buchanan, *Ignored Consequences – The Conflicting Policies of Labor Law and Business Reorganization and Its Impact on Organized Labor*, 15 AM. BANKR. INST. L. REV. 395, 411 (2007) (concluding that, contrary to the intentions of its sponsors, Section 1113 has weakened the position of labor in reorganization proceedings).

*Insert the following before the sentence beginning “For discussion of an unresolved attempt” in the top paragraph on page 997:*

Even Stockton, Calif. – whose dire straits forced it to become the largest U.S. city ever to declare bankruptcy – went into Chapter 9 planning *not* to undertake the arduous task of asking a bankruptcy judge to throw out the vested pension benefits of city employees. See Jim Christie, *Stockton, California Files for Bankruptcy*, Reuters, Jun. 28, 2012, reported at <http://www.reuters.com/article/2012/06/29/us-stockton-bankruptcy-idUSBRE85S05120120629>.

*Add the following to the end of the Chapter on page 1000:*

## **G. Antitrust Law, Antitrust Immunity, and the End of the Collective Bargaining Relationship**

## 1. Statutory and nonstatutory labor antitrust exemptions

Without antitrust immunity, practically every collective bargaining agreement, and practically every action undertaken to secure the terms of one, would constitute a “contract, combination . . . or conspiracy” in restraint of trade in violation of the Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1.

At common law in most states, concerted activities by workers – including strikes, picketing, boycotts, and other weapons deployed to demand that employers recognize unions and enter into collective bargaining agreements with them – were considered unlawful, enjoined conspiracies to restrain trade. *See, e.g., Vegelahn v. Guntner*, 167 Mass. 92, 44 N.E. 1077 (1896), discussed supra p. 18. For many years after the enactment the Sherman Antitrust Act, which imposed criminal as well as civil penalties (the latter in the form of treble damages), the federal courts continued to adhere to the common law view, despite the objections of organized labor that the Act was intended to outlaw combinations, contracts and conspiracies to restrain trade by business enterprises only. *See, e.g., Loewe v. Lawlor* (The Danbury Hatters Case), 208 U.S. 274 (1908). Even the statute’s amendment by Sections 6 and 20 of the Clayton Act of 1914, 15 U.S.C. §§ 6, 20, which were expressly designed to give labor immunity from antitrust liability, failed to dampen the enthusiasm of federal judges for declaring most concerted activities to be illegal restraints on competition, and enjoining workers and their unions from engaging in them. *See, e.g., Duplex Printing Press Co. v. Dearing*, 254 U.S. 443 (1921). This state of affairs did not begin to change until the enactment of the Norris-LaGuardia Act of 1932, 29 U.S.C. §§ 101-115, which ousted the federal courts of jurisdiction over most labor disputes. It took nearly a decade after that for the Supreme Court finally to hold that taken together the Sherman, Clayton, Norris-LaGuardia Acts create for workers and unions a “statutory” immunity, or exemption, from federal antitrust liability. *See United States v. Hutcheson*, 213 U.S. 219 (1941). With limited exceptions not relevant here, this exemption has shielded labor from most antitrust liability for over 70 years.

The statutory labor antitrust exemption may be claimed by a union when two conditions are met: first, the restraint of trade at issue is of legitimate interest to labor, *see, e.g., Powell v. National Football League*, 678 F. Supp. 777, 782 (D. Minn. 1988), *rev’d on other grounds*, 930 F.2d 1292 (8th Cir. 1989); second, it is not sought at the behest of non-labor groups, *see, e.g., Bridgeman v. National Basketball Ass’n*, 675 F. Supp. 960, 964 (D.N.J. 1987). Contract terms setting minimum wages, maximum hours, and other mandatory subjects of bargaining typically satisfy both conditions.

With the spread of multiemployer bargaining practices, or “pattern bargaining,” in major U.S. industries, especially after World War II, came the need to create a corresponding antitrust immunity to shield the parties sitting on the other side of the bargaining table – namely, employers. Pattern bargaining is still common in industries affecting aerospace, automobile manufacture, film and television entertainment, retail food, and major league team sports, among others. The need for a “nonstatutory” exemption arose from the tension between the free market principles embodied in the antitrust laws and national labor policy favoring collective bargaining. In 1965, the Supreme Court obliged by recognizing a nonstatutory antitrust exemption. *See Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel*

*Tea Co.*, 381 U.S. 676 (1965); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) *see also Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975). As the Court later explained:

As a matter of logic, it would be difficult, if not impossible, to require groups of employers and employees to bargain together, but at the same time to forbid them to make among themselves or with each other any of the competition-restricting agreements potentially necessary to make the process work or its results mutually acceptable.

*Brown v. Pro Football Inc.*, 518 U.S. 231, 237 (1996).

The nonstatutory labor antitrust exemption may be asserted by an employer or group of employers when at least two conditions are met: first, the restraint at issue primarily affects the parties to the collective bargaining relationship; and second, it constitutes a mandatory subject of bargaining under the NLR Act. *See Mackey v. National Football League*, 543 F.2d 606, 614 (8th Cir. 1976). Although there is a split of authority, a third condition may have to be met too: the restraint must be the product of bona fide, arms-length negotiations. *Compare, e.g., Mackey* (adopting third condition), *with, e.g., Claret v. National Football League*, 306 F. Supp. 2d 379 (S.D.N.Y. 2004) (rejecting third condition), *rev'd in part, vacated on other grounds*, 369 F.3d 124 (2d Cir. 2004), *cert. denied*, 544 U.S. 961 (2005); *see also California ex rel. Lockyer v. Safeway Inc.*, 371 F. Supp. 2d 1179, 1185 n.5 (C.D. Cal. 2005) (reasoning that *Brown v. Pro Football* overruled requirement that *Mackey's* third condition be met), *aff'd*, \_\_\_ F.3d \_\_\_, 2011 WL 2684942 (9th Cir. 2011) (en banc). As in the case of the statutory exemption, agreements by employers to set minimum wages, maximum hours, and other mandatory subjects of bargaining generally satisfy the conditions for the nonstatutory labor antitrust exemption.

### **1. Application to multiemployer bargaining in general**

The parties to litigation raising claims under Section 1 of the Sherman Antitrust Act must deal with up to three crucial issues affecting the employer's potential liability.

First, as noted above, the defendant employer may argue that it is exempt under the nonstatutory labor antitrust exemption. A successful defense under this exemption turns on whether the two (or three) conditions relating to this exemption have been satisfied.

Second, if the exemption arguably applies, then the plaintiff union may rebut by arguing that the defendant's conduct exceeded the proper scope of the exemption. It is now recognized that the scope of the nonstatutory labor antitrust exemption is limited by subject matter; it shields concerted activity affecting labor relations as undertaken by a multiemployer group. It does not shield commercial enterprises, such as an exclusive licensing agreement to manufacture clothing bearing the group's logo or other intellectual property for the consumer market. *See American Needle Inc. v. National Football League*, 130 S. Ct. 2201 (2010). Nor does it shield a mutual assistance pact among four grocery store employers calling for each employer to subsidize the others for losses caused by a particular labor dispute, if one of the employers is not involved in such labor dispute. *See California ex rel. Harris v. Safeway Inc.*, \_\_\_ F.3d \_\_\_, 2011 WL

2684942 (9th Cir. Jul 12, 2011) (en banc). It is also recognized that the scope of this exemption is limited by duration; it expires when the collective bargaining relationship ends, as indicated by decertification or some other event confirming the union's loss of majority support among employees. It does not expire when either the union contract terminates or the parties reach impasse in negotiations for a new contract. *See Brown v. Pro Football Inc.*, 518 U.S. 231 (1996).

Third, if the exemption and scope of exemption arguments are unavailing, the parties may argue the merits. The two means of establishing a Section 1 claim under the Sherman Antitrust Act are the per se approach or the rule-of-reason analysis. Historically, the per se approach was preferred. A Section 1 claim was considered meritorious if it fell into one of the categories of anticompetitive practices that are considered per se illegal, such price-fixing, engaging in a group boycott, entering into any contract "tying" the buyer to a promise not to deal with the seller's competitors, or agreeing to a horizontal division of markets. In the world of labor relations, the most common activity by employers that could give rise to potential antitrust liability is setting limits on wages, because wage-fixing is equivalent to price-fixing. *See Brown v. Pro Football Inc.*, 1992 WL 88039, at p. 7 (D.D.C. 1992). In recent decades, however, the rule of reason analysis has become predominant. This is a case-by-case test that balances the anticompetitive harm caused by the restraint against its procompetitive benefits, tempered by the availability of less restrictive means of accomplishing those benefits. *See National College Athletic Ass'n v. Board of Regents*, 468 U.S. 85 (1984).

For a summary of applicable labor antitrust law, see Douglas E. Ray, William R. Corbett & Christopher David Ruiz Cameron, *Labor-Management Relations: Strikes, Lockouts and Boycotts* ¶ 9:10 (2d ed. 2004 & Supp 2010-11).

### **3. Application to multiemployer bargaining in professional team sports**

The nonstatutory antitrust exemption is especially important to the business model found in major league team sports. In the U.S. and Canada, these sports are generally considered to be the ones operated by Major League Baseball (MLB), the National Basketball Association (NBA), National Football League (NFL), and the National Hockey League (NHL). Unlike most business enterprises, multiemployer coordination is essential to the operation of the MLB, NBA, NFL, and NHL. This is because each league, by definition, is a joint venture. Although clubs in the same league certainly engage in economic competition, they also undertake substantial economic coordination. They must agree to be paired with each other in order to compete on the field; they play under a common set of rules; they share television and other revenues generated by the games they play. Indeed, the product sold to live spectators and television audiences alike is not the performance of individual clubs playing by themselves, but rather the exhibition of games or matches between clubs played under the foregoing conditions. Without the nonstatutory antitrust exemption, collectively-bargained agreements by league owners as to the perennial, hot-button labor issues – such as the rookie draft, the reserve clause, minimum salary, free agency, salary arbitration, and the salary cap – would likely fall under the weight of treble damages imposed by the Sherman Act.

So the nonstatutory labor antitrust exemption has become a staple of labor relations in professional team sports. In recent years, the players, taking their cue from *Brown v. Pro Football*, have called the same basic play: if the union fails to achieve its goals at the bargaining table, or on the picket line, then it turns instead to the courts. Initially, negotiations are held. If they prove fruitless, then the parties may try mediation. If that doesn't work, then they may draw their economic weapons and prepare to fight. For players, this usually means calling a strike during the playoffs; for owners, it usually means locking the players out of training camp and all the games thereafter. If economic weapons don't work, then the players hold a pro forma decertification vote. Once it passes, the union, acting now as a voluntary membership organization rather than as the exclusive bargaining representative, proceeds to help individual players prepare and file lawsuits under the Sherman Antitrust Act against the affected league and all club owners. Perhaps one side will file unfair labor practice charges against the other with the NLRB. Rarely does either set of litigation proceed to trial. But without the shield afforded by the nonstatutory antitrust exemption, the owners are exposed to treble damage liability in the Sherman Act litigation. So the players can leverage owners into settling on terms more favorable than would otherwise exist. A settlement is reached, contingent upon approval by the union. After that, the players vote to recertify the union as their collective bargaining agent, and then vote to approve the new collective bargaining agreement, which incorporates by reference the litigation settlement. With some variations, every major league team sport in North America has faced this scenario.

As a result, strikes and lockouts, together with the resulting litigation, often draw more attention from the public when they occur in major league team sports than they when they occur in other industries. A labor dispute in professional sports has the potential to shut down an entire sports industry. The shutdown can last anytime from a single game to a full season or longer.<sup>4</sup>

In the summer of 2011, season-threatening lockouts by owners of clubs in both the NFL and the NBA commanded the public's attention. See Howard Beck, *Two Lockouts, Each with a Different Playbook*, N.Y. Times, Jul. 10, 2011, at p. SP8.

Take the NFL labor dispute, which arose first. When negotiations for a new contract between club owners and the National Football League Players Association (NFLPA) went nowhere, the owners filed unfair labor practice charges alleging that the NFLPA did not bargain in good faith. In particular, they argued that the NFLPA's aim from the get-go was to fail to reach an agreement so that the union could call the play outlined above. While ULP charges were

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<sup>4</sup> Until 1996, baseball club owners enjoyed a second labor antitrust exemption created especially for the MLB by the Supreme Court. See, e.g., *Flood v. Kuhn*, 407 U.S. 258 (1972). This baseball antitrust exemption, however, disappeared with the enactment of the Curt Flood Act of 1997, 15 U.S.C. § 12. Before that, baseball nevertheless had its share of well-publicized labor strife. For example, in the fall of 1994 and the winter of 1995, a strike by the Major League Baseball Players Association (MLBPA) ended one regular season early without any playoffs or World Series, and delayed the start of the following season. The players filed unfair labor practice charges accusing the owners of bargaining in bad faith. Play finally resumed under a Section 10(j) injunction finding that the charges were likely meritorious, and preserving pre-strike employment conditions. See *Silverman v. Major League Baseball Player Relations Committee*, 880 F. Supp. 2d 246 (S.D.N.Y.), *aff'd*, 67 F.3d 1054 (2d Cir. 1995). Today, therefore, club owners must take refuge, if any, in the same nonstatutory labor antitrust exemption available to owners in other professional team sports.

pending, the union rejected the owners' last, best, and final offer, and the players voted to decertify the union. The decertification vote set the stage for the players to argue that, bereft of a collective bargaining relationship and the nonstatutory labor exemption that comes with it, the owners were violating the antitrust laws. The owners responded by locking the players out of training camp. Then the players filed a class action lawsuit alleging claims under the Sherman Antitrust Act and seeking injunctive relief and damages. A federal district judge granted the players' motion for a preliminary injunction ending the lockout, but refused to stay her order pending the owners' appeal. A panel of the U.S. Court of Appeals for the Eighth Circuit, however, granted temporary and permanent stays, and by a 2 to 1 vote, dissolved the preliminary injunction on the ground that it had been issued in violation of the Norris-LaGuardia Act. The Eighth Circuit did not reach the merits of the parties' arguments about the status of the nonstatutory labor antitrust exemption. *See Brady v. National Football League*, 2011 WL 1535240 (D. Minn. Apr. 25), *stay denied*, 2011 WL 1578580 (D. Minn. Apr. 27), *stay granted*, 638 F.3d 1004 (8th Cir. Apr. 29), *stay granted*, 640 F.3d 785 (8th Cir. May 16), *preliminary injunction vacated*, 2011 WL 2652323 (8th Cir. Jul. 8, 2011).

Ultimately, both labor disputes were settled in time for regular season play. After a four-month dispute, the NFL and NFLPA entered into a 10-year collective bargaining agreement and went on to play a full regular season plus the playoffs; the deal included complete withdrawal of all antitrust litigation with no settlement payments, together with a supplemental revenue-sharing plan for owners. *See* Judy Battista, *N.F.L. Owners Vote for Tentative Labor Deal*, N.Y. Times, July 21, 2011, *available at* <http://www.nytimes.com/2011/07/22/sports/football/NFL-Union-Labor-Deal.html?pagewanted=all>. After a five-month dispute, the NBA and NBAPA entered into a 10-year collective bargaining agreement that salvaged 66 of 82 regular season games plus the playoffs; the price of the deal included reducing the players' share of league revenues from 57% to 50%. *See* Howard Beck, *N.B.A. Reaches a Tentative Deal to Save the Season*, N.Y. Times, Nov. 26, 2011, *available at* [http://www.nytimes.com/2011/11/27/sports/basketball/nba-and-basketball-players-reach-deal-to-end-lockout.html?\\_r=1&scp=10&sq=nba%20labor%20settlement&st=Search](http://www.nytimes.com/2011/11/27/sports/basketball/nba-and-basketball-players-reach-deal-to-end-lockout.html?_r=1&scp=10&sq=nba%20labor%20settlement&st=Search).

## **Chapter 10: Preemption**

### **C. Machinists Preemption**

*Insert the following at the end of paragraph beginning “The U.S. Supreme Court” and ending “avoid Machinists preemption” on page 1020:*

*See also, e.g., Building Industry Electrical Contractors Ass’n v. New York, 2012 WL 1563919, 193 L.R.R.M. (BNA) 2177 (2d Cir. 2012) (holding that, under market participation exception, NLRB did not preempt six PLAs covering some 32,000 workers employed on an estimated \$6 billion worth of electrical construction projects to be undertaken in New York City over a five-year period).*

*Add the following to the end of the Notes section on page 1030:*

6. As noted in Chapter 9, *supra* p. 949, successorship obligations arising out of the sale or transfer of businesses can be complicated. Often, a successor employer tries to lower its labor costs, and to reduce its exposure to liability for employment-related claims, by attempting to rid itself of collective bargaining obligations that the predecessor employer had incurred. To combat this tactic, may a city enact a municipal ordinance requiring the purchasers of large grocery stores to employ the predecessor owner’s employees for at least 90 days following the transfer? *See California Grocers Ass’n v. City of Los Angeles*, \_\_\_ Cal. 4th \_\_\_, 2011 WL 2750895 (Cal. S. Ct. Jul. 18, 2011).